THE STATE
versus
TAFADZWA SHAMBA
and
TAPIWA MAKORE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 3 & 13 October 2022 and 29 June 2023

Assessors: Mr Chakuvinga
Mrs Chitsiga

Criminal Trial

A Masamha, with *D H Chesa,* for the State
M T Mavhaire, for accused 1
M E Midzi, for accused 2

MUTEVEDZI J: When the registrar of the High Court advised the parties to this case that the court's judgment which had been reserved at the conclusion of the trial would be handed down on 29 June 2023, the Zimbabwe Broadcasting Corporation (ZBC) and the Zimbabwe Newspapers (1980) Limited Television, which are some of the media houses which indicated that they had been following and reporting on the proceedings in this case right from their commencement, petitioned the court seeking permission to conduct live broadcasts of the conclusion of the trial. In their view, the trial was of public interest. They said it had attracted and held the attention of the entire nation. In the case of *Nelson Chamisa* v *Emmerson Dambudzo Mnangagwa and 24 Others* CCZ 21/19, the Constitutional Court quoted with approval the dictum in the case of *South African Broadcasting Corporation Limited* v *Thatcher and Others*, [2005] 4 All SA 353 (C) at para [63], in which that court related to a statement by Lord Falconer of Throroton, the Lord Chancellor of England and Wales's foreword to the United Kingdom Consultation Paper 28/04, which became the basis of the "Broadcasting Courts Seminar" held in the United Kingdom in 2005, where he said:

> "The justice system exists to do justice. If it does not do justice in public it risks slipping into unacceptable behaviour, and losing public confidence. With a few exceptions, our courts are open to the public, but very few people who are not involved in cases ever go near a court. Most people's knowledge and perception of what goes on in court comes from court reporting and from fictionalised accounts of trials. The medium which gives most access to most people, television, is not allowed in our courts."

Writing for the full bench of the Constitutional Court, in *Chamisa* v *Mnangagwa* (*supra*), MALABA CJ reviewed various authorities across many jurisdictions and arrived at the conclusion that it is progressive to open court proceedings to the full glare of the public. He held that a court could permit or refuse the live broadcast of its proceedings because all the superior courts of Zimbabwe have inherent power to protect and regulate their own processes. He however emphasised that the overriding principle in whether or not to allow the live broadcasting of court proceedings is the consideration of the interests of justice. As such to allow or disallow live broadcasts from the courtroom is the discretion of the court guided by the interests of justice concept but subject to the limitations imposed by the call for every case to depend on its own facts and circumstances. The case before us is indeed extra ordinary. The gruesome manner in which the deceased was killed required this court to make its judgment open to all Zimbabwean citizens, to enable the public to appreciate first-hand the court's reasons for the verdict it would return. As judges we owe to the public, from whom we derive our judicial authority, a duty to give reasoned decisions and to ensure that the public has access to such judgments. In addition, the decision to permit live coverage of the trial would promote full, fair and accurate reporting of these proceedings. It was on basis that we concluded that it was in the interests of justice to allow the mentioned institutions to broadcast live, the handing down of this judgment.

We now turn to the court's decision in this case.

In George Orwell's 1945 novel *The Animal Farm*, when negotiations between the head pig and the farmer became ugly, the other creatures were said to have looked from pig to man and from man to pig but already, it was impossible for them to distinguish between person and beast. That episode in the novel, brings to the fore the question of how much of the animal is in human beings or conversely how much of human beings is in animals. Humanity, with its capacity for abstraction is considered clearly distinct from animals which have no ability to rationalise their feelings or control their instincts, appetites and passions. This murder, an unconscionable act of mortal violence unfortunately rubbishes that perception. From whichever side one views it, the inescapable conclusion is that there is no sharp human-animal

divide. It is further proof that the boundary between what is animal and what is human even in these modern times, is very blurred.

The deceased Tapiwa Makore (Junior), so-called by virtue of being accused 1's namesake was a seven year old boy. He went missing in the afternoon of 17 September 2020. His parents and other villagers in Makore village in Murewa mounted a search from the time it was noticed that the boy was missing. Their efforts were in vain. As will be illustrated later, his body or what remained of it, with the head, both hands and both legs having been cleanly severed from it was discovered the next morning at one of the villagers' premises being dragged by dogs. It left little doubt if any that the boy had been killed for ritual purposes. Several pieces of his missing limbs were later separately discovered at various locations including in a disused village pit latrine. A series of events unfolded which led to the arrest of *Tafadzwa Shamba* (accused 1) and *Tapiwa Makore* (accused 2). Two other accused persons who were discharged at the close of the prosecution's case after the state withdrew charges against them were also arrested. They were charged with the murder of the deceased boy.

The allegations were that on 17 September 2020 at Makore Village in Murewa, each or both of the accused persons unlawfully and with intent to kill caused the deceased's death by intoxicating him with alcohol before chopping off his head from the neck and severing his lower and upper limbs with an unknown object. The deceased died from the injuries. The state further alleged that the accused killed the deceased for ritual purposes because they wanted to use his body parts as a charm to enhance their business. In pursuit of their objective accused 1 and 2 lured the deceased from his mother's garden to accused 2's homestead. They locked him up in one of the rooms. Accused 1 proceeded to collect from accused 2 who had bought it at Katsande homestead, five litres of an illicit home brew commonly called *skokiana.* He mixed the brew with sugar to make it palatable for the boy. He gave him the concoction to drink. The boy became inebriated. Around midnight the two accused took the child to the foot of a nearby mountain. Accused 1 carried the boy on his back. Once there they laid him on some mats. Accused 1 sat abreast the boy and callously cut off his head whilst accused 2 was holding the legs. Like butchers on a slaughtered beast, they set to remove both the boy's hands and legs from the body. They packed the body parts into black plastic bags. On their way back, they dumped the deceased's torso at a place near a village graveyard. When they got to accused 2's homestead, they kept the parts in plastic buckets. The villagers mounted a search for the missing boy that evening. Needless to say, he was not found. The next morning the missing boy's torso was recovered from Summer Murwira's homestead being dragged by dogs. A

report was subsequently made to the police. Other parts from the boy's body were later discovered. The police arrested accused 1 after they stumbled upon his blood stained clothes. Accused 1 then implicated accused 2 leading to his arrest. The police took the recovered body parts for a deoxyribonucleic acid (DNA) examination. From a layman's point of view, DNA refers to molecular structures which connect hereditary characteristics of living organisms to their off spring. The long and short of its use in the police investigations in this case is that it confirmed that the torso and the parts which were recovered at various locations were indeed those of the missing boy. Because the head of the deceased was not recovered and that the body had been mutilated, the pathologist who conducted the post mortem examination concluded that the cause of the boy's death was indeterminable.

Both accused pleaded not guilty to the charge.

Accused 1 defence outline

Accused 1's defence outline was that he at the material time, was an employee of accused 2. He had spent the earlier part of the day in question with his co-workers watering vegetables in accused 2's garden. After work, accused 2 had purchased alcohol for him and the other employees. Accused 2 later went to the next village to follow up on a villager who owed him money. He said he only heard that the deceased was missing in the evening after he was told by one Edson Munanga a member of the community's neighbourhood watch. The following day, he reported for work as usual. Phillip Makore later arrived to advise that some human body parts had been recovered at Summer Murwira's homestead. Together with other villagers accused 1 said he proceeded to that homestead where they saw the gory spectacle. He was equally surprised by the events. The police were to arrest him after the discovery of his blood stained pair of trousers at accused 2's residence. He admitted that he is the owner of those trousers but that the stains on it were from the blood of a chicken which accused 2 had given him to slaughter. Accused 2 had gotten the chicken from someone who owed him money. He denied that the stains were from the deceased's blood. He also admitted knowledge of the blood soaked white vest which was discovered from his house. He explained that the vest belonged to him but his friend Terrence Mbidzo had used his room for purposes of engaging in sexual intercourse with his girlfriend at a time that the woman was on her menstrual periods. That had happened a week before the accused's arrest. The accused further denied ever selling human meat to Joiner Tangirire as alleged by the prosecutors. He argued that although he sold her some meat, it was beef which he had obtained from one Japhet Shamba. Above all the

accused alleged that he never saw the deceased boy on the material day let alone instructing James Makore to go and call the deceased for him. He said he was heavily assaulted by the police using iron bars, whips, sticks and was tied with a rope for more than five hours in a bid to induce him to confess to committing the crime. He added that he made indications under duress from the police particularly Andrew Nyadundu and Mawewe of Murewa Police Station. He further alleged that he was never taken to court for confirmation of his warned and cautioned statement and the indications. He had only appeared in court for purposes of remand proceedings. He denied that accused 2 played any role in the commission of the murder and alleged that he was directed by the police to implicate accused 2 or else they would kill him.

Accused 2's defence outline

Accused 2 said he is a cousin to the deceased's father. He denied ever participating in, arranging, cooperating with or conspiring in any way to murder the deceased. He alleged that he was *bona fide* in the search for the missing boy as any relative would be. When accused 1's blood stained pair of trousers was recovered the police demanded to search the homes of all villagers in Makore village. His home like those of many others was searched. The blood stained trousers belonging to accused 1 was then recovered. That led to accused 1's arrest. Accused 1 for reasons best known to himself wrongfully implicated him in the murder of the deceased. What he is sure of is that the blood stains found on accused 1's trousers was blood of a chicken which accused 1 had slaughtered a few days earlier on his instructions. Besides accused 1's confessions there is nothing that links him to the commission of the offence, so he alleged.

The prosecution's case

The state opened its case by applying to tender the post mortem report compiled by the pathologist who examined the remains of the deceased to ascertain the cause of death. The prosecutor sought it to be admitted together with an explanatory affidavit which was done in a bid to simplify the contents of the report. There were no objections from the accused persons. The court duly admitted the report and the affidavit which became exhibits 1 and 1(a) respectively. Although, the report indicated that the cause of death was indeterminable because of the state in which the mutilated body was recovered it was not in dispute that the deceased had been killed. Thereafter the prosecutor lined up eight witnesses to give oral evidence. We summarise each of the witnesses' evidence below.

1. Linda Munyori

She is the mother of the deceased boy. Her pain must have been unbearable. It was palpable as she testified. She appeared tormented. Any normal mother would be. She advised the court that the deceased was her only son. She has two other children. The fateful day began like any other. She returned from her chores to prepare breakfast for her seven year old boy. She bathed him and changed his clothes, packed his lunch box and send him off to the gardens where other children of his age usually spend the day guarding the vegetables from damage by cattle and other animals. Unbeknown to her, it was the last time she would see her son alive. Later in the day, around 1500 hours when her husband returned home they proceeded to their garden to check on the deceased and to get vegetables. When they got there, he was nowhere in the vicinity. His clothes, shoes, water bottle and his lunch box were however in a heap outside the garden. Together with her husband, they called out the boy's name but he did not answer. They thought he was playing with other children, picked up his belongings and went home. Around 1800 hours she advised the boy's grandmother that the child had not returned home. Word spread across the village and a search party was soon constituted. The search was fruitless. It was called off late into the evening. Accused 2 participated in the search. A lot of the villagers gathered at the witness's homestead. Accused 2 scolded the witness accusing her of being careless and not properly looking after the boy. He suggested that may be someone had taken the boy as a prank to teach her a lesson. The witness's sister in- law interjected and stopped accused 2 from making the obnoxious suggestions. It was debated what time the search would begin the next morning. Accused 2 suggested 0800 hours. He was vehemently opposed by other villagers who pointed that it was necessary to start the search before sunrise. They unapologetically told him not to be part of the search team if he did not want to. True to the villagers' determination, the next morning the search resumed very early. It did not however go on for long because someone came to call the villagers to proceed to Summer Murwira's homestead where a grisly discovery had been made. The witness was advised not to go there. Later she learnt of the torso that had been seen being dragged by Murwira's dogs.

Linda said prior to the incident her relationship with accused 2 was cordial. She narrated how the boy's other body parts were found and indicated that during the search for the parts a human skull was also found. It was taken for DNA examination. The pathologist concluded that it could not possibly be that of the missing boy because it was badly decomposed yet the torso was fresh. The teeth had come out and from his examination it was for a male

between the ages of twelve and fourteen years yet the missing boy was only seven years old. As a result, it was concluded that it did not belong to the deceased. They proceeded to bury the deceased's torso without the head and the other parts which remained missing. Part of her evidence cast aspersions on the accused's character and as required by law, the court cannot and will not rely on it.

2. Julia Kamunda

The evidence of this witness posed challenges to prosecution. In their summary of evidence it was indicated that she would advise the court on how her son James Makore had been asked by accused 1 to collect the deceased and hand him over to him (accused 1). He had complied with that directive and handed over the deceased to accused 1. James was alleged to have also advised the witness that he had been given some money and a green t-shirt by accused 2 as a way of thanking him for his role. The boy had then used the money to buy a radio. In court she made a volte-face and denied any knowledge of the issues in the summary of the state's evidence. The issues had been summarized from a statement she allegedly made to the police. In court she said her son James had only seen the deceased playing with other children and no more. She denied that he had ever said he was given money and a t-shirt by accused 2 as a thank you token. She agreed that she made a statement to the police but that the police had muzzled her to make it. She confirmed that the signature on the statement was hers. She further alleged that the police had assaulted her husband and her son James. As a result she was afraid. On the basis of that previous inconsistent statement the prosecutor applied that the witness be declared hostile and that he be allowed to cross examine her in terms of s 316 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CP &E Act). That section provides as follows:

> **"316 Impeachment and support of witness credibility**
>
> It shall be competent for any party in criminal proceedings to impeach or support the credibility of any witness called against or on behalf of that party in any manner and by any evidence in and by which, if the proceedings were before the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such party, and in no other manner and by no other evidence whatever:
>
> Provided that any such party who has called a witness who has given evidence in any such proceedings, whether that witness is or is not, in the opinion of the judge or judicial officer presiding at such proceedings, adverse to the party calling him, may, after the said party or the said judge or judicial officer has asked the witness whether he has or has not previously made a statement with which his testimony in the said proceedings is inconsistent and after sufficient particulars of the alleged previous statement to designate the occasion when it was made have

> been mentioned to the witness, prove that he previously made a statement with which his said testimony is inconsistent."

There is no argument that in this jurisdiction, a party calling a witness may not cross examine that witness or in any way contradict, discredit or challenge his/her evidence. That route can only be taken if and when the witness is held by the court to be a hostile or adverse witness. In the case of *S* v *Mazhambe & Ors* 1997 (2) ZLR 587 a hostile witness was held to be one who presents himself to have a mind hostile to the party calling him, or to the interests of such party.

Hostility is an aspect which is not usually readily admitted by the witness. It is for that reason that the law allows it to be deduced from a number of factors such as the witness's demeanour when he/she is giving evidence in court, his/her relationship with either party, his previous conduct or the fact that he/she has previously made a statement inconsistent with his/her oral testimony in court.

In the present case, Julia Kamunda was never stead in the witness box. She continuously fidgeted betraying some deep lying sense of insecurity. She appeared to be in an invidious position given the intricate relationships which exist between the parties involved in the trial. She is related to the second accused in that her husband and him are brothers. She is equally related to the deceased's parents. It is very likely that she found herself between a hard place and a rock. It was through the previous inconsistent statement which she admitted and her demeanour in court that the court accepted the prosecutor's application that she be declared a hostile witness. We duly declared her so paving way for prosecution to discredit her evidence. What we however found intriguing was that the witness's evidence although apparently inconsistent with her testimony in court was largely inadmissible. Both the prosecution team and counsels for the accused seemed not to appreciate it. It was all hearsay evidence. What the state wanted her to tell the court was what she had been told by her son. In the end there was nothing that the prosecution achieved even from impeaching her and cross examining her. The only significant conclusion we drew from that process was that Julia Kamunda is an excitable, devious and kind of dishonesty character whose evidence before the court was utterly valueless.

3. Summer Murwira

The missing boy's torso was discovered at his homestead. His evidence was that his dogs had been barking for a good part of the previous evening. In the morning when he was brushing his teeth outside he discovered to his horror, that one of his dogs was dragging a

human torso. He examined the torso and in his opinion, it appeared a sharp object had been used to sever the head and the limbs. He raised alarm which then attracted other villagers to his homestead as narrated earlier. The evidence was uncontentious.

4. Joseph Nyambuya

He was at his homestead when he also noticed that one of his dogs was biting a human palm. He got closer and observed that it was a child's palm. He alerted accused 2 who then suggested to him that he should bury the palm. The witness said he was aware that there was a child who was missing and whose torso had been recovered without other body parts. He refused to accede to accused 2's suggestion and argued that he could not conspire to do such a shameful act. He guarded the palm until the other villagers and the police came to retrieve it. Accused 2 accompanied them back. What surprised the witness when everyone arrived was that accused 2 for inexplicable reasons claimed credit for discovering the palm when in reality he had earlier wanted that evidence to be hidden.

5. Joiner Tangirire

She was principally called to testify because she had bought from accused 1, meat which was suspected to have been human meat. That had allegedly happened a day after the boy went missing. In court she said the meat she bought and ate tasted like beef. She confirmed that accused 2 also ate part of the meat. The only time that she thought accused 1 could have sold her human meat was when detectives came to inquire if she had bought meat from accused 1 at the material time. What is undeniable, in fact it is admitted, is that accused 1 sold this witness meat a day after the boy was killed. Our research revealed that writer Rachel Nuwer in her article in the Smithsonian Magazine, 3 February 2014 explained that human flesh firmly falls into the category of red meat. She concluded that beef would be the closest visual equivalent of a human fillet or rump roast. In the article the author recites the description given by William Seabrook, another author and journalist, who claimed to have eaten human meat during his travels to West Africa in the 1920s. He said among other descriptions of human flesh:

> "It was like good, fully developed calf meat, not young, but not yet beef. It was very definitely like that, and it was not like any other meat I had ever tasted. It was so nearly like good, fully developed veal that I think no person with a palate of ordinary, normal sensitiveness could distinguish it from veal. It was mild, good meat with no other sharply defined or highly characteristic taste such as for instance, goat, high game, and pork have. The steak was slightly

> tougher than prime veal, a little stringy, but not too tough or stringy to be agreeably edible. The roast, from which I cut and ate a central slice, was tender, and in colour, texture, smell as well as taste, strengthened my certainty that of all the meats we habitually know, beef is the one meat to which this meat is accurately comparable."[1]

If the meat which she purchased was human flesh Joina would fall into the category of cannibals. She naturally tried to wade off that tag despite that she had bought the meat without suspecting any foul play. It is however a lame and unconvincing argument by the witness that the meat was not human meat because it tasted like beef. It would equally be preposterous for us to believe the argument by prosecution that the meat was human flesh because it tasted and looked suspicious. If the above cited article is to be believed, the taste of human meat and beef is similar. In the process we can't hold that the witness ate or did not eat human meat because that flesh was never tested to ascertain its origin. We are a court of law and cannot make decisions on the basis of conjecture. The matter must simply end there. If prosecution really wanted to support its case on such evidence, it needed to do more.

6. Joromiah Madimbu

The witness is a detective stationed at ZRP Murewa attached to the Criminal Investigations Department. He was neither the arresting detail nor the investigating officer in this case. His participation in this case was that he led the team which went with accused 1 for indications. The indications, so he said, were done at the instance of the accused person. On the date in question he picked up accused 1 from the holding cells at Murewa after he had been assigned to the case. He advised the accused that he could only make indications if he freely wanted to do so. The accused confirmed his willingness to go for the indications. He then took him to the officer in charge's office. Thereat, the officer said he once more advised the accused that he had the right not to go for the indications. The accused repeated his readiness to go. He then made the accused sign a declaration to that effect. The team which the officer was leading was constituted by the following officers:

Detective Cst Lunga who was the driver, Detective Sgt Mutombeni who was the interpreter, Detective Cst Tshuma who was the photographer, Detective Cst Gadzani a witness, and Detective Cst Chikaka also a witness.

The accused person led the detectives to Makore village about thirty kilometres from Murewa centre. When they arrived, the indications started around 1200 hours and lasted until

[1] https://www.smithsonianmag.com/smart-news/human-flesh-looks-beef-taste-more-elusive-180949562/

1700 hours. The witness further advised the court that the indications were done with the full participation of the accused who did not complain that there was anything untoward. The accused was free all the time. He was however in leg irons given the gravity of the crime and that the indications were being done in a bushy area. At the end of the process the accused appended his signature to the indications signifying his acquiescence to the details of the indications which appeared on the document. When the prosecutor sought to have the indications admitted as an exhibit, counsel for both accused persons objected to the production of the exhibit. Their basis was that accused 1 had not made the indications freely and voluntarily. The indications were not confirmed by a magistrate. The prosecutor persisted that he wished to produce the indications. The indications which the prosecutor sought to produce were not a simple pointing out of places and things which would otherwise have been admissible without much debate. They were accompanied by extra curial-statements which the accused allegedly made in the process. As already said, the prosecution team pushed that they wanted to prove that accused 1 had made the indications without duress or any form of undue influence. Inevitably, the proceedings drifted into a trial within a trial. It entailed the suspension of the main proceedings.

The trial within a trial

In this case, the accused did not deny making the indications in questions. He said he did not make them freely and voluntarily. The factual issue of whether or not he made the indications clearly does not come into play. As required by law, accused 1 gave an outline of the full facts and circumstances upon which he alleged to have been unduly influenced to make the indications and on which he based his protestations against their admissibility. In summary his gripe with the indications was that he was taken from the police holding cells at Murewa into a room full of police officers. He was advised upon entering that room that at the station they did not accept any nonsense and going forward the officers expected his full cooperation with their directives. He was then advised that they would proceed for indications and that on arrival at Makore village, the officers would tell him what to say. The accused flatly refused and protested that he knew nothing about the murder of the boy. He was immediately slapped by officer Joromiah Madimbu. The other policemen then fetched a rope and an iron bar. They tied his hands and legs together before slipping the iron bar between them. The bar was then used as a pivot between two desks. The accused was suspended between the two tables facing upwards. The officer in charge of the station whose name the accused could not remember but

was affectionately called the boss by his colleagues brought a whip with which he thoroughly lashed the accused. As the officers assaulted him, they advised the accused on what to say. He was subsequently returned to the cells where he spend the remainder of that day. A police officer visited him at the cells and narrated to him what he was required to do during the indications. Accused insisted that he did not want to be part of the indications. He set the stage for prosecution to prove the admissibility of the indications which he made.

The prosecution's case

The state opened its case by calling the testimony of Joromiah Madimbu**.** For the second time during the trial, the witness advised the court in detail how he advised the accused of his rights to make or not to make indications. He advised the accused at the time he took him from the holding cells, that he was the officer who would be in charge of the team taking him for indications. Madimbu said he was speaking to the accused in English but there was an interpreter to convey the message to him in the vernacular. He asked the accused if he had any complaints to which the accused responded in the negative. He further advised the accused that he was not required to make indications if he did not wish to. The accused indicated that he was willing to go for the indications. To show his willingness the accused signed on the preamble to the indications signifying his free will. The officer further said he advised the accused of the implications of making indications particularly that whatever he would show the police would be recorded and would be tendered in court as evidence against him. In the officer in charge's office the same protocols were repeated. The accused again confirmed his willingness to make indications. The same team which Madimbu described earlier then left for Makore village for the indications. Accused 1 led the way. On arrival at Makore village, the accused stopped the officers. He led them to the garden from where he alleged to have taken the deceased. He led the detectives along a footpath to the gardens. He pointed to the spot where the deceased had been playing before he took him to accused 2's place. He lured the boy by promising him that he was going to give him a delicious meal. The accused then showed the detectives the road which he used to get to accused 2's place with the deceased. When they reached the homestead the accused indicated that he left the deceased seated on the house's pavement. He entered the house and brought *sadza* and relish in the form of some type of fish called *matemba*. The deceased ate. When he had finished the accused took him into the living room of the house. He implored him to remain there as he went to buy an illicit home brew commonly called *skokiana.* At that point the accused advised the detectives that he was

working on the instructions of accused 2 who wanted to perform rituals to enhance his cabbage business. When he brought the boy to the homestead, accused 2 was not there. He was at a beer party with other villagers. Accused 2 had purchased the illicit brew which the 1st accused went and collected. He returned with it. He drank it together with the deceased. He would mix the deceased's portion with sugar to make it palatable for the boy. The deceased got drunk and fell asleep. The accused laid him on a sofa in the room. Later that evening the accused indicated to the officers that he with the assistance of accused 2 took the deceased to the place where they killed him and severed his body parts. He showed the police officers the exact spot where that occurred. It was about one and a half kilometres from accused 2's homestead at the foot of a hill. The nearest homesteads from that place were about a kilometre away. The spot was surrounded by grown trees. There were no struggle signs at or around the spot. The accused further indicated that when he killed the boy he had pressed the boy's hands to the ground using his leg and then cut off his neck using a knife which they had brought from accused 2's homestead. During the murder accused 2 was holding a torch which illuminated the boy's body for accused 1 to easily perform his task. The accused further indicated how he had proceeded to dismember both the deceased's arms and both legs from the body. They then put the arms and the legs into one plastic bag and the torso into another. They left the area proceeding back to accused 2's homestead. Along the way, they discarded the torso. He further indicated that they had ultimately discarded the hands and the legs into a village pit latrine. He showed the police the particular toilet. The detectives then applied for permission to destroy the toilet. They obtained it.

Additionally officer Madimbu advised the court that during the indications there were several other people who were there apart from the police officers. Some of them were locals from Makore village but he had also later learnt that amongst those people were journalists who were following the story. Thereafter he was subjected to numerous questions in cross examination. Largely he stood by his account of events. He vouched that his team had explained to the accused all his rights in terms of the law. He swore that none of his team members ever assaulted or intimidated the accused in any way before, during or after the indications. He added that the fact that accused 2 refused to go for indications and the police did not force him to do so supports his contention that accused 1 voluntarily chose to do the indications. It further came out during cross examination that the video of the accused person making indications which was posted on social media platforms was originated by people

independent of the police investigations. The police used static and not video cameras during the process.

Kainos Chuma

He is a detective constable. He participated in the indications process as the official photographer of the proceedings. He said he took photographs as the accused narrated what transpired. He took the first photograph of the accused when he was still in the holding cells. Through him twenty-six of the photographs which he took during the process were tendered as exhibits to support the prosecution's argument that the accused made the indications freely and voluntarily. Led by the prosecutor, the witness went through each of the photographs and explained its essence. He said throughout the indications the accused was free and was not forced to indicate or say anything against his will. He maintained his evidence under cross examination. In addition he refuted the allegation that the police recorded a video of the proceedings. Instead he supported the view earlier stated by witness Madimbu that the video was privately originated by members of the public. He also stated that the reason why the accused was handcuffed was to ensure his own security and that of the police officers.

Andrew Nyadundu

He is a detective assistant inspector in the ZRP. He is the investigating officer in this case. His evidence was that when the accused was arrested and interrogated he recorded a warned and cautioned statement from him. That statement was confirmed by a magistrate at Murewa in terms of the law. During those interviews the accused intimated to him that he was prepared to show the police what had transpired at the time the offence was allegedly committed. A team which led the accused during the indications was set up. It was led by detective assistant inspector Madimbu. He accompanied them as an observer but did not directly participate in the indications proceedings. At the time the indications were conducted the accused was already on remand and was lodged at Murewa Prison. Nyadundu said when an accused is in the custody of the Zimbabwe Prisons and Correctional Services, an institution which is administered separately from the ZRP, the police do not simply walk in and take out a prisoner. The procedure, which was followed in the case of this accused, is that an application is made to the officer in charge of a prison. On receiving that application, the officer in charge of Murewa Prison interviewed the accused and asked him if he wanted to proceed to do indications with the police. The accused indicated his willingness. Documentation to that effect was completed. When the accused was returned to prison after the indications, the same

formalities were undertaken. Documentation was again completed and the accused was asked if he had any complaints against the officers who had taken him out or against the police generally. His response was that he did not. The document, called a form 86 which is the application for release of a prisoner to the police was by consent produced and admitted as an exhibit in the trial within a trial. The officer said he was in attendance throughout the indications process. The accused was neither assaulted nor intimidated nor unduly influenced by anyone. Under cross examination, the witness denied having suggested to the accused what to say and do during indications. He said it was impossible and not necessary because right from the time of his arrest, the accused was admitting to participating in the commission of the crime. The accused willingly assisted the police to solve this murder.

The Prosecutor closed its case

The accused's case

Tafadzwa Shamba testified in support of his allegations that he had not made the indications freely and voluntarily. He said he was arrested by officer Nyadundu who was in the company of three others after they had recovered what was believed to be his blood stained trousers in accused 2's house. They took him to the police station where after interrogations he was taken into some room. They handcuffed his hands and legs together. They then put a metal bar between the hands and the legs. That created a pivot. The ends of the metal bar were each placed on a table. It left him suspended in the air. The officers were all along threatening that they would deal with him if he did not accept that he had committed the murder. At first he felt nothing on the suspension bridge. After about fifteen to eighteen minutes he said he started feeling numb until the pain became unbearable. No one physically assaulted him. The only one who tried to do so was an officer called Mawewe but he was restrained by his colleagues. Because of the pain resulting from the torture on the suspended bridge he said he relented and admitted to committing the crime. He was immediately released. Thereafter he was taken to court for remand. At court he denied the charges and was remanded in custody and taken to prison. On the material dates, the police came and requested him from prisons. Their request was granted and he was handed over to the police. Once they got to the police station Nyadundu started accusing him of showing off before the magistrate. He suddenly grabbed him and shoved the accused's head into a bucket full of water with his legs in the air. The accused managed to free himself because he was not handcuffed. He said he ran off for about ten to fifteen metres. They stopped him and called him back. This happened on 26 September 2020. The accused added that they then took him back to the suspended bridge. That is when the issue

of indications arose. He was advised that the officers would take him for indications the following Monday. When it was pointed out to him by his counsel that it was being alleged that he volunteered to go for indications, the accused's answer was an interesting one. He said yes there were police officers who were entitled to say he volunteered to do that but those who knew the circumstances behind his willingness could not say so. He narrated that he only indicated that he was willing to go for indications after the police had tricked him. They advised him that as police they were not malicious and did not hate him. Instead it was some of his relatives who had come forward with his blood soiled trousers and advised that it was him who had committed the murder. They further advised him that it was him who would go to prison for twenty years yet the people who committed the murder were there. It was then that he told the detectives that he wanted to discuss the issue of indications. He sat down with them. The detectives informed him that in fact it was his co-accused Tapiwa Makore who wanted him to go to prison. They said he was the one who had surrendered the trousers to them and alleged that it was accused 1 who had committed the offence. The detectives further advised him that it was his choice to tell the truth. They wanted to know accused 2's involvement because they suspected it was him who knew where the deceased boy's head was wanted. Critically the accused testified that it then occurred to him that what the detectives were saying was possibly true. He said it dawned on him that accused 2 wanted to remain out of prison whilst he languished in jail. It further became apparent to him that accused 2 wanted to sell and reap the profits from the cabbages project whilst he was in prison. He added that he then thanked the detectives and from then on he started cooperating with them. He accepted that he had killed the deceased at the instigation of accused 2. He said the police further suggested to him that the accused would indicate that the child had been murdered inside accused 2's house before discarding the idea since it could be self-defeating because they needed blood stains in the house. It was then agreed that accused would indicate that the murder occurred in the forest. They did not however agree on the exact spot. The detectives argued that they did not know the local forest well and therefore it was entirely upon the accused to formulate the idea of where it was convenient that the child had been killed. The accused gladly advised the police that he had a spot in mind. They urged him not to leave accused 2 out of the picture. He added that the detectives told him to also think of a place where the torso of the boy's body was discovered and where a pair of blue jeans was also found. Curiously, the accused said he asked the detectives if there was anything in accused 2's house which could be used as evidence to incriminate him. The accused went on to narrate that during the indications process he willingly

showed the police everything they had agreed on. He wanted the indications process to come out well. The process was led by officer Madimbu who was asking questions in English. The questions were interpreted to him in the vernacular. He led the detectives to the place where he and accused 2 had allegedly killed the deceased and to the spot where the torso was supposedly dumped. He however said he did not lead them to the toilet where the limbs were recovered although he confirmed that indeed they were recovered from there. He further confirmed that the indications were done freely and voluntarily because he was now fully cooperating with the police. He said the people who were leading the indications such as officer Madimbu and the photographer Kainos Tshuma did not know his conspiracy with the other police officers. There was no reason why they would think the accused was not genuinely demonstrating how he and his co-accused had killed Tapiwa Makore. At the end of the indications, so the accused's story went, the officers explained to him that the indications were contained in a document which they requested him to sign. He appended his signature to that document. The accused further confirmed that there were times when the handcuffs were removed. What remained throughout were the leg irons. He sustained a painful back as a result of the assaults which occurred during the first days of his arrest. He was treated at prisons. Quizzed if at any point he had raised the issue of torture and assaults by the officers with any authority he said he had simply mentioned the issue at hospital when he was receiving treatment.

Under cross examination the accused conceded to a few significant issues. He admitted that when he went to court for initial remand the assaults had already taken place; that the court specifically asked him if he had any complaints against the police and if he had in any way been assaulted. He told the court that he had none. He further admitted that when the police applied to take him from prisons he advised the officer in charge that he was happy to go for the indications. He equally accepted that when he returned from the indications he again indicated that he was happy and did not have any complaints against the officers who had taken him from prisons and gone with for indications. He confirmed that the form 86 was therefore an authentic document which told the truth of what had transpired. The accused conceded that after his initial remand, he went to court on several other occasions but still did not raise the issue of assaults with any of the magistrates he appeared before. Thereafter, the accused closed his case.

The court's determination

The court proceeded to make a determination of the admissibility of the indications. It ruled that from the evidence and its assessment, the accused had made the indications freely and voluntarily without any undue influence or pressure having been exerted upon him. As such the indications were admissible. The ruling was an *ex tempore* one. The court indicated that its full reasons would be in the main judgment. These are they.

A trial-within-a-trial is a side contestation apart from the main issue of the guilt or innocence of an accused person. It has been accepted that it is the domain of the judicial officer alone. It is so because the admissibility or otherwise of a statement is viewed as a question of law because it is an issue whose resolution is solely dependent on the application of principles of law. Its sole objective is to ascertain the conditions obtaining at the time an accused person made the statement which he impugns as having been extracted from him by undue means. As can be discerned, the phrase freely and voluntarily has evolved to become a legal phrase. Its ordinary everyday usage though remains that freely means not being under anyone's control. Voluntarily implies freedom to make choices without external pressure. In legal parlance, the phrase simply means doing or saying something without being induced by any commination or promise coming from someone in a position of authority. When such issues crop up, the judicial officer is therefore required to temporarily discontinue the main trial and focus on examining the admissibility or otherwise of the statement in question. As already said, the question is simply whether or not the statement was made freely and intentionally without any improper sway. It has nothing to do with whether the statement is true or false because as MCNALLY JA would put it in *Donga & Anor* v *S* 1993(2) ZLR 291 (S):

> "A trial within a trial is about admissibility of a statement and not its truth for it might be the truth but improperly obtained."

Despite being repeatedly explained, the procedure of challenging and proving the admissibility of extra-curial statements remains elusive to many. When however what is required is broken down into its bare essentials, it appears elementary. The starting point is that the burden to prove that the extra curial statement is admissible lies with prosecution. The state must establish and beyond reasonable doubt for that matter, that the accused person made the statement intentionally and free from undue sway.

To me there can be three scenarios which arise and not the commonly envisaged two. First an accused can simply deny having made a statement and end there. In that case, the need for a trial within a trial does not arise. Assessors would participate in the resolution of the issue

in the ordinary course of the trial. Second an accused can admit having made a statement but deny that he made it freely and voluntarily. That amounts to a question of law which the judicial officer alone deals with. Third, an accused can deny both having made the statement and having made it freely and voluntarily. In that case there is both a factual dispute and a question of law. I have often wondered if assessors then can participate under the third scenario. I pose that question because of its reality. It however does not arise in this case. I would not therefore want to make any conclusions regarding it.

In proving its case, the prosecution must undertake a two stage process. First the prosecutor must prove the factual question of whether or not it is the accused who made the statement. The second stage is that the prosecutor must prove that the accused made the statement freely and voluntarily. That without a doubt is a question of law. Admissibility is predicated on it. The distinction between the scenarios is self-evident. In the first stage the accused is saying someone misrepresented that I made the statement when I did not make it at all. In the second phase, the accused is admitting making the statement. All that he is saying is that he did not do so in conditions where he had the power or right to act, think or speak without being shackled. Put in another way the accused is saying prosecution must show that he made the statement in the absence of debilitating conditions such as necessity, coercion or constraint of choice. In such cases, prosecution does not need to prove the factual aspect that the accused made the statement.

The admission into evidence, of extra curial statements is regulated by s 256 of the Criminal Procedure and Evidence Act [*Chapter 9:10*]. It provides that:

> **"256 Admissibility of confessions and statements by accused**
> (1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, or after committal and whether reduced into writing or not"

It has come to be accepted without debate that indications made to the police by an accused person during the course of investigations are mute extra curial statements in the same way that any other oral or written statement that an accused may make outside court is. In *S* v *Nkomo* 1989(3) ZLR 117 (S), the Supreme Court exorcised the misconception which many held about the position of indications in the realm of extra curial statements. MCNALLY JA at 124D-125E said:

> "…Sometimes I wonder if police officers and prosecutors labour under the mistaken belief that a statement is only statement when it is written down. Therefore they may think that rules of admissibility apply only to written statements. If that is a general belief, it is necessary to say firmly that it is wrong. No statements to a person in authority by an accused person, made outside the courtroom may be produced (if it is in writing) or quoted (if it is oral), unless the rules have been observed, that is to say unless the court is satisfied that it was made freely and voluntarily and without undue influence being brought to bear…"

Section 258 (2) of the CP&E Act however appears to place indications into a special category of extra curial statements. It provides that:

> **"258 Admissibility of facts discovered by means of inadmissible confession**
> (1) …
> (2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial"

Paraphrased, the above provision entails that where an accused points out something without verbal or written utterances that demonstration may be admitted into evidence without the need for a trial within a trial which usually precedes the admission of other objectionable extra curial statements. In addition, where a fact or item is discovered as a result of information made available by the accused that fact or item shall also be lawfully admitted into evidence despite it being linked to a confession or statement which in itself is by law not admissible. In this case for instance, if the prosecution had simply wished to produce indications made by the accused without accompanying statements allegedly uttered by him during the course of those indications, there would not have been any need to conduct a trial within a trial. Additionally if the state had also wished to rely on facts or things which were discovered as a result of such indications or other information made or given by the accused, the need for a trial within a trial would have been equally obviated. As was held by the Supreme Court in the case of *S* v *Nkomo* (*supra*) except where torture is alleged, all other irregularities which usually serve to impugn the admission of extra curial statements do not apply.

Unfortunately, the indications in issue here are those where all the above issues, aided by oral statements attributed to the accused are being sought to be admitted. Once the accused raised the objection that those unconfirmed indications which the police allege he made were not made freely and voluntarily, it became inevitable to hold the trial within a trial to determine the admissibility of the indications.

What is regarded as undue influence is any practice which would be ordinarily repugnant to the values of a fair trial in terms of the Zimbabwean law. The courts have

acknowledged for instance that the police have several methods of investigating crime. As long as those methods remain within the bounds of the law, their application and use in a particular case cannot be a basis to vitiate the freedom and voluntariness of a statement or indications made by an accused. In ***S* v *Nkomo* 1993(2) ZLR 131 (S),** the Supreme Court remarked that confrontation is a permissible element of police interrogation procedures provided it is not persistent. It also added that the police are allowed to tell a suspect that his co-accused has confessed to committing the crime where that is true or that they are aware of other issues connected to the commission of the crime. Undue influence, does not extend to a situation where an accused makes a choice and regretting it as a damning miscalculation later.

Application of the law to the facts

In this case, I am convinced that the accused volunteered to make the indications. To begin with he was arrested together with three accomplices. Amongst those suspects was accused 3, a woman. Given that position, my view is that she appeared more susceptible to undue influence than accused 1. That fact supports the prosecution's contention that if accused 1 had not elected to go for indications, the police would have left him like they did with all the other accused who did not choose to do so. Further, the first accused himself admitted that it was not the assaults by the police that made him choose to do the indications. Instead he considers the psychological influence which the police used to persuade him into making the indications to have been the decisive factor. By that the court understood the accused to be saying that he openly chose to make the indications because he believed that his co-accused particularly accused 2 wanted to have him go to prison for a long time whilst he remained behind to enjoy the profits realised from selling the cabbage crop they had planted together. For that reason accused 1 chose to cooperate with police investigations. Even more telling is the accused's admission that the majority of police officers who participated during the indications including the team leader D/A/I Madimbu, were not aware that he had cut a deal with the investigating officer. As held in *S* v *Nkomo* (supra) legitimate methods used by the police to investigate crime such as confrontation and advising a suspect that his/her accomplices have told the police what happened do not amount to undue influence. In this case, the police told the first accused that they had been given his blood stained pair of trousers by accused 2 which implicated him in the murder. From the evidence, that was a substantially true statement by the police. Accused 2 agrees it was him who told the police that the trousers belonged to accused 1. After hearing that damning development accused 1 panicked and divulged information which incriminated him in the commission of the offence. The court notes

with concern that very often defence counsels seek to extend principles relating to undue influence to a point where the investigative agencies would be severely hamstrung were the courts to impose such restrictions. This appears to me to have been a clear case of accused 1 making a miscalculation of epic proportions which he regretted after its reality dawned on him.

Accused 1 alleges that he was assaulted. He did not report the alleged assaults to anyone as expected. I admit it can be difficult for someone in bondage. But his situation is different because he had many opportunities at his disposal to do that. He appeared before different magistrates on many occasions. In some instances, he was directly asked about his treatment by the police. He admitted that the magistrate had, on his first appearance in court, asked him whether he had any complaints against the police to which he had advised the court that he had none. That appearance was at a time he alleged the police had already assaulted him. His answers were that he had no complains, betraying the presentation of this grievance as an afterthought and a futile attempt to resile from a damning situation. He also had opportunity to report to prison officials about the assaults. He equally conceded in court that he had been advised that he was not forced to go with the police for indications. In the face of that warning he was at liberty to choose not to go for the indications but he chose to.

The form 86 which is an application by the police to the officer in charge of a prison for the release from prison of an inmate wanted for further investigations shows that the accused did not lodge any complaint with the officer in charge of Murewa Prison both before and after he was taken for indications. Despite claiming that he had medical evidence to prove the injuries he suffered as a result of the alleged assaults by the police, he did not produce any. It was his responsibility to do so. He did not even bother to describe the injuries in detail to the court or to show the court any of them.

The fact that the accused was handcuffed and was in leg irons during parts of the indications process did not take away his voluntary participation. The accused was a suspect in a very violent crime. It would have been remiss of the police not to take precautions to ensure that he did not escape. In any case, the accused did not seem to have complained about it indicating that it did not in any way vitiate the voluntariness of his indications.

The accused signed the document alerting him of his rights after he chose to do the indications. He also signed the indications themselves as an acknowledgement that he had freely and willingly participated in them. In both instances he did not purport to have been forced to append his signature or that he did not know what he was signing for.

More importantly, the court is of the considered view that the accused's story is preposterous. It is demonstrably false. He urged the court to accept his cock and bull account that his participation in the indications was a rehearsed act. It is a red herring which the court refuses to accept. It could not have been prearranged because what the accused showed the police produced positive results. The police managed to gather substantive evidence as a result of the indications. That evidence included the recovery of the deceased's missing body parts. I am aware that at this stage I am not dealing with the weight of any evidence but simply the admissibility of the indications. I therefore point out these issues not as an assessment of the guilt of the accused but to show the incredibility of his assertion that he was play acting during the indications. To allege so would be absurd. It would entail that the police were aware of where the body parts were, that they were also aware of how and where the child had been murdered. If they did, then there would have been no reason for the indications. The accused could not advance any reason why the police would have wanted to falsely incriminate both him and accused 2 in the commission of the offence. His further allegation that he thought by making indications he would exonerate himself at the expense of accused 2 equally does not make sense. He knew that he was seriously incriminating himself by admitting that it was him who abducted the child, locked him up in accused 2's house, murdered him and tried to hide the evidence of the offence. Thinking that he was only incriminating accused 2 in the circumstances would have been foolishness of the highest order. Yet the accused in all this struck the court not as a foolish person but as an astute individual who spoke well in his defence and in his allegations against the police. He is fully conversant in both Shona and English because despite choosing to speak in Shona, in court he frequently found himself drifting into coherent conversations in English. The daftness which he sought to portray is not only incredible but is as palpably false as the yarn he tried to spin.

The general test on whether there has been 'undue influence' in the recording of a statement from the accused is as formulated in *R* v *Ananias* 1963 R & N 938 quoted with approval by MUSAKWA J (as he then was) in the case of *The S* v *George Francis Lovell* HH 220-16 where it was said:

> "Was there anything in the facts of the case to suggest that the confessor's will was swayed by external impulses, improperly brought to bear upon it, and calculated to negative his freedom of volition?"

From what I have said above, there is nothing to suggest that the accused made the indications due to external pressure from the police or from any quarter. It is for those reasons

that the court found that the indications in question were made by accused 1 freely and voluntarily and without any undue influence exerted on him. They are therefore admissible.

With the admissibility of accused's indications disposed of, the main trial resumed. Joromiah Madimbu continued with his testimony. He retold the events which took place during the indications exactly like he said during the trial within a trial. It will be pointless for the court to restate that narration once more save to say it then became part of the state's evidence in the main trial. Through that witness, the state applied to produce the indications and accompanying statements made during those indications at Makore village in Murewa on 29 September 2020. They were admitted and became exhibit 3.

7. Andrew Nyadundu

He became the eighth witness for prosecution. He is the investigating officer. He also restated the evidence he gave during the trial within a trial as part of his evidence in chief in the main trial. It is also already on record and will not be repeated. Outside that, the witness's testimony was that soon after the report of the murder was made, he attended the scene. On arrival he inspected the torso which had been recovered or rather which had surfaced in the village. The head, both legs and both arms had been cleanly cut off. It was the torso of a juvenile male. He concluded so because the genitals were still on the torso and depicted that. Together with his colleagues they went back to the village the next day. It was then that they discovered other parts of the deceased's body which included a palm and what appeared like a part of a buttock. Accused 2 claimed to have discovered the palm. That however was controverted by Joseph Nyambuwa, who was witness number five for the state. It was him who had actually discovered the palm. The second accused had attempted to secretly dispose it. The flesh which resembled part of a buttock was recovered in the premises where accused 2 and accused 4 (before he was discharged) reside. They are twin brothers who had different houses in the same compound. The flesh was found closer to accused 4's residence than that of accused 2. The discovery of these body parts forced the police to conduct a random search of homesteads and houses in the village particularly those which were close to where the body parts had been recovered. The officer indicated that all these events and recoveries were being photographed by the police's official camera person constable Kainos Chuma. By consent the prosecutor applied to produce a bunch of twenty six photographs relating to that event. They were admitted and collectively became exhibit number 4. It was during the searches that a blood stained pair of trousers was recovered from accused 2's hut. It was the only clothing item in that hut. The trousers was neatly folded and placed on an in-built bench in the hut. Accused 2 said the

trousers belonged to accused 1 who in turn admitted it. It became common cause that the trousers belonged to the first accused. The search continued and when it got to accused 1's place, the police recovered a white vest which had blood stains on it. It appeared like someone had attempted to wash off the stains. That subsequently led to the arrest of accused 1. Interestingly accused 1 had an explanation for the presence of blood on both his garments. On the trousers he said the blood was of a chicken which he had recently slaughtered at the instructions of accused 2. The blood on the vest was menstrual blood. In the week before the alleged murder, his friend had visited him with his girlfriend. He offered them his hut to sleep. They had had sexual intercourse therein. The girlfriend was on her periods. We presume she was not a particularly smart woman because accused 1 alleged that she had used his vest to clean up her menstrual blood. When the police asked him who the friend was, accused 1 mentioned a name but alleged the friend had subsequently gone to South Africa. The witness then said he followed up on the girlfriend who was staying with accused 3. She denied the allegation of having used the vest as alleged by accused 1. The girlfriend was called Joy. Through accused 1 the witness said they also recovered a blue pair of denim shorts in the bush between the homesteads and the gardens. It was also blood stained. As already said accused 1 was arrested and interrogated. A warned and cautioned statement was recorded. The accused was taken to court at Murewa where he appeared before a magistrate and the warned and cautioned statement was confirmed after due process was followed. The prosecutor applied to tender that confirmed statement. The court admitted it and it became exhibit 5. The statement was extensive. It is crucial to the determination of this case. For that reason we restate it hereunder in full exactly as it appears in the original complete with spelling errors and ungrammarly statements. The accused said:

> "I have understood the charge and I admit to the allegations being levelled against me. What transpired is that on a certain day whilst we were watering cabbages we discussed about the development of our business. We suggested on different ways which can assist us hence we enlightened each other on different ways until Tapiwa Makore said if you are brave it needs culture. I asked him what culture is and he said murdering. At first I thought it was a joke until he asked me that you are laughing? We stopped discussing the issue because certain people came in. On another day when he drank and was drunk in a jovial mood he started saying what have you said about my issue. I asked him to tell me citing that I am now brave and he told me that it needs the person one shares a name with. I told him that I don't share name with anyone and he said he do have him, the son of Munyaradzi and I told him that I know him. We changed discussion because we were at a beer drinking, people had gathered.
>
> The day of going to the garden early in the morning, it was on a Thursday morning we went and watered. We were with Fraderick Makore, Benjamin Hofisi, Victor Bhasvi. Upon completion we went to Katsande for a beer drink with our group of workers and bought 20 litres of home brewed beer and we drink whilst we were many and chatted. That is when we started

the issue and he asked me when can we do it and I told him that at any time and he asked even today? I said no problem. We continued buying beer till noon I went and peeped in the garden where they were playing and saw many children playing and went back to drink beer at Katsande. Around 2, I went back and saw him playing alone outside the garden and I called him. I talked to him whilst walking, asking him his favourite food and he said rice and chicken. We were going to Topoto, upon arrival we got into the kitchen and took sadza and matemba and got into the dining. When he was eating I left him in the house and locked it. I went to take 5 litres of beer which was bought by Topoto and went back. I arrived whilst he had finished and chatted whilst I was drinking with him whilst putting much sugar in his beers.

When he slept, I left him on the sofa and went back to beer until around 7 when local police officers came and took 6 scuds as exhibits. One police officer by the name Edson Makore came back and said to Fredrick and Topoto, uncles you are drinking beer, a child went missing, lets go and they all left. Upon their departure I went back home and began to drink that 5 litres until Topoto came around midnight. We planned to do our task and I took a towel and carried him on my back. I was at the front, Topoto behind till we arrived at the place of killing and I took him down but he was asleep. I placed a mat on the ground and laid him on it and I sat on his stomach and started with the head, followed by hands, lastly legs which were being handled by Topoto.

We placed arms, limbs together, head and abdomen together and carried proceeding, whilst on our way, he said this abdomen is being heavy for nothing and we left near a certain tsvedzagudo tree which is near graves and went home where we put them in the bucket and placed them in the dining. At the day break, we cooked sadza since we didn't ate and we cooked with mackerel. Just after eating message arrived that a child had been seen. We left in the company of Efrege Chaungama, Amai Eveline Fikiriza Philip, Topoto to see. Upon arrival we were shown the body and where it had been placed by dogs at Samaita. I was there for a short while and passed through home to a beer drink at Katsande but they refused me to buy and I went to Skenera. We drank beer until late. When it was evening when I went home, I arrived whilst Topoto was already there and he told me that the situation was now tense, this bucket must be taken out and find somewhere to place it even behind Samaita's mountain. At midnight I carried and placed it there whilst they were in a sack and I went back. At this time at the funeral was no longer reachable because of the police dogs so we were now hiding at the gardens and beer gatherings until I was arrested by the police."

We will return to deal with the statement in due course. The officer said after the accused had told them the above story, they followed it up and unearthed critical evidence in the process. Through that they discovered the place where the boy had been killed. They recovered a blood stained pair of shorts. They found a place where the ground was also blood stained. At accused 2's homestead in the sitting cum eating room, they found a five litre container with an inscription *Topoto* which contained the illicit brew that accused 1 brought to drug the deceased before the murder. *Topoto* happened to be accused 2's moniker. He is the one referred to as *Topoto* in accused 1's warned and cautioned statement. The prosecutor then sought the admission of the container inscribed with the words *Topoto* on the sides as an exhibit. Counsels for both accused did not object. The court admitted it. It became exhibit 6. In addition, the prosecutor sought to produce the certificate of DNA tests carried out on the

limbs and other pieces of flesh recovered after the death of the boy. By consent the court admitted it and marked it exhibit 7. The investigating officer however said he had no clue if anything came out of the forensic examination of the clothing items which the police recovered. Despite that handicap, the trousers which was recovered from accused 2's hut and which accused 1 admitted belonged to him and the white blood stained vest recovered from his residence and the blue denim short trousers recovered in the bush which he was allegedly wearing on the day of the murder were tendered and admitted as exhibits 9, 10 and 11 respectively. Asked to comment on the accused's explanation of the blood stains on each of the exhibits the investigating officer stated as follows: The accused said the blood on the trousers was that of a chicken he had slaughtered a few days before the murder at the instruction of accused 2. Accused 2 explained that he had gotten the chicken from his relative called Mrs Chaungama. The police had followed up that lead. Mrs Chaungama was from the Makore clan but was married in some other neighbouring village. She said she indeed had at one time given accused 2 a chicken but that it had been more than two months before the murder. On the blood stained vest, the officer had again attempted to follow up accused 1's story that it had been used by his friend's girlfriend to wipe menstrual blood at the time the friend had engaged in sexual intercourse with her at accused 1's residence. The friend could not be located because the accused said he had gone to South Africa. The alleged girlfriend, a woman called Joy denied the allegations. Regarding the denim short trousers, the officer said they found it hung on a tree in the bush through the indications of accused 1.

Further, the officer was asked to comment on accused 1's allegations that he only appeared in court for purposes of remand proceedings and not confirmation of his warned and cautioned statement. His response was that indeed accused 1 had gone to court and appeared before a provincial magistrate who confirmed his statement. That, he said, was even supported by the magistrate's signature on the confirmation proceedings and the statement itself.

We pause here to indicate that in relation to these exhibits, the police investigations were inept. It must occur to anyone involved with the criminal law that an accused is not required to prove his innocence but that the state must establish his guilt. In the case of *Tonic Magoma* v *The State* SC 36020 MATHONSI JA at p 12 of the cyclostyled judgment held that:

> "It is trite that where an accused person has given an explanation, the court is not at liberty to reject it unless satisfied, not only that the explanation is improbable, but that it is, beyond reasonable doubt false."

Prosecution was equally culpable. The importance of a forensic examination of the blood stains found on the various garments recovered by the police from the accused persons must have been obvious. Without that the accused persons' explanation of the stains no matter how absurd remain unassailable. If it had for instance been determined that the blood on the clothing apparels matched the deceased's blood then prosecution's allegations against the accused persons would have been an open and shut case. As it stands the spatters on the clothes may have been from anything ranging from menstrual blood, chicken blood to the blood of the deceased. The persons who are alleged to have controverted the accused persons' stories were not called to testify. No statements were recorded from them. Their evidence remains at large. Every aspect of a criminal trial which needs proof must be proved beyond reasonable doubt unless it is part of circumstantial evidence which must be added up to come up with one reasonable inference. In instances like this where there is doubt, it must be resolved in favour of the accused person. Without more the court cannot reject the accused's explanation. It cannot possibly conclude that those smears were the deceased's blood.

During cross examination counsel for accused 1 among other immaterial questions emphasised the issue that the accused had not made the indications and the warned and cautioned statement freely and voluntarily. May we restate once again, that where an accused challenges the making of a statement or indications on the basis that he did not do so out of his free will and the court undertakes a trial within a trial to establish that fact and holds that the statement was made freely and voluntarily and therefore admissible it may be futile for the accused to continue challenging the making of that same statement in the main trial. Not that he is precluded from doing so. The major purpose must be more to discredit the statement and show that it has no probative value than to show that the accused did not make it freely and voluntarily because that question is already decided. In the same cross examination, we also heard counsel to question the propriety of the confirmation proceedings. Because a confirmed statement is provisionally accepted by the court on its mere production, that indeed is the appropriate way to deal with grievances which an accused may have with a confirmed statement. The witness remained adamant that apart from the confession he made and in addition to the recoveries he earlier described, accused 1 led them to the recovery of the deceased's limbs which were found in the disused pit latrine. He stated that if it had not been the accused's indications no one would have known that the limbs had been disposed therein.

Counsel for accused 2's cross examination was also centred on the origins of the blood stains on the clothes. We have already decided the fate of that issue. There is no point in going

over it again. The witness disclosed through questioning by counsel that the police had also found black sanitary bags in accused 2's residence which matched those described by accused 1 in his warned and cautioned statement.

8. James Makore

He is a juvenile witness aged fourteen years. He denied the allegations that he is the one who had been send by accused 1 to call the deceased for him. He denied that he was given money and a shirt by accused 1 to buy his silence over the matter. Despite having made a previous inconsistent statement to the police, the prosecutor chose in his wisdom, not to seek an impeachment of the witness. His evidence therefore became nondescript.

9. Chiedza Makombo Gatsi

She is the magistrate who confirmed accused 1's warned and cautioned statement at Murewa Court. She narrated to the court the procedure she followed when she confirmed accused 1's statement. It was exactly as is required by law. She said her conclusion was that the accused had made the statement in issue freely and voluntarily. She endorsed her conclusion on the accused's statement. She was shown exhibit 5 and she confirmed that indeed it was the statement she had confirmed. She was surprised that accused 1 alleged that he had not appeared before her for the confirmation proceedings because she had not only confirmed the statement but that the accused had also appeared before her on various other occasions for purposes of remand.

After the evidence of the magistrate, the prosecutor closed the state's case.

Defence case for accused 1

Tafadzwa Shamba

He incorporated his defence outline into his evidence in chief. He added that on the day in question soon after watering the vegetables at the garden he proceeded to a beer drink at *Katsande* homestead in Makore village. He never saw the deceased that day. He did not see James Makore whom it is alleged he send to call the deceased for him. He spend the rest of that day at the beer party. He was with several other people whom he mentioned by name. He said he was arrested after his blood stained pair of trousers was recovered at accused 2's homestead. He then repeated the explanation he gave earlier about the origins of the blood on his garment. He denied knowledge of the blue denim short trousers. He restated his contention that he later made the alleged indications after he struck a deal with police officers to incriminate accused 2. Further he went over his earlier story about the whole episode on indications being a

rehearsed act and that the magistrate never confirmed his statement in his presence. He rounded his testimony by asking for forgiveness from accused for falsely implicating him in this murder.

Under cross examination the accused agreed that it would not have been possible that the boy was murdered by a lone killer. He also conceded that the way the murder was carried out showed that it could have been done by a person close to the deceased's family. He held that view because it would have been very difficult for a stranger to have done that without being noticed. He was grilled by the prosecutor on several aspects of this testimony, the indications and the evidence which was unearthed as a result thereof. We will return to deal with these issues at the appropriate stage. During cross examination by counsel for accused 2, he repeated that he had incriminated accused 2 because the police had informed him that accused 2 had given them his blood stained pair of trousers and alleged that he had killed the deceased. During indications he said he continuously mentioned accused 2's name because as per his plan with the police, that name was supposed to be involved. The accused did not call any witnesses and closed his case.

Defence case for accused 2

Tapiwa Makore

He decided to commence his testimony from the time that one of the deceased's palms was recovered. Contrary to the evidence of Nyambuwa the accused said when he was called to where the palm was, he instructed Nyambuwa to cover it with a dish as he went to inform the other villagers. He later proceeded to do so and returned to the scene with police officers and other villagers. He added that when the police searched his home they did so with his authority. He confirmed that during the search a blood stained trousers belonging to accused 1 was found. It was during the same search that the police recovered the lid of a snuff container. The lid had a small animal tail at its tip. In relation to the statement that was given by James Makore to the police in which he stated that he had been given $US 4 and a shirt by the accused as a bribe to silence him from mentioning accused's involvement in the murder, the second accused refuted doing so. He said he was a generally philanthropic person. If he had given James anything, it was well before the disappearance and subsequent murder of the deceased. He boasted that he did not have any financial challenges because all his children are adults. His eldest daughter is in South Africa whilst his second born son is in China. The accused stays with the youngest. During the search for the deceased on the night of the afternoon he went missing, the accused denied having had a direct altercation with the deceased's mother but

admitted that he reprimanded all mothers generally that they had a duty to properly look after their minor children. He then got to the point when he was arrested and taken to Murewa police station. There he was interrogated and assaulted by police officers who said they wanted him to confess.

Under cross examination, the accused agreed that the murder had been a grisly act. He agreed that accused 1 had assisted the police in investigating the murder. It was however not true that there had been any conspiracy between them to commit the murder. He conceded that *Topoto* was his nickname and that when accused 1 was talking about *Topoto* in his statement it was in reference to him. He further advised that when accused 1 referred to slaughtering a chicken he recalled that on 14 September 2020 his brother's son had given him a chicken which he instructed one Tobias to slaughter. Tobias had in turn given the chicken to accused 1 to slaughter. It was slaughtered on 14 September.

The court once again pauses here to observe and comment that this piece of evidence is telling. It directly contradicts what the accused told the police. To the police he said he had been given the chicken by one Mrs Chaungama who was his relative. Those versions are mutually exclusive. He therefore either lied to the police or to the court. He is apparently seeking to tailor his evidence after the investigating officer alleged in court that Mrs Chaungama had denied giving accused 2 a chicken at any time closer to the time the murder occurred. Instead she said she had done so about two months prior to the commission of this crime.

Accused 2 also insisted that Joseph *Nyambuwa* had not understood him at the time that he discovered a human palm in his yard. He said he had instructed Joseph to 'cover' as opposed to 'bury' the palm which Joseph had discovered. To us that was another attempt by accused 2 to wriggle his way out of trouble. The witness Nyambuwa did not hear the words *cover* and *dish* like the accused seeks the court to believe. There was an exchange of words between the accused and that witness such that if he had been misunderstood, the accused had all the time to correct his instruction. He did not do so. It illustrates that what Nyambuwa told the court is the truth of what happened. Even during his cross examination, accused 2 never suggested to Nyambuwa that he had misunderstood his instructions. Instead, what seemed to be the thrust of accused 2's argument was that he had asked Nyambuwa to guard the palm and not to cover it. An accused person particularly one who is represented by a legal practitioner, who has a different version of events from that of a witness but does not put that version for the comment of the witness disempowers himself/herself from relying on it. It is for that reason that we reject

the second accused's version of what transpired at the time that Nyambuwa discovered one of the deceased's palms at his premises. It cannot reasonably be true. It is false. We accept Nyambuwa's story that accused 2 exhorted him to bury the palm. Admittedly that does not make the second accused guilt of this murder. It is however more than curious that a person who was closely related to a boy who had just gone missing and had been discovered murdered would instruct a neighbour who found his dog dragging the palm of the missing boy to bury it without informing the police or other villagers. It is akin to destroying evidence. Accused 2 appears to us to be an enlightened man. He knew how vital to the resolution of the question of the boy's murder every piece of evidence which surfaced was. We will later illustrate the importance of the second accused person's indiscretion in this regard with that second accused closed his case.

Common cause issues and those already resolved

Whilst a number of issues are common cause in this trial others have already been determined and conclusions arrived at by the court. These are that:

a. Although the cause of his death could not be determined because of the state in which the body was recovered, the deceased was murdered
b. The manner in which the body was cleanly dismembered suggests that the murder was for ritual purposes
c. The torso of his body was recovered on the morning of the day following his disappearance. Various other parts were later recovered. These included the lower limps which were dug out of a pit latrine in the village. They were all DNA tested and confirmed to be parts of the deceased boy's body. His head however remained missing and is unaccounted for to date
d. Accused 1 freely and voluntarily made indications to the police
e. Accused 1 confessed the murder to the police and his confession was confirmed by a magistrate
f. Accused 1 and 2 had a cordial relationship in addition to being employee and employer
g. A blood stained pair of trousers belonging to accused 1, a five litre plastic container inscribed *Topoto,* a small animal tail and black plastic bags were recovered from accused 2's house
h. A blood stained vest was recovered from accused 1's house
i. After Joseph Nyambuwa found his dog dragging one of the deceased's palms, accused 2 exhorted him to secretly dispose of that evidence.

Issues for determination

Given the above, the question which remains for resolution in this case is who killed the deceased. In other words the issue is whether the accused persons were involved in the murder of the deceased. The starting point for the court is to acknowledge that no one witnessed the murder of the boy. What links the accused persons to the crime is the indirect evidence which litters the record of proceedings and accused 1's confession that he conspired with accused 2 to kill the boy. We propose to begin with accused 1's confession. That necessarily calls for a discussion of the law governing confessions.

The law on confessions

It is permissible for a court to convict a person accused of crime on the basis of his/her confession. That it so is supported by s 273 of the CP & E Act which prescribes that:

> **"273 Conviction on confession**
> Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:
>
> Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed"

The statute does not define a confession. Its meaning appears to be something that has been taken for granted. At common law, a confession is an unambiguous admission of guilt synonymous with a plea of guilty before a court. It follows therefore that all the safeguards employed to ensure that a plea of guilty is genuine equally apply in the measurement of the truthfulness of a confession. For instance where an accused makes a statement supposedly admitting the commission of an offence but the statement includes the possibility of a valid defence, that statement is simply considered as an admission and not a confession. In the statute, the import of s 273 is that a court does not require any evidence to support the facts stated in the confession. In other words the issues stated in a confession do not require corroboration. What is noteworthy is the prerequisite specified by the proviso to s 273. There must be, apart from the confession, other evidence to establish that the crime confessed to was actually committed. It may sound illogical that a person may confess to a crime which was not committed. The safeguard may therefore appear superfluous. In reality however it is not uncommon that a person may admit to a crime which was not committed in the first place. In the case of *State* v *John Scenera* HH 829/22 I had occasion to deal with the same issue. I remarked at p 6 of the cyclostyled judgment that:

> "The world over, hundreds of convicted prisoners, some of them awaiting execution, have well after their convictions, been exculpated from wrong doing. Analysis has shown that police induced false confessions are a leading cause for the conviction of otherwise innocent persons. Although largely outside the field of law, the scourge of false confessions raises stinking concerns about false convictions. They influence error in the judicial process and are a major source of false evidence which the courts are eager to latch on to for easy determination of complex cases before them. Needless to say however, false evidence inevitably leads to false convictions. Put simply a false confession entails a situation where a suspected offender falsely confesses to committing the crime under investigation. That can be followed by him/her giving a detailed account of how he did it. Because of those grave consequences, the legislature saw it fit to design safety nets to ensure that an accused can only be convicted on the basis of a confession which is genuinely true."

Admittedly, it is daftness of epic proportions for one to falsely confess to a crime which one did not commit. There exist however various reasons why an accused may falsely incriminate himself/herself. V.R.M. Gatte in his work *Wills on Circumstantial Evidence,* 7th Edition, at p 121 says false confessions may be caused by:

> " The agonies of torture, the dread of their infliction, the hope of escaping the rigours of slavery or the hardships of military service, a weariness of existence, self-delusion, the desire to shield a guilty relative or friend from the penalties of justice, the impulses of despair from the pressure of strong and apparently incontrovertible presumptions of guilt, the chance of escaping unmerited punishment and disgrace, the hope of pardon and even the love of notoriety frequently induce unfounded confessions of guilt."

It was for the above considerations that in the case of *Tonic Mangoma* v *The State* SC 36/20 the Supreme Court deemed the admission by the trial court of a supposed confession by an accused which had purportedly been confirmed by a magistrate in circumstances where the same magistrate had previously declined to confirm it after the accused had advised her that he had been assaulted and forced to confess, a grave error. The police officers who had earlier recorded the rejected statement had hunted down the accused, dragged him from prison and recorded a second statement. They brought it before the same court for confirmation. On the second occasion the accused raised no objection. The court confirmed the statement. At p.9 of the cyclostyled decision, the Supreme Court was unequivocal about the impropriety. It held that:

> "A statement induced by duress in the form of torture, physical beating or mistreatment of an accused person would not be made freely and voluntarily. An accused person should not be threatened, harassed or even offered some benefit if he or she makes a confessionary statement."

In the case of *S* v *Frank Mbano and 2 Ors* HB 154/17 MATHONSI J (as he then was) crisply summarised the requirement in s 273 when he said the court may convict on the basis of a confession either where there is proof that the crime was committed although there is no

evidence other than the confession to connect the accused with the crime or where there is direct evidence to confirm the accused's confession even though there is no proof of the commission of the offence.

In *S* v *Dube* 1992 (1) ZLR 234 (S) the Supreme Court, interpreting s 301 of the Criminal Procedure and Evidence Act which is the precursor to s 273 referred with approval to the dicta in the case of *R* v *Taputsa* 1966 RLR 662 (A) at 667 (E) where LEWIS JA stated that:

> "The effect of Sec 301 (2) seems to be that, where there is evidence *aliunde* proving that the offence has actually been committed the court may satisfy itself of the genuineness of confession by the accused that he committed or took part in it from the nature of the confession itself; where, however, there is no evidence *aluinde* proving that the offence itself has been committed, the court must, in addition, go outside the confession and be satisfied that it is confirmed by other evidence. In the leading case of *R* v *Blyth* 1940 AD 354, TINDALL JA delivering the judgment of the full bench of the Appellate Division, laid down that the confirming evidence required by the statute must be such as to corroborate the confession "in a material respect" although it need not directly implicate the accused in the offence, and that the statutory requirement, in this regard was similar to that in respect of an accomplice, as explained by SOLOMON ACJ – *R* v *Lakatula* 1919 AD 362…
> Applying this test to confession, it seems that the confirming evidence need not amount to evidence directly confirming that part of the confession in which the accused actually implicates himself in the commission of the offence it need only be evidence which is sufficiently corroborative of a material part or parts of the confession to satisfy the court that it can safely rely on the confession as a whole to convict the accused."

In the same case, the court continued by making reference to the decision in *R* v *Sambo* 1964 RLR 565 at 572 A-C where BEEADLE CJ said:

> "If the accused mentions facts in his confession, the knowledge of which could only come by being connected with the crime, the mentioning of such facts will, of course, be the most cogent evidence to show that the confession is genuine. But even if the accused may have been questioned by the Police on these very facts, their mention still has considerable probative value. If an accused freely makes a long statement and all the known facts fit in their proper sequence into this statement, this may often be sufficient on which to base a conclusion that the confession is genuine, even if the police may previously have questioned the accused on these facts, because unless the police put the actual words of the statement into the accused's mouth, if his only knowledge of the true facts has come from police questioning, he is hardly likely to present a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such a type will often therefore, prove its genuineness."

Where a confession mentions facts which turn out to be false that may be taken as a consideration tending to show that the confession may not be genuine. Courts have however been cautioned from placing too much reliance on that because more often than not people with a criminal mind make false statements on some facts while telling the truth on others. An accused who has decided to confess may have various motives that are not easily discernable

which drive him/her to withhold some true facts and not to tell the truth on such facts. The overriding principle is therefore that it must be the confession itself which the court must find to be true and not the entire set of facts alluded to in the confession.

Whether the first accused's statement satisfies the requirements of a confession

In our view there is ample evidence in the matter before us to show that the statement which the accused made qualifies as a confession and that it was a genuine confession. The relevant part of the first accused's confession which speaks directly to the killing of the deceased reads that:

> "We planned to do our task and I took a towel and carried him on my back. I was at the front, Topoto behind till we arrived at the place of killing and I took him down but he was asleep. I placed a mat on the ground and laid him on it and I sat on his stomach and started with the head, followed by hands, lastly legs which were being handled by Topoto. We placed arms, limbs together, head and abdomen together and carried proceeding, whilst on our way, he said this abdomen is being heavy for nothing and we left near a certain tsvedzagudo tree which is near graves and went home where we put them in the bucket and placed them in the dining."

As is apparent, the accused's admission that he killed the deceased is unequivocal. We do not understand the requirement that a confession must be unambiguous to mean that the accused must always have used explicit words like *"I killed him."* What it means is that there mustn't be doubt whether the accused killed the deceased or not. In this case, the first part of the crucial portion starts ambiguously with the first accused saying he started with the head, followed by the hands and then the legs. If he had ended there, the statement may have been difficult to categorise as a confession. But he did not. He added that he together with his accomplice then placed arms, limbs together, head and abdomen together and left. That narration can only be construed to mean that he had dismembered the body of the deceased. It is not possible for a human being to live when the head has been severed from the rest of the body. The accused therefore without using the words *"I killed him"*, undoubtedly admitted to killing the deceased. His statement qualifies as a confession. It follows that if it meets the rest of the requirements as already discussed, the court can convict him on the sole basis of the confession he made.

It is not debatable that the crime of murder was committed. As required by law, we are allowed to satisfy ourselves of the genuineness of the confession from the nature of the confession itself. The first accused made a lengthy statement to the police. In it he described in graphic and sordid detail how he kidnapped the deceased, fed him illicitly brewed beer and locked him up in some room until midnight when he took him to a secluded place where he

literally slaughtered him. He explained in detail how he disposed of the parts of the deceased's body. That detail illustrates his intimate knowledge of the crime which he could have only acquired by being involved in its commission. The first accused's confession when followed up by the investigators fitted squarely into the sequence of events. Almost every fact stated in the confession turned out to be true. In addition, he made the confession sometime after his arrest. We accepted earlier on that some people confess to crimes they never committed for the love of notoriety. If the 1st accused had wanted to claim the commission of this murder for purposes of bravado, he would have done so immediately after his arrest. In fact most of those who pursue such motive usually confess before anyone has asked. There is equally no indication that accused 1 was, by making the confession was trying to protect anyone from being implicated in the murder.

The first accused's situation is compounded by other issues. He did not only confess. He made indications. He disputed the voluntariness of the indications but we have already ruled that they were made freely and voluntarily. They bind him. He pointed at the house where the deceased was detained. The police recovered therefrom a container in which had brought the illicit brew to drug the child. They also recovered other paraphernalia allegedly used during and after the commission of the murder. Through his pointing the police recovered the boy's lower limbs dumped in a pit latrine. The indications corroborate his confession. In any case, the first accused's situation would not have changed even if the indications had been held to be inadmissible because of the damning provisions of s 258 of the CP & E Act. It states as follow:

> **"258 Admissibility of facts discovered by means of inadmissible confession**
> (1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused.
> (2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial. (Underlining is for emphasis)"

Indications refer to an apparent act through which an accused person physically points to the presence or location of a thing or place which is visible to the investigator. They serve to show that an accused is aware of a fact relevant to his guilt. We have already dealt with and disposed of the requirement that statements accompanying indications mustn't be admitted

under the guise of indications. We admitted the statements because their admissibility was vetted like any other extra- curial statements. They met the requirements for admissibility. The first accused's fate is sealed in this case by the fact that the items and the body parts referred to above were recovered through his confession and voluntary indications. That they were there is sufficient corroboration of his confession. The only escape avenue for the first accused would have been if the statement had been obtained through duress or other undue means. We discussed that issue extensively above. The confession was confirmed by a magistrate. The onus was thus shifted to the accused to demonstrate that the confirmation process was flawed. The prosecutor called the confirming magistrate. She adequately explained how she carried out the confirmation. It was in strict compliance with the dictates of the law. Once again, that door was slammed shut for the first accused person. He failed to discharge on a balance of probabilities the onus on him, that the confirmed warned and cautioned statement was not made freely and voluntarily. We have no apprehension that we are enjoined to find him guilty of this murder on the strength of the confession he made.

Regarding the second accused person the matter is more complicated. The first accused's confession cannot be used against the second accused. S 259 of the C P & E Act proscribes that. It provides that:

> **"259 Confession not admissible against other persons**
> No confession made by any person shall be admissible as evidence against any other person"

A confession is only admissible against its maker. It only serves to incriminate the person who made it. In the case of *Attorney-General v Roy Leslie Bennett* SC 7/11 the Supreme Court was emphatic that:

> "No confession made by one person shall be evidence against another person."

In *S v Sibanda* 1992 (2) ZLR 438 (S) at p. 442 GUBBAY CJ dealt with the only two exceptions in which a confession may be admitted not only against the person who made it but also against a co-accused when he remarked that:

> "It is only in two exceptional situations that an extra-curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused, by his words or conduct accepts the truth of the statement so as to make all or part of it a statement of his own. The second exception applies in the case of conspiracy or any crime which was committed in pursuance of a conspiracy. Statements of one of two conspirators made in the execution or furtherance of a common design are admissible in evidence against any other party to the conspiracy."

Needless to state, both exceptions are inapplicable in this case. The second accused vehemently denied any link to accused 1's depredations. He cannot therefore be held, by words or conduct to have accepted the truth of his co-accused's confession. The essence of the second exception is that the statement sought to be imputed on a co-accused must have been made during the execution or furtherance of the conspirators' common purpose. In other words the statement must have been said when the conspiracy was taking place. Any confession made to a third party after the conspiracy had terminated would remain inadmissible. The confession in question here relates to a statement which was made by accused 1 to the police well after the conspiracy had terminated if ever there had been one. It cannot be admissible against the second accused.

As is apparent, the independent evidence relating to the second accused's direct participation in the murder is tenuous. The criminal law however, perhaps has the longest arm of all branches of the law. It divides participants in criminal conduct into various categories. Broadly speaking, in criminal conduct there are perpetrators who can be subcategorized into principal and co-perpetrators; there are accomplices and accessories after the fact. A perpetrator is a participant in criminal conduct who satisfies all the essential elements of the crime in question. Co-perpetrators exist where there is more than one perpetrator. The law draws a marked distinction between perpetrators one hand and accomplices and accessories after the fact on the other. Perhaps the South African case of *S* v *Williams* 1980 (1) SA 60 provides the most lucid description of those distinctions. It held at p 63 that:

> "An accomplice's liability is accessory in nature so that there can be no question of an accomplice without a perpetrator or co-perpetrator who commits the crime. A perpetrator complies with all the requirements of the definition of the relevant crime. Where co-perpetrators commit the crime in concert, each co-perpetrator complies with the requirements of the definition of the relevant crime. On the other hand, an accomplice is not a perpetrator or co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself wittingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means, or the information which furthers the commission of the crime…According to general principles there must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator or co-perpetrator…he is…liable as an accomplice to murder on the ground of his own act either a positive act or an omission, to further the commission of the murder, and his own fault, *viz* the intent that the victim must be killed, coupled with the act*(actus reus)* of the perpetrator or co-perpetrator to kill the victim unlawfully."

The important considerations which stem from that decision are that:

(a) There law distinguishes between perpetrators and accomplices

(b) To be a perpetrator an accused must satisfy all the essential elements of the crime charged

(c) One becomes an accomplice where one lacks the unlawful conduct of the perpetrator

(d) The liability of an accomplice derives from his/her own unlawful conduct and fault

(e) There must be a nexus between the help offered by the accomplice and the commission of the crime by the perpetrator

As can be seen there are two elements to accomplice liability namely unlawful conduct or fault and the causal connection. Unlawful conduct manifests in facilitating or aiding in any way the commission of the offence. In Zimbabwe, the liability of accomplices is directly provided for under statute in s 197 of the Criminal Law Code. It prescribes that:

> **"197 Liability of accomplices**
> (1) Subject to this Part, an accomplice shall be guilty of the same crime as that committed by the actual
> perpetrator whom the accomplice incited, conspired with or authorised or to whom the accomplice rendered assistance.
> (2) For the avoidance of doubt it is declared that an accomplice to the commission of a crime is liable to
> be charged and convicted as such even where—
> (*a*) the actual perpetrator is produced as a witness on behalf of the prosecution; or
> (*b*) for any reason, it has not been possible to bring the actual perpetrator to trial."

An accomplice may therefore be convicted of the same crime of murder perpetrated by another even in circumstances where the accomplice's actions or omissions do not satisfy the requirements of that crime. We said above that the unlawful conduct of an accomplice exhibits itself through the facilitation or the aid that he/she accords to the perpetrator. The Criminal Law Code, in s 198 once more gives guidance to the considerations which must be taken to determine such issues. It provides that:

> **"198 Types of assistance to which accomplice liability applies**
> (1) Without limiting the expression, any of the following forms of assistance, when given to an actual perpetrator of a crime, shall render the assister an accomplice
> (*a*) supplying the means to commit the crime; or
> (*b*) supplying transport to enable the actual perpetrator to reach the scene of the crime; or
> (*c*) supplying information to enable the actual perpetrator to locate or identify his or her victim or
> to acquire knowledge of the place where the crime is to be committed; or
> (*d*) making premises of which the assister is the owner or occupier available for the commission of
> the crime; or
> (*e*) ....
> (*f*) ....

(*g*) ....
(*h*) ....
(2) In addition to the forms of assistance mentioned in subsection (1), the following forms of assistance
given to an actual perpetrator of a crime, namely—
(*a*) holding oneself available to give assistance in the commission of the crime, in the event of such
assistance being required; or
(*b*) immobilising or incapacitating the victim of the crime to enable the crime to be committed; or
(*c*) carrying implements or other things by which or with the aid of which the crime is committed;
or
(*d*) keeping watch for or guarding against intervention or discovery while the crime is being committed;
shall render the assister an accomplice…"

In this case, although we have discounted his direct participation in the murder for want of evidence, the second accused person is embroiled in its commission in more than one way. The court found as a fact that when the first accused kidnapped the deceased from the community gardens he took the boy to second accused's house. The deceased was abducted on 17 September 2020 around 1500 hours and remained in accused 2's house until about midnight of the same day. At the time of the abduction, the evidence before the court is that the second accused was at a beer drink in the village. The first accused locked the boy in accused 2's house, proceeded to the beer party where accused 2 was. In paragraph 4 of his defence outline accused 1 expressly alleges which allegation was never refuted by the second accused, that it was accused 2 who supplied the alcohol that they were drinking at *Katsande* homestead. It is the same alcohol part of which he later took in a container which accused 2 admitted was his to drug his victim. It was inscribed with his nickname.

The question which arises from the above is whether the second accused supplied the means for the first accused to commit the crime and or made his premises available for the commission of the murder to bring him within the confines of s 198(1) (a) and (d) of the Criminal Law Code. The child was locked in his house for many hours. In fact he must have been there for close to eight hours. The second accused person left the beer party and went home that evening. He went home after the futile search for the deceased earlier that night. He did not allege that he slept anywhere else other than at his residence on the fateful evening. It is unimaginable that he would have failed to notice the presence of the child in his house. The first accused said the boy was detained in the sitting-cum dining room of accused 2's house. After the murder, accused 1 said that same night he returned to accused 2's house with bags

full of the murdered boy's limps. He pulled some of them out of the bags and put them in a bucket. The second accused was in the house at the time. It is once more incredible that he did not notice the first accused doing all that he alleges to have done. The police recovered from accused 2's house black plastic bags similar to those which accused 1 alleged to have used to carry the deceased's limbs after killing him. They also recovered a small animal tail which accused 1 said had been used in the ritual to dissuade the deceased's spirit from avenging his death. They further recovered the container inscribed *Topoto* also from the second accused's house. Accused 2 supplied the alcohol which was used to drug the boy to facilitate his murder by accused 1. The apparatus in which the alcohol was stored was his. All the paraphernalia mentioned above were linked in one way or another to the commission of the murder by the first accused person. They were discovered as a consequence of police investigations following the confession by accused 1. The law provides for their admissibility. Section 258 of the CP & E Act states that:

> **258 Admissibility of facts discovered by means of inadmissible confession**
> "(1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused"

It is not an issue therefore that these discoveries were made in consequence of the confession made by accused 1 and that the evidence incriminates accused 2. The court accepts that the evidence pointing to accused 2 providing implements and his premises for the commission of the murder is circumstantial. The requirements governing circumstantial evidence must therefore come into play. Those considerations were properly summarised by this court in the case of *Muyanga v The State* HH 79/13 in the following terms:

> "(1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
>
> (2) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
>
> (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no-one else; and

(4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

See also the case of *S* v *Shoniwa* 1987 (1) ZLR 215 (S).

In this case the circumstantial evidence is not required not prove the guilt of the second accused as in satisfying the requirements of the crime of murder. The circumstances must simply prove that he supplied accused 1 with the implements and made his premises available to the accused for the commission of the offence. If they do that fact then attaches to accused 1's unlawful conduct to ground accused 2's guilt as an accomplice. From the circumstances outlined above we do not see how and what other inference could be drawn from them except that the second accused did so. An abducted child was detained in his house for hours on end; the accused was present at the premises for a substantial part of that period; the first accused who was also present took the child to a forest where he murdered him; he returns with the dismembered parts of the child to the same house where he packs them into bags and containers and later leaves to dispose them. Later the police discovered all the items described above in accused 2's house. As if to confirm that he knew that his premises had been used for the commission of the murder the second accused as discussed in earlier portions of this judgment, attempted to instigate one of the witnesses to destroy evidence necessary for the determination by investigators of how the boy had been murdered. The only logical conclusion is that the second accused must have allowed the first accused to use his premises for the commission of the murder because looked at holistically the circumstances create a chain which leaves no room for any other conclusion. There cannot be any other explanation to it.

The causal link

It is a requirement of the law that there be a causal relationship between the accomplice's conduct and the death. The question whether causal connection implies contributing to the commission of the crime which arose in the South African case of *S* v *Williams* (*supra*) provokes debate. In my view, the causal connection may result from positive acts or omissions by an accomplice. Where a person such as in this case, provides his premises to facilitate the commission of a murder, that person contributes to the commission of the murder. He intentionally facilitated the commission of the crime. He must and he indeed foresaw the possibility of accused 1 committing the crime. He was aware as was almost the entire village, that the child detained by accused 1 was being sought by his parents and everyone else.

The question whether a person becomes a perpetrator or an accomplice in a crime is entirely dependent on his/her degree of participation before the completion of the crime. In this case, we have already said there is no evidence showing accused 2's participation beyond his provision of facilities to accused 1. We cannot therefore find him liable as a co-perpetrator. He was an accomplice.

Disposition

After all is said and done, we are satisfied that either accused persons, in one form or another, left their bold and luminous footprints across the crime scene. Surely God did not see it fit to distribute the gift of intelligence evenly. The first accused is hoist by his own petard which he created from his catastrophic error of judgment when he decided to confess in the ill-informed belief that he was getting even with the second accused. On his part, the second accused person, for the reasons we pointed out above, significantly aided and abetted the commission of the murder. We cannot find him guilty as a co-perpetrator because other than the first accused's confession which remains inadmissible against him, there is no proof that he was together with accused 1 at the time the boy was murdered. There is also no evidence that he assisted accused 1 in such a way as to bring him within the ambit of an assister who knew or realized the possibility that a crime of the kind of murder would be committed as envisaged in paragraphs (e) or (f) of subsection (2) of s 198 of the Criminal Law Code. He is however liable in terms of paragraphs (a) and (d) of subsection (1) of s 198. Because of that there is no escaping liability as an accomplice.

In the end we have no apprehension that the state managed to prove Tafadzwa Shamba (accused 1)'s guilt beyond reasonable doubt as required by law. We are equally satisfied that Tapiwa Makore's role in the murder has also been proved beyond reasonable doubt.

In the circumstances, it is ordered that:

1. **Tafadzwa Shamba be and is hereby found guilty of the murder of the deceased as charged**
2. **Tapiwa Makore be and is hereby found guilty of the murder of the deceased as an accomplice.**

National Prosecuting Authority, state's legal practitioners
Mhaka Attorneys, first accused's legal practitioners
Mlotshwa Solicitors, second accused's legal practitioners