

THE STATE
versus
PATRICK MOYO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8, 9 10 June & 11 July 2016

Assessors: 1. Mr Gonzo
 2. Mr Chakvinga

Criminal Trial

A Muzini, for the State
A R Chizikami, for the accused (*pro deo*)

CHITAPI J: The accused is charged with the murder of Keniard Doro. The indictment charges that on 20 January, 2015 and at Hereford Farm Centenary, the accused acting with an intent to kill or realizing the real risk or possibility that his actions may result in death struck the deceased several times all over his body with a knobkerrie thereby inflicting injuries from which the deceased succumbed to his death. The accused when asked whether he understood the charge confirmed that he understood it. When asked what his plea to the charge was, he said:

“I do admit the charge although I would like to explain further.” Mr Chizikani stood up and indicated to the court that the plea by the accused did not accord with his instructions. He requested the court for leave to consult with the accused so that he could fully appreciate the accused’s position. The court granted the leave.

Mr Chizikani advised the court that he had taken instructions and explained to the accused the procedural aspects of plea recording. The court then explained the indictment to the accused and the elements of the crime of murder as defined in s 47 (1) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The accused confirmed that he fully understood

the explanation of the indictment by the court. When asked whether he admitted or denied the charge in the light of the explanation which he had understood, he responded as follows:

“I will deny the charge because there are certain aspects I will agree to and others which I will deny.”

The court recorded a plea of not guilty which plea was confirmed as according with his instructions by Mr Chizikani. The court also recorded the accused’s explanation. The court is required to record the statements so made in terms of s 180 (5) of the Criminal Procedure & Evidence Act [*Chapter 9:07*].

Mr Chizikani applied that some portions being lines 3 to 15 of the summary of the state case should be expunged from the record. He had filed written notice of application to strike out the offensive contents on 7 June 2016. His argument was based on the fact that the contents of the lines were prejudicial to the accused as they purported to detail what the accused allegedly did and yet there was no indication from a reading of the summary of state witnesses that any witness was going to lead such prejudicial evidence. The application was not opposed by the State and the lines complained of were deleted from the state summary.

This is not the first time that this court has admonished the prosecution on how to prepare the so called summary of State case. The court will repeat its directive and also refer to its pronouncements in the case *State v Tapiwa Chitsungo and Prosper Mubvongi* (CRB 108/16). In preparing the summary of the State case in High Court prosecutions, the state should be guided by the provisions of s 66 (6) of the Criminal Procedure & Evidence Act. In terms of the said section, the state is required to prepare a document to be served upon the accused together with the indictment or charge and a notice of trial. The document should contain a list of witnesses and a summary of the evidence of each such witness which he/she will give at the trial.

The content of the summarized evidence should be sufficient to inform the accused of all the material facts upon which the state will rely. The accused is required to give an outline of his defence and to also list the witnesses he or she propose to call and to outline the evidence of each such witness in sufficient detail to inform the Prosecutor – General of all the material facts relied upon in his or her defence.

The practice which the State has adopted is to consider the statements of its witnesses and other evidence. The State then outlines in summary what it alleges as having taken place. Such a

summary or State's conclusions is not only not provided for in the procedural law of conducting trials in the High Court but is of no evidential value. The summary may also have the effect of misdirecting the court on what the case is about. Many a time evidence when led in court will vary with the States' summary. The State should therefore comply with s 66 (6) (a) of the Criminal Procedure & Evidence Act. In this case had the State strictly complied with the provisions of s 66 (6) (a), the application to strike out portions of the summary which summary should not be included in the document referred to in s 66 (6) (a) would not have been necessary. If the State wants to address the court before leading evidence, the State should do so before opening the State case as provided for in s 198 (1) of the Criminal Procedure & Evidence Act. Whether such opening address is made in writing or verbally does not matter. The address or summary should not be included as part of the document which is referred to in s 66 (6) (a) as aforesaid which document has come to be colloquially referred to as the State Outline or summary of State case. A distinction in procedure should be noted between trials in the magistrates court where in terms of s 188 of the Criminal Procedure & Evidence Act, the prosecutor is required to make a statement outlining the nature of the State case and the material facts on which he relies and the procedure in the High Court.

Turning to the facts of this case, the document or summary of State case duly corrected by expungement of the 3 – 15 impugned by Mr Chizikani was admitted as Annexure 'A'. Its contents will not be repeated. It was read into and forms part of the record. Similarly the accused's defence outline was read into the record by Mr Chizikani and included in the record marked Annexure 'B'. The material facts alleged by the accused in his defence outline were as follows;

1. He denied taking part in any active act which led to the death of the deceased whom he did not know in his lifetime albeit denying that the remains recovered by the police and said to be those of the deceased were not in fact those of the deceased.
2. He was employed by a certain Amos said to be a serving member of the Zimbabwe Republic Police. His duties were to perform household chores at his employer's home in Gokwe.

3. Sometime in early 2015 his employer Amos Dube and the employer's relative one Ngonidzashe Sithole directed the accused to accompany the two on a business trip.
4. The two, that is Ngonidzashe Sithole and Amos Dube hired a vehicle. The two disabled the driver of the hired vehicle at some remote place leaving the driver alive but taking the vehicle with them. The accused did not assist Ngonidzashe Sithole and Amos Dube in dispossessing the driver of the hired vehicle.
5. He was later on instructed to go to the home of the owner/driver of the vehicle to obtain the vehicle registration book. He openly went to the driver's homestead and left his phone number. He did not suspect that the driver/owner of the vehicle had died.
6. He was sent on errands using the stolen vehicle as directed and these errands linked him to the death of the deceased.
7. He alleged heavy assaults upon him by the police and the police refused to look for his employer, Amos Dube and his friend Ngonidzashe Sithole.
8. He denied that the remains of the deceased were found in consequence of his indications but through a search.
9. He concluded his defence outline by averring that he would deny accounts inconsistent with his testimony on the events or facts of the matter.

The State opened its case by tendering a post mortem report as an exhibit in terms of s 278 (2) (b) of the Criminal Procedure and Evidence Act. The report pertained to the examination of the remains of a deceased person noted in the report as Keniard Doro Korekore. The remains were examined by Doctor Gonzalez a legal medicine specialist employed by the Ministry of Health and Child Welfare. He examined the remains on 14 August, 2015 at Harare Hospital after they were identified to him by Zimbabwe Republic Police details from Centenary. The doctors' observations revealed no fractures of the skull, ribs or long bones. He could not ascertain the cause of the deceased's death because only bones remained. Mr Chikikani for the accused consented to the production of the report and it was accepted as exh 1.

The State led evidence from the following witnesses whose evidence is summarized hereunder.

Dorothy Simbi

Is the wife of the deceased. She testified that the deceased left home, that is plot 13 Mukwengwere Farm, Centenary on 20 January 2015 in the morning. He left driving his motor vehicle, a Toyota Ipsum registration No. ABL 4665. He was in the company of Shongedzai their daughter. The deceased's undertook the journey as part of his routine since he always ferried children to crèche at St Alberts. She said that the deceased relied on commuting passengers with this car for a living. This was the last time that the witness saw her husband alive. She last tried to call him on his phone around 10:00am but did not receive any response. The daughter Shongedzai who would have returned with the deceased showed up in the evening alone. Shongedzai narrated to the witness how she had moved with the deceased that morning.

When the deceased did not show up the whole evening, something which he had never done before, she proceeded in the morning to St Alberts to make a report to the police. She also alerted members of the close family about the deceased having gone missing. Searches were carried out but the deceased was not found.

On 13 August, 2015 the witness was shown some human remains by the police at Mvurwi police station. She identified the remains as those of the deceased. The remains consisted of a skeleton. She however, identified the remains as those of the deceased through recognizing his belt and pair of cream trousers. She could not commit herself to saying that she identified the remains through a T-shirt though she mentioned it. The T-shirt had discolored. She also said that the head or skull had a jacket wrapped round it but she did not know whose jacket it was.

Under cross-examination, the witness refuted the suggestion that because the remains were just bones, she could not be certain that they belonged to the deceased. She steadfastly maintained her evidence that she identified the deceased's trousers and belt and also said that the deceased's bones were still intact in a skeleton shape and not just single bones. She also testified that she saw the accused at the police station and he was having a meal. The police told her that

the accused was responsible for killing the deceased. She said that it was her first time to see the accused when he was pointed out to her at the police station by the police.

The witness gave a simple narration of how the deceased left home in the morning on 20 January 2015 and was never seen alive again. Her evidence was largely not contentious save for the issue of how she identified the remains recovered by the police as those of the deceased. She maintained her position that she identified the remains as those of the deceased through the belt which was still wrapped round the trousers which were still downed by the skeleton. She identified the remains through the trousers which she said belonged to the deceased. The items of clothing were buried together with the remains and were not available to the court. The court noted that the issue of the identification of the deceased's remains did not appear to have been an issue and was not questioned until the trial commenced. Whether or not the identity of the remains of the deceased is material in the determination of the accused's guilt or innocence will be dealt with later in the judgment. The court will record at this stage that the witness gave her evidence clearly and in a cool manner. She did not exaggerate anything. The court believed her evidence as credible.

Shongedzai Doro

Is the deceased's daughter and was residing at the same Plot as the deceased. She worked and still works as an Early Childhood Development (ECD) teacher at St Alberts Centre, Centenary. She left home in the company of the deceased on 20 January, 2015 in the deceased's motor vehicle. They were headed for St Alberts. As the vehicle got to St Alberts police station, the deceased's cellphone rang and it was on loud. The person who phoned said 'Wave kupi mudahara (Oldman where are you now?)'. The deceased responded that he had already left home and that the caller should wait for him at Zororo restaurant. The caller then responded that he was already at the place.

On arrival at Zororo restaurant the witness saw the accused. He came to the driver's window and spoke to the deceased saying that 'they were late'. The deceased then asked the accused to wait whilst he dropped the children he was carrying in the car at the bus rank. The deceased then gave the witness \$100-00 and asked the witness to give him \$10-00. She did so and retained \$90-00. She disembarked from the vehicle. The deceased then told her that he had

been hired by the accused but that the witness should wait for him after works so that they would return home together. She testified that the accused whilst sitting in the passenger seat kept his face down and did not look up nor speak to her.

When she finished work she waited for the deceased but he did not show up. Around 4:00pm she telephoned her husband who came to pick her up and they returned home. She narrated to her husband and mother how the deceased had left her on hire by the accused and taken a direction which she did not notice. This was the last time that she saw the deceased. She was part of the team which searched for the deceased on the following day. She also sought police assistance and tried to gather information on the deceased's movements at the bus rank to no avail.

The witness identified the remains of the deceased at Mvurwi police as well as the accused whom she saw having a meal. She said that she identified the deceased through his grey hair and T-shirt with a red line which was however no longer visible.

The witness was cross examined on the attire which the deceased had been wearing on the day in question and he said that the deceased was putting on a red T-shirt with a white stripe, grey trousers and a green jacket. When put to her that her mother had testified that the deceased was putting on a cream trousers, she disagreed and reasoned that her mother could have been mistaken on account of her age. She confirmed that the skeletal remains still had a belt round it but could not commit to the belt colour as it was dirty.

There was still a little human flesh around the waist line of the skeleton with the rest being bones. Some of the grey hair was on the jacket and some on the head. The witness stated that she was scared when she saw the remains but maintained that her fears were related to her failure to have a second look at the skeleton. She was however satisfied that the remains were those of her father. Asked by the court whether the deceased had mentioned a name when he spoke with the person who telephoned him to find out how far he, was she said that the deceased had mentioned the name Patrick.

The witness's evidence was given in a simple narration. Despite the fact that the deceased was her father, she exhibited a high degree of composure. The court was impressed with her demeanor and accepted her evidence which was not seriously challenged save with respect to the

identification of the deceased. The issue of the identity of the deceased will be adverted to later with regards to its relevance and materiality.

Arnaldo Maguina Mussaliva

He resides at 57 St Alberts Business Centre Centenary. He is the resident pastor at the local church. The deceased was a member of the church having converted during the Easter holiday in 2014. On 20 January, 2015, the witness was on his way to the fields from the business centre. When he arrived at the intersection of Mukwengure/Centenary Roads, he saw the deceased's motor vehicle driving fast. The vehicle stopped and he was given a lift by the deceased as the vehicle was headed in the same direction where he was going to, being to the fields at a place called Dhuramandhla. He sat in the back seat of the vehicle. The deceased introduced him to the passenger whom he said had hired him and was en route to collect that person's team which intended to go to Mt Darwin to pay lobola. He did not really study or observe the passenger's features and the passenger only looked in the witness's direction once. He heard the two discuss about carrying crates in the back of the vehicle and the two agreeing a hire charge of US\$120.00. He was dropped off at the fields. On the following day the deceased's wife reported to him that the deceased had not returned home. The witness told the deceased's wife about his having been given a lift by the deceased the previous day. The witness advised the deceased's wife to report the deceased as missing to the police. In cross examination the witness was simply asked to confirm whether the passenger said "he" or "they" would pay the hire charge and he said that the reference was to them. Nothing really turned on the evidence of this witness save that he confirmed that the deceased had one passenger with him when he left St Alberts business centre as testified to by the last witness. His evidence corroborated that of the last witness's as well as regards the deceased's reason for driving away from St Alberts being that he had been hired. The witness's evidence was straight forward and the court accepted it as such.

Elijah Doro

Is the deceased's son and stays at 61 Avenue Haig Park. He is employed as a research officer by Parliament of Zimbabwe. On 20 January, 2015, he was in Harare when he received a

phone call from his mother the first witness who reported that the deceased had not returned home after leaving in the morning. He advised his mother to report to the police after 14 days. In the meantime he took time off work and went to join up with other family members to search for the deceased. The searches were in vain.

On some date in February, 2015 he said that the accused came to their rural home i.e. the deceased plot or residence. He had with him a file with some papers and a copy of the police outpost magazine. The accused was masquerading as a police officer and introduced himself as Constable Makomo. He purported that he had arrested some people at a road block driving a vehicle which could be or was the deceased's. He requested for the vehicle registration book of the deceased's vehicle so that he could use it to verify the identity of the vehicle.

The witness and other family members agreed to release the book to one of them who would then accompany the accused or Constable Makomo as he had called himself to Bindura Police Station and verify the vehicle identity. The accused was treated to some tea with bread which he partook of. After partaking of the tea and bread the accused said that he had some business to attend to at St Alberts centre. The accused then gave the witness and his young brother called Farai a net-one number for them to call him later. This was the last time the witness saw or spoke to the accused until after the accused's arrest. The witness said that he failed to get through to the net-one number and concluded that the visit by the accused passing as a police officer was a hoax meant to get the release of the registration book.

The next time that the witness saw the accused was at Mvurwi Police Station CID offices in August, 2015. The deceased was in leg irons. The other members of the deceased's family who included the deceased's wife, Shongedzai Doro and her husband were also at the station. The witness reasoned that the accused must have had something to do with the deceased's death which had been reported to him. The witness identified the deceased by his clothing namely a cream trousers and golf t/shirt which he had bought for the deceased in Uganda. He noted that the deceased had a jacket wrapped on his head or skull and the jacket did not belong to the deceased.

The cross examination of the witness was a non-event. He agreed that when the accused came to the deceased's home under the guise of a police officer, he conversed with a person in dreadlocks. The dreadlocked person was the witness's uncle. The witness's evidence not

unexpectedly was not contentious. He gave his evidence with little emotion and exhibited a high level of maturity and impartiality. The court did not hesitate to accept his evidence.

Evans Mupundu

He stays at 75B Chiedza Street, Sanyati. He recalled a day when the accused came to where he was with some friends seated on a trailer. The accused enquired whether the witness knew anyone who washed motor vehicles. He did not know the accused prior to that encounter. The witness responded that he did not know of anyone who washed motor vehicles. The accused next stated that his vehicle had broken down by the bridge and that his driver whose licence he produced was refusing to leave a compound where he was with a girlfriend so that the vehicle could be driven away.

He enquired if the witness could drive and the witness confirmed and also agreed to help. The two then went to where the vehicle was with a 5 litre container of petrol bought by the accused. The vehicle battery was however flat and the vehicle could not start. The accused left the witness by the car saying that he was going to look for a battery. The witness remained by the car until around 1-00 am when the accused returned. The witness was by the car in the company of some locals as the vehicle was stopped or parked near a bottle store. The witness then spent the rest of the night in the vehicle with the accused as it was now dark. Around 5-00 am the witness and the accused waited by the roadside trying to get help from passing motorists but none came. The accused who was on the phone most of the time then went away and returned with a battery. They jump started the vehicle and drove o Kuwirirana Business Centre. The accused continued with his telephone calls. The witness noticed that the accused showed little interest in the vehicle and when the witness asked about the registration book, the accused opened the passenger's glove compartment and took out certificates in the name of a certain woman.

The accused's behaviour made the witness suspect that something was not right because of his continued phone calls. When the accused went into the bush whilst on the phone the witness alerted other persons around about the accused's suspicious behaviour including a member of the neighborhood watch committee. Upon the accused's return from the bush he was

asked about the registration book but failed to produce it. The accused and the witness were later arrested, but the witness was released after paying a deposit fine for driving without a licence.

Under cross-examination the witness denied that the accused ever mentioned other persons except his errant driver who had holed up with a girlfriend and refused to continue to perform his driver's duties. The accused told the witness that he was in the business of swapping cars for cattle. He noted that the accused apart from being unable to drive could not even play the car radio nor identify the vehicle registration book and produced educational certificates instead. The certificates were in the name of Maidei.

The evidence of this witness though suspect had a ring of truth. The court was alive to the fact that the witness's evidence had to be treated with caution because the witness at one time or another was in possession of the deceased's vehicle albeit in the company of or under the instructions of the accused. The witness was treated as a possible accomplice. If not an accomplice in the death of the deceased, he certainly was such in the unlawful possession and use of the deceased's vehicle.

An accomplice from an evidence perspective and in its wide meaning connotes a person who has committed an offence connected with the charge at hand. This includes a person who appears to have some intricate knowledge of the offence charged or is connected with it and would have a reason to shield himself from the consequences of his unlawful conduct. An accomplice because of his intricate knowledge of the facts can easily convince the unwary by lying or minimizing his involvement.

See Hoffman and Zeffert, *South African Law of Evidence* 4th ed pp 575-576 *Moyo v State* SC 170/90, *S v Mubayiwa* 1980 ZLR 477 (A), *S v Moyo*, 1989 (3) ZLR 250, *S v Lawrence & Anor* 1989 (1) ZLR 29 (S), *S v Masuku*, 1969 (2) SA 315 N.

The court has also been guided in its approach to this witness's evidence in addition to the guidelines in the above cases by ss 267 - 279 of the Criminal Procedure and Evidence Act [Chapter 9:07]. As indicated, it was only after hearing the witness's testimony that the court formed the view that although the witness was not presented as an accomplice by the State in which case the court would have warned or admonished him to tell the truth even if such evidence implicated him, it was advisable to approach the witness's evidence as one would do

with that of an accomplice. The bottom line is that the court must be satisfied that it safely rely on the witness's evidence without being hoodwinked or misled.

In *casu*, the court was satisfied that it could safely rely on the evidence of the witness and considered a number of facts which strengthened its resolve to accept the evidence as truthful. The considerations are as follows:

- (a) The witness's testimony on material points was not denied by the accused.
- (b) The witness reported the accused's suspicious behaviour to the neighborhood watch committee member leading to the accused's arrest.
- (c) The accused in his testimony did not implicate the witness in the commission of the offence.
- (d) The witness admitted his role of driving the deceased's vehicle without a licence and paid a deposit fine for his misdeed.

The court formed the impression that the witness just got excited by the prospect of being hired to drive a motor vehicle and other promises of good fortune offered by the accused like a newly found job otherwise the witness was not really involved in what befell the deceased.

Tapiwa Maziti

Is a detective sergeant in the Zimbabwe Republic Police and part of the investigating team. He accompanied the investigating officer Sergeant Chinyani to Nembudziya and Kadoma Police Stations following the arrest of the accused and the last witness. This was following the recovery of the deceased's motor vehicle. The team interviewed the accused and thereafter, the accused elected to make indications which he did freely and voluntarily. The accused indicated the route which he took from St Alberts and also how he, Ngonidzashe Dube and Amos Moyo murdered the deceased. The deceased's remains were recovered on the accused's indications covered by stones in a shallow cave.

The remains were taken to Mvurwi CID and identified by the deceased's relatives. He said that a team was dispatched to Gokwe to investigate the whereabouts of Ngonidzashe Dube and Amos Moyo but the two could not be found or identified. The accused then gave another

address to which police were dispatched. The witness was then transferred to Chiredzi and did not know what the result of the subsequent investigation or follow up revealed.

Under cross examination he agreed that the accused mentioned the involvement of his accomplices Amos Moyo whom he said was his brother and Ngonidzashe Dube whom he said was a friend. He denied that the names mentioned by the accused were Amos Dube and Ngonidzashe Sithole. He also denied that the accused mentioned that he was employed by Amos Dube, a policeman. The indications took 1^{1/2} – 2 hours when the police got to the mountainous areas where the deceased's remains were found. However the aggregate time from the time the police and the accused left station was about 8 hours because most of the time was spent negotiating the roads and the place was about 150km away from Mvurwi. The accused indicated a rented place where he said him and his accomplices were camping before meeting with the deceased. He also indicated the place where the deceased was attacked and also where the deceased's body was buried.

The witness described the general area where the murder occurred as a newly resettled area, sparsely populated with the nearest house though unoccupied being some 200-300 metres from the place where the deceased's body was recovered. There were also some 10 or so houses some 500^m – 600^m away. The area has dense vegetation. The team did not meet any person nor see live stock during indications. The witness denied that the deceased was assaulted by either him or anyone else. He denied that he already had an idea of the area where the indications took place. He denied being aware of whether or not the accused's warned and cautioned statement was confirmed nor the reasons thereof. He admitted however that the accused alleged at court on 13 August, 2015 that he had been assaulted. He denied that the accused was denied food and said that as a detainee, the accused was fed by the uniformed section of the police. He denied the suggestion that he was out to mislead the court. In re-examination he said that he was not aware that the deceased was dead prior to indications. On clarifications by the court, the witness testified that the remains of the deceased were located at Hereford Farm in Centenary being a place which the witness had never previously visited.

Despite the suggestion by the accused's counsel that the witness was out to mislead the court, the court did not share this view. On the contrary the evidence of the witness was clear and easy to believe. The crux of his evidence related to indications allegedly made by the accused.

The indications led to the recovery of human remains identified later as those of the deceased. It was not alleged that the remains were planted where they were found and the accused merely led to the place. It was not shown that the witness knew the place where the recovery of the remains took place prior to the accused's indications. The witness was also candid enough to admit that the accused mentioned his accomplices although the details of the names differed including what the accused said was the relationship of the trio. The court accepted the evidence of the witness.

Roy Chinyani

Is a Detective Sgt in the Zimbabwe Republic police. He is the investigating officer. He was allocated a docket concerning the missing deceased and his motor vehicle an Ipsum registration No ABL 4605 on 21 January, 2015. The witness interviewed Alexio Manyara and Roderick Chakabuda on 24 January, 2015. They alleged that they had been offered employment by the accused as driver and assistant on 24 January, 2015 but the accused just dumped them. Roderick knew the accused. He alleged that he had previously stayed with him in Muzarabani.

The witness later received information concerning the deceased's vehicle from Farai Doro. He teamed up with other police details and went to Nembudziya police station where he interviewed Evans Mupundu who narrated how he had been requested by the accused to drive the vehicle and later paid a deposit fine for driving a vehicle without a licence. He recovered the deceased vehicle and discovered that the accused had been released to go and collect the vehicle registration book before the vehicle could be released to him. However, the accused did not return.

In August, 2015 he was advised of the accused's arrest in Kadoma. He proceeded there and interviewed the accused under warn and caution. He then took the accused to Mvurwi Police Station for further investigations. At Mvurwi the accused elected to make indications. The accused indicated the place where he was picked up by the deceased, the place where the vehicle failed to cross a stream and the place where the deceased was attacked as well the place where the remains were recovered in a shallow cave. He said that the accused mentioned that he committed the offence with accomplices namely Amos Moyo and Ngonidzashe Dube. The accomplices could not be found at places where the accused gave out as their place of abode. The persons were not known. He went to Chikurubi Prison where the accused gave him names of

girlfriends of the said accomplices and where to find them so that they could assist in the location of accomplice. The girlfriends were not located nor known. The witness' evidence as to the recovery of the deceased's remains was the same as that of the last witness and no purpose will be served by regurgitating it.

Under cross-examination the witness said that the belt and trousers were buried with the remains of the deceased and he did not consider it necessary to keep them as exhibits. He confirmed that the accused had gone to the deceased's residence and left a phone number. The phone number was investigated and belonged to a certain teacher at Mukwenge Primary School and not to the accused. He testified that he interviewed the owner of a hut where the accused said they camped but she could not identify the accused. He denied that the accused had referred to Amos Dube nor that Amos Dube was a policeman. He denied that he did not follow the leads given by the accused which could have led to the arrest of the accused's accomplices. He admitted that the accused's warned and cautioned statement was not confirmed because the accused alleged that the police had assaulted him. It was however not put to him that it was him who assaulted the accused or when the accused purported to have been assaulted by the police. He denied that the accused had told him that the deceased had been handcuffed by Amos Dube and Ngonidzashe Sithole. He said that this was news to him which he was hearing for the first time.

The witness gave his evidence in a straightforward manner. The evidence was not contentious. Again the materiality of his evidence lies in the indications made by the accused and the investigations made to locate and arrest the alleged accomplices. His evidence stood up to cross-examination well and his evidence remained intact. The court did not have problems accepting the same. The court took note that although allegations of assault were made at court when it was sought to confirm the accused's warned and cautioned statement as admitted by the witness, the identity of which police detail(s) assaulted the accused or when were issues that were not developed. Critically, it was not contended that this particular witness assaulted the accused.

It must be recorded that the accused made admissions of the evidence as outlined in the summary of State case of the following witnesses, *viz*, Rodrick Chakabuda who knew the accused as someone who had been employed as a herdboys by Mrs Ndigume in Muzarabani. He

saw the accused on 21 January, 2015 purporting that he was waiting for his relative who drove a Toyota Ipsum and was looking for him. The accused told the witness that he now stayed in Chinhoyi and was in the business of buying and selling cattle. He engaged the witness as driver and asked the witness to drive the Toyota Ipsum to Chinhoyi on the pretext that he wanted to have cattle cleared. From Chinhoyi they drove to Chegutu. The accused dumped the witness and his colleague Alexio Manyara in Chegutu and they had to find their way back home. He next saw the accused in August, 2015 at Mvurwi Police Station.

Other witnesses whose evidence was admitted were Ronald Mashayombe the deceased's son in law who sold the deceased the Toyota Ipsum in question and identified it at Nembudziya Police Station, Elvis Mangwaira a police officer whose police attire and identity card were stolen on 10 February, 2015 whilst he was stationed at a police base in Nembudziya.. The attire and police identity card had been recovered from the accused upon his arrest in Kadoma.

The accused elected to give evidence and he took the oath. He gave a long story in which a lot of what he stated had little relevance to his defence. His defence per his defence outline was basically that whilst he had knowledge of the case, his involvement was peripheral or indirect because he was acting on instructions of Amos Dube a serving member of the Zimbabwe Republic Police who was his employer.

The evidence will not be repeated but a summary of the same will suffice. He said that he had been employed by Amos Dube for 3 years as a herd boy. He was told by his employer that they were going to buy cattle in Muzarabani and he was surprised. He was given a phone and directed to telephone the deceased. The deceased was known to Amos Dube. Amos Dube told the accused on phoning him to say that they would be going to pay lobola and would meet Amos on the way. He did connect with the deceased and met with Amos Dube and Ngonidzashe Sithole at a place called Chinyani. It was at this place that the deceased was ordered to disembark from the vehicle grabbed by his hands and handcuffed. Ngonidzashe then put the deceased in leg iron. The deceased was tied to two trees whilst prostrate. He called out for help but no one assisted him. He was left there. He said that the handcuffs belonged to Amos Dube. He admitted that the three of them with Amos driving left or abandoned the deceased. In short they robbed the deceased of his motor vehicle. The rest of the evidence concerned how the trio continued to use

the vehicle for their errands. He admitted being sent to try and retrieve the car registration book from the deceased place and posing as a policeman there after being given a police uniform by Amos Dube.

The trio later returned to where the deceased was. He was still alive. The deceased was asked for the car registration by Amos Dube and Ngonidzashe Sithole. He told them that the book was at his home. He went to the deceased's homestead. He admitted lying to the deceased's family about the registration book. He admitted that he again returned to the scene with Ngonidzashe and Amos and found that the deceased had died. He said that Ngonidzashe then gave him keys to unlock the handcuffs and leg irons. Amos however volunteered to unlock the cuffs and did so. The deceased's body was then placed beside a rock and covered with grass and stones. The deceased's remains were left there and the trio drove away.

The accused testified that after covering the remains of the deceased, Amos drove the vehicle with him and Ngonidzashe as passengers to Centenary. Whilst in Centenary Amos then said that he was known in the area. He was asked to look for a driver because he (the accused was not known). He then went to the bus rank and looked for a driver to drive his boss. He engaged a driver whose name he does not remember but that driver was in the company of Rodrick whom he knew. He said that the driver, him and Roderick then proceeded to Chegutu where Amos and Ngoni had proceeded in advance. The driver and Rodrick were dropped off in Chegutu and Amos Dube took over the driving and the trio, that is, accused, Amos and Ngoni then proceeded to Kadoma. From Kadoma they drove to Copper Queen where the vehicle ran out of fuel and it was left on the roadside. The trio went to their homes. On the following morning, the accused was instructed to go and collect the vehicle and he went with fuel. He said that he engaged a driver whom he knew to drive the vehicle but it would not start as the battery was flat. He then returned to Amos Dube's place and collected a tractor battery. The driver was able to start the vehicle.

From there he said that the vehicle with him and the driver as the occupants of the vehicle was driven to Kuwirirana Business Centre. He did not tell the driver their exact destination. At Kuwirirana, he was instructed by Ngoni to take the vehicle home. He however never got the opportunity to do so because he was then arrested at that business centre and detained by police details from Nembudziya. He was released released on the following day to go and collect the

vehicle registration book. He lied to the deceased's family that upon his release he was given the police uniform Amos Dube. He then masqueraded as a policeman and tried to get the deceased's family to give him the book after lying to them. He gave details of the lies he told the deceased's family about who he was and why he wanted the registration book. He had that he had business at St Alberts after failing to get the book. He returned to his accomplices and they agreed to abort the efforts to retrieve the book. The deceased's family members continued to phone on the numbers which he had given them when he lied that he was going to St Alberts. Amos would cut them off. In terms of sequence of events, the visit to the deceased's homestead occurred before they went back to where they had left the deceased in handcuffs and leg irons to retrieve the same and bury the deceased's remains.

He said that he then returned to his workplace in Gokwe and continued with his duties of herding cattle and doing other chores. He then went to Kadoma for some shopping, missed his bus back home and was arrested by police officers patrolling the bus rank. He was detained for 4 days and was collected by police officers from Mvurwi CID on the fifth day. He denied having been in police uniform upon his arrest. He said that police assaulted him. He testified that he told the police to quickly arrest Ngonidzashe and Amos but the police did not believe his story about the involvement of Ngonidzashe and Amos. They accused him of lying.

The accused was asked by his *pro-deo* counsel whether he did anything in the goings on which contributed to participating in the commission of the offence charged. The accused's response was that "I was following instructions." He said that he was forced to sign a warned and cautioned statement and was thoroughly beaten to a point where the magistrate at Guruve ordered that he be treated as he was coughing and nose bleeding. The court noted however that the statement was not tendered in evidence. He said that Amos and Ngonidzashe used to visit him at prison. He further testified that each time he gave the police the correct names of his accomplices, the police would deliberately change the names to fix him because he is an orphan. He said that the police changed the names to Amos Moyo and Ngonidzashe Dube yet he had given them the names Amos Dube and Ngonidzashe Sithole.

The accused was cross examined by the prosecutor. He was just on the defensive and evaded questions. He however agreed that the person whom he lured on the pretext of hiring him is the same person whose remains were recovered by police. The admission of course put paid to

his denial in the defence outline that the remains recovered by the police were those of the deceased in this indictment.

He denied that Shongedzai Doro saw him when he was picked up by the deceased. He denied picking up Mussaliva the priest. He denied being in uniform when he went to the deceased's residence to try and get the vehicle log book. Asked why he impersonated a police officer, he said that he was not educated and had in fact asked Amos Dube and Ngonidzashe Sithole whether when they sent him to try and get the vehicle log book, he would not meet up with police. He denied that he introduced himself to the deceased's family as Constable Makomo of Bindura Traffic. Asked about the cell number which he gave to the deceased's relatives being that of a teacher he said that the number belonged to Amos Dube. He said that when the deceased was being tied up, he sat inside the car and did not do anything. Asked what he thought was happening when the deceased was being tied up, he said that he was pre-occupied with his thoughts which were troubling him, in particular that he no longer wanted to work for Amos Dube.

Asked why he did not report the incident to the police, he said that he was not given a chance. As to why he continued associating with Amos Dube & Ngonidzashe Sithole to the extent of hiring drivers and also accompanying them to Kadoma, Chegutu, Sanyati and Copper Queen, he said that he had nowhere to go.

He agreed that when the trio returned to the place where the deceased had been left tied up to follow up on the vehicle log book the deceased was still alive but very hungry. He appreciated that the deceased could die. Asked if he cared at all what would happen to the deceased he said that he did care but that Amos and Ngonidzashe were hard hearted or headed. He agreed that he was 26 years old at the time of the incident an adult but that Amos stopped him from helping the deceased. He said that he was illiterate and did not own a driver's licence. It was put to him, that Amos and Ngonidzashe were an afterthought of his and he said that the police deliberately recorded the names wrongly. He could not explain the discrepancy between his defence outline and his evidence regarding indications and said that the police are the ones who made him indicate the various indications and that he was in leg irons. He agreed that he stayed with his accomplices in a hut near the place where the deceased was attacked but that he stayed there with his accomplices only once. Asked by the court whether he appreciated that he

and his alleged accomplices were committing an offence, he said that he could not do much as he was employed. Asked why police would shield criminals by recording wrong names to the ones he gave them, he said that he did not know.

The accused did not impress the court at all as witness in his defence. He failed to present a coherent account of his involvement in the events leading to the death of the deceased. The court was of the view that the accused was making every effort to make a clean breast from blame or involvement in the death of the deceased and sought to portray his role as being on the peripheral. He sought to convince the court that he was just an unwilling log in a machine being operated upon by his accomplices. Measured against the state witnesses the accused presented himself as a pathetic witness who did not care to tell even the most obvious lie. Each time that the accused opened his mouth to speak, one expected surprises if not fairy tales. The court rejected the evidence wherever it conflicted with that of witnesses.

The prosecutor submitted that there were really few if any material disputes of fact when one considered or contrasted the evidence of the State witnesses with that of the accused. The only point of disagreement or departure consisted in the accused's involvement of his alleged accomplices whom no one appears to have seen except of course the accused. The police tried to follow on the leads regarding the accomplices but drew a blank. The accused's assertion that the police when given leads and names of the accomplices deliberately changed the names given to them is so improbable and unbelievable as to be decidedly false. Only a gullible court would accept that in the circumstances of this case and given the seriousness of the charge of murder, the police would have sought to sacrifice the accused and exonerate the accomplices. No motive for such dereliction of duty or unprofessionalism on the part of the police was suggested and the allegation just didn't make sense and must be dismissed.

The objective evidence in this matter clearly established beyond any reasonable doubt that:

- (a) the accused purported to hire the deceased for purposes of going to pay lobola in Mount Darwin which was a lie. The Motive for the hire was intended to lure the deceased to agree to the hire as he would have wanted to know the purpose of the proposed trip.

- (b) at all material times the accused was in the deceased's motor vehicle and had possession and control of it either by himself or through third parties whom he engaged to drive the vehicle under the guise that he had employed them only to dump them.
- (c) the accused's action leave the court and indeed any reasonable trier of fact in no doubt that he intended to deprive the deceased of his motor vehicle and went to the extent of impersonating a police officer and lying to the deceased's family as to his identity in a bid to cause the family to release the registration book. If the registration had been released to the accused, he would have again hoodwinked the police at Nembudziya to release the deceased's vehicle to him.
- (d) the accused could not have remained in the motor vehicle when the deceased was being disposed of his vehicle as he alleged. It is also inconceivable that the deceased would not have offered some resistance. In any event even if it were accepted that the accused had accomplices who helped him disable the deceased, he nonetheless did not dissociate himself from the unlawful acts of the accomplices and thus made common purpose with them. He clearly appreciated what had been done to the deceased, that is, robbing him of his motor vehicle. He then willingly took a ride with his accomplices in the vehicle, that is, if there were any accomplices at all.
- (e) the remains of the deceased were found as a result of indications made by the accused. Whilst s 258 of the Criminal Procedure & Evidence Act provides that facts discovered as a result of an inadmissible statement or confession is admissible in evidence if relevant to the matter before the courts, the court was of the view that there was no need to rely on the provisions of this section. This is so because the accused did not challenge any confession which was introduced by the State. The accused despite complaining of assaults by the police nonetheless testified that it was him who showed the police the murder scene and it was through his indications that the remains of the deceased were recovered. He pointed to the place where the remains were and volunteered the information that the remains were laid against a stone and covered with grass and stones by his accomplices in his presence.

It was submitted that there was no direct evidence of how the deceased met his death. The court does not agree. The accused was last seen with the deceased when the deceased was alive. The accused gave graphic details of how the deceased was lured into a trap and disposed of his vehicle, how he was disabled, handcuffed and leg shackled and left to die. Even before he had died the accused testified that he and his accomplices went back to demand information on the registration book and found him so weak that it was clear even to the accused that the deceased would die. After the deceased had died, the accused testified to how the apparatus used to disable him, namely the handcuffs and leg irons were removed from the deceased after the deceased had died. Evidence was also led of how the deceased's remains were concealed. The evidence was in the nature of direct evidence from the accused. Had the accused not testified to the above evidence then it would have been appropriate to consider circumstantial evidence. The acts or conduct which led to the deceased death were testified to by the accused.

The accused's *pro deo* counsel submitted that there was no evidence led beyond reasonable doubt that the remains recovered by the police were those of the deceased. This submission was startling because the accused himself indicated the place where the remains of the deceased had been buried. There was no suggestion that the remains could be of anyone else other than the deceased. The accused admitted that the deceased died as a result of the actions of the accused's accomplices and they recovered their handcuffs and leg irons from the deceased's body before burying his remains under stones and grass. What better evidence of identification could one have sought for? This was a clear case where the identification of the body of the deceased was made by the accused and confirmed by the State witnesses. No scientific evidence was necessary. In any event it would not have mattered that the remains were not of the deceased but of another human for as long as such unidentified person would have been killed as a result of the unlawful actions of the accused. See s 56 of the Criminal Code.

The accused just could not advance a plausible defence even on a balance of probabilities. He admitted to committing to or being a member of a trio which robbed the deceased of his motor vehicle and caused his death. The actual manner of death is not important. What is material is that the accused and/or his accomplices intended that death should result or foresaw the possibility of their conduct resulting in death and continued in such conduct notwithstanding the realization. The accused's defence of compulsion does not stand scrutiny.

Compulsion is defined in s 243 of the Criminal Law (Codification & Reform Act). There must have been a threat of death or serious bodily harm made to or against the person compelled to act. The threat could also be of causing the compelled person to suffer financial and proprietary loss. The compelled person must on reasonable grounds believe that the threat is imminent and that the threat is inescapable. The conduct of the compelled person must not do no more harm than necessary to avert the threat. Where a person voluntarily associated, himself with another knowing that he will or there is possibility that he will be involved in the commission of an offence, the person shall be deemed to have associated himself voluntarily and must bear the fault of the conduct of the associate(s). The accused was not compelled at all in this case to act and has not established the defence of compulsion on a balance of probabilities.

The last issue is to consider the accused's defence that his accomplices were the ones who committed the offence. The court carefully considered the accused's assertion and the probabilities against all the proven objective facts in the matter. The court concluded that the so called accomplices Ngonidzashe Sithole and Amos Dube were made up by the accused. They do not exist in the matrix of the matter. The accused acted alone. At all stages when he was seen by the witnesses who testified, he was a lone ranger. It is inconceivable that the accomplices just vanished into the air. At the very least even if not caught, their existence should at least have been established. The court holds that the accused did not act with any accomplices let alone under compulsion, instructions or influence of anyone. Even if the court is found to have erred in so concluding, the accused would still be guilty as an accomplice since he made common cause with the accomplices in rendering assistance to either further the crime committed evade justice or to conceal it as more fully set out under s 206 of the Criminal Law (Codification Reform Act).

The accused would still be guilty for providing assistance or holding himself available to give assistance when required as defined in s 198 of the same Act. The accused would still further be guilty as a co-perpetrator of the offence as defined in s 196 and 196A of the said Act in that he was present at or in the immediate vicinity of the scene of the crime in circumstances which implicated him directly or indirectly in the commission of the offence charged or engaged in criminal conduct as part of the trio which conduct resulted in the crime charged.

In all the circumstances of this case, the court is satisfied that the indictment against the accused was proved beyond a reasonable doubt. The verdict of the court is that accused engaged

in unlawful conduct as detailed in this judgment with the intention that the deceased should die and the accused is found guilty of murder with intent as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

Sentence

The accused is a young man and he indicated that he is an orphan. The court heard that he does not really have a family to talk about. He unfortunately found himself at the deep end as was indicated by the State counsel and as clearly evident from the facts. It would be difficult for one to forgive the accused's motive for committing the offence. The court considered that even if it were to assume that it had erred in finding that the accused acted alone without accomplices but that there had been the three of them, it could have been difficult to differentiate their sentences. The accused's level of blameworthiness would be the same. What concerned the court is that there did not seem to be any sign of contrition on the accused's part. The accused presented himself as a victim of circumstances. Even if he had acted with his alleged accomplices, the court did not hear him say that he regretted what the accomplices did in his presence. The accused did not express any regret to the deceased's family which lost their father.

The accused's attitude was that he had to do what he did after being asked to do so by his employer. He however knew that what he was doing would result in death but he just did not care. He therefore presented an epitome of someone who is evil minded. The motive for attacking the deceased was clear robbery and that motive was realised. The plan to rob the deceased of his motor vehicle did not end with his death, the accused went to the extent of trying to make sure that he would not lose the vehicle in question that he had robbed the deceased of. After the vehicle had been held up by the police, the accused had the audacity to visit the deceased's family under the guise of a police officer. He gave the family a false hope. The accused was well received and fed by the deceased's family members. Whilst he was being fed, he in turn was also feeding them with lies. He intended that they should release the vehicle registration book to him because the police who were holding the vehicle wanted that book so that they could release the vehicle to the accused who would continue keeping it. Accused went on to put on a stolen police uniform in order to try and convince the family that he was police officer. That in itself showed planning and resolve.

And if one considers the evidence as set out, the manner that the deceased was treated was most inhuman. The deceased was tied up to two trees in handcuffs and leg irons. He was held as a dangerous criminal by a dangerous criminal in the person of the accused. To shackle a person, handcuff him, make him lie on his stomach and to abandon him in the bush amounted to a high degree of physical torture. There was time for the accused to reflect because before going to lie to the deceased's family, he went back to where the deceased had been left to try and get the car book. He was directed to get it from home by the deceased who was still alive. Instead of the accused relenting, the deceased was again abandoned in clear circumstances that he was going to die. This in fact is what moved this court to hold that even if at the beginning there might have been a foreseeability of death, by abandoning the deceased for the second time, the intention really was that deceased should die.

After the deceased had died his remains were hidden. The act of hiding the deceased's body was intended that he should never be found and that the crime of his murder would remain unknown. The Prosecutor properly submitted that the offence that the accused had been convicted of is a capital one. It is the most serious of all offences. The new constitution has provided that the right to life is the most important right that must be enjoyed by any person. There is no gain saying that this murder was committed in circumstances of aggravation. There are just no mitigating factors to water down the aggravation. The Prosecutor indicated that there was careful planning and execution carried out with recklessness abandon. This is correct.

It is difficult for the court to imagine that there was any stage at which the feelings of the victim ever entered the accused's mind. It was selfishness throughout. The accused's legal practitioner properly submitted that the court should not be vindictive and should exercise a level of mercy. Whilst the court will always do that, the circumstances of each case must be looked at individually. Mercy is not exercised in a vacuum. A basis must be laid for it. As already indicated the accused did not show any element of remorse. The court's hands became tied. The court really agonized over what sentence to pass in this matter. In view of the adverse finding that this was a murder committed in serious and aggravating circumstances with the accused not showing any elements of remorse and the mitigating factors being virtually nil, the court considered that the justice of the case called for the ultimate penalty.

In all the circumstances of this case, the accused is sentenced as follows:

Death sentence. The accused shall be returned to prison and the sentence of death will be executed upon him in accordance with the law. These proceedings will be subject of automatic appeal to the Supreme Court and if confirmed the sentence will only be carried out after consideration by the State president who will either endorse it or gives the accused a pardon.

National Prosecuting Authority, state's legal practitioners
A R Chizikani Legal Practitioners, accused's legal practitioners