

THE STATE
versus
GARIKAI ZVAWANDA TABARINDA
and
ITAI MANYOKA

HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 31 JANUARY 2017, 1 AND 2 FEBRUARY 2017

Criminal Trial

S Pedzisayi for the state
R Chidawanyika for the 1st accused
J Mahamba for the 2nd accused

MATHONSI J: The two deceased persons Nancy Lorraine Sibanda (“Nancy”) who was aged 28 and her cousin sister Cynthia Hlabangana (“Cynthia”) who was aged 24 died a painful and defining death, the victims of an arson committed at their newly rented lodgings at No 343 Fusire Road, Old Ascot Gweru. They succumbed to 60% and 55% mixed level burns of the body respectively after a rejected former boyfriend of Nancy who was smitten by spikes of mortal passion had, during an episode of envy, or jealousy, thrown molotov cocktails of petrol into a room occupied by the two ladies before exiting the scene and proceeding to enjoy a beer with the driver of a hired motor vehicle at the Ascot shops located a short distance away from the scene.

At the material time Garikayi Zvawanda Tabarinda (accused 1) the former boyfriend of Nancy was aged 43 while Itai Manyoka, the driver of the hired Honda Fit motor vehicle registration number ADB 2302 dark blue in colour smarting a brown plastic serving as the rear wind screen, was aged 32 years. The two are now jointly charged with two counts of murder in contravention of s47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] it being alleged that on 2 December 2016 at House Number 343 Fusire Road, Old Ascot Gweru,

the two of them, or one or both of them unlawfully caused the death of Nancy and Cynthia by setting fire in their room using petrol thereby inflicting extensive burns on their bodies intending to kill both of them or realizing that there was a real risk or possibility that their conduct might cause death but continuing to engage in that conduct notwithstanding that risk or possibility. As a result Nancy and Cynthia died on 4 and 6 December 2016 respectively.

Although accused 1 pleaded guilty to the charge, a plea of not guilty was entered according to law. Accused 2 pleaded not guilty to the charge. In his defence outline, accused one stated that he started having an affair with Nancy about January 2015 while she was working at an Ecocash Shop. At some stage they commenced living together although they were never married. In 2016 they opened a business together at Ascot Shopping Centre in Gweru but both their romance and business soon ran into turbulent weather, owing to his drinking habits. When drunk he would lose his mental faculties and would become hostile and abusive.

Accused one stated that himself and Nancy broke up sometime in October or November 2016. They shared the stock that they had in the shop and commenced to live apart. Later, with the help of one Jabulani Mtetwa, they started trying to patch up their relationship although Nancy had obtained a protection order against him. On 1 December 2016 Nancy had secured new accommodation at number 343 Fusire Road, Old Ascot Gweru and was moving to those lodgings when he decided to give her a hand. Together they moved her property from her previous lodgings commencing at about 2100 hours and finishing at about 2200 hours.

During that process a text signal came onto Nancy's phone and when he forcibly dispossessed her of that phone, he intercepted a love message from Nancy's lover who was saying he had gone to Harare. A misunderstanding arose between them over that message. As he was expecting to receive money through ecocash on Nancy's phone he took that phone with him and hired a taxi driven by accused two going into town to cash out the money he had received managing to cash out at the Bowling club.

Thereafter himself and accused two proceeded to Zuva Petroleum where he bought 9 litres of fuel. He wanted to give that fuel to the owner of a vehicle he intended to use the following morning going to Gothwick Mine in Silobela. He then paid accused two \$6-00 and

asked to be dropped at his home, except that he did not go to his home but was driven to Nancy's new lodgings at number 343 Fusire Road Old Ascot, Gweru. He was not dropped there either, but he says when he knocked at Nancy's room he heard whispers and suspected that she had a boyfriend inside.

Accused one stated that he told Nancy that he would throw petrol inside the room. Her response was to challenge him to do so. In a fit of rage he threw the two containers inside the room through a broken window pane and followed that with a match stick before departing. He returned to accused two's waiting vehicle and asked him to drive to the shops where they bought some beer.

After buying beer they went to No 513 Tembo Road, Ascot Gweru where he told his cousin (he was later to metamorphose to be his nephew) that he had committed a serious offence of burning Nancy and her boyfriend inside the house. They returned to the scene of crime where the cousin investigated and discovered that he had in fact burnt two women who had been rushed to hospital. They proceeded to Gweru Hospital where, upon being identified by Nancy's relative he was sprung by accused two in his motor vehicle.

Even after what he called a heinous crime that he had just committed and escaping arrest at the hospital, he says he was driven to Mkoba 6 where he continued drinking at Giant's Nite Club. He only managed to go home at 0500 hours where he was arrested.

Accused one stated in his defence outline that he had been so intoxicated and so enraged by his suspicion that Nancy was cheating on him that he failed to appreciate the consequences of his actions.

Accused two stated in his defence outline that he had not known accused one until he hired him on the fateful night. Once he had been hired by accused one the fact that the latter was a stranger to him did not stop accused two from taking over the responsibility of hunting for two fuel containers for the stranger the moment they drove into town that night. He stated in his defence outline that when accused one hired him in Ascot, he told him he wanted to be taken to town to buy petrol for use at his mine. Of course this explanation was at variance with accused one's own explanation firstly that he had to go to town after he had failed to access money from

ecocash outlets in Ascot which were closed and secondly that once in town and having gotten cash he decided to purchase petrol to fuel a vehicle which was to take him to Gothwick Mine in Silobela the following morning.

Accused two stated further that after purchasing the fuel he drove accused one to number 343 Fusire Road, Old Ascot, Gweru where upon arrival accused one disembarked with the petrol. He requested accused two to wait for him before going inside. He returned after 15 minutes and requested him to drive to the nearby shops where they parked. Accused one bought some beers which they shared. It was then that he observed a big fire in the direction where they had come from. He also beheld a fire engine proceeding to the fire.

At that stage accused one appeared worried. He suggested to him that house number 343 Fusire Road could have caught fire. Accused one again requested him to drive to a certain house at another part of Ascot called TCs where they picked accused one's nephew before returning to the scene of crime to find out what had transpired there. Along the way they saw the fire engine leaving the scene and upon arrival it is accused one's nephew who went in to investigate.

When the nephew returned he reported to accused one that the situation was bad as some occupants of the house had been burnt and taken to hospital. On accused one's instructions he drove to Gweru General Hospital. At the hospital accused one entered the casualty department leaving him in the vehicle only to return a few minutes later running. He advised accused two that they were in danger as people wanted to harm him as they suspected he had set the house on fire. Accused one instructed him to drive off. Accused two stated that he complied and drove off. Although the security guards tried to stop him he did not stop but took accused one away.

Accused two maintained in his defence outline that he did not give a hand in the attack on the deceased persons. Appearing to contradict himself, he stated that he did not know what accused one wanted to do with the petrol. He wanted to leave after realizing that accused one had done something wrong but accused one forced him to drive him around. He did not want to leave his vehicle fearing that accused two would flee and report him to the police. At some stage accused one even confiscated his car keys and cellphone.

The state produced a number of exhibits by consent. Exhibit 13 is an affidavit in terms of s 278 (1)(a) and (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] by David Zuze, a forensic scientist at the Department of Forensic Science in the Ministry of Home Affairs. This is an expert witness who investigated the scene of the fire and made certain pertinent observations. His report reads in relevant part;

- “3. Physical evidence indicated that one of the bottom window pane(s) was smashed open from the outside. Some of the fragmented glasses fell on the bed and some on the floor. The other three window panes exhibited great heat intensity. They exhibited crazing effect.
4. The physical evidence indicated that Molotov cocktail was thrown inside the room through the broken window pane. This resulted in mechanically atomizing the gasoline into an explosive mist subsequent creation of a fireball on higher level inside the room.
5. ----.
6. ----.
7. ----.
8. a white plastic container base and also remnants of a red plastic container were observed inside the room.”

The two post mortem reports in respect of Nancy and Cynthia were also produced in terms of s278 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. According to Dr. T Javangwe who performed the external post mortem examination of the body of Cynthia on 6 December 2016, the cause death was 55% mixed level burns of the body. Dr Grayly, a forensic pathologist at Parirenyatwa Hospital examined the body of Nancy and observed 60% burns and concluded that the cause of death was septic shock, 60% septic superficial and deep burns.

The two accused persons’ confirmed warned and cautioned statements were also produced as exhibits. On 5 December 2016 accused one gave a statement under caution in response to the charge of the murder of Cynthia. He stated:

“I have understood the caution and I deny the charge. There was no way I could have murdered Cynthia Hlabangana since I regarded her as my own daughter. The one that I left petrol for safe keeping was Nancy Sibanda which she placed inside the house. I later heard that the house had burned whilst I was having beer at the shops. Had it been that I burnt the house I could not have waited, I never fled from my residence where I was caught by the police. I had had some beer on this day but I never burnt the house. The reason why I had to go to the hospital is that I had heard about the incident. Upon arrival

at the hospital, I heard Nancy Sibanda's relatives saying 'beat up this person, he is the one who burnt the house'. This scared me and I had to flee. I never saw a law enforcement agent around the place. I did not seriously regard this issue since I was going about indulging in alcohol. I went back to drinking beer and the time was towards 4 o'clock in the morning. Since I had not torched anyone, I returned at house number 513 Tembo Road in Ascot where everyone knows to be where I reside. Had it been that I committed the offence, I would have fled. I have nothing else to say about this matter."

After Nancy died on 6 December 2016, accused one was again charged with her murder.

He gave a warned and cautioned statement on 7 December 2016 in response. He said:

"I have understood the caution and I deny the charge. What I know is that I left 9 litres of petrol with Nancy Sibanda for safe keeping inside the house where we were staying together. On this day I was engaged in drinking beer. I do not know what later took place."

Accused two also gave a warned and cautioned statement to the police on 5 December 2016. For his part he stated:

"I have understood the caution and I deny the charge. What I know is that I met Garikayi Zvawanda Tabarinda at Ascot shops as I was ferrying passengers using my Honda Fit vehicle with the following registration number ADB 2302. He asked me to take him into Gweru town where he intended to buy petrol. I took him to town where he visited quite a number of Ecocash agents intending to withdraw money but could not get it. We then proceeded to the Bowling Club where he got cash. He then said he wanted us to secure some containers to fill with petrol. I drove my vehicle to a point at OK Supermarket where cars carry passengers and I requested for two 5 litre containers. I got the first container from a young man who ferries passengers with his car and the one from a woman who sells items outside OK Supermarket along Main Street. We then went to Zuva Petroleum service station along Robert Mugabe road, where Garikayi Zvawanda Tabarinda purchased 9 litres of petrol which was poured into the two containers. I bought fuel worth \$2-00 for my vehicle. We then went to house number 343 Fusire Road in Ascot, Gweru where Garikayi Zvawanda Tabarinda alighted from the vehicle with the two containers of petrol and went to the house. He was gone for 15 minutes after which he returned to the vehicle and said that we proceed to where he wanted us to go. We proceeded and parked along Six pence Road in Ascot from where we observed two Firebrigade vehicles proceeding to a house where he had been to. Garikayi Zvawanda Tabarinda then told me to drive to T-C houses in Ascot where he talked with a certain young man who he said was his nephew and indicated to him that we go to General Hospital to check on the condition of his aunt. Upon arrival at the General Hospital I parked the vehicle outside the Casualty Department and Garikayi Zvawanda Tabarinda sent his nephew to get in to check how his aunt was. The nephew went into Casualty

Department, after a short while Garikayi Zvawanda Tabarinda got out of the car and also went into the Casualty Department. After a short while I saw Garikayi Zvawanda Tabarinda and his nephew running towards the vehicle being chased after by hospital security guards as well as other men and were saying ‘he is the very person.’ After Garikayi Zvawanda Tabarinda and his nephew got into the car, Garikayi Zvawanda Tabarinda said to me ‘take off, the situation is not good.’

I drove off at high speed while some people as well as security guards gave chase. The guard manning the boom gate was told not to open it and he never did. I reversed and turned the vehicle so as to exit using the way of cars driving into the hospital. A security guard ran to the exiting way stopping me with his hands but I did not comply. He stood aside for fear of being run over by my car. Garikayi Zvawanda Tabarinda told me to drive to Mkoba 6 shopping centre where he bought beer which we drank. We then went back to T –C in Ascot where I dropped them at around 5am. This is all I know about the matter.”

Before she died Nancy had had her dying declaration recorded by a magistrate under oath while she was admitted at Parirenyatwa Hospital Ward B6 on 4 December 2016. The dying declaration was recorded in terms of s254 of the Criminal Procedure and Evidence Act [Chapter 9:07]. In terms of s254;

- “(1) ----.
- (2) When it is made to appear to the satisfaction of any magistrate that any person is dangerously ill and, in the opinion of a medical practitioner not likely to recover from such illness and is able and willing to give material information relating to any offence or to any person accused of any offence, and it is not practicable to examine in accordance with any other provision of this Act the person so being ill, it shall be lawful for the said magistrate to take in writing the statement on oath of such person.
- (3) The magistrate taking such a statement in terms of subsection (2) shall sign it and set out his reasons for taking the same, the date and place of taking it and the names of the persons, if any, present at the time.
- (4) If, afterwards, upon the trial of any offender or offence to which the same relate, the person who made a statement taken in terms of subsection (2) is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to travel or give evidence, it shall be lawful to read such statement in evidence either for or against the accused without further proof thereof—
- (a) if the same purports to be signed by the magistrate by or before whom it purports to be taken; and
- (b) if it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person, whether

prosecutor or accused, against whom it is proposed to be read in evidence and that such person or his legal representative had or might have had, if he had chosen to be present, full opportunity of cross examining the person who made the same.”

We have examined the dying declaration recorded from Nancy as she lay battling for her life at Parirenyatwa Hospital Ward B6 (Burns) on 4 December 2016 at 1310 hours by Gamuchirai Siwardi, a magistrate based at Harare. We are satisfied that there was strict compliance with the provisions of s254. The defence has not raised any objection suggesting that paragraph (b) of subsection (4) of s254 relating to reasonable notice was not complied with. Therefore the dying declaration is admissible as evidence and we shall rely on it in deciding the matter.

The following is what Nancy stated of this matter while facing death;

“For me to have sustained such injuries at one stage I was being assaulted consistently and I approached the police and obtained a peace order. On the 1st December I was chased away from my former place of residence because Garikayi Zvawanda Tabaringa was consistently coming to my place. It was last month that he followed me to my place of residence. When he came there he axed the door into the room that I was staying. I wonder who indicated to him where I was staying. The landlord Mr Mukada asked me to seek for alternative accommodation. On the 1st day of December I knocked off my place of employ. I was in the company of my aunt’s daughter the one who is also a victim of this attack Cynthia Hlabangana. As we were in the process of removing our items of property to our new place at one stage Garikayi appeared to be offering some assistance. Suffice to say that Garikayi asserted that he also intended to spend the night in that particular room after we had packed our items of property.

Garikayi said to me I love you, I love you so much. However a considerable period of time has lapsed during which you have been bothering me so much. Immediately after he had exited I quickly locked the door. In fact the door is made of zinc. One has to use a padlock in securing the door. He came back only to find that the door could not be opened.

He broke the window, Cynthia and I were actually shocked as we set on the bed. Garikayi then directed the beam of his torch on us. In fact let me say it had been his song that he was going to kill us. He said he was going to kill himself because of me. He was going to kill us and then take his own life. In fact we did not know as to how he was going to kill us. It is then that he sprinkled from a plastic container some petrol all over the house. At that point in time we had failed to get the key that is Cynthia and I.

He struck lit a match stick and we were caught up in the flames of fire as we cried out. I would not know for a fact as to how the on lookers who were gathered outside eventually

managed to pull us out of the house. I would say that thereafter I was not conscious of what took place. Garikayi got into the house once when he was assisting us in taking out our property. Garikayi did not enter into the room, he broke the window from outside. In fact I believe that most of the events which took place leading to the final assault is contained in my application for a peace order. Suffice to state that at one stage he threatened that he was going to proceed and get a firearm from his friend one Chisvo who stays within the same neighbourhood. Garikayi has been harassing me for a considerable period of time. That is all.”

This was indeed the cry of a thoroughly battered woman who, as the whole world watched, was subjected to systematic and sustained abuse by what must have been a cantankerous human being who turned her life into a living hell. She had moved from one house to the other but a recalcitrant stalker would not let go. She had tried to obtain a peace order all to no avail. In the end, distraught, desperate and with no sense of solution whatsoever, she could only cuddle with her young sister while crying out for help as someone condemned them to a painful and unmitigated death. Significantly that declaration which we have admitted as evidence stands unchallenged in the record.

In fact this is one of those rare cases in which virtually all the facts are common cause. Even the evidence of the two state witnesses who gave *viva voce* evidence was unchallenged. Moffat Tizai was one of the lodgers who occupied a room at No. 343 Fusire Road Ascot, Gweru, the scene of the arson. He stated that he was asleep at about 0200 hours when he heard footsteps passing by his room. This was followed by a knock on the metal door of the room which he though was vacant, it had been unoccupied for two months.

He said the knocking soon translated to a banging on the door. The person who was knocking then called out to Nancy demanding that she opens the door and also asking who was with her in the room. When the person who later turned out to be Nancy responded that she was with her cousin sister and that she was not going to open the door, the banging on the door continued as the intruder who had identified himself as “Gari” demanded that Nancy’s cousin sister should leave to allow him to come in and deal with Nancy.

Tizai stated that drawing the curtain aside he beheld a man squatting and making a fire. After he had closed the curtain he heard the sound of a breaking window pane. He realized that

the area had been illuminated by fire. Shortly thereafter there were two explosions and he saw that fire was now approaching his own room through the door. He then heard screams of a woman followed by the retreating footsteps of the person who had started the fire. There was the sound of a motor vehicle being started and then driving away.

The witness said that he managed to escape through the window. When Nancy and Cynthia were eventually rescued and were writhing in pain Nancy revealed to them that it was “Gari” who had started the fire to burn them in the house. Much later after the said Gari was arrested and brought to the scene he heard him bragging to the police that it was him who had burnt the victims. He had done so because he had spent money on them and that he was teaching the community of Ascot an emphatic lesson that it was improper to spend someone’s money and then reject them.

The evidence of Tizai is consistent with and corroborates the dying declaration of Nancy in material respects. Zenzo Zangairai told the sad story of how he rescued the victims from the inferno. He had heard the screams of the victims from his residence No 374 Foya Road, Old Ascot Gweru, which is directly opposite the scene of crime about 12 ½ paces away. He braved the inferno and managed to open the door before pouring water to reduce the flames and pulling them out one by one. Once outside Nancy pointed an accusing finger at accused one as being the one who had set them ablaze.

The rest of the evidence of the state, a total of 22 witnesses was admitted in terms of s314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears on the state summary. That evidence, especially that of George Maburo who saw the Honda Fit motor vehicle belonging to accused two parked along Rufaro street some 20 meters from the intersection of Fusire Road and Gilbert Geshom, not only incriminated accused one but accused two as well.

Although accused one had denied committing the offence in his warned and cautioned statement, he must have undergone some damascene experience just before the trial. In his evidence he admitted the facts. Although he had tried to conjure a defence based on mental incapacity, he admitted during cross examination that he was in control of his mental faculties and that he appreciated what he was doing.

He explained his conduct by saying that he had quarreled with Nancy, who was his wife after he had intercepted a love message. He had then confiscated her phone and proceeded to hire accused two to drive him into town where he wanted to buy fuel. The fuel was for use by a vehicle of a person he was yet to meet on a trip to Silobela to start a mining venture. He then took it to Nancy's residence for safe keeping overnight. A heap of lies given that the story in question is demonstrably false. He could not have bought fuel for use the following day when the vehicle could have been filled at the filling station, and for a person he was yet to meet, in respect of a mining venture which was non-existent.

His story goes on that upon arrival at No 343 Fusire Road, he overheard Nancy whispering to someone and assumed she was cheating on him. When she refused to open the door he threatened to burn the two occupants inside. Because Nancy dared him to do that, he executed the threat thinking that he was setting alight Nancy and her boyfriend in the room. After he had accomplished that mission he left the scene. That part of the story is also a bunch of lies by a witness who has made it a habit to lie each time he is given the opportunity to say something about the issue. To illustrate our point, he lied when he gave a statement to the police denying completely having set the room on fire. He admits that Nancy had told him that she was in the company of Cynthia so there was no basis for suspecting the presence of a boyfriend. In any event we have the dying declaration of Nancy which stands on a higher pedestal than the chameleonic rants of an incoherent accused person devoid of any explanation for his strange behaviour. Nancy stated that after accused one had broken the window pane he flashed a torch at the two of them and saw them sitting on the bed.

It is therefore our finding that what triggered accused one's sojourn into town to purchase fuel was the love message he had intercepted. He had always threatened to kill Nancy and decided to accomplish it that day. This is a person who had axed a door where Nancy was a few days earlier. He then meticulously planned to execute her in the most despicable and brutal manner possible. It is important to note that even his feigned remorsefulness only overcame him, he says, upon realizing there was no boyfriend in there. If we follow his reasoning, had there been a boyfriend it would have been proper for Nancy to perish with him inside the room.

Mr *Chidawanyika* therefore has a point in his concession that in accused one's warped thought process, if he was not going to have Nancy noone else could. There was premeditation in the execution of the crime. Accused one desired only to end the lives of Nancy and Cynthia. He had actual intention.

Regarding accused two, he started off with the defence of compulsion stating that when they left No 343 Fusire Road he was being compelled by accused one to drive him around and to remain with him. Accused one even confiscated his keys and cellphone at one stage to ensure that he remained with him. He however conceded that when they arrived at that house and accused one had alighted with the two gallons of fuel he remained in the vehicle parked only 9 ½ paces from the scene where accused one was performing his antics. He conceded that he had observed the fire which had started in the direction from where accused one came before asking him to drive off.

We should add that accused two should have heard the screams of the victims because he was only 9 ½ paces away. Zenzo Zangairai had been fast asleep when he heard the screams from 12 ½ paces away. Accused two who was awake (he says he conveniently dosed off at that very moment) certainly heard the cries for help, but he turned his back from those victims and drove accused one to his home at the TC area.

Accused two also conceded that he became aware of the fate of the victims while still in the vicinity of the scene as accused and himself guzzled pint after pint of beer while watching the commotion at the scene from a safe distance. He did not disengage but continued to associate with accused one as they drove to the hospital. When security guards and the victims' relatives were bearing down upon accused one and his nephew accused two admits that he followed accused one's instruction to drive off at high speed to evade arrest. When the boom gate blocked his way he reversed and took off again at high speed using the wrong way out. In the process he almost ran over a security guard who had to jump out of the way. That way he sprung accused one to safety. They then continued drinking in Mkoba 6. At no time did he report the matter to the police until he was arrested while going about his business.

Faced with that difficulty Mr *Mahamba* who appeared for accused two conceded that compulsion was not available as a defence for accused two. In our view the concession was properly made. The requirements for compulsion set out in s243 as read with s244 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] are legendary by their absence in this matter.

Mr *Pedzisayi* for the state submitted that accused two's liability is that of an accomplice and as such he should be found guilty of murder in respect of both counts. He made reference to s198 of the Act providing for the types of assistance which make a person an accomplice. I must state from the outset that s198 which has the list of the types of assistance was amended by the General Laws Amendment Act No 3 of 2016 which came into effect on 24 June 2016 by the repeal of paragraphs (e), (f), (g) and (h) which were then re-enacted as subsection (2) of s198 which reads:

“In addition to the forms of assistance mentioned in subsection (1), the following forms of assistance given to an actual perpetrator of a crime; namely—

- (a) holding oneself available to give assistance in the commission of the crime, in the event of such assistance being required; or
- (b) ----.
- (c) carrying implements or things by which or with the aid of which the crime is committed; or
- (d) keeping watch for or guarding against intervention or discovery while the crime is being committed;

shall render the assister an accomplice unless—

- (e) the assister is present with the actual perpetrator during the commission of the crime; and
- (f) the state adduces any evidence that the assister knew or realized that there was a real risk or possibility that a crime of the kind in question would be committed. in which event the assister shall be liable as a co-perpetrator.”

Mr *Pedzisayi* did not urge us to find accused two guilty as a co-perpetrator in terms of either paragraphs (e) or (f) of subsection (2) of s198. This is because he was not present with the actual perpetrator during the commission of the crime and the state did not adduce evidence that

he was an assister who knew or realized the possibility that a crime of the kind of murder would be committed. Instead he relied on paragraph (a) of subsection (2).

If accused two is to be caught by that provision there has to be evidence that when he sat in his vehicle after accused one had alighted and was misbehaving outside Nancy's window, accused two was available to give assistance in burning the room.

In our view there is no such evidence. The evidence that is there is that he saw the fire that accused one had started. We are even prepared to go as far as to find that circumstantially he even heard the noises, as Zangairai did from his house. However, all that it comes up to is that having seen that accused one had committed an offence accused two associated with his enterprise after he had committed the offence.

In that regard he is covered by s205 which defines an accessory as:

“in relation to a crime, means a person who renders assistance to the actual perpetrator of the crime, or to any accomplice of the actual perpetrator after it has been committed.”

In terms of s206 any person who, knowing that the actual perpetrator has committed a crime, or realizing that risk or possibility renders assistance to him or to any accomplice which enables him or the accomplice to conceal or to evade justice, is guilty of being an accessory to the crime concerned.

In our view accused two gave an explanation concerning his involvement with accused one prior to the fire which explanation has not been shown to be false. It would be recalled that an accused person bears no onus to prove his innocence. If he gives an explanation even if that explanation is improbable the court can only convict if satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. See *R v Difford* 1937 AD 370 at 373; *S v Pisirayi* HB 121/16.

The accused two explained that all the time that they were buying fuel and driving to No 343 Fusire Road he had been made to believe that it was for use at a mine. He did not know accused one until that night and therefore could not have been expected to know that the story of the mine was an elaborate hoax. The state has not rebutted that explanation. The evidence the state has led proves that accused two became aware of the criminal tendencies of accused one

after he had torched the room when fire was issuing out from the room. The moment he took accused one in his vehicle he was aiding a fugitive. His assistance came after the fact. He was therefore an accessory to murder.

In the result it is ordered that:

1. Accused one is hereby found guilty of two counts of murder with actual intent.
2. Accused two is hereby found guilty as an accessory to two counts of murder.

Reasons for sentence

In considering sentence we have had regard to the following factors.

Accused one is aged 43 years. He has sired six children with four different women who are the ones looking after those children. Of the six children five of them are minors. He lost his parents although we are not told at what stage of his life he lost them. He had consumed alcohol. Accused two is aged 37 years. He is married with two children. He is a first offender. At the time of the commission of the offence he had consumed alcohol which, we are told could have numbed his conscience and left him unable to draw the line between right and wrong. This therefore made him insensitive to the plight of the victims. We are told that his love for alcohol and money drove him to associate with this heinous crime.

The state also conceded that accused two's moral blameworthiness cannot possibly be equated to that of accused one who is the actual perpetrator. Accused two did not know the victims and had nothing against them. He did not stand to gain much except alcohol and a few pieces of silver. There can really be nothing that can mitigate the killing of two defenceless women who were sheltering under the comfort of their home at the witching hour of 0200 hours in the morning. In fact one really runs out of words to describe the savagery and banditry displayed by accused one on this day in question. Nancy had done everything that she could to ward off a persistent and unrepentant predator who thought that he could arrogate to himself the power of God. She had moved from one house to the other. She had even moved lodgings during the night but accused one could simply not let go of her. He continued hounding and stalking her.

She had tried the legal route and says she obtained a peace order. Little did she know that she was dealing with someone who respected no law and believed that once he had chosen a woman he would not accept rejection. Someone who right up to the wire thinks that a woman that he did not marry whether by civil rites or customarily could be appropriated as a piece of chattel until kingdom come for no consideration whatsoever.

The manner in which accused one, with a bottle of black label in hand, went about planning and preparing to execute the two deceased persons on that fateful night is shocking to say the least. This is a person who was so determined that he hired a vehicle, spent several hours looking for money, when he finally found it he purchased large amounts of highly inflammable substance – 9 litres of petrol – which he then took to 343 Fusire road to execute a lady that had rejected him because he simply could not accept rejection. It is time that we reminded sexual pervades, cowards who prey on defenceless women that when a woman says “no”, she means “no”. She does not mean “no but yes”. People who still harbor the archaic beliefs that women are objects of appropriation by men to be abused at a whim should know that as long as courts of law are still open, and as long as they still purport to be arbiters of justice and fairness that kind of affront to women will not be tolerated and will be punished without fear or favour.

These were murders committed in the most gruesome manner by persons who have no respect for human life. The coldness displayed by both accused persons even in the face of death is astonishing. While Nancy and Cynthia were groaning in pain the two accused persons had the cheek to buy beer a few metres away from the scene and consume it. They continued imbibing right up to sun rise as if nothing had happened.

In terms of s47 (2) and (3) of the Criminal Law Code, when determining an appropriate sentence to be imposed upon a person convicted of murder, the court shall regard as an aggravating circumstance that the murder was committed in the course of or in connection with or as a result of the commission of an unlawful entry into a dwelling or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives.

It is also an aggravating factor that the murder was premeditated or that the murder was one of two or more murders committed by the accused during the same episode. Therefore we have three factors in aggravation in this matter. In respect of accused one our hands are therefore tied.

Regarding accused two, we are alive to the fact that although he has been convicted as an accessory to murder, in terms of s210 of the Criminal Law Code, he is liable to the same punishment to which he would have been liable had he been convicted of the crime committed by the actual perpetrator to whom he rendered assistance. However, considering his reduced level of participation, we have, in the exercise of our discretion, decided to treat him differently from accused one. This is partly because we accept that his involvement was more as a result of foolishness and an unending love for beer than an evil mind.

Accordingly in respect of both accused, the two counts of murder are treated as one for purposes of sentence;

- 1) Accused two is hereby sentenced to 15 years imprisonment.
- 2) Accused one shall be returned to custody and that the sentence of death be executed upon him according to law.

National Prosecuting Authority, state's legal practitioners
Chitere Chidawanyika & Partners, 1st accused's legal practitioners
Mahamba & Partners, 2nd accused's legal practitioners