THE STATE
versus
MICHAEL ZIIRA
and
KUDAKWASHE NOREST CHIKUKWA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20, 22, 23 & 28 March 2017; 11, 12 & 13 April 2017

ASSESSORS: 1. Mr Mhandu
2. Mr Chivanda

Criminal Trial - Murder

C Chambati, for the State
E Mubayiwa, for the 1st accused (*Pro-Deo*)
T Mberi, for the 2nd accused

CHITAPI J: The two accused persons were indicted on a charge of murder as defined in s 47 of the Criminal Law Codification & Reform Act [*Chapter 9:23*]. It was alleged against them that on 29 September 2013 both accused or one of them unlawfully caused the death of Timothy Mbova by strangling him, thereby inflicting upon him certain injuries from which he died. Both accused pleaded not guilty to the charge.

Both accused persons elected to and filed defence outlines. In summary, the 1st accused denied any involvement in the commission of offence. He further denied planning or intending to rob or steal from the deceased or anyone else either alone or with any other person. Following on this denial of involvement in the commission of the offence nor being witness to it, he averred that he therefore had no knowledge of the charge which he dismissed as having been fabricated against him. He indicated that he would disown "instruments" attributed to him as connecting him to the offence and that as regards his confirmed warned and cautioned statement, the same was exacted from him through torture, violence and force

and threats of the same which he attributed to a police officer, Mhakayakora and another police officer whose identity he could no longer recollect. In short therefore, the accused person's defence was one of being falsely implicated in the commission of the offence which he was not involved in and knew nothing about.

The 2nd accused similarly distanced himself from the commission of the offence. He averred in his defence outline that on the alleged date of commission of the offence he was nowhere near the scene of the offence but was at home with his two relatives namely Robert Nyama and Munashe Chikukwa. He dismissed the allegations implicating him to the offence as having been fabricated. As regards the allegation that he was implicated by the 1st accused, he averred that the 1st accused could have done so following threats and torture. He also averred that any alleged implications made against him by one Blessing Chidzingwa were equally a result of torture and force applied to the said Blessing Chidzingwa in the 2nd accused's presence. He knew the 1st accused as an erstwhile tenant at his premises who had left unceremoniously and that the police had come to the 2nd accused's premises looking for the 1st accused and also arrested the 2nd accused whom they interrogated on the whereabouts of the 1st accused. On not getting any positive information from the 2nd accused on their search for the 1st accused, the police released him. In short therefore, the 2nd accused denied any knowledge of nor involvement in the commission of the offence.

Thus put in another way, the accused person's defences amounted to alleging that the state had arraigned the wrong people in the dock or that the police arrested the wrong persons in the form of the two accused. It should be pointed out at this stage that when the matter was called, the indictment listed four accused persons, namely the 1st and 2nd accused one, Blessing Tawanda Chidzingwa and Chamunorwa Magwaza. The prosecutor advised the court that Chamunorwa Magwaza was now deceased whilst Blessing Tawanda Chidzingwa who had been on bail had absconded and a warrant of arrest issued. Chidzingwa was still on the run and had not been served with the indictment and other trial papers. The prosecutor applied to separate the trials and only proceed with the charge against 1st and 2nd accused's counsel. By consent of all counsel, the trial was postponed to 22 March 2017 to enable the prosecution to make necessary amendments to the state papers, serve any amended papers on the defence counsels and for the defence counsels to also prepare, and make any such amendments as they considered appropriate to the defence outlines of 1st and 2nd accused if so advised.

State case:

The prosecutor opened the state case by seeking admissions of various pieces of evidence in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. In terms of the provisions of the said section, the accused person or his legal practitioner or the prosecutor may admit any fact relevant to an issue before the court, where after the admission once made is deemed sufficient evidence of the fact so admitted. The defence counsels admitted the evidence herein following as briefly outlined.

1. Affidavit of Miria Mbova:

She resides at house number 7 Hanyani Avenue, New Mabvuku. She is the widow of the deceased to whom she had been married for 8 years and had two children. On 28 September, 2013 the deceased who was a police officer left home around 7.00 am going to Harare Central Police Station, his duty station. The deceased did not return home and as is common cause was never to return home alive. When the deceased left home, he had cash amounting to about US$360.00. She gave details of the clothes which the deceased left putting on and that in addition he carried his cellphone, a nokia x 2 with red covers. The deceased had given details of his duties for the day to the witness including that he would attend a function at Glamis Arena schedule to end in the early hours of 29 September 2013 at 0200 hours.

In the course of the day, she tried to contact the deceased on his phone. The phone would ring initially and not be answered. Later it was switched off. She contacted deceased's work place looking for him to no avail. She later learnt from the deceased's work colleague that he had last seen the deceased around 0200 hours when he was going to collect his allowance for the night duty he had performed. She also gathered that the deceased had last indicated that he was going to Hatfield.

She identified the deceased's body during a post mortem at Harare Central Hospital on 1 October 2013. On 7 October 2013 the witness identified the deceased's cellphone, a nokia x 2 through its serial number 35168905281317, white takkies he had been wearing, navy blue and grey pant and police uniform comprising of riot gear trousers, grey shirt, webbing belt and police identity card in the deceased's name.

2. Affidavit of Raymond Mugasi

He resides at house 6640 Kuwadzana 5 and is self employed repairing cellphones at Kuwadzana 5 Shopping Centre. On 1 October 2013, he proceeded to Magaba Flyover,

Mbare Harare intending to swap his Nokia N8 cellphone with cell phone dealers there. He wanted a phone with fewer applications because his was expensive on airtime owing to its numerous applications.

The witness swapped his N8 cellphone with a Nokia x 2. He transacted with one Alouis Samuel. He then started using the Nokia x 2 until 5 October 2013, when the police approached him over the Nokia x 2 which they recovered from him as being the property of the deceased. He explained the circumstances of his possession of the phone and led the police to Magaba Flyover where he showed the police Alouis Samuel whom he had done a phone swap with. The police arrested Alouis Samuel.

3. Affidavit of Tawanda Chimbwanda:

He resides in New Tafara and owns a motor vehicle namely, a Toyota Spacio registration number ACE 6241. He uses it as a taxi. On 29 September 2013 around 0100 hours he was parked outside Elizabeth Hotel, Robert Mugabe/Rezende Street waiting for hire. He was approached by three persons who hired him for US$8.00 to drive them to a certain night club called Down Town at Machipisa, Highfield Harare. He was given an advance payment for his service. In Highfiled he was directed to drive to a certain house where one of the passengers purchased dagger. He proceeded to the night club thereafter. At the night club, one of the three disembarked went to the night club and came back to report that the entrance fee was too high. He was requested to drive to another night club called Current in Budiriro 5, Harare. He charged the trio US$9.00 which they promised to pay him on arrival.

When he arrived at the club he parked outside and instead of being paid his fare one of the trio who sat in the backseat grabbed him by the neck and dragged him to the backseat. His colleague who was seated in the front passenger seat took over the steering wheel and started the vehicle.

One of the trio cut off the front passenger seat belt and used to tie the witness' legs. The trio then removed the witness belt and tied his hands from the back. They drove to a secluded area called Ngungunyani where the witness was dumped out of the vehicle. They made away with the vehicle. , his takings of US$62.00, a Samsung cellphone handset with Econet line, his drivers and national identity cards. The witness managed to untie himself and proceeded to Budiriro Police Station where he made a report.

Around 1900 hours on 29 September 2013, he was telephoned by Police Vehicle Theft Squad details and advised that his vehicle had been recovered abandoned at a place called Komboniyatsva in Epworth. He went to Epworth in the company of the police and

identified the vehicle as his. The vehicle was taken to Southerton vehicle theft recovery yard. The vehicle was only released to the witness on 7 October 2013. When he opened the boot he discovered the deceased's police uniform comprising of blue cap, blue trousers, grey shirt and police identity card in the name of the deceased. The police took the items of property and booked them as exhibits. The witness could not identify his assailants save that one of them wore a short sleeved grey/white checked shirt and had short hair. The other two wore woollen hats of the type worn by Rastafarians which were multi-coloured.

4. Affidavit of Clemence Kazenga

He is a police officer who on 29 September 2013 conveyed the deceased's body from where it was found dumped along Twentydales road extension Hatfield Harare. The witness conveyed the body to Harare Hospital where a doctor certified the deceased dead. He thereafter labelled the body and placed it in the hospital mortuary.

5. Other exhibits

Other exhibits also admitted in evidence by consent comprised a pair of white takkies which the deceased was wearing, the police uniform recovered from the boot of Chimbwanda's vehicle, the deceased's police identification card and the Nokia x 2 serial no 351689052813107 and one police brown stocking.

The prosecutor also produced the post mortem report prepared by Dr Mapunda who examined the deceased's remains on 1 October 2013. The highlights of his report were that the deceased's estimated age was 37 years old, the body exhibited fresh injuries showing stabbing cuts. There was blood oozing from the nostrils, facial abrasions over the forehead. Having examined the external and internal organs of the deceased, the doctor concluded that the deceased was strangled with a soft object which restricted oxygenation by blocking the air passages. The deceased died of mechanical asphyxia with death occuring in seconds to minutes. Asyphyxia starves the body of blood flow between the heart and the brain and leads to death.

6. Confirmed warned and cautioned statement by 1st Accused

The statement was confirmed by the magistrate in terms of s 113 of the Criminal Procedure & Evidence in camera. The magistrate made the requisite enquiries and completed the form which sets out what the magistrate must do like asking all police members who recorded the statement to leave the court room if they should be in court and recording answers to questions put to the accused person. The statement was read over to the accused as well as the explanations of the purpose and purport of confirmation proceedings. The

accused was recorded as having understood the explanation and having admitted to making the statement freely and voluntarily without being induced by anyone including the police. The warned and cautioned statement was then confirmed by the magistrate at Marondera Magistrates Court on 28 October 2013.

The prosecutor produced the confirmed statement in terms of s 256 (2) of the Criminal Procedure & Evidence Act as read with s 113 (3) (b) of the same Act. It is important to note that the confirmed statement albeit its production consequent to its confirmation will not be used as evidence against the accused person if he proves that he is not the one who made the statement or that he did not make the statement freely and voluntarily without his having been unduly influenced thereto. In short therefore the accused who seeks to challenge the adduction as evidence against him of a confirmed warned and cautioned statement produced in terms of s 256 (2) of the Criminal Procedure & Evidence Act bears the onus to prove that he is not the maker of the statement or that he did not make the statement freely and voluntarily without being unduly influenced to make it. The accused where he challenges the use of the statement as evidence against him is required to discharge the onus on a balance of probabilities. *S* v *Ndlovu* 1983 (4) SA 507 (ZS); *Matanga* v *S* SC 16/2015. It is also observed that s 70 (3) of the Constitution of Zimbabwe (2013) suffers the court in a criminal trial to exclude evidence which has been obtained in a manner that violates any provision of the constitution if its admission has the effect of rendering a trial unfair or detrimental to the administration of justice and the public interest. Section 256 (2) of the Criminal Procedure and Evidence Act should therefore be read together with s 70 (3) of the Constitution. It is also important to note as observed in the *Matanga* case (*supra*) that an accused person's challenge to a confirmed statement that he is not the maker is a question of fact, whilst a challenge that he did not freely and voluntarily give the statement is a question of law. The court will accordingly be guided when dealing with the accused's challenge to the confirmed warned and cautioned statement.

Dealing with oral evidence, the prosecutor led evidence from three witnesses namely Mathew Murehwa, Alouis Samuel and Alfred Mhakayakora. The evidence of the witnesses and the court's impressions was as listed herein below.

Mathew Murehwa:

It turned out that this witness was still appearing on remand over the murder of the deceased. This came out in cross-examination when it was put to him that he was a suspect in the case and had reason to seek to implicate others or assuage himself from involvement in

the murder of the deceased. It is convenient to deal with this aspect of the witness being a suspect and on remand for the case at this stage. From a legal point of view the witness was at the time he testified technically an accomplice. The use of the words technically derives from the conclusion the court came to after what the prosecutor submitted when asked by the court on the position or status of the witness vis-à-vis the charge at hand. The prosecutor submitted that he was not aware that the witness and Alouis Samuel were still on remand as suspects in the matter. He submitted that the charges against the two should have been withdrawn. He attributed the formal non withdrawal of the charges to a disconnect between the police and the remand court prosecutor. The State did not have any intention to bring the witness and Alouis Samuel on trial for this case. The prosecutor advised the court that had he been made aware that charges had not been formally withdrawn against the witness, he would have advised the court. He undertook to and subsequently confirmed that he had caused charges to be withdrawn against the witness (after he had testified) and Alouis Samuel and two others.

In terms of s 267 of the Criminal Procedure and Evidence Act, the prosecutor has a duty to inform the court when he or she produces a person to testify for the prosecution who is or has in the prosecutor's opinion been an accomplice, principal or accessory in the commission of the offence alleged in the charge or indictment before the court. The court once informed will inform the witness to answer all questions put to him fully including those which incriminate him in the offence. The accomplice, principal or accessory as the case may be will be absolved from liability for prosecution on the charge if the court rules that he or she has fully answered questions satisfactorily. All that the court warns the witness of is that the witness should just tell the truth. See *State* v *Ngara* 1987 (1) ZLR 91 (s).

The failure by the prosecutor to advise the court of the status of an accomplice witness as provided for in s 267 aforesaid does not render the evidence of the witness inadmissible. It may affect the weight to be attached to such evidence. Despite the failure by the prosecutor to advise the court of the status of the witness, the court was always going to approach the evidence of this witness and that of Alouis Samuel with caution because they both at one point or another were in possession of the deceased's cellphone which left the latter's possession through his being robbed and strangled to death. Such persons were obviously suspects and a suspect's evidence is always treated with extra scrutiny and where necessary corroboration of the suspect's evidence will allay the courts fears that the suspect is not out to exculpate himself by seeking to extend liability to another person who may well be

innocent. See *State* v *Masuku* 1969 (2) SA 375; *State* v *Bennet* HH 79/2010; *State* v *Ndlovu and another* HC 98/15; *State* v *Mupfumbiri* HH 64/2014. *R* v *Ncanana* 1948 (4) SA 399 (A).

Having warned itself to treat the evidence with caution and scrutiny, the court proceeded to be so advised in its assessment of the same. The witness resides in the same neighbourhood of Epworth with the 1st accused, within a radius given as 4km by the witness albeit the 1st accused giving a much shorter radius. The distance between the 1st accused and the witnesses homestead was not in the court's view a matter of great moment because what was crucial or material was the common cause fact that the two knew each other well and therefore there could not be any chance of one being mistaken on the identity of the other one. The witness operated a shebeen to which the 1st accused was a regular patron.

The witnesses testified that in the morning of 29 September, 2013 around 8.00am, the 1st accused came to the witness's residence in the company of one Daniel Mabhena who was also known to the witness. Mabhena was said to be known to the 1st accused better including knowing where the 1st accused resided and could be found. The accused wanted to borrow US$45.00 to use to take his wife to hospital. He promised to return the money by 10.00am. After negotiations, the witness gave the accused US$35.00 against the security of a red Nokia X2 cellphone handset offered by the accused. The witness described the handset as having red covers and a black face. It also had a battery which was black in colour with white markings. The phone was still newish and the witness was satisfied that he could sell it and recoup the loan in the event of default in repayment by the accused. The witness identified exh 8 which was produced by consent as the deceased's phone as the phone which the 1st accused gave to them as security. He opened the battery compartment and confirmed that it was the same phone. He also said that the inscription in white on the battery distinguished it from other batteries which were black without any markings.

The witness said that he informed one Shadreck Binza about the deal. He knew 1st accused as Sibale and only got to know of his actual name later. The 1st accused used to come to the shebeen with two of his mates namely Chamela and Muchawa. The witness testified that he never saw the 2nd accused. He said that the 1st accused returned after 9.00am and told the witness that he had failed to find money which he expected to get from his mother who had not returned. He advised the witness that he could sell the phone to recoup his money.

The witness said that he then decided to offer the phone for sale to phone dealers at Magaba Flyover in Mbare, Harare. It was at Magaba Flyover that the witness offered the phone to Alouis Samuel in a swap and top up deal for US$40.00. He was given money and a

small Nokia phone commonly referred to as 'kambudzi'. Alouis Samuel tested the Nokia X2 and found it to be in working order. The witness also gave Alouis Samuel details of his phone contact number so that Alouis Samuel could contact him if he experienced problems with the phone because he knew the person from whom he had obtained it.

The witness who said he was also an informal trader proceeded to Mozambique on 3 October, 2013 and returned on 7 October 2013. Upon his return his wife advised him that some police officers had come looking for him. He decided to wait for them to return since they had indicated that they would return. In cross examination the witness said that he presented himself to Epworth Police Station but was advised that it was not the station which wanted to see him. On 11 October, 2013 police detectives from C.I.D Homicide came and arrested the witness through information given by Alouis Samuel. The police interrogated him about the X2 phone. The witness advised the police that he had obtained the cellphone from Sibale, the first 1st accused whose residence was known by Danny Mabhena. The police then teamed up with the witness, Danny Shadreck Binza and 2nd accused and went to the first accused's residence. The 1st accused reportedly ran away. The 2nd accused was arrested because police had found him in the company of Danny Mabhena and they wanted to carry out further investigations. Since the police had failed to arrest the 1st accused, they caused the witness and Alouis Samuel to be placed on remand because they remained linked to the offence by the deceased's phone which they had possessed in circumstances which needed to be cleared after investigations.

With respect to the US$35.00 which the witness gave to the 1st accused, he said that the 1st accused shared the money with his two colleagues whom he came with to borrow the money. The 1st accused reportedly gave them US$10.00 each.

In cross examination by counsel for 1st accused, the witness agreed that there were several Nokia x 2 phone handsets in Harare. He however insisted that exhibit 8, the deceased phone was the one which he was given as security by the first accused. The witness said that he gave Alouis Samuel his phone number because Alouis Samuel had said that the type of phone which the witness had sold to him was being targeted by thieves. He thus gave Samuel his phone number to reassure him that he could contact him if there was a problem. He agreed that he was a suspect still on remand for the case but said that he had always availed himself to clear his name and also maintained his story as to how he came into possession of the phone.

Under cross examination by counsel for 2nd accused, the witness said that he knew the 2nd accused as a friend to Danny. He however exonerated the 2nd accused from any involvement or possession of the deceased's phone.

In re-examination the witness said that exh 8 was the only phone which he sold to Alouis Samuel. He said that he was not a phone dealer but a hairdresser. Asked whether he could be mistaken about the phone exh 8, he responded that he could not be mistaken and could describe it and the features he identified it by which description he also gave to the police. When asked by the court as to why he did not present himself to the police upon his return from Mozambique after receiving a report from his wife that police were looking for him, he said that he presented himself to the local police who said that they were not looking for him. He decided to wait for the police who had looked for him to return as they had promised to, to his wife. He also said that he knew the cellphone which the 1st accused gave him as security to be a Nokia X2 because it was inscribed Nokia X2. He showed the court the inscription on the face of the phone handset.

The court believed the evidence of this witness and was impressed by his demeanour. He gave a clear account of how he came to be in possession of the deceased's phone. There was no reason advanced as to why the witness would have wanted to falsely implicate the 1st accused. In fact, in cross examination, no motive to falsely implicate the 1st accused was suggested to the witness although the 1st accused was to later on in his evidence testify that the witness had previously made what he considered an improper overture to the 1st accused's wife, an allegation that will later be dealt with. The witness did not distance himself from the deceased's cellphone even though he could have done so since the transactions concerning the phone was not recorded anywhere. The court was also satisfied that the witness description of the phone exhibit 8 was reliable. In fact, apart from suggesting that there could be several Nokia X2 phones around, there was no evidence to show that the witness had had possession of any other Nokia X2 save for exhibit 8. The court was satisfied that it was not being deceived by a witness who wanted to make a clean breast of his involvement. The witness presented himself to the local police and waited for C.I.D detectives to return where after he confessed his involvement with the deceased's phone and what he had done with it. He co-operated with the police and maintained his innocent possession of the phone. The witness's account of how he possessed the phone and disposed of it was convincing. The witness was not given or promised any inducement to implicate the

1st accused. He also exonerated the 2nd accused; see State v Lawrence and Another 1989 (1) ZLR 29(s).

The prosecutor next led evidence from Alouis Samuel. He is a cellphone dealer operating from Magaba, Mbare flyover. He did not know the accused persons. He knew the witness Mathew Murehwa as rasta and he confirmed that the two transacted at his work place in respect of a phone. Mathew Murehwa came to the witness's work station with a colleague and both Murehwa and his colleague were selling Nokia X2 cellphone handsets. The colleague was Shadreck Binza. Binza was selling a grey phone with a black front whilst Murehwa was selling one, red in colour with a black face. He bought the one being sold by Mathew Murehwa for $40 USD and a top up of a small Nokia phone. He tested the phone to see if it was operational and charging. He did so by inserting his phone line into the phone and making calls. He subsequently sold the phone to Raymond Maguri in a swap deal with a Nokia N8. He said that he did not trade in any other Nokia X2 phones except the one which the witness Mathew Murehwa sold to him.

The witness said that Raymond Maguri subsequently came with Homicide C.I.D detectives and he confirmed having swapped phones with Raymond Maguri. He was arrested thereafter and taken to Harare Central Police Station. He gave his explanation of how he acquired the phone to the police. He then gave the police the phone number which had been given to him by the persons who sold the phone to him. The number was for Shadreck Binza. The police then said that the two, namely the witness and Raymond would not to be released until the "rastas", that is Matthew Murehwa and Shadreck Binza had been arrested. The two were charged with the murder of the deceased and placed on remand. The witness was bailed out and charges against him withdrawn before plea prior to giving evidence.

The witness identified the deceased's phone exh 8 as the phone which he bought from Matthew Murehwa and subsequently sold to Raymond Mugari. He described it by its features of having red covers with a black face and inscription Nokia x 2. He said that he could not fail to recognize the phone since he had handled it before.

Under cross examination by 1st accused's counsel the witness agreed that Nokia x 2 phones with a red cover and black face did abound. He said that he could distinguish the phones if similar ones were placed before him by examining the keypads since some could be faded and also by the battery. He said that he did not distinguish phones by their serial numbers as he was not knowledgeable on that aspect. He was asked whether he took precautions that Raymond Mugari could not bring a different phone and attribute it to the

witness and he responded that he could not be mistaken over the identity of a phone which he had handled and sold. He said that if Raymond had brought the wrong phone, he could have denied knowledge of it to the police.

Under cross examination by counsel for 2nd accused, although counsel dwelt on matters which did not concern the 2nd accused, the witness confirmed that he did not know the 2nd accused and never transacted with him. It was also his first time to see the 2nd accused in court.

The witness gave his evidence in a composed and forthright manner. Although minor discrepancies were pointed out to him between his evidence in court and what was recorded in his statement, it turned out that he gave his statement in Shona but police recorded his deposition in English, read out what they had written in Shona but made him to sign on the English version. In passing it is noted that where a witness gives a statement in Shona, it should be recorded in that language. The witness should then read or have the statement read to him in the language in which it has been recorded. He then signs it if he agrees with it. A translation into English can then be made and attached to the Shona version. This avoids situations where witnesses resile or disown their statements and blame translations. The discrepancy noted related to whether he had prior knowledge of Matthew Murehwa and Shadreck Binza. The discrepancy in the court's view did not detract from the positive impression which the witness made upon the court. The witness owned up to being the person who had sold the cellphone to Raymond Mugari even though he could have denied the transaction since there was no written record of it. The court was satisfied therefore that exh 8 was the phone handset which belonged to the deceased and was sold to the witness in a swap deal with Matthew Murehwa. In assessing the evidence of the witness, the court remained cautious of the fact that the witness had admitted possession of the deceased phone taken away from the deceased in the robbery which resulted in the death of the deceased. Despite any suspicions which could abound, the court was satisfied with the witness' demeanour and accepted his evidence.

The last state witness was detective inspector Alfred Mhakayakora. In 2013 he was a detective assistant inspector attached to C.I.D Homicide. He is the investigating officer. In the course of his investigations, he obtained the serial and phone numbers of the deceased's phone from his wife. Through tracing with the network provider, the handset was traced in use by Raymond Mugari who was traced to Kuwadzana suburb, Harare. Raymond was located and he had the deceased's phone. He led the police to Alouis Samuel who in turn led

the police to Matthew Murehwa and Shadreck Binza. He charged Alouis Samuel and Raymond Mugari with the murder of the deceased and did the same with Matthew Mugari and Shadreck Binza whilst he continued with investigations.

He went on a haunt for Sibale, the 1st accused. He subsequently traced the 1st accused to Marondera where he had been arrested for a different case. He proceeded to Marondera and interviewed the 1st accused who gave his name as Michael Ziira, Sibale being and alias or nickname. He warned and cautioned the 1st accused who freely and voluntarily elected to give a statement in Shona which was recorded in Shona and translated into English. The 1st accused confessed to the murder and implicated accomplices who included Chamunorwa Magwaza, Tawanda Chidzingwa and Kudakwashe Chakukwa. He managed to arrest 2nd accused in Epworth. He charged the 2nd accused with the murder of the deceased and the 2nd accused denied involvement in the case. He booked out the 1st accused from custody to Marondera Court for confirmation of his warned and cautioned statement by the magistrate and the same was confirmed. He said that one of the accused persons Chamunorwa Magwaza passed on whilst in prison and Blessing Chidzingwa absconded and is on the run.

He took charge of exhibits recovered from Chimbwanda's motor vehicle and the deceased's phone. He caused the 1st accused to be brought to court for remand after confirmation of his warned and cautioned statement. He said that there was no separate docket compiled for Matthwe Murehwa, Alouis Samuel; Raymond Mugari and Shadreck Binza. Charges against them ought to have been withdrawn. He did not have any other evidence to connect the 2nd accused to the murder of the deceased other than the say so of the 1st accused. He identified the exhibits already produced through other state witnesses.

Under cross examination the witness confirmed that he recorded the accused's warned and cautioned statement in Shona. He confirmed that according to the statement, the person who strangled the deceased was Kudakwashe Jongwe who was never arrested and is on the rum. He denied that Kudakwashe was central to the case and maintained that the accused persons acted as a group and acted in concert. He said that the 1st accused also made indications on how the murder was committed. He denied that he tortured the 1st accused whom he described as having been very co-operative and given a dramatic account of the murder whilst at Marondera where the warned and cautioned statement was then recorded and confirmed. When it was put to him that the accused would deny that he gave the phone exh 8 to Matthew Murehwa and further deny taking part in the robber, the witness responded

that the denial was not supportable because the 1st accused gave a detailed account of what transpired.

Under cross examination by counsel for 2nd accused witness though he was asked many irrelevant questions to the 2nd accused's defence confirmed that he did not find any evidence to link the 2nd accused to the offence.

The witness gave his evidence well and with confidence. His evidence was not put to any serious challenge. It was not put to him that the warned and cautioned statement of the 1st accused was not made by the 1st accused. It was however put to him that he tortured the 1st accused and he denied doing so. Details of the torture, where and when it took place were not put to him. It was not put to him that he sat inside the court during confirmation proceedings. The court was satisfied that the witness was truthful and gave a correct account of what he did and of the 1st accused's confessions.

The State closed its case. Counsel for the 2nd accused applied for the discharge of the 2nd accused in terms of s 198 (3) of the Criminal procedure and Evidence Act on the basis that there was no admissible evidence adduced by the state to link the 2nd accused to the commission of the offence. The application was not opposed by the prosecutor and quite rightly so. The 2nd accused was discharged and acquitted. The court pointed out that the reasons for the discharge would form part of the main judgment. The brief reasons are these. There was clearly no admissible evidence to link the 2nd accused to the commission of the offence. The investigating officer admitted that the only evidence he had was the implication of the 2nd accused by the 1st accused in his confession. It is trite that a confession made by one accused is not admissible against another person but only against the maker; see s 259 of the Criminal Procedure and Evidence Act. In the absence of other evidence to link the 2nd accused to the offence and the inadmissibility of the 1st accused's confession against the 2nd accused, no *prima facie* case was made against the 2nd accused hence his discharge. The 1st accused (hereinafter called the accused) elected to testify.

The accused gave evidence in his defence. He went on and on and would not be controlled by his counsel to respond to that which counsel wanted him to dwell on. The court had to come in and advise him that it was in his interest to be led by counsel as opposed to him seeking to testify as he wanted to without direction. The gist of his evidence which is relevant to the case is summarised hereafter. He was arrested for this case in Marondera where he was held by police for another case. He went into detail about the other case for

which he was arrested against counsel's advice. The court has warned itself not have any regard to the other case for which the accused went into detail.

He admitted that he was known as Sibale. He said that police from Harare came to Marondera Police Station. They included the last state witness. He testified that they said they did not want to waste time. They gave him his bag and another police officer said that he was not going to be seen by his relatives again. He was brought to Harare. On arrival, a police officer, Tsodzo gave $20 00 to a uniformed police officer to buy food for him. He was also bought some cigarette. He was bought some food and thereafter led to detention cells at Harare Central Police cells where other accused persons were locked-up. They asked him how it was that he was still alive and walking if he was Sibale. They then told him that he was alleged to have killed a police officer and sold his phone to some rastas. He however partook of his meal and proceeded to sleep.

Around 1.00 am he was collected by officers Mhakayakora and Tsodzo. He said that he panicked at being collected at such an hour because he had seen people who had been assaulted and was afraid that he would also be assaulted. He testified that the police officers then said that their bosses were now asleep with their wives and that it was now time to tell the police where he had learnt how to commit offences. He was taken to some room downstairs and shown a list of names. He was asked to confirm if the persons listed were his friends. He said that he could not read or understand English since he was a grade 6 drop out. He said that he could read and write some Shona words but was not proficient. When asked by his counsel to tell the court the names; of persons he was shown, he said that "I forget some surnames because it was my first time to hear the names. I recall Tinashe, Blessing, Chamunorwa Magwaza; Kudakwashe Jongwe, Trymore, Dunmore Mabhena. There were several names but I recall these ones." He said that he denied knowing the persons although he knew Dunmore Mabhena.

The accused said that he was handcuffed with his hands behind his back and further cuffed in leg irons. He was shown a Monarch bag measuring ½ metres or 50cm x 1 metre high and ordered to get into it. He said that he was being assaulted but he did not exactly identify the assailants save that there were about 7 police officers present in the room before he was forced to get inside the monarch suitcase. The suite case was zipped closed and he was starved of breathing air. He asked to be let out of the suit case and it was unzipped open. He still recalled that the police officers who were part of the seven included, officers Tsodzo and Mhakayakora.

He testified that the assault on him was perpetrated using probably a plank. He was sure that an iron bar was not used nor hands. The assault whilst he was in the monarch suitcase lasted 5 minutes and when it was unzipped open and he was let out of it, he told the police that they were killing him for nothing. They then said that he was joking and started to assault him again whilst he was out of the suitcase. He was being assaulted by officer Tsodzo and three other policemen. He was assaulted all over his body with button sticks and he used his hands to ward off the blows. The police officers were assaulting him at the same time and they were drunk.

He testified that subsequently, a woman came into the room and asked the police assailants why they were assaulting her sweetheart. The male police officers responded that the woman should find out for herself from the accused. The police officers then told the woman that the accused had killed the deceased with other persons. She then asked the police officers to leave so that she would speak to her husband alone, referring to the accused. He was ordered to lie facing upwards and the woman stood astride him so that he faced her privates. She asked what he was seeing and he responded that he could not see anything. The woman asked whether he could not see her purple panties which she was putting on and said that, that was how the accused was denying offences. The woman left him with the male police officers.

He testified that as a result of the assault he was in pain and his feet were swollen. He then thought it best to admit. When defence counsel sought to show him the confirmed warned and cautioned statement he said that he could not read. When excepts from the statement were read to him he said that they were a fabrication. He was asked to comment on whether the statement was freely and voluntarily given and he responded that he gave the statement under duress. He said that he was puzzled by the evidence of Mhakayakora that the deceased's uniform was found in the trunk of a motor vehicle because he was never charged in connection with the motor vehicle. When asked to confirm if the statement was false he responded "They were just building a case. The statement was read in English. I did not comprehend anything."

Questioned to comment on the confirmation of the statement he agreed that he recalled what he said in answer to questions put to him by the magistrate as to the contents of the statement. When asked to explain why he lied to the magistrate about making the statement freely and voluntariy and its authenticity, he had a long explanation to give. The court will not repeat it. It will very briefly summarise what the accused said. He said that as a

result of the assault on him, he had defecated or soiled himself. He then washed his clothes. He was taken to a way bridge where there were two tables separated with an iron bar which joined them. He was dangled on the bar whilst his hands and feet were tied together. He was then hosed with a hose pipe after which police said they were taking him to the showground. He had been told by a good samaritan police officer that if he was taken to the show ground and asked to stretch his legs he risked being shot if he did so.

He continued in his testimony that he wrung his clothes, put them on and was ordered into a vehicle which was driven to the show grounds where it was parked. The police removed the leg irons and ordered him to move some steps and pick up a stick which was on the ground in front of him. He did not comply but instead picked up the leg irons and recuffed his legs. He asked the police for forgiveness and said that his wife was 7 months pregnant. He was acting on the advice of the good samaritan police officer who had told him about the risk of being shot. The police officers discussed amongst themselves aside from him. Mhakayakora then came to the accused and asked him what church he attended and why he did not pick the stick because he had intended to shoot him. He was told that he had escaped death by a whisker but would be returned to Marondera for court. He was warned to agree to everything at the courts and that if he did not do so, the police would continue investigating the case and shoot him.

At Marondera court, he alleged that the woman magistrate before whom he appeared commented that he did not appear to be free and was therefore sending people out of the court. The magistrate and officer Mhakayakora exchanged a conversation in English and Mhakayakora remained sitting in the gallery. He said that there was an interpreter and the statement was read to him. He just looked at Mhakayakora and admitted to everything. He was afraid to tell the magistrate about the duress because of Mhakayakora's presence in the gallery.

Turning to the alleged exchange of the cellphone between him and Matthew Murehwa, the accused denied the transaction. He admitted that he knew Matthew Murehwa as someone at whose residence drugs were sold. He also knew him as a hairdresser who once plaited his wife's hair. He said that he was seeing exhibit 8 for the first time in court. He denied knowledge of Kudakwashe Jongwe nor borrowing any money from Matthew Murehwa let alone sharing any money allegedly given by given to him by Murehwa with his colleagues.

Under cross examination, the prosecutor described the accused as a good story teller who could write Hollywood fiction movies. The description of course arose from the fact that the accused would rumble on and on unabated in giving his evidence even accusing his counsel of not allowing or seeking to stop him from baring it all. He was asked to explain why police would record his warned and cautioned statement in Harare but take the trouble to have it confirmed in Marondera. He responded that he was due to attend court in Marondera. He said that he was a grade 6 drop out who could not write well. He said that he gave graphic details of the assaults perpetrated upon him to his counsel although this was not put to Mhayakora. He said that he suffered injuries and could not walk properly. Asked whether the magistrate did not notice this, he said that when he was in the dock, the lower part of his body was concealed so that the magistrate could not notice the injuries. He said that all the information in the statement was generated by the police. He was asked why the police would include Kudakwashe Jongwe's name in the statement and yet he had never been arrested. He responded that the police were intent on bolstering their case against him. He said that he did not know why police left out the names of Dumnmore Mabhena, Matthew Murehwa and others whom they had arrested if they were out to build a case against him and he could not suggest a reason for the omission to include them. He could not suggest a reason why Matthew Murehwa would seek to falsely implicate him. He then said that the reason could be that Matthew Murehwa plaited his wife's hair and charged a fee of $15 USD. Matthew Murehwa then told the accused's wife that if the accused then provided for the money for payment she should keep the money for herself. The wife reported this to the accused who confronted Matthew Murehwa and he said that he had only wanted to test her. The accused then resolved to spend the money on himself instead. Asked why this was not put to Matthew Murehwa, he said that he had given instructions on this to his defence counsel.

In re-examination he said that he could not mistake Matthew Murehwa and vice-versa. When asked by the court to clarify whether he attended Marondera Court for the case for which he had been previously arrested and what took place first between his appearance in court for the first case and confirmation proceedings, the accused responded that he was led out of court to go to another court and Mhakayakora went to buy him slippers and soap. He was then taken by prison officers to another court where he was sentenced. Asked to explain the benevolence of Mhakayakora in buying the accused soap and slippers, he said that the police officer just bought him slippers and soap because he had brought him from

Harare. He said that only the signature on the warned and cautioned statement was attributable to him.

The accused did not present himself to the court as an honest witness. In fact the court formed the impression that he was lying about his denial of being in possession of the deceased's phone and surrendering it as security for the money he borrowed from Matthew Murehwa. The court also formed the impression that the accused lied about the assaults allegedly perpetrated upon him by the police and that the contents of the statements were an invention by the police. The accused was represented by an experienced counsel who presented himself as being well prepared and thorough in executing his defence duties. It was highly improbable that had counsel been briefed on the graphic details of the alleged assault by the police, their place of occurrence and nature he would not have taken Inspector Mhakayakora to task in cross examination asking him to comment on the accused's allegations. Indeed a reading of the accused's evidence and looking at him, left the court in no doubt that it was dealing with a cunning and untruthful person intent on avoiding liability for his actions.

A reading of the accused's defence outline in para 3-5 contradicts his evidence on torture. In para 3-5 aforesaid, the accused alleged assault by police but stated that despite the assaults "he stood resolute and adamant in protecting his innocence". He stated that he refused to be intimidated. This contrasts sharply with his evidence when he said that he was beaten so badly and exposed to indecent acts by a woman police officer until he decided to admit the case to escape further assaults. It was not a surprise therefore that defence counsel could not have put the details of the assaults to Mhakayakora because the accused simply made them up as he rumbled on with his evidence which appeared to have been rehearsed, hence his desire to recite all that he had rehearsed despite counsel seeking to guide him to no avail.

The long and short of what the court made of the accused was that he was an accomplished but unpolished liar. His evidence regarding what took place at the confirmation proceedings concerning the conduct of the magistrate was not only with in the defence outline but was so improbable as to be decidedly false. It was highly improbable that the magistrate would have allowed Mhakayakora to remain in the gallery yet he was the recording detail.

Defence counsel in his closing submissions strenuously argued that the State witnesses should not be believed. The court holds a contrary view. The case before the court

must be decided on circumstantial evidence. Circumstantial evidence is of no less cogency than direct evidence. The approach to assessing whether the accused person is guilty of the offence charged on the basis of circumstantial evidence is not take individual circumstantial facts in isolation. The correct approach is to consider the cumulative effect of relevant or material proven circumstantial facts taken together. Where they point to the guilt of the accused and leave the court in no doubt about the accused person's guilt, then the court is entitled to return a guilty verdict. The approach of the court to circumstantial evidence is further subject to the rider that the inference of guilt sought to be drawn must not just be the only reasonable influence which can be drawn but it must be consistent with proven facts which as indicated should not be treated in isolation or independent of one another. The celebrated case of *R* v *Blom* 1939 AD 188 has stood the test of time and been consistently followed in this jurisdiction in so far as it provides a guide on the approach of a court to circumstantial evidence. See also *S* v *Marange* 1991 (1) ZLR 244 (SC), *S* v *Mlambo* HH 43/15; *Prosecutor General* v *Shumbayarerwa and Magistrate Tsikwa* HH 405/15.

In this case the court accepted that exh 8, the deceased's phone was in the possession of the accused in the morning following the early hours of the same day that the deceased was last seen alive and later discovered dead the same day. The court accepted that the accused surrendered the deceased's phone to the witness Matthew Murehwa from whom the accused borrowed money. The accused did not profer an innocent explanation for his possession of the phone nor transacting in it. His denial of possession and transacting in the phone was dismissed by the court as a false denial. He did not profer any explanation of his movements and whereabouts on the night of 28 September, 2013 and early hours of 29 September, 2013. He did not only fail to account for his movements in the defence outline but in evidence in court as well.

In addition to the phone, the court accepted the accused's confession in the confirmed warned and cautioned statement as having been that of the accused, given freely and voluntarily as testified to by the investigating officer. Once the statement was confirmed, the onus shifted to the accused to prove that the statement or confession was not made by him or that it was not made freely and voluntarily. The accused failed to prove his allegations of not being the maker of the statement and the duress aspect. The court disbelieved his evidence of assaults including threats and attempts to shoot him on the pretext that he was escaping. It defies logic that the police would have chosen to take him to the showground and shoot him after he had already confessed to the murder. There would have been no logical reason for

police to remove a suspect who has confessed to a murder from the cells and seek to shoot him dead. The accused as observed by the court was most unimpressive as a witness and his evidence denying involvement in the commission of the offence was in the conclusion of the court false beyond a reasonable doubt.

The court will therefore accept as evidence against the accused person the accused's confirmed warned and cautioned statement. The statement provides details of how the accused and his co-perpetrators and accomplishes murdered the deceased by strangling him to death after they had given him a lift in a vehicle which they had robbed from its owner. The strangulation of the deceased was committed in the course of executing a robbery in which the deceased was robbed of his clothing, phone, identity cards and money. The deceased was killed in a movie style robbery after he had finished duty and was looking for transport. The accused did not dissociate himself from the actions of his accomplices and made common design with them. He also took the deceased's phone. It should be pointed out that despite the defence arguments that the evidence on whether the cellphone recovered from Mugari is the same one which the accused had given to Matthew Murehwa would have been of substance had it been the only fact connecting the accused person to the offence. The accused's confession corroborated the evidence that the phone in question exh 8 can only be and was the phone which the accused had after obtaining it from the deceased following the robbery committed on him and/or his death. It was not necessary for the State to prove the actual role which the accused played in the commission. The accused was a co-perpetrator as envisaged in s 196 of the Criminal Law & Reform Act. He associated himself with his co-perpetrators and made common cause with them. Section 196 reads as follows:

"196 Liability of co-perpetrators

(1) Subject to this section, where
(*a*) two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and
(*b*) any one of the persons referred to in paragraph (*a*) ("the actual perpetrator") commits the crime; and
(*c*) any one of the persons referred to in paragraph (*a*) other than the actual perpetrator ("the co-perpetrator") is present with the actual perpetrator during the commission of the crime;
the conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.

(2) If the State has established that two or more accused persons—
(*a*) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
(*b*) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged;

and that they were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime, then it shall be presumed, unless the contrary is shown, that—

(*c*) they knowingly associated with each other for a criminal purpose; and

(*d*) the crime actually committed—

(i) was the crime for the commission of which they associated with each other; or

(ii) was, if not the specific crime for the commission of which they associated with each other, a crime whose commission they realised was a real risk or possibility.

(3) If any accused person referred to in subsection (2) who is not the actual perpetrator of the crime—

(*a*) does not discharge the burden mentioned in subparagraph (i) or (ii) of paragraph (*d*) of subsection (2),

his or her liability as the co-perpetrator of the crime shall not differ in any respect from the liability of the actual perpetrator, unless he or she satisfies the court that there are special circumstances peculiar to him or her or to the case (which circumstances shall be recorded by the court) why the same penalty as that imposed on the actual perpetrator should not be imposed on him or her; or

(*b*) discharges the burden mentioned in subparagraphs (i) and (ii) of paragraph (*d*) of subsection (2), he or she shall be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory.

[Paragraph amended by section 31 of Act 9 of 2006.]

(4) Where there is a dispute between or among two or more accused persons referred to in subsection (1) as to the identity of the actual perpetrator (which dispute cannot be resolved by reference to the evidence that is available to the State) the burden of proving that any particular accused person did not actually perpetrate the crime shall rest with that person.

(5) If any of the accused persons referred to in subsection (4) fails to discharge the burden there referred to and the actual perpetrator is not identified, the accused person or persons concerned shall be liable for punishment as if he or she or each of them was the actual perpetrator.

(6) It shall not be necessary to prove that there was a prior conspiracy to commit the crime for the commission of which a person is associated with another person or other persons in order for a court to find that any person is liable as a co-perpetrator of any crime.

(7) A person charged with being a co-perpetrator of crime may be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory if such are the facts proved.

(8) For the avoidance of doubt it is declared that this section may not be used to convict a co-perpetrator of murder unless he or she was present with the actual perpetrator while the victim was still alive and before a mortal wound or mortal wounds had been inflicted.

It therefore did not matter that Kudakwashe Jongwe was according to the accused's confession the one who strangled the deceased. The accused was present when the offence was committed. He is presumed to have made common cause and associated with his co-perpetrators to commit the offence. The accused bore the burden to show that he did not associate himself with Kudakwashe Jongwe and others to commit the offence. By offering a bare denial of involvement and alleging fabrication of the charges against him, the accused failed to discharge the onus to disprove the presumption against him. In any event, the accused would still have had difficulties in proving innocent association because he had in his possession the deceased's phone.

In all the circumstances of the case therefore, the verdict of the court is that the State proved its case beyond a reasonable doubt and the accused is found guilty of murder with intent as defined in s 47 (1) (a) of the Criminal Law Codification and Reform Act.

Sentence

The accused stands convicted of a capital offence. Both defence and state counsels have addressed the court on the issue of sentence.

The court will consider the changes in the Law with respect to sentence for murder following the promulgation of the new Constitution (2013) and amendments to the Criminal Procedure & Evidence Act [*Chapter 9:07*] and the Criminal Law Codification & Reform Act [*Chapter 9:23*].

The constitution in s 48 (1) entrenches the right of every person to life. Section 48 (2) provides that a Law may permit the death sentence to be imposed in cases of a murder committed in aggravating circumstances. The constitution therefore left it to the legislature to exercise discretion to pass such a law. Where the legislature elects to pass such a law there are certain conditions which such a law must satisfy. These conditions are spelt out in s 48 (2a -e) of the constitution. I do not propose to list all of them. I however quote s 48 (2a) which provides that where such a law has been enacted, "the law must permit the court discretion whether or not to impose the penalty". Therefore courts are under no obligation to impose the death penalty notwithstanding that a law allowing for it is put in place. Section 48 (2a) commends itself as good law as it accords with the generally accepted principle of sentencing that the imposition of a sentence in any given case is the province of the trial court which must exercise its discretion within the confines of the law and further exercise the discretion judiciously.

The legislature enacted the Criminal Procedure and Evidence Amendment Act No. 2 of 2016. It became Law on 10 June, 2016. Amongst other provisions, the act amended s 337 of the Criminal Procedure and Evidence Act by providing for the imposition of a death sentence by this court in its discretion upon an offender convicted of murder committed in aggravating circumstances. The same amendment act amended s 338 to exclude offenders under 21 years at the time of commission of the offence, persons above 70 years old and women from being liable to the death penalty. This amending legislation therefore operationalized s 48 (2) of the Constitution by enacting the law which permits the imposition of the death sentence as provided for therein.

The cited amendment act did not however define aggravating circumstances. Subsequently on 24 June, 2016, the General Laws Amendment Act No. 3 of 2016 was promulgated into law. It amended s 47 of the Criminal Law Codification and Reform Act by providing without limit the factors which the High Court must have regard to as aggravating circumstances when considering whether or not a murder was committed in aggravating circumstances. For reasons which shall become apparent, more particularly in that l do not consider that the amended law is applicable in the present case, I shall not dwell much on or interrogate the listed factors. What l can authoritatively state is that by reason of the enactment of the two Acts as detailed above, it has become permissible in this jurisdiction for the High Court in its discretion to impose the death penalty upon an offender convicted of murder committed in aggravating circumstances.

The question which arises in this case is whether or not the court has a discretion to impose the death sentence on the strength of the two legislative provisions l have cited, if circumstances warrant. State counsel argued for the imposition of the death penalty pursuant to the said amendments. I disagree that the provisions are applicable in this case.

I hold the view that the provisions do not apply because of the presumption against applying a law retrospectively unless the new law provides so. In short, the presumption provides that where a new law is enacted or comes into being, unless it provides so, the law does not affect matters which have already occured before its promulgation. Having stated as above, l have to determine whether the constitution passes for "a law" just like any other piece of legislation given that it is considered supreme or the mother of all laws in regard to which any inconsistent law, conduct, practice or custom with the constitution should by virtue of s 2 be declared invalid to the extent of the inconsistency. I should mention that part 4 of the sixth schedule to the constitution provides that existing laws are the laws in force at the time that the constitution came into being which was in May 2013. The transitional provisions do not apply to laws enacted after the promulgation of the constitution.

The short title to the constitution reads as follows "This Act may be cited as the Constitution of Zimbabwe Amendment (No 20) Act, 2013." It is also reads in the pre-amble that it is "Enacted by the President and the Parliament of Zimbabwe." It will be noted that the wording used as above quoted is the wording used in every other piece of legislation passed by Parliament that it is an "Act" enacted by the President and Parliament of Zimbabwe. The constitution is therefore an "Act" of Parliament differentiated from other Acts in that is made

the Supreme Law and overrides every other law which is consistent with it to the extent of the inconsistency.

The constitution being an Act as aforesaid, it follows that the Interpretation Act, [*Chapter 1:01*] is applicable to it. Section 17 (1) of the Interpretation Act provides that the repeal of an enactment does not affect any offence created by the repealed enactment nor the penalty provided for it by the repealed enactment. This provision should be read together with ss 18 (9) and 18 (10) of the Sixth Schedule to the Constitution. The aforesaid sections provide for continuation of cases pending before the courts before the advent of the constitution, under the same procedure then obtaining. The procedure then obtaining as the case may be is applicable notwithstanding the provisions of Chapter 4 of the constitution which entrenches the declaration of rights. A criminal case is said to be pending upon the accused entering a plea to the charge. Following on this, the accused's case was therefore not pending as at the time that the constitution came into being because he was only called upon to plead after the constitution was promulgated. This was the argument proferred by the state.

I however consider that the determining piece of legislation is the Interpretation Act. The offence in this case was committed on 29 September 2013. Section 48 (2) of the constitution had not yet been operationalized. It was operationalized in June 2016. The determination of sentence in this case cannot therefore be guided by enactments which came into being in June 2016 without offending the presumption against retrospective application of legislation and the Interpretation Act. When the accused was arrested and arraigned before the court on the murder charge, the new law allowing for the imposing the death penalty where there exists aggravating circumstances had not been enacted. The court will therefore apply the old law, that is, s 337 of the Criminal Procedure & Evidence Act before its repeal and substitution.

In terms of the old law, the court is obliged to pass the death sentence upon an offender convicted of murder unless the offender was aged below 18 years when he committed the offence was over 70 years old or a pregnant woman. The court can however pass a sentence of life imprisonment or a shorter term of imprisonment if it makes a finding that there exists extenuating circumstances in the case.

The court accordingly proceeded to consider whether or not extenuating circumstances existed in the case. Extenuating circumstances consist in unusual or compelling facts which excuse, reduce or mitigate the moral turpitude, iniquity or gravity of an accused's conduct or blameworthiness. Extenuating circumstances are therefore situational

and whilst one can generalize that certain factors amount to extenuating circumstances, the facts of each case will determine whether extenuating circumstances are present. Legislation also plays a part as evidenced from section 47 (2) of the Criminal Code which defines aggravating circumstances whose presence in a given case would merit imposition of the death sentence.

The approach of the court in the application of the old law in cases as the present one, has always been that in the absence of weighty extenuating circumstances, murder committed in the course of a robbery attracts the imposition of the death sentence. In *S* v *Matongo* SC 61/2005, SANDURA JA stated as follows;

> "The law in this regard is clear. A murder committed in the course of a robbery attracts the death penalty unless there are weighty extenuating circumstances.
> As GUBBAY CJ said in *S* v *Sibanda* 1992 (2) ZLR 438 (S) at 443 F-H:
>
> > 'Warnings have frequently been given that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty. This is because as observed in *S v Ndlovu* SC 34/85 (unreported):'
> > … it is the duty of the courts to protect members of the public against this type of offence which has become disturbing prevalent. People must feel that it is possible for them to enjoy the sanctify of their homes, to attend at their business premises or to go abroad, without being subjected to unlawful interference and attack."

See also *S* v *Marijo* SC 150/04; *Dube & Anor* v *S* SC 245/96; *Moyo & Anor* v *S* SC 37/13 and *Kwashira* v *S* SC 34/14.

What is significant from SANDURA JA's judgment above is that the Supreme Court indicated that it was "law" that in the absence of weighty extenuating circumstances murder committed in the course of a robbery attracts the death penalty. It being judge made law as aforesaid, this court must defer to the Supreme Court pronouncement in as much as it is bound by it.

The court has considered submissions made on behalf of the accused and by the State counsel. The court came to the conclusion that the conduct of the accused and his accomplices was most reprehensible thus lifting the degree of their moral blameworthiness to a very high level.

The attack upon the deceased was pre-meditated or planned. The motive for the attack was to rob the deceased of his valuables. The deceased was strangled to death and his body just abandoned. After abandoning the body and robbing the deceased of his valuables, the accused went about his life as if nothing had happened. The accused person took possession of the deceased cellphone hand set and traded it for money which he was paid and used. It

was just fortuitous that following its recovery, the phone became the tool which the police used to trace and connect the accused to the offence.

The accused person and his accomplices showed no respect for human life. Death to them was just an occurrence. No reasonable society can condone such kind of lawlessness. It was submitted that the accused person was remorseful because he confessed his guilt to the police. Had the accused not made a turn around and resiled from the confession, the submission would have held some weight. The accused throughout the trial steadfastly maintained that he had been coerced by police to confess to the murder. Had the accused admitted his confession, the argument would be different. The upshot of denying the confession was tantamount to refusing to own up to the dastardly act which he committed.

The court should not be understood as saying that an accused should plead guilty and that it is only in such circumstances that he can be said to be remorseful. No. The point which the court makes is that remorse is easily demonstrable where an offender owns up to his or her misdeeds. Being remorseful is a simple concept. Anyone in court should be able to go out of the court room and tell the world at large that the offender showed remorse and was very sorry for what he did. Once the bystander says that the accused person continued to deny the case until the court found him guilty, it would be anomalous or aberrant to hold that the offender was remorseful for his misdeed.

It was also submitted by the defence counsel that the accused is not the one who strangled the deceased. It was argued that it was the accomplices who did so. The prosecutor argued that this was not a circumstance of extenuation. The court agreed with prosecutor. The deceased was a victim of a gang robbery. The accused was part of the gang. He was present when the deceased was being strangled. He did not dissociate himself from the acts of the accomplices. He was witness to the strangulation of the deceased. The strangulation was part and parcel of the robbery enterprise. The accused made common cause with the actions of the accomplices and shared in the ill-gotten gains or property of the deceased after he had been strangled. In law, the doctrines of common purpose, accomplices and co-perpetrators comes into play. In terms of the proviso to s 200 of the Criminal Law Codification and Reform Act, a co-perpetrator or accomplice may in the court's discretion be sentenced to a lesser penalty than the principal offender where the former shows that he took positive steps within his power to prevent stop or frustrate the commission of the crime. There was however no evidence led in this case that the accused entertained any other intent different from his

accomplices at any stage. The post mortem report showed stab wounds meaning that the deceased was not just strangled but stabbed as well. The accused was party to this.

Defence counsel submitted that the accused was semi-illiterate and that the instrument used to strangle the deceased was in the vehicle. It was thus submitted that the accused did not carry any weapon. The court did not find the submission persuasive. The accused knew right from wrong and in particular that it was unlawful to commit a robbery or kill another human being. The accused and his accomplices used an instrument that availed itself to them at the moment that they committed the act. They used the car seat belt of a vehicle which they unlawfully dispossessed the owner of (a taxi) and dumped him. The court whilst noting that the accused is not on trial for robbery of the motor vehicle is entitled to take into account that the accused and his accomplices were on a spree of terrorizing other citizens through robberies. Such conduct on their part impacts negatively on a favourable finding of their levels of blameworthiness.

In the view of the court the circumstances of this case portrays a repulsive example of robbery and murder which this court has ever dealt with. An innocent policeman who had just completed his sworn duties of ensuring the maintenance of law and order, incidentally such duty being one from which the accused and his accomplices would stand to benefit, met his demise in circumstances of being a victim of terror. The deceased had done nothing wrong. Thus, even though one could argue that the accused and his accomplices may not have known that the victim was a police officer, that is, assuming that he had removed his uniform, the fact remains that a police officer was killed and robbed or robbed then killed. Our society appears to have lost respect for the sanctity of human life. Courts are by law required and expected to impose appropriate sentences on offenders of serious crime. Such sentences should reflect society's abhorrence for serious crime. Legislative intent where statutory provisions bearing on sentence are provided for should be given full effect to or applied.

Defence counsel also submitted that the accused was 24 years old and therefore youthful. This is admitted because s 20 of the Constitution defines a youth as a person aged between 15 and 35 years. However the actions of the accused and his accomplices can only be described as daring. They are not actions one would expect to be exhibited by youthful offenders of the accused's age. They showed scant regard for human life. The accused was married and thus could not be said to be immature. Youthfulness where an offender commits a calculated, planned and daring serious crime can hardly pass for an extenuating or mitigatory factor.

The court reached a unanimous finding of no extenuating circumstances arising from the case. The court also considered that even if it was to apply the new law of balancing aggravating and mitigatory circumstances and exercising its discretion to pass the death penalty, the aggravating circumstances in this case totally eclipsed the mitigatory factors. A policeman was killed and his uniform taken away. The offence was pre planned. The circumstances of the case present themselves as not allowing of the exercise of a prerogative of mercy being extended to the accused person and his terrorist gang of accomplices.

Lastly it is necessary to comment on the submissions that the Executive Arm of Government appears to have a mind-set not to carry out the death sentence. Indeed this may be true not only of the Executive but also of the judiciary where judges as human beings hold their individual opinions on whether they support the death penalty. The submission was made that there have been no hangings in this jurisdiction for a very long time and that death row convicts are just languishing in prison. As l understand the argument, its upshot is to pose the question "why impose the sentence of death when it is never carried out?" It is not up to the court to order the Executive to carry out the death penalty. This court becomes *functus officio* after pronouncing on its sentence. It is not mandated to make a follow up that its sentence has been carried into execution. This court is required to apply the law. The death penalty exists on our statutes and in a proper case it should be imposed, lest the court fails in discharging its constitutional mandate. The doctrine of separation of powers should be maintained so that powers of three arms of government, executive, legislature and judiciary are kept in check. A court would be failing in its duty were it to avoid imposing the death penalty where circumstances warrant it simply because the sentence never gets carried out by the Executive.

Having found no extenuating circumstances, the court's hands become tied since the appropriate sentence is statute imposed under the old law and the death penalty must therefore be imposed.

When asked whether he had anything to say as to why the death sentence should not be imposed upon him, the accused stated that he now wanted to tell the truth. He confessed that he had lied about being beaten up by the police and being forced to make a confession. He said that what he had written in his warned and cautioned statement was the truth. Further he said that he had been influenced by other inmates at Chikurubi Prison to deny the charge. He said that he was living in trauma because the deceased kept appearing in his dreams

demanding that the accused should approach the deceased's family, confess his misdeed and pay compensation.

The court advised the accused that what he had stated did not amount to a lawful excuse for the court not to impose the death penalty. He was advised that his capitulation on his denial of the offence and other matters he had stated had been recorded and would be considered at the next levels since there was an automatic appeal of the case to the Supreme Court and that the sentence of death would only be executed in the event that his appeal is dismissed and the Presidential prerogative of mercy or pardon was not exercised in his favour. So far as this court was concerned, the accused was advised that its hands were tied and it was bound at law to pass upon the accused, the penalty of death.

Accordingly the sentence of the court is that the accused shall be returned to prison and the death penalty shall be carried out upon the accused in accordance with the law.

National Prosecuting Authority, for the State legal practitioners
Harare Law Chambers of Advocates, for the 1st accused legal practitioners
Mberi Chimwamurombe Legal Practice, for the 2nd accused legal practitioners