

STATE
versus
SIMBARASHE DAVID CHIMUKA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 8,9,10,11,12 February; 7, 9,10,24 March; 5,6 and 7 April 2016

Assessors : 1. Mr. Chidyausiku
2. Mr. Mhandu

Criminal Trial

T. Kasema, for the State
A Rubaya, for the accused

CHITAPI J: The accused pleaded not guilty to a charge of murder in which the State charged him with unlawfully causing the death of Clemence Chitete by striking the deceased with a concrete block and brick on the head on 5 November 2014 at house number 83 Blakeway Drive, Belvedere, Harare. It was the State's allegation that when the accused struck the deceased with a concrete block and brick as aforesaid, he intended to kill the deceased or realized that there was a real risk or possibility that his conduct might result in the death of the deceased but continued in that conduct despite such realization.

In the summary of the State case in which it sought to amplify the charge, the State alleged that on 5 November, 2014, the accused went to 83 Blakeway Drive, Belvedere Harare. When he got there, he gained entry into the premises through the durawall and armed himself with a brick which he picked in the yard. He then used an unknown blunt object to force open the kitchen door to the deceased occupied cottage and proceeded into the accused's bedroom. The deceased awakened following the intrusion and the two fought. The accused then struck the deceased on the forehead several times with a brick and an ottimo steam iron. The deceased fell

down unconscious. After the deceased had fallen down and was unconscious, the accused went outside the deceased's premises, picked up a concrete brick and struck the deceased with it on the head resulting in the death of the deceased.

The State in its summary of state case further alleged that the accused after incapacitating the deceased as aforesaid, then stole the deceased's jeans, shirts, 32 inch Samsung television set, HP laptop, blackberry cell phone, Nokia cellphone, bunch of house keys, deceased's driver's license and the deceased's Toyota Corolla Sedan motor vehicle which he used as a gate away car. It was further contended by the State in its summary that the accused dropped his pair of white and black sandals inside the yard of 83 Blakeway Drive. The accused was alleged to have disposed the stolen items by selling them except for the blackberry phone which the accused allegedly gave to a prostitute in exchange for her services and the motor vehicle which he abandoned along Harare-Bulawayo after the motor vehicle ran out of fuel.

The offence according to the summary of State case was discovered by the gardener on 6 November, 2014 and a report of the same was made. The accused was then subsequently arrested in Victoria Falls trying to run away. A post mortem examination on the deceased was carried out by Doctor Mauricio Gonzales who concluded that the deceased died from subarachnoid hemorrhage, head trauma due to assault.

The summary of the State case also listed 20 witnesses and their summaries of evidence and further listed 4 exhibits which the State intended to use in evidence. The summary of state case which lists witnesses which the State intends to call and the summaries of their evidence is a pre-requisite document which should be prepared and served upon the accused on his being indicted by the magistrate for trial in the High Court in terms of s 66 (6) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. The importance of this document lies in the need to ensure that the accused is sufficiently informed of the facts and evidence upon which the state will seek to rely to prove its allegations or charge against him. Section 66 (6) (a) of the Criminal Procedure and Evidence Act, provides that the said summary or document should in terms of particularity, give such particulars as are "..... sufficient to inform the accused of all the material facts upon which the state relies." The copy of the summary of the state case is required to be lodged by the Prosecutor General with the Registrar of the court in terms of s 66 (7) of the

Criminal Procedure and Evidence Act together with copies of other documents which will have been served upon the accused on his or her indictment.

The summary of the State case and evidence of witnesses is necessary to enable the accused to properly prepare his defence to ensure a fair trial. The corollary to the summary of the state case is the accused's statement of defence. The accused is enjoined in terms of s 66 (6) (b) to give an outline of his or her defence if any to the charge and is also required to list the names of the witnesses which he or she proposes to call to support his or her defence. The list of witnesses should be accompanied by a summary of the evidence of each such witness and in terms of particularity of, the summary of the evidence should "be sufficient to inform the Prosecutor-General of all the material facts on which he or she (the accused) relies in his or her defence". Section 67 (2) of the Criminal Procedure and Evidence Act, provides for adverse inferences which the court may draw from the accused's failure to strictly comply with s 66 (6) (b).

The provisions of s 66 (6) of the Criminal Procedure and Evidence Act, accord with the provisions of s 70 (1) (b) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 which provides that an accused has the right to be promptly informed of the charge in sufficient detail to enable him or her to answer it. A moot point arises as to whether s 67 (2) of the Criminal Procedure and Evidence Act on the drawing of an adverse inference can be said to be in conflict with s 70 (1) (1) of the Constitution which gives the accused the right to remain silent and not to testify or be compelled to give self-incriminating evidence. This judgment does not seek to address the issue as it does not arise nor has it been argued. Suffice however that in the view of the court there would be no conflict at all between the two legislative provisions where the accused has elected to testify. Where the accused has elected to remain silent, it would be misdirection on the part of a court to draw an adverse inference from such refusal to testify.

The other relevance of the summaries of State case and defence outlines respectively is that the State and defence counsels are able to appreciate and analyse the evidence which either side seeks to adduce. In several cases the documents have presented an opportunity for convergence by the prosecution and defence leading to plea bargaining, the making of admissions to curtail the trial and the listing of agreed facts. On the part of the court, the trial

judge and assessors will also read the documents and attune themselves to the nature of the case they will hear and prepare accordingly.

It follows that the court will expect that what is listed as available evidence will be adduced. The summaries aforesaid should therefore not be made up basing on conjecture but on available evidence. It is improper for the State to give a summary of case which is not supportable by the evidence which will then be called or is available. It has been said that a criminal trial should not be a game of hide and seek because justice should be seen to be done and it can only thrive where there is openness.

It has been necessary to give an overview of the pre-trial documents preparation procedures because of what transpired in this case which the court will advert to when it gives its analysis of the evidence which was led by the State vis-à-vis the summary of what was stated as having transpired on the evening that the deceased met this death. Having dealt with the summary of the State case and the provisions of the law with the respect to s 66 (6) of the Criminal Procedure and Evidence, the court will proceed to summarize the outline of the accuser's defence which he filed pursuant to s 66 (6) (b) of the Criminal Procedure and Evidence Act.

The accused in his defence outline denied that he unlawfully and intentionally caused the death of the deceased as alleged. He denied striking the deceased with a concrete 'block' and brick on the head as alleged. He outlined that on the day in question he went to the deceased's cottage to follow up on unpaid October, 2014 rentals because he needed to use the rentals for a planned journey to Victoria Falls where he intended to meet up with a Brazilian friend, and erstwhile Curtin University fellow student whom the accused had learnt with in Western Australia between 2006 – 2009.

His outlined continued that on arrival at the cottage occupied by the deceased, he noticed an attimo steam iron outside the cottage. He noticed at the same time that the deceased was pacing up and down in his kitchen. Upon seeing the accused, the deceased started shouting at the accused accusing him of having broken down the cottage door and stolen the deceased's property which included a laptop, television set and 'other things.'

The accused alleged that he refuted the allegations made against him vehemently but the deceased immediately and violently charged at the accused. He alleged that the deceased

punched, kicked and indiscriminately assaulted him and tripped him when he was trying to escape and he fell to the ground. The deceased continued the assault “unabated” upon the accused using the attimo electrical iron which was on the slab just outside the house. The accused was left with no option but to act in self-defence, by hitting the deceased with clenched fists in order to make good his escape.

When the accused hit the deceased with clenched fists, the deceased fell onto the ground hitting his head on the slab just outside the cottage in which the deceased was staying. The deceased started bleeding and crawled back into the cottage. The accused presumed that the deceased intended to get more weapons. He took the opportunity to run away for his life as he was not sure what the deceased’s intention was when he crawled into the cottage.

The accused further averred in the defence outline that he did not use any concrete brick on the deceased. It was the deceased who acted as a possessed person, was not acting normally and was intent on inflicting serious harm on the accused and was unrelenting even when the deceased fell to the ground. He stated that his intention in fighting the deceased was to defend himself using reasonable force and he did not foresee or realize the possibility that the deceased would fall down and meet his death consequent to the injuries.

After escaping from the attack, the accused outlined that he went to his drinking spot at Hollies Night Club in Harare Street and spent the whole night drinking beer and gambling. On the following day 6 November, 2014 he went back to 83 Blakeway drive intending to further follow up on the outstanding rentals with the deceased. On arrival, he learnt that the deceased had not been seen that morning. He then used his gambling wins which he had made on 5 November 2014, and proceeded to Victoria Falls to meet with his friend Santos.

He denied in the defence outline that he intended to escape into Zambia as he neither had a passport nor any other travelling document. His sister Jean Chimuka on communicating with her advised him that police were looking for him. The accused arranged to meet Victoria Falls Police Officers at O.K Supermarket, Victoria Falls. He is the one who called the police to find out their mission and would have made good his escape had he intended to. When he went to meet the police at O.K supermarket aboard a taxi he was in the company of his friend Joseph Santos. The police chased away Joseph Santos and the taxi driver and arrested him.

The accused continued with his defence outline and denied admitting to the offence and alleged threats of assault by police officers Simbarashe Havurovi, Ngonidzashe Zhou and other unnamed police officers. His supposed warned and cautioned statement was made by the police who forced him to just sign it.

From Victoria Falls to Bulawayo and then to Harare, he stated in the defence outline that he was being systematically assaulted by police officers to make incriminatory indications. The police officers were from Harare Central Police and he was handed over to them in Bulawayo by police officers from Victoria Falls. On arrival in Harare he alleged that he was advised by police officers from Homicide department, namely, Damson Chatukuta, George Kachidza and Joseph Nemaisa that he would be dealt with by being assaulted or being shot if he made any complaints against the police at the magistrate's court. He further alleged that he was advised that a lawyer was not necessary at the initial remand hearing and he was not granted access to his legal practitioners.

His defence outline further alleged that he was not advised of his constitutional rights on signing his warned and cautioned statement and the making of the video recorded indications which was made freely and voluntarily and he was in handcuffs and shackled. He alleged threats by the homicide Police details if he refused to confirm his statement and that some of the police details whom he did not name sat in the gallery during confirmation proceedings whilst others stood outside the court waiting to get confirmation as to whether he had complied with their orders. He stated that he was also told by the police officers who took him for confirmation that he did not need legal representation. He alleged that he was booked out of remand prison and detained in the police cells for 3 days for nothing save that police wanted to show him that they could do as they liked with him. Police officers Joseph Nemaise and Damson Chatukuta threatened him not to divulge the threats made upon him or else they would shoot him if they saw him roaming the streets of Harare.

The accused denied stealing the deceased's motor vehicle or any of the deceased's belongings'. He stated that he was not a driver and did not dump the vehicle along Harare – Bulawayo road averring that those who were found in possession of the deceased's property should explain their possession as he was not the person who gave them the property. He denied being found in possession of anything belonging to the deceased and further denied being an

abuser of dangerous drugs like cocaine. Lastly, he stated that he denied any other allegations by state witnesses in their statements which tended to incriminate him.

All in all, the accused defence outline was eight typed. The foregoing therefore summarizes the summary of that case, without repeating the summaries of the actual evidence of the witnesses and the summary of the defence outline respectively. The summary of State evidence was marked exh 1 and the summary of the defence outline exh 2.

The prosecutor in seeking to prove the State case called a number of witnesses whose evidence is summarized and analysed hereunder.

Culture Mvere

He resides in the neighbourhood of 83 Blakeway Drive, Belvedere, Harare at Number 68 where he is employed as a gardener. He did not know the deceased but knew the accused as a son of the owner of No 83 Blakeway Drive. He had known the accused for over one year and knew him to have stayed at that house although on 5 November, 2014, he did not know where the deceased was actually residing.

On 6 November, 2014, he woke up around 7:00am and at about 7:30am he went to 83 Blakeway Drive to collect his hoe which had been borrowed by the gardener who stayed at 83 Blakeway Drive. On arrival, the gate was closed and he waited. He then observed two men whom he told that he wanted to see Nelson Gomo. He was directed to the cottages which he noticed to be two in number. He proceeded to the first cottage which he found open.

The witness saw the deceased lying on the floor. He said that the deceased was beaten. He called out to the deceased but did not get a response. He observed blood on the deceased's back and formed the view that the deceased was dead. He rushed to the two persons who had come out of the main house when he entered the gate and reported to them that there was a badly injured person at the cottage. One of the two persons was a young boy of school going age. The witness then accompanied the older person to the cottage where the deceased was. The witness then further observed that the deceased's body lay on the floor and there was blood on the cement floor and blood stains near the door. He went to the police station in the company of the occupant of the main house and made a report.

Under cross examination the witness admitted that he did not know how the deceased had met his death. He did not check the place where the deceased body lay or observe the deceased's closely. On returning with the police, the witness saw a blood stained ½ cement brick. He then observed that the deceased lay by the door of the kitchen facing downwards leaning on his right arm. When police lifted the deceased, he saw blood coming out of the deceased's mouth and there was blood where the deceased was lying on the floor. Asked by the court where the half brick came from, he said that he only saw it in the hands of the police but there were no other bricks around the scene. He also said that the deceased's upper part of the body was inside the cottage with the legs slightly outside the door.

The court's assessment of this witness is that he was truthful and gave a simple account of what he did and saw. What he saw of the deceased was something that he did not expect to see when he went to the cottage to collect a hoe. The witness was not investigative and did not have reason to. A reading of his evidence and listening and looking at him left the court in no doubt that the spectacle of seeing the deceased came as a shock to him. The court accepted that the witness was the first person to discover the deceased's body. Of particular note is the fact that the witness saw a half concrete blood stained brick at the scene and the brick was, according to the witness, recovered by the police. The court noted that the witness came with the police whom he referred to as the ones whom he observed holding the ½ brick. The court accepted that the deceased was already dead when the witness got to the deceased's cottage and that the witness called out to the deceased without receiving a response.

Tinotenda Goredema

He was resident at 83 Blakeway Drive Belvedere and was a student doing form 4 at Belvedere Christ Ministries.

He was 18 years at the time of the occurrence of the death of the deceased. He stayed in the main house with his brother and one Batsirai. He knew the accused as he came to collect rentals at the end of the month. He was at home throughout the day on 5 November, 2014 from 6:00pm until the following morning. He saw the deceased's body on the morning of 6 November, 2014 around 7:00am an hour after he had seen the accused at 6:00am. The

deceased's body was lying on the floor in his cottage with part of his body, the upper part inside the cottage and the legs outside the door.

The witness observed some injuries on the deceased's head. He observed a broken iron in the passage leading to the door into the cottage. He also went to the police station to make a report with Batsirai and the last witness. He did not hear or witness any disturbances during the night except for the barking of the deceased's dog. When he returned to the scene with the police, he did not get inside the cottage.

The witness was cross examined at length. He said that he saw the accused on 5 November, 2014 around 7:00pm and the accused enquired on the whereabouts of the witness brother. He said that he did not see the accused again that day. When it was put to him that in his statement to the police he had said that the deceased returned about 20 minutes later with five male adults in a car, the witness said that he only saw the vehicle drive into the yard and assumed that the accused was part of the passengers. When he saw the accused, the accused was wearing a $\frac{3}{4}$ short, that is a short trousers which extends to below the knees.

On 6 November, 2014 the witness saw the accused around 6:00 am. The accused knocked on the window to the main house and enquired on the whereabouts of the witness's brother and if he had seen the deceased. The witness could not commit himself to the mode of transport used by the accused. The witness said that he did not make a thorough observation of the scene of the murder. He said that he did not depose to seeing the iron in his statement because when he made the statement he was under pressure but insisted that the iron was there for anyone to see it as it was in the passage leading to the door into the cottage. The witness did not see the police recovering any other exhibit apart from the iron.

When questioned by the court, the witness said that when he first saw the iron it was next to the deceased but when he returned with the police the iron was outside the passage near the wall. He said that the accused's puppy was lifting things around the scene and did not allow anyone to get to the deceased.

As with the last witness, this witness gave his evidence by a simple narration. The witness was soft spoken and had to be admonished to raise his voice several times. He struck the court as being honest and also shocked at the sight of the deceased. He did not make any investigative observations. His lack of close observations can easily be understood when one

considers his youthfulness at the time. The court accepted the witness evidence as to what the witness observed and did.

Esther Victor

She resides at 85 Blakeway Drive, Belvedere and the house adjoins 83 Blakeway Drive. A durawall separates the two premises. On the night of 5 November, 2014 it rained. There was no electricity. She stayed in a cottage at 85 Blakeway Drive and the deceased's occupied cottage was some 200 – 300 metres away from hers. She last saw the accused a long while back although she knew him.

During the night of 5 November, 2014, she was awoken around 11:00pm by sounds of stones being thrown about and the noise did not last long. She did not go out of her cottage to investigate but just sat up until the noise died down. She said that she then heard a loud sound. There was quietness after that. The stone throwing was coming from the deceased's cottage.

Under cross-examination she was asked to clarify the sounds which she allegedly heard. She said that she heard one loud noise preceded by earlier sounds and she thought the noise was produced by stones being thrown. She clarified that her cottage and that of the deceased are separated by a durawall and would be about 7 metres apart. She disagreed that the noises she heard could have been produced by people fighting and insisted that a noise produced by stones being thrown would be different from noise produced by people engaged in a fight. The episode lasted about 2 minutes. She said that the noises were coming from outside the deceased's cottage. She retired back to bed about 5 minutes after the last loud noise. On 6 November, 2014 she got into the premises of 83 Blakeway Drive and the police removed the deceased's body therefrom in her presence. She did not see in what position the deceased was. Asked by the court if she heard any noises, she said that she did not hear any voices.

Again this witness gave a simple account of what she heard on the night of 5 November 2014. Her evidence is of no real probative value save that it confirms that there was some commotion late around 11:00pm at the deceased's cottage. In this regard the witness checked her watch and noted that it was 2237 hours. The witness was honest enough not to commit herself to giving evidence on matters which she did not have personal knowledge of. The defence has submitted that no stones were recovered at the scene but however the court noted that there was

evidence led of a ½ brick being recovered and a broken iron. Therefore the fact that the witness heard sounds of stones being thrown cannot be dismissed out of hand. The issue to be considered will be whether by stating that she heard stones being thrown which she never saw, the witness testimony should be disbelieved for using the word stone as opposed to saying that the sounds she heard were like those produced by a stone when it strikes an object.

Albert Mlamblo

Is a police officer stationed at the theft from car section of the Zimbabwe Republic Police? At the material time he was stationed at Milton Park Police station. He attended on the informants of the occurrence at 83 Blakeway Drive on 6 November 2014. The informants were Washington Makore and Tinotenda Goredema. They reported discovering the deceased's body. He proceeded to the scene with the informants. On arrival, he observed the deceased's body. There were blood stains around where it lay and more stains a few metres outside the kitchen door. He observed a blue and white steel iron which was blood stained. It was on the ground near the blood stains on the floor where the deceased lay. He observed struggle marks as indicated by a spot on the ground. The kitchen door was open. The deceased lay on his right side and his left leg hung on the bottom door handle of the kitchen cupboard. The deceased's body was bleeding from the mouth and nose and there was vomit. He called out to the deceased without response and he saw no sign of life.

The witness made a cursory observation of the bedroom and saw that items therein were scattered about. The deceased was wearing a navy blue short without shoes or a shirt. There were some half bricks in the bedroom. The kitchen door had scratch marks showing that it could have been forced open. He then called his mother station and reported the occurrence to his officer in charge crime Assistant Inspector Hove who subsequently attended the scene with other police officers. The team then called police C.I.D Homicide.

The witness testified that he turned over the deceased's body and observed injuries on the deceased's forehead and some burn like marks on the stomach. The marks looked to the witness as if some hot substance had been pressed against the deceased's stomach. Police from C.I.D Homicide department arrived and took photographs of the scene and the deceased after which the witness assisted with the removal of the deceased's body to Parirenyatwa Hospital where the

deceased was certified died and his body placed in the mortuary. He said that he locked up the deceased's dog in one of the rooms as it was interfering with the scene.

Under cross examination the witness said that the blood stains were concentrated on the veranda of the cottage and started some 3 -4 metres from the concrete slab of the cottage. The iron was just outside the veranda. The iron was not in the kitchen or passage but outside and it was broken. The deceased's whole body was inside the kitchen and about 70cm from the door. When it was put to him that the informants who reported the occurrence to him had testified that the deceased's body was partly within the kitchen with legs outside, he said that it could be that as civilians they were in a state of shock and scared and this affected their state of mind and observations. He said that he also saw a bunch of keys near the iron but he did not take possession of them. No fingerprints were taken. There were blood stains in the form of a finger imprint on the kitchen doors. There were half bricks near the deceased's head and some small fragments. The ½ brick was the common brick type and it was blood stained. The blood stains on the iron were also on the handle of the iron. He said that the burn like marks could have been caused by the iron. The deceased's body had blood on the chest and on his shorts. A half brick similar to the one which the witness observed besides the deceased was recovered outside the kitchen. The ½ brick did not have blood stains. When told that his statement only referred to brick fragments, the witness said that, it could have been an omission but he did not consider it appropriate to lie on oath and not depose to the truth of what he saw simply because his recorded statement did not capture all his evidence. He showed the ½ bricks to the police team from his station and does not know whether the police C.I.D Homicide collected the exhibits.

In answer to clarifications sought by the court, the witness said that the deceased's clothes were scattered by the bed and the wardrobe doors were open. There was no television on the television stand and the A/V cables had been removed.

This witness impressed the court and struck the court as being truthful in his testimony which he did not seek to embellish. He made observations at the scene which he explained with clarity. He acted professionally by not tampering with the scene prior to calling his superiors and the arrival of CID Homicide. The court believed the witness. He did not tailor his evidence or make it to suit that of other witnesses when some discrepancies between his evidence and that of

others was pointed out to him. The witness stood up well to expert cross examination by the accused's legal counsel and stuck to his testimony without contradictions.

Lorraine Tsopotsa

Is a police constable based at Milton Park police station. She drove the vehicle ferrying the team of policemen from Milton Park Police Station who attended the scene. She parked the vehicle outside 83 Blake way Drive and with other police officers proceeded on foot to where the last witness Constable Mlambo was by the cottage. She saw an iron on the lawn outside the cottage adjacent to the cottage wall. The iron had blood stains on it and it was blue and white in colour.

The witness only got into the Kitchen of the cottage where the deceased's body lay after CID Homicide Members had taken pictures of the scene. She observed the deceased lying on the floor on his right-side bleeding from the mouth and nose. She noticed pieces or debris of burnt brick. The deceased's forehead was swollen and he was dressed in shorts without shoes or a shirt. When constable Mlambo turned the deceased's body over so that it could be loaded into the metal police coffin, she observed that the deceased's clothes were scattered within the bedroom and that there was a ½ brick in the middle of the room near the deceased's bed. After the deceased's body was loaded into the metal coffin, the witness drove the police vehicle with the coffin which contained the deceased's remains to Parirenyatwa hospital.

Under cross-examination the witness said that the only half brick she saw was in the bedroom near the deceased's bed. It was covered with clothes and newspapers but could be seen. It was on top of the clothes and newspapers partially covered it. She observed the deceased's body lying on its right side with the right leg adjacent the kitchen unit. The witness saw a bunch of 3 or 4 keys outside the cottage. She did not see any ½ brick outside the cottage nor sandals. She saw bruises on the deceased's stomach above the navel when he was turned over and not burns. The iron had blood stains where the cord is connected to it and it was broken. She saw brick fragments in the kitchen where the deceased lay, next to this body. She did not observe a pool of blood where the deceased lay but observed blood coming out the deceased's mouth and nose. She also saw some blood stains on the lawn outside the cottage.

The witness gave her evidence well with confidence and maintained her story. She withstood cross examination well and impressed the court with her openness and simplicity. Her evidence was not colored and she stood by what she saw even when told that other witnesses had testified differently on what items they claim to have seen at the cottage. The court believed her evidence.

Lynne Chanakira

Knew the deceased as a workmate and did not know the accused. On 6 November, 2014, the deceased did not show up for work. The deceased was her supervisor who allocated work to her. She called the deceased's cell number around 8:am after she had waited for him from about 7:30 am. The deceased was always invariably the first to arrive at work. She thought that the deceased could have watched soccer into the late hours and delayed to wake up.

When the witness telephoned the deceased's phone she was answered by a male voice but the voice was not the deceased's voice. She asked to speak to the deceased and was told to hold on after which she was cut off. When she tried to call again the deceased's phone had been switched off. She reported to her boss and a driver was assigned to drive her to check on the deceased at his place of residence as it was felt that something was wrong. The workmates thought that the deceased could have been involved in an accident.

On arrival at the deceased's residence, she found police officers in attendance and was informed of the deceased's death in an alleged robbery. She proceeded to the cottage where the deceased's body was removed to the lawn and she identified him. She was not allowed into the cottage as police said that they were still investigating.

She returned to work and reported her findings. Her boss tasked her to go and advise the deceased's parents in Mufakose of the deceased's death and she did so. She was subsequently invited to CID Homicide where she identified the deceased's work laptop. She used the work pass word to access it and identified it. She produced the laptop as exh 4.

Nothing came out of the witness' cross examination which consisted of three questions to confirm that she could not connect the deceased to the recovery of the laptop. She confirmed so.

The witness' evidence was straight forward and not contentious. Its relevance lies more in the witness' identification of the deceased's work lap top at CID Homicide.

Nyasha Yvonne Choto

Is the deceased's girlfriend whom she met in 2012 and fell in love with in May 2014. She was the deceased's lover until his death. She was in a close relationship with the deceased and kept a set of spare keys to the deceased's cottage whose contents and property she was familiar with.

On 5 November 2014, the deceased visited her where she stayed at 3 Blenheim Avenue within the same suburb of Belvedere. The deceased called her on her cellphone at 17:17 hrs. and subsequently went to her place shortly thereafter driving his Corolla Sedan Registration No. ADE 5146 Pearl in color. The deceased was wearing a long sleeved shirt, pair of grey trousers, black leather shoes and he had 2 cellphone handsets, a blackberry and nokia, the blackberry being his work phone and the nokia being a dual sim with an econet/buddie and telecel lines. He also had a card holder where he kept his business cards.

The deceased remained at the witness' place until 10:00pm and in between, it rained. The deceased never telephoned to advise his safe arrival home or to say good night. This was the last time that she saw the deceased alive. The following day she went to attend a funeral and around 1549 hours after failing to get through to the deceased's phone lines, she telephoned his work place and spoke with the last witness Lynne Chanakira who broke the news of the deceased's death to her.

On 7 November, 2014 she went to the deceased's residence and observed black sandals on the lawn by the cottage. They were produced in evidence as exh 5. She handed the sandals to the police and said that they did not belong to the deceased. She observed that the kitchen door which is also the entrance door had been forced open and there were dried blood stains on the floor. She saw pieces of broken brick in the kitchen. She entered the bedroom and observed the deceased's laptops to be missing from the desk where he usually kept them. The television set was also missing. She tried to locate deceased's cellphones to no avail. She observed a black $\frac{3}{4}$ short inscribed METERS BROWNE between the bed and the couch on the ground. The short did not belong to the deceased. She was shown a television set which she identified as the deceased's which was taken from the cottage. It was produced as exh 7.

Under cross examination the witness said that she had last visited the deceased's residence on 3 November, 2014. There was no brick kept in the deceased's cottage as at

3 November, 2014. She also argued that she could not say whose sloped they were which she recovered on the lawn although they were of the size the deceased wore. She also agreed that she could not say when the sloped were left by whoever left them on the lawn. She also agreed that she could not connect the accused to the property stolen from the deceased's house nor say whether the property was stolen before or after the accused had left the residence. The witness also saw the deceased's black sandals on the lawn.

The witness impressed the court and was cool and calm despite losing her boyfriend. She exhibited a high degree of composure and maturity and never sought to implicate the accused or anyone else in the murder of her boyfriend. She went to the scene 2 days after the event. She gave evidence of her observations without bias. She identified the deceased's television set and readily avoided reaching any conclusions based on conjecture. She did not buckle under cross-examination and answered questions openly and fairly conceding where she did not have personal knowledge of facts. The witness held herself from emotion and the court accepted her evidence without misgivings.

Jean Mary Chimuka

Resides at 42 Farai Court and is a sister to the accused. She knew the deceased as an ex-workmate and a tenant at 83 Blakeway Drive. The property is owned by the witness and the accused's parents. The witness' father was late though. The accused and herself derived income from letting out the property. The accused collected rentals from tenants in the cottages and the witness from tenants in the main house.

The witness stayed with the accused at Flat 19 Excelsior Court, Fife Avenue/Harare Street at the material time. On 5 November, 2014, she telephoned the deceased to check for her if the gardener who had asked for time off had returned. The deceased had promised to check and advise her when he got home. On the same date, she left the accused in the flat as she went to work after bidding him farewell. On her return from work she did not find the accused at home. The accused did not have a phone. She tried to find the accused by telephoning at 83 Blake way Drive on 6 November, 2014 but he was not there.

The witness only next made contact with the accused on 7 November, 2014 when the accused telephoned her. She told the accused that she was looking for him and he said that he

was in Victoria Falls as per his previous communication to her to that effect. She asked the accused to return to Harare because there were things which she could not handle as she was at work. She told the accused about the deceased's death and the accused expressed surprise and said "ah what happened?". She told the accused that it was the reason why she was requesting him to return so that he could handle the issue.

Asked how the accused was arrested, she said that she was invited to Milton Park Police Station on 7 November, 2014 where she was asked as to when she had last seen her brother the accused, to which she answered that she had last seen him on 5 November, 2014. She said that she was told that the accused was a suspect in the murder of the deceased. She advised the police that the accused had telephoned her requesting her to send him some money for transport to return to Harare and that she had told the accused to return the same way he had gone to Victoria Falls. The police told her that she should not have said that to him.

She said that the police showed her some clothes which she could not identify. She said that she telephoned her mother Junior Pfuudziridza and advised her of the occurrences at 83 Blakeway Drive and the fact that the police were looking for the accused. Her mother advised to co-operate with the police and tell them what she knew. She said that the police then gave her a name and said that if the accused phoned for money again she should tell him that she would send the money through that named person. The accused subsequently telephoned her and she told him that she would go to the bank and withdraw the money and send to him. The prosecutor abruptly ended the witness' testimony and asked her whether she had helped the police to trap the accused and she denied that assertion.

Under cross examination she admitted that when the accused telephoned her, she advised her about the death of the deceased and he said that he was in Victoria Falls with friends and reminded her that he had previously told her of his intended visit to Victoria Falls. She did not see the accused on 5 November, 2014. The accused did not refuse to return to Harare but wanted transport money to do so. She left the accused asleep on 5 November, 2014. She was shown a short and sandals and could not confirm if they belonged to the accused i.e. exh 5 and 6, the ¾ short and North star slopes. She said that if it is alleged that the accused wanted money to go to Zambia she would have wondered how he would do so since he did not have a passport. Asked if she knew how the police in Victoria falls connected with the accused, she said that when the

accused enquired about money on the phone he suggested that it be sent through eco-cash using the telephone number of a driver. She told him that she was not registered for eco-cash and could not send the money by eco-cash. However, she advised the accused to telephone Zhou who would meet him by OK Supermarket. She said that police then briefed Zhou who then arrested the accused. The witness said that she and the accused had spare keys to 83 Blakeway and could access the premises anytime. The gardener had keys to the gate as well. The accused was in the habit of just leaving and going away without bidding farewell and she chided him for this now and then.

Asked by the court to clarify her role in having the accused arrested, she said that she did not lead the police to arrest the accused but the police officers are the ones who told her to use their person Zhou. She said that she was looking after the accused as he was not employed. When asked whether the accused had told her that he had had a fight with the deceased, she said that the accused had not told her. She said that apart from expressing surprise at the news of the deceased's death, the accused had said that it was better to come back home. The witness did not see the accused again until she visited him at remand prison on 10 or 11 November, 2014.

The witness did not overly impress the court and appeared to be awe stricken and in a rush to gloss over issues asked of her in order to just be done with the burden of giving evidence. The court formed the impression that the witness was caught between a brick and hard place because she was being asked to testify against her young brother, never an easy thing to do. Her reluctance to commit herself to addressing squarely questions put to her did not escape the observance of the court. The court will treat her evidence bearing in mind its observations as foregoing.

Tichaona Bright Shava

Is a resident of Warren Park Suburb in Harare. He operates a tyre repair service near Total Service Station in Warren Park. He did not know the deceased and only knows the accused in connection with this case. He testified that around 6:00 am on 6 November, 2014, the accused came to his workplace on foot and offered him a tyre for sale for which he charged the witness US\$15-00. The accused said that he had run out of fuel for his car which he pointed at which was stationery at the Total Service Station.

The accused went to his car which was a Toyota Sedan pearl in color, opened it and took out a tyre, a biscuit type and brought it to the witness. The witness said that he only had \$5-00 and the accused agreed to sell the tyre at the offered price. The accused then drove the Toyota vehicle to the fuel pump but the witness did not observe if the car was fuelled. He however saw the accused drive away from the pump.

After a few days, the accused came to his workplace in the company of the police and enquired whether the witness knew the accused and whether the witness had bought a tyre from the accused. The witness confirmed and produced the tyre to the police. He said that he easily identified the tyre because it was the only one with a yellow rim. When the transaction between the witness and the accused took place, there were only the two of them and he concluded that the police could only have been led to his workplace by the accused. The witness identified the recovered tyre with rim in court and it was produced as exh 8. On the issue of the actual time that the witness transacted with the accused, he said that he thought it was around 6:00am because it was now light but the sun had not risen. The witness did not record the registration numbers of the vehicle which the accused drove and removed the tyre therefrom but the vehicle was parked 20-25 metres away from where the exchange of the tyre and money took place.

The witness was subjected to intense cross-examination by the accused's counsel. The cross-examination was concentrated towards establishing mistaken identity of the accused by the witness. The witness said that he spoke to the accused for a few minutes but was looking at the accused as he spoke to him. He denied that he could be mistaken as to the identity of the accused because only a period of 3 or so days had lapsed from the time of the sale of the tyre and the accused coming to the witness' workplace. The legal counsel pointed out to the accused's gaping or missing teeth and asked the witness why he had not referred to them in describing the features by which he identified the accused. The witness responded that when a person looks at another, one does not go into details of the eyes, mouth and other minute details. When it was pointed out to the witness that the accused had a bald head and that the witness had not referred to it, the witness responded that he was sure of the accused's identity because the accused first came to him to offer the tyre for sale, returned with the tyre and returned to the motor vehicle which he then drove to the pump. It was also put to the witness that since the accused came in the company of the police, it was clear that there was trouble and it was convenient for him to

simply agree that the accused was the one who sold him the tyre to avoid his getting into trouble. The witness responded that he was interested only in the truth and believed the police were doing their work dutifully. The witness also disagreed that US\$5-00 for the tyre was a giveaway price and said that the type of tyre is a temporary one for emergencies and other car owners give them out for free and acquire full sized tyres and rims as spares. He testified that the accused removed the tyre from the boot of the Toyota Corolla. He agreed that he was not aware of the identity of the deceased's vehicle and could not say the tyre came from the deceased's vehicle. He however, insisted that only the accused could have told the police about the tyre transaction because the accused came with the police and told them that he had sold the tyre to the witness.

The witness denied that he was a stooge set up by the police to create a link between the accused and the recovery of the deceased's property and said that no one had told him what to say or do. He denied knowing the names Wellington Sykes and Kelvin Kavande. He denied the suggestion by the accused's counsel that he was being used to shield the said two persons who could have committed a robbery on the deceased. He said that he walked with God and was not given to lying but admitted that as a human being he could joke and had also told lies here and there when he was young boy. He then said "what I can assure you about is that I did not tell the police that I bought a tyre". He reasoned that only the accused could have done so as he was the one who brought the police to the witness.

The witness said that as he conversed with the accused, he was also working on a tyre which a customer had left behind for repairs but that this notwithstanding he had the opportunity to observe the accused. He denied that he was tailor making his evidence to suit what the police had told him nor that the police told him what to say. When it was again put to the witness that he had not identified the accused through peculiar features like missing front teeth and a bald head, the witness said "I do not know how we are created but you can identify a person you will have seen."

Under re-examination the witness said that he produced the \$5-00 and handed it over to the accused and the two were facing each other as they exchanged the money. He said that the money was denominated in \$1-00 notes. When asked by the court to describe the exact location of his workplace, the witness said that it was at Warren Park Shopping Centre and across the road there is Total Service Station. His workplace was next to the service station.

The court carefully considered the testimony of the witness and found him to be an unsophisticated and simple witness who gave a truthful account of what he did. The witness' demeanor was impressive. He did not seek to embellish his evidence and was not argumentative. He gave straight answers to questions put to him. The court found that suggestions that he was a decoy or stooge planted by the police did not have a sound basis. If the place intended to stage manage and create evidence, there would have been no reason for them to drive all the way to Warren Park leaving tyre repairers around and nearer town and settling for the witness. There was no suggestion made or evidence produced to show that the police knew this witness beforehand. The court did not find the accused's omission to describe the accused or identify him through some missing front teeth and a balding head to be of any great moment. On the contrary by not pointing to these features which were visible to anyone, the witness was being honest that he did not merely identify the accused by those features but as someone whom he had interacted with. It was daylight and the court accepted that the witness was not mistaken as to the identity of the accused. The court accepted that the witness had ample opportunity to observe the accused and be able to identify him. In short, the court accepted that the accused sold the witness exh 8, and that the tyre was removed from a Toyota Corolla as described by the witness and further that the accused was driving the Toyota Corolla, pearl in colour as testified to by the witness.

Wellington Skyes

Is a confessed cocaine peddler who stays in Eastlea, Harare? He did not know the deceased but knew the accused as his customer to whom he used to sell drugs occasionally at intervals of once a week. He testified that on 5 November, 2014 the accused telephoned him before midnight seeking to purchase US\$30-00 worth of cocaine. They agreed on a meeting place being Argyll and West Road close to Strathaven before the traffic lights. The witness arrived at the rendezvous first and the accused arrived shortly after. The witness drove his vehicle to the meeting and the accused came driving a Toyota Corolla, grey in color. The meeting place was darkish as there were no street lights. The two met on the same side of the road in between their vehicles with the accused coming out of the driver's side of the Toyota Corolla. When the two met, the witness put out his hand to the accused to receive the money and the accused said that he had a laptop which the witness could hold as security for the money and

return the same on being paid the money. The witness gave the accused 0.4 grams of crack cocaine worth US\$40-00. He said that crack cocaine is the type which is prepared with water and soda and is smoked instead of being sniffed and is more effective in getting the user feel high.

The witness identified exh 4, the deceased's work laptop as the laptop which he was given by the accused to hold as security in exchange for the cocaine. The witness was not paid for the laptop and did not see the accused until January, 2015 at Harare Remand Prison. Within a week of the transaction, the witness was called by CID Homicide and asked to bring the laptop to CID because it was stolen property and he complied. He does not know how the police got the information that it was him who had the lap top but suspected that the accused could have informed the police. The witness knew where the accused resided as being in Belvedere close to Marimba Shopping Centre. He dropped the accused once or twice at his residence but never visited or entered the residence.

The witness was subjected to lengthy cross examination which was detailed. He admitted knowing persons by the names Herbert Chivasa, Tonderai Musekiwa and Tonderai Kavande, the last of whom he knew as a fellow drug peddler. He denied knowing a person by the name Mike. He said that he was in the avenues area around 7pm and was driving a Toyota Sedan mark II white in color and it was a hired vehicle. When he met the accused at remand prison, he had been arrested and remanded in custody and shared the same cell with the accused and the two conversed. He said that the color of the vehicles which the accused was driving could have been pearl or silver grey and that the colors are not markedly different. He was however sure that it was a Toyota Corolla and said that he was familiar with vehicle models. He did not take the accused's contact number to follow up on the money in the event of non-payment because the laptop was more valuable than the cocaine which he supplied and he expected the accused to contact him.

The witness had two women passengers in his vehicle. He was not mistaken about the laptop because he last had a laptop as security a year before. He denied ever driving into the deceased's premises in Belvedere. He admitted to being known as "Wamusongo" as an alias and said a police officer Joseph Nemaize was aware of this name. He had known the police officer for about 2 years. He admitted that when police phoned for the laptop he sent a taxi driver with it but the police insisted on his attendance. He sent a taxi driver because he was afraid of the

implications since the laptop was said to be stolen. The witness when prodded further on the issue then said that he now recollected that when he was called by the police he attended the police station without the laptop but sent a taxi driver to bring the laptop to the police station where he was. He admitted that he knew that he would be in trouble with the matter. He denied framing the accused and further denied ever getting to the deceased's cottage or being at 83 Blakeway Drive. He denied asking the accused to give him \$500-00 so that he would clear him. When it was put to him that the accused was not a drug taker but just an acquaintance whom he would meet with at clubs, the witness insisted that the accused was his client and was a drug user.

The witness met Kelvin Kavande at the police station on the day following that on which he surrendered the laptop to the police. He denied stealing the deceased's laptop and averred that stealing was not his line of business but drug peddling. When asked by the court as to why he did not look for the accused to follow up on his money he said that he expected the accused to look for him and that the fact that the accused had not phoned meant that he had not mobilized the money. He admitted that when he met the accused at remand prison he had been arrested for possessing cocaine. When asked whether he appreciated that his line of business was against the law, he admitted so. When asked to clarify how he transacted with the accused on the night of 5 November, 2014, he said that the accused came out of the vehicle he was driving with the laptop in his hand and the witness went towards the accused's driven vehicle which had its headlights on. They transacted with the aid of the lighting from the headlamps of the accused's vehicle. He said that the transaction took a minute or two to be completed. After questions arising from clarifications sought by the court, he was asked by the accused's counsel as to how the court could trust him since he engaged in an illegal business and he responded that his business did not depend on lies.

This witness' evidence was scrutinized by the court with extra-caution not leastwise because he was an admitted drug pusher but because he was found in possession of a laptop removed from the scene of a murder. Assuming that he was involved in the unlawful removal of the laptop from the deceased's residence, the witness would have a motive to distance himself from the crime. The court having adopted a cautious approach to his evidence was satisfied that the witness was truthful in his testimony on how he came to be in possession of the deceased's

laptop. There was no suggestion or any evidence presented from which the court could infer that the witness had been to the deceased's cottage, let alone enter the premises of 83 Blakeway Drive on 5 November, 2014. The suggestion that the police planted the witness to make up a case against the accused was farfetched and not deriving from any objective fact. Thus bearing in mind the cautious approach adopted by the court in treating the evidence of the witness, the court accepted that the witness told the truth of what transpired between the witness and the accused.

Kelvin Itayi Kavande

Like the last witness, he is a drug peddler who stays in Chitungwiza. He did not know the deceased but knew the accused for about 2 years prior to 5 November, 2014. He testified that on 5 November, 2014 the accused telephoned him wanting to buy drugs. The witness was at Londoners night club. The accused did not have cash but offered the witness a 32 inch Samsung flat screen television in exchange for drugs worth \$150-00. The television in question is exh 7 removed from the deceased's residence. He said that the accused was his client and he had dealt with him the previous year. The transaction of drugs in exchange for the drugs took place in the car park outside the night club.

He said that a few days later he received a telephone call from CID Homicide to bring the television set which he had been given by Simba. He said that at first he did not place who Simba was because he knew the accused as "Chimzee". The witness said that the accused came to Londoners driving a Toyota Corolla pearl white in color and he was alone. The witness took the television set to the police station as directed. His relationship with the accused was purely a business one. He said that he assumed that the television belonged to the accused. He confirmed knowing Wellington Sykes as a fellow drug peddler and business friend.

Under cross-examination, he said that he regarded the accused as a client and that clients with time become friends. He met the accused after 10pm. He did not take down the accused's vehicle number plates. He supplied the accused with 3 pieces of crack cocaine. He took the television set to his parents' place in Chitungwiza instead of Greendale where he was staying with a girlfriend for fear that the girlfriend would demand it. He did not discuss this case with Wellington Sykes. He admitted to having been to the accused's premises in Belvedere two or three times and said that the premises comprised a big house, small cottages and a garage. He did

not know the occupants of the cottage and denied taking a bath at the house. He denied taking the television from the deceased's cottage. He admitted that when police telephoned him to bring the television, he suspected that there was a problem. He admitted that he knew about the accused's arrest before he took the television to the police. He denied being part of a conspiracy involving him, Tichaona Shava, and Wellington Sykes to frame the accused. He admitted that his-illicit dealing in drugs was unlawful.

The court approached this witness' evidence as it did with that of the last witness and nonetheless came to the conclusion that it could safely rely on the evidence of the witness which was clear and straight forward. The witness did not seek to distance himself from the television set which he could easily have done. He did not deny his illegal involvement in drugs. The suggestion that he could have removed the television set from the deceased's premises can safely be discounted because there is just no evidence of his having been anywhere near the scene of the murder other than the fact that the deceased's television was traced to him and he admitted its possession and produced it. The court found no plausible reason to disbelieve his evidence.

Joseph Nemaia

Is a detective inspector stationed at CID Homicide, Harare and did not know the deceased? He knows the accused in connection with the case before the court. He attended the scene of the murder of the deceased on 7 November, 2014 in the company of Yvonne Choto, the deceased's girlfriend and other police officers. Yvonne Choto who was familiar with arrangements at the deceased's premises identified a pair of black and white North star push sandals on the lawn to the east of the cottage and a pair of sandals which belonged to the deceased. He identified exh 5 and 6 when shown to him in court. In the deceased's bedroom, Yvonne Choto identified a black ¾ short which did not belong to the deceased and it was between the bed and couch. She also indicated that the deceased's Samsung television set, 2 laptops, 2 cell phones and the accused's motor vehicle, Toyota Corolla Reg ADE 5146 pearl in color were missing.

He recovered the sandals, ¾ shorts and pushes for further investigations. He invited the accused's sister Jean Mary Chimuka to CID offices after receiving information regarding the whereabouts of the accused and that he was the prime suspect. The witness used Jean Mary

Chimika in arranging for a trap which led to the arrest of the accused in Victoria Falls. The accused had requested for money from his sister to cross into Zambia and the witness arranged with detective Constable Zhou who was in Victoria Falls to link up with the accused after pretending that he had been asked by Jean Mary Chimuka to pass over to the accused some money. The accused was arrested in the trap. The witness knew Wellington Sykes and Kelvin Kavande but he was not involved in the recovery of the television set or laptop or the recording of the accused's warned and cautioned statement.

Under cross-examination he admitted that his statement did not include information on the part played by Jean Chimuka in trapping the accused but insisted that he spoke to her about it. He said that the accused and Jean Chimuka spoke on the phone 3 times and the accused was arrested the same day on 7 November, 2014. The conversations between the accused and Jean Chimuka were on speaker phone. He denied threatening to shoot the accused at any stage if he withdrew his admission that he committed the offence. He denied that he had anything to do with booking the accused from remand prison on 25 November, 2014 but admitted that the accused was booked out of prison for further investigations by the investigating officer. The witness did not commit himself to agreeing or disagreeing that the accused was not brought to court within 48 hours of his arrest. He said that the information regarding the whereabouts of the television set and laptop came from the accused. He denied threatening to take the accused to a bridge and assaulting him there.

Under re-examination the witness pointed to the remand record on which was recorded that the accused had no complaints against the police. Asked to explain what the accused and Jean Mary Chimuka discussed on the phone he said that Jean put the phone on speaker phone. The accused asked for \$50-00 to cross into Zambia and arrangements were then made with Constable Zhou whose number was given to the accused as the one who would give him the money and the accused would be arrested in a trap.

The court found the witness to be a confident police officer who did not evade questions and stood his ground under cross examination. An examination of his evidence did not reveal any exaggeration or hesitation in answering questions. His evidence was straightforward and the court did believe it.

Ngonidzashe Zhou

Is a detective sergeant stationed at Victoria Falls police station. He is the arresting officer. He said that he received a telephone call from C.I.D Homicide Harare about the suspect, i.e. the accused and a trap was discussed. He spoke with the accused's sister Jean Mary Chimuka and gave her his number so that he would give the same to the accused for the accused to contact him in turn. He organised a team of detective which included him. The accused then phoned the witness asking to meet so that he could collect the money sent by his sister. He arranged to meet with the accused outside O.K Supermarket in Victoria Falls. He had been given a description of the accused by the C.I.D. Homicide and the deceased's sister. The accused when he called the witness said that he was in a taxi driven by a short man. When the accused arrived outside the supermarket in the taxi he arrested him.

The witness explained to the accused the reasons for arresting him. He also explained his rights to him. The witness searched the accused and recovered the deceased's driver's license, a 9mm pendant made from a bullet cartridge and 4 Rand. He produced the deceased's license No. 28673LK as exh 9 and the pendant necklace as exh 10. He said that the accused said that he had obtained the license from the deceased whom he had killed in Milton Park. He recorded the accused's warned and cautioned statement.

When the prosecutor sought to produce the warned and cautioned statement, the defence counsel objected on the basis that the statement was not properly confirmed. After making submissions on the issue both counsels agreed that the witness be stood down until the issue of confirmation of the statement and its admissibility was resolved. A determination on its admissibility would determine the direction of cross examination of the witness. The proceedings were adjourned to allow for the attendance of the confirming magistrate Milton Serima a provincial magistrate stationed in Marondera.

Milton Serima gave evidence and was cross examined. The state then indicated that it did not seek to rely on his evidence nor the warned and cautioned. Although the court took the view that it was entitled to consider all the evidence led before it despite the election by the State that it would not rely on the witness evidence, the evidence will not be taken into account in the determination of this matter for the reason of its non-probative value and not because the State does not seek to rely on it. Once a witness has given evidence and been cross-examined, such

witness' evidence will be before the court and neither the prosecutor nor defence counsel is entitled to withdraw it. The parties can only attack it on recognizable grounds of relevance and admissibility and it will be the function of the court to determine such questions and to decide whether it is relevant or conducive to proving or disproving any issues arising in the trial. In this case, the witness evidence was limited to the process which he followed in confirming the accused's warned and cautioned statement which the state did not then seek to produce. Since the warned and cautioned statement was not placed before the court, the evidence of its making and confirmation became irrelevant. For this reason the court considered that an analysis of this witness evidence had little or no bearing on issues to be determined and therefore irrelevant to proof of the accused's guilt or innocence.

Before the witness Ngonidzashe Zhou was recalled for continuation of his evidence and cross examination, the state called Mayvin Nyangoni. For purposes of being methodical however, the court will deal with the continuation of the evidence of Sgt Zhou. When he was called back to the witness stand, the state had no further questions to ask him and he was subjected to cross-examination. He agreed that the accused contacted him first but that this was after the accused's sister had already spoken with him. He was taken to task on whether the drivers' license was entered in the exhibit book at Victoria Falls and whether the recoveries of exhibits were recorded in the occurrence book and whether the exhibits were recorded in the books at every station of handover namely Bulawayo and C.I.D Homicide Harare and he said that he believed that this was done as it was procedure. He said that these records were available if the accused wanted to see them. He denied that the accused was in the company of another person other than the taxi driver. He denied that he chased away the taxi driver and Joseph Santos whom he never saw. He said that the accused was made to believe that the witness would give him \$200-00 and denied a figure of \$50-00. He said that when accused phoned he mentioned \$200-00. He agreed that the deceased did not have a passport on him.

In the court's assessment of this witness evidence, it did not find anything to doubt its sincerity. The accuracy of whether the amount mentioned as due to be received by the accused being \$200-00 or \$50-00 is a matter of detail and of no great moment. The crux of the witness's evidence is that he lured the accused into a trap wherein the accused thought that he was going to be given money but was arrested instead. The deceased's driving licence was found in

possession of the accused. The court was impressed by the evidence of the witness which was given in a straight forward manner and the witnesses maintained his cool. The cross examination of the witness was not eventful and he did not present himself to the court as one building up on the case to nail the accused.

Malvin Nyangoni

Is the investigating officer and a member of C.I.D Homicide police? He attended the scene of the murder on 6 November, 2014 with two colleagues. He observed some muddy foot prints on the durawall and assumed that the point with the footprints could have been used as the exit point by the perpetrator of the offence. He saw some black and white sandals outside the cottage. He was shown to the cottage where he found the body of the deceased lying on its side facing sideways. He saw signs of a break in on the lock. He observed scars on the deceased's forehead and his head was swollen. Blood was oozing from the deceased's nose. He also observed that the deceased's clothes and books were scattered and a Television and A/V cables were missing. He recovered the registration book of the accused's motor vehicle but the vehicle was not there. Photographs were taken in his presence. He produced photographs marked 5, 6, 7 and 9 showing the damaged door, the body of the deceased lying on the floor and the bedroom area. The witness also saw a broken steam iron. He handed over the case to Detective Inspector Nemaia.

Under cross-examination the witness said he not could tell whose foot prints were on the durawall. No finger prints were taken and he did not know the owner of the sandals which he observed. The T/V stand was blood stained.

The witness did not really tell the court anything new and basically corroborated what other witnesses said. He gave his evidence well and no criticisms of his evidence has been proffered by the defence.

Doctor Mauricio Gonzalez

Conducted a post-mortem on the deceased on 7 November, 2014. His report was produced by consent as exh 12. The report shows that the deceased had a swollen left eye and was bleeding from the mouth and nostrils. He had a swelling on the left side of the head and

some injuries measuring 3 cm on the frontal area. There were bruises on the thorax and on both knees. The internal examination revealed a big subgaleal haematoma on the occipital area and another subgaleal haematoma on the frontal area. The brain was congested with subarachoid haemorrhage. He concluded that the deceased died of head trauma, subarachoid haemorrhage and assault.

The State closed its case and the accused took the witness stand and testified on oath. His evidence was to the following effect:

He is a student aged 32 years old and was looking for employment at the time of his arrest. He used to stay at 83 Blakeway Drive which property is owned by his mother. He had known the deceased as a tenant occupying one of the cottages for 2 years. He vacated 83 Blakeway Drive on 5 April, 2014 and was staying with his sister Jean Mary Chimuka at 5 Exclessor Court. The deceased was his tenant and paid \$250-00 per month.

On 5 November, 2014 he went to 83 Blakeway Drive to check on the deceased and to follow up on his unpaid rent and renovations being done to the main house. He went there around 6.00pm. The deceased was not there. He returned after 9.45pm to again follow up on his rentals. He let himself into the premises through the main gate using his set of keys and proceeded to the deceased's cottage. He stumbled upon an iron which was on the ground. He used the moonlight as a source of light to see where he was going. He got to the cottage and found the door open. There was some light from a candle. The deceased was in the kitchen. He greeted the deceased and the latter turned around and looked at him. The deceased immediately started shouting accusing him of having broken into the cottage and taken his property namely, a television, a laptop and other things. He denied the allegations but the accused rushed out of the kitchen and began to violently attack the accused, kicking and punching him accusing him of taking his things.

The deceased kicked him on his upper legs and abdomen and punched him on the upper chest and on his head. The accused backed away but the deceased continued to advance towards him and he managed to get to the exit of the cottage entrance. He was then tripped and fell to the ground. The deceased then picked up the iron which was on the ground and attempted to hit him with it 3 or 4 times. The deceased was between him and his way out. The accused decided to fight back using his fist. He hit the deceased on the upper part of the body and the deceased fell

down on the concrete area. The deceased then crawled back into the cottage on his hands and knees. The accused who was not sure whether the deceased was not going to get a weapon to attack him left the premises through the main gate on foot.

He denied attacking the deceased with a concrete block but admitted to hitting the deceased once with his fist. He said that he was defending himself and wanted to stop the attack on him and leave the premises. He denied taking any of the deceased's property. He was wearing his blue work suit and had blue jeans and a black T/shirt inside. He denied wearing exh 5 the $\frac{3}{4}$ short nor the North Star pushes. He said that he could not drive a vehicle and did not steal the deceased's vehicle. He did not meet witnesses Wellington Sykes and Kelvin Kavande on that day and did not give them the deceased's laptop and television respectively. He had known the two for about a year but he was not their client. They were friends of his friends and used to visit 83 Blakeway Drive with his friends.

After the fight with deceased he went to Hollies night club where he gambled and drank the night away till morning. Around 5am - 5.30am he left the night club and proceeded to 83 Blakeway Drive where he again opened the gate and let himself into the premises. He observed that the deceased's vehicle was not in its parking place. He went to the window of the main house and knocked. He spoke to Tatenda Goredema and enquired on the deceased's whereabouts. Tatenda said that he had not seen him. Tatenda was preparing to go to school. The accused decided to leave. He denied using the durawall to enter the premises. He denied using deceased's Toyota Corolla the previous evening. He went to 83 Blakeway Drive at 5.00am because he was intent on getting his rent from the deceased since he wanted to go to Victoria Falls to meet up with his friend and did not have sufficient funds. He denied selling a tyre to Tichaona Shava or dumping the deceased's car along Bulawayo road. He said that Tichaona Shava wrongly identified him. He said that the police just took him to Tichaona Shava's workplace and he did not know why and he remained in the police vehicle.

On leaving 83 Blakeway Drive he took a combi to the show ground and got a lift to Bulawayo. He used money from his gambling wins. From Bulawayo he got another lift to Victoria Falls where he met his friend Joseph Santos a Brazilian whom he had alerted of his coming by e-mail sent from an internet café in Bulawayo. He arrived in Victoria Falls at 8.00am on 7 November, 2014. On the same date after meeting with Joseph Santos he telephoned his

sister Jean Mary Chimuka to check on her. He used Santos' mobile phone. She then advised him of the deceased's death and he was shocked. He did not tell her that he had fought with the deceased because he did not think that it was of any consequence. He asked Jean as to what he should now do. He resolved to return to Harare and asked Jean for \$50-00 and she said that she would send the money through a detective called Zhou. He denied saying that he wanted to use the money to cross to Zambia.

He said that he telephoned Zhou and asked him whether his sister had sent the \$50-00 not \$200-00 and they arranged to meet by O.K Supermarket. He and Joseph hired a taxi and proceeded to O.K supermarket where he was to meet with Zhou. He phoned Zhou again and told him that he was in a silver corolla parked outside the supermarket. The police arrived 2 or 3 minutes later with guns drawn and arrested him after asking who of the those amongst him, Joseph and the driver was Simbarashe. He said that he was asked to empty his pockets and only a necklace was recovered. The keys which he had been using were at Joseph Santos place of abode, a rest house. He denied admitting that the deceased's license belonged to a person he had killed in Milton Park and said that the deceased was found in Lincoln Green, Belvedere not Milton Park. He denied breaking into the accused's premises or using a brick to attack deceased and said that it was the deceased who used the iron on him. Had he wanted to access the deceased's cottage, he could have done so by opening it as he had keys to it. He said that the deceased was the aggressor yet he only wanted his rentals. He only used his fist to fight the accused intending to make good his escape.

Under cross-examination he said that he obtained a degree in marketing and management in Australia. It was not unusual for him to follow up on his rentals at night but not as late as 10.00pm. He sometimes communicated to the deceased on the phone about rentals. He knew witnesses Kavande and Sykes as they sometimes came to 83 Blakeway Drive when he was still staying there for purposes of having drinks with other friends. He did not have their contact numbers. He also interacted with them in pubs and around the city centre but never at Londoners. He was introduced to the two by Farai Mubayiwa, Brian Mutongosere and Kudzayi Chipoka who were close to him. He denied seeing the accused's vehicle on the two occasions he revisited 83 Blakeway Drive on 5 November. He visited again on 6 November, 2015 and asked Tinotenda about the deceased and noted that the deceased vehicle was missing. He said that the deceased

never gave him a chance at a conversation and just started accusing him of stealing his things on seeing him. When the deceased shouted at him he was about 4 metres away from the kitchen door towards the main entrance. The deceased tripped him and he fell down at the entrance to the cottage. The deceased assaulted him whilst he lay on the ground. He did not sustain any visible injuries but maybe internal injuries. He did not suffer any bruises. He admitted that the injuries observed on the deceased were serious. He blocked the iron with his arm when the deceased tried to hit him with it. He suffered some swelling but no visible injuries/ He attributed the deceased's injuries to falling on the concrete and the knee injuries to crawling into his cottage.

Asked by the court why people would connive against him i.e. Sykes, Kavande and Shava, he said that as for the Sykes and Kavande he wanted to dissociate himself from them but for Shava, he did not have any idea. Asked why he wanted to dissociate himself from Sykes and Kavande, he said that he had missed some of his stuff when they came to 83 Blakeway Drive. He followed up on the missing items and caused a commotion at Sykes' place leading to his arrest. Asked if he was present when deceased's motor vehicle was recovered, he said that he could not say that he was present because on the way from Victoria Falls the police stopped by the vehicle outside Chegutu and this was by Musariri Farm. The defence counsel closed his case.

The accused did not impress the court as a witness and appeared as if he had rehearsed his testimony. He clearly is an eloquent and intelligent person. His account of events which boils down to that he was a victim of an assault by the deceased and a victim of being falsely framed by police and other witnesses is in all the circumstances of the case so improbable as to be decidedly false.

Before making a detailed analysis of the case it is necessary to comment on the summary of the State case. As previously pointed out, the summary which should be provided to the accused in terms of s 66 (6) (a) is a summary of the evidence of the witnesses whose names must be listed. In this case, the State gave a summary of what it says the accused did but there is nothing in the summary of evidence of the listed witnesses to indicate that what the State says took place did in fact take place. Presumably the State intended to rely on the evidence of a confession by the accused. If this was so, it should have mentioned so. It reflects badly on the state to prepare a summary of a case which purports that it has evidence that the offence was committed in a particular manner but does not in listing the witnesses and their summary of

evidence include any evidence from which what it says the accused did is derived. It is not intended to repeat the summary prepared by the State as this has been done at the beginning of this judgment.

After hearing all the evidence, it is clear that no one mentioned what the State alleged in its summary as having happened to the deceased, that is, how the deceased met his death. There is no direct evidence of what transpired. The accused however was the last person to see the deceased alive and had a physical engagement with him. There is no evidence other the accused's say so that there had been an earlier break in at the deceased's place nor that there was another intrusion after the accused's fight with the deceased.

Counsels are agreed that the determination of the accused's guilt or innocence/ acquittal depends on circumstantial evidence. The court agrees. The court will also be guided by the cases cited by counsel namely *Muyange v The State* HH 79/2013; *State v Marange & Ors* 1991 (1) ZLR 244 SC at 249; *R v Bloom* 1939 AD 202 at 203. In *Muyange's case*, HUNGWE J said at p 21 of the cyclostyled judgment;

“The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests;

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused;
- (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and no one else; and
- (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the Accused and such evidence should not only be consistent with the guilt of the Accused but should be inconsistent with his innocence. See *S v Shoniwa* 1987 (1) 215 (SC) and the cases therein cited”.

Also Lord Normand observed in *Teper v R* (1952) AC at 489 that:

“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another.. It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

It is critical however to always bear in mind that when dealing with circumstantial evidence, it is not necessary that each circumstantial fact be isolated and proven beyond a reasonable doubt because no individual fact can prove the guilt of the accused. The court is enjoined to consider all the circumstances of the case cumulatively and decide whether in all the circumstances it is satisfied that the accused is guilty of the offence beyond a reasonable doubt.

A reasonable doubt does not mean beyond a shadow of doubt. The court does not act upon absolute certainties. In *S v Ntsale* 1998 (2) SACR 178 (SLA) it was held that where a court is dealing with circumstantial evidence, it need not consider every fragment of evidence individually to determine what weight to attach to it. It is the cumulative impression which taken collectively should be considered to determine if the accused's guilty has been proven beyond a reasonable doubt. In *R v Reddy* 1996 (2) SACR 178 (SCA) it was held that:

“the fact that a number of inferences can be drawn from a certain fact, taken in isolation does not mean that in every case, the State in order to discharge the onus resting upon it is obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the court is called upon to seek speculative explanations for conduct which on the face of it, is incriminating”.

Turning to the facts of this case, the evidence of the State witnesses has been outlined and commented upon. The court in short believed the witnesses and where it was required to or considered it prudent to treat the evidence of certain witnesses with caution, it did so. The accused on the other hand was found not to be an impressive witness. The accused was on the hunt for the deceased on the fateful day on rental follow-ups. He did not telephone the accused but was intent on a face to face confrontation. He was therefore determined to collect his rentals come what may. No other explanation can be given for accused having looked for the deceased in the early hours of the evening and very late around 10-00pm. The deceased had not asked the accused to collect the rentals from him on the day.

The accused had a physical engagement with the deceased. The deceased from the photographs was dressed only in shorts which points to the fact that he must have retired to bed before the altercation. He could not have been in the kitchen doing nothing. He had left his girlfriend's place late around 10.00pm. The accused said that the deceased upon seeing him just started to accuse the accused of having broken into the cottage. There is really no rational explanation as to why this should have been so. The accused avers that he acted in self-defence

and punched the deceased just once and the deceased fell down and crawled into the passage. The accused's account as stated is so improbable as to be false beyond a reasonable doubt.

The circumstantial evidence weighs heavily against him. The injuries on the deceased are not consistent with just one blow delivered upon the deceased nor with a fall because they are concentrated on the frontal side and occipital areas. The deceased had a swollen eye, swollen left side of head, bruises on the thorax, a 3 cm injury of frontal area another 5 cm hematoma the frontal area and bleeding from the brain. These injuries cannot have been inflicted by the application of one fist or one fall as the accused tried to argue. The court is convinced that it is the accused who caused the injuries on the deceased leading to the deceased death and is not persuaded that the accused acted in self-defence which alleged defence is in the court's view a red herring and made up. If anyone used the broken iron on the other, it must have been the accused and not the other way around. The accused did not suffer any injury as could be said to be consistent with the use of a blunt weapon like an iron, whereas the deceased's injuries are so consistent with the use of weapons. Pieces of brick were seen in the house and the court believes that they were used during the attack on the deceased by the accused.

The court disbelieved the accused's denial that he did not trade in the deceased's television and laptop in exchange for drugs with Sykes and Kavande. He knew the two prior to the date of the commission of the offence. The suggestion of a conspiracy by the police to use the two drug dealers to build a case against the accused has no substance. It is inconceivable that the police would out of the blue have known that the two drug dealers were in possession of the deceased's property and sought to then shield them and sacrifice the accused. The court believed the evidence of Tichaona Shava. It is again inconceivable that Tichaona Shava was a police decoy and that the police conspired to use him to nail the accused. The most probable explanation which the court accepted is that it is the accused who led the police to Tichaona Shava to whom he had sold the spare tyre of the deceased's vehicle. It cannot have been coincidence that the accused was driving a pearl or grey Toyota corolla as seen by Kavande and Sykes and Tichaona Shava seeing him removing the spare tyre he sold to him from a Toyota vehicle, the deceased (owner of a pearl Toyota corolla) dead, his Toyota corolla missing and the accused being found in possession of the deceased's license as believed by the court.

The accused was arrested in a trap. It is not important that he may have said he wanted to escape to Zambia nor that he could not have done so as he had no passport. Once the court believed the state evidence that the accused was in possession of the accused's passport, that provided a sufficient link to connect the accused to the offence. The deceased's property was recovered only after the accused had been arrested and not before. The court is satisfied that the accused owned up to what he had done and only created the self-defence story later as an afterthought, ingenious as the defence sought to strenuously argue it.

Once the court found as it did that there was no unlawful attack perpetrated by the deceased upon the accused, the defence of self-defence crumbles and there is no need for the court to concern itself with the rest of the requirements of self-defence as espoused in s 253 of the Criminal Law Codification Reform Act.

Apart from the poor demeanour of the accused when he gave evidence, the probabilities of the case do not support his account of events that he was in fact the victim of an unlawful assault, was framed up in a conspiracy where police used witnesses to build a case against him that he stole the deceased's goods and sold them for drugs and fuel money and that police had then used his sister to trap him. The accused clearly lied about his encounter with the deceased and in the circumstances, he has himself to blame in leaving the court to make inferences adverse to him.

In all the circumstances of this case taking into account the proven circumstantial facts cumulatively or collectively and the probabilities, the court has reached the conclusion that the accused caused the death of the deceased in circumstances where he must have and did realize a real risk that his unlawful attack upon the deceased could cause the deceased's death and continued to engage in that conduct.

See *S v deVilliers* 1944 AD 493

R v Reddy (supra)

R v Mlembu 1950 (1) SA 670.

The court further finds that after causing the death of the deceased or incapacitating him through injuries from which the deceased died, the accused ransacked the deceased's rented premises and stole his property some of which was recovered. The accused is accordingly found guilty of murder under s 47 (1) (b) of the Criminal Law Codification Reform Act [*Chapter 9:23*].

SENTENCE

Accused has been convicted of a serious offence, that of taking another's life. Both counsels are agreed and it is true that every person has the right to life. Under the new constitution this right has been entrenched as a fundamental human right under s 48. That being the case, it follows that the sanctity of human life where it has been lost must be emphasized. Society's people must have respect for each other and more importantly must respect that every person has got a right to existence. Human life should only be taken away through natural means or other lawful means. The constitution had provided that a court may pass a death sentence for murder and this means that other than a person losing his life or her life naturally, the law recognizes that a person may lose life through application of the law.

The court carefully considered the accused personal circumstances. He is a first offender and relatively young. He committed the offence when he was 30 years old and he will be 32 this November. He is an educated person, who is degreed. He can tell right from wrong. He is not employed, which is a pity because his education has just been going to waste. The court will accept that he showed some elements of remorse. When he gave evidence he did indicate that he was sorry in that the fight he engaged in resulted in the death of the deceased. Against him is the fact that his level of moral blameworthiness is very high. His motive for committing the offence cannot be justified. He might have been entitled to collect his rentals. He might have been intent on getting the money whose payment had been delayed but this did not justify his resorting to physical confrontation to extract the money from the deceased. He went to the deceased's place twice including very late at night just to try and get his rent. It is difficult for anyone to really appreciate and understand his motive and insistence.

The court made a finding that the deceased was already in bed when he was confronted by the accused. Indeed, the photographs produced show that he was scantily dressed. He was just in shorts. The court although it found that the accused showed some remorse does not accept that he is contrite nor did he show contrition. It is his right not to be contrite and the court does not hold it against him save that lack of contrition dilutes the mitigatory factors. He has persisted that he was in fact the victim and that he was defending himself. The subsequent events which the

court has accepted that he proceeded to then steal the deceased's property are totally inconsistent with one who had a good motive for visiting the deceased. Such conduct is not consistent with one who has been defending himself. Instead of leaving the place he then decided to take the property of the person whom he had overpowered. The property was disposed of the same night. It was not for a worthy cause but to acquire drugs and to go on a joy ride.

The court will consider the principles of law regarding sentencing that have been drawn to its attention by the accused legal practitioner, more importantly that the court must not over emphasize the retributive aspect and also the aspect do deterrent. It is however the approach of the court that in the absence of weighty mitigating factors, where a murder has been committed in the course of a robbery invariably the accused will be sentenced to death. In this case it is very difficult for a court to forgive the accused's motive. The court will not adopt an eye for an eye approach. The court thanks the legal practitioners for referring it to all the cases they cited including the case of Oscar Pistorius with the rider though that in Oscar Pistorius' case the judge was dealing with sentencing following a finding of culpable homicide. It is also true that the Pistorius case has not yet been finalized and the South African Appeal Court has since found that Pistorius should have been convicted of murder and he is to be sentenced afresh for murder.

The accused offered compensation. The concept of compensation where a life has been lost is difficult to appreciate unless one is dealing with property loss or injury. Where life has been lost how does one measure compensation since lost life cannot be restored? The legal practitioner submitted that customarily compensation was ordered for unlawful killing of another person. If one looks at the aspect of compensation from a traditional perspective, a family that lost a person was compensated by being given a person usually a woman by the family of the offender to replace the dead person so to speak. The concept is foreign to this court. The court is not able to quantify compensation in this case and no argument has been addressed on how one can quantify compensation where life has been lost. The court is not aware of any cases in this jurisdiction where a court in a murder case has ordered that there should be compensation for the loss of life. The law that the court is aware of relates to loss of support following the death of a breadwinner for example and derives from the law of deceit. All the same the court will consider that the accused offered compensation. Hopefully the offer related to financial assistance to the deceased's family and dependants if the deceased had financial responsibilities.

If one thinks deeply that is the extent to which compensation may relate where it has been submitted that the accused will have taken care of or refund funeral expenses. That is the kind of compensation that easily comes to mind not that where a life has been lost then one can pay for it. However as indicated, if one goes into customary practices the chiefs courts could do so. The legal practitioner has suggested that a sentence in the region of 10 years with part suspended will meet the justice of this case. The court is not able to agree. The sentences meted in the cases cited by counsel of 13 years respectively would not be appropriate given the circumstances' of this case. The circumstances of this case are very simple. The accused unlawfully and without justification caused the death of the deceased. Thereafter the accused took away the deceased's property and disposed of it though most of it was recovered.

If one draws a parallel there is really no difference between what the accused did and where a murder is committed in the course of a robbery. That is basically what it boils down to. How does a court forgive a person who commits an offense in order to steal? Even if the intention to steal is formed after the death the victim, this does not reduce the accused's moral blameworthiness. The court has already indicated that the approach in such cases has been to pass the ultimate sentence in the absence of weighty circumstances which reduce the accused's level of moral blameworthiness. In the view of the court the accused committed this offence for evil motives or developed evil motives after committing the offense. Under such circumstances, societal interests must override the accused's personal interests. There are more circumstances of aggravation than there are of mitigation.

Therefore taking into account the way the offense was committed and the reasons for its commission and being mindful of the fact that the court should not over emphasize the element of retributive to the exclusion of other factors, the court nonetheless holds the view that this is one of those very bad cases of murder with constructive intent. Having agonized over what the appropriate sentence is and accepting that sentencing is really a very difficult exercise like the accused legal practitioner has said, the court is of the considered view that the appropriate sentence in this matter is that the accused be sentenced to life imprisonment. It is therefore so ordered.

Rubaya & Chatambudza, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners