

THE STATE
versus
ASPIAS SHUMBA
and
MOTION JAKOPO
and
SIMON MAFUNDA
and
MICHAEL MAKWALO
and
LEE MAKOPE
and
BENEDICT TAPFUMA
and
BLESSING SAIDI

IN THE HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 28-31 January 2013, 02 February 2013, 23 September 2013,
17-19 June 2015, 15 and 18 July 2016

ASSESSORS 1. Mr Chokuvinga
2. Mr Mutambira

Criminal Trial

M Manhamo, for the State
G C Manyurureni, for the 1st accused
Z Kajokoto, for the 2nd -7th accused

MWAYERA J: All the accused were indicted to answer to a charge of murder. It is the State's contention that on 17 March 2012 all the accused or one or more of them unlawfully and intentionally assaulted the deceased Luxmore Chivambo thereby intentionally causing his death or realising the real risk and possibility of death occurring persisted with their conduct thereby causing death as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. All the accused pleaded not guilty to the charge.

The 1st accused Aspias Shumba denied ever applying force on the body of the deceased on the day the police conducted a raid at Ashley Mine Compound. He told the court that the deceased might have been injured during skirmishes that occurred during the raid.

The second accused's defence was that he applied minimal force to effect an arrest of the deceased who was violent and that he acted in self-defence so as to rescue the 6th accused who was under attack from the deceased.

The 3rd accused denied assaulting the deceased in any manner as he remained by the police vehicle when the others preceded to effect arrest at the compound.

The 4th accused person in denying the allegations told the court that his role on the day in question was simply to carry some crates of beer from the deceased's place. He recounted that there was commotion between the Police details and some residence of the compound and that he had to flee for safety after realising that the 6th accused was under attack. The 5th accused denied ever assaulting the deceased and stated that he did not go anywhere close to the deceased's residence. His role was to guard some suspects who had been arrested by the 2nd accused.

The 6th accused denied assault the deceased and pointed out that he was actually a victim of assault. He told the court that he had to be rescued from the attack by accused 2 as the deceased was resisting arrest. He confirmed that he was rescued by the 2nd accused.

The 7th accused told the court that he approached the deceased's residence after hearing some noise. He observed the 2nd accused rescue the 6th accused from the deceased's attack. The 7th accused denied ever assaulting the deceased in any manner.

The State adduced evidence by seeking to formally admit the evidence of 4 witnesses namely Joshua Mhlanga, Emmanuel Timoli, Simon Elisha and Temba Matembedza. All these witnesses evidence was on common cause aspects after the event at Ashly Compound when the deceased was taken to hospital and pronounced dead.

Further the State adduced *viva voce* evidence from 6 witnesses as follows. Majory Shamu the deceased's wife chronicled events of the night in question. She recounted how on the night in question the police approached the residence when she and her husband the deceased had retired to bed. The police officers were in uniform with button sticks. She observed the 2nd accused assaulting her husband and that the other three detectives in his company also joined in and assaulted the deceased while at the same time demanding that all beer in the house should be taken out. On trying to plead on behalf of her husband she was also assaulted and had to flee for safety. She later returned home after the police details had

gone away with her husband. The witness maintained the version that the assault of deceased was immediately upon opening of the door and that the police officers demanded to know who had robbed the 1st accused wife in the afternoon.

Willard Mapuranga confirmed that the police officers opened the deceased's door and that later the deceased's wife Majory Shamu bolted out. He identified the 2nd accused whom he ordinarily knew since he was in the prison services. He pleaded with the 2nd accused to stop assaulting the deceased but his plea fell on deaf ears as the witness was asked to demonstrate to the deceased how to roll on the ground the military way. The deceased failed and was subjected to further assaults for almost 30 minutes. The witness later took advantage of the fading light and escaped from place. His evidence in so far as the police details assaulted the deceased and recovered beer from the deceased's house tallied with Majory Shamu's evidence. Further he corroborated the deceased's wife's evidence that the police officers demanded to know who had robbed the 1st accused's wife. The difference in number of police details being 6 and 4 is understandable given this was at night and it was violent situation. The witness had no motive to give false evidence.

Martha Chidzenga a resident of Ashley Mine compound narrated how she was violently roused from sleep by the police. She told the court that the policemen demanded for all beer which was in the house. She together with the others were taken to the ground where they were subjected to assault indiscriminately by button sticks and booted feet. The witness narrated how one female police detail who refused to participate in assaulting the suspects almost got herself assaulted by the first accused. According to the witnesses the 1st accused ordered the other details to assault the suspects until there was disclosure of who had robbed his wife. The witness could not describe specifications of assaults on the suspects as she was facing down per the police directives. She was candid with the court and only limited herself to what she observed and heard accused 1 instruct.

Matare Zimukonzi confirmed witnesses evidence of what transpired at the deceased's place. She observed the police officers assault the deceased and when she pleaded with them to stop she was also assaulted on the face. She told the court that all the 4 police officers who were at the deceased's house assaulted the deceased. Her evidence to a great extent corroborated that of Majory and Willard. She observed accused 2, 4 and 7 at the compound assaulting the deceased. The witness gave her evidence in a straight forward manner.

Shepherd Hudye confirmed the police presence at the compound on the night in question. He was approached by two details and particularly identified accused 2 whom he

knew prior to the night in question. The witness told the court that upon being taken to the grounds accused 1 ordered that the suspects be assaulted till they disclosed who had robbed his wife in the afternoon. The suspects were indiscriminately assaulted by button sticks and booted feet. The witness gave evidence to the effect that the assaults were severe and that the deceased complained of pains. His condition deteriorated until he passed on. The witness also told the court that the 1st and 3rd accused were not in police uniform. He stood his ground during cross examination. He maintained the assaults were severe and the police participated in assaulting them. Accused 5 only ordered them to sing revolutionary songs but did not assault anyone.

The last witness Energy Chigaba the only female detail who was part of the team that carried out a raid at Ashley Compound also testified. It was her evidence that they went out after being briefed by accused's 1 that they were going to raid illegal beer outlets and clear out any other outstanding cases. She like Shepherd Hudye told the court that accused 1 and 3 were the only ones not in uniform. She remained with accused 1 and 3 at the motor vehicle while the rest of the details armed with baton sticks proceeded to the compound. Her role as defined by accused 1, while at the ground was to guard the female suspects. She corroborated with the other state witnesses evidence that the 1st accused ordered the police officers to assault the suspects till they disclosed who had robbed his wife. She was nearly assaulted for defying that order. She observed the first, second and third accused indiscriminately assault the deceased with baton sticks and booted feet. The witness was not only subjected to lengthy bruising cross examination but she was unbruised and she maintained her story. She did not seek to exaggerate by narrating what happened at the compound during her absence. The version of events at the ground matched the other state witnesses' version that assaults were at the instigation and directive of accused 1 who insisted suspects had to disclose who had robbed his wife. The witness impressed the court as not only candid but genuine. She did not participate in assaulting suspects as clearly confirmed by the state witnesses. She dissociated herself from the unlawful conduct of assaulting suspects which explains her not being a suspect and accused in the murder charge. She therefore had nothing to benefit by misleading the court.

All the accused confirmed and adopted their defence outline as evidence in chief. No other witnesses were called in the respective defence cases. The first accused chronicled how he had to drive the team of officers to carry out the raid for illegal beer outlets. He confirmed the state witnesses evidence that he remained at the ground together with accused 3 and the

state witness Energy Chigaba. His evidence tallied with the state witnesses' version that suspects were subjected to assault although he gave a different reason for the assault. He pointed out that they were subjected to some assault to speed up departure since there was a riotous mob approaching. He also stated that only minimum force was used to effect speed departure. This version was exposed as fallous given if there was a riotous mob there would have been no room for briefing by accused 2. The officers would have left in a huff. But evidence does not support that further questioning and assaults occurred when suspects had already been apprehended.

The 2nd accused narrated how he carried out the operation with the other officers. He confirmed that he was with accused 4, 5 and 7 at accused's place. He told the court that he applied minimal force upon the deceased in order to subdue him as the later was attacking accused 6. The witness could however, not consistently recount how the 6th accused was attacked by the deceased. He like the state witnesses pointed out that the deceased walked slowly to the ground and this buttresses the state witnesses' assertion that the deceased was badly injured. His assertion that the police were under an attack from a riotous mob was unbelievable given they still continued collecting the beer and also took suspect. Just like the state witness he could not dispute that the condition of the deceased deteriorated from the time of arrest that night till he died. It is quite evident the second accused was actively involved in the arrest and assault of the deceased. The chain of events brings his suggestions of effecting minimum force as a myth moreso given the continual assault on a hopeless injured deceased at the motor vehicles.

The 3rd accused a security officer's evidence was as given by other witnesses that he was by the vehicle with accused 1 and the state witness Energy Chigaba when the rest of the team proceeded to the compound. He sought to portray a picture that after the arrests all he was doing was load the crates of beer onto the truck and as such was so entangled that he did not witness the events around. That he was oblivious to on goings around him was unbelievable given he was a security office.

His evidence in so far as happenings at the grounds after suspects were brought is far from convincing given his role as a security officer he would involved in surveillance. He in an incredible manner did not wish to comment on what happened at the ground but could not dispute Energy Chigaba's version and other state witnesses' version that he participated in the assault of the deceased.

The 4th accused's evidence was to the effect that he stood by the doorway while accused 2 went inside the deceased's house. He like the state witnesses told the court that the deceased's wife bolted out of the house giving credence to the state witnesses' evidence that the police were violent when they approached the deceased's residence. He was not forthcoming on what happened at the deceased's residence even as regards whether or not the 6th accused was attacked. His business was to carry beer to the vehicle. All he stated was that there was commotion at the deceased's residence but did not specify how the skirmishes occurred. His evidence was exposed during cross examination when he could not satisfactorily explain why he would have left accused 6 and the other colleagues under attack without offering assistance but carried beer. The witness just emphasised he was a junior officer. He was economical with detail of what transpired more so in the face of some of the state witnesses saying the 4th accused together with accused 2, accused 6 and 7 assaulted the deceased.

The 5th accused also adopted his defence outline as evidence in chief. He remained behind to guard suspects while accused 2, 4, 6 and 7 proceeded to the deceased's place. The witness's evidence confirmed the state witnesses' evidence on material aspects. He confirmed that at the vehicle the 1st accused gave orders for suspects to be assaulted and that he 1st accused did not take lightly to anyone who did not obey the instructions. To this extent he confirmed Energy Chigaba's version that she almost got beaten for not complying with the order. The witness himself was actually assaulted for failing to act in accordance with the order. His baton stick was retrieved from him by the first accused and was never returned. Given the first accused was not in uniform but is said (by all witnesses) to have assaulted the deceased and other suspects indiscriminately using a baton stick and booted feet the 5th accused's version that he did not assault anyone is believable. This is more so given no state witness positively described how the 5th accused assaulted the deceased.

The 6th accused gave an incredible account of how he was pushed to the ground by the deceased who was in a bid to foil the arrest. He told the court that he was assaulted by the deceased who sat on his thighs till the 2nd accused came to the 6th accused's rescue and effected arrest of the deceased. He then carried crates to the motor vehicle. The 6th accused's version that he was assaulted by the deceased without any mention of injuries by the 2nd accused or the 6th accused himself or by witness was difficult to believe. More so when viewed in conjunction with the fatal injuries occasioned on the deceased. Further the 6th accused did not impress the court as an honest witness given he could not reconcile how the

police officers, if they were under severe attack from a mob they logically had time to collect crates of beer. It was not clear from his evidence if the police were under attack at the deceased's house to use force to arrest the deceased. His versions of how he was assaulted by the deceased differed from the second accused who suggested the 6th accused was throttled.

The 7th accused was adamant that he was not at the deceased's residence as he had been assigned to search for illegal beer outlets by the 2nd accused. He told the court that he only returned to the deceased place upon hearing noise and threats. He arrested one person and together with accused 2 and 6 they carried beer crates to the vehicle. The accused sought to dissociate himself from having used a button stick by pointing out that he left his button stick and cap at a friend's residence in order to appear in disguise as a civilian. His narration of events portrayed him as an untruthful witness desperate to remove himself from the scene as if he only featured after the event. What then was his purpose there remains unanswered more so when one considers the state witnesses' evidence on the approach by police details at the deceased's place if he was to disguise as a civilian he could have gone in civilian attire not the alleged half uniform. The state witnesses Willard Mapuranga and the deceased's wife talked of four – five people assaulting the deceased.

From the totality of the evidence adduced it is apparent all the accused sought to rely on either non-participation in the commission of the offence or having applied minimal force so as to effect a lawful arrest during the operation code named "Teerera Mutemo Pahwahwa" or self-defence on basis of an attack on the 6th accused by the deceased. From the evidence of the state witnesses who were at the deceased's residence the police details just stormed into the deceased's house and attacked while at the same time demanding to know who robbed the officer in charge's wife. The alleged attack of accused 6 by the deceased was not clearly spelt out by accused 2, 4, 6 and 7 who were at the scene. Accused 2 talked of accused 6 being throttled but accused 6 and 4 did not talk about that. In fact accused 6 talked of being mounted on the belly and on thighs, accused 4 carried on carrying beer crates so did accused 7. That scenario is certainly not consistent with a person under attack necessitating self-defence as accused 2 suggested. If at all accused 6 was under attack he could have consistently chronicled the attack and means used to avert such attack. There was no mention of use of weapon by the deceased or those close by. In fact to show that accused 6's life was not in danger at all when accused 7 got to the scene he did not intervene to assist or subdue the deceased but carried on to collect beer crates. This signifies that the assault by button sticks on the deceased was unwarranted. The deceased as given by witnesses and accused

was severely injured as evidenced by him walking slowly to the grounds where the motor vehicle was parked. Assuming he had resisted arrest the amount of force used to subdue an unarmed man who was in bed when the police arrived was disproportionate. The defence of self or third part is only available where the requirements outlined in s 238 of the Criminal Law [Codification Reform] Act [*Chapter 9:23*] are met. In this case there was no attack on the 6th accused warranting use of such excessive force occasioning multiple injuries. Even at the motor vehicle the deceased who was lying on the ground was further indiscriminately assaulted with button sticks to effect an already effected arrest.

The manner of assault does not fall under the use of minimal force or reasonably justifiable force envisaged by s 42 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The circumstances of this case being a raid for illegal beer outlets and search for the culprit for robbery of the purse of the officer in charge's wife given the suggested form of resistance do not justify use of force to effect arrest, let alone severe force as evidenced by the group assault by use of button sticks and booted feet occasioning multiple injuries as reflected on Exh 1, the post – mortem report by the Pathologist. The defence to a lesser extent also sought to rely on lack of identification parade. Such a parade in the circumstances of this case was not necessary as most aspects as will unfold were common cause. The state witnesses observed the police details assault the deceased and others suspects and the police details themselves confirmed being at the scene and to an extent assaulting the deceased and suspects as to effect arrest. Identity was therefore, not in contention. It is a fact the 7 accused and Energy Chigaba the only female detail proceeded for the operation on the night in question. The variance in numbers as given by witnesses given the sequence of events and the accused person's say so on different roles they played does not cloud the involvement and identity of each of the accused at all.

Worth noting also from the totality of the evidence and submission by counsels is the post mortem report by Dr Gabriel Agüero, a forensic pathologist. The doctor was said to be out of the country and therefore not available to testify. It is apparent from the report that the doctor conducted both internal and external examination of the remains of the deceased. The doctor as is the norm recorded the clinical history from the people who brought the body to him. He cannot be faulted for recording history as that is normal practice. The doctor did not end on recording history but carried out internal and external examination. The fact that he was given as clinical history that the deceased was ASTHMATIC does not mean that the deceased died from Asthmatic attack as suggested by defence counsels. Under internal

examination para 18 Head injuries under scalp, the doctor observed Haemorrhage under the scalp right parietal and odema brain. He also observed surface wounds and injuries under para 16. In conclusion he made a finding that death was due to multiple injuries due to assault. If asthma was the cause of death given the detailed report he would have so recorded. Even his recommendation for the police to investigate was after he established that death occasioned by multiple assaults. It does not suggest uncertainty on his findings, on the contrary he concluded death was not natural hence the law was to take its course by police investigating the perpetrators. The doctor's report ought to assist the court by not being devoid of detail. The post mortem report in this case was well prepared and covered details of examination inclusive of clinical history, external and internal examination and in conclusion giving the doctor's finding as regards the cause of death. The doctor's report is conclusive. See *S v Musandira* HH 320/14. The defence suggested cause of death was ASTHMA or vomiting induced by drink without any substantiation. This appears to come in on the basis that the doctor was not available to testify. The post mortem report does not refer to any vomitus ingestion. The reference to Asthma as a condition is under clinical history records which are very procedural. In the absence of substation I find no reason why the doctor would not have written that the cause of death as ASTHMA if that was his finding. The detailed post mortem report is quiet instructive more so given the uncontroverted sequence of events of the day in question.

It is common cause that the police officers on the night in question carried out a raid at Ashley Compound, it is also not in dispute that the police officers were in uniform except for accused 1 and accused 3. The uniformed officers approached the compound while armed with button sticks. It cannot be disputed that some suspects inclusive of the deceased were picked from the compound and that crates of beer were recovered. It is also not in dispute that the suspects including the deceased were assaulted during the raid. That the deceased sustained injuries as a result of the assault following which he passed on is also not in dispute. It is also not contentious that at the motor vehicle the deceased and other suspects were further assaulted indiscriminately by button sticks and booted feet.

Going by the evidence of the state witnesses and to a considerable extend the accused person's evidence the only reasonable inference of the sequence of events is as follows.

Accused 2, 4, 6, and 7 assaulted the deceased at the compound as witnessed by Marjory Shamu, Willard Mapuranga and Matare Zimukuzani. The 1st and 3rd accused persons joined in the assaults of deceased and other suspects at the motor vehicle as observed by

Energy Chigaba, Shepherd Hudye, Martha Chidzenga and the 4th and 5th accused Lee Makope. All the accused were under command of accused 1 from the briefing at the charge office to the brief at the grounds where the motor vehicle was parked up to the time the suspects were brought back to the motor vehicle. In fact accused 2 who was in charge in the compound came back and briefed accused 1, following which orders to assault the suspects, were issued by accused 1. There was clear connectivity of the events to accused 1's directives. When the suspects were brought in, accused 1 and 3 joined in the assault. Further assaults were perpetrated on the suspects including the deceased. The 5th accused was assaulted for not obeying the instructions of accused 1. Energy Chigaba the only female, detail, was almost assaulted for not assaulting the deceased and other suspects. It is apparent from the totality of evidence that accused 5 did not directly participate in the assault of the deceased which is why he was assaulted by his superior accused 1. He only caused suspects to sing revolutionary songs while they were being assaulted. There is no evidence in support of the 5th accused's active participation in the assault of the deceased either at the compound or at the grounds. In fact the 5th accused disassociated himself from the group by refusing to subject suspects to assaults which earned him assault himself.

In respect of accused 1, 2, 3, 4, 6 and 7 there was active participation and involvement in the assault of the deceased. Accused 1 was quite pivotal for the on goings at the compound as the commander soon after arrival from the camp and accused 2 brief accused 1. The culprits who had robbed his wife had to be brought to book. Upon being brought to the vehicle the 1st accused realised the deceased could have been mortally injured during the arrest but went ahead to direct perpetration of further assaults. Accused 1, 2, 3, 4, 6 and 7 actively participated such that one can easily read a group acting with common purpose and in consent. Section 197 (1) of the Criminal Law (Codification and Reform) it is instructive. It reads:

“Subject to this part, an accomplice shall be guilty of the same crime as that committed by the actual perpetrator whom the accomplice incited, conspired with or authorised or to whom the accomplice rendered assistance”

In *casu* the 1st, 2nd, 3rd, 4th, 6th and 7th accused actively associated with the unlawful assault from which deceased sustained injuries and subsequently died. The 1st, 2nd, 3rd, 4th, 6th and 7th accused cannot escape liability on the basis that it is not known who among them struck the fatal blow. See *S v Makuyo* SC 186/92 wherein it was held that where the accused persons patently had a common purpose to carry out an assault with intent to commit

grievous bodily harm, it is not necessary or material who struck the fatal blow. There must be an active association by him with the conduct of the others for the attainment of common purpose. See also *S v Sinjo* 1993 (2) SA 765. *S v Woods and Anor* 1993 (2) ZLR 258 and *S v Chauke and Anor* 2008 (3) ZLR 494.

In this case the 1st, 2nd, 3rd, 4th, 6th and 7th accused were acting with common purpose when they subjected the deceased to assault. They cannot escape liability for the unlawful attack. The question that has to be answered is simply on their degree of liability is whether or not the state has managed to discharge the required onus and prove the charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act.

The state counsel rightly conceded murder with actual intention cannot be sustained in the circumstances of this case. The accused did not set out with a desire to kill and accomplished that desire by killing the deceased. The second wrung of murder with constructive intention involves the subjective test of foreseeability. In the circumstances of this case did the accused foresee that by assaulting the deceased in the manner they were assaulting him death would ensue but none the less they proceeded. The question can be formulated that the accused realised the risk or possibility of death occurring if they were to shoot but none the less proceeded to shoot. In the circumstances of this case as conceded by the state counsel the accused did not have the requisite foresight such that murder with constructive intention cannot be sustained.

Given the evidence before the court the next wrung would be to consider whether or not a reasonable man in accused's position would have foreseen the possibility of death ensuing from his conduct. The test here is objective. The accused must be shown or proved to have realised that his/her actions may result in death but failed to ensure or guard against the possibility of death. The test is objective in that the court enquires as to what a reasonable person would have done in the circumstances.

The accused in this case acted negligently when they unreasonably assaulted the deceased indiscriminately using button sticks and booted feet. The 1st accused after being briefed by accused 2 about circumstances of deceased's arrest was of the opinion that deceased might have been mortally wounded per his evidence but he still ordered further assaults and he also assaulted the deceased. Despite the deceased's condition deteriorating the accused were not in a rush to guard against harm by taking deceased for medical attention. The accused actually detained the deceased who had injuries culminating in his death. There is a nexus between the accused person's negligent attack on the deceased and his subsequent

death. The accused are the proximate cause of the deceased's death. The injuries as observed by Dr Aguero Gabriel were consistent with blunt trauma and thus consistent with button stick and booted feet used by the 1st, 2nd, 3rd, 4th, 6th and 7th accused persons. There is no evidence linking the 5th accused with the commission of offence given his dissociation and lack of common purpose. The 5th accused is accordingly found not guilty and acquitted. In respect of accused 1st, 2nd, 3rd, 4th, 6th and 7th liability of negligently causing the death of the deceased has been proved beyond reasonable doubt. The accused acting with common purpose and in consent negligently assaulted the deceased thereby causing injuries from which the deceased died. The 1st, 2nd, 3rd, 4th, 6th and 7th accused are accordingly found guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

SENTENCE

The delicate exercise of sentencing discretion is not an easy walk down the park. It involves seeking to strike a balance between the crime, the criminal and societal interest of administration of justice, while considering the appropriate sentence it is important for justice to be blended with mercy. We are indebted to all counsels for their very helpful submission in mitigation and aggravation in our bid to come up with an appropriate sentence.

Mr *Manyurureni* for the 1st accused submitted that the accused is a first offender. He is a widower with 3 children all dependent on him. One of the children is a minor. Further he submitted that the 1st accused was at the time of commission of the offence an Inspector and Officer in charge having served the police force for 25 unblemished years. The offence caused the 1st accused to lose his job and that indeed is clear fall from grace. Further it was submitted in accused 1's favour that the matter has been hovering over his head for a long period about 4 years. That period of suspense having a serious charge of murder hovering over one's head is by no means easy. Mr *Manyurureni* also submitted that the 1st accused's wife passed on during the course of the trial. We cannot ignore that the alleged robbers of the 1st accused's wife's purse was central during the commission of the offence and surely the loss of his wife, will keep reminding accused 1 of events of the day in question.

Mr *Kajokoto* submitted on before of accused 2 that he is a 44 year old married man with 4 children still school going and dependent on him. In respect of accused 3 it was submitted he is a 35 year old man with 3 children all of whom are dependent on him for their livelihood.

Mr *Kajokoto* submitted in mitigation that both accused 2 and 3 were assistant inspectors and that they have since lost employment because of the offence. They have also been convicted for assault emanating from the circumstances of this case.

It was further submitted on behalf of accused 4 that he is a 34 year old married man and with 3 children. The 4th accused is responsible for the upkeep of his family. He was a constable of 3 years' service at the time of the commission of the offence and has since lost his job because of the offence. He was also convicted for assault in respect of circumstances linked to this offence. In mitigation on behalf of the 6th accused Mr *Kajokoto* submitted that the accused is 25 and that at the time of commission of the offence he was a constable of 1 year service in the force. He further submitted that accused 6 is currently studying with the Midlands State University a degree programme which he is due to complete next year. Further the 6th accused is a married man with 1 child indicative of family responsibilities. He has also lost his employment because of the offence. The 7th accused as submitted by Mr *Kajokoto* was at the time of offence a constable of 1 year serving experience. He is still a member of the force. Accused 7 is a 30 year old father of 2 children. His family is dependent on him for sustenance. It was submitted on his behalf that the conviction would occasion loss of employment.

In passing sentence we were urged to consider the sentencing principles of tempering justice with mercy so as to ensure that the sentence meted out will not break but rehabilitate all the accused persons. It was also apparent from the defence counsels submissions that the court should consider each individual accused's circumstances so as to come up with a just sentence be fitting the crime and the offender as opposed to global general deterrent sentence. In passing sentence we have taken note of all the mitigatory factors submitted on behalf of the accused. We have also taken as highly mitigatory in respect of all the accused, the fact that this matter has dragged on for long about four years from commencement of trial and also that from commission of the offence March 2012 to today July 19th 2016 matter has been hanging over the accused's head for about 4 ½ years. Even though the accused were out on bail the suspense and trauma which goes with having a criminal charge hanging over one's head cannot be understated. The accused will leave with the trauma of having caused the death of a civilian all their life.

In aggravating as correcting and properly submitted by Mr *Manhamo* the accused stand convicted of a heinous offence. Loss of precious human life through negligent use of violence is prevalent. All the accused committed the offence while they were on duty as

members of the Zimbabwe Republic Police. Police brutality is condemned world over for the obvious reason that society looks up to the police as law enforcement agency to protect them and uphold the law as opposed to abuse and in human treatment. The accused persons on the day in question set out to enforce law in an unlawful manner. They, contrary to the Constitution subjected the deceased and other suspects to inhuman treatment by subjecting them to assaults using button sticks and booted feet indiscriminately. The suspects have a right to be treated with dignity allowing the law to take its course. No one has a right to take the law into their own hands and administer violence on the person of another for the alleged commission of an unproved offence. On the day in question the accused teamed up and negligently assaulted the deceased causing his death over petty allegations of illegal sell of beer and robbery of the officer in charge's wife's purse which was said to have 100 dollars. Clearly want on disregard of precious human life under the guise of upholding the law has no place in a progressive democratic society. The policemen instead of leading by example as law enforcement agency turned violent and in unwarranted display of hooliganism cruelly and shamelessly assaulted the deceased occasioning severe injuries from which the deceased passed on. The accused exhibited a carefree and reckless attitude when despite the obvious bad condition of the deceased they detained him as opposed to assist him seek medical attention. They created the fatal condition and did not even bother to guard against death occurring. The counts have to send a clear message to the police and other law enforcement agency that no one is above the law. The human rights as expounded in Chapter 4 of the Constitution have to be recognised and upheld. By assaulting the deceased the accused without justification violated the rights of the arrestees thereby flouting s 50 1 (c) which read;

“Any person who is arrested must be treated humanely and with respect for their inherent dignity”.

In this case the accused did not end in violating the right to human treatment and dignity but negligently caused the death of the deceased thereby flouting the God given right to life. Our Constitution guarantees the Right to life. Section 48

“Every person has the right to life”.

The courts are duty bound to protect the sanctity of the precious human life. No one has a right to take away another's life. In expressing displeasure at the reckless conduct occasioning loss of human life exemplary and deterrent sentences to deter not only the accused but other members of the public that violence related crimes will not be treated

leniently. The use of violence on another is not only barbaric but a clear indication of no respect for the civilised nation of the rule of law. What further aggravates the moral blameworthiness of the accused is their nature of being policemen. Allowing police brutality would not only lead to anarchy and chaos but will lead the society to lose confidence in not only the Zimbabwe Republic Police but also the whole justice system.

I am alive to the principle enunciated in *S v Richard* ZLR (1) 2001 at 129 that in culpable homicide based on negligence the accused is not being punished for his evil intent, for he had no intention at all but that he is being punished for being careless. In the present case the accused are to be punished for their careless conduct when they caused the death of the deceased. The sentence should as pronounced in *Richard* case, be educative and enunciate. Caution in police force and citizenry that they have a duty to be attentive when it comes to safety of the others. I must hasten to mention that the circumstances of *Richard* case are completely different from the present case where policemen in conduct unbecomingly inhumanly treated arrestee and negligently assaulted the deceased causing injuries from which the deceased died. In the *Richard* case the culpable homicide emanated from a deflected blow when the bullet which was to shoot a bird ricocheted and hit the deceased. The defence have suggested a none custodial sentence or shortest possible sentence as appropriate. Taking care from the distinguishable *Richards* case *supra* it would not be appropriate.

In the circumstances of this case where persons of authority the police subjected a civilian to assault over petty charges it would be not only a mockery of the justice delivery system to consider a fine or community service based sentence but that would certainly trivialise a serious offence. The Zimbabwean society shuns loss of life occasioned at the hands of others as evidenced by the penalty provision which gives up to life imprisonment for culpable homicide. The court is alive to the hardship that will be occasioned on the accused's families by impositions of severe sentence but equally the loss of life of the deceased at the age of 34 has occasioned hardship on his family which looked up to him for sustenance. I subscribe to sentiments echoed by Makonese J in *Melly Mbno v S* HB 114/15 wherein he reiterated that a sentence in culpable homicide should reflect on the impact of the culpable homicide on the deceased's family. No amount of compensation will bring back the deceased to his family.

Upon considering the circumstances of the commission of the offence mitigatory and aggravating factors, the offence is deserving of a custodial term. It is quite apparent from the

circumstances of the matter that the moral blameworthiness of the accused persons cannot be equated. This is more so when one considers the protocol in the police force. The first accused the officer in charge was an inspector and 25 years experience in the force at the time of the commission of the offence. Equally accused 2 and 3 were assistant inspectors in the police force and were fairly experienced such that their association with the crime cannot be differentiated from accused 1. The moral blameworthiness of the less experienced police details accused 4, 6 and 7 who were just a year to 3 years in service at the time of the commission of the crime cannot in all fairness be equated to inspectors of vast experience.

It is on the basis of this consideration that although, there is need for uniformity in sentence and the accused were acting with common purpose when they negligently assaulted the deceased, negligently causing his death, their moral blameworthiness is not at the same level with accused 1-3. In a bid to match the crime to the criminal while at the same time satisfying the societal interests and blending justice with mercy it is our considered view that accused 1-3 be given a different sentence from accused 4, 6 and 7.

You are sentenced as follows:-

Accused 1, 2 and 3.

Each 6 years imprisonment of which 2 years imprisonment is suspended for 3 years on condition accused does not within that period commit an offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

Accused 4, 6 and 7

Each 4 years imprisonment wholly suspended for 3 years on condition accused does not commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, legal practitioners for the State
Manyurureni & Company, 1st accused's legal practitioners
Kajokoto & Company, 2nd- 7th accused's legal practitioners