

THE STATE
versus
TAISON CHAIRA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 11, 12 & 15 January & 29 February 2024

Assessors: Mr. Shenje
Mr. Gwatiringa

Criminal trial

Ms. *C Mutimusakwa*, for the State
Ms. *L Garanowako*, for the accused

MUREMBA J: The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (The Criminal Law Code). It is alleged that on 17 May 2022 and at Chaira Village, Chief Musarurwa, Masasa in Chivhu, he murdered one Gibson Mawire by assaulting him several times all over his body and throwing him into a well. The accused pleaded not guilty to the charge.

In his defence outline the accused said that on the night of 16 May 2022, he was alone at home in Chaira Village in Chivhu. He said that on 17 May 2022, in the morning he left for Harare as planned. On 20 or 22 May 2022, his wife phoned him telling him that the deceased who was his nephew had died. When he was on his way to the funeral, he received news that he was a suspect for the murder of the deceased and that the police were going to arrest him upon his arrival. He learnt that his friend Bothwell Gurende had already been arrested as an accomplice to the murder. The accused said that out of fear he returned to Harare. He did not explain how he was arrested, but he said that he did not make his warned and cautioned statement freely and voluntarily. He further said that its confirmation in court was not made freely and voluntarily. He also said that he did not make the indications freely and voluntarily. He further said that he is not the one who made the indications that led to the recovery of the lockset. The accused said that he is being framed for the murder offence by a State witness

with whom there is bad blood. However, the accused did not mention the name of the particular witness.

The State's evidence

The State produced the post-mortem report with the consent of the defence. The report states that the deceased was 82 years old. Doctor Zimbwa who examined the remains of the deceased noted the following injuries. A depressed skull fracture on the right frontal bone; a neck fracture; multiple facial bruises; dislocated right shoulder and multiple lower limb bruises. The doctor noted that the deceased's hands were tied behind the body. He concluded that what caused the death of the deceased was a severe head injury and a neck fracture. The doctor did not give *viva voce* evidence. His evidence was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act (the CPEA) with the consent of the defence. The State went on to produce the accused's confirmed warned and cautioned statement with the consent of the defence. The statement was recorded by the Investigating Officer Detective Sergeant Zhou on 31 May 2022 at 0900 hours at CID Chivhu.

Viva voce evidence was led from Tsitsi Homerai, Precious Mhenyu, Lancelot Nduna, Panashe Chaira and Norman Chaira. All of them except Precious Mhenyu reside in Chaira Village under Chief Musarurwa in Chivhu. This is where both the accused and the deceased were residing. The two were related as uncle and nephew respectively. Their homesteads are about 1 kilometre apart and there are two homesteads in between.

Although the State alleged that the accused murdered the deceased on the 17th of May 2022, none of its witnesses remembered the date when this happened. It was Tsitsi Homerai's evidence that the deceased was her maternal uncle in that he was a brother to her maternal grandmother. She said that the accused is her uncle because he is a nephew to her maternal grandmother. Tsitsi Homerai said that on a date she could not remember but on a Monday around 5 or 6pm, she went to the deceased's homestead to collect her vegetables which she had left there to dry in the sun. She found the deceased at home. He was with the accused. The accused was holding a pump which he had borrowed from the deceased. She exchanged greetings with the accused. The deceased said he had been trying to call her in the afternoon because he wanted her to assist him in ferrying unshelled maize from the field on the next day. The two then agreed to do the job on the next day. Tsitsi Homerai then left for her home.

Tsitsi Homerai said that on the next morning around 6am she went to the deceased's home. She started by going to the backyard of the house and fetched water from the well with a bucket. She went to her home with the water. She went back to the deceased's home in about

10 minutes. This time she went to the front of the house and saw the door slightly open. She called out to the deceased but there was no response. She assumed that he had gone to the toilet. She fetched another bucket of water from the well and rushed back to her home with the water.

Upon her return for the third time, she met Precious Mhenyu who had also come to assist the deceased in ferrying maize from the field. Precious Mhenyu asked her where the deceased was and she told her that she did not know. The two of them decided to ferry the maize and commenced work. They finished the work between 7 and 8am. To their surprise the deceased had not joined them. They checked for him in the house but he was not there. Tsitsi Homerai found the deceased's phone on the floor in the bedroom. She used it to phone the deceased's brother and other people asking them if they had seen the deceased. She did not get a positive answer. Tsitsi Homerai and Precious Mhenyu made further checks in the rooms and noticed that the door to the wardrobe in the bedroom was open. The small bag that the deceased used to keep his money in the wardrobe was missing.

The deceased's brother then arrived with his wife. Other villagers also came to the deceased's homestead as word spread that the deceased was missing. People had come to assist with the search. Whilst that was happening, the deceased's brother's wife then fetched water from the well. She commented that the water was dirty. It was murky and brownish. Tsitsi Homerai said that she had also made the same observation when she fetched water around 6am. She said that she had assumed that this was probably because the deceased had watered the garden. Tsitsi Homerai said that during the search people then noticed that one of the deceased's slopes was near the well. A suggestion was made to check for the deceased in the well. People used a long stick from a gumtree and a rope which they put inside the water and pulled. The device hooked the deceased's body. The police were phoned and they gave a go ahead to the villagers to retrieve the body. One Lancelot Nduna got inside the well and retrieved the body. Tsitsi Homerai observed that the deceased was wearing the other slope in one foot. The deceased's hands were tied together at the back and his mouth was gagged with some clothes. The police then came and took the deceased's body away. The body was later returned for burial. Tsitsi Homerai said that the police later brought the accused who was now under arrest. He made some indications and in doing so he indicated to the police where he had thrown the latch that he had removed from the deceased's door. The latch was recovered within the homestead of the deceased in some grass.

Precious Mhenyu testified that she was in a love relationship with the deceased. She had last seen him on Monday in the afternoon. They had spent the day working in his maize field. She returned to her place of residence in a different village around 4pm. She last spoke to him on the phone around 6pm as she was updating him about the work, they were going to do the next morning. The work was about ferrying unshelled maize from the deceased's field. On the next morning the witness went to the deceased's home and found the deceased not at home, but the door was open. Whilst she was checking for the deceased, Tsitsi Homeraï arrived from her home where she had gone with some water that she had fetched from the deceased's home. What she said transpired thereafter is similar to what Tsitsi Homeraï said and it is not necessary to repeat it.

Lancelot Nduna who went inside the well and retrieved the body of the deceased said the well is about 8-9 metres deep. He described it as very deep. He said its diameter is less than a metre. The body's position inside the well showed that the deceased had fallen headlong because the head was at the bottom whilst the legs were up. When the body was taken out, he observed that the legs were not tied. The hands were tied behind the body with a neck tie and the mouth was tied with a t-shirt and a neck tie but the colour of the t-shirt could not be seen because it was soiled with blood. The witness said that the clothing items that were used to tie the deceased were taken away by the police together with the body. The State counsel submitted that the clothing items were not available for identification by the witness.

Panashe Chaira who is the accused's blood brother who comes after the accused testified as follows. Their parents are deceased. Panashe said when he heard that the deceased was missing, he went to the deceased's homestead and found people gathered. He was then sent to the police to make a report that the deceased was missing. Upon his return he found the body of the deceased having been recovered and retrieved from the well. He spent the night at the deceased's home with other villagers and police officers guarding the body. The body was taken away by the police the next day around 9am. After that he went with his nephew one Tashinga Horinda to let out the cattle from the cattle pen. From there they proceeded to Panashe's homestead. Whilst there, Tashinga requested to charge his phone. They went into the accused's bedroom because that is where they would normally charge their phones.

Upon getting inside the accused's room, they saw the accused's clothing items that he was wearing on the day preceding the night the deceased was murdered. The clothes were on the floor next to a bucket just behind the door. There were a lot of flies on the clothes and this is what drew their attention. They then noticed that the clothes had fresh blood stains. The

clothes were a red t-shirt, a track sweater and a track bottom. The blood on the sweater and track bottom was visible but they did not see any blood on the red t-shirt which was inside the sweater. Panashe Chaira said that the coincidence of seeing blood-stained clothes when a person had just been murdered in their village was too much. It made them suspicious of the accused. They then decided to report to Norman Chaira, Panashe's half-brother that they had seen some blood stains on the accused's clothes. Norman Chaira came and took the clothes away. Norman further phoned the police who came and took the clothes.

During trial the clothes were produced as exhibits three, four and five. The sweater had what looked like dry blood stains on the front where it is written "Nike" in white and on the shoulder areas. The black track bottom with red stripes on the sides had what looked like dry blood stains at the bottom around the hem. It was Panashe Chaira's evidence that he had last seen the accused wearing these clothes in the afternoon around 4pm on the day preceding the night of the murder. He said that he left the accused at home while he went to look for his cattle that he wanted to pen. When he returned home around 6pm he found the accused no longer at home. He prepared his supper and ate. He went to his room and started chatting on WhatsApp until around midnight when the accused came and knocked on his door. The accused spoke to him whilst outside and bade him farewell. He said he was going to Harare that night. He said he did not have enough bus fare and that as such his friend Bothwell Gurende was accompanying him with a bicycle to a certain bus stop. The accused then left. On the next morning that is when Panashe Chaira learnt that the deceased was missing. Panashe Chaira said that the accused was later brought to the deceased's homestead by the police to make indications. The accused was under arrest. In making the indications he pointed to some place in the grass where he said he had thrown the latch to the deceased's door. The people who were there looked for it and recovered it.

During cross examination the defence counsel put it to this witness that there was bad blood between him and the accused over issues to do with the inheritance of the homestead and cattle that were left by their late mother. The witness vehemently denied it saying that there was no such thing. He even expressed shock when this was put to him. He said both the homestead and the cattle were left for all the children. He disputed that he ever made claims that these things now belonged to him alone as the youngest son.

Panashe Chaira said that at the time material to this case, it was just himself and the accused staying at their late parents' home. The accused's wife had gone back to her parents' home in Mupfururirwa village. Panashe said that the accused and his wife's relationship was

always on and off. Panashe said that the accused and himself were using separate bedrooms in the flat roofed cottage at their homestead. Panashe disputed that the accused was wearing a blue t-shirt on the day before the night he left for Harare. He also disputed that the accused was alone at their home on the night the deceased was murdered. The impression that the accused wanted to create was that it was Panashe who spent the night away from home on the night the deceased was murdered.

Norman Chaira who is the accused's half-brother testified as follows. He shares the same father with the accused and Panashe Chaira. He is 65 years old and much older than the accused. The deceased was the son to their paternal grandfather's sister. Norman Chaira who had no recollection of the date the deceased was murdered said that the accused came to his home after 8pm on a Monday. He said that he had already retired to bed. The accused asked for a crowbar saying that he wanted to harvest some honey. He gave the accused the crowbar and went back to bed. The accused returned the crowbar just after 12 midnight. Norman said that he was surprised that the accused had decided to return the crowbar at night and asked him if all was well. The accused said that he had returned the crowbar at night because he was leaving for Harare that night. The accused further explained that he did not have enough bus fare and that as such he was going to travel all the way to the tarrred road with his friend Bothwell Gurende whom he said was waiting for him somewhere in the dark. The accused said he was travelling to Harare to collect money from the people who owed his late mother some money. The accused said that he had been informed that the money was now available for collection. The witness said that when he was talking to the accused, they were standing 2 metres apart. They were by the door to his bedroom and he was able to see what the accused was wearing. The accused was wearing a black track bottom and a black track top which had some white inscriptions at the front. A red t-shirt was protruding from the neckline and from the waistline of the track top. The witness said visibility was good because there was moonlight.

The witness said on the next day he went to church and whilst there, Tsitsi Homeraï phoned him informing him that the deceased was missing. By the time he got to the deceased's home, the deceased's body had been recovered and retrieved from his well. The police later came and collected it. Panashe Chaira then came and collected him from the deceased's homestead saying that he wanted him to see the accused's clothes which were at their home. He went with Panashe to their home. Norman Chaira said that when they entered the accused's room, he saw the accused's clothes on the floor. These were the clothes the accused was

wearing on the night he came to ask for a crowbar before he left for Harare. Norman Chaira took a closer look at the clothes and noticed that there was blood at the bottom of the track bottom. The track top had blood on the shoulders but the blood was not very visible. He said that there was no blood on the red t-shirt which was inside the track top. His observation was that the red t-shirt and the track top had been taken off at once.

Norman Chaira said that he then took the accused's clothes for safe keeping at his home and phoned the police who came the following day and took them away. The witness said after the accused was arrested, he was brought by the police to the deceased's home to make indications. He said the accused indicated to the police where he had thrown the latch which he had removed from the deceased's house. The witness said that the accused indicated that he had thrown it behind the deceased's bedroom under a tree where there was some grass. The witness said that some group of boys looked for the latch and recovered it whilst the accused was seated at the grain storage barn.

The witness said that there was no bad blood between the accused and his young brother Panashe Chaira. He also said that there was no inheritance dispute between the two. He said the four cattle that the late mother of the two left, were meant for all the children. The witness also said that there was no bad blood between him and the accused.

During cross-examination it was put to the witness that on the night of 16 May 2022, the accused never came to his homestead. The witness was adamant that the accused had come to his place looking for a crowbar and that he had also returned it. He said his wife could be called to testify on this issue. He said that he spoke to the accused whilst standing by the door to his bedroom and whilst his wife was sleeping inside. It was put to the witness that it is Panashe Chaira who picked up the latch to the deceased's bedroom from the grass but the witness vehemently denied it. He said that Panashe did not join the group of boys who went to search for the latch in the grass.

Ricky Zhou the investigating officer testified as follows. He is a detective sergeant in the Zimbabwe Republic Police. He was stationed at Chivhu CID at the time material to this case. He was assigned this case on 18 May 2022. He went to attend the scene of crime with other police officers. They found the deceased's body having been retrieved from the well but it was still at the homestead. The deceased was wearing a black t-shirt inscribed "Netone" and a black pair of shorts. The right foot was wearing a black and green rubber slope. The deceased's hands were tied behind his back using a brown neck tie with diamond patterns. His

mouth was tied with a black t-shirt with red lines and a blue scotched shirt with red lines. The body had bruises on the forehead, right cheek and both knees.

The witness said they then interviewed Tsitsi Homerai on what had happened. After that they went to inspect the deceased's house and noticed that there was a latch that was removed from the door. They went inside the house and noticed that the spare bedroom had been ransacked. Clothes were scattered all over the room. Money had been stolen from the wardrobe in that room. The door to the wardrobe was open. The witness said that in the main bedroom where the deceased was sleeping there was no wardrobe. They saw that the blankets were at the edge of the bed hanging down to the floor. The witness said that in the process of searching for foreign objects in the room, they removed the blankets from the edge of the bed. They then saw a lot of blood on the mattress. The witness said that they took pictures of the blood and he said that the pictures were in the docket. Surprisingly, the State counsel did not produce these pictures as exhibits and no submissions were made about these pictures.

The investigating officer said that it was his conclusion that the deceased must have seen the accused inside his house stealing and confronted him. It was also his conclusion that the deceased was thrown into the well alive because if the deceased had died before being thrown into the well, there was no need for his hands and his mouth to be tied. He said the tying of the hands and the mouth must have been done to disable the deceased from climbing out of the well and shouting for help. The investigating officer said that he established that the deceased was thrown into the well headlong. He said that he also established that the deceased was a treasurer of a burial society in his village and that at the time material to his death, he had money as he had advertised that he was looking for two beasts to buy. The investigating officer said that they then took the body of the deceased to the mortuary. He said that on the same day he then received a phone call to the effect that the accused person's brothers, Panashe and Norman Chaira had recovered some blood-stained clothes in the accused's bedroom. He said that he made arrangements for the clothes to be collected by police officers from the nearest police base. He said he later went and collected the clothes from the police base. He identified exhibits three, four and five as the clothes in question. He confirmed seeing blood on these clothes just as described by Norman and Panashe Chaira. The investigating officer said that he packed the clothes in question together with blood samples that were taken from the deceased's body during post mortem and sent them to C.I.D. Forensic for examination, but no examination was done. C.I.D. Forensic said that their machine was down.

The investigating officer said that all efforts to arrest the accused were in vain. At one time they learnt that he was at his in-laws' place in Masasa in Chivhu but when they went there, the in-laws told them that the accused had left with his wife for the deceased's funeral. However, on the way to the funeral the accused is said to have given an excuse that he was going to relieve himself and disappeared on his wife. The investigating officer said that the accused never reached the deceased's home for the funeral. He said they interviewed the accused's friend Bothwell Gurende about what had happened but they never arrested Bothwell Gurende for the murder of the deceased. He said on 30 May 2022, they then received information that the accused was in Ushewokunze area in Harare. They contacted police officers at ZRP Southlea Park, Harare who then went and arrested the accused at his place of residence. On that same day, the investigating officer and other police officers from C.I.D Chivhu came to Harare to collect the accused from ZRP Southlea Park. He said on 31 May 2022 and at C.I.D Chivhu, they interviewed the accused who confessed to the murder of the deceased and narrated what happened on the fateful night. He said that he recorded a warned and cautioned statement from the accused at 9am. He further said that they then took the accused for indications at the deceased's home.

The investigating officer did not go into the evidence of the indications that were made by the accused. The indications were not confirmed and the accused had indicated in his defence outline that he was challenging their admissibility. The State counsel submitted that the State was not going to conduct a trial within a trial. However, the investigating officer said that during the indications the accused made an indication that led to the recovery of the door latch that was removed from the deceased's door. The investigating officer said that since the accused had confessed to the murder of the deceased, they requested him to show them where he had put the door latch. He said that they wanted this as evidence that the accused was the person who had murdered the deceased. He said that the accused pointed to some place in the grass saying that, that was where he had thrown the latch. The investigating officer said that since the place in question was big, he requested for assistance from the boys who were there. He said the boys searched the area and one of them picked it up. The investigating officer said that when the search was being conducted, the accused was seated behind the granary. The latch was produced through this witness as exhibit 6. It is a long brass metal with a hook.

The investigating officer said that on 1 June 2022, he took the accused to court on a Form 242 for him to be placed on remand. He also said that he took with him the accused's warned and cautioned statement which he gave to the court interpreter for translation into

English. He said after the accused had been placed on remand and was remanded in custody, he went back to the Police Station to type the translated version in English. After typing it, he took it back to court and left it with the Public Prosecutor on the same day. The investigating officer said that he went back to court on 3 June 2022, to collect the warned and cautioned statement from the police post after it had been confirmed by the magistrate. He said that when the confirmation of the statement was done on 1 June 2022, he was not at court.

During cross-examination it was put to the investigating officer that the accused was assaulted as he was being interviewed for the offence. The investigating officer vehemently denied it. He said that if the accused had indeed been assaulted, he would have told the magistrate during confirmation proceedings since no police officer who was part of the investigating team was in attendance. It was put to him that Detective Mutausi who was part of the investigating team was the one who had done much of the beating. The investigating officer denied it. It was also put to the investigating officer that when they took the accused to court on 1 June 2022, Detective Mutausi showed the accused a gun and told him that if he was going to deny the warned and cautioned statement, he was going to shoot him in the legs. The investigating officer said that that was not true because there was no one with a gun on this day. He also said that when the confirmation proceedings were done on 1 June 2022, the accused was no longer in the custody of the police but prisons since he had now been placed on remand. It was put to the witness that Detective Mutausi had put the accused in a metal coffin at the police station. The investigating officer denied it saying that that was not possible because there is no such coffin at the C.I.D. Offices. The investigating officer said that the accused was lying against Detective Mutausi because Detective Mutausi was well known in Masasa area because he had been there for a long time whereas the other officers were new in the area at that time.

Sam Chitumwa the Provincial Magistrate who confirmed the accused's warned and cautioned statement testified as follows. He recognized exhibit two as the accused's warned and cautioned statement which he confirmed on 1 June 2022. He said that using the Pro Forma that is used in confirmation proceedings, he explained to the accused the process or the steps he was going to take in order to confirm his warned and cautioned statement. He said after that he had the warned and cautioned statement read out to the accused. The accused answered the questions satisfactorily and he confirmed the statement. The witness said that during the whole process the accused never mentioned that he did not make the statement freely and voluntarily to the police. He said that if the accused had said this, he would not have confirmed the

statement. He said the accused never mentioned that he was shown a gun by the police at court before the confirmation proceedings commenced. He said that the normal procedure before commencement of confirmation proceedings is to clear the court room of all police officers so that the accused is free to say whatever he wants to say. There was no meaningful challenge to the evidence of this witness.

Sam Mutausi the detective who is said to have assaulted the accused during investigations and threatened the accused before confirmation proceedings commenced testified as follows. He was involved in ferrying the accused from Harare to Chivhu after his arrest in Harare. He said he also escorted the accused from CID Chivhu to court for initial remand. He disputed that he threatened the accused with a gun at court. He said that he did not carry any gun to court. He further said the he was not even privy to the contents of the accused's warned and cautioned statement as he was not present during its recording. He said he could not have threatened to shoot the accused when he did not even know what the accused had said in his warned and cautioned statement. He said during confirmation proceedings he was not even in the court room. He said that although he had been involved in collecting the accused from Harare to Chivhu after his arrest by ZRP Southlea Park and had also escorted the accused to court, he had not participated in interviewing the accused. He said that if the investigating officer had told the court that he participated in interviewing the accused, he had made a mistake because he was never involved in interviewing the accused. He said that since he was not involved in interviewing the accused, there is no way he could have assaulted him. He said that he did not even see the metal coffin the accused was talking about.

During cross-examination he said that the accused could have picked on him simply because he had been at Chivhu CID longer than his colleagues who had interviewed him. He said that the accused might have settled for a familiar name. He said that if he had assaulted and threatened the accused with a gun as he alleges, the accused ought to have told the magistrate who confirmed his warned and cautioned statement about it.

The accused's evidence

The accused was the sole witness for his case. He had intended to call his maternal grandmother as a witness to testify on the bad relationship that exists between him and his brother Norman Chaira, but he later abandoned this saying that his grandmother was not available to testify. This was despite the fact that the court had postponed the case to enable the grandmother to come to court and testify. Be that as it may, the accused gave the following

evidence. He was at home in Chaira village in Chivhu from 6pm of 16 May 2022 to 6am of 17 May 2022. He said that he had last seen Panashe Chaira his young brother on 16 May 2022 at 4pm at home at the time he came from collecting cattle from the grazing area. We take note that the defence counsel did not put this to Panashe Chaira when she was cross-examining him. This ought to have been put to Panashe in view of the fact that Panashe said that he last saw the accused at home at 4pm before he went to collect the cattle.

In giving his evidence in chief, the accused commented on the blood-stained clothes that were produced by the State as exhibits three, four and five. He said that although he knew the clothes in question, the problem was that there are two pairs of identical tracksuits at their home. He said one pair is his and the other pair belongs to Panashe Chiara, his young brother. He said that he was not sure if the pair that was produced in court is his or Panashe's. What we find unsatisfactory about the accused's evidence is that he did not have this put to Panashe by his legal practitioner during cross-examination. If this was true, it should have been put to Panashe to enable him to comment.

The accused went on to say that on 16 May 2022, he was wearing a blue t-shirt and a pair of black denim trousers. He said that his friend Bothwell Gurende was a witness to this. Surprisingly, the accused did not call Bothwell Gurende to testify on this issue. We do not find the evidence of the accused credible on this issue. We believe the evidence of the accused's brothers Norman Chaira and Panashe Chaira who testified that on 16 May 2022, the accused was wearing the clothes that the State produced as exhibits three, four and five. The two corroborated each other and impressed the court as credible witnesses. We do not see why the two witnesses would lie against their brother.

The accused said that he was indeed arrested in Harare and collected by detectives from CID Chivhu. He said that they arrived in Chivhu in the evening. He said that the police officers assaulted him before they placed him in the cells. He said on the following morning he was taken to the CID offices where he was severely assaulted whilst in handcuffs. He said that an iron rod was placed between his knees whilst his feet were chained with leg irons. He said that he was placed on a desk with his legs up and the detectives began to assault him on the soles of his feet as they were asking him to tell the truth. He said he continued to deny any knowledge of the murder. The accused said that when the detectives realized that he was not admitting to the offence, they took him to a room where there were some coffins. They placed him inside one of the coffins and closed it. They had told him that they were going to dig a pit and place the coffin in the pit. He said after the coffin was closed, it was carried to a motor vehicle. The

accused said he became afraid and hit the coffin asking the police to stop. He said that when the police asked him what the matter was, he told them that he now wanted to tell them the truth. He said that it was then that he told them that it was him who had murdered the deceased. He said there were four detectives and these were Mutausi, Milanzi, TK and a female detective called Moyo. He said the investigating officer Ricky Zhou never assaulted him, but he would come in and go as he was being assaulted. The accused said that when he eventually gave his warned and cautioned statement to the investigating officer, he was not free as he had been assaulted by the other detectives.

We find it difficult to accept the accused's evidence on the assault because the description and severity of the assault was never put to the investigating officer and Detective Mutausi when they were cross-examined by the defence counsel after they had given their evidence. It is clear that the accused chose to withhold the details of the assault until the defence case when the State had closed its case and its witnesses were no longer available to comment on his evidence or rebut it. The description of the assault ought to have been put to the police officers to enable them to respond to it. With the detail the accused gave about the assault, we do not see why the defence counsel failed to put this detail to the police officers. We are left to conclude that the accused was fabricating his defence as the trial progressed. Our conclusion is strengthened by the fact that during the State case, the only police officer who was implicated in the assault of the accused was Detective Mutausi. Detectives Milanzi, TK and Moyo were never mentioned. It was only during the defence case that their names were mentioned for the very first time. The question is why were their names not mentioned when Mutausi's name was mentioned? There is no logical explanation for the omission of their names especially when one considers that they are alleged to have participated in the severe assault of the accused before his warned and cautioned statement was recorded. The omission of their names can only mean that the accused was concocting the assault story as the trial was progressing.

The accused went on to say that the contents of the statement are not true. When it was put to him by his legal practitioner that his warned and confirmed statement was later confirmed at court, he initially said he was unaware of it. He later on changed and said that the statement had been confirmed. It is surprising that he could even say that he was not aware that his statement was confirmed yet the magistrate who confirmed his statement appeared in this trial and testified on how he conducted the confirmation proceedings. The State called the magistrate because the accused had indicated that he was challenging the confirmation

proceedings. It was therefore absurd for the accused to turn around and say that he was not aware that his warned and cautioned statement was confirmed. This is evidence that the accused was lying through his teeth.

When the defence counsel asked the accused why he did not tell the magistrate that Detective Mutausi had threatened to shoot his legs if he did not have his statement confirmed in court, the accused said that he had met Detective Mutausi by the stairs on his way to the court room and the detective had said that if he was going to deny the contents of his statement, he was going to request him from the court and take him back to the police station to deal with him. When the defence counsel asked the accused who else was present when Detective Mutausi said this, the accused changed his story. That is when he said when they arrived at court from the police station, the investigating officer left him with Detective Mutausi as he went to a certain office with the papers. He said it was at that time that Detective Mutausi threatened him. The two stories that the accused gave clearly show that he was not telling the truth. In the first story he gives the impression that he was walking alone going to the court room and happened to meet Detective Mutausi by the stairs. The story is highly incredible because under no circumstances is an accused person who is in custody left to walk to court alone without being escorted by prison officers. The accused could not have met the detective alone by the stairs. When the accused realized that his story was not making sense after being asked who had witnessed the detective threatening him, he then changed his story and said the investigating officer had left him under the escort of the detective who threatened him. The inconsistencies in the accused's story make it as clear as daylight that the accused was lying about having been threatened with a gun by Detective Mutausi at court before confirmation proceedings commenced. If the accused had been threatened, he would have given a clear and coherent story of how this happened. This is more so in view of the fact that when the confirmation proceedings were conducted, the accused was no longer in police custody but in the custody of prison officers as he had already been placed on remand and in custody.

The accused confirmed going to Chaira village for indications after his arrest. He vehemently denied indicating to the police where it is said he threw the door latch. The accused said that he does not even know how the said latch was recovered. He said all he knows is that the police went to the backyard of the house and brought the latch to the front of the house where he was seated. This new version of events by the accused is surprising because during the State case, the accused's legal practitioner put it to Panashe Chaira (the accused's young brother) and the rest of the witnesses who were present during the indications that it was

Panashe Chaira who had picked up the latch. The accused's legal practitioner could only have said this on the basis of the instructions she got from the accused. By giving a different account in the defence case, the accused only showed that he was not telling the truth about how the latch was recovered. We are left with no choice but to believe the evidence of the State witnesses that the latch was recovered as a result of the indication that was made by the accused. All the eye witnesses and the police officers were in agreement on this issue. We have no reason to believe that they all lied against the accused.

During cross-examination the accused said that he left for Harare on 17 May 2022 around 4am. This was a departure from what he said in his evidence in chief. In his evidence-in-chief he said that he was at home from 6pm of 16 May 2022 to 6am of 17 May 2022. The variation in the times is a clear indication that the accused was not being honest about the time that he left for Harare. His brother Norman Chaira said that accused bade him farewell just after midnight on 16 May 2022. Panashe, his other brother said the same thing. We believe the two brothers because they corroborated each other and had no reason to lie against the accused.

The accused said during confirmation proceedings what was read out to him was not his warned and cautioned statement but the charge. Asked why this was not put to the magistrate during cross examination, he said that he thought that the warned and cautioned statement was the charge. Whatever he meant was not clear to us.

The accused said that the contents of his warned and cautioned statement came from the police officers who told him what to say. The accused however did not say which police officer told him what to say in his statement. Moreover, he did not say this when he gave his evidence in chief. If the accused could tell us that he was severely assaulted by the police, we do not see why he failed to mention at that stage that the police officers had gone on to tell him what to say in his warned and cautioned statement. To make matters worse the police officers who testified were not told during cross-examination that they were the ones who had told the accused what to say in his statement. It was only when the court asked the accused who exactly had told him what to say in his statement, that he said that it was Detectives Milanzi, Mutausi and Moyo. The question is why was this not put to Detective Mutausi when he testified? Why would the accused only say that Detective Mutausi assaulted him during investigations without saying that he was one of the police officers who had told him what to say in his warned and cautioned statement? A further question is, why would the accused say this after being asked by the court well after he had given his evidence in chief and after he had been cross-examines by the State counsel?

Analysis of evidence

That the deceased was murdered is not in dispute. He was last seen alive on 16 May 2022 at around 5-6pm by Tsitsi Homerai. By 6am of 17 May 2022, he was missing. He was dead. His body was retrieved from the well at his home later that morning. The fact that the hands and the mouth were tied with clothing items is evidence that the deceased was murdered. The pertinent question is, is it the accused who murdered the deceased?

What caused the accused to be arrested were his clothes which were produced as exhibits three, four and five. His brothers demonstrated beyond doubt that these clothes belonged to him and nobody else. In addition, the two brothers said that these were the clothes the accused was wearing on 16 May 2022, during the day and before he left for Harare that night. It is unfortunate that C.I.D Forensic was not able to examine the blood on them in order to determine whose blood it was. There is nothing to show that the blood was the deceased's. So, the blood does not link the accused to the murder. It provides no proof that the accused murdered the deceased. However, as was correctly submitted by the State counsel, the only significance of the blood is that it is what raised the suspicion that the accused could have murdered the deceased. It is on this basis that the accused was arrested. We therefore have to consider whether the State managed to present other evidence that proves that the accused is the person who murdered the deceased.

It is clear from the evidence led by the State that there were no eyewitnesses to the murder of the deceased. The deceased was murdered during the night between sunset of 16 May 2022, and sunrise of 17 May 2022, and he is a person who was staying by himself. The State counsel submitted that the State was seeking to rely on the accused's confirmed warned and cautioned statement that it produced. When the State counsel applied to produce the statement during trial, the defence counsel made no objection to the application despite the fact that the accused person had mentioned in his defence outline that he did not have it confirmed in court freely and voluntarily. By not raising an objection when the State counsel applied to produce the statement as an exhibit, the defence was simply saying that it was no longer challenging the propriety of the confirmation proceedings. In light of the provisions of s 256(2) of the CPEA which pertains to the admissibility of confirmed confessions or statements in court proceedings, we accepted the statement into evidence as exhibit 2. The provision reads:

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

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

The provision means that a confession or statement confirmed under the conditions specified in subsection (3) of section one hundred and thirteen can be presented as evidence in court by the prosecutor by the simple act of handing over the confession or statement. In other words, when the prosecutor produces the confession or statement, it is accepted by the court as evidence without requiring any additional proof or validation. The document itself is sufficient for its admission as evidence. However, in terms of the proviso, the accused can challenge the use of this confession or statement as evidence against him or her if he or she can prove that the confession or statement was not made by him or her, or that the statement was not made freely and voluntarily, without the accused having been unduly influenced thereto to make the statement. If the accused has already presented his or her defense during the trial, and the prosecutor believes that additional evidence related to the making of the confession or statement is necessary, the prosecutor can re-open the State’s case for that purpose.

As already stated elsewhere above, in the present case there was no challenge to the production of the accused’s confirmed warned and cautioned statement. What is confusing however is that after the defence had consented to the production of the confirmed statement, the State went on to lead evidence from the magistrate who confirmed the statement. It is not clear why the State still found it necessary to do so. When the defence does not challenge the production of a confirmed warned and cautioned statement when the prosecutor tenders it over the bar, it means that the propriety of the confirmation proceedings is not being challenged. It means that the defence will be saying that the statement was properly confirmed in terms of s 113(3) of the CPEA. In such a case it is therefore not necessary for the State to lead evidence from the magistrate who confirmed the statement.

It appears that the State counsel got confused by the fact that the accused had stated in his defence outline that his warned and cautioned statement was not confirmed freely and voluntarily. Maybe it is on this basis that the State counsel, decided to err on the side of caution by simply calling the confirming magistrate to testify on how he conducted the confirmation proceedings. On the other hand, considering what the accused had said in his defence outline, it is also not clear as to why the defence counsel consented to the production of the confirmed

statement when the State counsel applied to produce it. The defence was inconsistent in its approach to the challenges to the statement. It appeared as well that the defence counsel did not fully appreciate the purport of s 256(2) of the CPEA. The interpretation of this provision is that if a confession or statement is confirmed according to the conditions specified in subsection (3) of Section 113 of the CPEA, that confession or statement is admissible in evidence in court upon its mere production by the prosecutor. The prosecutor can present this confession or statement before the court without the need for any additional proof beyond the production of the statement itself. Put differently, if a confession meets the criteria outlined in subsection (3) of Section 113, it can be used as evidence in court without further verification. So, by not objecting to the production of the confirmed statement, the defence counsel was essentially saying that the confirmation proceedings were properly done in compliance with s 113(3) and are valid. The State counsel therefore did not have to lead evidence from the confirming magistrate.

In a case where an accused is disputing the propriety of the confirmation proceedings, and is alleging that they were not conducted correctly according to the conditions specified in subsection (3) of Section 113, he or she should raise an objection or a challenge at the time the prosecutor seeks to tender the confirmed statement as an exhibit. Once a potentially sustainable challenge to the confirmation proceedings has been raised, the confirmed statement cannot be admitted into evidence upon its mere production. The court will need to consider the validity of the challenge before accepting the confirmed statement. The State will therefore be required to furnish additional proof before the statement can be accepted into evidence by the court. The court is obliged to determine the validity of the challenge or objection as a separate preliminary issue of fact. See *S v Woods & Ors* 1993 (2) ZLR 258 @ 268 (S). The onus is on the State to prove beyond a reasonable doubt the absence of any irregularity in the confirmation proceedings. A challenge to the propriety of the confirmation proceedings need not be apparent in the record of proceedings. The challenge can be based on factors not shown in the record of confirmation proceedings. External factors such as denial of legal representation or police threats can be relied on. See *S v Slatter & Ors* 1983 (2) ZLR 144 (H) @ 158C-G and 160D-161B and *Attorney General v Slatter & Ors* 1984 (1) ZLR 306 (S) @316E-F. In *Tafadzwa Watson Mapfoche v The State* SC 84/21 MAKARAU JA (as she then was) said;

“In a long line of decided cases, the steps that a court must take where an accused person challenges a confirmed warned and cautioned statement is settled. It is this:

Where the accused raises a potentially sustainable challenge to the propriety of the confirmation proceedings, the court is obliged to determine the validity of that challenge as a separate issue of fact. The *onus* is on the State to prove the absence of any irregularity.”

The point that needs emphasis is that it is only in the absence of consent to the admission of the statement, that the court has to make a finding of fact on whether or not the statement is admissible evidence before proceeding with the main trial. There appears to be no decided cases which outline the procedure of dealing with the preliminary issue of fact. An outline of the procedure will therefore be of benefit to both the State counsel and the defence counsel for posterity. When the accused or the defence objects to the production of the confirmed statement, the court should stop the main trial and require the prosecution to prove that the confirmation proceedings were free from any impropriety. The following is the procedure.

▪ **Accused’s challenge:**

The accused raises an objection regarding the propriety (legality or fairness) of the confirmation proceedings. He or she outlines why he or she says the proceedings were conducted improperly, violated his or her rights, or were influenced by external factors. In other words, the accused lays the foundation of his or her objection or challenge.

▪ **The State’s evidence:**

-The State opens its case and the prosecutor leads evidence from witnesses (relevant officials such as the magistrate and prosecutor) who were involved in the confirmation proceedings. The witnesses testify on the circumstances surrounding the confirmation of the accused’s warned and cautioned statement.

-Depending on what the accused would have said in his or her grounds for challenging the confirmation proceedings, in some cases it may be necessary for the prosecutor to even call police officers such as the investigating officer and other police officers who accompanied the accused to court.

-The accused or his or her legal practitioner has the opportunity to cross-examine these witnesses.

-The State closes its case.

▪ **The accused’s evidence:**

-The accused opens his or her case and takes the witness stand. He or she now gives evidence under oath explaining why he or she says that the confirmation proceedings were not done properly.

-The accused can call witnesses to corroborate his or her story if he or she has any.

-The prosecutor has the opportunity to cross-examine the accused and his or her witnesses.

-The accused closes his or her case.

▪ **Closing submissions:**

-The State and the defence make submissions persuading the court to find in their favour.

▪ **Decision:**

The court evaluates all the evidence and arguments. The court examines the circumstances surrounding the confirmation proceedings and gives its ruling on the objection or challenge by the accused.

The procedure is akin to the procedure that is done in a trial within a trial for unconfirmed extra curial statements.

If the State is able to discharge its onus, the challenge by the accused is rejected and the statement is provisionally admitted into evidence. The onus then shifts to the accused to show, on a balance of probabilities, during the main trial, that the statement was not made freely and voluntarily and that therefore no weight should be placed on it. If on the other hand the accused's challenge is upheld, the confirmed statement is not admitted into evidence. It is treated as an unconfirmed statement. If the State still wishes to rely on the statement, it can conduct a trial within a trial. If the State has other evidence other than the warned and cautioned statement and does not wish to go into a trial within a trial, it can then abandon its reliance on the warned and cautioned statement. In the *Mapfoche* case *supra* MAKARAU JA said;

If the State discharges the *onus*, the statement is provisionally admissible and the onus shifts to the accused to rebut the presumption that the statement is admissible. The *onus* of proof on the accused is to prove on a balance of probabilities that the statements are inadmissible. If the accused's challenge is upheld, the *onus* remains on the State to prove beyond a reasonable doubt that the accused made the statement and that he made it freely and voluntarily. (See *S v Woods* 1993 (2) ZLR 258 (SC); *S v Slatter and Others* 1983 (2) ZLR 144; *S v Manukwa and Others* 1982 ZLR 30 (SC), and *S v Gwaze & Anor* 1978 RLR 13 at 18D-H.)”

The foregoing demonstrates that in *casu* if the defence wanted to challenge the propriety of the confirmation proceedings, the defence counsel ought to have raised an objection at the time the State counsel applied to tender the confirmed statement. This would have been consistent with the averment that the accused made in his defence outline. If the correct

procedure had been adopted, the main trial would have been stopped in order to determine the validity of the challenge as a separate preliminary issue of fact before allowing the confirmed statement to be produced. With the State having the onus to prove the absence of any irregularity, that is when the State would have gone on to lead evidence from the confirming magistrate and other witnesses. In turn the accused would have gone on to lead his evidence rebutting the evidence of the State. The challenge would have been determined before allowing the statement to be produced in evidence. So, as it is, the evidence that was adduced from the confirming magistrate is not of any use since the statement had already been produced when he testified. As such we will not analyse it.

Since the accused said that he did not make the confirmed statement freely and voluntarily to the police, its admission in court as evidence, was provisional. The onus shifted to him to prove, on a balance of probabilities, that he did not make the statement freely and voluntarily and that as such no weight should be placed on it. In terms of the proviso to s 256(2) of the CPEA, a confirmed warned and cautioned statement shall not be used against the accused if he proves that the statement was not made by him or that he did not make the statement freely and voluntarily without his having been unduly influenced thereto. In *casu* it is our considered view that the accused did not discharge the onus. The reasons are as follows. It was only during the defence case well after the State had closed its case that the accused said that it is the police officers who told him what to say in his warned and cautioned statement. This was never put to the investigating officer Ricky Zhou who recorded the accused's statement. This was never put to Detective Mutausi whom the accused later said had told him what to say. If this is what had happened, surely the accused would have mentioned this to the two police officers when they testified. The accused would not have waited to say it during the defence case well after the State had closed its case.

The accused also failed to show, on a balance of probabilities, that he was assaulted when he was being interviewed before his warned and cautioned statement was recorded. The only person that he implicated during the State case was Detective Mutausi. However, during the defence case he then said that he was also assaulted by Detectives Milanzi, Moyo and Tk. He said these people chained his hands and feet and placed him on a desk and severely assaulted him under his feet. He said that they then placed him in a metal coffin and then carried it to a motor vehicle. If Detective Mutausi had assaulted the accused together with Detectives Milanzi, TK and Moyo, why did the accused not mention Detectives Milanzi, TK and Moyo when the State was still leading its witnesses? Why would the accused wait until after the State

had closed its case to make this disclosure? This can only mean that the accused was not being truthful that he was assaulted. We are therefore satisfied that the accused made his warned and cautioned statement freely and voluntarily and that he was not told what to say by the police officers. It is on this basis that the finding was made that the accused's statement is admissible.

The contents of the accused's confirmed warned and cautioned statement read as follows.

"I admit the charge. I wanted money. I used a screwdriver to unscrew a hinge which was on the door and then entered into this grandfather's house and took some money. As I was exiting from the house, I then met this grandfather Gibson Mamire, the now deceased and we fought and I overpowered him. I took him into his house where I tied his hands behind his back with a neck tie, then a shirt and a t-shirt around his mouth. That is when I lifted him up and went and threw him in a well which was at the homestead, then I went home where I left my clothes and proceeded to Harare."

From the statement it is clear that the accused confessed to the murder of the deceased. What the accused described in his statement is consistent with what the State witnesses observed at the scene of crime. In the statement the accused said he fought with the deceased and tied his hands and mouth with a tie, t-shirt and shirt. The State witnesses observed that the deceased's hands and mouth were indeed tied with a tie, t-shirt and shirt when the body was retrieved from the well. In the statement the accused said that he threw the deceased into the well which is at his homestead. The deceased's body was indeed retrieved from the well at his homestead. In the statement the accused said after throwing the deceased into the well, he then proceeded to his home where he left his clothes and proceeded to Harare. This is consistent with what his brothers Norman Chaira and Panashe Chaira said. They both said around midnight on 16 May 2022, the accused bade them farewell saying that he was leaving for Harare. After he had left, that is when they saw the clothes he was wearing on 16 May 2022 in his bedroom on the floor. These clothes were produced as exhibits three, four and five. They had blood on them. In the statement the accused said that he broke into the deceased's house and stole money. The deceased's girlfriend Precious Mhenyu and the deceased's niece Tsitsi Homerai confirmed that money was stolen from the deceased's wardrobe. In the statement the accused said that he unscrewed the hinge on the door to the deceased's house in order to gain entry. The object that was produced as a hinge is not a hinge but a latch which keeps the door fastened. The investigating officer and all the State witnesses confirmed that the accused made indications leading to the recovery of the latch in the grass at the deceased's homestead. This is the latch that had been removed from the door leading to the deceased's house. From the evidence led, it is clear that had it not been for the indication that was made by the accused, the

latch would not have been recovered. He was the only person who knew where the latch was. Everything that the accused said in his warned and cautioned statement about how he murdered the deceased turned out to be true. This is evidence that it is him who murdered the deceased.

Although the State did not lead evidence on the unconfirmed indications that were made by the accused at the scene of crime, it led evidence to the effect that during the indications the accused caused the recovery of the door latch that had been removed from the door to the deceased's house. In denying having caused the recovery of the latch, the accused did not say that he was assaulted or threatened in any manner. He simply denied that it was him who told the police where the latch was. He said that he had no knowledge of how the latch was recovered behind the house and by whom yet during cross examination of State witnesses his legal practitioner was saying that the latch was picked up by his young brother Panashe Chaira. So, it was a dispute of fact between the State and the defence. The State witnesses satisfied the court as credible witnesses as they remained consistent. They also remained unshaken during cross- examination. We have no reason to disbelieve them. On the other hand, the accused was not consistent on the issue. What he said during the defence case is contrary to the instructions that he gave to his legal practitioner. In any case in his confirmed warned and cautioned statement the accused said that he used a screwdriver to unscrew the latch. This means he therefore knew where he had put it. This is further proof that the State witnesses did not lie that he is the one who caused its recovery at the deceased's homestead when he was making indications. This is further proof that it is the accused who murdered the deceased.

Evidence that was led from the State witnesses shows that when the deceased was thrown into the well, he was alive. The tying of the mouth was meant to ensure that the deceased would not cry out for help. The tying of the hands was meant to ensure that he would not by any means climb out of the well. As was correctly observed by the investigating officer, if the deceased had died before being thrown into the well, it would not have been necessary for the accused to tie him the way he did. He would have simply thrown him into the well untied. A person who throws another person head down into a well that is 7-8 metres deep after having tied their mouth and their hands behind the back intend nothing but death. Moreover, there was water in the well. So, there is no way the deceased would have survived.

We thus make a finding that the accused intentionally murdered the deceased. We find him guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act.

National Prosecuting Authority, the State's legal practitioners
L T Muringani Law Practice, the accused's legal practitioners