

THE STATE
versus
FREZA WADSON
and
CHRISPEN LUNGU

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 21 June 2012

ASSESSORS : 1. Mr Mutambara
 2. Mr Chivanda

Criminal trial

C Manhiri, for the State
Ms D Mushambi, for 1st accused
Ms Y Masvora, for 2nd accused

MWAYERA J: The two accused persons plead not guilty to a charge of murder as defined in s 47 of the Criminal Law Codification Reform Act [*Chapter 9:23*]. It is alleged that on 17 May 2007, at Pote River, Muringayi Village, Chief Chinhamhora, Goromonzi. The accused, both or more of them unlawfully and with intend to kill, murder Charles Kureti by forcing his t-shirt into his mouth wrapping his head with his trousers, covering his face and pushing him into the river full of water causing him to drown which caused Charles Kureti's death. The brief facts of the state case are outlined below;

That the accused and the deceased were residents of Ngwanda-ngwanda Village, Chief, Chinhamhora. It is the state's contention that the two accused together with one Temba Lungu who is still at large, who was still at large at the time of trial planned to kill the now deceased. On 17 May 2007, one Temba Lungu invited the now deceased and his wife to his father's residents that is the Lungu's residents while at Temba's father's house the second accused and first accused joined them. The second accused grabbed the now deceased from behind and the first accused tied the now deceased's hands with a wire at the back. The deceased was subjected to assault by the second accused who smashed the now deceased's head on a traditional stove in the house a couple of times.

After the assault the two accused and Temba Lungu took the deceased with them to Pote River. At the river they removed the now deceased's t-shirt and forced it into the latter's mouth, they covered the face by tying the deceased's trousers around his head and his face and then pushed the deceased into Pote river causing him to drown. Both the accused and Temba Lungu notified their parents and the rest of the people who had remained at home that they had surrendered the now deceased to the police. About three or four days later on 20 May 2007 a body was discovered floating in Pote river following which the police retrieved the body. A post mortem report which was tendered in court as exh 1 revealed cause of death was asphyxia and homicide.

Information later filtered through police suggestion box that the body that was recovered was that of the now deceased and that the two accused and Temba Lungu had murdered the deceased. This then culminated in the arrest of two accused persons. The first accused Freda Wadson gave basis of denial of the offence pointing out that the deceased was married to his sister. He was approached by Temba Lungu who told him that the now deceased was disturbing his church sermons and that he required assistance in taking the now deceased to the police. He agreed in assisting because the now deceased was in the habit of assaulting his sister. On the fateful day he was advised that the now deceased and his wife that is the accused's sister was at the Lungu homestead for marriage counselling. The accused then proceeded to the Lungu homestead via accused two's place where he was to collect a wire to use to tie the now deceased so as to facilitate taking him to the police station.

At the Lungu Homestead, accused two entered the house first, shortly after the first accused heard some screams to which he responded by entering the kitchen and tied the deceased's hands using the wire he had brought from accused two's place. After tying the deceased the trio left taking the deceased to the police. At the confluence of Pote and Masikendoro river according to the first accused, Temba produced a knife then threatened to kill anyone who refused to comply with his orders. Under that threat he removed the deceased's t-shirt and trousers and then he stuffed the t-shirt into the deceased's mouth and covered the deceased's head with the trousers as per orders. It was then that he pushed the deceased into the river. The accused further stated that Temba threatened to kill anyone who revealed the incident and ordered him when they got home that they should tell the Lungu's and his sister that the deceased had been left at the police station and that the mission had been accomplished according to the first accused. After the death of the deceased the first accused's sister Neria Wadson started staying with Temba Lungu showing they had an affair.

The second accused denied the charge pointing out that he was invited by accused 1 to his parents' home that is Radius Lungu's homestead. The first accused took a wire from accused two's place then further stated that upon their arrival at Lungu homestead accused one told him that they wanted to take the deceased to the police station. Accused two told the court that whilst inside the house he grabbed the deceased's hands and a scuffle ensued which led him to hit the deceased's head a couple of times on the traditional stove which was in the house so as to subdue the deceased. It was then that the first accused entered and tied the deceased's hands with the wire at the back.

They then left for the police station. At the confluence of Pote and Masikandoro River he walked ahead for about 12 meters then he heard the first accused threaten to fix the deceased and he further heard the tearing of the t-shirt. He observed the t-shirt being stuffed into the deceased's mouth and that further the first accused tore the deceased's trousers and wrapped around the deceased's head. He walked back but when he was about 5 meters away the first accused pushed the deceased into the dam causing the later to be drown. According to the second accused Temba Lungu was also about 20 meters away from the first accused and deceased. On their way back after the deceased had been caused to drown accused two pointed out that he was threatened by Temba Lungu and the first accused with an undisclosed or unspecified action if he disclosed what had happened. He denied being part of the plan to kill the deceased and pleaded ignorance and none participation in the commission of the offence.

The state adduced evidence from witnesses as follows, Neria Wadson the deceased's former wife recounted how on the fateful day she proceeded to Temba Lungu's place so that he as a prophet would pray for her since she was having problems with her husband the now deceased. She would be assaulted by the deceased and go back to her parents and return to the deceased. While she was at Temba Lungu's house Charles Kureti the now deceased also arrived and Temba disclosed that her husband was also in the habit of seeking for help from him. It was then that Temba Lungu advised that it was best that they proceeded to his father Mr Radius Lungu's residence for them to be counselled. She told the court that they walked at night to go to the Lungu residence and it took them about an hour from 8 pm to just after 9 pm to walk a distance of about 4 to 5 kilometres.

According to the witness shortly after exchanging greetings and when Mr Lungu was about to start the counselling accused two threatened to grab Charles Kureti's hands and he actually proceeded to grab them and place them at the back. At that stage accused 1's brother

walked in and tied the hands at the back using a wire. Whilst in that position, accused 2 Crispen Lungu then grabbed hold of the deceased's head and hit it 3 times against the stove made of iron and metal that is the traditional stove. Thereafter accused two, Crispen Lungu announced that they were taking the deceased to the police station and that Temba and accused one proceeded to the police with the now deceased. She was ordered to remain behind at Mr Radius Lungu's place together with Mrs Lungu between 11:00 to 12:00 midnight. Upon the return of the accused persons Crispen Lungu advised his father Mr Lungu that they had left the now deceased at the police station. It was at that stage they then parted ways each going to their respective homes.

The witness told the court that after about two to three days Temba Lungu proposed to her and she started staying with him as husband and wife and they had one child out of the union. According to the witness she started staying with Temba after she had heard about the dead body with hands tied to the back which had been discovered in Pote River. She feared Temba would harm her hence she then stayed with the leader of the Zambuko Apostolic Sect. The witness's testimony was generally straight forward. The second witness Radius Lungu father of the second accused and Temba Lungu confirmed the visit at night by Temba in the company of the deceased and his wife Neria Wadson. He told the court that the visit was an unannounced one at around 8 pm when he was just sitting in doors with his wife. According to the witness, Temba came with the deceased and his wife and stated that they required him to assist in reconciling since Neria Wadson was refusing to stay with the now deceased. Just as he was conversing with Neria urging her to stay well with the deceased as husband and wife, accused two walked in.

He confirmed the first witness's testimony that accused two walked in and grabbed the deceased causing him to hit his head on the stove. He also notified the court that at the time that accused two grabbed the hands of the deceased it was then accused one walked in and tied the hands of the deceased. He tried to restrain them but they did not budge. He told the court that accused one, two and Temba Lungu left his home saying they were taking the deceased to the police across the river and he warned them not continue assaulting the deceased. The witness also confirmed the first witness's testimony that around midnight the three returned that is Temba, and the two accused persons. They notified that they had left the deceased at the police station, and that he had been taken by a Bindura Police Station vehicle. There is nothing to criticize about the manner the witnesses testified. His evidence tallied much with that of the first witness, it was fairly straight forward as regards happenings and it

was in conformity with what the first accused told the court as regards the movement from the house to Pote River.

The third state witness a member of the Criminal Investigations Department Daniel Matwana testified. He recounted how he together with other police details proceeded to the scene of crime upon being allocated a murder docket. Upon arrival at the scene that is at the confluence of Pote and Masikandoro River he and other details who were in his company were shown the body of the deceased. The body had hands tied at the back with a wire and the face was covered with a trousers. He caused the body to be ferried to Parirenyatwa Hospital for post mortem. Efforts to establish identity of the body yielded nothing. It was only after a report was placed years later in the suggestion box that the police made follow ups and they then arrested the accused persons. The witness later after interviewing the suspects accused one and two recorded warned and cautioned statements from the witnesses which were subsequently confirmed in the Magistrate Court. Temba Lungu evaded arrest.

The statements were produced as exhibits 3 (a) and 3 (b) respectively. An account of indications given by the accused at the scene was also given by the witness. He told court that the two accused persons made indications separately. This was on how the they took the deceased from Lungu's residence, took off his clothes and pushed him into the river. Photographs pertaining to the indications were tendered as exhibits 2 (a) to 2 (n). The witness, who was the Investigating Officer maintained that the accused persons gave their warned cautioned statements and made indications freely and voluntarily without any undue influence from him or from other police details. He was firm that at least during his presence he did not witness any undue influence being brought to the accused persons. The witness clearly did not flout the rules of evidence in that he properly warned the accused persons and took them for indications and also recorded statements which he then took for purposes of confirmation.

The last state witness Mr Shingirayi Matthew Mutiro, a Provincial Magistrate with Judicial Service Commission based at Murehwa Court's evidence was basically that the two accused persons were brought before him separately for purposes of confirmation of proceedings to be conducted. It was apparent from the record of proceedings attached to the exhibits 3 (a) and (b) that the confirmation proceedings were properly followed as explanations were given pertaining to the proceedings to the accused before the confirmation of the statements. According to the witness, both accused agreed during the absence of the Investigating Officer that the statements were given freely and voluntarily. It was clear when

the witness testified that the basis of challenging the confirmation proceedings could not be sustained and maintained as it was clear from the record there were no irregularities in the confirmation proceedings. In fact the warned and cautioned statements were procedurally obtained and properly confirmed. Nothing much can be said about the witness serve to point out he acted in a professional manner in confirmation proceedings.

The accused both testified in their defence cases. The first accused insisted he was invited by Temba Lungu so that they would take the deceased who was in the habit of assaulting his sister Neria Wadson to the police station. He recounted how he tied the deceased hands with a wire at the back while accused two Crispen Lungu was holding the hands following which the later hit the deceased's against the stove. According to the first accused, they then took the deceased away so as to take him to the police station. His account was not really different from the confirmed warned and cautioned statement, serve for the introduction of the fact that he had been threatened. He told the court that after they had crossed Masikandoro River at a point close to Pote River he, in compliance with Temba Lungu's instructions removed the deceased's clothes covered the deceased's face and pushed the deceased into the river.

The first accused stated that he acted in that manner because Temba Lungu had produced a knife and threatened to stab him if he did not comply with his instructions. He confirmed the state's version that he gave a statement freely and voluntarily and that the statement was confirmed. This was in conformity with Daniel Matwana's evidence. He mentioned that the Investigating Officer did not subject him to assault although he mentioned having been assaulted by some unknown police details, he did not say that this influenced him to give the warned and cautioned statement. His defence was generally that of compulsion from Temba.

The second accused Crispen Lungu on the other hand testified in his defence. He sought to portray a picture that he was not part of the plan to kill the deceased. In other words he argued that he was present when events leading to the death of the deceased occurred but he was ignorant of what was going on. He just gloped in darkness so to speak and only participated in hitting the deceased's head on the traditional stove at Radius Lungu's house and just watched and observed accused one remove clothes from the deceased, cover the deceased's face and push him down the river to drown. The second accused claims this happened when he was 12 metres away and his brother. When he walked back to restrain it was too late for accused one who had pushed the deceased into the river.

From the totality of the evidence before the court there are factors which are sticking as common cause. Firstly it is not in dispute that the deceased lost his life and that cause of death was established as asphyxia and homicide. It is also common cause that the two accused and one Temba Lungu, Neria Wadson and the now deceased went to Radius Lungu's residence in evening on the night of 17 May 2007. Further it cannot be disputed that accused one collected a wire from accused two before going together with accused two to Mr Radius Lungu's homestead. That the wire was used to tie the deceased's hands by accused one Freza after accused two Crispin had subdued the deceased and grabbed the hands to the back is also common cause.

It is also not in dispute that the two accused together with Temba Lungu took the deceased from Radius Lungu's place to the confluence of Pote and Masikendoro Rivers where accused one Freza tore deceased's t-shirt stuffed it into deceased's mouth, tore the deceased's trousers which he wrapped around deceased's face and head and then pushed the deceased into the river. Having said it is common cause that the deceased was taken to the river where he was drowned by both accused and one Temba Lungu. It is important to look at how the deceased lost his life in relation to the defences proffered by the two accused persons.

The first accused proffered the defence of compulsion as provided for in s 243 and 244 of the Criminal Law Codification Reform Act [*Chapter 9:23*]. Section 244 gives additional requirements for compulsion to be complete defence to murder. Section 244 (a) reads, "the compulsion took the form of a threats unlawfully to kill the accused or some other person, (b) the accused could not escape or resist the threat referred to in paragraph (a) (c) the accused had no warning in the threats referred to in paragraph (a) to enable him or her to forestall it whether by reporting the matter to the police or by other means". Once the requirements spelt out are satisfied then the defence of compulsion shall be a complete defence to the charge of murder. This is applicable whether the accused is the actual perpetrator or an accomplice.

The second accused's defence of mistake or ignorance of fact is provided for in s 233 of the Criminal Law Codification Reform Act. Section 233 (1) reads,

"if a person does or omit to do anything which would be an essential element of a crime if done or omitted as the case maybe with any form of intention knowledge or realisation the person shall have a complete defence to the charge of committing that crime if when he or she did not or omitted to do the thing he or she was genuinely mistaken or ignorant as to the essential elements or facts of the crime".

Subsection 2 of the s 233 provides that subject to this Act or any other enactments the mistake or ignorance of essential fact maybe a defence to a crime referred to in subsection 1 even if it is not reasonable provided that the reasonableness of any mistake or ignorance maybe taken into account in determining whether or not it is a genuine mistake. The question that comes to mind is given the set of facts and evidence before the court do the circumstances satisfy the requirements of the defences of compulsion and mistake or ignorance as given by the two accused persons. If the answer to the question posed above is in the affirmative then the accused persons are entitled to complete defences of compulsion and mistake respectively and thus entitled to acquittal. If on the other hand the answer is in the negative then the defences proffered do not satisfy the requirements and the defence and thus fall off and expose the accused as liable.

It is apparent from the evidence that the two accused persons in the company of one Temba Lungu set off from Radius Lungu's residence. The set off with the deceased whose hands were tied to the back with a wire brought from the accused two's residence. They walked together up to the confluence of Pote and Masikandoro River. There is no evidence that there were threats issued whilst on the way. Accused one stated that he was threatened at the scene but accused two pointed out that there were no threats even at the scene. At the confluence of the rivers accused one Wadson Freza who had earlier caused the deceased to take off his shoes without being given instructions by Temba he caused the deceased to take off his shoes so as to be able to cross the river. He proceeded to tear the deceased's t-shirt and trousers, he stuffed the t-shirt into the deceased's mouth and covered the latter's head and face with the trousers with hands still tied at back with a wire. The deceased was in that state pushed into the river and he drowned. After the push both the accused and Temba Lungu returned to Radius Lungu's place signalling end of mission. Upon arrival at Radius Lungu's home the trio notified that they had left the deceased at the police station.

All these events occurred on 17 May 2007, a few days later the body was recovered from the river. None of the accused mentioned anything pertaining to the deceased's death. It was only in February 2011, that an "anonymous" letter was issued in a police suggestion box that the accused persons were then apprehended. The question then is was accused 1 under threat or compulsion when he set off to Pote and Masikandoro confluence and back to Radius Lungu's place. The events leading to the death, the manner of dying, events shortly after death and occurrences after the arrest of the accused certainly do not support such assertion of compulsion. What happened after the drowning was clear concealment of what

had transpired. If the first accused had been threatened he ought to have immediately, when not under threat disclosed the brutal act.

The first accused made indications to the police freely and voluntarily and gave a confirmed warned and cautioned statement, exh 3 in which he never alluded to having been threatened by Temba. Even if one was to stretch the mind and say he was compelled when he collected the wire from accused two when Temba was not there one wonders who threatened him and then when they set out on the journey to the police at night if he was not interested he could have sneaked away taking advantage of the darkness. On the way he was not threatened in any manner but he caused the deceased to take off his shoes. In fact the first accused's conduct on that day was that of voluntary association with the Lungus to inflict harm on the deceased. If he had been threatened at the confluence of Pote and Masikendoro River then the question is why then shortly after, did he not disclose what had transpired when he was not under threat. If at all there was any threat on accused it was brought about by himself of self - created. The issue of threats was also disputed by accused two who was part of the team. What turns out from the foregoing is that the accused one set out on his own accord and voluntarily associated with Temba Lungu's for purposes of inflicting harm on the deceased.

The first accused actually is the one who tied the wire on the hands at the back, stuffed the t-shirt into the mouth, covered the head and the face with a trousers and pushed the deceased into the river causing him to be drown. The answer to the question earlier alluded to on satisfying requirements of the defence of compulsion on satisfying requirements of the defence of compulsion is therefore in the negative. The first accused does not satisfying the requirements of the defence of compulsion he sought to rely on and that defence fall off.

The second accused on the other hand also set out to join his brother Temba Lungu and accused one Freza Wadson to Radius Lungu's house where the deceased and wife were made to believe they were to be attending a counselling session. What transpired shortly after arrival of accused two shows there was no desire for counselling. The manner of entering with accused two first getting in and immediately attacking the deceased holding the latter's hands behind and accused one timely walking in to tie the hands with a wire obtained from accused two's place is indicative of a planned move or activity. Immediately after subduing and assaulting the deceased by hitting the head on the stove a couple of times, accused two set out under the pretext of going to the police with accused one and Temba. The

second accused observed accused one tear the t-shirt, tear the trousers and cover the head of a man whose hands were tied with a wire to the back. These hands had been tied at the back with the help of accused two who is the one who placed the hands to the back. He observed accused one push the deceased into the river. After the drowning accused two also went back to Radius Lungu's place and stated that they had left the deceased at the police station. He just like accused one and Temba Lungu never disclosed what had happened till 2011 February following the anonymous tip off to the police.

The second accused made indications freely and voluntarily and also gave a warned and cautioned statement which was confirmed. Contents of that statement are pertinent. He highlighted that he and his brother Temba Lungu were standing guard making sure that the deceased did not escape, there is no mention that he was not aware of what was happening. The defence of mistake raised when viewed with the totality of the circumstances and evidence and events of 17 May 2007 is exposed as not genuine at all. In fact the second accused did not impress the court as a candid person at all, his story was incredible. The fact that when the second accused when invited and requested for a wire by accused one never showed a surprise depicted a well-orchestrated mission.

The entry into Radius Lungu's house was not at random but systematic. He, the second accused attacked the deceased and subdued him enabling the accused one to enter and tie hands with a wire brought from accused two's place. They walked together up to Pote and Masikandoro confluence. He pointed out that he was at a distance of about 12 meters away while his brother Temba Lungu was about 20 to 25 meters away when accused tore the t-shirt and trousers. That assertion is not consistent with him managing to hear the tear of a towelling t-shirt at a distance of 12 meters away. If he had heard the tearing of the towel or towelling material then he ought to have been close within arm's length. If he was not in agreement with accused one then one wonders why he did not intervene leaving the t-shirt being stuffed into the mouth, the trousers being torn and being used to cover the face and head and the push over into the river. When one takes accused two's version that there was no threat to anyone when the deceased met with his death then one wonders why he did not take active role to stop what was transpiring if he was not part to it. In fact the second accused person's testimony left a lot of questions. If the purpose of the journey was to go to the police station then accused two ought to have queried why accused one was behaving in the manner he was behaving even if he was 12 meters away he could have called out. The fact that accused one stood there without calling out for accused one to stop buttresses that

things were going as planned, hence his actions even after the event to seek to mislead that they had left the deceased at the police.

The defence raised of mistake falls off. It lacks genuineness. The fact that the actual push was from accused one cannot exonerate accused two given provisions of s 196 of the Criminal Law Codification Reform Act. The section reads s 1 “(a) subject to this section where two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime and any one of the persons referred to in para (a) the actual perpetrator commits the crime and any one of the persons referred to in para (a) other than the actual perpetrator that is the core perpetrator is present with the actual perpetrator during the commission of the crime. The conduct of the actual perpetrator shall be deemed also to be the conduct of every core perpetrator”. Whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator”. The whole section goes on to show liability in respect of a co-perpetrator being equal liability.

Subsection 8 of the same section which reads “for avoidance of doubt it is declared that this sections may not be used to convict a co-perpetrator of murder unless he or she was present with the actual unless he or she was present with the actual perpetrator while the victim was still alive and before a mortal wound or mortal wounds have been inflicted”

. The second accused was with the first accused and Lungu when the deceased lost his life. Accused two knowingly and in full appreciation associated himself with accused one and Temba from the time he teamed up with the accused one, armed with a wire which they used to tie the deceased’s hands at Radius Lungu’s residence. They then walked together with the deceased up to the point where the later was caused to take off his shoes. The deceased was then taken to the confluence of Pote and Masikendoro River where he met his fate. Upon considering all the circumstance preparatory to the actual commission of the offence, the commission of the offence and events after the drowning of the deceased it is apparent the first and second accused and Temba Lungu were together. They set out on a mission to eliminate the deceased under the pretext that they were taking him to the police. This was under the pretext that it was to protect Neria Wadson who shortly after the incident was married to Temba Lungu a renowned prophet who was complaining that the deceased was disrupting his church sermons.

The first and second accused person participated and perpetrated the offence. The manner in which the deceased was killed is indicative of the fact that both the accused had

some intention to kill. The defence of compulsion raised by the first accused given the totality of the evidence as earlier mentioned falls off and similarly the defence of mistake raised by the second accused does not hold water for it has been shown not to be genuine. The defence fall off this is more so when considers the evidence from the time just prior to the commission of the offence, the occurrence and happenings at Mr Radius Lungu's house these accused two and the deceased and the more of up to the confluence of Pote and Masikendoro River and the events after the drowning.

Both defences raised were contrary to the confirmed warned and cautioned statements of the two accused persons. The manner in which the deceased was killed and the events leading to his death clearly shows the liability of both accused as evidenced by their association and plan to take the deceased to the confluence of Pote and Masikendoro River, where accused one caused the deceased to drown while accused two was urging him on by standing guard to make sure the mission was accomplished. Accused one perpetrated the killing whilst the accused two the core perpetrators ensured killing was effected.

Accordingly, both accused had the intention to kill the deceased and the state has discharged the required onus that they are both found guilty of murder with actual intent.

SENTENCE

In an endeavour to receipt an appropriate sentence the court has taken note of mitigatory factors advanced in respect of both accused by defence counsels and state counsel and also taken note of other factors advised by the state counsel. Ms *Mushambi* submitted that the first accused is the first offender who has family responsibilities and as such dependants. She further submitted that the accused has been in custody for more than a year awaiting finalisation of this matter. The court will take note of the mitigatory factor in arriving at an appropriate sentence. She correctly pointed out that the period of suspense during the time that the accused was in custody awaiting the finalisation of the matter causes anxiety and such anxiety is indeed traumatic. The court will not pay a blind eye to cases highlighted which are relevant for purposes of sentencing particularly cases pertaining to principals of sentence. She urged the court in sentencing to blend justice with mercy.

Ms *Masvora* also highlighted the second accused person is a family man with two wives and with minor children who are all dependent on him. That he is the sole bread winner responsible for the family upkeep from his own self - employment job as a craft man. She further highlighted that the second accused is HIV positive and that a severe sentence would

impact negative in his condition. The court will indeed take regard of the HIV status to the extent that it is capable of taking such condition just like everyone living with an ill condition who stands as an convict, this is more so in line with the fact that the legislature and its wisdom created offences which among others involve offences as regards people who are HIV positive. Whereas being HIV positive is not a defence or it is totally an aspect which may be regarded as a mitigatory factor.

In the same manner, as counsel for the second accused, Ms *Masvora* cited some relevant cases on sentencing principle urging the court to pass a rehabilitative sentence and pointing out that punishment should fit the crime and offender. These mitigatory factors were indeed acknowledged by the state counsel Mr *Manhiri*. There are some cases which were cited which are distinguishable particularly in responses to addresses in aggravation by state counsel the court should take note. He highlighted that the two accused stand convicted of a serious offence which was committed with a clear premeditation and determination. He highlighted correctly how the accused together with Temba Lungu set out to Radius Lungu's house and subdued the deceased. After assaulting and tying him his hands to the back with a wire they walked with him to the confluence of Pote and Masikandoro River where a t-shirt was stuffed into his mouth to stop breathing. The head and face were covered using his trousers, with hands tied, mouth stuffed with a t-shirt and head covered like that the accused disabled the victim whom they pushed into deep pool at the confluence of rivers.

In passing sentence the court cannot ignore the circumstances surrounding the commission of the offence and the manner in which the offence was committed. Indeed the manner in which the offence was committed depicts a callous and brutal murder as observed by state counsel. The accused were not only cruel up to the accomplishment of the mission that is the drowning of the deceased or death, but after the commission of the offence the events that occurred portray men of unfeeling and cruel nature as they did not disclose the murder but created the impression that they had taken the now deceased to the police station. Such conduct can only be described as not being remorseful. They were mum about the occurrence for about four years and the matter only surfaced from an anonymous letter to the police. The co-accused Temba Lungu, as per evidence which was not disputed before the court, took the wife of the deceased immediately or shortly thereafter as his wife. That is certainly in aggravation and it supports the state's assertion then that there are severe aggravating factors.

The court has made a finding that there are extenuating circumstances in this case, namely the societal motive to deal with the perpetrator of domestic violence, the belief in super natural forces of immunity and the lesser degree of participation basically for accused two only. This court will take the extenuating circumstances as mitigatory factors having reduced the moral blameworthiness of the accused person. Upon considering the extenuating circumstances which the court has taken as mitigatory factors together with mitigatory factors highlighted by counsel. Upon juxtaposing mitigatory and aggravating factors, the aggravatory factors, far outweigh the mitigatory factors in the matter. The accused murdered the deceased when they actually desired the outcome. That is taken by court to be clearly lack of respect of the sanctity of human life. Our supreme law the Constitution of Zimbabwe in the declaration of Human Rights Chapter recognises the right to life.

The accused teamed up for purposes of killing a family man. His life can never be replaced by any amount of compensation. His children will grow up as orphans. His family and relatives will forever suffer the loss. To treat such loss of human life lightly would erode the confidence that the community has in the justice delivery system. When all these factors are weighed vis-a-vis mitigatory factors the offence is deserving a severe penalty. We must mention that we do not see any justification in differentiation of sentence to be imposed in respect of the two accused persons who were acting with common purposes in commission of the offence. Their criminal liability is the same and aggravating factors are equally affecting them in the same manner.

The court in passing sentence has considered the nature of offence, the offenders, the societal interests and at the same time sought to strike a balance with the interest of administration of justice. By finding extenuating circumstances in this case we are persuaded to depart from the capital punishment. A length imprisonment term given the manner of commission of the offence is called for. The sentence is as follows each 23 years imprisonment.

Attorney General's Office, State's legal practitioners
Gula Ndebele & Partners, 1st accused's legal practitioners
Sinyoro & Partners, 2nd accused's legal practitioners