

THE STATE  
versus  
BRIDGET MUZADZI  
and  
GREYSTONE RUFARO CHIHORO  
and  
EDWIN RUSIKE  
and  
RITA KAMERA

HIGH COURT OF ZIMBABWE  
MUNGWARI J  
HARARE, 7 November 2022, 28 April & 8 May 2023

### **Criminal Trial**

**Assessors:** Mr Kunaka  
Mr Mutombwa

*P Gumbo*, for the State  
Mr *P Muzvuzvu*, for the 1<sup>st</sup> and 2<sup>nd</sup> accused  
Mr *D Mudadirwa*, for the 3<sup>rd</sup> and 4<sup>th</sup> accused

**MUNGWARI J:** This homicide was a result of the accused and other villagers' belief in extra judicial punishment or retribution on the victim whom they suspected of wrongdoing. The four accused appeared before us on a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (The Code). They are accused of having lynched the deceased to death on 11 April 2020 at Nechiva Village, of Chief Seke. The prosecutor alleges that they unlawfully and with intent to kill, or realizing that there was a real risk or possibility that their conduct may cause death, engaged and persisted in that conduct, and caused the death of Aleck Kaitano (the deceased) by beating him with switches all over his body and striking him with a machete below the knees causing mortal injuries.

The facts giving rise to this charge are as follows:

The deceased, an adult man was a resident of Masona village, in Chief Seke. The accused reside in Nechiva village. The villages are both under Chief Seke although there is some distance between them. Bridget Muzadzi (first accused) and Greystone Rufaro Chihoro (second

accused) are mother and son respectively. They reside at the same homestead. Edwin Rusike (third accused) and Rita Kamera (fourth accused) are first and second accused's co-villagers.

On 11 April 2020 at around 1900 hours the deceased arrived at his home from a beer drink. He inexplicably turned violent and started destroying household property. Consumed by that demon of destruction, belligerent and combative, the deceased left his homestead for Nechiva village. Save for a scanty pair of white shorts, he was otherwise naked. When he stormed Nechiva village, the villagers were naturally alarmed and suspicious of his intentions. About thirty villagers including the accused persons subsequently gathered and surrounded him. They accused him of being a thief and assaulted him. All the accused were part of the mob. They used switches to assault the deceased all over the body. He was also struck with a machete below the knees. He sustained multiple cuts and other injuries all over his body. A Good Samaritan Robert Maibeki who observed the assaults phoned the deceased's wife to alert her of what was going on. He also informed her that the deceased's condition was bad and appeared to be deteriorating by the minute. In response and possibly driven by love for her husband, the deceased's wife sought the assistance of her relatives who included her brother Fanuel Kasukuwere and their neighbours. They rushed to the scene. On arrival they found the deceased in a critical condition and subsequently ferried him to hospital. Unfortunately, the assaults were fatal because the deceased was pronounced dead upon arrival at the hospital. A post-mortem was conducted and the cause of death was recorded as severe brain oedema and head trauma.

All the accused pleaded not guilty to the charge. In their defence outlines, the first and second accused stated that the deceased died from an assault by a mob. The first accused also informed the court that she is a married woman and her husband, the father of second accused was present at the material time. Because of this, so she said, it was not conceivable that her husband would have stood aside and allowed both her and second accused to assault the deceased in any manner. The two of them admitted having witnessed the assault but denied taking part in it. They argued that they were just being made sacrificial lambs for the wrongs of the mob that killed the deceased. The third and fourth accused, also denied being part of the mob which assaulted the deceased. Their account of the incident was that they arrived at the scene after the deceased had already been assaulted. They were not in possession of any switches. In their view, the persons who had apprehended the deceased must have been the ones who had assaulted him.

## STATE CASE

The State opened its case by seeking the formal admission of the evidence of two police officers, John Mavingire and Bothwell Mutingwende, in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CP&E Act). The defence consented to the application largely because the two's evidence did not in any way further the state case. Besides both confirming that they conducted the investigations after receiving the report of the murder something which had already been made common cause there was nothing of value to be derived from their evidence.

The State followed this up by tendering with the consent of the defence the post-mortem report, exhibit 1. The cause of death was equally not in issue. The deceased died as a result of injuries inflicted upon him during the assault. Dr Martinez a forensic pathologist who examined the deceased's remains at Harare Central Hospital on 20 April 2020 observed the following surface wounds and injuries:

1. Plague abrasion in left frontal region
2. Plague abrasion in left temporal region
3. Multiple abrasion in upper third of the thorax
4. Plague abrasion in right lateral of the thorax
5. Multiple plague abrasion in both upper limbs
6. Plague abrasion in anterior face of left leg

In the final analysis he stated the cause of death as:

- a. Severe brain oedema and
- b. Head Trauma

## ORAL EVIDENCE

The State led *viva voce* evidence from seven witnesses namely Alwina Kasukuwere, the deceased's widow, Fanuel Kasukuwere brother to the deceased's wife, Fungai Mapuranga, Jeffrey Sanganah, Robert Maibeki, Marshal Chikwanha and Kuda Gift Nechiva. The accused on the other hand were the sole witnesses for their defences.

### 1. Alwina Kasukuwere (Alwina)

As already stated, Alwina is the deceased's widow. Her evidence was not very useful in resolving this issue because she was not an eye witness to the assault.

The only critical aspect of her evidence was explaining to the court what occurred before the deceased left his homestead. It was that, the deceased was in a drunken state. He was also very belligerent and combative. She however resisted the urge to fight with the

deceased as he wantonly destroyed their household property. She had to hurriedly leave the house to seek help from her brother. He later left the homestead in a huff. Later, she received a call from someone who advised her to come and rescue her husband from the scene where he had been badly assaulted and injured. She went there and found the deceased in a bad state. The deceased only managed to inform her that he had been injured by a light skinned woman before he died. The veracity of that evidence is questionable. It is difficult to classify it. In one breadth, it could easily be hearsay yet in another it could be taken as a dying declaration. The witness however said she did not know any of the villagers in Nechiva village let alone a light skinned woman. She said the relevance of the deceased's utterances were lost to her and as result served no discernible purpose. We were of the view that the issues in this case could be resolved by other evidence without resort to the deceased's utterances on his death bed and the controversy which is evoked by the concept of dying declarations in our law today. See the case of *S v Wellington Gurumombe* HH 405/22 where MUTEVEDZI J held that the applicability of dying declarations is intrinsically tied to English law and that the developments which occurred in England over the years has seriously distorted the applicability of the concept in Zimbabwean law.

## **2. Fanuel Kasukuwere (Fanuel)**

Fanuel is a brother of Alwina. Like her before him he had nothing relevant to the issue at hand. He arrived to find the deceased already assaulted and sprawled on the ground. He did not see any of the assailants in action. His only role was to ferry the deceased to hospital where he died upon arrival. The deceased had indicated to him too that a light skinned woman had injured him. He too did not know any light skinned woman in that village and as such could not tell whether any one of the accused was implicated by the deceased as the perpetrator.

## **3. Fungai Mapuranga (Fungai)**

He is a resident of Nechiva village. He witnessed the assault. The relevance of his testimony was that he saw a light skinned woman and a dreadlocked man assaulting the deceased. The dreadlocked man held an iron bar whilst the woman held a machete. At some stage the two were disarmed of those weapons but they took switches and resumed assaulting the deceased all over the body. He was new in that community and could therefore not identify the assailants by name. He also said he saw the younger brother to the village head whom he only knew by his moniker of "VZ" assisting the deceased by asking who he was and where he was from. The mob that had gathered started dispersing soon after "VZ" had stopped the assaults and restored order. The witness said he was not aware of the identities of the

perpetrators. Whilst he alluded to the light skinned assailant being hefty, he could not with certainty state that the first accused was that woman. As for the dreadlocked man, he shifted between stating that it was the second or the third accused persons and back to the second accused again. Our assessment of him was that standing on its own, his evidence could be unreliable. His identification was as bad as they come. Either because of fear of implicating the accused persons for one reason or another or because he is simply unsophisticated he failed to tell the court with certainty whether the people he saw assaulting the deceased were amongst the accused persons. All that came out of his evidence was that a light skinned hefty woman and a dreadlocked man participated in the murder because they thoroughly assaulted the deceased using an iron bar and a machete.

**4. Jeffrey Sanganah (Jeffrey)**

The witness arrived at the scene after hostilities had ceased. Like Fungai, he also was new in the community. As a result, he could not identify any of the people in attendance except Kuda Gift Nechiva (Kuda) who ensured that order was restored at the scene. Kuda managed to extract from the deceased his next of kin's number. The witness then used his phone to notify the deceased's relatives. He left the scene when the relatives of the deceased had arrived. He however noticed that the deceased had been beaten to a pulp. His leg was bleeding from below the knee. His evidence did not take the state case any further than it already was.

**5. Kuda Gift Nechiva (Kuda)**

Kuda is a younger brother to the Nechiva village head and a relative to all the four accused persons. He told the court that first accused is his brother's wife and second accused is his brother's son. The third accused is a nephew being his sister's son and the fourth accused is also his sister in law being his younger brother's wife. On the fateful day someone passed by his place of residence shouting out "thief!" After some thirty or so minutes he heard voices of people returning apparently with the thief in tow. He heard the commotion of people assaulting the thief. From his gate which was about fifteen metres away he was able to see a group of about thirty villagers. He drew closer to where deceased was being assaulted. He saw him lying on the ground being assaulted by some people who included the four accused. The deceased was using his hands in an attempt to block the assaults. He was clearly not a threat to any of the accused but they all were unrelenting in their assaults. He tried to restrain all the accused from assaulting the deceased since they are his relatives. It took some time for them to stop but they eventually did. The accused used switches in the assault. He observed that the deceased had switch marks all over the body and an injured left leg. After he had

managed to restrain all the accused, the first accused turned around and went back to assaulting the deceased with switches again. The witness had to beg her to desist from assaulting the deceased since they had already injured him. He then asked the deceased for his relatives' contact details. He got them and advised them to come to his aid. The relatives arrived a short while later and people started to disperse from the scene. The witness said he lingered on at the scene but also later left for his home. He was informed by the police the following day that the deceased had passed away.

The witness was clear in his testimony that the four accused all contributed to the death of the deceased. He saw all of them in plain view assaulting the deceased. He told the court that he had no reason to lie against the accused as he related well with all of them. He had to restrain them because they are his relatives and he did not want them to encounter any problems as a result of their reckless conduct. No meaningful cross examination of the witness was conducted. The suggestion by counsels for the accused that the witness was sacrificing them because he wanted to cover up for his wife who also assaulted the deceased was tossed out by the witness. He explained that his wife had recently given birth and that she was at home minding the baby. He was adamant that he saw all the accused assaulting the deceased with switches. He clearly identified them because of the moonlight which illuminated the scene. In any case he even spoke to them as he urged them to desist from assaulting the deceased. They are his relatives whom he knew. As such there was no identification to talk about. He simply recognised them all.

When asked how he managed to restrain the first accused the witness told the court that he started by speaking to her and begging her to stop. He then pushed her to the side so that she would stop. She only stopped briefly after which she continued with the assaults. She then continued after he spoke to her again for the second time. With the other three accused he simply begged them to stop and physically pushed them to the side. They did not resume the assault after he managed to restrain them. The witness was steady in his narrative. He was neither diverted nor shaken in cross examination. His evidence remained unscathed. He gave sound reasons on how he identified the accused and why he did so. As a traditional leader in the community he was looked upon with respect. He had no reason to falsify anything. True to his leadership position, he ensured order was restored. Because of his truthful nature he did not shy away from reporting his own kith and kin as the perpetrators of the offence. We found him to be a credible witness. His identification of the accused as perpetrators of this crime cannot be faulted. He knew all of them. He saw them at the scene. He spoke with them and scuffled

with each of them. As already stated, this was not an identification but a recognition of the accused persons. See the case of *S v Nkomo* 1989(3) ZLR on the subject of identification evidence.

**6. Robert Tawanda Maibeki (Robert)**

The witness is another villager in Nechiva. He told the court that he arrived at the scene in time to see the first and second accused assaulting the deceased with switches all over his body. Within a short time Kuda Gift Nechiva arrived and restrained those who were assaulting the deceased. He managed to identify a light skinned heavily built woman who he identified as first accused and a man with dreadlocks who he identified as second accused. They were both assaulting the deceased. He refuted any assertions by the first and second accused that they did not participate in the assault and insisted that they assaulted the deceased, alleging that he was a thief and that they had two weeks earlier experienced a theft at their homestead.

The evidence of this and the previous witness Kuda, was crucial in that it dispelled the mystery around the identity of the hefty light skinned woman and the dreadlocked man. According to Robert and Kuda, the light skinned woman who beat up the deceased was none other than the first accused. She and her son the second accused were heavily involved in the assault of the deceased to the extent that they had to be restrained. The evidence of the two equally corroborated that of Fungai in relation to the participation of the hefty light skinned woman and the dreadlocked man. We found the evidence of the witnesses safe to rely on.

**7. Marshal Chikwanha (Marshal)**

He was another eye witness. Marshal's evidence was also crucial to the resolution of the issue at hand. He was born and raised in Nechiva village. He claimed to know all the accused and told the court that he could not have been mistaken in his identification of them. On the day in question, he was awakened by the sound of people running and shouting that there was a thief in the village. Curious to know what was going on the witness went outside to investigate. About thirty meters away he saw some people surrounding the deceased. He arrived at the scene after the deceased had already been severely assaulted. He was lying on the ground on his left side crying loudly as he indicated that he was in a lot of pain. He saw the first accused person assaulting the deceased. She was holding a machete. He took the machete from her and threw it on to the grass. She then took switches from the hedge and continued to assault the deceased. He saw her assaulting the deceased on the back with a switch. He told the court that while he saw the second accused at the scene he didn't see how he assaulted the deceased. He claimed not to have seen the third accused at the scene. He

however saw the fourth accused take one of the used switches and assault the deceased with it. She assaulted him on the legs but didn't do so more than five times. But even when she did so the deceased had already been severely injured and was already howling in pain. Those that he saw assaulting the deceased then stopped doing so when they were restrained by Kuda Gift Nechiva who arrived a short while later.

Under cross examination by defence counsel for first and second accused, the witness stated that he arrived in time to see the first accused assaulting the deceased with a machete on the legs that is why he then took the machete from her. He was clear that he properly saw the first accused do it. He feared that she could severely harm the deceased hence his decision to disarm her. Still she turned around broke some switches and came from behind Kuda and assaulted the deceased, directing her blows on the back of the deceased until she was restrained once more by Kuda.

Upon being questioned by the court the witness was clear that first accused beat up the deceased intensely and forcefully whilst the fourth accused did so moderately.

The evidence of Kuda, Robert and Marshal was not meaningfully challenged by the accused. They each observed the assault of the now deceased at different intervals. In summary the State's evidence is clear that the first witness to arrive at the scene was Marshal. Marshal arrived to find the first accused thrashing the deceased with a machete. After he disarmed her she turned to use a switch. Robert arrived shortly thereafter in time to see the first and second accused now assaulting the deceased viciously with switches. Shortly thereafter Kuda arrived too. He observed all four accused assaulting the deceased with switches. He begged them all to stop, but first accused only stopped momentarily. She returned a short while later to continue the assault. This marked the second time she had been restrained by two different witnesses. Marshal who had been the first to arrive then also observed the fourth accused assaulting the deceased at the tail end of the attack after the deceased had already been injured. The fourth accused assaulted the deceased moderately with a switch.

The three eye witnesses corroborated each other in their evidence. Two eyewitnesses Robert and Kuda agreed that the dominant and most vicious assailants were the light skinned first accused and her dreadlocked son, the second accused. According to Robert's testimony they had reason enough to assault the alleged thief because they were angry that two weeks earlier they had been victims of a robbery at their homestead. The first accused was identified by all the eyewitnesses who knew her prior to the incident with some even related to her. The

witnesses insisted that they were not mistaken in the identity of the perpetrators and the roles that each played in the assault.

There is no basis to allege that they could all collude to falsely incriminate the accused. None of them were implicated by the accused in the assault of the now deceased. To that extent therefore they had no motive to falsely incriminate the accused.

## **THE DEFENCE CASE**

### **1. Bridget Muzadzi (Bridget)**

The first accused adopted her defence outline as her evidence in chief and added detail. She said that she was awakened by noise from outside her house. Her husband went out presumably to check what was going on. He did not return immediately. The first accused together with her son who is second accused then decided to follow him. The second accused armed himself with a machete because they feared being mugged by thieves along the way. They went where the noise was coming from and once at the scene the first accused took the machete from the second accused. She did so because she feared that he would use it to fight against other people. Interestingly the first accused did not explain the basis of that apprehension. Unless if he had psychological challenges. It was not expected that the second accused would simply get to where other villagers were gathered and start a fight without any provocation. The first accused went on to say that when she arrived at the scene she found Kuda holding a switch in his hand but did not see him use that switch. She claimed that she is not in good books with Kuda as they have a pending land dispute before the courts. She said Marshal who she considers as a son to her then took the machete from her as he feared that she would assault other people with it. She then started to look for her husband and did not find him. She denied any participation in the assaults of the deceased.

With that evidence, the first accused inadvertently corroborated the State's evidence. She confirmed having left the house armed with a machete. She also confirmed having been disarmed of the machete by Marshal who she said feared that she would assault other people. Once again, that evidence betrays the incredibility of the accused's story. She left her home armed with a machete ostensibly for purposes of her self-defence but once she got to the crime scene her relative harboured the apprehension that she could attack other people with it. She claims that she had taken the machete from the second accused because she entertained the same fear that he would use it to attack other people. That narrative does not make sense. No normal human being would suspect violence from another who does not have or has not shown a violent predisposition. It would have been senseless for the first accused to suspect that the

second accused could suddenly become violent as much as it was also senseless for Marshall to suspect without any reason that the first accused herself could become violent and use the machete. It leaves us with the firm conclusion that the reason first and second accused gave for carrying the machete is a concocted one. They intended to use it in the assault. Our view is supported by the accused's failure to satisfactorily answer questions around those issues.

In addition first accused conceded that her suggestion that the hefty light skinned woman might have been Kuda's wife was not feasible because Kuda's wife was nursing a three weeks old baby at the material time. This left her as the only heavily built and light skinned woman present at the scene. She was identified and recognised by the various witnesses as explained above. By her own admission, she was armed with a machete. Her tepid assertion that Kuda was falsely implicating her because of a land dispute between them easily fell through. That grudge was never suggested to Kuda when he was giving evidence illustrating the futility of attempting to raise it when she knew it could not be tested. In any case even if the court were to give her the benefit of doubt, it would not save her because Kuda was not the only witness whose evidence incriminated her. There were several others who saw her assault the deceased. Marshal and Robert for instance heavily implicated her. Yet in her evidence in chief she confirmed that she enjoyed a cordial relationship with Marshal who is her 'son'. That left no room for him to falsely incriminate her.

The first accused appeared to have forgotten and damagingly so, that her defence hinged heavily on the fact that her husband was in attendance at the scene and could not possibly have left her and second accused to assault the deceased. When she was reminded of this fact she conceded that she had not seen him at the scene. That ripped through her web of untruths. A witness who lies in one aspect of his/her evidence must not expect the court to believe the other parts of his/her evidence. Her story cannot possibly be true. She tripped herself more than twice in her testimony. It is therefore palpably false and we reject it.

## **2. Rufaro Greystone Chihoro (Rufaro)**

Rufaro is the second accused. He corroborated Bridget Muzadzi's evidence by confirming that he carried the machete to the crime scene. He told the court that once at the scene the first accused took the machete from him as she wanted to secure it because it was a dangerous weapon. He further indicated that he left the first accused standing some distance from the commotion as he entered amongst the people gathered looking for his father. He saw the deceased who had already been assaulted. He was lying on the ground. He also observed several dreadlocked men from the neighbourhood. He could only recall that one of the

dreadlocked men was Anashe. His surname was lost to him. He also saw a hefty light skinned woman. He identified her as his auntie Kuda's wife. He noted that she was just standing with others. He told the court that Kuda had lied that he restrained him from assaulting the deceased. For some inexplicable reason, the prosecutor simply chose not to cross examine this witness. We are perturbed and left wondering if indeed the prosecutor appreciates that the court may draw inferences from a party's failure to ask questions in cross examination. Be that as it may, the court sought clarifications regarding the grudge between the first accused and witness Kuda. The second accused conceded that he was only eighteen years at the time the supposed feud occurred. He further conceded that he played no role in it and that Kuda had no reason to falsely implicate him.

We noted that, just like the first accused the second accused's evidence corroborated that of the state witnesses. He placed himself at the scene armed with a machete. He confirmed that if at all Kuda's wife was in attendance (which she wasn't) she had not done anything to the deceased leaving the first accused as the only heavily built and light skinned woman who had been fingered as one of the perpetrators. His desire to name other dreadlocked men who were presumably at the scene was a hopeless attempt. The mention of Anashe, an apparently indescribable individual with no family name was to us, a clear afterthought. We are inclined to believe that the second accused was the dreadlocked man whose description was mentioned by those witnesses who did not know his name and who was identified and recognised by those witnesses who knew him well. Linked as it was to his mother's the second accused's story was as much a cock and bull narrative. We again have no choice but to reject it.

### **3. Edwin Rusike (Edwin)**

The third accused also maintained his defence outline. He added a few issues. He alleges that he arrived at the scene and found that the assaults on the near naked stranger had ceased. He did not see anyone assault him. He equally did not assault anyone. He disputed that Kuda saw him assaulting the deceased. His suspicion was that Kuda reported him because he wanted to make a uniform report. He confirmed that he enjoyed cordial relations with Kuda the only witness who implicated him. The witness mentioned that he was one of identical triplet brothers. As such he suggested that it could have been one of his brothers whom Kuda saw. He however discarded that line of argument when he confirmed that his other two brothers were not at the scene. It therefore left him as the only one of the identical triplets who turned up at the scene where the deceased was assaulted. The suggestion of false incrimination by Kuda also didn't hold water because of the accused's own confirmation that his relationship

with Kuda was cordial. Given those conclusions, we could not escape the finding that indeed the third accused was at the scene and that he indeed participated in assaulting the deceased.

#### **4. Rita Kamera (Rita)**

Like her co-accused the fourth accused maintained her defence outline. She told the court that she did not know of any reason why Kuda and Marshal would lie against her and insist that they saw her assaulting the deceased with switches when they didn't. She confirmed that she enjoyed cordial relations with both those state witnesses. We were convinced by this assertion therefore that her evidence was not true. She was at the scene and she assaulted the deceased with a switch.

### **COMMON CAUSE ISSUES**

The issues which are not in dispute in this trial are that:

1. The deceased was heavily assaulted by villagers in Nechiva.
2. The deceased sustained severe injuries from which he died.

### **ISSUES**

When the evidence adduced by the state, the defense's arguments and the common cause issues outlined above are put together it is apparent that the only narrow issue for determination is whether each of the accused participated in the fatal assault of the now deceased and if they did:

- a. the extent to which they participated and
- b. whether they acted in common purpose or individually

For expediency, we propose to start with the issue of common purpose.

### **THE LAW**

From our analysis of the various witnesses' evidence and pitting it against that of each of the accused's defences we concluded that there is clear evidence that each of the accused participated in one way or another in the assault. What remains is for us to determine whether that participation can be regarded as having been in common purpose with each other.

In the case of *S v Madzokere & 3 Ors* SC 71/21 MAKARAU JA (as she then was) dealt with and defined the doctrine of common purpose as:

“ a principle that deems the participation of two or more persons in the commission of a crime where the two or more persons associate with a common intent to commit the crime and one of them does commit the crime. It thus provides for co-perpetrators of crime with a common intent. In essence, the doctrine provides that if two or more people act together in pursuance of a common intent, every act done by one of them in furtherance of that common intent is deemed at law to be the act of them all.”

The doctrine of common purpose is a common law principle. With the codification of and reformation of the criminal law in this jurisdiction it appeared like the doctrine had lost its significance. A reading of the statute however reveals that the doctrine was transposed to the Criminal Law Code. S 196 A of the Criminal Law Code provides for the liability of co-perpetrators in the following terms:

**“196 A Liability of Co-perpetrators**

(1) If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realisation of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as 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) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they—

(a) 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; or

(b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or

(c) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged.

(3) 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.”

From the above, it is apparent that common purpose although with a different name is still alive and being applied in this jurisdiction. My understanding of the liability of co-perpetrators doctrine is that where it is evoked, the state has the responsibility to show that each of the accused possessed the requisite intention to commit the alleged crime. That *onus* is discharged by the prosecutor proving that each accused either had the direct intention or had the knowledge that the offence would be committed or realised that there was a real risk or possibility that the crime or another kindred offence would be committed. Once that is established, the actions of the principal perpetrator can be held as the conduct of every co-perpetrator. That rule applies even in instances where none of the perpetrators is identifiable as having played the role of principal perpetrator. It is immaterial whether or not the conduct of each co-perpetrator assisted directly in any way to the commission of the crime by the principal perpetrator. The legislature then proceeded to give guidelines in the form of factors which may assist prosecution in proving that two or more people accused of the same crime acted in common purpose. I paraphrase them to mean that:

- a. where there is evidence that the co-perpetrators were present or were in the immediate vicinity of the crime scene in circumstances where they are directly or indirectly implicated in the commission of the crime; or
- b. where the co-perpetrators are linked in association to any conduct in the course of anything which may be deemed as conduct preparatory to any action or omission which results in the crime that they are charged with; or
- c. Where the co-perpetrators participated in any criminal behaviour as a collective before the conduct which resulted in the crime for which they are charged.

### **APPLICATION OF THE LAW TO THE FACTS**

In this case the question is therefore whether the prosecutor established any of the above three requirements. Clearly, the language which the legislature employed illustrates that there is no need for the state to establish the existence of all the three considerations at the same time. The proof of one or more of them suffices. We have already discussed and found beyond reasonable doubt that each of the four accused was present at the scene of crime. We remain aware that the provision states that the establishment of each or more of the factors is not in itself necessarily decisive. What that means is that usually more is required for the co-perpetrators to be liable. For instance not everyone who was present when the deceased was assaulted can be held as a co-perpetrator of the murder. There must be other evidence which implicates an accused. In this case, we have already held that indeed each of the accused in one way or another participated in assaulting the deceased. Each of them therefore had the intention to or knowledge that murder could be committed. At the very least there is no denying that each of them realised that there was a real risk or possibility that their indiscriminate beating of the deceased could result in death but were nonetheless reckless as to the consequences of their actions. There is therefore besides their presence at the scene, a causal link between the deceased's death and the accused's actions. There is proof that the death was a consequence of accused's assault of the deceased. The post-mortem clearly spells out the cause of death. It is our finding that first and second accused assaulted the deceased from the time they arrived at the scene up to the time that they were restrained by Kuda. The assault was severe, indiscriminate and prolonged. They arrived at the scene together armed with a machete. They claimed to have endured a spate of thefts at their homestead. They were agitated by the presence of the alleged thief in their village and were bent on teaching him a lesson. Their common purpose which was apparent from the time they left the house was to assault the deceased. In our view first accused and second accused cannot escape liability for the murder.

The third and fourth accused persons although in a less blatant way than their colleagues in one way or another equally assaulted the deceased. Their behaviour is brought into the realm of co-perpetrators through the employment of the doctrine of liability of co-perpetrators as discussed above. A machete is a lethal weapon. The accused must have and indeed knew that attacking a human being with such a weapon might result in death. Assaulting him severely with switches on top of using the lethal weapon only served to compound that realisation. The unavoidable conclusion is that all the accused persons acted in common purpose and caused the death of the deceased.

Against the above background, we are convinced prosecution managed to prove their case against each of the four accused persons beyond reasonable doubt.

**Accordingly we find each accused guilty of the crime of murder as charged.**

#### **SENTENCE**

In arriving at the appropriate sentence, we took into consideration all mitigating and aggravating factors presented by the defence counsels, Mr *Muzvuzvu* and Mr *Mudadirwa* and the state prosecutor Mr *Gumbo*. The first accused is a 45year old woman who is the mother of the second accused, a 24year old. The third accused is also 24 years old while the fourth accused is 38years old. They are all related.

The first, second and fourth accused are unsophisticated rural people who rely on subsistence farming and manual labour to support their families. Third accused is a third year student at Midlands State University and as such should have known better than to participate in mob justice against the accused. However, we note that the accused are all first time offenders hence they deserve to be treated with some measure of leniency.

It is mitigating that the offence was not committed in aggravating circumstances as envisaged in s 47(2) and (3) of The Code. The accused, acted out of excitement and had a sense of chivalry when they assaulted the deceased who was roaming about in their village in a near naked state. They suspected him to be a thief. The intention behind the assault was to show the deceased that thieves would not be tolerated or treated with kid gloves in their village. The evidence before us indicates that the first and second accused had suffered from a spate of thefts at their homestead in recent times leading to their suspicion of the deceased. The offence was therefore not pre-meditated amongst all aggravating factors outlined in the said section of the Code. However sight should not be lost of the fact that the moral blameworthiness of the accused in this case is high. The vicious attack with a machete and switches which was perpetrated on the deceased was uncalled for. The deceased was severely assaulted. The

concept of mob justice is not only barbaric but also incompatible with the values of a civilised and progressive society like ours. In a society that upholds the rule of law, there are proper legal channels that must be followed when one feels that they have been wronged. Vigilante justice should be discouraged at all costs.

We note that there was a delay of two years in finalising this matter which should have weighed heavily on the minds of the accused persons. The delay may also have impacted on their resources as they had to attend court during this period. Additionally, all the accused suffered from pre-trial incarceration for five months, which further compounded their situation. Furthermore, the social stigma of being labelled murderers is a burden that the accused will have to face and live with for the rest of their lives.

However, in aggravation, the accused stand convicted of a very serious offence. The sanctity of human life is paramount and the courts have a duty to uphold it. It should be made clear to the accused that no one has the right to take the life of another regardless of the circumstances. Those accused of crime should be subjected to procedural justice. It was therefore crucial for the accused to exercise self-control as the loss of a life is irreparable. Once a person's life is taken, there is no way to bring him back.

In the result, we believe the following sentence in respect of each accused is appropriate.

Each accused **10 years imprisonment.**

*National Prosecuting Authority, State's legal practitioners*  
*Hamunakwadi & Nyandioro Law Chambers, first and second accused's legal practitioners*  
*Nsingo & Associates, third and fourth accused's legal practitioners*