

THE STATE

versus

1. TUNGAMIRAI MADZOKERE
2. YVONNE MUSARURWA
3. LAST MAYENGEHAMA
4. LAZARUS MAYENGEHAMA
5. PHENEAS NHATARIKWA
6. EDWIN MUINGIRI
7. PAUL NGANEROPA

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 12 March 2012; 19 April 2012; 05-07, 11, 13-14, 18-19 & 25-28 June 2012; 4, 16, 19 July 2016; 10, 12-13, 17-19 & 24-27 September 2012; 10-11, 16-18 & 31 October 2012; 5-8, 12-13, 16, 30 November 2012; 5 December 2012; 30 January 2013; 11-13, 20, 25, 27-28 February 2013; 8 & 11 March 2013; 2 & 23-24 April 2013; 12 June 2013, 19 September 2013; 16, 21 & 29 January 2014; 28 February 2014; 24 -25 & 31 March 2014; 9 - 10 & 12-13 June 2014; 17 & 28 July 2014; 15, 18 & 25 September 2014; 1 & 21 October 2014; 15 April 2015; 6 September 2016

ASSESSORS:           1.       Mr Musengezi  
                              2.       Mr Mhandu

### **Criminal trial**

*E Nyazamba and P Mpfu*, for the State  
*Mrs B. Mtetwa, G. Mutisi, C. Kwaramba,*  
*J. Bamu and T. Zhuwarara*, for the defence

BHUNU J: The 7 accused persons are charged with murder as defined in s 47 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. In the alternative or concurrently they are charged with public violence as defined in s 36 of the Act. They were initially jointly charged with 22 others who were discharged at the closure of the State case.

The seven are alleged to have murdered a policeman on duty, inspector Petros Mutedza at Glen-View 3 Shopping Centre on 29 May 2011 in the course of politically motivated mob violence, acting in common purpose and consort.

The facts giving rise to the charges are by and large common cause as there is no serious dispute concerning the bulk of the circumstances leading to the death of inspector Mutedza on the day in question.

It is not in dispute and a matter of common cause that on 29 May 2011 members of a political party going by the moniker MDC-T were gathered at Glen-View 4 Shopping Centre to celebrate what they termed the T/Shirt visibility day. They were feasting, drinking, roasting and merry making in their common purpose to project the visibility of their political party in the area.

The political gathering was however unsanctioned in terms of the prevailing laws and regulations of the country. For that reason the police deemed the gathering to be unlawful. As a result, the deceased was tasked to lead a troop of 7 police officers to go and disband the unlawful gathering.

The troop comprised the deceased, assistant sergeant Chikwanda, sergeant major Mutsigwa, constables Solomon Mushaninga, Magonagona, Magutarima and Dehwe. Enroute to Glen View 4 Shopping Centre they passed through Glen- View 4 Police Station where they were joined by inspector Nyararai before proceeding to Glen-View 4 Shopping Centre to disperse the unlawful gathering. Inspector Nyararai was familiar with the area and knew some of the participants in the MDC-T, T/shirt visibility day.

At Glenview 4 Shopping Centre they confronted and ordered the group of MDC-T activists that was drinking, roasting meat and merry making to disperse. The activists did not resist but successfully negotiated for permission to finish roasting their meat before dispersing.

After finishing roasting their meat the activists relocated to Glenview 3 Shopping Centre to continue with their unsanctioned celebrations previously aborted at Glenview 4 shopping Centre. The relocation to Glenview 3 Shopping Centre was clearly an act of defiance of the order to disband the unlawful gathering.

Upon learning of the group's relocation to Glenview 3 Shopping Centre, inspector Mutedza and his details followed in hot pursuit to once again disperse the unsanctioned gathering. They however met with stiff violent resistance when they confronted the group at Glenview 3 shopping centre leading to the tragic death of Inspector Mutedza in the ensuing melee.

The accused persons are alleged to be members of the Movement for Democratic Change Tsvangirai (MDC-T). It is common cause that some of the accused persons are in fact members of that party.

That inspector Mutedza died as a result of the confrontation with some of the people who were celebrating the MDC-T, T/shirt visibility day is beyond question. There is however a dispute as to whether all the accused persons are members of that political party. The determination of the case does not however, hinge on whether or not one was a member of that political party. Each accused person's liability is based on whether or not he or she participated in the commission of the offence either directly or by association.

It is therefore, not necessary for this court to determine whether or not each accused person is in fact a member of the MDC-T political party. The State however led credible evidence to the effect that the bulk of the people who participated in the attack and killing of the deceased were members of the MDC-T political party who were celebrating their T/shirt visibility day.

They could be identified by their regalia and the slogans they were chanting. Some of the accused persons frequented the local police station and were personally known to some police witnesses. Some of the accused persons personally known to some police witnesses were observed actively aiding and abating the commission of the crime. Some incriminating MDC-T, T/shirts though not produced in court on account of having been misplaced were allegedly recovered during investigations.

The State case hinges on the doctrine of common purpose. It is therefore, necessary to briefly traverse the origin, effect and application of that doctrine before delving into the facts to ascertain each accused person's liability on the facts found proved.

The common purpose doctrine is firmly grounded in English law. The underlying principle of that doctrine is set out in *Macklin, Murphy and Others* (1834)<sup>2</sup> *Lewis* 225 (1838) 168 ER 1136 where Alderson B observed that:

“It is a principle of law that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law done by all.”

The learned author Burchell in his book *South African Criminal Law and Procedure* Vol. 1, 3<sup>rd</sup> ed. At p. 307 elaborates and redefines the doctrine of common purpose as follows:

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design.”

That definition was adopted in the local case of *S v Chauke* 2000 (2) ZLR 494 (S) at 497. The long and short of it all is that the law ascribes joint collective criminal responsibility to people who collude or act with a common intent in furtherance of the commission of a crime regardless of who the actual perpetrator of the crime is. What this means is that every associate in crime is criminally liable for the criminal conduct of his compatriot in crime. This is meant to discourage and punish fellowship in crime. The underlying principle is that he who does a thing through another does it himself.

At this juncture I now proceed to identify the common purpose and motive for the attack on the police in this case. From the proven facts I hold that the common purpose or design was to protect an unlawful gathering by unlawful violent means in furtherance of the MDC-T T/shirt visibility day celebrations.

I come to that conclusion because Constable Mushaninga gave credible evidence to the effect that during the standoff between the police and the MDC-T mob one young man was heard shouting the MDC-T party slogan “Chinja!” and others responding “Maitiro!” before protesting and urging the mob to attack the police saying::

“When MDC members have a meeting the police would disturb them, but not ZANU PF members and so they are supposed to be killed!”

That statement categorically sets out the common purpose and motive for the mob attack on the deceased and his fellow police officers. Constable Mushaninga’s evidence to that effect was amply corroborated by his fellow police officers and the absence of any other credible reason for which the MDC-T mob could have attacked the police.

Having identified the common purpose or motive for the commission of the offence, it is necessary to determine as a matter of fact how the deceased met his death.

### **How the deceased met his death**

It is an established fact beyond question that the deceased was killed in a violent confrontation with a mob comprising mainly members of MDC-T who were celebrating their T/shirt visibility day. There are however two conflicting versions as to how the deceased met his death.

The State's version is that he was pursued and stoned to death as he was fleeing from the violent marauding mob that was resisting police orders to disperse.

On the other hand the defence's version is that the fatal injuries were sustained when he fell off a truck he attempted to board as he was fleeing from the mob.

Cleopas Chikwira, a neutral bystander who observed the skirmish from a distance of about 58m gave a vivid graphic account of how the deceased was attacked and mortally injured. In his own words according to my longhand notes, this is what he had to say:

"I heard some noise from the bar. I did not know what was transpiring but it seemed something was wrong from inside. The MDC people seemed they had just arrived at the shops. They were walking towards the bar because I saw them the time I entered the bar. They were not doing anything else.

I recognised them as MDC members because they were wearing red and white T/shirts. They were written the party name. I did not listen to what they were saying.

I saw people running I do not know what was happening because there were some vendors. I do not know exactly what transpired, I saw members of the police and ordinary members of the public running. Stones were being thrown from all directions. I do not know who was throwing stones because I was also afraid of being struck.

I just thought the police were running from the stones that were being thrown. I just saw a few MDC members who had removed their T/shirts but most of them I did not see where they were. They were holding their T/shirts in their hands. They were putting on other clothes.

Everyone was running from the shops and no one was left. **The officer who was struck was struck from nowhere. And he fell down.** I was some distance from him but it was from here to the main gate about 58 metres.

...

The policeman who was struck was running coming from Munyarari bar. He was struck from the side. The stone came from the front of Munyarari bar, at the front of the door. I was unable to see the person who threw the stone because there were quite a number of people."

Joshua Daka, an off duty police officer who was standing at a nearby butchery also gave an eye witness account of the skirmishes. His version of the commotion more or less dovetails with that of Cleopas Chikwira with the exception that he stated that as the deceased was fleeing he attempted to board a pickup truck which drove off and he fell down heavily on his back. The mob of about 20 people then set upon him randomly attacking him as he lay helplessly on the ground. This is what he had to say:

"When he was running that is when stones were being thrown at him. When he got to the car he went to the driver's door. He tried to open the door but he couldn't because the driver was inside. It was a white pickup Hardbody

He tried to get onto the back of that car. The car was driven off and he fell down.

.....

The stones being thrown while he was running were coming from people who were behind him wearing red and white T/shirts that were inscribed "Yes or no" at the back. These people were coming from Munyarari bar.

After the motor vehicle the police officer had tried to board had driven away, the people started to assault the police officer. I did not manage to see how many they were. They were about 20. They were taking turns to strike him with booted feet"

Constable Daka was standing at Chirandu butchery while Cleopas Chikwira was standing at Munyarari bar where the commotion started. He conceded that Cleopas was closer to the scene and had better vision of the events than him. That being the case, the court is inclined to lean more in favour of Cleopas' evidence than that of constable Daka.

Ednah Chihota a rustic lady who had recently arrived in the area was at Glenview 3 Shopping centre helping her elder sister to vent. She was seated about 20m in front of Munyarari bar selling her wares. She confirmed she saw the arrival of about 100 people clad in MDC regalia. She later saw the arrival of the police who entered Munyarari bar a short while later she saw the deceased coming out of Munyarari bar with a barrage of stones being thrown at him. The stones were being thrown by the people clad in MDC regalia. She saw the motor vehicle which constable Daka said he attempted to board but fell on his back as it drove off.

She however disputed that the deceased fell off as the vehicle drove off. It was her testimony that he only fell down under a barrage of stones long after the vehicle had driven away. This witness' evidence was discredited under cross-examination when she confessed that she was confused when she gave her statement to the police. Her evidence was therefore unhelpful in determining whether or not the fatal injuries the deceased suffered were sustained in a car accident or by stoning.

The other police witnesses however gave their evidence well. They honestly confessed ignorance as to how the deceased sustained the fatal injuries. They gave that truthful evidence in circumstances where they could easily have misrepresented facts had they intended to falsely implicate the accused. Their evidence nevertheless did not extend beyond what they witnessed and heard with their own senses. We believe them.

The situation on the ground was however volatile, fluid and dangerous such that the witnesses could not be expected to have followed the skirmishes with the same accuracy and attention to detail as if they were watching a film on television. They could all be telling the truth but may have missed a detail or two observed by the other. That much is not surprising especially in cases of mob violence. One witness could have fixed his attention on the stone striking the deceased while the other fixed his attention on the deceased's desperate attempt to board the pickup truck. This is a real possibility considering that humanity is not endowed with a photographic memory.

While a doctor may fix his attention on a child's runny nose an adoring lady may fix her attention on its floral dress. When giving evidence the doctor may have no idea what the child was wearing but will remember that it had a runny nose. Conversely, the lady may have no recollection that the child had a runny nose but will remember that it was wearing a floral dress. Despite the inconsistency both witnesses will be telling the truth. It therefore does not follow that whenever there are inconsistencies, the evidence proffered is tainted and unreliable. Each case must be treated according to its own exigencies.

The same applies to all the other witnesses. Minor differences on detail should not be allowed to distract the court from the bigger picture established by facts beyond question. The remarks of Bere J in the case of *Moyo v Nkomo & Another* HB 38/11 are apposite. In that case the learned judge had occasion to remark as follows:

“Witnesses who testify on anything are not expected to recount events as if they were recording machines. People will observe or hear certain things but put emphasis on different aspects of what they hear and see. There is absolutely no way witnesses can hear and then repeat the same thing in similar fashion. What is required is to try and see if there is a common denomination/common thread running in the witnesses' evidence”

Despite the differing testimonies as to what actually killed the deceased, all relevant state witnesses are agreed and corroborate each other on the critical issue that he sustained fatal injuries during an attack by people bearing the brand of MDC-T political party.

Apart from mere speculation and conjecture in this case, lay witnesses are unable to tell us the exact cause of death with any degree of accuracy. The exact cause of death can only be determined scientifically through a post mortem report.

To that end, the State called the evidence of Dr Aguero Gonzalis a specialist expatriate Forensic Pathologist. He is a qualified Legal Medicine Specialist of 30 years

standing. He conducted an examination of the deceased's body and compiled a post mortem report exhibit 8. Doctor Aguero is Spanish and not so proficient with the English Language. He gave his evidence through an interpreter.

It was his testimony that upon examining the body he observed that it had bruises on the forehead. A wound on the right ear as well as bruises on the right hand. Swollen left side above the left ear and swollen left eye.

The head had sustained a depressed skull fracture on the left parietal area. Upon opening the head he observed that blood had accumulated on the left side of the head. The depression had caused brain damage.

As a result of such observations he concluded that death was due to severe **head injury, depressed skull and damaged brain due to assault**. Despite searching vigorous cross-examination he was adamant that in carrying out the post mortem he was not influenced by anyone. He relied entirely on his observations and analysis of the evidence exhibited by the corpse before him. He denied that he suffered any constraints or impediment from his limited proficiency in the English language because the terminologies used both in Spanish and English were the same.

As a result of his findings he concluded that the fatal injury had been inflicted by a hard object which struck the deceased on the left side of the head. That conclusion is consistent with Cleopas Chikwira's evidence that he saw the deceased being struck by a stone on the side of the head. His evidence to that effect was amply corroborated by constables Dehwe and Magonagona who rushed to the deceased's aid shortly after he had been mortally wounded.

The absence of any injury at the back of the head is wholly inconsistent with constable Daka's evidence that he saw the deceased falling on his back and hitting his head on the tar mark. Even if we were to give him the benefit of a doubt the absence of any injury at the back of the head will still mean that the alleged fall did not cause the deceased's death.

Dr Aguero was an honest and credible professional witness who had no motive whatsoever for misrepresenting facts. The same applies to Cleopas Chikwira's evidence. He was an independent innocent bystander who had no motive to misrepresent facts one way or the other. They gave their evidence well without any signs of hesitation or distortion of the facts. Their evidence amply corroborated each other. We have no hesitation whatsoever in believing their respective testimonies as proof of the facts stated therein.

All the same there is however over whelming evidence, that the deceased was attacked with a barrage of stones thrown by a group of people comprising mainly MDC-T members celebrating their T/shirt visibility day. Although one culprit may have delivered the fatal blow, his conduct and intention must be ascribed to all those who made it their common purpose to attack the deceased. I accordingly find as a matter of fact that the deceased was mortally injured when he was struck by a stone thrown by a group of people comprising mainly members of the MDC-T Political Party resisting police orders to disperse.

Like I have already said before, in the eyes of the law it does not matter who actually threw the stone which killed the deceased. Whoever threw that stone was acting in solidarity and common purpose with the group of MDC-T members celebrating their T/shirt visibility day. Whether or not the assailant was a member of the MDC-T is an irrelevant consideration.

The stone was thrown with reckless abandon, with ferocious murderous intent as evinced by the accompanying shouts and threats to “kill the frogs” meaning, “kill the police officers”. On the basis of such finding we come to the unanimous conclusion that the group had the actual intention to kill the deceased. That intention must be ascribed to whoever associated himself with the attack on the deceased. It therefore follows, that whoever associated with the murderous group had the necessary intention to kill the deceased and therefore guilty of murder with actual intent.

Having established the cause of death I now turn to consider the liability of each accused person on the basis of the evidence before this court.

The critical issue for determination in this case is whether or not each of the accused persons has been correctly identified and shown beyond reasonable doubt to have participated in the commission of the offences charged. The case therefore, to a large extent falls to be determined on findings of facts based on the credibility and quality of evidence proffered before the court.

1. **Tungamirai Madzokere and**
2. **Yvonne Musarurwa**

The 1<sup>st</sup> accused is the local councillor for Glenview ward 32. He admits having attended the MDC-T/shirt visibility day celebrations on 29 May 2011 at Glenview 4 Shopping Centre. He voluntarily contributed \$10.00 to buy meat for the braai or barbecue. He accompanied the group to Glenview 3 Shopping Centre after being ordered to disband by the

police at Glenview 4 Shopping Centre. He was present at Glenview 3 Shopping Centre when the police arrived leading to the commotion that led to the deceased's death.

He however denies ever having participated in the confrontation that led to the deceased's death. His defence is that at the time of the commotion he was drinking beer in the nearby council park with Gladys, Nohlahla and Yvonne Musarurwa among vendors, while Nohlahla's shoe was being repaired by a cobbler.

Inspector Spencer Nyararai stationed at Glenview Police station had prior knowledge of the accused as a frequent visitor to the police station. It was his testimony that he observed the accused participating in the commission of the offence on the day in question. He saw him among people who were in front of Munyarari bar chanting slogans and shouting "Uraya datya" "kill the frog". In his testimony this is what he had to say:

"Yvonne and Tungamirai were chanting slogans. I saw them. The 1<sup>st</sup> accused did not run away from the scene. The same as accused 2. Yvonne Musarurwa did not run away. She was standing in front of Munyarari bar. When the police arrived they were chanting slogans."

There is some contradiction between the evidence of inspector Nyararai and sergeant major Mutsigwa as to who was at the entrance of Munyarari bar when the police reaction group arrived. Inspector Nyararai said it was the group of MDC-T Members clad in their party regalia whereas sergeant major Mutsigwa said it was ordinary members of the public who when ordered to disperse complied.

That contradiction to me is not material. What is material is that when the disturbances started members of the MDC-T pursued the deceased through the front of Munyarari bar chanting slogans and attacking the police with stones resulting in the deceased being mortally wounded in front of the bar.

During the commotion inspector Nyararai received information to the effect that one police officer had been injured. He proceeded to the scene and found the deceased lying unconscious at the front of Munyarari bar. He observed that the deceased had a swollen lump on the left side near the left ear. There was some white stuff in his nose. There was a broken police communication radio lying next to the deceased as well as 3 stones and a half brick. He later collected the 3 stones and half brick which were produced in evidence as exhibit 2.

His evidence in this respect was amply corroborated by sergeant major Mutsigwa. Most of the police officers witnessed the violence and attack on the police but did not see

how the deceased was injured as they fled from the scene of the disturbances in different directions.

It is however needless to say that the accused's defence places him squarely at the scene of the crime. It again establishes an association with the group that killed the deceased. By his own admission he was an active participant who played a supervisory role in the activities of the group on that day.

I have already made a factual finding that the act of relocating to Glenview 3 Shopping Centre after being ordered to disperse by the police was an act of unlawful defiance calculated to resist police authority. Thus this accused Tungamirai Madzokere made it his common purpose with the group that eventually killed the deceased to unlawfully resist police orders in promotion of the unlawful MDCT-, T/shirt visibility day celebrations. At no time did he dissociate himself from the activities of the group.

Yvonne Musarurwa is the youth deputy secretary of the MDC-T Party, Budiriro district. Her case is no different from that of the 1<sup>st</sup> accused Tungamirai Madzokere as they were together before and during the skirmishes that led to the deceased's death. Her defence is that she actively participated in the MDC-T, T/shirt visibility day celebrations organised by the Provincial Youth Committee on the day in question, that is to say, 29 May 2011. At the time of the commotion she was drinking beer in the council park in the company of the 1<sup>st</sup> accused, Nohlahla and Gladys while Nohlahla's shoe was being repaired by a cobbler at the entrance to Munyarari bar where the police were eventually attacked leading to the deceased's death.

Both accused told the court that they fled from the park as soon as they saw the police arrive at Glenview 3 Shopping Centre because people were in the habit of running away as soon as they saw the police. In the words of Yvonne:

"I do not know what happened after we had fled. Myself and others fled because it is the habit of people to run away if they see the police arriving."

Both accused were not telling the truth in this respect because it is common cause that they had not fled from Glenview 4 Shopping Centre earlier that day when the police arrived. They in fact engaged the police and successfully negotiated to finish roasting their meat before dispersing. Undisputed evidence abound from state witnesses including the police officers at the scene that far from running away members of the public assisted the police in rendering first aid to the deceased. In fact it were members of the public who alerted the police that their colleague had been attacked and injured.

On that score, we find that there is no shred of truth in the accused's assertion that they fled from the police upon sight without having done anything wrong and in the absence of any commotion or skirmishes with the police. That cannot be the behaviour of a councillor and a high ranking party official.

Pheneas Nhatarikwa a co-accused who gave them a lift as they were fleeing from the scene testified that when both accused stopped him they appeared to be fleeing from the commotion. We believe Nhatarikwa's evidence in this respect as they are fighting from the same corner. His evidence on that point of fact was virtually unchallenged and he had absolutely no reason to misrepresent facts against the accused.

Fleeing from a scene of crime may be interpreted as admission by conduct as the guilty are always afraid. Thus the only reasonable inference to be drawn from their behaviour is that this time around they fled from Glenview 3 Shopping Centre because of their participation in the skirmishes that led to the death of the deceased.

The commotion occurred soon after the arrival of the police at Glenview 3 Shopping Centre. It is therefore unbelievable that both accused saw and heard nothing as they were fleeing from the scene of crime until the following day.

The glaring misrepresentation in this respect gives credence to the State's assertion that they were observed by Inspector Spencer Nyararai actively participating in the commission of the crime. They were observed chanting party slogans and encouraging members of her group to attack the police. As already demonstrated above, Inspector Nyararai knew both of them very well prior to the commission of the offence.

If at one time both accused separated from the main group to attend to other side issues they were still in the vicinity of the scene of crime in the company of part of the group comprising Gladys and Nohlahla. They were still drinking beer in the nearby municipal park in pursuit of their collective scheme of things and common purpose.

By side tracking to assist with the repair of Nohlahla's shoe the accused were not dissociating themselves from the common purpose of the group that killed the deceased. They still harboured the desire and object to defy and resist police orders to disperse in furtherance of the illegal MDC-T, T/shirt visibility day celebrations. When the commotion started they must have left the park to join in the fray as they were active members of the group. I come to that conclusion because they were seen by Inspector Nyararai who knew them well and could not have mistaken them for anyone else in broad day light.

Inspector Nyararai must therefore have been telling the truth when he said he saw the accused chanting slogans and urging their compatriots to attack the police in front of Munyarari bar where Nohlhla's shoe was being repaired.

When a group of about 100 people randomly throw stones and attack others with ferocious determination uttering death threats the intention to kill cannot be excluded. Thus whoever threw the stone with sufficient force to depress the skull causing brain damage, had the actual intent to kill the deceased.

Both accused's presence at the scene of crime and close association with the marauding group of youths that eventually resisted and attacked the police lead inexorably to the conclusion that the State has established beyond reasonable doubt that both accused colluded and acted in common purpose in killing the deceased. The state has therefore established its case against the 1<sup>st</sup> accused Tungamirai Madzokere and the 2<sup>nd</sup> accused Yvonne Musarurwa beyond reasonable doubt. They are accordingly found guilty as charged of murder with actual intent and not guilty of the alternative charge of public violence as it forms part of the main charge.

### **3. LAST MAENGEHAMA.**

This accused person is a businessman and a national executive member of the Movement of Democratic Change (MDC-T) political party. He is also a member of the United Family International Church.

His defence is that commonly known as an *alibi*. He flatly denies having been anywhere near the scene of the crime at the material time. He claims that he was at the City Sports Centre attending a church service of the United Family International Church led by Prophet Emmanuel Makandiwa. The service was conducted by Pastor Kufa as prophet Makandiwa was not present. He sought to call at least four people who accompanied him to church on that day to confirm his defence.

There is however state eye witness evidence to the effect that the accused was seen at Munyarari bar actively participating in the commission of the crime. Constable Solomon Mushaninga who was in the company of the deceased when he met his death gave a graphic description of the accused's peculiar features as fitting one of his attackers who threw a stool at him inside Munyarari bar. He identified the accused by his dark complexion, medium built and swollen forehead. That description fits the accused.

It was his testimony that as the mob attacked them with a hail of stones the deceased fled into Munyarari bar and he followed suit with Constable Makopa. Inside the bar there were people clad in MDC T/shirts and others in plain clothes who attacked them with open hands and booted feet. As he fled through the bar he encountered at close range a certain boy, dark in complexion and of medium height with a swollen forehead. That person picked up a stool and threw it at the witness. He ducked and the stool missed him. He came face to face with his assailant for about 2 minutes before running away. This was his first time to encounter his assailant. He however identified accused 3 Last Maengehama in the dock as the culprit.

This occurred at around 4 pm. He was able to see the accused clearly because the room was lit by an electric lamp. He was however unable to recall what the accused was wearing. Constable Makopa was not called to buttress constable Mushaninga's evidence on what transpired between the accused and constable Mushaninga in the bar as they were fleeing. The failure to call constable Makopa is however quite understandable. He might not have witnessed that encounter as he was preoccupied with his own safety and also busy trying to escape from the attack.

The accused denied being at the scene of crime and behaving in the manner alleged or at all. It was his defence that on the day in question he left home for church between 10:00 hours and 11:00 hours in the company of his neighbours Martin Rwafa and his wife Embedzai Paradzai, Ronald Nyaude and his wife Martha, Pius and Irene Nthando. He drove them to and from church on that date the 29<sup>th</sup> of May 2011. The church service ended at 16:30 hours and he only left the venue of the church service at the City Sports Centre around 17:00 hours. He only learnt of the disturbances when he got home.

In his defence outline he states that the only reason why he was arrested is that he is a high ranking member of the MDC-T who stays very close to the scene of crime He accused the State of refusing to investigate his defence of an *alibi*.

Chief inspector Maida the arresting detail told the court that when they raided Last Maengehama's residence it was his wife who told him that she had been at prophet Makandiwa's church service. The accused did not tell him that he had been at church at the material time.

The investigating officer Chief inspector Ntini denied that Last Maengehama advised him of his *alibi* otherwise he would have investigated it. His evidence reads:

“I would have made a follow up to verify if the accused person had made such an *alibi*. I recorded a warned and cautioned statement from him. That information is not contained in his warned and cautioned statement”

In cross-examining this witness the defence makes it clear that Last Maengehama did not in fact raise the defence of an *alibi* with the police. This emerges quite clearly from the following exchanges between defence counsel and chief inspector Ntini:

“Q. You agree that when you record a warned and cautioned statement you would have conducted interviews, interrogations and other investigations?

A. That’s correct. Yes.

Q. And that not everything that comes out of the interviews goes into the warned and cautioned statement?

A. What goes into the interview is the preamble and the reply by the accused. The interview is never recorded in the warned and cautioned statement.

Q. So not every *alibi* is therefore in the warned and cautioned statement?

A. An *alibi* forms part of the reply by an accused person and for that reason it should be in the warned and cautioned statement.

Q. Did you investigate any of the other accused persons’ *alibis*?

A. Yes.

Q. Which accused persons?

A. Gift Zwelibanzi Dube, Solomon Madzore, and Cynthea Fungai Manjoro.

Q. Does Mr Madzore mention his *alibi* in his warned and cautioned Statement?

A. No he doesn’t.

Q. So how did you know about his *alibi*?

A. The matter came up during his bail application.

Q. So he did mention his *alibi* though it is not in his warned and cautioned statement?

A. Yes.”

Considering that the accused’s defence hinged on the alleged *alibi*, it is inconceivable that he could have failed to raise the defence in his warned and cautioned statement had he in fact been at the church when the offence was committed. In my view what the accused person says in his warned and cautioned statement forms the basis of his defence. In carrying out their investigations, the police cannot be blamed for being guided by the warned and cautioned statement which made no mention of the alleged *alibi*.

Considering that the accused consistently failed to raise the alleged *alibi* with the arresting detail as well as the investigating officer this gives the impression that the defence is concocted and a product of recent fabrication. The accused’s concerted effort to blame the police of failure to investigate an *alibi* which he had not raised at the appropriate time is rather dishonest and misleading.

The accused's admitted failure to raise his alleged alibi in his warned and cautioned statement is ample proof and support of police evidence that the accused did not raise the defence of any *alibi* with them. We accordingly find as a fact proved that the accused did not raise with the police the defence of the *alibi* which he now proffers before the court. That being the case, the police could not have been expected to go on a wild goose chase in search of an *alibi* they were not aware of.

It therefore, stands to reason that the police were under no obligation to investigate an *alibi* not drawn to their attention. The accused's reliance on the case of *S v Manuwa* 2012 (1) ZLR 174 is misplaced as that case is authority for the proposition that an accused person has the obligation to furnish the State with material details of the *alibi* he seeks to rely on timeously for the truth of the *alibi* to be investigated. Failure to do so may result in the defence being rejected leading to conviction of the accused as happened in that case.

This should really put paid to the defence of the alleged *alibi* but for the sake of completeness it is necessary to interrogate the cogence of the defence as proffered by the accused.

The accused alleges that he was at the UFI church service when the offence was committed. To that end he led evidence of a video recording allegedly taken on the day in question showing him attending the church service. The video recording was done by one Ruwezha Mazhata. The critical issue is not whether the accused appears in the video but the date on which it was recorded.

The state disputed that the video was recorded on the day in question, that is to say 29 May 2011. In challenging the authenticity of the video recording the State pointed out that the video camera has a facility to show time and date on the film. Despite the availability of that function the video clip shown to the court does not show the date and time of the recording.

Mazhata under cross-examination conceded that the digital data storage device he used had a Ranon Access memory (RAM) meaning that what is recorded on that film can easily be edited, modified or deleted. There was no evidence that the video tapes were kept in a safe place free from interference. There was no official handover takeover of the video tapes. Mazhata was not responsible for the safe keeping of the video tapes and as such he was unable to vouch for their safe keeping.

If we were to assume for one moment that the accused was at the church service as he alleges this would still not vindicate him. This is because the video recording was done for 5 hours from 7:30 am to 12:30 pm. The video clip shown to the court cannot therefore be

evidence of the fact that the accused was still at church service after 12:30 pm. The offence was committed around 4pm thereby giving him ample time to travel to the scene of crime beforehand. That finding is consistent with his co-accused brother Lazarus's evidence that he remained home while others went to church. His relatives began to trickle back home around lunch hour.

While the evidence of the video recording is admissible because it was presented by the recorder, it is heavily discredited and of no probative value. No reliance can be placed on it.

The accused is a high ranking member of the MDC-T. Its T/shirt visibility day celebrations were being held in his area close to his residence. Viewed from that angle, the possibility that he could have skipped church service or left early to join in the celebrations cannot be excluded. That finding is fortified by the accused's failure to raise the *alibi* timeously as did his wife who was then absolved from any wrong doing.

Once the accused's own evidence is severely discredited as shown above, any supporting evidence is equally tainted.

The accused's conduct in proffering a fake *alibi* long after the event is wholly inconsistent with an innocent frame of mind. That conduct on his part tends to lend weight to the state's evidence that he was seen by an eye witness actively participating in the commission of the offence. Constable Mushaninga came face to face with his assailant for about 2 minutes in broad day light with the benefit of an electric light in the bar.

The accused is dark in complexion and of medium height one can easily describe him as tall or of medium height as there is no fixed point at which medium height ends and tallness begins when one is of medium height. Constable Mushaninga's description of the accused as of medium height or tall is of little consequence one way or the other in the circumstances of this case. These are only relative terms which standing alone are not of much use in the precise identification of an accused person.

What is material is that the accused bears a striking brand in the form of a bulge on his forehead. This makes him an exceptional being easily identifiable in a crowd. He stands out like a sore thumb. That being the case, and having regard to his own personal circumstances as a high ranking member of the MDC-T residing in the neighbourhood and coupled with his behaviour upon arrest, the possibility that he has been wrongfully identified is remote.

Constable Mushaniga's identification of the accused was amply corroborated by inspector Nyararai who testified that he had seen the accused Last Maengehama earlier that day at Glenview 4 Shopping centre actively participating in the MDC-T, T/shirt visibility day celebrations. He later saw him again at Glenview 3 Shopping Centre chanting slogans in front of Munyarari bar where the deceased was murdered.

While the court is mindful of the need to exercise caution in dealing with the evidence of identification, in this case we are convinced that the danger of false or mistaken identification has been wholly excluded. Constable Mushaniga did not know the accused prior to this day. He therefore had no motive to falsely implicate the accused of all people who were at the scene of crime.

Both constable Mushaniga and inspector Nyararai were honest and believable witnesses. We believe them.

In the final analysis we find as a matter of fact that the accused Last Maengehama has been correctly identified as the person who threw a stool at constable Mushaniga inside Munyarari bar. By participating in the attack he made it his common purpose with the MDC-T group to resist police orders to disperse by perpetrating an unlawful attack on the police thereby causing the deceased's death. The Court has already made the finding that the attack was made with the actual intention to kill. That intention is equally ascribed to the accused. We are of the unanimous view that the State has proved its case beyond reasonable doubt against the accused Last Maengehama. He is accordingly found guilty of murder with actual intent and not guilty of public violence as that charge is embodied in the charge of murder.

#### **4. Lazarus Maengehama**

This accused person is a brother to the 4<sup>th</sup> accused Last Maengehama. His defence is that at the material time he was employed in Botswana but he was back home on a visit and residing with his co-accused brother Last at house number 4712 - 58<sup>th</sup> Crescent Glenview. He denies being a politician or political activist. He states in his defence outline that on the day in question he remained at home while his wife and others went to church. His wife found him at home upon her return from church around lunch time.

After lunch he was joined by Micah Muzambi and Willard Magaya in drinking beer at home. His relatives who had gone to church in the morning started to trickle home round about this time.

He only learnt of the disturbances at the shops from his wife who had been to the shops around 4 pm. He was surprised to be arrested during a night police raid. At 44 years of age he is no longer a youth and as such he could not have been participating in the said MDC-T youths activities.

He proposed to call his drinking mates to confirm his *alibi* but subject to their availability.

Despite his spirited denial Inspector Nyararai identified him as one of the persons he saw participating in the commission of the crime. It was his testimony that he knew the accused prior to the commission of the offence because he had previously seen him at Glenview 4 earlier that day.

Apart from the uncorroborated evidence of inspector Nyararai no other evidence emerged positively identifying this accused person as having been at the scene of crime participating in the commission of the crime. Inspector Nyararai did not know this accused person prior to that date. Unlike his brother he bears no striking mark to make him easily identifiable. For that reason we consider it unsafe to convict on the basis of rather shaky evidence of identification. The accused Lazarus Maengehama is entitled to the benefit of a reasonable doubt. He is accordingly found not guilty and discharged on both counts.

## **5. Phineas Nhatarikwa**

This accused person admits being at the scene of crime associating with the group that eventually killed the deceased. He is however adamant that his association with the group was innocent as he was merely performing his official duties in the course of employment.

His defence is that he is employed by the MDC-T party as a driver. On the day in question he was on duty attending to the party's T/Shirt Visibility day at Glenview 3 Shopping Centre. At or about the time of the disturbances he was at the scene of crime attending to his duties with an MDC-T pickup truck. He had been called by one of the youths leaders to ferry utensils, and empty bottles.

As he arrived at Glenview 3 Shopping Centre he noticed police in riot gear arriving in a police vehicle and he decided to drive off. As he was driving off he was stopped by accused two, Yvonne Musarurwa in the company of accused one Tungamirai Madzokere and others who appeared to be fleeing from the commotion. He then drove off to avoid being caught in the crossfire.

The State led evidence to the effect that a truck was seen being used as a gate-away vehicle from the scene of the murder. The accused's presence at the scene with a truck and his association with the group of persons responsible for the death of the deceased renders him a prime suspect in the commission of the offence. The accused having associated with the group that allegedly killed the deceased, the onus is on him to satisfy this Court that his association with the group was innocent. This accused's admitted involvement in the group's activities and providing some of the criminal elements with the means of escaping from the scene provides a nexus between the accused and the commission of the offence. There is however, no direct evidence linking the accused to the killing of the deceased. That being the case, we find that there is a ring of truth when he says as a driver for the MDC he was at the scene merely to collect the dishes as directed in the course of employment.

Section 206 of the Criminal Law (Codification and Reform Act) renders persons who give assistance to criminals after the commission of an offence criminally liable as accessories after the fact. It reads:

“Any person, other than an actual perpetrator of a crime, who □

- (a) knowing that an actual perpetrator has committed a crime; or
- (b) realising that there is a real risk or possibility that an actual perpetrator has committed a crime; renders to the actual perpetrator or to any accomplice of the actual perpetrator any assistance which enables the actual perpetrator or accomplice to conceal the crime or to evade justice or which in any other way associates the person rendering the assistance with the crime after it has been committed, shall be guilty of being an accessory to the crime concerned.”

That definition makes it clear that one can only be guilty of being an accessory after the fact of a crime if one with knowledge or realising that there is real risk or possibility an actual perpetrator has committed a crime, associates with the perpetrator renders the actual perpetrator assistance to conceal or to evade justice.

In this case it is abundantly clear that the accused rendered assistance to his associates who were fleeing from the scene of crime of public violence. He knew of their involvement in the MDC-T,T shirt visibility day and that they had sparked the public violence. By giving them a lift he was aiding and assisting them to evade justice.

It should be noted that the accused's official duties were to collect the dishes but he ended up providing some of the criminals with the means of escape from the scene of crime

by giving them a lift. He was not a disinterested by-stander. He had an insight and interest in what was going on between the police and members of his party. He must have known and therefore did know that members of the MDC-T Party had caused the commotion and public violence. He knew both Tungamirai Madzokere and Yvonne Musarurwa as leading members of the group. For that reason he knew that they were somehow responsible for the public violence that had erupted at the Shopping Centre.

It follows therefore, that when he gave them a lift as they fled from the scene he intended to help them escape from the scene of crime. This is because he knew of the violence that had erupted as mere arrival of the police without more could not have induced him to flee leaving his official duties. He must have seen the public violence erupting in his presence. It is only then that he decided to flee to avoid being caught in the melee.

The accused's conduct in deliberately spiriting away people he knew to have committed the crime of public violence renders him criminally liable as an accessory after the fact of that offence. The accused Phinias Nhatarikwa is accordingly found guilty of the competent verdict of being an accessory after the fact of public violence as defined in s 206 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] and not guilty of the main charge of murder..

## **6. Edwin Muingiri.**

This accused person's defence is that on the day in question, that is to say 29 May 2011 he was selling airtime at Glen view 4 Shopping Centre. He mixed and mingled with the MDC youths who were clad in their party regalia to show that the party was still active in the area. They were merry making, drinking and roasting meat.

When the youths dispersed around 1400 hours he remained behind gathering empty bottles and dishes. Later on he decided to follow the youths to Glenview 3 to recover some empty bottles from the youths. On his way to Glenview 3 he met someone who advised him that there were police in riot gear at Glenview 3. He then decided to abort his journey to Glenview 3 Shopping Centre. He therefore denies having been at the scene of crime at the time of the deceased's death.

The State was unable to lead credible evidence to rebut the accused's defence that he was not at Glenview 3 Shopping Centre when the offence was committed. There being no nexus between the accused and the commission of the offence, the accused Edwin Muingiri is entitled to the benefit of a reasonable doubt. He is accordingly found not guilty and acquitted.

**7. Paul Nganeropa Rukanda.**

This accused person is the MDC-T Organising Secretary for Glenview. He is 34 years of age. In his defence outline he admits having attended the MDC-T, T/shirt Visibility Day Celebrations at Glenview 4 Shopping Centre to see how the proceedings were progressing. Despite such involvement he denies having been part of the youths' activities as his responsibilities lie with the main wing.

It is his defence that after monitoring events at Glenview 4 he went straight home. He denies ever going to Glenview 3 Shopping Centre on that day. Apart from providing evidence that the accused was at Glenview 4 shopping Centre actively associating with the group that later killed the deceased at Glenview 3 shopping Centre, the state was unable to provide independent evidence proving beyond reasonable doubt that this accused was present at the scene of crime when the offence was committed.

Mere presence at Glenview 4 Shopping Centre where the offence was not committed does not constitute a criminal offence in the absence of evidence of conspiracy to commit the offence having occurred at Glenview 4 Shopping Centre. There being no evidence linking this accused person to the commission of the offence at Glenview 3 Shopping Centre, we consider it wholly unsafe to convict. The accused is entitled to the benefit of a reasonable doubt. He is accordingly found not guilty and acquitted on both counts.

*The prosecutor-General's office, State's legal practitioners  
Mtetwa & Nyambira, the Accused's legal practitioners*