THE STATE
versus
TAPIWA CHITSUNGO
and
PROSPER MUBVONGI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 13, 14, 15, 16 & 17 June 2016

Criminal Trial: Murder

S W Munyoro, for the State
K Tundu, for the 1st accused (*pro deo*)
G Mabwe, for the 2nd accused (*pro deo*)

CHITAPI J: The two accused persons are jointly charged with the offence of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The State alleged in the indictment that the two accused persons acting with an intention to kill assaulted the late Radolph Cherekedzai Gora with open hands and tree logs at about 9:00pm on 29 May, 2015 at Chitsungo Village, Chief Chitsungo, Pfungwe thereby causing his death.

Both accused persons pleaded not guilty to the charge. The summary of the State case which was produced as annexure A outlined that on the fateful night, the deceased was at Victor Chitsungo's homestead where he intended to buy tobacco. Victor Chitsungo suspected that the deceased had an extra-marital affair with his wife Naome Ahombile who was present at the homestead. Victor Chitsungo summoned some villagers to his homestead intending to report to them that he had caught the deceased at his homestead as well as his suspicions. The accused persons were later to arrive at Victor Chitsungo's homestead around 10:00pm. Other villagers were then about to leave the homestead when the two accused arrived in the company of one Tichaona Tichabwa. The two accused then assaulted the deceased with 1st accused using his open hands several times on the face and the 2nd accused using a munhondo tree log and striking the deceased with it on the buttocks several times. The accused persons who would not be restrained continued to assault the deceased until he fell unconscious. The 1st accused further assaulted the deceased with fists on the head and face and also with two sticks plucked from a musawu tree at the deceased's residence. The outline also stated that the 1st accused threw the deceased into a fire whilst the 2nd accused hit the deceased with

booted feet several times on the head. The deceased is alleged to have succumbed to his injuries in hospital on 28 June, 2015.

The State outline summarizes what the State alleges to have happened. At least 4 paragraphs have been devoted to the summary and it covers a whole page. After the summary, the State outline then lists 9 witnesses with summaries of what each such witness will testify to being outlined. A word of caution is necessary to be given to the State. This court has noted an increased tendency by the State to provide lengthy summaries of what the State outline describes as having happened in a specific case. The document which is loosely referred to herein as the State outline is a document which the law provides that it be served upon the accused when he is committed by the magistrate for trial before the High Court. The document and its content are provided for under section 66 (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The court will divert a bit and comment on the pre-trial documents which are required to be provided to the accused and also by the accused prior to the commencement of his or her trial in the High Court.

In terms of s 136 (1) of the Criminal Procedure and Evidence Act;

> "When a person charged with an offence has been committed for trial or sentence and it is intended to prosecute him before the High Court, the charge shall be in writing in a document called an indictment."

In terms of s 137 of the Criminal Procedure and Evidence Act,

> "As soon as the indictment in any criminal case brought before the High Court has been lodged with the Registrar of that court, such a case shall be deemed to be pending in that court."

In terms of s 66 of the Criminal Procedure and Evidence Act, if the Prosecutor – General decides that in respect of an offence which a particular accused be charged with, should be tried in the High Court, he is required to cause a notice to be served upon the magistrate before whom the accused may be appearing for remand or the magistrate for the province in which the accused to be tried in the High Court is residing or is present. On the strength of the notice, the magistrate commits the person to custody until he appears for trial before the High Court on the appointed date. The person so committed for trial remains in custody unless liberated on bail pending such appearance for his trial. If however the person was on bail, the committal for trial does not cancel the bail. This judgment is not intended to comment on all the modalities of the procedure for committal but on the documents which the accused being committed should be served with by the magistrate. The documents which the accused should be served with include *inter alia* the indictment as defined in s 136 of the

Criminal Procedure and Evidence Act, the notice of trial and in terms of s 66 (6), the document or State outline. In this judgment, the court seeks as already indicated to comment on this document.

Section 66 (6) of the Criminal Procedure and Evidence Act, provides as follows:

> "Where an accused has been committed for trial in terms of subsection (2) there shall be served upon him or her in addition to the indictment and notice of trial-
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> (a) a document containing a list of witnesses it is proposed to call at the trial and a summary of the evidence which each witness will give, sufficient to inform the accused of all the material facts upon which the State relies; and
> (b) a notice requesting the accused
> (i) to give an outline of his or her defence, if any, to the charge; and
> (ii) to supply the names of any witnesses he or she proposes to call in his or her defence together with a summary of the evidence which each witness will give; sufficient to inform the Prosecutor-General of all the material facts on which he or she relies in his or her defence; and informing the accused of the provisions of section 67 (2)"

Section 67 (2) of course deals with the issue of inferences which the court is entitled to draw from an accused's failure to mention or include material facts in the outline of his defence where it is considered by the court that the accused should have reasonably been expected to include such facts if they were existing at the time of the making of the defence outline. This judgment again does not concern itself with s 67 (2) nor to debate it in the light of an accused's right to remain silent as provided for in s 50 (4) of the Constitution. The court however observes that there would appear to be nothing in s 50 (4) which entrenches the accused's right to remain silent on trial as opposed to upon arrest or detention.

This judgment concerns itself with pointing out that it is improper for the State to give a summary of facts or to draw conclusions on what it alleges to have happened. Such summarization and conclusions fall outside the ambit of s 66 (6) (a) of the Criminal Procedure & Evidence Act. The State should comply with the provisions of the section. The summarization of what happened does not assist the court and is of no evidential value. If anything, it will be useless because it is based on conclusions drawn by the State from a reading of witness statements before they have given evidence. Many a time, the court after hearing evidence of witnesses finds that the evidence is at variance with the summation by the State. The State should therefore desist from seeking to summarize its case in the document referred to in s 66 (6) (a). A distinction must be made between proceedings in the High Court and in the Magistrates Court. In the Magistrates Court, where an accused has pleaded not guilty, the prosecutor is required in terms of s 188 of the Criminal Procedure &

Evidence Act to make a statement outlining the nature of the State case and the material facts on which the State relies. The accused will likewise do the same. In the High Court, the practice of summarizing evidence whilst it is not provided for under s 66 (6) of the Criminal Procedure & Evidence is nonetheless provided for in s 198 of the same Act. Section 198 (1) of the Criminal Procedure and Evidence Act provides as follows:

> "(1) The prosecutor may, at any trial before any evidence is given, address the court for purposes of explaining the charge and opening the evidence intended to be adduced for the prosecution, but without comment thereon".

The State should be guided by this section if it intends to make an address before leading evidence. In short this is done at the trial.

It is hoped that the comments made in this judgment will in future guide the State when preparing the document referred to in s 66 (6) as aforesaid. In this judgment, the court notwithstanding the purported summation by the State as outlined at the beginning of this judgment will not be swayed or influenced by it but will base its judgment on the evidence. Lastly whilst s 65 (v) of the Criminal Procedure & Evidence Act provides that any irregularity in failing to comply with the provisions of s 66 will not vitiate the validity of a trial, the provision should not be read as giving the right to the State not to comply with the clear provisions of s 66 as set out therein.

Reverting to the case before the court, the State read out the summaries of the evidence of the proposed State witnesses. The accused persons defence outlines were also read into the record. The sate summary was admitted as Annexure "A" The defence outline for accused 1 was admitted as annexure B and that of accused 2 as annexure C. It is not proposed to repeat the contents of the defence outlines and indeed of the summaries of the State witnesses. The documents and their contents are part of the record.

The Prosecutor led evidence from 5 witnesses and applied for the admission of the evidence of 4 other witnesses as outlined in the summaries of their evidence and the defence counsels on behalf of the accused persons admitted the evidence. The evidence on which the court heard *viva-voce* was from the following witnesses, *viz* Doctor Tsungai Victor Jawangwe, Naome Ahombile, Nhamo Chitsungo, Winne Chekeredzayi and Victor Chitsungo. The evidence which was admitted related to summaries of the evidence of witnesses, Kudakwashe Mubvongi, Casper Kamedza, Givemore Chiorese and Shadreck Mavuka.

The admitted evidence as outlined in the summary of the State case was as follows:

Kudakwashe Mubvongi:

He was summoned to the scene of the altercation by Naome Ahombile who in turn had been sent to call the witness by Victor Chitsungo. On arrival at the scene he found Victor Chitsungo holding the deceased by his jacket. He advised Victor to refer his dispute with the deceased to the village Head or Chief to deal with. He remained at the scene until the Village Head and others arrived. He was still at the scene when the two accused persons arrived thereat. He witnessed the two accused persons attack the deceased. When he tried to restrain the 2nd accused from further assaulting the deceased with a log, the 2nd accused turned against him and kicked the witness on the groin forcing the witness to flee from the scene.

Casper Kamedza

He accompanied Nhamo Chitsungo, the Village Head to the scene and it was accepted that his evidence was corroborative of that of Nhamo Chitsungo.

Givemore Chiorese and Shadreck Mavuka

They are members of the Zimbabwe Republic Police. The former was the arresting detail who also attended the scene of the alleged assault on the deceased and he referred the deceased to the hospital for treatment. He recovered the various exhibits which were produced in court. He arrested the accused person. The latter, that is, Shadreck Mavuka was the investigating officer and compiled the case docket.

No comments are really necessary with regards the admitted evidence of the witnesses already listed. Note is however made from the evidence of Kudakwashe Mubvongi that the accused persons both assaulted the deceased and that the 2nd accused could not be restrained but instead attacked the witness by kicking him in the groin resulting in the witness removing from the scene.

Doctor Tsungai Victor Jawangwe

Is stationed at Parirenyatwa Hospital. He speaks with a stammer but what he said was audible. His qualifications are MBCHB; M. Med Histopathology and Diploma in Forensic Medicine: (Pathology). He conducted the autopsy on the deceased on 2 July, 2015 following the deceased's death on 28 June, 2015 at the same hospital. The highlights of his evidence which he explained are contained in a report which was produced as exh 1. He recorded the deceased as being an African male 71 years. The background information given to him was that the deceased had been assaulted on 29 May, 2015. His external examination noted the following:

1. Healed linear lacerations' 25 – 30 mm long and 2 mm wide on both the left and right sides of the body
2. Healed lacerations on right hand 9 mm above the wrist.
3. 3 medial wounds 55mm x 3mm
4. Wounds 60m x 45mm above the buttocks
5. 15.8cm wound above the head.
6. Lateral midline wounds 60mm x 7mm wide.
7. Circular healing would 19cm above midline on right leg.
8. Healing bruise 16cm above midline on left leg.

His internal examination revealed the following on the head, brain skull and thorax

9. Intramuscular right temporal muscle haermorrage on left side 45 x 28mm
10. Subdural haemotoma on the skull
11. Swollen right cerebral hemisphere with shift of midline to the left.
12. Large liquefied cystic cavity on right frontal lobe 50mm diameter.
13. Inter – muscular haematoma in chest muscles 60 x 40mm
14. Intermuscular haematoma on 1st, 2nd 3rd intercostal spaces.

His conclusion as to the cause of death was that the deceased died from complications of blunt force induced head injury. He said that the injuries were consistent with the use of a linear object and further consistent with the use of a stick. He agreed that a fall could also cause head injuries. The other lacerations were unlikely to cause death. Subdural haemotoma was the immediate cause of death because it consisted in bleeding of veins between the brain and the cranial space. He said that aged people easily succumbed to such injuries because the brain will have shrunk and easily shakes within the cavity where it sits. He discounted HIV as a cause of death nor as being a contributory factor.

The evidence of the doctor was not really tested nor seriously disputed. The court accepted without reserve that the deceased met his death through complications which resulted from injury to his head as a result of the application of blunt force by a linear object.

Naome Ahombile

The court approached the evidence of the witness with caution. This was so because she engaged in secret conversation with the deceased. She was telephoned by the deceased and asked whether she was alone and if her husband was away and she confirmed. She agreed to meet the deceased. She did not report to anyone the deceased's approaches to her. Her husband arrived whilst she had welcomed the deceased at night and after he had made prior arrangements to meet with her. Such a witness would not surprisingly seek to cast herself as an innocent participant. The court could not however make a conclusive finding that she was in love with the deceased nor that the two had engaged in a sexual act. The court however, raised its eyebrows on the nature of the two's relationship.

The court did not accept the seeming insinuation by the witness that she found the deceased at her homestead by accident. The probabilities point to an arranged meeting between the witness and the deceased which however was unexpectedly disturbed by the witness's husband. The court accepted that the deceased was caught unexpectedly at the scene and hence ended up creating the story that he was looking for tobacco to buy yet the tobacco would have been available at the shops being a place where the deceased knew and had given out as his destination when he bid his wife farewell saying that he was going to watch soccer on television at the business centre.

Despite its mistrust of the witness' designs with the deceased, the court accepted the witness evidence that the assault upon the deceased was perpetrated by the two accused persons and that the two appeared drunk and would not be deterred. The court accepted the witness evidence that the 1st accused slapped the deceased and the 2nd accused kicked the deceased with booted feet and also used exh 2 the munondo stick to assault the deceased. Exhibit 2 as a matter of fact is linear in shape. The court accepted her evidence that the 2nd accused assaulted the deceased with exh 2 indiscriminately and not on one particular area of his body. The evidence of the witness with regards the assault upon the deceased was corroborated by Nhamo Chitsungo the Village Head and by Victor Chitsungo.

Nhamo Chitsungo

His evidence largely corroborated that of Naome the last witness as far as he described how the assault was perpetrated by the accused persons. It is not necessary to go through it in any detail. He was called to the scene and was given a report on how the deceased had been found by Victor at his homestead and failed to give a convincing explanation about his intentions. The deceased had agreed to compensate Victor for invasion

of his privacy with the matter to be talked over at the Village Court on the following day. The witness had no idea that the deceased had been seriously injured and only became aware after he sent his messenger to summon the deceased to the Village Court so that the previous night'sevents could be concluded.

The witness removed from the scene to escape threats of violence by the accused persons. Victor did the same. The accused person would not be restrained. The 2nd accused was more violent than the 1st accused. The 2nd accused used a weapon, exh 2 to assault the deceased. Exhibit 2 is 128cm long, 3cm in diameter at the thick end and 1 – 5 cm in diameter at the thin end. The witness said that exh 2 was applied to the accused's buttocks whilst he was now prostrate. This therefore means that the deceased fell because of the assault or in the process of being assaulted because it is common cause that when the accused persons arrived at the scene, the deceased was seated as confirmed by the accused persons' own admission.

Victor Chitsungo's evidence also confirmed that of the other witnesses that the accused persons never gave the deceased a chance to defend himself. They just pounced on him and continued to assault him despite his pleas to them that they were injuring him and killing him. The court accepted the evidence of this witness that the accused persons would not be restrained especially the 2nd accused. The evidence of this witness read properly is materially similar to that of the other state witnesses. Nothing new arises from its analysis and any differences in the evidence relate to immaterial points or aspects. This is to be expected when the scene is mobile

The last witness Winnie Cherekedzayi gave a chilling account of how the accused persons assaulted the deceased at his homestead using their hands, kicking him and using switches produced by consent. It was not denied by the accused that the switches were plucked from a tree at the deceased's residence. The accused persons however denied using the switches. The witness testified to deceased being thrown into a fire and being unable to walk, stand or talk. Deceased was almost stripped naked with accused persons having taken possession of his jacket, shoes and hat which they were putting on. The witness presented a picture of an honest witness and her evidence as to the deceased's condition was corroborated by the fact that the deceased had to be taken to hospital and ended up in Harare. The deceased could not attend at the police station to record statements and failed to show up at the village court. The State closed its case.

The evidence of the accused's persons and that of state witness are not at variance on material points. In their defence outlines they accept or admit perpetrating an assault upon the

deceased. Their motives for doing so in the case of the 1st accused lies in his grudge with the deceased whom he believed to have caused the breakup of his marriage and also infected him with HIV. As for the 2nd accused his motive was that he wanted to reprimand the deceased for his wayward ways of proposing love to other men's wives and setting a bad example.

This case is not difficult to determine because the material facts are common cause. The two accused persons assaulted the deceased who did not retaliate and was defenceless imploring them to stop their assault because they were injuring him. The accused persons were not deterred. Accused 1 used his hands and a switch at Victor Chitsungo's home and the deceased's home respectively. Accused 2 used his booted feet and a munondo stick exh 2 although he says that he used a mususu switch. It is not necessary to determine whether the switch he used was plucked of a mususu or munondo tree. Whichever tree it came from, it was sufficient to inflict some injuries noted upon the deceased in so far as they were consistent with the use of a linear object. From the testimony of the witnesses however, the court records that it preferred the state evidence as to the use of exh 2 by accused 2.

The accused persons behaved like animals. They took it upon themselves to inflict punishment upon the deceased. They were not the injured parties and did not even have full information on what sin or wrong the deceased had committed. They in typical style of village bullies attacked deceased. The assaults were prolonged. The deceased's clothes like the shirt were torn to tatters. The jacket was torn. The deceased had his shoes removed. His spectacles were damaged. His watch was damaged. He was thrown into a fire. The assaults were vicious in magnitude. The assaults ended only when it was clear that the deceased was helpless. This is the evidence before the court.

The 1st accused has sort to minimize the extent of his involvement and the nature of assault he inflicted upon the deceased. The 2nd accused has similarly done the same. The accused persons were poor in demeanor as witnesses. The 1st accused was not entirely honest with the court. He however ended up apologizing for his conduct. The 2nd accused was such a poor witness to the extent that the court had to intercede to bring him to answer questions in his interest. He showed no signs of remorse and sought to portray state witnesses as ganging up against him. Whilst he testified that he had had an altercation with the Village Head, hence suggesting a motive for the Village Head to lie against him, he could not advance any motive for the other witnesses who corroborated the Village Head to also lie against him.

In the court's view, there are only two issues for the court to answer. These are; whether or not the accused acted in common purpose and the second one whether if they

acted with a common purpose, they foresaw that their actions could result in serious injury or the death of the deceased. The law on common purpose is well settled see *S* v *Safatsa & Others* 1988 (1) SA 868 (a); *S* v *Mgedeza & Others* 1989 (1) SA 687; *S* v *Mzwempi* 2011 (2) SALR 227 *S* v *Madzogo* HH 397/15.

The requirements can be said to be as follows. There must be evidence adduced to prove that:

(i) each accused was present at the scene of the offence when it was committed

(ii) each accused must have been aware of the commission of the offence

(iii) Each accused must have intended to make common cause with the other person or persons committing the offence

(iv) Each accused must have manifested his sharing of common purpose with the other by performing some act of association with the conduct of the other

(v) Each accused must have had the *mens rea* to commit the offence.

Jonathan Burchell – *Principles of Criminal Law* 3rd ed (2008) at 574 writes:

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

See also s 196 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*].

In this case both accused were aware that they were committing an offence of assaulting the deceased. They associated in the assault and intended to achieve the same result being the application of unlawful force on the deceased. They had the necessary intention to apply this force and their voluntary intoxication considered against their actions did not negative *mens rea.*

On the second enquiry as to whether or not the accused foresaw the possibility subjectively that death could result from their conduct if not serious injury, the answer is in the affirmative. The accused persons perpetrated a sustained brutal assault upon the deceased and held him hostage. He was defenceless. One of them used a weapon during the initial assault, that is exh 2 and the other used weapons being two switches at the deceased's home. The assaults contrary to what the deceased stated were applied indiscriminately on the deceased. The court does not accept the accused's explanation that they picked up and chose where on the body of the deceased to direct their blows. The evidence of choice of points on the body where to land blows is inconsistent with the volatility of the situation. The possibilities certainly do not favour a finding that the accused persons were composed to the

point of choosing areas on the deceased to direct their blows. They tore the deceased's clothes. Deceased was thrown into the fire. He pleaded with the accused persons that they would kill him. The deceased persons were not deterred. They continued to assault the deceased until he was helpless and he had to be assisted into his bedroom not talking and never to talk again. The accused's person's evidence that they walked with the deceased to his home normally does not accord with the rest of the objective evidence adduced and accepted by the court as well as the probabilities.

When a person perpetrates an unlawful, sustained and indiscriminate assault upon another using either his hands, first, booted feet or as in this case weapons, such person if he perpetrates such an assault knowingly must surely subjectively foresee the possibility that his assault might cause serious bodily harm if not death. The manner of death is not important because people are made differently. In any event the thin skull rule provides that you take your victim as you find him. It is the finding of the court that the accused were aware of and foresaw the risk or possibility that their actions could result in the death of the deceased by infliction of mitigated injury upon him and continued to engage in that conduct. The verdict of the court is therefore that:

Each accused is found guilty of the murder of the deceased under s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence:

These are the reasons for sentence. The accused persons have been convicted of a very serious and capital offence. The offence of murder is viewed by the courts in a very serious light. Section 48 of the Constitution of Zimbabwe Amendment (No.20) Act, 2013 provides that every person has a right to life. The right to life is a fundamental right and is the most sacrosanct right which should be safeguarded. It is important that our society accepts that a person should only lose his or her due to natural caused or by operation of law.

Section 86 (3) (a) of the Constitution provides that the right to life cannot be limited. Section 53 of the Constitution provides that no person may be subjected to physical or psychological torture or to cruel inhuman or degrading treatment or punishment. Section 86 (3) (c) also provides that no law may limit the right not to be tortured or subjected to cruel inhuman or degrading treatment.

There has been a sudden upsurge in cases of murder in the country of recent. One reads of and the courts preside over cases of murder on a daily basis. It is also observed that

the police hierarchy continues to bemoan the upsurge in cases of homicide. As a society, people need to respect the life of each other. The moment that society behaves in a barbaric fashion where the sanctity of human life is no longer held sacrosanct, society drifts back to the barbaric ages. It is noted that there are institutions to be found at all levels of society starting with the family to deal with disputes. In this case, the village head was called to intercede in the dispute by the wronged person, Victor Chitsungo. The accused instead of respecting the authority of the village head to resolve the dispute threatened the village head. The village head fearing for his health or an assault on him ran away from the scene. The accused persons then took it upon themselves to torture the deceased who was old enough to be their father if not their grandfather. The accused's conduct was very abhorrent.

The two accused said that they beat up the deceased in order to teach him to be exemplary. How so? It is foreign to cultural norms in Zimbabwe that the young as in this case accused persons in their thirties should beat up a 71 year old man and teach him how to behave and be exemplary. The nature of the assault that the two accused person perpetrated upon the deceased deserved of severe censure. They almost stripped him naked. They behaved as untouchable kings and could not be deterred by anyone. The prosecutor properly described the behaviour of the accused as barbaric. They took away the deceased's clothes and put them on as if the clothes were a trophy they had won in a contest. Over and above this, the accused persons exhibited very little signs of being remorseful for their conduct.

In the case of the 1st accused, right up to the end of the trial and despite any evidence to support his assertions being availed, he continued to accuse the deceased of having afflicted him with the HIV virus. He argued that he got the affliction from his wife who in turn was infected by the deceased. His belief existed in his imagination because there was no evidence that there was any sexual contact between the deceased and the accused's wife. There was no evidence either of the HIV status of the deceased which was led or placed before the court. The accusation that the deceased was H.I.V positive amounted to an insult upon the dead. The state witnesses who were related to the 1st accused testified that they were hearing about the 1st accused's accusations for the first time in court which included the further accusation that the 1st accused's wife had divorced him because she had hooked up with the deceased. The subject matter of the 1st accused's divorce was never discussed by his family yet the 1st accused had the audacity to come to court and allege serious unsubstantiated allegations in a bid to justify his barbaric conduct. The court found such stance on the part of the 1st accused to be deplorable.

The 2nd accused's behaviour was that of an outright criminal. People tried to reason with him not to be violent and he turned against them threatening to assault them. The court as in the case of 1st accused did not observe any signs of remorse or regret over his conduct and the consequences which ensued.

It was submitted by defence counsels that the accused persons were unsophisticated rural persons. This is true and it will be given its due weight. The accused both denied that they were prone to violence and said that they had never been arrested before. Despite being unsophisticated persons, they therefore appreciated right from wrong. They were thus informed persons who appreciated that violence was a crime.

This case presented itself as one of the bad cases which has come before this court. The two accused person's appeared not to care whatsoever as to what could become of the deceased, that is whether he was seriously injured or died. Not only did the accused assault the deceased at Victor Chitsingo's homestead, they dragged the deceased to his home undressing him on the way. They also assaulted him in front of his elderly wife. They were not deterred when the deceased's wife tried to reason with them to desist from assaulting the deceased. They threw the deceased into a fire at his homestead. The accused persons clearly took the law in to their own hands holding that it was their responsibility to punish the deceased. Such conduct is not countenanced by courts of law.

The court will however notwithstanding its strong disapproval for the accused's conduct still consider the mitigatory factors submitted on the accused's behalf. The 1st accused was said to be HIV positive. Thankfully, medicine has made inroads in controlling the medical condition which used to be a sure death eventuality. The accused can continue to access his HIV medication in prison. Both accused persons were said to have family responsibilities. In the case of the 2nd accused, in addition to his own family it was submitted that he was responsible for the family of his brother-in-law. The brother in law is an invalid.

Family people should always appreciate that they have a responsibility to their families. They should not engage in conduct which is irresponsible because in the end not only do they suffer the consequences of their conduct but their innocent dependant's also suffer in the process. It is therefore inevitable that the dependents in this case will be indirectly affected by the incarceration of the accused persons. The state counsel submitted that undue weight should not be given to the fact that the accused's persons had partaken alcohol.

The court was faced with evidence that the accused persons had been drinking beer at the township. The state witness Naome Ahombile testified that both accused upon arrival at Victor Chitungo's homestead where the deceased was, appeared to be drunk. In terms of s 221 of the Criminal Law (Codification and Reform) Act voluntary intoxication where it does not lead to an accused being unable to form the intention required to be proven to found a conviction for the offence charged may properly take voluntary intoxication into consideration as a mitigatory factor together with all other circumstances of the case being taken into account. There is no doubt that intoxication played a part in the accused's conduct even though the accused denied this. It is a truism that a person will lie unto himself or herself by denying that alcohol influenced his or her conduct. The lie is usually motivated by the fact that such persons then thinks that his or her position or defence will worsen or not be believed if he or she admits to being intoxicated. The court takes into account the observations made in the case of *S* v *Mario* HH 468/86 in which the judge stated that intoxication is one of the age old frailties which will always reduce the intoxicant's ability to act rationally. The legislature has also observed and legislated as such in s 221 and 222 of the Criminal Code.

The court in sentencing the accused should not be affected by emotion. Allowing emotion to affect its judgment would place the court in the same boat as the accused persons who allowed their emotions to override reason. It is important that any sentence which a court passes should be measured. It will properly be measured through the court exercising an appropriate degree of mercy in the given circumstances. The court will be mindful of this and take the principle into account.

The State counsel has submitted that an appropriate sentence in this matter despite the accused persons being first offenders is a lengthy custodial sentence. A first offender will only benefit from being spared imprisonment where the circumstanced of the case allow. A human life was lost needlessly and societal interests must override the personal interests of the accused. There appears to be no basis to differentiate the sentences of the two accused persons nor is there justification to suspend any portion of the sentence. If a long custodial sentence does not deter an offender from future commission of crime, a suspended sentence is unlikely to achieve this effect. Taking into account all the circumstances of this case, the accused's personal circumstances and the interests of society, the following sentence in the view of the court is merited.

Each accused is sentenced to 20 years imprisonment.

National Prosecuting Authority, for the State
Dzoro & Partners, accused's legal practitioners