

STATE  
versus  
TANGAI GAMBIZA  
and  
CHAMUNORWA NDOFURA

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 24, 25, 26 July and 6, 7, & 8 September 2017

**ASSESSORS:**           1. Mr Chakvinga  
                              2. Mr Chivanda

### **Criminal Trial**

*HM Muringani*, for the State  
*LT Mudziwapasi*, for the 1<sup>st</sup> accused  
*Mr C Mupangani with F Muserere*, for the 2<sup>nd</sup> accused

TSANGA J: If the biblical story of Cain treacherously killing Abel prepares us for the unthinkable spectre of brother killing a brother, and if the love of money is indeed the root of all evil, this case locates itself squarely within such parameters. The two accused persons in this case, who pleaded not guilty to all charges, were arraigned before the court facing four counts as follows: one count of attempted murder; one count of murder; one count of violating a corpse and one count of defeating or obstructing justice.

**The facts**

As to the context of the four counts, the facts were as follows: On 10 December 2015, the deceased visited the clinic in Makande at around 5.00 pm complaining of stomach pains. He was accompanied by the second accused “Ndofura” a self-styled prophet. He had developed the stomach pains whilst at Ndofura’s house having been given something to drink and had been brought in by Ndofura for treatment. He had vomited violently before coming to the clinic. According to the nurse Ephraim Nyoni who gave this evidence, Ndofura had told him not to disclose that he had given him something to drink.

After Ndofura had left him at the clinic where he was detained overnight, the deceased had he told the nurse Ephraim Nyoni that he suspected that he had been poisoned by Ndofura as he had been made to drink some substance at a prayer session. According to Nyoni’s evidence, the deceased however did not exhibit any clinical signs of poisoning. His conclusion was that he was suffering from colic pain and he had administered paracetamol. However, he had not entirely ignored the deceased’s fears. The following morning as the deceased was ready for discharge, he had asked him to go to the police to obtain a report that he could continue being treated in light of his poison claims. The deceased had done so and returned.

At that same time Ndofura had dutifully returned to check on his friend when the deceased was about to be discharged. He had been told that the patient could not be released into his custody. Ndofura, still in Samaritan mode had gone to fetch the deceased’s brother, the first accused Tangai Gambiza. According to Nyoni, Ndofura had returned “shortly” thereafter with him. At around 11 am that Saturday morning, the deceased had thereafter been released into the custody of his brother and Ndofura. As far as Nyoni was concerned he had in fact released him to a close relative, his own blood brother. Nothing could happen to the deceased or so he thought. He was wrong. He was never to be seen alive again. Instead it would be the story of the various parts of his body, burnt and dismembered that would inform the basis of this murder trial.

According to the State, his brother had filed a police report on 12 December in which he reported that the now deceased Talent Gambiza had escaped from their custody after being told that he was mentally ill.

The next piece of the jigsaw puzzle as to what had really happened to the deceased emerged from the evidence of Itai Chakazama. He is a farmer who resides at Nyadara Village 38, Makande, and is also the ZANU PF party chairperson in the area. Both accused persons were known to him. He knew the first accused as the brother to the deceased and the second accused as a prophet. As the chairperson of the area he had heard that the deceased was missing. He had also heard that the second accused had sustained a bitten finger at the hands of the deceased who was said to have escaped from the custody of the two accused after he had been released from hospital. He had seen the bite on the accused's finger. The witness had gone to the accused's homestead on the 15<sup>th</sup> of December 2015, to get further particulars of his escape since after a few days there was still no sign of the escapee. His intention in going to his homestead was to get the second accused who had knowledge of the escape to assist other youths in looking for the deceased. This time the second accused had not spun a yarn about the escape. Instead as the witness put it "God had intervened" and the second accused had taken him aside and told him that the deceased was in fact now late. He had told the others in his company of what the accused had said. The second accused who was clearly troubled by what had happened thereafter taken the witness and others to a place not far from his home where he said the deceased had met this death. He had sat down and without looking at the actual spot had simply pointed to them that that is where the deceased had met his demise. With the entourage still in disbelief that the deceased was actually dead, N dofura had led them to where there had buried his hands after burning the body.

Reduced to tears by what they had been shown, the second accused told them he had not finished showing them the rest of the body. He had then proceeded to where he said they had plucked some fibre from a tree and had used it to tie the deceased's remains. There were struggle marks at the scene and he told the court it was evident that they had fought and wrestled for a long time. The second accused had been merely pointing and had not said

much. He had also not mentioned the first accused person Tangai Gambiza. It was only when the two met that they had started blaming each other.

The witness had thereafter encouraged the second accused to go to the nearest shops and there they had tied him before proceeding to the home of the first accused since the N dofura was laying the blame on Tangai Gambiza. A local business man had availed his car and they had gone to the first accused's residence. Not much was said but a citizen's arrest had been effected. The police, located approximately 15 kilometres away, had come after the two had been apprehended by the villagers.

The witness told the court that whilst at the shops both accused persons had started blaming each other, one saying the other had held the deceased's hand whilst the other retorted that the co accused had held the legs. N dofura had also then said that he had not participated in the killing but had only been informed by Tangai Gambiza for "cleansing purposes" since he was a prophet. It was only then that he claimed to have become aware of the murder and had been shown the places where the various body parts were hidden.

Itai Chakazama's evidence was that it was very clear to him from what he had gathered that both accused had acted in common purpose. He also told the court that what emerged was that the first accused had wanted help to kill his brother over some rentals from a property that had been left by their parents. Tangai did not want to share these rentals with his brother. It was in this context that N dofura whom he plotted with about his demise was said to have administered some concoction to the deceased which had not worked and hence the actual physical killing. He dismissed N dofura's assertion that he had only become aware of the murder as a result of being shown the body parts by the first accused.

Neither of the two accused person's counsel had any questions for this witness. No "ifs". No "buts". Just total acceptance of the witness's evidence. As such this court noted that the evidence of Itai Chakazama was from the two accused person's own standpoint at the material time, an accurate portrayal of how the body of the deceased had been discovered and of the events and statements that accompanied that recovery. For ease I shall hereinafter refer to Tangai Gambiza the deceased's brother as the first accused and to N dofura the prophet as the second accused.

### **Admitted evidence and exhibits**

Much of the evidence from witness statements including exhibits was admitted by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] It established the following;

1. That on 15 December 2015 Mitchell Mugari a villager at village 32 Kanyati B had been with Itai Chamunorwa when they had visited the second accused's homestead regarding the missing person. His sworn statement (Annexure E), confirms that it was when they indicated that they had mobilised youths to search the mountains at that point the accused stated that the deceased was murdered by his brother and that he could show them where the body was. It further confirms the arrest of the second accused after these indications.
2. That on 12 December when Tendai Kwaramba was on duty as a member of the Zimbabwe Republic Police at ZRP Magunje the two accused persons made a report to the effect that Talent Gambiza the deceased went missing on 11 December 2015. A report had been entered as RRB 225 7030. That report received book was admitted in evidence as Exhibit No2. It showed that the report made on the 12<sup>th</sup> recorded that the missing person had escaped the informant's custody on their way from Makande Clinic after being informed that he was mentally ill.
3. The post-mortem report by Dr Paraza confirmed that the deceased's body was charred and in pieces and that some body parts were missing. In other words the corpse had been violated. It also stated that the cause of death had been a head injury in the doctor's opinion.
4. Photographs taken at the scene when the two accused persons each made indications to the police were admitted without question as Exhibit No.3 and were marked A to K. The first accused is shown in photograph B indicating how he held the deceased's legs whilst the deceased struck him on the head with a log. He is also shown holding a log that he too had used to strike the deceased. (Exhibits B & C) The second accused

is shown indicating to the police the rocks where they hid some of the remains of the deceased person and also where he hid his clothes. (Exhibits F and K)

5. A log had been used to assault the deceased. The log weighed 6.7 kgs and its weight certificate. (Exhibit 3 and 3A respectively).
6. Some of the clothes accused had been wearing were positively identified through accused number two. (Exhibits 5 A-C)

### **The oral evidence by the police**

Maudy Muvhimbi a police detective, had participated in the indications. Both accused had led them to the crime scene. The first accused had been taken first to do his indications and had shown them where they had struck the deceased with a log and he had fallen to the ground. He had also indicated where they had burnt the body and where they had hidden the log. The second accused had also then indicated where they had struck the accused and where they had burnt his remains. The second accused had further indicated where they hid the deceased's clothes a shirt, a shoe and cap. The body parts had been exhumed and taken for a post mortem. She had not observed blood on the log. She explained that both accused persons had clearly acted in cahoots as each knew what had had happened, when, and where the various body parts and items had been hidden. Furthermore, she had established that both accused had taken turns hitting the deceased with the log. In addition she explained that the hill where the remains were hidden was very steep and they had helped each other to take the body up the rocky mountain. It was not possible for one accused person to have done it on his own.

She had further clarified that she had established that the motive for the killing was so that the first accused could have all the rentals from the house the parents had left them all to himself. The house was realising about US\$130.00 a month. The deceased had just gotten married and had been pestering the first accused for his share. As for the second accused, she had established during investigation that he had been paid two bags of fertilizer in advance by the first accused. As a prophet he was supposed to have killed him "spiritually" but when this

failed he had resorted to killing him physically. He had summoned the deceased to his house for cleansing on 9 December and the deceased had gone there on 10 December. Additionally, since the deceased was now aware that the second accused wanted to kill him, the second accused was afraid that this would be divulged and had therefore killed him to prevent him from disclosing. He had specifically accompanied the deceased to the clinic to prevent him from disclosing. He had further been at the clinic early in the morning to further ensure non-disclosure.

**The first accused's evidence.**

He told the court he had received a text message from the deceased on the 11<sup>th</sup> of December asking him to come to Makande Clinic. That is when he had gotten to know that the deceased was at the clinic. He had gone to the deceased's house for further particulars but there had been no one there. He had proceeded to Makande clinic and on his way had met the first accused, Ndoofura who had been coming to see him. They had arrived at the clinic at around 4pm when the clinic was about to close for business. Nurse Nyoni had confirmed that he had indeed sent for him and that he had not expected him that early.

He was reluctant to take his brother but the second accused said he would assist him to take the deceased home. Nurse Nyoni had then released the deceased into his custody and they had left the clinic. Upon stepping outside the clinic and feeling hungry he had gone to a shop to buy bread leaving the deceased in the custody of the second accused. It had rained for about four minutes. When he returned to where he had left the second accused and his brother standing, the deceased had disappeared. He had walked along the main road and had met the second accused alone who told him that the deceased had gone home when it had started to rain. He had gone home himself whilst the second accused had headed to the shops. He had arrived at his home around 01: am since the clinic is about 20 kilometres away. His wife had asked him where the deceased was and he told her that he had assumed the deceased had arrived.

The following morning the 12<sup>th</sup> of December he had gone to the deceased's homestead to check on him thrice but to no avail. He had gone to his aunt's house where he had found his aunt together with the deceased's wife. He had revealed that he had not found the deceased when he had come out of the shop. The family had suggested that go to the second accused to find out which direction the deceased had taken when they parted ways.

At the second accused's house he had only found his son as the second accused was said to have travelled to Makande to buy medicine for his cows. He had then proceeded to Makande where he had met the second accused. He had noticed then that the second accused's hand had an injury. He had told the second accused that the deceased had not gotten home and he had not been specific about which direction he had taken when he said they had parted ways. The second accused had remarked that they had rushed to look for the deceased and that maybe he had arrived home by then. They had proceeded to the clinic as he wanted to know if the ambulance that the deceased had wanted to get into to go to Kariba for treatment had perhaps picked him up.

They had seen nurse Nyoni and told him that the deceased had not arrived and that they were looking for him. The second accused had removed his hand from his pocket and he had noticed water oozing from it. His explanation was that he had been injured the previous night working on some iron bars whilst cutting a part of the ox drawn plough. The second accused had requested to be treated. The nurse had initially said that he required a police report but had in the end put some medication and bandaged him. Thereafter he had proceeded to the police to report his missing brother.

He told the court that the nature of the report he had made was that they had parted ways and that on his return from the shops he was unable to find the deceased after leaving him with the second accused person. The police had said they would initiate investigations for a missing person after three days.

On 13 December he had spent the day looking for the deceased at a building site where he had been doing some work as there was speculation that he might have gone there. On the morning of the 14<sup>th</sup> of December he had gone back to the police to advise them that there was now nowhere else to look. The police had said they would give the matter another

four days. On arrival home he found men had gathered for an update. Relatives had also come to assist with the search. They had proceeded in a vehicle to fetch the second accused and had gone to the police station. They all had questions relating to how he had come to the clinic and how he had consumed poison. On the 15<sup>th</sup> the search had continued and it was that afternoon that Itai Chakazama and Mitchel Mugari had come to his house to effect an arrest. In sum the first accused denied having killed the deceased or burning his body together with the second accused person.

In cross examination by second accused's counsel he denied giving the second accused any fertiliser at all. This was despite the fact that second's accused's counsel had in cross examination of Maudy Muvhimbi acknowledged that fertiliser had been given although it was the previous year. Whilst he told the court that the second accused had nothing to gain from killing his brother, he could not however vouch for him that he had not murdered him. He had not spoken to the deceased about their parent's house at any time. He maintained that he had not walked with the deceased from the clinic at any time. He did concede in cross examination that he had a water pump and a grinding mill at his homestead but that the water pump which uses petrol was broken at that time. He also clarified that he was alone when he made the report about the missing person on the 12<sup>th</sup> of December.

In cross examination by the State, his position was that he was not the one who had showed the police the crime scene in the initial instance and that he was not in agreement with the evidence of the indications as related by detective Maudy Muvhimbi. He had been forced to make the indications because the police had squeezed his testicles whilst at the police station. He said he had been told what to do and had been clearly not at ease during those indications. At best he could only point to the second accused as the perpetrator because of the injury on his hand. Suffice it to note that none of these allegations against the police had been made when the detective gave her evidence.

### **Second accused's evidence**

The deceased had come to his house on the 10<sup>th</sup> of December complaining of stomach pains. He had given him water only. He had a running tummy and started vomiting. He had indeed accompanied him to the clinic and had returned the next morning at around 10am. Nurse Nyoni had asked him to fetch the deceased's brother and he had gone to his residence and told him that the nurse had called for him. They had proceeded back together at clinic and had arrived at around 4pm when the clinic was about to close. The deceased had been released into his brother's custody. On the way there had been a dispute between the first accused and his brother following an enquiry by the deceased why the first accused was using up all the money from the rentals for himself. They had fought in his presence and he had restrained them. It had been about to rain and he had told them that he needed to hasten home as his cattle were still out in the fields. They had parted ways and had not seen each other thereafter.

From the 11<sup>th</sup> to the 13<sup>th</sup> he was at home. On 14 December the first accused had come to his house in the company of his relatives on the basis that they wanted to go to Makande to understand what had really happened to the now deceased. The first accused had told the police that they had come because his relatives wanted to ascertain whether he had made a report to them about a missing person. The police had confirmed that they had indeed given an allowance of three days before starting a search. He had not gone back to his home with them but had instead spent the night at the police station with the first accused as the relatives they had come with were drunk and carried *sjamboks*. He feared for his life.

On the morning of the 15<sup>th</sup>, police officer Kwaramba had asked the first accused where the deceased person was and he had said he did not know. On their way home that is when the first accused had revealed to him that he had in fact killed his brother after they had parted ways as the dispute had further erupted. The first accused specifically wanted his prophetic powers to work on the relatives so that they would lose interest in the deceased. The second accused had been reluctant to assist being unconvinced that the deceased was indeed dead. In order to convince him the first accused had taken him to see the remains. He had shown him a place where there were just ashes. He had also shown him a log he had used. He had also retrieved body parts from the sand in the stream. The parts were

unidentifiable. He had also shown him a tree from which he had stripped some bark to tie the deceased. Thereafter he had shown him a large piece of flesh he had hidden between some rocks. Finally he had shown him where he had stashed the deceased clothes. He was then convinced that indeed the deceased was no more.

He had advised the first accused to return the following day at noon on the pretext that he would by then have sourced the relevant “stuff” that he needed to assist him with his request. Each had then proceeded to their respective homes. As he was charging his phone intending to call Tendai Kwaramba the Police Officer, Itai Chakazama had arrived asking about the deceased. He had taken Itai aside and told him what the first accused had shown him. Thereafter he had proceeded to show Itai and other community members what he had been shown. Community elders had remained at the scene of the crime whilst he had gone home and later joined others at the shops. Tendai Kwaramba the Police Officer had heard the news and had come to the shops at around 5 pm. The first accused had been brought to the shops and it had been revealed that he was saying he had committed the crime with the witness. It was then that he, the second accused had been arrested. He denied having received any fertiliser from the first accused. His version was that the deceased had come to his house for spiritual healing and had stomach pains. He had not summoned him. He had vomited some yellow stuff after drinking the water. He denied that the nurse had ever mentioned anything about poisoning.

His version of events was that on the way from the clinic he had accompanied the two to a point because they use the same road home from the clinic. He denied having an injury on this hand. He equally denied having gone to the police to make a report. He accused the state witnesses of lying.

He explained that he had allowed the accused to show him the remains first because if he had gone to the police immediately without being shown, the first accused would simply have denied his admission. He denied violating the deceased’s body. All he had done was to show those members of the community who had come with Itai Chakazama the place where the first accused had shown him where he had buried he deceased.

Regarding the photographs from the indications, he had tried to explain that he had merely been shown the body parts by the first accused. The police had not accepted the explanation and had assaulted him on account of playing games with them. In short he denied giving the deceased a poisonous substance. He denied murdering the deceased. He denied tampering with a corpse.

In cross examination by counsel for first accused he said he had not informed the relatives that the deceased was at the clinic that night because he had arrived home late. He could not phone them either because of network difficulties in that area. He denied that he was the one who posed the greatest danger to the accused. He also stated that he had revealed to the accused 's relatives that that he had separated with the deceased on the 11<sup>th</sup> and that it was the reason why they had wanted to go to the police station to confirm that the first accused had indeed made a missing person report. He revealed in evidence that the scene of the crime was 600m from the house. Asked if this was a mere coincidence, his explanation was that it was a grazing area. The reason he had told the first accused to return on the 16<sup>th</sup> was because he wanted to use the 15<sup>th</sup> to reveal to people what had transpired.

The state in its cross examination put it to him that he had been contracted to kill and that the poison he had tried to administer had not worked. He maintained that he had administered nothing more than water which works through the power of God. Asked whether the normal reaction on being shown the body parts would not have been to head straight to the police he agreed that this was a possible sensible reaction. It was put to him that he had acted in common purpose which disputed. He admitted that he had shown the police where the deceased's clothes were simply because the first accused who had showed them to him earlier had omitted to reveal their location. Asked why he had not challenged Itai Chakazama when he stated in evidence that the witness had not stated that he was merely just pointing, his explanation was that he had waited for his turn to come to give his evidence. It was pointed out to him that he had instructed this lawyer not to cross examine Itai Chakazama which he denied on the basis that he had nothing to fear as he was in fact the one who had helped the case unfold. He equally maintained his stance that he was not present when the police report was made. He denied that he had asked the deceased to lie to the

nurse. His version in cross examination was that the deceased had indicated that he had been spraying tobacco seed beds and had eaten a mango without washing his hands. He had emphasised to him that he was supposed to explain this to the nurse. He denied that he had said this merely to divert attention from the substance he had made him drink. He maintained his denial that his hand had an injury.

Suffice it to note that there was no consistency even on basic factual details between the versions by the two accused persons. There was discrepancy for instance as to when they next met each other after they parted ways according to the second accused's evidence. Whereas the first accused said they had seen each other on the 12<sup>th</sup> in Makande the second accused said that they had only seen each other on the 14<sup>th</sup>. Each was spinning his own yarn against the other.

### **Closing submissions**

In its closing submissions the state emphasised the following as regards the count of murder:

- the admitted evidence of the witnesses
- the indications made by both accused persons
- The admission of the log which confirmed the death due to head injury

As regards the count of violating a corpse, the state emphasised that the two accused had corroborated each other in their indications as revealed by the police. On count four relating to obstructing justice the state pinpointed that the accepted evidence of Itai Kwaramba the state witness was clear that the two accused persons had made the report of the missing person. This exhibit had been admitted without question. On the count of poisoning the state maintained that there was no way what was administered was water only given the deceased's complaints to the nursing sister that he had smelt poison. The State therefore prayed for the acceptance of its evidence on all counts and that the two accused person's evidence on the other hand, be treated with caution as they had clearly chosen which aspects of their evidence they wanted the court to know. The discrepancies in their evidence

as to when they had parted was emphasised. The second accused for example mentioned a fight while the first accused had mentioned no such fight. The first accused had also mentioned a bite on accused's one's finger which he had denied. On the report being in first accused's name, the State's explanation was that the police had probably taken his particulars since he was the relative.

Counsel for first accused on the other hand argued that there was no link between the first accused and the count on attempted murder. There was also no evidence that he had been at the second's accused's shrine when the attempted murder had taken place. He therefore prayed for an acquittal on that count. On the count of murder he admitted that the two accused had given mutually distracting defences. He emphasised that it was however the second accused who had made the initial indications. It was equally him who had identified the log used, the inference being that he remembered the log he had used. He denied being at the scene when the crime was committed. He submitted that it was no mere coincidence that the body had been found 600m from the second accused's residence. On the count of violating the corpse, he argued that if the court accepts the first accused's version that he was not involved then he could not have participated in burning the deceased's body. Furthermore, he had revealed had diesel and not petrol at his home. On the count of obstructing justice whilst the first accused accepts that he made a report, his intention was not to obstruct the course of justice. He genuinely believed that the now deceased was then missing. Lastly he emphasised that there was no direct evidence linking the first accused to the counts as it was all circumstantial evidence.

The second's accused's counsel emphasised that on the count of attempted murder through poisoning, virtually no evidence had been placed by the state and its witnesses to support his count. On count two of murder and count three of violating a corpse, the second accused had indicated that if the first accused was correct that he had left him with the deceased for all of four minutes then this time would not have been enough for him to have committed the crimes alleged.

With regards to the count of obstructing justice he argued that the only evidence that the State had produced was that a false report had been made yet no evidence had actually

been adduced that any obstruction had actually taken place or that the accused person intended to obstruct such justice.

### **Findings on evidence on each count**

We turn now to each count for legal and factual analysis in the content of our findings on each count.

#### **Count one Attempted murder as defined in s 47 as read with s 189 of the Criminal Law Codification and Reform Act [*Chapter 9:23*].**

The gist of this count was that an unknown toxic substance was administered to the deceased Talent Gambiza. Our factual finding was that what the evidence established was that the second accused in particular had given the deceased something to drink when he had attended to the deceased on 10 December 2015 having summoned him to his house. We had no basis for doubting the evidence of Maudy Mavhimbi that her investigations had revealed that it was the second accused who had summoned the deceased to his home. To the extent that the second accused painted a picture that he had come of his own volition with stomach pains, we did not believe him. Taking into account the entire factual matrix that was placed before this court our finding was that in administering whatever substance that the second accused gave to the deceased, he was in cahoots with the first accused even if the latter may not have been at the second accused's home on that particular day. This was probably deliberate and well within the scheme of the execution of their plan. We did find from the evidence of nurse Nyoni that the deceased told him he had been poisoned. We did find from the evidence that in a somewhat state of panic the second accused had taken the deceased to the clinic and had told him not to reveal what had happened. We also found that the deceased revealed to the nurse that he had vomited and had had diarrhoea before he came. Our additional finding was that nurse Nyoni's evidence that what he had consumed was not poison was his own hunch from his own observation of the absence of symptomatic evidence of poisoning, rather than from the conclusion of any scientific test. Where the evidence of the state witnesses fell short of the required standard of proof beyond reasonable doubt was that

it failed to prove definitively that the administered substance was toxic. This was because no toxicology tests had been done or could have been done given that the deceased body was mutilated and burnt. Therefore much as our finding on this count was that the deceased had undoubtedly been given something suspicious to drink by the second accused, we were unable to arrive at a conclusion in the absence of scientific reports that it was poison. The count of attempted murder against both accused persons therefore cannot stand. They are found not guilty of this count.

### **Count 2 Murder as defined in section 47 (1) (a) of the Criminal Code**

Section 47 (1) (a) of the Code penalises any person who causes the death of another person intending to kill the other person. An accused person charged with murder with specific intent in terms of s 47 (1) (a) of the Code must, in other words, have that intention to accomplish the murder that they are charged with. *Mens rea* must extend to all elements of the crime.

Both accused persons were charged with this count. Our finding was that the evidence led by the State proved beyond a shadow of doubt that both accused persons had the specific intention to kill the accused. The fact that the evidence was circumstantial is not the point because circumstantial evidence is at par with direct evidence as long as the evidence excludes all other inferences save that the accused committed the crime in question. As stated in *R v Blom* 1939 AD 188 at p 202 the first requirement is that the inference sought to be drawn must be consistent with all the proved facts. The second is that the proved facts should be such that they exclude every reasonable inference, save the one sought to be drawn. See *Attorney General v Paweni Trade Corp (Pvt) Ltd* 1990 (1) ZLR (SC) at p 32C; *R v Sibanda & Ors* 1965 RLR 363 (A); *S v Hartlebury* 1985 (1) ZLR 1 at p 7B; *S v Shoniwa* 1987 (1) ZLR 215 (SC); and *S v Rugara & another* HH 582-17 for a discussion of the principle in our jurisdiction.

We substantiate this conclusion as follows. The murder of the deceased in this case unfolded because of the indications second accused made to the witness Itai Chakazama and his revelation that the deceased was no more. Materially we found the failure to cross

examine Itai Chakazama on any aspects of the evidence revealed by the second accused, very telling.

We would have thought that if his evidence was untrue at the very least his assertion that when the two accused were now together at the shops they had blamed each other with the one saying the other had held the deceased's legs whilst the other perpetrated the assault would have been challenged instantly. It was not. That evidence also made it clear that the second accused was at all times with the first accused and the deceased up until his death. The fact that the deceased body was in pieces equally betrayed a clear intention to kill as did the post mortem report. Yet this evidence was not challenged when presented. The only inference is that it was not challenged because the accused knew that they had indeed admitted to the murder having been together at the same time when it happened.

Itai Chakazama had also observed an injury on the second accused's finger which was said to have been a bite by the deceased when he escaped from them. Again Itai Chakazama was not challenged on this crucial piece of evidence which suggested that the deceased had not gone down without a fight. He had fought for dear life. The admitted evidence of Mitchel Mugari which corroborated that of Itai Chakazama was equally revealing. A crucial aspect of that evidence was that when the second accused learnt from Itai that he had put together a party to conduct a search on the mountains, the second accused inevitably buckled because that is where a team of youths would undoubtedly have unearthed evidence of their foul play.

The evidence of the indications carried by the police was also in our view extremely credible. They had not been part of the indications that the second accused had done the previous day to the community members who had been present with Itai Chakazama. Moreover, the police had led the first accused to make his indications first before taking the second accused. Each knew exactly where the body parts were and how they had been hidden. They had not questioned the detective when she said they had taken turns assaulting the deceased. The assertion by the accused persons that the police had led them and forced them to make indications made no sense since the police would not have known where to lead the accused to. The finding of the clothes by the second accused which the first accused had left out also confirmed to us that both accused were present at the same time and acting

in common purpose at all times. We did not believe the evidence by the second accused that he merely knew where the items were because they had been indicated to him by the first accused at the time that he wanted his spiritual intervention after the crime had been committed. As stated what we found was that the second accused unravelled when it became evident to him that a search party was headed to the very area within 600m of his home where he had every reason to fear that they would find direct evidence. After all the community already knew that the deceased had been last seen with him and the first accused. Itai Chakazama's evidence also made it clear that they were aware at that time of the story that the deceased had escaped from their custody. Our conclusion therefore was that his revelations were hardly an act of benevolence on his part.

The story put forward by the first accused that he had left the deceased in the company of the second accused for all of four minutes simply stretched the imagination. Equally, the evidence of the second accused that he had left the two brothers and proceeded on his merry way was not credible. These were imaginary conflicting stories spun to their fullest for the good measure of creating maximum confusion once the key state witnesses had left the witness stand. If the motive of the first accused in wanting the deceased dead was to have all his parents inheritance to himself, the second accused in aiding and abetting him had not only been hired to kill but also most likely feared that if the poison story leaked out his reputation as a self-styled prophet was at stake. How else do we explain his absolute hounding of the deceased in the guise of a "Good Samaritan" at the time of giving him the botched concoction as well as following him up the following day. The fact both accused continued to spin different stories even in the face of clear evidence that they had murdered the deceased clearly shows the depth of their depravity.

As regards co-perpetrators s 196 A introduced through Act 3 of 2016 of the Code is crystalline in articulating that where the state has managed to adduce evidence that two or more persons acted in association and that they had the requisite mental intention to commit the crime in question, they may be convicted as co-perpetrators even if each none is identified as the actual perpetrator. It is a recently introduced provision through and provides as follows:

### 196A Liability of co-perpetrators

- (1) If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realisation of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.

It further sets out the indicators of co-perpetrations as follows:

- (2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove

that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they—

- (a) were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or
- (b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
- (c) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged.

- (3) A person charged with being a co-perpetrator of crime may be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory if such are the facts proved.

There is no doubt from the evidence of the State as led by nurse Nyoni that he had released the deceased into the custody of his brother who was in the company of the second accused. They had left together purportedly on their way home. In fact our finding is that the first accused must already have been in the vicinity when the second accused went to fetch him which is why Nurse Nyoni remarked in his evidence that the second accused had returned very shortly with the deceased's brother after he had sent him to fetch him. Itai Chakazama's evidence that the two had acted together at all times was also not challenged. Our conclusion is that they were present together when the crime was committed and that the

evidence revealed in court implicated them both in the commission of the murder. Putting all the state's evidence together on the actual murder we find that the accused at all times acted in common purpose as co perpetrators and are guilty of murder with actual intent. See *S v Muleya and Ors* 1988 (1) ZLR 359 (SC) on equal apportionment of blame where a murder is carried out with actual intent to kill.

### **Count 3 Violating a Corpse**

The charge in this regard was that the accused persons had unlawfully and intentionally burnt the corpse of the deceased by pouring petrol and heaping dry wood on the deceased's corpse and setting it on fire. Section 111 of the Criminal Code provides as follows as regards corpse desecration:

#### **111 Violating corpses**

(1) Any person who damages, mutilates, removes pieces from or otherwise violates a dead human body, knowing that he or she is doing so or realising that there is a real risk or possibility that he or she may be doing so, shall be guilty of violating a corpse and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding five years or both.

What is apparent is that the Criminal Code penalises such conduct as a stand-alone offence and for good reason. It matters not that the body is dead. Not only is the conduct of mutilating a corpse abhorrent, and not only are there significant health risks from improper burials as happened in this case where body parts were stuffed between rocks or simply loosely buried in river sand, but the conduct goes against societal mores. It is offensive not just to the family but to the community and society as a whole. It must be clearly dealt with as such. It is therefore proper that in such cases where a corpse has been violated in any way after a murder, that the offence be put as a separate charge and not be subsumed into the murder. Our society, as virtually every society in the world has its own customs about burying the deceased and violating a dead body is anathema.

That the body shown to the community members on the 15<sup>th</sup> of December by the second accused and to the police during indications the following day by both accused, was mutilated was established. The facts spoke for themselves in terms of how they violated the

corpse. The evidence by the police detective in court was clear that one person would not have been able to carry the mutilated body up the stony mountain alone and that the two had acted in common purpose as co-perpetrator in mutilating the body. As if the killing of his own brother by the first accused aided at all times by the second accused was not sufficiently abhorrent in itself, the two accused added mutilation to a crime that already outraged public sensibilities by its very character and its underlying motivations. The mutilation had been perpetrated with a view to concealing the murder. To agree to be enlisted further for this purpose was equally unlawful.

The deceased's family will, needless to say, remain traumatised for life as a result of the conduct of the accused. To put it plainly, they were deprived not only of the life of their dearly beloved but also of a meaningful burial in the face of a most cruel and heartless murder. The value of his life to the perpetrators who went on to mutilate him was no more than the sum of \$130.00, (or \$40.00 if we take into account what the first accused was actually receiving), and two bags of fertiliser as well as a warped sense of reputation by a clearly deluded false prophet.

Both accused persons are guilty of violating s 111 of the Criminal Code as charged.

#### **Count four: Defeating or obstructing the course of justice as defined in s 184 of the Criminal Code**

On this count the two accused are said to have unlawfully made a false report of a missing report at Makande Police Post under RRB 225 7030 well knowing they had murdered and burnt and concealed the remains of Talent Gambiza. An examination of s 184 shows that it outlines the various kinds of situations that give rise to the crime of obstruction of justice. Of relevance to this case is s 184 (e) which provides as follows:

#### **184 Defeating or obstructing the course of justice**

(1) Any person who

(e) knowing that a police officer is investigating the commission of a crime, or realising that there is a real risk or possibility that a police officer may be investigating the commission or suspected commission of a crime, and who, by any

act or omission, causes such investigation to be defeated or obstructed, intending to defeat or obstruct the investigation or realising that there is a real risk or possibility that the investigation may be defeated or obstructed; or

.....

shall be guilty of defeating or obstructing the course of justice

Section 184 (e) covers the type of situation where persons consciously spin a yarn in order avoid a crime being detected. Penalising obstruction seeks to discourage any tendencies towards interference with the smooth administration of justice. There was in this case the requisite intent to obstruct justice in the sense that the accused knew very well that they had killed a person. By declaring him as missing they delayed the police putting in motion immediate measures for searching for the accused but more importantly knowing that he was dead they interfered with the process of bringing them to book immediately. It is sufficient according to s 184 (e) if a person realises that a matter may be investigated and does something to obstruct that investigation. The intention to obstruct in making the report as they did was manifest. They need not have succeeded in their obstruction as it would seem from the above section that a realisation of the real risk or possibility of obstruction is all that suffices. Their statement in this case had the real risk of obstructing justice and in fact it can be said that it did up to the time that they were caught.

The evidence of Tendai Kwaramba that a report had been made on 12 December was common cause as the report was accepted into evidence by consent. We therefore accepted the evidence that although the report that the deceased had gone missing after being told that he was mad had been made by the first accused in his name, both accused were indeed present as captured in the written statement of Tendai Kwaramba. As the deceased's brother it was only proper that the report be made by the next of kin. This does not however detract from the presence of the second accused who was clearly with the accused in Makande that day. They had even gone to the clinic together. It was therefore patently false that the second accused was not there when the report was made. The State did prove beyond reasonable doubt that the accused were guilty of obstructing justice in the manner articulated in s 184 (e).

We find both accused guilty of obstructing justice in terms of s 184 (e) of the Criminal Code.

To summarise the verdicts on the four counts are as follows:

Count one attempted murder: Both accused are found not guilty

Count two Murder: Both accused are found guilty as charged

Count three violating a corpse: both accused are found guilty as charged.

Count four: obstructing justice: both accused are found guilty as charged.

### **Mitigation and Aggravation**

In mitigation the first accused put forward that he is a 43 year old first offender, married with four children. He also looks after his paralysed brother who suffers from epilepsy and is aged 36. He has been the one looking after him since 2005. In addition, he has also been in custody since 18 December 2015. Relying on the case of *State v Nicole Sibanda* HH 76/12, his counsel laid this out to be a factor which should be taken into account. Suffice it to point out that each case should be dealt with on its own merits as the accused in that case was being sentenced some 10 years after his conviction for reasons that were fully articulated.

Equally mitigating was said to be the fact that being found guilty of the crime will haunt him for the rest of his life and that it has earned him a permanent tag in his family. The case of the *State v Masilela* HB 83/17 was cited for this principle. Again the 18 year term of imprisonment imposed in that case was in relation to facts germane to the particular circumstances in that matter.

It was further claimed that the accused through his counsel, has been remorseful. As regards the appropriate sentence to be passed, the murder was said not to have been committed under aggravating circumstances, and that as such he should be spared the death penalty. Furthermore, such a sentence was said to be still discretionary since the Constitution remains supreme in terms of interpreting the provisions of Amendment Act No.3 to the Criminal Code. Whilst acknowledging that the deceased was indeed only 22 years old at the

time of his murder, it was argued that imposing a death penalty would not bring him back. His counsel prayed for a sentence that would allow his rehabilitation into society. A period of fifteen years was put forward as likely to meet the justice of the case.

The second accused highlighted that he is a 32 year old first offender with two minor children and a wife. He was the major bread winner and was also looking after other relatives. He was also the community's spiritual leader. As a first offender, it was argued that he could be rehabilitated and furthermore that the element of mercy is the hall mark of a civilised society. He too has spent almost 2 years in prison which it was said ought to be taken into account. *S v Mutakwa & Anor* 2000 (1) ZLR 393 (H). Relying on the case of *Makoni v Commissioner of Prisoners & Anor* CCZ 8/16 his counsel put forward that a life sentence without parole would amount to cruel in human and degrading treatment. With regards to sentencing for violating a corpse he stated that the accused should receive a suspended sentence as this would hover over his head and make him a better member of society. Furthermore, it was said that he had been foolishly coerced into committing the offence in question. He was also said to have cooperated with the police at the time of his arrest. The appropriate sentence in his case was proposed as a 10 year term of imprisonment.

The State on the other hand argued that the murder had been committed under aggravating circumstances as exemplified by the fact both accused persons had colluded to kill the deceased intentionally. The murder was violent and callous and a life had been needlessly lost. Furthermore, the premeditated murder had thereafter been accompanied by mutilation and burning of the corpse, which was abominable. Imprisonment was advocated for all counts upon which the accused had been found guilty. Whilst catering for a fine or imprisonment or both, s 111 on violating a corpse attracts a maximum term of 5 years imprisonment and does s 184 (e) on obstruction of justice. The state advocated for a life imprisonment as the murder had been committed out of greed. The State pressed for all counts to be treated as one for purposes of sentence.

The issue to be decided was whether the murder was committed under aggravating circumstances. The deceased was murdered with a log and blows to the head. The State rightly pointed out that the act of mutilation was done to conceal the offence after the

deceased had died. Section 47 (2) (c) talks of mutilation and torture as being part of the actual murder. This was not the case here. But there was indeed one aggravating circumstance as pointed out which was that the murder was indeed premeditated – a factor which can be taken into account as aggravation in terms of s 47 (3) (a). Premeditation in this instance outweighs their mitigatory circumstances in terms of this court's determination of an appropriate sentence. A court is required to pass a sentence which takes into account the seriousness of the offence committed, the interests of society whilst remaining alive to the need to temper just with mercy. Whilst each of the accused are first offenders and whilst noting each of their personal circumstances as outlined to the court, the crime committed was extremely serious. It has resulted in trauma not just for the family but for the community as whole.

What was particularly striking during this trial was the total lack of remorse by either of the accused for the commission of the offence bolstering the reality of its premeditation. If blaming each other so as to create confusion with neither party taking responsibility is the new version of remorse, then it is indeed a warped sense of remorse. Always of concern when offenders fail to show remorse is whether they pose a danger to society in their belief that they can get away with murder. In the case of the first accused with greed having been the motivating factor in the commission of the offence and with his total lack of remorse, he revealed a character where he will stop at nothing to have his own way. In the case of the second accused, a self-styled spiritual leader, his attitude is that he too can get away with murder. There is nothing benign about his leadership that would warrant this court to pander to his whims and fancies that he is a spiritual leader of his community. In fact his murderous version of spiritual leadership makes him a danger to that community.

Both accused persons certainly pose a risk to society. Their crime was callous and unwarranted and as the court found, they acted as co-perpetrators. Among the purposes of sentencing are to protect the public, to punish the offender and to change an offender's behaviour. These are the important considerations to be taken into account. A life sentence is warranted. It could be that with the passage of time as they serve their sentence they will have evolved in ways that make them truly ready for reintegration into society. That is to be considered by the relevant authorities at the appropriate time.

The concerns expressed by counsel about the imposition of life sentence are well addressed in the case of *Obediah Makoni v Commissioner of Prisons Minister of Justice Legal & Parliamentary Affairs* CCZ 8/16. A proper reading of the case shows that a generous and purposive approach is to be applied by relevant Prison Board in the construction of Part XX of the Prisons Act regarding parole for all prisoners by not excluding those undergoing life imprisonment.

As Patel JA put it:

“...I take the view that Part XX of the Prisons Act should be construed and applied in conformity with the Constitution, by extending the scope of their coverage to all prisoners, including prisoners sentenced to life imprisonment”.

He concluded that pending the enactment of legislation amending the provisions of Part XX of the Prisons Act [*Chapter 7:11*] so as to conform with the right to equal protection and benefit of the law under section 56(1) of the Constitution, the relevant authorities shall apply those provisions, *mutatis mutandis*, to every prisoner sentenced to imprisonment for life. There are therefore no legitimate concerns about life imprisonment being without the possibility of parole. Given that a life sentence has been imposed, the accused will not receive separate sentences for violating a corpse and for obstruction of justice. All three counts are treated as one for sentencing.

Accordingly, both accused persons are sentenced to life imprisonment.

*National Prosecuting Authority*, legal practitioners for the state  
*Muvirimi Law Chambers*, legal practitioners for the 1<sup>st</sup> accused  
*Messrs Manase & Manase*, legal practitioners for the 2<sup>nd</sup> Accused