

STATE  
versus  
DAVID MUNETSI  
and  
JEWISH MUNDIHWO  
and  
LLOYD BODO  
and  
TRUST MUDZIDZWA  
and  
HARDLIFE MWONZORA  
and  
TINASHE MUNDIHWO  
and  
THOMAS MUNDIHWO  
and  
NGONI BUKUTA

HIGH COURT OF ZIMBABWE  
MUZENDA J

MUTARE, 14, 26, 14 JULY, 11 August, 16, 17, 22, 29 September, 1 and 14 October 2021.

Assessors: 1. Mr Mudzinge  
2. Mr Magorokosho

*M. Musarurwa*, for the state.  
*T. Kanengoni*, for the 1<sup>st</sup> Accused.  
*K. Kabaya*, for the 2<sup>nd</sup> Accused.  
*Mrs M. Mandingwa*, for the 3<sup>rd</sup> Accused.  
*Mrs M. Karimanzira*, for the 4<sup>th</sup> Accused  
*B. Mujamanda*, for the 5<sup>th</sup> Accused  
*D. Muture*, for the 6<sup>th</sup> Accused  
*T.T. Sigauke*, for the 7<sup>th</sup> Accused.  
*M. Mareanadzo*, for the 8<sup>th</sup> Accused.

MUZENDA J: All the 8 accused are charged of Murder as defined in s 47 (1)(a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] it being alleged by state that on 5 February 2017 and at Hobhouse Rank, Sakubva, Mutare, all accused and each or one or more of them acting in common purpose and in association with each other unlawfully caused the death of Josphat Munyoro by assaulting him several times all over the body using knobkerries, wooden sticks, machetes and golf clubs intending to kill him or realising that there

was a real risk or possibility that their conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which the said Josphat Munyoro died.

The pathologist who conducted a post-mortem on the deceased's body concluded that the cause of death was due to subdural haematoma.

All the eight accused pleaded not guilty to Murder and accused 3 pleaded guilty to culpable homicide.

In his defence outline first accused stated that he was nowhere near the scene of crime, he was at Makadzange bar watching football in the company of fourth accused. He admits meeting all other co-accused at seventh accused's house together with other men Nyasha Bukuta, Tendai Masaite, Trymore, Patrick Sanyanga, Tony, among others. He also acknowledges that discussions ensued at seventh accused's place later during that night and then proceeded home to sleep. He prayed for his acquittal.

Accused 2 in his defence outline stated that he received a phone call from first accused advising him about 6<sup>th</sup> accused's assault at Hobhouse rank. He was at Zvirimugwara bar. Accused heeded the call and proceeded to Hobhouse rank but found the rank deserted. From a distance he perceived a scuffle taking place but could not identify the people who were involved. He later proceeded to seventh accused's house where he stays. He was neither at the scene nor did he participate in the assault of deceased. He prays for his acquittal.

Third accused states in his defence outline that all the accused person's intention was to take over control of Hobhouse rank from a rival group. Accused 3 stated that he did not participate in the actual assault of deceased but was within the vicinity of where deceased was assaulted by Patrick Sanyanga who is at large. All the eight accused person belong to a gang known as "Osama" which is led by accused 7. He added that at seventh accused's house it was strategized that all the blame should be piled on him since he was the youngest and likely to attract sympathy of the court. He denied using a slasher nor any other weapon, but admits that he should not have associated with the gang whose other members assaulted the deceased leading to his death.

Accused 4 in his defence outline denied acting in common purpose nor association with any of the co-accused who caused the death of deceased. He denied being a taut and does not belong to any gang or group. On the date in question he was watching soccer at Makadzange bar in the company of first accused. After first accused received calls about sixth accused's assault, 4<sup>th</sup> accused decided to proceed to Hobhouse rank to check on sixth accused's condition.

Whilst on the way he slipped and fell resulting in him aborting the trip to rank. He heard second accused shouting that people should not assault the person on the head. Fourth accused did not see who was being assaulted nor did he know the assailant. He prays for his acquittal.

Accused 5 denied being a taut nor belonging to any gang or group. On the day in question he was inside Zvirimugwara shop at Sakubva when first and fourth accused entered and informed him that sixth accused had been assaulted. Fifth accused exited Zvirimugwara shop and came across a group of people who were coming from the scene of crime. He joined that group and accompanied the members to seventh accused's residence. He denied any involvement in the matter and prays for his acquittal.

Sixth accused states in his defence outline that he was the one who had a fight with Frank Tabvuma at the Hobhouse rank. He was assaulted by a wooden plank and sustained injuries on the head and elbow. He reported the assault to seventh accused. Seventh accused teamed up with some of the co-accused and went back to Hobhouse rank looking for Frank Tabvuma. 6<sup>th</sup> accused said further that deceased arrived at the scene in the company of third accused who all of a sudden started to assault deceased with open hands. He remonstrated third accused but accused 3 did not listen, he then saw third accused striking deceased with a slasher on the back of the head and deceased fell on the ground. Sixth accused informed seventh accused on what had transpired to the deceased and after that sixth accused joined other accused and proceeded to seventh accused's house where he was later advised that the now deceased had died. Sixth accused denied assaulting deceased and also denied possessing any weapon and distanced himself from events that led to deceased's demise. He prayed for his acquittal.

Seventh accused stated in his defence outline that he was told about sixth accused's assault by sixth accused himself but he told sixth accused that he was bound for work and sixth accused and Trymore left. Seventh accused later followed sixth accused to Hobhouse rank and met sixth accused, fourth accused, fifth accused, first accused, eighth accused and Patrick Sanyanga. He discouraged them from taking revenge but they could not obey him, except first accused who relented and remained standing with seventh accused. Seventh accused decided to go to his house. On the way he was caught up by fourth, sixth, eighth accused and Nyasha Bukuta and was informed by them that they had assaulted some people. He acknowledged that a discussion of what had transpired was held at his house although he did not participate in it. He denied causing any injury to deceased, he denied belonging to a gang and also denied acting in common purpose with any of the co-accused and prayed for his acquittal.

Eighth accused in his defence denied being a rank marshal and denied fighting with anyone. On the day in question he was called by first accused who informed him about sixth accused's assault. Eighth accused accompanied first accused to go and check the condition of sixth accused. Along the way they met fourth and seventh accused persons. At the rank eighth accused noted that there was commotion, he separated with his colleagues. Eighth accused noticed third accused striking deceased on the head and could not identify the weapon used. Deceased collapsed. Eighth accused left the scene and passed through seventh accused's house where he met his co-accused. He denied participating in the commotion which culminated in the fatal assault of the deceased and prayed for his acquittal.

In order to prove its case the state with the consent of all defence counsel produced the post-mortem report, first accused's confirmed warned and cautioned statement as well as those of second, third, fourth, fifth, sixth, seventh and eighth accused persons'. Indications were also produced as exhibits together with the sketch plan. The evidence of the following witnesses Wellington Chandipa, Sheila Chaedza, Bruce Chikukwa, Malinga May Salim, Dr Mutinhema, Dr R. A. Dozva, Anna Chipso Kasanayi and Joyce Kapfudza's evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act, [*Chapter (9:07)*].

The state led evidence from George Kanhanga. He was in the company of the deceased. He saw a group of young men whom he could not recognise facially emerging from the direction of the bus terminus at Sakubva Musika. When he was about to pass the boom gate he over heard someone from the group uttering the following "that is not possible, they can not assault our colleague so let us confront them." At that point the witness observed that now deceased was standing at the rank opposite N. Richards shop where commuters board buses going to Hobhouse. He walked at a faster pace to get into a stationary bus and incidentally met deceased. He warned deceased about the young men and potential danger looming judged by the threats the witness had heard. Deceased told the witness that he had not wronged no one to deserve an assault. Immediately thereafter the group of the young men arrived where he was with deceased. The group started to indiscriminately assault whomsoever it came across. Some of the members of the group approached the witness and deceased and enquired information about where they ordinarily reside and the two told the group that were staying in Hobhouse.

The witness went on to tell the court that he and now deceased walked for a short distance from the rank in order to get transport home. The young men caught up with the two, one of them asked the witness what he was looking for. Before he could respond he was slapped on either side of his face, he was also whipped at the back and he fled for a distance of 10-15m

and decided to stop. He turned his face back-wards to check on deceased and noticed that he was running following after him. Whilst deceased was running, he was struck on the forehead above the right eye but could not identify the assailant. Instead of boarding a bus going to Hobhouse he got into one going to town whereupon disembarking he was told about the condition of now deceased and went back to the rank. Upon arrival he discovered that deceased had passed on. Deceased's head was deformed and was frothing from the mouth. According to this witness the group had besieged unsuspecting people at the rank encircling them and placing them at the centre He could not go and help deceased because of the tense atmosphere attaining at the rank. The object that hit the deceased on the head was a hard object and the force used by the assailant was severe. He was able to see that the young men were armed with a golf stick, wooden planks and logs. He also heard the group uttering words pointing towards controlling the rank. The witness denied being a rank marshal nor belonging to any rival group which sought to control the rank. He also added that deceased did not belong to any rival group, he was just caught in cross fire simply because the young men were looking for someone who had dreadlocks and deceased had dreadlocks.

The state then called Collen Makura, a police detail. The witness' evidence mainly related to third accused's indications as well as to the admissibility of his extra-curial statements. At the end of state witnesses' testimony his evidence was subsequently admitted in terms of s314 of the Criminal Procedure and Evidence Act.

Frank Tabvuma (alias Mastove) testified. He knows all octet accused in one way or the other but none of them is a stranger to him. On 5 July 2017 he was at Hobhouse rank in the company of Simbarashe Saungweme, Freddy Kandiyero and McDonald Karumbidza. He noticed that the sixth accused was also at the rank accompanied by three other young men. They approached him and asked him to buy some bananas for them and he gave them. Later one of the young men he had given bananas returned to him in the company of the other and started to assault the witness. He was hit with a stone on his right cheek. The assailant was armed with a piece of a plank and the assailant was identified as sixth accused. He was further hit on the rib cage and when sixth accused tried to hit the witness using a plank for a second time, the witness wrestled the plank from sixth accused and struck sixth accused on the left elbow and the trio fled.

He went on to tell the court that on the second occasion he saw a group of young men which included an older person, who is seventh accused among them. The group was armed with golf clubs, planks among other weapons and he also realised that seventh accused

appeared to be the ring leader of the young men. He noted the presence of second, fourth and sixth accused who was by then bandaged on his elbow, he also noted eighth accused among the group. The witness panicked and decided to seek refuge behind N. Richards shop. However from that position he was able to see what was happening. He observed Mc Donald being assaulted by the group and according to him it was a mob attack. He saw the assailants leaving McDonald advancing towards Simbarashe Saungweme who was seated besides deceased. One of the group pushed Simbarashe aside in order to get where now deceased was. The group was after Nicholas Muchemwa who was dreadlocked. The group got to where the deceased was and assaulted him. The witness left his hiding place and ran towards the industrial area at that time the group was assaulting the deceased. He saw the group using weapons and he was approximately watching from a distance of 25m away. During the melee the assailants uttered words to the effect that they did not want “Mastove” to control the rank, they preferred someone from their group.

The witness added that he saw second accused armed and participating in the assault of deceased. He was aided by lights of motor vehicles passing by. He did not clearly see what role third accused played on that day nor did he see what fourth accused did. However he was adamant that he saw fifth accused randomly assaulting people. Sixth accused was to the witness the instigator and he saw him assaulting the deceased, the seventh accused was the ringleader who commandeered the youngsters. He added further that the eighth accused was equally armed and he observed him actually participating in the assaulting of the deceased as well as other people at the rank. He denied that the deceased belonged to any group or gang.

Under cross examination the witness reiterated that he managed to identify second accused by his facial features. He denied that second accused was somewhere else than where he saw him. He added further that all the eight accused walked towards Zvirimugwara bar after the skirmishes at the rank and denied falsely implicating second accused. The witness was asked by third accused’s counsel to explain the discrepancy between his statement to the police where he implicated first accused and his evidence in chief where he states that he did not see first accused assaulting deceased though present at the scene and dithered about that version. During cross examination by fifth accused’s counsel he maintained that he positively identified first, third, sixth and eighth accused as assailants of the deceased on the day in question. He further added that fifth accused’s alias is “Maphone” since his trade is that of repairing cellphones. He saw fifth accused assaulting deceased as well. He admitted that not all of the

accused are touts but they all wanted to take control of Hobhouse rank. The witness went on to add that fifth accused used a weapon to assault the now deceased.

Under heated cross examination by sixth accused's counsel, the witness emphasised that sixth accused provoked him, assaulted him and later on went away to summon his colleagues, returned to the rank and randomly assaulted people. Sixth accused was among the group which besieged deceased and took part in the assault of deceased. He repeated that when deceased fell he was unable to get up.

When he was cross-examined by seventh accused's counsel, he admitted the version of George Kanhanga was different from his. What he reiterated, however was that from a distance he discerned that seventh accused appeared to him a field marshal. He was also injured on the eye as a result of sixth accused's assault.

He was questioned by eighth accused's counsel and told the court that the people who assaulted deceased repair and sell, cellphones and lift weights at seventh accused's house. This is the information he supplied to the police. The same group of people had previously attacked him before attacking the now deceased.

Freddy Kandiyado testified. He knew deceased as a friend and they grew up together. He is known to all the eight accused. During the afternoon of 5 July 2017 all accused had visited the rank intending to collect money from buses but they faced resistance from Frank Tabvuma's group and literally hid in the banana tables near Hobhouse rank. The group returned around 1900hours and the witness managed to identify first accused, second, fourth, fifth and seventh accused. The remainder of the group concealed their faces. Second accused was armed with a golf stick, fourth accused was armed with an unknown weapon but the witness later changed his story and told the court that fourth accused was armed with a golf stick. The witness did not see deceased being assaulted but was adamant that the assailants were looking for a dreadlocked man, deceased was mistakenly attacked. He was also able to see that the group of attackers were armed with golf sticks, thick planks and fourth accused could have been wielding a machete, the witness was not sure about that. Third accused was armed with a weapon but the witness, could not see what it was. However first and second accused were to the witness, the front runners. The group of attackers, all accused, wanted to overrun and take over the rank removing Frank Tabvuma's group and the witness was perplexed by this motive since all the eight accused were dealers of cellphones at the rank. He was not new to first accused for they had previously worked together. He insisted that the scene was well-lit from vehicle lights and he was sober on the night in question and could not have been mistaken on

what he had seen. He added that second accused was known to him as a brother to seventh accused and George Kanhanga used to stay together with deceased. The witness told the court that he did not see the 8<sup>th</sup> accused.

Simbarashe Saungweme also testified. He knows all the eight accused as well as the deceased. Before the attack on deceased there were skirmishes between two rival groups which wanted to control the rank. He told the court that he saw all the eight accused at the scene and deceased was just behind him though he had not taken note of that prior to the melee. He saw about 50 people emerging from the banana tables and heard one of them bellowing orders that all people should be assaulted, one of the members of the group wanted to attack the witness but was stopped and told to look for one in dreadlocks. In that group of attackers the witness told the court that all the eight accused were present and immediately after deceased was attacked and collapsed he identified first, second, third, fourth, fifth, sixth seventh and eighth accused persons . First accused was not armed, 2<sup>nd</sup> accused had a plank, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> were not armed at the time he saw them and 4<sup>th</sup> accused was urging his colleagues. 8<sup>th</sup> accused was armed with a knobkerrie and 7<sup>th</sup> accused was a ringleader. It was Osama, 7<sup>th</sup> accused who ordered the group to disperse after deceased had been attacked. The witness described the scene as tense, scary and dangerous as customers scampered for cover to save their lives, he also heard McDonald screaming in pain. Asked by first accused's counsel about first accused not being present at the scene the witness told the court that he saw first accused with his own eyes. When the accused arrived at the rank they asked the witness on the whereabouts of Frank Tabvuma and at that moment he observed first accused wearing a blue pair of jean trousers and a t-shirt. Hence he says he was not mistaken about the presence of first accused at the scene.

The last state witness called by the state was McDonald Karumbidza. He knows each of the eight accused either prior to the commission of the offence or in connection with the matter before the court. He confirms that 6<sup>th</sup> accused had had a scuffle with Frank Tabvuma and that 7<sup>th</sup> accused was the group leader of all the eight accused. McDonald admitted being a tout and operates at Hobhouse rank. He did not see first accused assaulting deceased on that day. He saw second accused coming to the scene armed with a plank or a log, he saw third accused at the scene armed with a weapon which looked like a plank or piece of brandering but did not remember what third accused did at the scene. Fourth accused was previously involved in a scuffle with Frank Tabvuma then went away. Later he returned in the company of the group of young men who had been mobilised by sixth accused. Fifth accused was among the young men who came with fourth and sixth accused around 1900 hours. When sixth accused

returned to the rank in the evening the witness told the court that he was carrying a weapon but could not precisely tell what it was. The seventh accused was described by the witness as the leader of the youthful group and wanted to resolve the rank dispute by taking it over. The eighth accused was at the rank, he approached the witness in the company of third accused and wanted to beat people at the market. Third accused later assaulted the witness during the presence of eighth accused and the witness was assaulted roughly at the same time deceased was attacked. Under cross examination by counsel it appeared that the witness was not sure of the exact weapon third accused attacked him with. The witness added that the fifth witness acted in solidarity with his co-accused and appeared to be sympathising with them during the commotion and supported the cause of what was happening. After the melee all the eight accused went to gather at first accused's work station. After his testimony the state closed its case.

First accused testified and virtually stuck to his defence outline. He was also known to all the co-accused, they either worked at the rank or meet for gymnastic exercises at accused seven's house. He did not deny much of what his co-accused stated both in their defence outline as well as evidence in chief more particularly about him being at the rank at the material time, about him assembling with all others at his work station and gathering at seventh accused's residence. He could not proffer a plausible explanation why his colleagues particularly third accused, would falsely implicate him. Admittedly there was no bad blood amongst them and no reason was advanced by first accused why he was arrested and why some of the state witnesses especially Frank Tabvuma and Freddy Kandiyado would say he was among the assailants of the deceased and third accused saying that a meeting was held at seventh accused's residence three days before 5 July 2017 where it was agreed that the group would take over Hobhouse rank.

Second accused took the witness box. He told the court that he attended the scene but could not see anyone. He proceeded to seventh accused's house where he heard Patrick Sanyanga talking of having assaulted someone who had sustained serious injuries. No one at seventh accused's residence made comments after Patrick Sanyanga made the utterances. He could not explain the discrepancy between the information in his defence outline on whether at the time of the scuffle he was at home or at Zvirimugwara bar. He admitted that after the skirmish all the accused assembled at seventh accused's place but he distanced himself from those who were discussing since he was cooking sadza. He denied participating in a meeting alluded to third accused where accused decided to place all blame on third accused. He could

not explain the reason why some of his co-accused placed him at the scene of the incident. After his testimony he had no witness to call.

Third accused testified. He denied being in possession of a slasher as indicated in his indications to the police. He knows all the other co-accused in this case. He told the court that three days prior to the fatal assault of now deceased, all accused had gathered at seventh accused's residence and all resolved unanimously to take over Hobhouse rank. Seventh accused was pointed as the chief strategist. To accused three both first and second accused were at the scene of the crime but first accused was unarmed, but second accused had chuckle sticks, fourth accused had a whip, fifth accused was unarmed, sixth accused had a piece of a plank, seventh accused had a machete and eighth accused was armed with a golf stick. Third accused denied assaulting the now deceased. A whistle was blown to disperse and all accused converged at seventh accused's residence. Third accused saw fifth accused at the rank and fifth accused attended all the meetings alluded to in his evidence in chief. He added that what triggered the commotion on 5 February 2017 was the assault of sixth accused. He also spoke of the 5-2-1 formation where some of the accused had to be acquitted and others absolved and third accused to be convicted of a lesser offence and get sympathy from the court. Third accused did not have witnesses, he closed his case.

Fourth accused testified and principally stuck to his defence outline. After he fell he did not proceed to the scene but admitted gathering with others at seventh accused's residence. When third accused's counsel cross examined fourth accused he admitted that the place he allegedly fell is close to Hobhouse rank. He could not explain why third and sixth accused placed him at the scene and why third accused implicated him. He closed his case.

Fifth accused gave evidence. He insisted that he did not reach the scene of crime but was at seventh accused's house where all others gathered. He echoed what has become a chorus to all accused persons that Patrick Sanyanga had badly injured someone during an assault at the rank. He could not explain why Frank Tabvuma told the court that he saw him at the scene. He used to have cordial relations with both second and third accused and does not know why the two would implicate him. He then closed his case.

Sixth accused adopted his defence outline in his evidence in chief. He added that he met third, seventh accused, Stephen and Muzarewetu who told him of a misunderstanding with Frank Tabvuma. He repeated his version that third accused struck the now deceased on the head. He further told the court that eighth accused was at the scene standing next to first accused. After the assault all eight accused met at seventh accused's house and whilst there

Patrick Sanyanga made a confession of assaulting someone but did not say who it was. The sixth accused saw third accused emerging from the banana tables to assault the now deceased. He closed his case.

Seventh accused testified and adopted his defence summary. He denies being the leader of all the seven co-accused. He did not participate in the discussion at his home because he was preparing to go to work. He dithered about gymnastics activities at his house and literally abandoned his alias “Osama”. He closed his case.

Eighth accused gave evidence and similarly adopted his defence summary to form part of his evidence in chief. Eighth accused in his evidence in chief conceded and confirmed that he went to the scene but qualified his statement by stating that he was watching from a distance. He witnessed both fourth and sixth accused persons at the scene. He confirmed that sixth accused informed him about the assault by Frank Tabvuma. He reiterated that he saw third accused assaulting the deceased but did not remember what he (third accused) used but third accused struck now deceased on the head. He was at an estimated distance of six to eight metres from deceased and third accused. After the melee he also proceeded to seventh accused’s residence where he heard Patrick Sanyanga speaking of having stoned someone and that the person fell. He also heard one of his fellow accused stating that third accused’s victim had been injured. Eighth accused was certain that it was third accused who had delivered a fatal blow on deceased.

#### The Law

Section 196A of the Criminal law (Codification and Reform) Act, [*Chapter 9:23*], deals with the liability of co-perpetrators who knowingly associate for common purpose of committing a crime or crimes. As clearly and competently traversed by her ladyship MAKARAU JA (as she then was) in the seminal case of *Tungamirai Madzokere and 3 others v The State* SC 71/21 the common law principle of common purpose had been re-enacted with modification that restricted its application. Principally, the state had to lead evidence tending to show firstly that the accused knowingly associated with the person who killed deceased, secondly that such association was with the intention that each or any of them would kill or be prepared to kill the deceased and thirdly that the accused were present with the actual perpetrator when the fatal blow was delivered. A common intent had to be proved or *in casu* that all the eight accused knowingly came together with one intent for the purposes of the law.

On page 18 of the cyclostyled judgment the learned judge of appeal made the following pertinent observations:

“I pause to observe that the cases where the common law principle of common purpose was applied successfully in this jurisdiction invariably involved a team or group of persons setting out to commit a crime. The accused persons knowingly embarked on their respective criminal enterprises ....see *State v Mubaiwa and Another* 1992 (2) ZLR 362 (SC) *State v Ndebu and Another* 1985 (2) ZLR 45 (SC) *Matende and Machokoto v State* AD 55/79.....”

The law as provided in s196A seeks to penalise two or more people who knowingly embarked on criminal enterprise. Equally so MCNALLY JA in the case of *Safa Ncube v State* SC 90/90 remarked as follows:

“The essence of the doctrine of common purpose is that when two or more persons associate in a joint unlawful enterprise each will be responsible for any acts of his fellows which fall within their common design ...Association in a common design or object or purpose is, in this case, the key issue”.

Hence as per *Madzekerere* case (*supra*) it is mandatory for the state to prove that each of the accused had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit or the knowledge that it would be committed or the realisation of a real risk or possibility that a crime of the kind in question would be committed. Each of the accused person must actively participate in the murder and his association must be direct and be active in nature.

It is also imperative to note that for one to be convicted of murder in terms of s47 of the Criminal Code the following elements had to be established, that accused killed the deceased, accused acted with intent to kill or realised that there is a real possibility that his or her conduct may cause death but continued to engage in that conduct despite that possibility or risk and that accused acted unlawfully. On the other hand for one to be convicted of culpable homicide in contravention of s49 of the Criminal Code it must be shown that the person caused the death of another negligently failing to realise that death may result from his or her conduct or realising that death may result from his or her conduct negligently failed to guard against that possibility.

All the accused persons’ counsel are unanimous that each accused blames one another and that the court is dealing with evidence of an accomplice or a suspect witness.

In *State v Chingono* 1995 (2) ZLR 116 (H) BARTLETT J held on p 117 B-C

“that the principal reasons for observing caution in evaluating the evidence of an accomplice are

- (a) He is ex hypothesis a criminal himself.
  - (b) Because he has taken part in the commission of the offence he is peculiarly equipped to convince the court that his lies are the truth and
  - (c) There is the possibility that he may have implicated the accused in order to ingratiate himself with the police and improve his chances of securing an indemnity for himself.
- In this case, however, it was common cause that the accused was involved, the only question being the degree of his involvement .....

At p 117 F-G the learned judge held further:

“...that it was then necessary to consider whether the court might have been deceived by plausible witnesses. The best way to be satisfied that an accomplice is reliable is to find corroboration implicating the accused. The risk in accepting the accomplice’s evidence would also be reduced if the accused were found to be a liar. If this were not shown, the court could still convict if, being aware of the danger, it was satisfied that it could rely on the accomplice’s evidence because the merits of the accomplice as against the accused as a witness was beyond question. What this meant was that if the court, having warned itself was satisfied that despite the imperfections, the evidence of the accomplice is reliable and that the demerits of the accused’s evidence are clear, then a conviction would be appropriate.”

Cautionary is one of the practice and must be followed whenever the evidence of a certain class of witnesses is under scrutiny. It serves as a constant reminder to courts that the acceptance of the credibility of certain witnesses may prove dangerous. It ought to be viewed with suspicion. However as regularly emphasised by these courts, caution should not be allowed to displace the exercise of common sense. Further corroboration is not the only manner in which the cautionary rule should be satisfied. Any factor which can in the ordinary course of human experience reduce the risk of a wrong finding will suffice for example, mendacity (or untruthfulness) a failure to cross examine, the absence of gainsaying. All these factors constitute a circumstance in favour of the truth of such ordinarily suspect evidence emanating from an accomplice. Moreso the risk of false incrimination will also be reduced in a proper case where the accomplice is a friend of the accused (See *State v Masuku and Another* 1969 (2) SA 375-7).

What is important in all situations is for the court to be alert to the dangers of accomplice evidence. In the same view where two or more persons are jointly charged with an offence and each gives evidence blaming the other for the offence, the evidence of each is admissible against the other, but the court must approach the evidence with great caution since there is an inherent risk that either or both or all may be seeking to protect oneself by telling lies. In my view where accused are jointly charged and an accused opts to give evidence under oath and implicates a co-accused there is no legal basis for the court to disregard that evidence as long as the court has to look at the credibility and plausibility of such evidence juxtaposed

with the totality of evidence placed before it. As emphasized in the matter of *State v Chouhan* 1986 (2) ZLR 237 (SC) at 237E per DUMBUCHENA CJ.

“It is proper to treat with caution and call for corroboration of the evidence of every witness who has a motive to implicate the accused; an accomplice has a motive to benefit himself by implicating the accused and has the advantage of being in a position to deceive the unwary by giving a realistic account of the offence in question”.

#### Submissions by the respective parties

Mr *Musarurwa* for the state submitted that all the state witnesses should be found credible. He also averred that the evidence of each accused is admissible against the other. He urged the court to accept third accused's evidence implicating all other seven. All the accused conspired to commit the offence three days before the eventful date. Accused six and eight implicated third accused as the one who fatally struck deceased. He added that the state established that a group of accused were armed with lethal weapons among these golf sticks, wooden planks, chuckle sticks, whips and metal bars. The state further submitted that the issue of *mens rea* is clear and urged the court to convict all eight accused of murder with legal intent or culpable homicide. He however conceded that there is no evidence to suggest that accused intended to kill the deceased. The state went on to add that third accused attacked deceased with a slasher on the head and used excessive force and hence ought to have foreseen that assaulting deceased on the head using a slasher had a real risk that death would occur. He concluded by submitting that once third accused is found guilty of murder with constructive intent, it follows that all other co-accused be found guilty of the offence.

To the contrary all eight defence counsel with the exception of third accused, contended that the state has failed to prove its case against the accused. They all invariably and similarly submitted that benefit of doubt should be accorded to the accused and a verdict of guilty be returned on each. The defence urged the court to find no credit in the state witness' evidence and rule that s 196 A of the Criminal Code does not apply in this matter. Third accused's confession, it was submitted, should also be treated with circumspection and be rejected. All counsel are unanimous on the issue of treatment of accomplice evidence and in their submissions quote almost similar cases to advance their submission. They are also in agreement that conspiracy and common purpose occupy the pivot of the case before us. However not much effort was done by counsel to address the issues in *extenso*. A relatively cursory address was done.

### Application of the law to the facts

As crisply elucidated by state counsel as well as third accused's defence counsel there is largely, and admittedly a number of common cause issues. All the eight accused are known to one another and before this date, cordially related socially in business as well as fitness exercises. There is no bad blood amongst all the accused. Some are even related in one way or the other. On 5 November 2017 sixth accused had a scuffle with Frank Tabvuma, leader of a rival group of touts at Hobhouse rank. Sixth accused was overpowered and injured in the melee, he left in a hush and left the rank to coordinate reinforcement. All the seven accused responded in solidarity and headed for the rank. A declaration was made by accused's group that people should be assaulted at the rank. Deceased was at the rank but did not belong to any group of rank marshals but had dreadlocks. The original drive of the accused group was to take revenge of the sixth accused's assault on Frank Tabvuma but none of the group managed to locate Frank Tabvuma. Several people were assaulted by the group at the rank and some of them were seriously injured. Deceased was one of those injured who were indiscriminately assaulted and deceased sustained serious injuries and was pronounced dead at the hospital.

All accused in their extra curial statements and evidence in chief speak of Patrick Sanyanga who is still at large being part of the assaults and others believed he is the one who delivered a fatal blow on the deceased. Accused 3 admits being part of the group and tendered a plea of guilty to culpable homicide. All eight accused left the rank and convened at seventh accused' residence and even though some of the accused saw that deceased had been badly injured none of them offered help to the deceased, they left him lying helpless where he had been assaulted. It is common cause too that there was apparent pandemonium at the rank caused by violent behaviour of the riotous group of young men and people ran in all directions to save lives. Indeed the foregoing seem not to be controverted by any of the accused.

It can be observed that generally all state witnesses told the court what each perceived at scene. They were positioned at different locations and some of them were witnesses of assault as well. A lot of criticism was attributed to these witnesses and for sure witnesses had different versions here and there during their testimony. However the differences cannot be adjudged to be material. There was commotion at the rank and a lot of mobility and anxiety but what is clear is that none of the witnesses was proved to have exaggerated his testimony by the defence. For those who identified each of the accused, they were consistently stating that they saw accused at the scene and were not mistaken about that. We are unable to agree with defence submission that Frank Tabvuma and other witnesses were accomplices or suspect witnesses.

Frank Tabvuma was unlawfully attacked by sixth accused and his colleagues and only reacted in defence of self. We see no legal basis for treating witnesses called by the state as suspect witnesses who would attract a cautionary approach by the court. We found that all state witnesses fared well on the witness box and we accept their evidence putting all eight accused on the scene. In any cases in addition there is evidence of the co-accused. As clearly repeated by His Lordship BARTLETT J in the *Chingomo* case (*supra*) at 117 D-E:

“...that it had to be remembered that one cannot expect witnesses of that kind to be wholly consistent, reliable and truthful. It is necessary that the court should be satisfied beyond reasonable doubt that in its essential features the accomplices’ story is true, but if more than that were required, the administration of justice would in many cases be rendered impossible. There were discrepancies, alterations and contradictions in the accomplice’s evidence, but it had to be remembered that both were unsophisticated and uneducated, and taking into account those facts the accomplices were credible witnesses in the essential features.”

Accused testified against each other and implicated one another right from the date statements were recorded by the police. Others implicated the others during indications which also form part of extra-curial statements. The confirmed warned and cautioned statements and indications were produced in court as exhibits and not challenged. First accused was placed on the scene by state witnesses as well as by co-accused. All agree that he was not armed but was part of the gang. He arrived at the scene with co-accused, masterminded the assault of people at the rank, he also simultaneously left the rank with his co-accused to go to seventh accused’s place of residence. All aspects were not challenged by first accused. All the other seven accused implicate one another and none of them proffer any cogent reason why co-accused would lie against any of them. We accept each respective implication by accomplices as credible and plausible. In each case we find the evidence of each accused against that of the accomplice, each accused was a poor witness whose evidence was unreliable and unconvincing. Some of the accused could not explain the discrepancy between their evidence in chief and defence outline professionally prepared on their behalf. Their versions were widely improbable whereas that of the accomplices more particularly third accused’s was substantially probable. Viewing the third accused’s evidence against that of the accused persons, the danger of false incrimination had been eliminated. Accused 3 had virtually nothing to benefit from falsely implicating the co-accused. He was their partner and close friend who responded to sixth accused’s call to avenge an assault. None of the accused advances a plausible explanation as to why third accused would lie against any of them. He chose to tell the truth about who was part of the gang and we would take him as being truthful on that aspect. The court will also accept his version that prior to the eventful date, the group had met and resolved to team up

and take over the Hobhouse rank employing any workable method. We have also carefully looked at the version of the third accused and accepted that all the eight accused assembled before randomly attacking people at the rank, they were then ordered to disperse and met at seventh accused's house where a lot of strategies were debated including shifting all blame to third accused. We also further take it as proved that seventh accused was the leader of the group and was in control of the accused persons. We also find credence in the evidence of third accused about the 5-2-1 formula. Accused persons did not spiritedly challenge this evidence, we take it as true and explains why all other accused in giving their statement to the place chose to implicate Patrick Sanyanga as the perpetrator just because he is not in court.

The next question is who fatally struck the deceased? Sixth and eighth accused point to third accused. Third accused made indications to the police placing himself right at the scene. During indications he alluded to the slasher and his version is that if he had used the slasher visible injuries could have been noted by the doctor. The postmortem alludes to head injuries, its not clear which part of the slasher was used so that one could certainly infer that the part of the slasher used could have left visible wounds or scars. In the same vein we do not find any reason why sixth and eighth accused would lie against third accused. All the three accused, third, sixth and eighth accused among others were at the scene and saw third accused striking deceased who instantly collapsed. We are satisfied that third accused is the one who hit deceased on the head with an unknown object.

For a court to return a verdict of murder with actual intent, the court must be satisfied beyond reasonable doubt either that the accused desired to bring about the death of his victim and succeeded in completing that purpose or that while pursuing another objective the accused foresaw the death of his victim as a substantially certain result of that activity and proceeded regardless. A verdict of murder with constructive intent, on the other hand requires the foreseen result to be possible as opposed to being substantially certain, making it a question of degree more than anything else. (See *S v Mugwanda* 2002 (1) ZLR 574 (S)). Third accused struck deceased on the head and the post-mortem report shows that injuries were concentrated on the upper vulnerable part of the body mainly the head, he used a slasher and these facts show that third accused foresaw the possibility of the deceased's death as a consequence of the assault and persisted with the assault. We are satisfied that he should be found guilty of murder with constructive intent and reject his plea of guilty to culpable homicide.

Accused 1, 2, 4, 5, 6 7 and 8 were all aware that they were going to avenge sixth accused's assault on Frank Tabvuma and the group was heard uttering words to that effect.

There is also evidence that one of the members of the group was heard bellowing orders of beating people at the rank. Sixth accused's assault triggered the melee and availed to the accused a ripe opportunity to wrestle control of the rank. All accused were aware that what they were doing was unlawful. They were aware that some of them were armed with lethal weapons and such weapons could potentially be used during the melee by any one of them. It was not relevant whether first accused or any other of them was armed with a weapon or not, the act of one would be the act of the other. Assaulting of people was one of the design to revenge the assault on sixth accused or to take over the rank and it was foreseeable that one of those armed members of the group could use such a weapon. We do not accept that first and seventh accused discouraged those unarmed youth from behaving violently. Seventh accused was the frontliner and architect among the young group. It therefore did not matter which member of the group actually killed the now deceased. All accused must have foreseen that anyone at the rank attacked during the skirmishes by the use of such weapons could be killed even in cross-fire. (See the case of *State v Chauke* 200 (2) ZLR 494 (S)).

A lot of energy has been used to point out about the onus of proof by the state in this matter. In the matter of *S v Isolano* 1985 (1) ZLR 62 (SC) the then Chief Justice, His Lordship DUMBUTSHENA CJ cited the celebrated English case of *Miller v Minister of Pensions* [1974] 2 ALL ER 372 (KB) per Lord DENNING describing the degree of proof at 373H as follows:

“...and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

In our view the degree of proof required in a criminal case has been fulfilled. We are further satisfied that all the requirements of s 196 A of the Criminal Code were fully established by the state beyond reasonable doubt. All accused enthusiastically and actively participated or associated themselves with the commission of the crime in such a manner as to attract criminal liability. All were present at the scene when third accused delivered the fatal blow and all departed upon being alerted through a whistle and all headed to seventh accused's place of residence.

The remaining seven accused are found guilty as co-perpetrators of Murder with constructive intent.

## SENTENCE

In arriving at an appropriate sentence the court will take into account what has been submitted by both state and all defence counsel. Life was unnecessarily lost and it is obvious that from the time deceased was struck on the head, he never recovered. The attack was callous, severe and merciless. Deceased had not wronged anyone of the accused, his mistake was that he was at the wrong place at the wrong time. There is freedom of movement in this country and the violent behaviour of the accused on the day in question should not be tolerated. The idea to take revenge against Frank Tabvuma was unlawful, the idea to takeover Hobhouse rank was egotistically for selfish purposes, to collect money from buses. People at the rank were thrown into panic and subjected to turmoil and there was literally public violence. The degree of this medieval type of unlawfulness is not accepted at all. Society abhors such type of conduct and it should be protected by these courts.

Seventh accused is productively employed and the eldest among all the accused. He should have shown a mature restrained behaviour to decently mould the young generation than to lead them astray. Several other people were injured unnecessarily and for certain all people were taken by surprise. Given different ages of the accused I will distinguish the sentences according to that grid.

In terms of s 202 of the Criminal Code a person convicted of a crime as an accomplice or co-perpetrator shall be liable to the same punishment as to that of the actual perpetrator of the crime concerned. People must begin to show that they are civilised than to live life wild.

You are sentenced as follows:

Accused 1, 4, 5 and 7: **10 years imprisonment 2 years of which are suspended for 5 years** on condition within that period each accused is not convicted of an offence involving violence to which he is sentenced to imprisonment.

Accused 2, 3, 6 and 8: **8 years imprisonment 2 years of which are suspended for 5 years** on condition within that period each accused is not convicted of an offence involving violence to which he is sentenced to imprisonment.

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*Matsika Legal Practitioners*, 1<sup>st</sup> accused's legal practitioners  
*Maanda Maunga & Associates*, 2<sup>nd</sup> accused's legal practitioners  
*Mhungu & Associates*, 3<sup>rd</sup> and 4<sup>th</sup> accused's legal practitioners  
*Khupe Chijara Law Chambers*, 5<sup>th</sup> accused's legal practitioners  
*Tanaya law Chambers*, 6<sup>th</sup> accused's legal practitioners  
*Justice for Children Trust*, 7<sup>th</sup> accused's legal practitioners  
*Chikamhi Mareanadzo*, 8<sup>th</sup> accused's legal practitioners