STATE
versus
JAMES ACKIM
and
LAMECK ACKIM

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 5, 6 May and 22, 23 September 2011, 5 and 6 December 2016, 30 and 31 March 2017 and 28 and 29 June 2017 and 9 & 15 March 2018

ASSESSORS: 1. Mr AH Mhandu
2. Mr CG Chivanda

Criminal Trial

E Makoto, for the State
T Mutebere, for the first accused
K Chirenje, for the second accused

KUDYA J: The two accused persons are brothers. They were jointly charged with the murder of Jokonia Choga Muunganirwa at Chemhanza Hill in Chevakadzi Resettlement Area in Bindura on 31 January 2010. They were alleged to have caused his death by assaulting him indiscriminately all over his body and stoning him on the ribs and head.

The State called the evidence of eight witnesses, one of which was impeached and produced a total of 17 exhibits consisting of 5 physical and 12 documentary exhibits. Each accused person testified on his own behalf and both called the evidence of the nurse in charge of Bindura Prison camp and produced one documentary exhibit.

<u>The missing man and common cause evidence</u>

The events leading to the alleged murder started at Billabonge farm, situated some 14 km from Chevakadzi Resettlement area in Bindura. On some undisclosed date in 2009 two aluminium pipes went missing from the farm and in January 2010, a further four were stolen from the same farm. The farm owner set up a team of undercover investigators consisting of employees of various grades drawn from his security guards and general workers. They were tasked to investigate blacksmiths and welders in the surrounding villages and resettlement areas

who were perceived by virtue of their craft to be the consumers of aluminium pipes. The first accused was a welder who used aluminium solder to repair metal utensils. The deceased and his wife Faith Shonhiwa were co-opted into the team and in consequence sometime in January 2010, the wife took a black pot with a finger sized hole at the bottom for repair to the second accused's homestead. Prior to her visit, her employer and the police, in a bid to apprehend accused 1, unsuccessfully raided his homestead. In order to allay any suspicion from the occupants of accused 2's homestead she deliberately misled accused 2's pregnant wife that she hailed from Kerry and not Billabonge farm. She left the pot in her custody.

On Friday, 29 January 2010, the deceased left Billabonge farm. He was wearing a white shirt, black pair of trousers, scotch-checked cap, black pair of gumboots, and blue work suit jacket and grey suit jacket. He took his 12 year old nephew Edmore, destined for Kerry farm, with him to his communal home. He was expected back on Sunday 31 January 2010. He was tasked to collect the pot from accused 1's homestead. That Sunday at around 2pm, he parted company with his nephew at Kerry farm and proceeded to Chevakadzi Resettlement area to collect the pot. The defence outline of accused 1 and the evidence of a ritual friend to the accused persons, Pias Muchambo established that he arrived at accused 1's tuck-shop in Chevakadzi Resettlement area. He was directed to the first accused's homestead from where he collected the black pot.

Pias stated that the man who arrived at the tuck shop was wearing a yellow shirt, khaki pair of trousers and carried a sack. He asked for directions to accused 1's homestead**.** Accused 1 who together with accused 2, the witness and other patrons were drinking beer at the tuck shop, attended to the man some 4m away from Pias. Pias heard the two men discussing about a pot. Thereafter the man took the direction to accused 1's homestead and was soon followed by both accused persons. The man was never seen again. He did not return to his wife at Billabonge farm.

The missing man's family and workmates conducted a search for him but failed to find him. On 5 February 2010, the man's wife and four security guards visited accused 2's homestead where they found accused 2, his wife and mother and members of the apostolic faith celebrating the birth of a baby. The mother berated her daughter-in-law for accepting the black pot and failing to refer the man's wife to Bhobho, the local blacksmith. She turned her ire on the man's wife for allowing herself to be used by the farm owner of Billabonge in his bid to get her sons arrested and pretending to be from Kerry farm. She intimated that accused 2 had observed her movements on the day she left the pot and threatened her with harm if she ever

visited her son's homestead again. She however indicated that her pot had been collected by an elderly man on the preceding Sunday but declined to describe him further. In the result she made a missing person report at Bindura police station on 8 February 2010. Two detectives accompanied her to accused 2's homestead and questioned the mother about her outburst on her last visit. The police managed to collect some aluminium pots and pieces of pipe which they took to the police station but failed to get any information on her missing husband.

It was common cause that the missing man's relatives mounted a big search for him. On 14 and 15 February 2010, they co-opted the village head of the two accused's village, Mhedziso Jenje. They conducted the search in his village and concentrated their focus in the vicinity of accused 1's homestead. The second accused and a group of local youths participated in the search on the second day. The missing man was not found.

On 13 March 2010, members of the Bindura CID team consisting of Detective Sergeants Trymore Mutambi, Leonard Karemba and Niverd Charuma descended on accused 1's homestead. The two accused persons were not present. They took their mother and young brother Simbarashe Ackim to the police station for questioning and left word with the village head for the two to report at the police station. On the next day the two went to the village head's home before proceeding to the police station. They were detained and their mother and young brother were released.

The two accused persons were subjected to intensive interrogation by the investigating team. On 15 March 2010 the two accused and seven detectives in plain clothes and one uniformed police officer drove in a Mitsubishi truck to accused 1's residence and then a further 4kms to Chemhanza hill. The truck was driven by detective sergeant Mutambi and the two accused were in the back pan with other detectives.

At Chemhanza Hill

The events that took place at Chemhanza hill were hotly disputed by the two accused persons. The investigating officer, detective sergeant Mutambi and detective sergeant Karemba's version of events was confirmed by the village head Mhedziso Jenje and his aide Black Chihumo. The two villagers stated that the two accused persons did not exhibit any signs of physical discomfort and mental strain during the drive and at the scene. They did not observe any visible injuries on either of them. They appeared to be in good health. They formed the opinion that the two acted out of their own free volition. They were present throughout the indications and heard the words uttered by each accused person as he pointed out the different spots that were captured by the police photographer on celluloid.

The testimony of the village head and his aide was that the two accused persons led the police to Chemhanza hill. Accused 2 remained in the police truck while accused 1 led the police some 20m uphill to a burnt patch of ground on which were some ashes. He pointed at the spot where a man died. He showed the stones, exh 7, and stick, exh 9 used to assault the man. He pointed out the spot where the man lay after the assaults and where his remains were burnt. He walked to the top of the hill and pointed to a cave. He then entered the cave and retrieved some bones. He emerged with a plastic bag containing bones about 7 to 8 cm long which he showed to those on top of the hill and when they descended to those at the bottom of the hill where the car was parked. The second accused also followed the same route pointing at various features along the hill slopes and rocks. The village head and his aide said the second accused retrieved a flattened tin, exh 8 from the cleft between two rocks, a crashed black pot, exh 3 from on top of the hill and pointed and picked up the stone he used, exh 7. A piece of burnt rubber which looked like the remnant of a gumboot, exh 4 and a piece of cloth from a work suit were retrieved from the ashes as were some more bones. Each accused person picked the stone he used to hit the man and volunteered information on the part of the body where each directed his stone.

It was common cause that the photographs exh 10 to 17 were all taken by detective sergeant Sharara. The two detective sergeants stated how the first accused picked a 1,25m long stick he used from the ground. He was photographed in exh 10 holding the 1.25m long stick, exh 9. In photograph 11 he pointed to the place of killing, a burned out area with a 3 kilogramme stone and 8 pieces of bones on the ground. In exh 12 he pointed to fire burnished stone weapons at the site. He was outside the cave in exh 13 and in exh 14 he held one of the charred bones while pointing at the remains in the cave. In exh 15 he pointed to the back of the cave where the smashed pot and flattened tin were while exh 16 were tree stumps from which firewood was cut. They both indicated that accused 2 in turn pointed to the same features that were pointed out by accused 1. Exhibit 17 showed accused 2 holding the stone he used and pointing to the stumps of cut firewood that was used to burn the remains. The photographs did not reveal any visible signs of assault on each of the accused persons. Detective sergeant Karemba indicated under cross examination that the missing man's family called the aid of a spirit medium in their search of the missing man. He was adamant that the accused and not the spirit medium led them to the Chemhanza hill where the recoveries were made.

The evidence of Dr Lawrence Hlatwayo of Bindura Hospital established that the charred bones were human bones and not animal bones. He indicated that they were thicker

than bones of such animals as monkeys and baboons that are regarded as second cousins to humans, designed as they were to withstand gravity in the upright posture. He identified the phalange, tibia and fibula and scapula bones that constitute the human hand and arm from the remains that were submitted to him for post mortem. In the absence of DNA testing and forensic equipment, he was unable to establish the cause of death from the charred remains he saw and whose remains they were notwithstanding the suggestive history that he extrapolated from the police documents attached to the request for the post mortem.

Confirmed warned and cautioned statements

The first accused's confirmed warned and cautioned statement together with the record of the proceedings was produced as exh 1 while that of accused 2 and its record was produced as exh 2. They were recorded by detective sergeant Karemba and witnessed by detective sergeant Charuma on 16 March 2010, the day following the indications. On 17 March 2010 an interpreter based at Bindura Magistrates Court confirmed the accuracy of the interpretations. They were both confirmed by a magistrate at Bindura Magistrates Court on 18 March 2010.

In exh 1, the first accused admitted to murdering the missing man. He was wearing a white shirt, blue work suit tied to his waist and a black pair of trousers and black gumboots, a khaki cap and had a sack with loose tobacco and half bar of soap. He regarded him as the spy from Billabonge farm on a mission to entrap him for the theft of aluminium pipes. The man pretended to be returning to Nyamaropa but took the Billabonge road after accused 1 went out of sight. He related the weapons he used on the missing man and the injuries he sustained. He stated how the missing man reached Chemhanza hill and how and when he died. He described how the missing man came to be a pile of bones and ashes on the hill slopes and in the cave. He stated what became of his pot.

The first accused indicated during confirmation proceedings that he sustained injuries on his ankles from leg irons and on his back from assaults perpetrated by members of the CID. The magistrate nonetheless confirmed the statement after the accused maintained that these assaults had not influenced him to make the statement.

The second accused gave a more detailed statement. He admitted the charge. His confession followed the general outline of his co-accused. He described where and with whom he found the missing man and his attire of a white shirt, grey pair of trousers and black gumboots. He related his weapons of choice and the injuries sustained by the missing man. He stated how he died and the fate that befell his remains and pot.

The two detective sergeants were subjected to searching cross examination. They disputed ever subjecting the accused to torture and assault but admitted conducting intensive interrogation which elicited contradictory versions from the two. They averred that the invitation extended to the village head and his aide for indications was in accordance with the tenets of community policing which encouraged the police to involve local leaders in policing areas under their jurisdiction. They disputed being present in court when the warned and cautioned statements were confirmed.

The versions of the accused persons

In his defence outline the first accused stated that the man who came to collect the pot went to his homestead while he went to protect his crops from marauding baboons. He averred that both the indications and confirmed warned and cautioned statement were induced by physical assaults and torture. He described how the detectives assaulted him and his co-accused on the back and under his feet with baton sticks, planks and open hands and on his testicles with rubber bands causing them to swell and pass blood stained urine for a period of 3 weeks for which he was treated at Parirenyatwa Hospital. In his evidence in chief, he intimated that he spent the whole of that Sunday in his field and was not at the tuck shop. He voluntarily surrendered himself to the police, was detained and intimidated by detective sergeants Mutambi, Karemba and Charuma in a room with blood stained walls. He was then placed in leg irons and ordered to squat. A metal rod was placed under his knees. He was lifted and placed on a table and hanged upside down. He was swung on this bridge and hit under his feet and back. He was shot on his testicles with rubber bands. The ordeal lasted for about 45 minutes. He was dumped in the holding cells. His co-accused was taken to the same room and underwent the same ordeal. He was treated for leg and back injuries at Bindura prison. Thereafter he signed the document that was placed before him without any further ado. The court record from Bindura Magistrate Court shows that they were both placed on initial remand and advised to apply for bail at the High Court on 17 March 2010 and did not register any complaints against the police. They were remanded in prison custody from where they returned to court on the following day for the confirmation of their statements. He did not advise the magistrate of his ordeal in fear of the threats that had been issued against him but admitted making the statements of his own free will.

In regards to the indications he intimated that he was forced to pose for the pictures in exh 10 to 16 by the photographer and that exh 3, the smashed pot photographed in exh 15 was run over at and collected from his homestead and planted on the hill by the police on the day

they went for indications. He said he was assaulted during the indications. He averred the deceased's wife had on an earlier occasion rejected exh 3 as her pot. He conceded that he was at the tuck shop when the man described by Pias Muchambo came but identified him as a Mr Foya of Chemhanza village. He had a dispute with him over the length of a hose pipe he had purchased from him, which was resolved by his co-accused who took them to his garden to measure it. He admitted in cross examination that the pot was collected from his homestead but denied any knowledge of the deceased. Contrary to his insistence that he was treated at Bindura prison, the assistant principal correction officer in charge of clinic records at that prison did not find any record of the treatment. He however produced exh 18, an extract of the treatment received by accused 2 at that prison.

The second accused categorically denied any knowledge of the deceased. He participated in the search of the missing man together with other youths. The missing man's family was led by a spirit medium, which focused the search around the first accused's garden and homestead. He believed that the spirit medium led the police to Chemhanza hill. He described the bridge technique torture he underwent at the hands of the investigating team after he voluntarily surrendered himself to the police. He was hit by baton sticks under his feet and by a soft drink bottle on the knees and ankles and by a plank on his back. He was also shot on his testicles with rubber bands. He admitted to the offence to stop the torture. His version in regards to how they went for indications was similar to that of his co-accused. The pot, exh 3 and flattened tin, ex 8 both photographed in exh 15 were collected from the first accused's home and planted at the scene. He was forced to hold a stone while his picture was taken at Chemhanza hill in a bid to dramatize the situation. He suspected the police made a prior visit to the scene on the day they arrested his mother and young brother. He stated that the indications were choreographed and the photo sessions stage managed by the investigation team. He further stated that he admitted the contents of the confirmed statement before the magistrate in order to forestall any possible torture that would have followed his denials.

He was treated in prison for assault injuries recorded in exh 18, the outpatients register held at Bindura prison that was produced by the nurse in charge of the prison clinic, Assistant Principal Correctional Officer Norman Kusosa. The accused was examined on 17 March 2010 by Chigumete, a nurse based at the prison at that time. He complained of a painful right leg arising from an assault by CID and had a wound on the right limb arising from assault. The nurse noted "one wound on limb due to assault". He administered some aspirin and cloxa

tablets and applied betadine dressing on the wound. The diagnosis and medication showed that the second accused was treated for what he alleged were assault injuries.

Analysis of the evidence

We found the testimony of the missing man's wife concerning her interactions with accused 2, which was not controverted, credible. She established that her husband collected the pot on Sunday 31 January 2010. The evidence of Pias Muchambo confirmed that the man who came to the tuck shop looking for the first accused was her husband. We were satisfied that notwithstanding that Pias was drinking alcohol on that day; he established that the discussion between the first accused and the man revolved around a pot and not a hosepipe. The two words do not rhyme. We found accused 1's version that he talked to Mr Foya about a hosepipe an afterthought. He mentioned it for the first time in his evidence in chief and even then with much hesitation and stuttering. It did not form part of his instructions to his legal practitioner and was thus not canvassed with Pias Muchambo in cross examination. We recognised the difference between the evidence of Pias and the missing man's wife on the clothes that he wore on the day he disappeared. A convergence in the description would have confirmed his identity. We were however satisfied that his identity was established firstly by accused 1's defence outline, secondly by the discussion of a pot between the missing man and accused 1 and lastly by the admission made by the mother of the accused persons to the man's wife in the presence of accused 2 that an elderly man had collected the pot on the Sunday in question.

We did not believe that the wife could identify the burnished belt buckle and burnt rubber, both produced as exh 4, and even the burnt piece of cloth recovered from the scene as the ones that were worn by her husband on the day he disappeared. There were no special marks and features and she did not refer us to any, which survived the fire that she could reasonably possibly recognise. In our view, it was beyond the scope of any human being to positively assert as she did that these items belonged to her husband. We however found that these items were similar to those worn by her husband on the day he disappeared.

The village head and his aide gave their evidence well. They were not shaken in cross examination. We accepted their testimony on how the search for the missing husband was conducted and on who the participants were. They confirmed the items that were recovered and the places on the hill that they were recovered from. These two witnesses were present during the indications as independent observers representing their community. They did not observe any signs of distress on any of the two accused person during the indications. They did

not hear any of the detectives and especially the photographer dictate to the accused persons on what to say or do on the hill. They were satisfied that each accused person freely and voluntarily conducted the indications. We believed their version more so because the allegations of force adverted to by each accused person in his respective evidence was not discussed by counsel with them in cross examination.

In our view, there were aspects of the evidence of both detective sergeant Mutambi and Karemba which were credible and others which were disquieting. We accepted that they were part of the investigations team that thoroughly interrogated the two accused persons separately. They went for indications on 15 March 2010 and recorded their warned cautioned statements on the following day. We accepted that the two were remanded in prison custody on 17 March 2010 and that on 18 March 2010 detective sergeant Mutambi and not Karemba requested the accused from prison and took them back to Bindura Magistrate Court for the confirmation of their statements. We accepted that sergeant Mutambi was not in the courtroom during the confirmation process. The only detective alleged by each of the accused persons to have remained in the courtroom during the confirmations was one Chitsa whose further details were not provided. They knew sergeant Mutambi by name and if he had been in the confirmation proceedings they would have mentioned his name.

We were satisfied by the reasons they proffered for arresting the two accused persons' parents but not the young brother when their target all along were the two accused persons. The father was purportedly arrested on suspicion that he knew something because he was violent towards the detectives while the mother may have been arrested for the comments she made to the missing man's wife on 5 February 2010. The young brother was ostensibly arrested to ascertain what he knew about the missing man. We believed that their release soon after the two accused person surrendered themselves suggested that they were used as human bait. It was therefore improper for the detectives to employ such illegal and underhand investigative techniques. The conduct of the investigation team was the subject of strident criticism by both Mr *Mutebere*, for accused 1 and Mr *Chirenje*, for accused 2. They submitted that the accused persons were subjected to intense torture and assault between the period they handed themselves to the police and the time they were taken for indications. Mr *Makoto*, for the State submitted that the indications were conducted and the warned and cautioned statements recorded freely and voluntarily without any undue influence having been brought to bear upon each of the accused persons.

It was common ground that the warned and cautioned statements, exh 1 and 2 were confirmed. They were accordingly admitted in evidence in terms of s 256 (1) and (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which read:

"**256 Admissibility of confessions and statements by accused**

(1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, or after committal and whether reduced into writing or not:

Provided that—

(i) a certified copy of the record produced in terms of subsection (1) of section 115B shall be admissible in evidence against the accused;

(ii) any information given under any enactment which provides a penalty for a failure or refusal to give such information shall not, on that account alone, be inadmissible.

[Subsection amended by section 19 of Act 9 of 2006.]

(2) A confession or statement confirmed in terms of subsection (3) of section *one hundred and thirteen* shall be received in evidence before any court upon its mere production by the prosecutor without further proof:

Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose."

The confirmation tended to portray the two detectives as credible witnesses in regard to how the statements were recorded. The onus of establishing on a balance of probabilities that the statements were not made freely and voluntarily even though they were confirmed lay on each of the accused persons. The accused alleged that they were stripped of their clothing and taken to a room that had splurges of what they were informed was human and not animal or fowl blood on the walls. They were each in turn subjected to the bridge torture technique. This method involves first tying the victim's legs together preferably with handcuffs. The victim is forced to squat and an iron rod which is able to hold his weight is inserted underneath his knees. He is then lifted upside down by the rod and hanged between two tables. The two tables and the rod mimic a bridge, hence the name. The hanging causes an abnormal flow of blood to the head and face and disorientation to the victim.

The accused person averred that in that helpless state they were each subjected to painful and indiscriminate assaults under their feet and on their backs and for accused 2 on the ankles and knees by all manner of weapons that included baton sticks, planks and soft drink bottles and shot on their testicles by rubber bands. Thereafter they were driven to accused 1's

homestead where police ran over the black pot, exh 3 and the flattened tin exh 8 and collected them before driving them to Chemhanza Hill. On the following day, they readily signed the documents that were place before them. They were taken to Court on 17 March 2010. They did not disclose to the remanding magistrate that they had been assaulted by the police. They were remanded to prison and asked to apply for bail at the High Court. On 18 March 2018, they returned to Court for the confirmation of their statements. They had been warned of the terrible consequences that a rejection of the statements in court would evoke, so they readily went along with the ministrations of the confirming magistrate.

In their respective evidence and under cross examination the two detectives who testified disputed the allegations of torture and assault and maintained that they questioned the two intensely and separately until they confessed the crime. Their breakthrough came when the two gave conflicting versions on whether they had dealt with the missing husband on the fateful Sunday or not. All resistance broke down when each was confronted with their respective inconsistencies. We were satisfied that the two accused persons established on a balance of probabilities that they were assaulted by the investigation team before they went for indications. They however failed to establish that they were tortured using the bridge method. The injuries they described to the confirming magistrate and Bindura prison nurse were disproportional to the brutal assaults they ascribed to the bridge method. Their legal practitioners did not articulate both the bridge torture technique and the detailed brutal assaults attributed to this torture method to the two police detectives during cross examination. The accused persons also failed to properly describe the torture method in question.

We were however satisfied that they were still smarting under the effects of the assaults they described to the magistrate and prison nurse when they made their warned and cautioned statements and appeared for confirmation. Our satisfaction was derived from three factors. The first was that they informed the confirming magistrate that they had injuries sustained in police custody. In respect of the first accused the confirming magistrate cryptically wrote that he sustained injuries "from the handcuffs and on the back assault from CID but this did not affect my statement." In respect of accused 2 he wrote that the injury "was because of the leg irons". In our view, the confirming magistrate abdicated his responsibilities towards the accused persons and the criminal justice system. These responses should have served to alert the confirming magistrate of the dangers of confirming these particular statements without investigating the circumstances in which the handcuffs and leg irons caused these injuries. It is a notorious fact that leg irons and handcuffs do not normally cause injury unless they are

deliberately tightened by the handcuffing officer. Our view is that the deliberate tightening of handcuffs or leg irons is inconsistent with the exercise of volition. Our view is that the injuries were in the main caused by the tightening of the leg irons on each accused person. Assaulting a suspect is not only a crime but does negate and undermine the voluntariness of any resultant confession. After all it is illogical to assault a suspect who is admitting the charge. The suspicion of the magistrate should have been further aroused by the caveat advanced by the first accused that despite the assault he freely made the statement. The evidence of the assistant principal correction officer in charge of Bindura prison hospital and exhibit 18 clearly demonstrated that the second accused was treated for assault injuries at Bindura prison. However the injuries in our view were consistent with tightened leg irons. Thus even though he did not find any reference to the treatment administered on accused 1, we were satisfied that both of them were assaulted in the same way.

It is for these reasons that we were satisfied that the confessions that led to Chemhanza Hill and the recording of the warned and cautioned statements and the confirmation proceedings were extracted through these assaults. We did not believe the investigations team's platitudes of innocence. They were incredible and untruthful witnesses in this regard. We will therefore disregard the contents of the confirmed warned and cautioned statement in our determination of whether or not the accused persons committed the offence they stand charged with.

In our assessment both accused persons, like the police detectives gave truthful evidence in certain respects and false evidence in other respects. We accepted their version on how they were arrested and assaulted in police custody. We did not believe them when they said they never met the missing husband on that fateful Sunday. Pias Muchambo, whom they both accepted was a truthful and not malevolent witness, saw and heard accused 1 talk to the missing husband. He saw the two accused trail him to accused 1's homestead. That the missing husband collected the pot that Sunday was confirmed by the ranting of the accused persons' mother in the presence of accused 2. We did not accept their version that the police had prior knowledge of the scene of crime. Accused 2 suggested that a spirit medium had located the scene of crime before the date on which they went for indications and suspected that the police were coming from the Chemhanza Hill on the day they arrested his mother and brother. His suspicions were not backed by any concrete evidence. His counsel did not suggest this as a probability to the two detectives and wife of the missing husband when they were on the witness stand. He did not call his mother or brother or any other witness to verify his suspicions.

We found it ludicrous that the spirit medium that had led the searchers on a wild goose chase on 14 and 15 February 2010 around the accused 1's homestead and village would have developed such prescient powers of discovery a month later. We would have expected a spirit medium endowed with such powers to have led the search party to Chemhanza Hill from the very beginning. Rather, the testimony of the wife, Pias Muchambo, the village head and his aide was that the missing husband's family visited the scene after the indications to collect the ashes for burial.

We did not believe them when they averred that the police detectives led them to Chemhanza Hill. We find that they pointed out Chemhanza Hill to the detectives. We did not believe their story concerning the recovery of the pot and the flattened tin from accused 1's homestead for two reasons. The first was that neither the village head nor his aide who went with them to Chemhanza Hill witnessed this incident nor were questioned about it by defence counsel. The second is that both the pot and the flattened tin were retrieved from the top of the hill in the presence of the village head and his aide who at all times were part of the indications team. The police detectives who were at all times in their sight did not have an opportunity to plant these exhibits before they were pointed out by each accused person. We did not believe the accused when they stated that they were told where and what to point at Chemhanza Hill. We believed the village head and his aide that the two accused persons each in turn pointed out the places and items that are covered in the photographs exh 10 to 17.

In our law confessions that are extracted and extra curial statements that are made through unlawful means are inadmissible in evidence. The police must obey the law and all statements made whether confirmed or not outside the strictures of the law are illegal and should not be considered by a court as evidence against the maker. The law prohibits us to consider exhibit 1 and 2 as evidence against the accused persons, however self-incriminating they may be against them. However, s 258 (2) of the Criminal Procedure and Evidence Act admits into evidence anything that was pointed out by any person under trial even though the pointing out was in consequence of an inadmissible confession or statement. The section provides that:

> **"258 Admissibility of facts discovered by means of inadmissible confession**
> (2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial."

We were mindful of the construction rendered to this section by McNally JA in *S* v *Nkomo* 1989 (3) ZLR 117 (S) at 129H-131B-H and 133D. We did not find that the assaults that they were subjected to amounted to torture. The evidence established that they were not forced to point at any spot on the hill. They voluntarily took the police to each spot on the hill and uttered the accompanying words connected to each spot freely and voluntarily. We find that they pointed out the scene of crime and the various positions and items that were connected to the commission of the crime freely and voluntarily. The detectives did not have foreknowledge of the scene of crime or its state. A pot similar to the one the wife left at accused 2's residence for repairs was recovered. The other dress apparel like the buckle, the piece of rubber and piece of work suit similar to those worn by the deceased on the day he went missing were also recovered as a result of the pointing out of the accused persons.

Counsel for the accused persons strenuously argued that the State had failed to establish beyond a reasonable doubt that the bones belonged firstly, to a human being, secondly to a male and thirdly to the missing husband. We were satisfied that Dr Hlatwayo established that the bones belonged to a human being. He physically examined the bones that were retrieved from Chemhanza Hill. He saw bones belonging to a human hand, the tibia and fibula and phalange and the human shoulder, the scapula and others from the vertebrae bones of the backbone. In the absence of DNA testing, the doctor was unable to say whether they belonged to a male or female. He could not say they belonged to the missing husband nor establish the cause of death.

It was common cause that there was no direct evidence to establish the identity of the person to whom the bones belonged, the cause of death and the perpetrators, if any, who might have killed that person. Both State and defence counsel submitted that answers to these questions must perforce rely on the circumstantial evidence led during the trial. Mr *Makoto* submitted that the circumstantial evidence established that the charred remains belonged to the missing husband, the cause of death was the malevolent force directed to his person and the perpetrators were the accused persons.

In *S* v *Nyamayaro* 1987 (2) ZLR 222 (S) at 225G-226A KORSAH JA cited with approval the sentiments of WATERMEYER JA in *R* v *Blom* 1939 AD 188 at 202-203 that:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
>
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other

> reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

In our view the State has proved beyond a reasonable doubt that the missing husband collected his pot from accused 1. The two accused persons were last seen following him to accused 1's homestead. The pot that he collected from accused 1 was positively identified by the hole at the base by the deceased's wife as the one that was collected by her husband. On the indications of both accused persons the pot was recovered from atop Chemhanza Hill. The accused persons in turn pointed to various places on the hill and gave information as they did so of how the deceased came to Chemhanza hill. They pointed out the weapons used, the 1.25m long stick exh 9 and two stones weighing 3kg each, exh 7. They demonstrated how the first accused fell the deceased to the ground before crashing his ribs with the 3kg stone and how accused 2 finished him off with a skull crunching strike to the head with the other stone of the same weight. They pointed at the trees they cut and the spot they set the corpse on fire. They pointed out the tin they used to carry some of the charred bones in. They pointed out a cave on top of the hill where they deposited them. They pointed the spot where they threw the pot and tin. Apparels similar to those worn by the deceased were recovered from the scene. All these were established by the State beyond a reasonable doubt.

That the charred remains belonged to the missing husband was consistent with these proved facts. The cause of death by the blows delivered to the ribs and head was established by the information the accused gave that accompanied the pointing out. The stones, exh 7, were pointed out by the accused persons and recovered. These proved facts exclude every other reasonable inference which could be drawn on the cause of death and identity of the owner of the bones and the purveyors of that death.

It was common cause that the deceased and his wife were part of an elaborate plot designed to entrap the first accused in the theft of aluminium pipes belonging to the farm owner of Billabonge farm that were used as welding solder. We were satisfied that the first accused was aware that he was on the farm owner's crosshairs and took measures to diffuse the plot.

Initial verdict

We are satisfied that by inflicting one blow by a 3kg stone on the ribs and another by a stone of equivalent weight on the head of a prostrate and defenceless 60 year old the two accused persons actually desired the death of the deceased. They knew that these were vulnerable parts

of the human anatomy and that death would ensue from their respective conduct. They desired the death of the deceased. We accordingly find them guilty of murder with actual intent.

Extenuating Circumstances

The Sixth Schedule to the Constitution[1]

There are two paragraphs to the Sixth Schedule of the Constitution which have a bearing on the question of extenuation. The first is para 2, which stipulates that:

> "2. This schedule prevails, to the extent of any inconsistency, over all other provisions of this Constitution."

And the second is para 18 (9) and (10) which provide that:

> "(9) All cases, other than pending constitutional cases, that were pending before any court before the effective date may be continued before that court or the equivalent court established by this Constitution, as the case may be, as if this Constitution had been in force when the cases were commenced, but—
>
> (*a*) the procedure to be followed in those cases must be the procedure that was applicable to them immediately before the effective date; and
>
> (*b*) the procedure referred to in subparagraph (*a*) applies to those cases even if it is contrary to any provision of Chapter 4 of this Constitution.
>
> (10) For the purposes of subparagraph (9)—
>
> (*a*) a criminal case is deemed to have commenced when the accused person pleaded to the charge;

The effective date as defined in para 1 as read with para 3(2) of the Sixth Schedule to the Constitution was the date on which the President elected in terms of the Constitution assumed office, which he did 22 August 2013. The two accused persons pleaded to the charge on 5 May 2011. The procedure to be followed by the Court before the effective date was the one which required the Court to consider extenuating circumstances. In the absence of extenuating circumstances the Court was obliged to impose the death penalty. Where the Court found extenuating circumstances, it had the discretion to impose the death penalty if the aggravating features outweighed the mitigatory features. It was however precluded from imposing the death penalty where the offender was a woman convicted of the murder of her newly born child or was pregnant, or against any person over the age 70 years on the date of sentence or under the age of 18 years at the time the offence was committed.

The Constitution removed the imposition of the mandatory death sentence.

Section 48 (2) states that:

[1] Constitution of Zimbabwe Amendment (No. 20) Act, 2013

(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—
(*a*) the law must permit the court a discretion whether or not to impose the penalty;
(*b*) the penalty may be carried out only in accordance with a final judgment of a competent court;
(*c*) the penalty must not be imposed on a person—
(i) who was less than twenty-one years old when the offence was committed; or
(ii) who is more than seventy years old;
(*d*) the penalty must not be imposed or carried out on a woman; and
(*e*) the person sentenced must have a right to seek pardon or commutation of the penalty from the President."

In *S* v *Samson Mutero* SC 28/2017 at p 17 of the cyclostyled judgment GOWORA JA correctly construed s 48 (2) as an enabling and not a sentencing provision. She correctly stated that:

> "The court *a quo* however completely overlooked the section[s 337 of the Criminal Procedure and Evidence Act as it was prior to the amendment of 1 July 2016] and went on to sentence the appellant in terms of s 48 (2) of the Constitution. The court was clearly in error as s 48 of the Constitution is not an operative provision for the purposes of sentencing. It does not specify what sentence the Court may pass upon a person convicted of murder. It is a section which defines and sets out fundamental rights of a person convicted of murder. In addition, and most fundamentally, s 48 (2) requires that the death penalty be provided for in a law permitting a court to pass sentence for murder committed in aggravating circumstances. Therefore, it stands to reason that s 48 is not such a law. In my view, it is an enabling provision for the promulgation of the necessary law. In the absence of the contemplated law, therefore, the trial court could not pass a sentence of death. To do so would be a violation of s 48 (2)."

It must be borne in mind that the murder in *S* v *Mutero* was committed on 20 September 2013 and the plea taken on 28 January 2015. The date of conviction was not disclosed but it must have been before 3 August 2015, the date on which the appeal was first argued and thus well before the promulgation of the contemplated law. In our view, the provisions of para 2 and para 18 (9) and (10) of the Sixth Schedule to the Constitution override s 48 (2) for a plea taken before the effective date. The effect of Gowora JA's proposition read in the context of para 2 and 18 (9) and (10) of the Sixth Schedule was that the death penalty could not be passed on convictions imposed in the interregnum between the effective date and the date on which the law contemplated by s 48 (2) was promulgated in respect of all pleas taken during the interregnum. The relevant law was promulgated on 1 July 2016[2] in s 8 of Part XX the General Laws Amendment Act No 3 of 2016, which effectively repealed subsections (2) and (3) of s 47 of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]* and substituted them with six subsections. The Court now has a discretion on whether or not to pass the death penalty over all convictions for which the pleas were entered into on or after 22 August 2013.

[2] GN 108/2016 in the Government Gazette of 1 July 2016

However, in the present matter, as the plea was entered into before the effective date and as the provisions of para 2 and para 18 (9) and (10) override the provisions of s 48 (2) of the Constitution, we are mandated to consider the question of extenuating circumstances.

It is trite that extenuating circumstances are factors in the commission of the offence which reduce the offender's moral guilt rather than his legal guilt. Reid Rowland in *Criminal Procedure in Zimbabwe* on p 25-36 lists several extenuation circumstances found in numerous cases by our courts. The only one we found relevant was intoxication. We are satisfied that they did not partake of alcohol on that day to boost their courage as they were unaware of the pending visit of the deceased. Like MCNALLY JA in *S* v *Kamusewu* 1988 (1) ZLR 182 at 189A we found the "mindless and wanton brutality of [their] actions support the conclusion that what each accused did was done at a time when his normal inhibitions had been clouded by his consumption of alcohol." See also *S* v *Tshuma* 1991 (1) ZLR 166 (S) at 170C-G.

The two had been drinking Scheepers cane spirit and opaque beer from 6am and 10am respectively until about 2 pm. Even though they knew what they were doing we are satisfied that the alcohol they imbibed influenced their irrational behaviour on that day. We find intoxication to be an extenuating circumstance.

Final verdict

We return a final verdict of murder with actual intent with extenuating circumstances.

Sentence

The appropriate penalty in a murder with actual intent with extenuating factors is derived from an assessment of the circumstances pertaining to the offender, the offence and the interests of society. The first accused is a married man with 5 children while his younger brother, the second accused is 33 years with a wife and a child. They are first offenders who have been deprived of a normal family life for the past 8 years. In consequence, they have been unable to participate in the nurturing of their children and the provision of love, security and sustenance of their respective families. They suffered pre-trial physical punishment in police custody and mental anguish in prison custody, as they awaited the conclusion of their trial; both of which are also highly mitigatory. The delay was in the main occasioned by the absence of a crucial state witness who was away on international duty for protracted periods of time between 2011 and 2016.

The offence was committed with despicable, mindless and wanton brutality. The two brothers paid no regard to the sanctity of life. They desecrated the remains of the deceased by

fire, in an obvious attempt to obliterate the evidence of their cruel and evil deed. The deceased's mission as an undercover agent had been unsuccessful. He had not found any incriminating evidence against the two accused persons. He did not deserve such a shocking and terrifying end. Their respective moral blameworthiness was very high.

I agree with counsel for both accused persons and the State that their mitigatory features, especially the long pre-trial incaceration and punishment militate against the imposition of life imprisonment or even the maximum term of imprisonment in the 20-25 years range that is often imposed for murder with actual intent with extenuating circumstances. I will impose on each accused a sentence similar to the one imposed in *S v Mutsunge and Anor* 1987 (1) ZLR 53 (S) at 61D and *S* v *Tshuma, supra*.

Accordingly, after weighing their mitigatory features against their aggravating features, each accused person is sentenced to 20 years imprisonment.

Prosecution General's Office, State legal practitioners
Mushangwe and Company, accused 1's legal practitioners
Chirenje Legal Practitioner, accused 2, legal practitioners