

THE STATE  
versus  
EALLAH CHINODYA  
and  
BRIAN TONGOWASHA  
and  
TONGAI CHINODYA

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 17-20, 30 October & 13 November 2023

**Criminal trial**

**Assessors:** Mr Shenje  
Mr Barwa

Mrs *K Chigwedere*, for the State  
*T Kabuya*, for the first accused  
*K Tichawangana*, for the second accused  
*E Chibondo*, for the third accused

**MUREMBA J:** The accused persons pleaded not guilty to the charge of murder they are facing.

*The State's allegations*

It is alleged that on the 7<sup>th</sup> of October 2022, the accused confronted the deceased who was drinking beer with his colleagues in front of the guard room near Nyenyere Flats in Mbare, Harare. The accused persons demanded that the deceased and his colleagues vacate the piece of land they had taken. When the deceased's colleagues told the accused persons that they had nothing to do with the said piece of land, the accused persons started to assault the deceased on the head with stones. They went on to assault the deceased with open hands and booted feet all over his body. Out of fear for their lives, the deceased's colleagues fled from the scene. The accused persons continued to assault the deceased severely. The third accused picked up a log and struck the deceased with it on the head resulting in the deceased falling to the ground. The deceased sustained a deep cut on the head and blood started gushing out. The accused persons

then left the scene as the deceased was unconscious and bleeding profusely from the mouth, nose and the head. Members of the public tried to render first aid to the deceased and then took him to ZRP Matapi. The deceased was then taken to hospital where he passed on as he was being attended to on the same day.

*The accused person's defence outline*

In denying the charge all the accused persons who said that they are CCC supporters distanced themselves from the scene. They all gave *alibi* defences.

Accused one said that he sells wares at Mupedzanhamo market and was also renting a small bar in Hopley. He said that on 5 October 2022, ZANU PF members and ZANU PF vendors gathered and destroyed the vending stalls of CCC supporters in Mbare as a way of dispersing them. This resulted in chaos in Mbare. The police were deployed to quell the chaos and were throwing teargas and beating anyone within the vicinity of Mupedzanhamo market. Business came to a standstill. Throughout the 6<sup>th</sup> and the 7<sup>th</sup> of October 2022 there was chaos in Mbare. The first accused said that he then got word that ZANU PF members wanted to destroy his bar in Hopley. He said that he then decided to go back home in Budiro to look for a place to operate from. He said he left Mbare on the morning of the 7<sup>th</sup> of October at around 9am and only returned to Mbare after 8pm on that day.

Accused two said that he used to be a ZANU PF supporter but is now a CCC supporter. The charges against him are fabricated just to punish him for being a CCC supporter and abandoning ZANU PF. Just like what the first accused said, accused two said that there was chaos in Mbare, Mupedzanhamo area from the 5<sup>th</sup> to the 8<sup>th</sup> of October 2022 after ZANU PF supporters had started to displace CCC supporters. He said that when the deceased was assaulted, he was playing football at Mushawasha grounds which is about 500m away from the scene of crime. He said that he left the grounds at 1600 hours after the tournament had ended and went home straight. He said that he was in the company of Allied Tanga, Titus Watosvorwa and Innocent Jonasi. He said that he was apprehended by some ZANU PF supporters on the 8<sup>th</sup> of October 2022 when he was on his way to his trading place. They took him to ZANU PF offices where they assaulted him for supporting CCC. After being assaulted he was handed over to the police who charged him for theft and public violence. He was taken to court on 10 October 2022 where he was remanded in custody until he was granted bail on the 14<sup>th</sup> of October 2022. It was only on the 3<sup>rd</sup> of November 2022 that he learnt from some members of

his community that the police had come looking for him. He said that when he then went to the police station to inquire why the police had been looking for him, that is when the police arrested him for the murder of the deceased. The accused said that if he had committed the murder, the police would have arrested him for it on the 8<sup>th</sup> of October 2022 when they arrested him for theft and public violence. He said that it does not make sense that he would be arrested for less serious offences when he had committed a more serious offence of murder. He said that his line of trade does not need any land or shop space and as such he had no reason to assault or cause the death of the deceased. He said that he did not even know the deceased.

The third accused said that he sells clothes at Mupedzanhamo market in Mbare. He said that he left Harare for Mazowe on the 27<sup>th</sup> of September 2022 to sell second hand clothes to gold panners. He said that he returned to Harare on the 10<sup>th</sup> of October 2022. He said that he had no knowledge about the assault that was perpetrated on the deceased. He believed that his arrest was politically motivated and was just meant to get rid of him. He said that he went to Mazowe in the company of one Tendai Musauke whom he said he was going to call as a witness.

*The evidence of the State*

To prove its case the State produced the post mortem report which shows the cause of the deceased's death as brain damage, severe head trauma secondary to assault and epidural hematoma on the right hemisphere. What is sticking out from the defence outlines of the accused persons is that all of them are not disputing that the deceased was assaulted and that he died from the injuries that he sustained during the assault. What they dispute is that they are the ones who assaulted the deceased. All they did was to distance themselves from the commission of the offences and the scene of crime.

The State led evidence from four eye witnesses, namely Charles Moyo, Urgent Kamumvuri, Robson Kandenga and Xavier Juliao. It also led evidence from Terrence Zireva and George Garauzive who are police officers. Charles Moyo was friends with the deceased for about 7 years and on the fateful day he was drinking beer with the deceased. Although he was not an eloquent witness, he told the court that he sells clothes at Mupedzanhamo market and that the accused persons were people that he knew very well. He said that he had known the first and third accused persons for about 5 years each before the fateful day. They used to collect money for tables in Mupedzanhamo market from vendors who sell wares in that market.

He said that the two are CCC supporters. He said that he knows accused one as Eriah and accused three as Ganda. He said that he had known the second accused for about 7 years. He said that he used to be friends with his father one Maskiri. He said that the second accused used to sell tyres for push carts at Magaba complex. It was Charles Moyo's evidence that on the fateful day at around 3pm as he was drinking beer with the deceased and Robson Kandenga, a group of about 60 people came to where they were seated. They came from the roadside holding stones. Accused one and three were part of that group. Accused three, Ganda, who was holding stones uttered threatening words to the effect that death was going to occur. The group of people then attacked the deceased and accused one was the last to attack the deceased with a log at the back of the head. Charles Moyo said that he saw the first accused person throw stones as well. He however said that he did not see the second accused in the group that attacked the deceased. He said that he was surprised by his arrest. Charles Moyo said that the deceased was surrounded by a mob of people but the ring leaders were accused one and three. It was his evidence that as soon as the attack on the deceased started, he escaped and went to hide in some poly pipes from where he watched what was happening. There was a distance of about 10 metres from the scene of crime. During cross examination by the third accused's lawyer, it was put to him that Ganda is not accused three's name, but the witness was adamant that he knew accused three by that name. Charles Moyo explained that what caused the attack on the deceased was the dispute over the piece of land where they were seated drinking beer. The dispute involved ZANU PF supporters and CCC supporters. He, however, said that this dispute had nothing to do with the trio who were drinking beer. From what the witness said it looks like the deceased and his friends just happened to be at the wrong place at the wrong time.

The evidence of Urgent Kamumvuri was as follows. He resides in Joburg lines in Mbare and sells timber and hardware material in Magaba area of Mbare. It was not disputed that he knew all the accused persons very well before the fateful day. He had known all the three accused persons for more than 5 years and knew each one of them by name. He said that he usually sees the first accused at Block 1 in Nenyere Flats in Mbare where he resides. He said that he used to know the second accused as a footballer. He said that he used to see the third accused with his car at a place where tyres are sold and was in the business of selling tyres. It was Urgent Kamumvuri's evidence that on the fateful day he was at the place of scene digging some holes with the intention of erecting a fence. One Mutare Alfred, one Matowo, one Juliao and one Dereck were the owners of the said piece of land who had engaged him and other

people to dig the holes. The witness said that as they were digging the holes, a group of about 25-30 people came shouting and instructing them to stop whatever they were doing or else people were going to die. He said that the three accused persons, Mrs. Mashiri, Mrs Chinodya, one Jonah and Simba Mutare were part of the group. The group immediately started throwing stones towards the people that were at the scene. People at the scene started to disperse out of fear. Urgent Kamumvuri said that he also ran away from the scene and started watching what was happening from a distance of 12-13 metres. He said that accused one was at the front leading the group. He was also throwing stones and he is the one who eventually hit the deceased with a log and the deceased fell down. Urgent Kamumvuri said that he then saw the second accused stepping on the head of the deceased with booted feet after he had been struck with the log by accused one and had fallen down. He also said that accused three was at the front of the group and was throwing stones. He said that accused three was actually the first person to assault the people that were at the office including a State witness who was in custody and was yet to testify in the matter. The witness he was referring to was Robson Kandenga. He however said that he did not see what accused three did to the deceased. The witness said that the incident happened around 11am and lasted about three hours up to around 2pm. He however said that the actual assault on the deceased lasted about 10-12 minutes. He said that the deceased was targeted simply because he had remained seated on the bench when everybody else was dispersing as the group was advancing and throwing stones. The group was saying that no one was supposed to construct anything on that piece of land. The witness said that he is a member of ZANU PF and the accused persons are members of CCC. He said that what caused the violence was the land dispute between some ZANU PF members and CCC members who were also claiming to be the land owners. The witness however disputed that he was motivated by political reasons to falsely implicate the accused persons.

Robson Kandenga's evidence was as follows. He resides in Block 6 at Mbare Flats where he is self employed as a vendor. He sells steel at Magaba complex. He said that of the three accused persons the third accused person is the only person that he knew. He said that he had never seen the first and the second accused persons before and was seeing them for the first time in court. He said that he had known the third accused person for more than 5 years before the day the deceased was murdered. He knew him by his name and that he was in the business of selling tyres in Mbare at Magaba complex. It was his evidence that on the fateful day he was in the company of the deceased and Charles Moyo drinking opaque beer at an office

in Magaba. At around 3pm a group of more than 20 people then approached them. Accused three who was in their midst asked him why they were seated there and went on to slap him on the left cheek once. The witness said that he then rose with the intention of fighting back, but when he turned and noticed that the third accused was in the company of many people, he quickly realized that if he was going to retaliate, these people were going to kill him. The witness said that accused three then went on to slap the now deceased with an open hand once on the cheek. The deceased stood and started to fight back. When accused three realized that the deceased was now fighting back, he went on to remove a pole which was supporting a table. He went on to hit the deceased with it once on the centre of the head and the deceased fell down. When the deceased was on the ground that is when he was assaulted by more than 10 people. They were stepping on him using booted feet and they were also using their hands to assault him all over his body. The witness said by that time he had run away from the scene and was watching what was happening from a distance of about 25 metres. He said that the pole that the third accused used was about 1 metre long and 7.5 cm wide. When he was shown a pole in court by the State counsel, he commented that the pole was slightly longer and thinner than the one he saw the third accused use. The witness disputed that the third accused was not at the scene because the said accused had actually assaulted him at close range. This witness said that he was not involved in politics and neither was the deceased. He further said that he was not even aware that the third accused had left ZANU PF for CCC. The witness said that it was not the first accused who hit the deceased with a log. When asked if he had seen the second State witness Urgent Kamumvuri at the scene of crime, he said that he did not know him. He said the assault on the deceased took about 30-40 minutes and the group stopped on its own after noticing that the deceased was now looking lifeless.

During cross examination the witness said that he ran away from the scene of crime after accused three had hit the deceased with a log and after the deceased had fallen. When it was put to him that Charles Moyo with whom he was drinking beer had said that it was the first accused who had hit the deceased with a log and not the third accused, he disputed it saying that Charles Moyo had fled from the scene at the time the deceased was slapped. The witness was insinuating that Charles Moyo had not seen what had happened since he had run away from the scene of crime. Even when it was put to him that Urgent Kamumvuri had said the same thing, he continued to dispute it. He said that the court should believe him because out of the three people who were drinking beer together, he was the first to be assaulted. The witness

said that he was not drunk because when the commotion started, he had just started drinking beer and he was still on his first scud of opaque beer. He said that he had just joined the deceased and Charles Moyo who had started drinking earlier than him. It was his evidence that he was able to identify the third accused because the third accused had assaulted him when he had not wronged him in any way. He further said that of all the people that assaulted the deceased, the only person that he managed to identify was the third accused. He said that if other people who assaulted the deceased, other than the accused persons, had been arrested, he would not have been able to identify them because he did not know them.

Xavier Juliao testified as follows. He resides in Budiriro and owns some shops in Mbare. He makes wheelbarrows at a stand which is near Block 1 Nenyere Flats in Mbare. He has known the first accused since around the year 2000 as he (accused 1) grew up at Block 1 Nenyere Flats. He said that accused one used to fix car tyres near Block 1 under a tree. He said that he knew the second accused because his late father was his friend and he also resides in Block 1 Nenyere Flats. He said that the second accused also used to sell tyres just after Block 1 at a place that is 20 metres away from the first accused's place. He said that he had known the second accused since his childhood. The witness said that he also knows the third accused as a resident of Block 1 Nenyere Flats and that he is also in the business of selling tyres. He said that accused three is also known as Ganda which is his nickname. Xavier Juliao said that he has known all the three accused persons for about 20 years.

The witness said that what led to the commotion that happened on the day the deceased was killed was a dispute over a piece of land. He said that he was personally involved in that dispute because he was one of the seven people that were allocated stands on that piece of land by the city council. He said that the land had been taken away from them by members of CCC. They successfully sued the CCC members and got an eviction order from court. The sheriff and the police then came and demolished the structures that had been erected by CCC members. The day of the demolitions was peaceful. On the next day the witness went with Urgent Kamumvuri to dig holes on the said piece of land with the intention of erecting a fence and that day was the 7<sup>th</sup> of October 2022. As the witness was digging the holes, accused three came holding some stones and ordered him to stop what he was doing. He is said to have said, "*Iwe mudhara siya zvauri kuita izvo.*" The witness said that he answered back saying that accused three could not stop him from what he was doing because he was not an official from the city council. Accused one then arrived at the scene holding a bottle of beer. He threw the bottle at

the witness from a distance of 5-6 metres. The witness said that when he dodged the bottle, the third accused who had been standing holding stones then started throwing them. Accused three was then joined by the second accused and two other young men who were not arrested.

The witness said he successfully dodged the stones for 5-6 minutes until these people left him and started to walk away. At a distance of 8-10metres, they then met up with a group of their friends that was coming towards the witness. The witness said that when he saw them coming, he fled from the scene and went across the road. He then saw the group approach three people who were drinking beer outside the office. These people were the now deceased, Charles Moyo and Robson Kandenga. The group started attacking the trio. Accused three was the first to slap Robson Kandenga on the cheek with an open hand. At that moment Charles Moyo moved aside and went out of the gate. Accused three went on to slap the deceased. The deceased asked the third accused why he was assaulting him and started to fight back. At that moment a group of more than 10 people started to assault the deceased. Some were using open hands while some were assaulting him with stones that they were holding in their hands. The group continued to assault the deceased until he fell down. As he was on the ground the group continued to assault him. As he was being assaulted, he was moving and trying to rise in order to defend himself. At last, the third accused snatched a log from the first accused who had taken the log from the kitchen at the place where dishes are washed and hit the deceased with it on the head. This kitchen was close to the office where the trio had been drinking beer. The kitchen belonged to the mother of Derias. Xavier said that he did not quite see where the first accused pulled the log from. When the deceased was struck with the log he fell down and urinated. He was now bleeding from the nose and the mouth. He started crying but he could not talk. The group was now stepping on him. The group eventually stopped the assault on its own.

Xavier Juliao said that the accused persons' parents were not happy with the demolitions because they were the ones who had lost the case and they were the ones who used to collect rentals from the shops they had erected on the said piece of land. The witness said that although the accused persons were CCC members, he was not lying against them as he himself does not belong to any political party. He said that he is a Mozambican national and has nothing to do with ZANU PF. He said that after the deceased had been assaulted, he ferried him in his motor vehicle to Matapi Police Station. He said that the duration of the assault was 7-8 minutes. He said that he watched it at close range at a distance of 8m from where the deceased was being assaulted. He said after running away from the group and crossing the

road, he had gone back close to the scene and hid behind some pipes where he could see clearly. He said that the deceased was assaulted around 2-3pm. The witness identified the log before the court as the one that was used to assault the deceased.

Terrence Zireva a police officer who was in charge of police officers in the charge office at Matapi police station on the 7<sup>th</sup> of October 2022, testified as follows. At around 11am he received a report to the effect that police officers who had gone to Block 1 Nenyere Flats in Mbare to enforce the eviction order had been assaulted by a mob of people. At around 1pm the deceased was then brought by Xavier Juliao who was carrying him in his hands. The deceased was bleeding from the mouth and the nose. He was injured on the head. His body was lifeless. He could not even speak. Xavier Juliao reported that the deceased had been hit with a log by one Eallah Chinodya (accused one) and that the deceased had been stepped on by a mob of 12-20 people until his body was lifeless. Another person whom the witness could no longer remember had also brought the log that had been used to assault the deceased. He brought it at the time the deceased was brought by Xavier Juliao.

The witness said that he then made arrangements for the deceased to be taken to hospital. The witness identified the log that was before the court as the one that was brought together with the deceased. He said that he is the one who received it and booked it as an exhibit and took it to the exhibit room from the charge office. It was through this witness that the log was produced as an exhibit and it was marked as exhibit no. 2. The log was 2m long and 7cm thick. The witness said that he then referred the matter to the investigation section on the same day at around 2pm. He said that at that stage the case that was being investigated was the case of assault as the deceased was still alive. He said that he was not privy to how the accused persons were eventually arrested for the murder of the deceased. He however said that when he reported for duty on the next day, the 8<sup>th</sup> of October 2022 at 7am, he found accused two and three now in police custody. They had been arrested for the offence of public violence which had resulted in police officers being assaulted by a mob on the 7<sup>th</sup> of October 2022. He said that the two accused persons were not the only people who had been arrested for the public violence offence. A number of people had been arrested including women. The witness was however not privy to how all these people had been arrested. He said that when he later learnt of the death of the deceased on that day, he had already seen accused two and three in police custody in the morning during handover and takeover from the police officer who had been in charge on night duty. It was the evidence of this witness that before the day the deceased was

assaulted there had not been any incidents of violence in Mbare. The witness said that out of the mob that assaulted the deceased, the only person that Xavier Juliao mentioned by name was Eallar Chinodya who is the first accused.

George Garauzive who was the investigating officer in the matter testified as follows. At the time of giving evidence he had retired from the police force. However, at the time material to this case he was employed in the police force as a detective assistant inspector and was stationed at CID Law and Order in Harare. When he was assigned the matter on 11 October 2022, he was given the docket and the log which had been used during the commission of the offence. He said that at that time none of the accused persons had been arrested for the murder charge. In the docket there was only one statement, that of the informant. The investigating officer said that he then made a follow up on the witnesses and recorded their statements. He said that he learnt from the witnesses that the offence had been committed by about 12 people who included the three accused persons. He said that the three accused persons were identified by the State witnesses because they were known to the State witnesses. He said that nothing in the docket gave a hint about the whereabouts of the accused persons. He said concerted efforts were made to bring the accused persons to book, but all was in vain as the accused persons were on the run. He said that together with a team of other detectives they had looked for the accused persons in Mbare in the restaurants, in the bars and in Block 1 Nyenyere Flats where it was said they all resided, but they did not locate them. He said that the accused persons were subsequently arrested with the help of members of the public, but he was not involved in their arrest. He said that accused one was arrested on 1 November 2022, accused two on 2 November 2022 and accused three on 20 November 2022. The witness said that the three accused persons had been placed at the scene of crime by the witnesses who had already testified for the State. He confirmed that accused two had indeed been initially arrested for offences of theft and public violence and had appeared at Mbare Magistrates Court for those offences before he came to surrender himself to CID Law and Order for the murder offence.

The investigating officer said that although the accused persons had given *alibi* defences, the State witnesses who were eye witnesses to the assault of the deceased had placed all of them at the scene of crime. He said that during the interviews accused one distanced himself from the scene of crime by saying that on the day the offence was committed in Mbare he was in Budiro but he did not say where exactly in Budiro he was. The investigating officer said that he tried to establish the exact place the first accused was but he failed to get

any information. He said that the first accused did mention the person that he said he was with but he failed to avail that person to the police. The investigating officer said that he had since forgotten the name of the person the first accused mentioned. The investigating officer said that since the first accused failed to bring forth the person whom he said he was with, he concluded that the first accused person's *alibi* defence was false.

It was the investigating officer's evidence that accused two initially said that when the offence was committed, he was in custody having been arrested for a different offence, but on investigating that *alibi*, it turned out that the *alibi* was false as he had only been arrested after the assault of the deceased had happened. The investigating officer said that when the second accused realized that his *alibi* defence had been discredited, he gave another *alibi* defence to the effect that he had been at Mushawasha grounds in Mbare on that day. He said that the second accused however failed to explain what he was doing at the grounds and with whom he was. The investigating officer said that he thus concluded that the *alibi* defence was false.

The investigating officer said that the third accused simply denied the allegations by saying, "*I deny the allegations as I was not there.*" The witness said the third accused was asked where he was but he could not say. He just denied the allegations.

The investigating officer said that he had gathered information that the offence had been committed around 2pm on 7 October 2022. He said that he had also gathered information to the effect that the deceased used to be a member of ZANU PF.

#### *Evidence led by the defence*

All the accused persons maintained their *alibi* defences. Each one of them gave long winded stories of how they had spent the day of 7 October 2022 away from Mbare where the deceased was assaulted. The first accused who said he resides in Budiriro 1 explained how he spent that day looking for a bar to rent in the company of Artwell Chipope, Dimitlas Chiwashira and Stalin Chikwekwete whom he all called as defence witnesses. They came and confirmed his story that they had left Budiriro 1 in the morning and proceeded to Glen view where they spent the better part of the day and returned home in the evening around 9pm. The first accused also explained how he was apprehended in Mbare by ZANU PF youths after he had gone there well after the deceased had died. He however had no recollection of the date. He said that the ZANU PF youths came and surrounded the motor vehicle he was in and in a short while police officers from CID Law and Order arrived at the scene and took him to the police station. He

vehemently denied participating in the violence that led to the death of the deceased on 7 October 2022. He said the State witnesses who implicated him in the commission of the offence have personal issues with him. He said that Xavier Juliao lied against him because when Xavier sued his mother over the disputed piece of land, it was him (accused one) who engaged a lawyer to defend his mother and the other defendants. The first accused said that all the State witnesses who implicated him believe that he is the one who is hindering them from doing their business at the disputed piece of land. He also said that there is bad blood between him and the State witnesses because he is a member of CCC. However, all of this was never put to the State witnesses during cross examination.

The first accused disputed that he is the one who struck the deceased with a log saying that he was involved in a road traffic accident some years before the deceased was assaulted and dislocated his right hand. He said that as a result he cannot even lift a 2-litre container or greet a person with force. He said that at the time material to this case he was staying in Budiro, but he admitted that he once stayed in Mbare.

During cross examination the first accused was made to read out what he said in his warned and cautioned statement to police officer Mavhura who recorded the statement. In that statement he simply said, "*I deny the charge, that's all I wish to say*".

The second accused said the following in his evidence. He resides in Block 1 Nenyere Flats in Mbare. He explained in detail how he spent the day in question at Mushawasha grounds playing football from 9am to 5pm. He said that Mushawasha grounds is about 500metres away from the place where the deceased was assaulted. He said that the State witnesses lied against him because they are ZANU PF supporters whereas he is a CCC supporter. He said that Xavier Juliao was also involved in a dispute with his mother over the disputed piece of land. The second accused did admit that Xavier Juliao used to be a friend of his late father. During cross examination he read out what he said in his warned and cautioned statement that he made to Detective Sergeant Mavura. In that statement the accused denied the charge by saying that he was not at the scene of crime as he had been arrested by police officers from ZRP Matapi on 2 October 2022 and taken to court and was only discharged from custody on 15 October 2022. The second accused tried to distance himself from the statement saying that is not what he had told the police officer who recorded his warned and cautioned statement. This was despite the fact that he had affixed his signature on the statement in question. The second accused insisted

that he had been playing football on the day the deceased was assaulted at Nenyere flats. He went on to lead evidence from Allied Tanga, Taitos Watosvorwa and Innocent Jonasi who all confirmed that on the day the deceased was assaulted they spent the whole day playing soccer with the second accused at Mushawasha grounds.

The third accused testified as follows. He resides in Budiro and used to sell second hand clothes in Mbare. He said that when violence erupted in Mbare, he decided to go and sell his second-hand clothes in Mazowe. He said that he went with Tendai Musauki whom he regards as a nephew. He said that they left for Mazowe on 27 September 2022 and they returned on 10 October 2022. He said all the State witnesses had lied against him because he was not at the scene of crime on 7 October 2022. He said that he was arrested by some ZANU PF youths in November 2022 in Magaba in Mbare when they saw him there. The third accused also read out what he said in his warned and cautioned statement to Detective Mutamba. In that statement he said, "*I deny the charge because I was not there.*" The accused said that that is all he said because the police never asked him where he was. The third accused denied that he was under arrest and in police custody on 8 October 2022. He said that he did not know why Robson Kandenga had lied against him. He said Robson Kandenga had lied that he had slapped him with an open hand and that he had also slapped the deceased and struck the deceased with a log on the head. He said relations between him and Robson Kandenga used to be cordial as they would greet whenever they would meet. The third accused explained that the first accused is his biological young brother. The third accused led evidence from Tendai Musauki who confirmed that they went to Mazowe together to sell second hand clothes on 27 September 2022 and returned to Harare on 10 October 2022.

#### *Analysis of evidence*

What is not disputed by the accused persons is that on 7 October 2022 violence occurred at an office at Block 1 Nenyere flats in Mbare and that pursuant to that violence the deceased was severely assaulted by a mob of more than 10 people and suffered head injuries from which he died on the very day. The accused persons did not dispute that the deceased was hit on the head with a log that was produced during trial as exhibit two. They also did not dispute that after the deceased had been struck on the head he fell down and urinated. It was also not disputed that the mob continued to assault the deceased by stepping on his head even after he had fallen down. No one restrained the mob as people were afraid. The mob stopped the assault

on its own when the deceased was now looking lifeless. The deceased was now bleeding from the head, nose and mouth. He was crying and could no longer talk. When he was taken to the police station, the police officer was not able to talk to him. He was not responding.

The post-mortem report which was produced as exhibit one indicates that the deceased died as a result of brain damage, epidural hematoma in the right hemisphere and severe head trauma secondary to assault. The post mortem report thus shows that there is a direct link between the assault that was perpetrated on the deceased and what caused his death.

The circumstances of the assault as described by the State witnesses show that the mob realised that that there was a real risk or possibility that their conduct could cause the death of the deceased but continued to engage in that conduct despite the risk or possibility. They were reckless as to the consequences of their behaviour. They were assaulting the deceased with hands and booted feet randomly all over his body. As the deceased tried to rise and defend himself, they continued to assault him. One of them reached for a log and struck him on the head. Despite the deceased falling down and urinating in the process, the mob continued to assault him by stepping on his head. This shows that the mob was acting in common purpose. They only left him when his body was looking lifeless. The circumstances of the assault show that the mob committed the offence of murder. It appears that the person who struck the deceased with a 2m x 7.5cm log on the head is the one who inflicted the fatal blow, but even those that did not inflict the fatal blow are also guilty of murder on the basis of s 196A of the Criminal Law Code which deals with the liability of co-perpetrators who knowingly associate for the common purpose of committing a crime or crimes. The provision reads as follows:

**“196A 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 or the knowledge that it would be committed, or the realization 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 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 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 behavior as a team or group prior to the conduct which resulted in the crime for which they are charged.”

The provision means that if two or more people are accused of committing a crime together, and the prosecution can prove that each of them had the necessary *mens rea* (mental state) to commit the crime, then they can be convicted as co-perpetrators. This means that the conduct of the actual perpetrator will be deemed to be the conduct of every co-perpetrator, even if none of them is identified as the actual perpetrator, and whether or not the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator. Subsection 2 (a)-(c) lists three factors that may be used to prove that two or more people accused of committing crime together had the necessary *mens rea* to commit the crime. It is however important to note that these factors are not necessarily decisive, but they can be used as evidence to support the prosecution’s case.

Put differently, this provision holds that all members of a group are responsible for a crime committed by any member of the group, regardless of who was the actual perpetrator, if they shared a common intention to commit the crime. Therefore, in a murder case all members of the group are liable for the murder regardless of who delivered the fatal blow if it is shown that the group shared a common intention to kill the deceased. In the present case we have already made a finding that the circumstances of the assault as described by the State witnesses show that the mob that assaulted the deceased realised that that there was a real risk or possibility that its conduct could cause the death of the deceased, and nevertheless continued to engage in that conduct despite the risk or possibility. We have already explained why we concluded that the mob was reckless as to the consequences of its behaviour. What it therefore means is that every person who was part of the mob which assaulted the deceased is guilty of murder regardless of who actually struck the deceased on the head with the log. The State’s failure to identify that particular person is therefore of no consequence.

What now needs to be resolved is whether the State managed to prove that the accused persons were part of the mob. This issue should be resolved in light of the *alibi* defences that the accused persons tendered. In *S v Hlabangana and 2 Others* (101 of 2022) [2022] ZWBHC 101 (31 March 2022) TAKUVA J said:

“An *alibi* is a statement of defence to the effect that a person accused of a crime was at a specific place different from the crime scene at the time the crime was being committed..... An *alibi* is proven by a person who swears to have been in the accused’s company on the date, time and place at the time the offence was committed.”

There is however no burden of proof on the accused to prove his *alibi*. The burden is on the prosecution to prove that the accused’s *alibi* is not reasonably possibly true. See *S v Mutandi* 1996 (1) ZLR 367 (HC); *S v Musakwa* 1995 (1) ZLR 1 (SC); *S v Masawi & Anor* 1996 (2) ZLR 472 (SC) and *S v Malefo en Andere* 1998 (1) SACR 127 (W) at 158a-e. It is common cause that the prosecution disproves the accused persons’ *alibi* through leading evidence from the State witnesses. This means that the evidence for the prosecution should be gathered before trial commences. So, the police should investigate the *alibi* before trial commences. Investigations cannot be done after trial has commenced. In practice what this therefore means is that even though our law does not state at what stage an *alibi* defence ought to be raised, an accused person who wants to rely on an *alibi* defence during trial needs to disclose to the police during investigations the specific place where he or she claims to have been at the time of the alleged offence, the name, address, and telephone number of each *alibi* witness on whom he or she intends to rely. This disclosure is necessary to enable the police to investigate and verify the defence before trial commences. We are aware that in terms of s 50 (4)(a) of the Constitution of Zimbabwe, 2013, any person who is arrested for an alleged offence has the right to remain silent. This right allows an accused person to refuse to answer questions by police officers during investigations. The accused is not compelled to make any confession or admission that could be used in evidence against him or her during trial. The right is an important protection against self-incrimination. However, whilst an accused is free to exercise this right and not even disclose his or her *alibi* defence during investigations, such an election is not without consequences as it disables the police from investigating and verifying the defence. Raising the defence after commencement of trial does not on its own mean that the accused is guilty but it may lead to an adverse inference being drawn that the defence has been concocted or fabricated. However, this notwithstanding, the State still has the burden to prove the guilt of the accused beyond reasonable doubt. If it fails to discharge the burden, the accused is entitled to his or her acquittal even if it is shown that the *alibi* defence he or she gave was concocted.

In *casu* from the evidence led from the four eye witnesses to the assault, all the three accused persons were placed at the scene of crime and each one of them was seen assaulting the deceased. The first accused was identified by Charles Moyo, Urgent Kamumvuri and

Xavier Juliao. They described him as the ring leader. He was seen throwing stones. Xavier Juliao even said that the first accused was the first person to throw a bottle of beer at him before the attack on the deceased commenced. However, Robson Kandenga said he did not see the first accused at the scene. The second accused was identified at the scene of crime by Urgent Kamumvuri and Xavier Juliao. Urgent Kamumvuri said that he saw the second accused stepping on the deceased. Xavier Juliao said that the second accused joined the third accused in throwing stones at him before the attack on the deceased commenced. However, Charles Moyo and Robson Kandenga did not identify the second accused at the scene of crime. The third accused was identified at the scene of crime by all the four eye witnesses Charles Moyo, Urgent Kamumvuri, Robson Kandenga and Xavier Juliao. All of them said he was the ring leader. He is the one who is said to have said that death was going to occur. He was the first to throw stones at Xavier Juliao. He was the first to slap Robson Kandenga. He was the first to slap the deceased. When the deceased retaliated that is when a mob of more than 10 people started to assault the deceased.

Despite the fact that accused one was not identified by Robson Kandenga and that accused two was not identified by Charles Moyo and Robson Kandenga, we are satisfied that all the three accused persons were at the scene of crime on the fateful day. This is because when a person is attacked by a mob of people, it can be difficult for the eye witnesses to identify all the perpetrators. The chaos and confusion of the situation can make it challenging for the eye witnesses to see and identify each and every perpetrator and see what each one is doing. Two people can perceive the same event differently based on their attention and the angle from which they are observing the assault. Another factor that is contributory is whether the witnesses knew the perpetrators before. Robson Kandenga said that he did not know the first and second accused persons before. So, his failure to identify them out of more than 12 people who were assaulting the deceased is understandable. He was able to identify the third accused because he had prior knowledge of him. He said that he had known the third accused for more than five years and that he was in the business of selling tyres. The third accused did not dispute this. He even confirmed knowing the witness as well. What made Robson remember the third accused was that he is the person who assaulted him before he assaulted the deceased. So, he had a special reason for remembering him. The same applies to Xavier Juliao. He had known each of the three accused persons for about 20 years. He even said that the second accused's late father was his friend. He said that all the three accused persons attacked him on the fateful

day. We do not see why he would falsely implicate the second accused whose late father was his friend. All the witnesses who identified the first and third accused persons corroborated each other by saying that they were the ring leaders. The accused persons failed to give convincing reasons why the witnesses would lie against them. It is not convincing to say that the accused persons were falsely implicated because they are CCC supporters. This is in view of the fact that the whole mob that assaulted the deceased was made up of CCC supporters. Why were the accused persons the only ones who were arrested? We do not believe that the three accused persons are the only CCC supporters that are known by the State witnesses. The three were implicated because they were seen participating in the assault of the deceased by the State witnesses.

We take note though that the eye witnesses to the assault of the deceased were divided as to who between the two brothers hit the deceased with the log on the head. Charles Moyo and Urgent Kamumvuri said that it was the first accused who took the log from the kitchen and hit the deceased with it. On the other hand, Robson Kandenga and Xavier Juliao said that it was the third accused who hit the deceased with a log. According to Xavier Juliao the third accused actually snatched the log from the first accused who had taken the log from the kitchen. It is therefore difficult to determine who between the first and the third accused struck the deceased with the log. However, this is not fatal to the State case because we do appreciate that in cases of assault committed by a mob of people, it is not uncommon for witnesses to contradict each other depending on how each witness perceived the assault.

Although the accused persons gave *alibi* defences to the effect that they were not at the scene of the crime when the crime occurred, we do not believe them. The first and third accused persons made bare denials of the charge during investigations and then gave detailed *alibi* defences during trial. This did not enable the police to investigate their *alibis*. The prosecution challenged the *alibi* defences by presenting evidence of eye witnesses that contradicted the accused persons' claims of having been elsewhere at the time the crime was committed. An *alibi* defence that is raised belatedly at trial cannot prevail over positive, reliable and categorical testimonies of eye witnesses placing the accused at the scene of crime. In the circumstances of this case the accused persons were placed at the scene of the crime by people who had known them for several years prior to the commission of the offence. These witnesses satisfied the court as credible witnesses. Whilst the defence witnesses sounded credible about having spent the fateful day with the two accused persons away from the scene of crime, we are not

convinced that the events the defence witnesses narrated happened on 7 October 2022. To begin with, the defence counsels were asking them to narrate what happened on this specific date which was wrong because the date was of the essence in this matter. The lawyers were leading the defence witnesses on the date yet the date needed to come from the witnesses themselves. Secondly, the accused persons did not give their *alibis* to the police during investigations. As such these *alibis* were not verified. If the *alibis* were true, why did the accused persons not tell the police about them? We cannot help but conclude that the *alibis* were concocted.

As for the second accused he gave an *alibi* defence to the police to the effect that he was under arrest and in custody at the time the present offence was committed, yet this was all a lie. During trial he then sought to distance himself from the statement saying that that is not what he had told the police. The question is why and how would the police come up with such a defence for him? The investigating officer said that the second accused gave two *alibi* defences and that what is in his warned and cautioned statement was his first *alibi* defence which he however changed when the police discovered that it was a false *alibi*. He is said to then have said that he had been at Mushawasha grounds at the time the offence was committed. We took note that this is the *alibi* defence that he gave at trial. He even called three witnesses to confirm it. The witnesses sounded credible in their narration of a soccer match they played with him. We however do not believe that it is a soccer match that was played on the day the deceased was assaulted. If it was played on that date, the accused would have mentioned it as his *alibi* defence right from the start instead of lying to the police that he was under arrest and in custody when the offence was committed. One of the accused's witnesses even said that they had played the soccer match in question about two months before this trial commenced. He was therefore saying that the soccer match was played this year in 2023 and not in October 2022. This was a clear indication that the second accused's *alibi* defence was a fabrication.

In view of the foregoing, we are satisfied that the State managed to prove that the three accused persons were part of the mob that assaulted the deceased on 7 October 2022 at Nenyere flats in Mbare with the common intention of killing him. The State managed to prove the guilt of the accused persons beyond reasonable doubt. We find each one of them guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act.

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