

THE STATE  
versus  
MILLION MAIROS  
and  
TAKUDZWA MUMBA  
and  
MAPHIOS MUKATI  
and  
BRIAN MAKONI  
and  
ALFRED CHARI  
and  
AGREEMENT MUSUSA

HIGH COURT OF ZIMBABWE  
**MUNGWARI J**  
HARARE, 14 February 2024, 10 June and 13 June 2024

*Criminal Trial*

**Assessors:** Mr *Barwa*  
Mr *Chakvinga*

*K Chigwedere*, for the State  
*P Mukumbiri*, for the 1st accused  
*D Mpofu*, for the 2<sup>nd</sup> accused  
*L Nyamudeza*, for the 3<sup>rd</sup> accused  
*K Mutero*, for the 4<sup>th</sup> accused  
*L Rwizi*, for the 5<sup>th</sup> accused  
*P Kavhunu*, for the 6<sup>th</sup> accused

**MUNGWARI J:** A thirty-nine-year-old thief, Tafadzwa Kamudyariwa (herein after referred to as “the deceased”), his friend Joseph Mugwambiwa and an unnamed assailant conspired to steal irrigation water pipes at Geluck Farm in Bindura. The state alleged that, on 16 September 2022, they proceeded to Geluck farm. They however aborted their mission when alarm was raised about their unwelcome presence at the farm. The thieves fled to nearby Avonda farm. A number of male farm workers teamed up and pursued them.

[1] The workers included the six accused who are, Million Mairos (first accused), Takudzwa Mumba (second accused), Maphios Mukati (third accused), Brian Makoni (fourth accused), Alfred Chari (fifth accused), and Agreement Mususa (sixth accused).

Their unnamed accomplice made good his escape. Although Joseph Mugwambiwa (Joseph) and the deceased made a spirited attempt to flee they were apprehended. Upon being caught the deceased and Joseph were severely assaulted by the accused persons who took turns to indiscriminately assault them. The deceased in particular was assaulted all over his body with switches and aluminum pipes. After the prolonged and severe assaults, a report on the attempted theft was initiated by one of the accused persons and arrangements were made to ferry the deceased and Joseph to the nearest police station. Joseph survived the assaults but the deceased was not similarly lucky because he met his tragic demise at the hands of some or all of the six accused persons. He succumbed to his injuries on the way to the police station.

[2] A post mortem examination on the remains of the deceased established the cause of death as brain edema, hemorrhage in the spinal bulb and head trauma due to assault. The six accused were later arrested and arraigned before this court to answer to the charge of murder in contravention of section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleged that one or all of the accused, unlawfully and with intent to kill, or realizing that there was a real risk or possibility that death might ensue continued to engage in the conduct of assaulting the deceased, despite the risk or possibility resulting in the deceased's death.

[3] All the six accused pleaded not guilty to the offence. We state below, a summary of their defence outlines. All the accused persons admit that they are farm workers who on the fateful day reacted to an alarm of a theft at Geluck farm. They all came from their respective places of work and abode and teamed up to pursue the suspected thieves. They also called on Tendai Mukati to join them and together they proceeded to Avonda Farm where they suspected that the thieves had gone to. At Avonda farm they agreed to spread themselves around the area where the suspected thieves were in order to block them from escaping. The first, fourth and sixth accused admitted to having pursued the deceased. The first accused however stated that he arrived to find the deceased already apprehended by the fourth and sixth accused. He claims to have also found the deceased already injured. The fourth accused on the other hand conceded that he chased the deceased but that he did so with first, fifth and sixth accused and that they all apprehended the deceased at the same time. He added that when pursuing the deceased, they had called out to him to stop but he kept running until he fell. They did not see what caused him to fall but assumed that he could have

slid on some stones or that his legs got entangled in the vegetation. They then heard him cry out that his leg had been injured. The sixth accused also echoed the first and fourth accused's sentiments and confirmed that they pursued the deceased. He differed with the fourth accused when he confirmed that it was just the three of them, the first, fourth and sixth accused who gave chase on the deceased. He exonerated the fifth accused from the apprehension of the deceased. He stated that when they arrived where he was they found him on the ground crying that his leg had been injured. The sixth accused stated that he had proceeded to where the thieves had been sitting and had uplifted two bags from there, an iron cutter, and an aluminium steel pipe which he then took to the road. Joseph who had already been apprehended was ordered to carry the deceased to Geluck farm. He parted ways with the others at Mazowe River.

[4] The second and third accused both claimed to have chased Joseph who they managed to apprehend with the assistance of the first accused who later joined them and provided reinforcement. They professed ignorance on how the deceased was injured and insisted that they were not involved in his arrest. As such, they said they wouldn't know how he sustained his injuries. Lastly the fifth accused, claimed that he ran in a different direction pursuing the person who made off and was never apprehended.

[5] All the six accused denied assaulting the deceased and insisted that they did not witness any assault being perpetrated on him by either one or more of them.

### **THE STATE CASE**

[6] With the consent of the defence, the state opened its case by tendering the autopsy report which was sworn to by a pathologist, Dr Martinez on 29 September 2022. The court admitted the report in terms of s278 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CPEA) and marked it as Exhibit 1. The pathologist observed the following surface wounds and injuries;

- “1) Abrasion in frontal region (left and right)
- 2) Abrasions in left lateral of the neck
- 3) Abrasions in right lateral of the abdomen
- 4) Abrasions in left leg and luxation in the knee
- 5) Abrasion in the back
- 6) Abrasion in right knee”

[7] The doctor also noted haemorrhagic infiltration in the frontal region of the deceased's head as well as severe brain edema haemorrhage in the spinal bulb. In conclusion the

doctor stated that the cause of death was due to brain edema, haemorrhage in the spinal bulb and head trauma due to assault. The injuries are clear signs of the violence that was perpetrated upon the deceased. Undoubtedly therefore the death of the deceased was due to an assault.

[8] The State followed this up by tendering with the consent of the defence Exhibits 2 to 7 which are confirmed, warned and cautioned statements by the first to the sixth accused respectively. Exhibits 8 and 9 were also tendered. Exhibit 8 is a steel pipe accompanied by its certificate of weight. According to the certificate of weight the steel pipe weighs 1,7kg and is 90cms long. We observed that it is a heavy pipe and one would need to use both hands. A significant amount of energy would be required to lift it. Exhibit 9 is also an aluminium pipe weighing 1.9 kgs and is about one metre and two centimetres long. The steel and aluminium pipes are lethal weapons if used on a human being.

[9] In addition to the above, the evidence of three state witnesses namely Tamise Fungulani, Onismas Makuya and Artbold Kachere, was formally admitted in terms of s314 of the CPEA as it appears in the state's summary of evidence. The defence consented to the admission largely because the three's evidence did not in any way further the state case. Besides Tamise Fungulani confirming that she ferried the deceased and Joseph to the police station the two police officers Onismas Makuya and Artbold Kachere both confirmed that they conducted the investigations after receiving the report of the murder something which had already been made common cause by the accused persons in their defence outlines. There was nothing of value therefore to be derived from their evidence as none of these witnesses shed light on the identity of the person or people who assaulted the deceased.

### **ORAL EVIDENCE**

[10] In support of its case the State led *viva voce* evidence from two witnesses namely, Joseph Mugwambiwa and Tendai Mukati. The accused on the other hand each gave evidence in their own defence and did not call any witnesses.

### **Joseph Mugwambiwa (Joseph)**

[11] The witness a twenty-four-year-old self-confessed thief and illegal gold panner was a friend of the deceased. The gist of his evidence was that, on the fateful night he left his rural home in Madziwa and teamed up with the deceased and one Blessed Kanoti. Their intention was to steal some pipes at Geluk farm. After a foiled attempt

to steal they fled the scene and hid at nearby Avonda farm. Thinking they had escaped, the trio let down their guard and settled in the bushes at Avonda farm and lit a fire to warm themselves. Unbeknown to them the accused had detected their presence and laid an ambush for them while they slept in front of the fire. At the crack of dawn just when sunlight was beginning to seep through Joseph noticed the accused as they made their way towards him. Visibility was good and he could see clearly. He noticed the third accused and other men who were armed with catapults. He also observed that the fourth accused was armed with a metal bar. Once the three thieves realised that their hiding place had been discovered they scurried away with the accused persons in hot pursuit. According to Joseph, they ran in a single file with Blessed Kanoti in front, the deceased in the middle and he at the back. He was clear that the fourth and sixth accused pursued the deceased. When he was four metres away from the deceased he saw the fourth accused throw a metal object at the deceased and break his leg. The deceased fell to the ground and lay there wailing and calling out that his leg had been injured. The witness identified Exhibit 9 as the metal object used to assault the deceased on the leg.

[12] The second and third accused continued to pursue him and 50 metres away from where the deceased fell they managed to catch up with him. The third accused struck him with a catapult on the left ear and started assaulting him. The two men tied his hands with tree barks and subjected him to assaults with metal objects. He saw some other accused pursuing Blessing Kanoti who outpaced them. He did not manage to see what happened to the deceased after he fell to the ground but only saw him being dragged from the bush and to the tarred road where he was. The witness testified that the first and fourth accused took turns to assault him with a metal object all over his body as the deceased cried out loudly in pain. At that stage the deceased was not in any condition to walk as he had been injured from the hip down to the knee. According to the witness the fourth accused used excessive force in assaulting the deceased as the first accused also stepped on the deceased's head with booted feet. When it was the first accused's turn to assault the deceased, he did not use excessive force. At that stage the other accused did not assault the deceased so he said. He expressly excluded the sixth accused from the assault on the deceased and said that at that time the sixth accused had gone back into the bush to take their bags and could not have assaulted him.

[13] Joseph was then instructed to carry the deceased to Geluck farm and he did. He said he made numerous stops as he was in pain from the assaults and the weight of the deceased. At Geluck farm the fifth accused instructed him to throw the deceased on to the ground and he did. After the throw, the deceased landed on his back and the fourth and second accused started pulling and dragging him. He on the other hand was assaulted by the second and third accused with switches. Meanwhile the deceased continued crying. He was made to lie on his stomach by the third accused and had a log tied to his body. He was turned around and the third to sixth accused all took turns to assault him indiscriminately. He saw the second accused hold a scissors in hand with the intention of cutting the deceased's trousers as the first accused poured water on the deceased.

[14] Further, Joseph said the assault at the farm took approximately thirty minutes. At that stage the deceased was in bad shape and was sporting some abrasions on the arms. The fourth accused who appeared to be in charge then instructed him to carry the deceased and go away with him. After about five metres the two collapsed into a heap as they were both weak and worse for wear from the continuous beatings. They were then transported to the police station in a motor vehicle. The deceased passed away on the way to the police station. The witness concluded that all the accused were present at the scene and all of them contributed at various stages to the deceased's demise in one way or another. It was his evidence that the fourth accused is the one who hit the deceased more as compared to his co-accused persons.

[15] During cross examination, the witness insisted that he saw the fourth accused throw a metal bar as he ran facing forwards but would occasionally turn backwards. He then made an about turn in his testimony and stated that it was actually the fourth and sixth accused who dragged the deceased at Avondah farm and not the first and third as earlier alluded to in his evidence in chief. Counsels for the accused questioned him on how he expected the court to rely on his evidence if he was making such mistakes. He changed his statement again during cross examination by the fourth accused's defence counsel and said the first and third accused are the ones who dragged the deceased from the bush to the tarred road.

[16] From his testimony we concluded that Joseph told the truth in some instances, exaggerated in some and in others outrightly lied. He had reason to do so. First, he was not an entirely honest man himself because this incident resulted from an attempt to

steal at Geluck farm. Second, the deceased was his friend with whom he had been apprehended and assaulted together. He would have wanted the culprits to be brought to justice by whatever means necessary. He just did not know how to do so other than to attribute his death to all of them. To him they could only be nailed if each and everyone's role was pinpointed. Those claims of having been able to identify the role of each and every accused person was unlikely considering that he was also under attack, that the situation was highly fluid and that this was his first time to meet the accused persons. However, despite the exaggerations and deficiencies Joseph's evidence confirmed what had already been made common cause by the accused themselves. That is that they were all at the scene of the crime. It confirmed Exhibit 1's finding that the deceased died from injuries sustained in an assault. It also highlighted that the fourth accused was the ringleader and that he together with the first accused assaulted the deceased.

[17] The other accused's roles in the assault remained uncertain due to the continuing turns and corrections that Joseph made to his own evidence. We therefore concluded that Joseph saw the deceased being apprehended by the first and fourth accused. In any case, the apprehension had already been admitted by the first and fourth accused in their defence outlines. We reason that after apprehending him they could not just have looked at him, armed as they were. They must have assaulted him causing him to fall down and cry that his leg had been injured. The witness was therefore correct when he said he saw them assault the deceased with an iron bar at that stage. Besides this not much else could be derived from his evidence.

**Tendai Mukati (Tendai)**

[18] The second state witness is a farm worker who also attended at the scene with the other accused in a bid to apprehend the thieves. He is a brother to the third accused. He told the court that on the fateful night he was assigned the duty of standing by the road side as a safety measure to ensure that the thieves would not escape while the other six accused entered into the bush to apprehend the thieves. In no time he heard noises from within the bushes. It sounded as if there was a chase. He did not see anything as he ran in a different direction. He then saw the second, third and fifth accused who instructed him to get tree barks so that they could tie Joseph. The witness claimed that he did not know how the deceased had been injured since he never went inside the bush when he heard the sounds of a chase. He also did not see any assault

on the deceased at the roadside or any other place. He parted ways with the others before they got to the base and does not know what happened there.

[19] While it may appear as if the witnesses' evidence is immaterial it is actually vital. It served to indicate the place where the deceased might have sustained the fatal injuries. From the witnesses' evidence, the fatal injuries occurred inside the bushes when he heard noises from within and thereafter saw the second accused come to the road carrying the deceased who was injured although he said he did not know who exactly had caused the injuries and how.

### **THE DEFENCE CASES**

#### **First accused -Million Mairos (Million)**

[20] The first accused adopted his defence outline as his evidence in chief and added detail. He claimed to have gone after the deceased but only did so by walking as he has a problematic leg which makes him unable to run. He arrived well after the fourth and sixth accused had already apprehended the deceased. He also arrived to find the deceased's leg already broken and him wriggling on the ground. He further stated that he was only informed by the fourth accused that deceased had fallen and sustained injuries. It was his testimony that the fourth and sixth accused should be able to explain what happened to the deceased because they were the first to arrive where the deceased was. With this statement he inadvertently hinted to the court that something happened to the deceased at the point of apprehension which the fourth and sixth accused would be better placed to tell the court on.

[21] He continued in his testimony and said that with the assistance of the fourth accused he carried the deceased to where his bags and aluminium pipes were. They were joined by the second and third accused who then carried the deceased to the road where Joseph was. The second accused ordered Joseph to carry the deceased to the farm on his back. He parted ways with everyone after they crossed Mazowe River heading home. He does not know what transpired at Geluck farm afterwards. He denied that he assaulted the deceased in the bush or anywhere and stated that Joseph did not witness any assault incident in the bush. He claimed that Joseph falsified evidence because he wanted to fix them as he was hurt by the loss of his friend and relative.

[22] During cross examination by the state counsel the accused admitted having gone to the scene armed with catapults and stones. He admitted that these are lethal



weapons. After the variation in his warned and caution statement was brought to his attention, he then admitted having assaulted Joseph at the road when he had wanted the court to believe that nothing happened there and that Joseph is an outright liar. His explanation for the variation was that he forgot due to passage of time. His explanation for the deceased's injuries was that the deceased may have injured himself when he fell on a rocky surface as he ran away in the mountains. He however claimed not to have seen the fall. The accused then conceded that the deceased may have been assaulted at the point of apprehension but still insisted that he did not participate in the assault. He however admitted that his actions and those of his co-accused caused the death of the deceased but insisted that it was never their intention to do so.

[23] We pause here to comment that the accused could not make up his mind over whether he ran or walked towards the deceased after the supposed fall. In his warned and cautioned statement Exhibit 2 he stated that 'I ran there and saw the now deceased crying holding his leg indicating that he was injured' yet in his evidence he claimed to have walked there as he has a known leg injury which limits his ability to run. Because of the disparity between the two statements we are not inclined to believe that he walked. He had come armed with catapults and stones with the intention of apprehending the thieves. The thieves were fleeing. He therefore could not have walked to apprehend the fleeing thieves. He had to run.

[24] Looking at the totality of his evidence, Million struck us as a witness who was economical with the truth. He hinted that something happened to the deceased at the point of apprehension. He admitted that the deceased might have been assaulted but insisted that he knows nothing about the assault. From his testimony we got the distinct impression that he must have seen or even participated in the assault but was not keen to disclose that aspect to the court.

**Second, third and fifth accused (Takudzwa Mumba, Maphios Mukati and Alfred Chari)**

[25] The second, third and fifth accused adopted their defence outlines as their evidence in chief. Their testimonies were materially similar. In them, they reiterated that they did not chase the deceased but that the first, fourth and sixth accused did. They had instead chased and apprehended Joseph. They had also chased the unknown thief who escaped. They dismissed Joseph's evidence as expressions of a desperate thief, who was heartbroken by the demise of his friend and was intent on pinning the

murder on all of them to the extent of fabricating evidence against them. They denied having participated in the assault of the deceased. It was their evidence that those who apprehended the deceased know exactly what happened to the deceased and that if any assault occurred, it was perpetrated by the first, fourth and sixth accused as they are the ones who apprehended the deceased. They denied liability for the actions of the first, fourth and sixth accused. They said those accused's actions could not be attributed to them because that is not what they had set out to do. They insisted that their intention from the beginning was to apprehend the thieves and bring them to book. That is why they had coordinated with each other to provide reinforcement in case the thieves would try and flee. The three men were steadfast in their evidence and no amount of cross examining them by state counsel could make them depart from their evidence. We believed their testimonies thereto.

**Fourth accused -Brian Makoni (Brian)**

[26] The 38-year-old male claimed that he reached the deceased at the same time as first and sixth accused. He however exonerated the sixth accused and said he did nothing but carry the bags of the thieves. He denied having thrown the aluminium pipe at the deceased as alleged by Joseph in his testimony. He denied that he and the first accused assaulted the deceased heavily as alleged by Joseph. He gave three versions of how the deceased presumably fell and injured himself. He first testified that he and the first and sixth accused ran down the deceased and before they reached him they all saw him falling face down on rocky ground which had vegetation around. The deceased then complained of an injured leg as he rolled on the ground. The fourth accused however failed to explain why if the deceased fell on his face first he would sustain injuries on his leg. He then tried to demonstrate to the court how the deceased fell and by doing so gave the second version which depicted the deceased kneeling first and then falling to the ground. The demonstration failed to show how an individual could sustain such fatal injuries particularly if he first cushioned himself with his knees. He tried to explain his failure by stating that the circumstances in the demonstration were different. In contrast, in his confirmed warned and cautioned statement which provided the third version, he said the deceased fell after slipping on a stone, and was entangled in the tree roots. After these three different versions we could only conclude that the assertion that the deceased died as a result of a fall was not true but that it is an afterthought and an outrightly fabricated narrative. On the one

hand the fourth accused admitted having assaulted Joseph at the roadside, but on the other denied having assaulted the deceased something which we found strange because the two were both perceived as thieves. We do not understand why the fourth accused would have chosen to assault the one but not the other thief. It only worked to cast further dust on his testimony.

**Sixth accused- Agreement Mususa (Agreement)**

[27] The sixth accused refused to adopt his defence outline as his evidence in chief and insisted that he wanted to tell the court the truth since he was now on the stand and because previously when at Bindura Remand prison, his colleagues, particularly the fourth accused coerced him into sticking to one story, and that each would tell the truth in court on their own. He said none of them had given an entirely truthful narration of what happened when testifying. Besides hinting at what may have happened they said nothing else. He said he had not wanted to be a sell out and was afraid of the unspecified action that he had been threatened with by his colleagues at prison. The fourth accused indirectly had a hold over all of them and this had been stifling him. He however felt safe to tell the truth in court now. He said that himself, first and fourth accused ran after the deceased in the bush at Avonda. He stated that he got to the deceased after the first and fourth accused had already arrived. He found the deceased on top of the fourth accused, and first accused was assaulting the deceased with an aluminium pipe, calling out to him to release the fourth accused whom he was pinning to the ground. The fourth accused was on the ground and was struggling to shake off the deceased who clearly had the upper hand. As a result of the movements the two appeared to be engaged in an entangle. The deceased complied with the first accused's demands for him to stop and he sat down on the ground. When the first accused showed a desire to continue assaulting the deceased Agreement stated that he reprimanded him against assaulting the deceased and the first accused took heed and stopped. However, the fourth accused got up and furiously grabbed the aluminium pipe from the first accused and started assaulting the deceased. He said he also reprimanded the fourth accused against assaulting the deceased and told him that there was no reason to assault him since they had now subdued him. Instead the fourth accused justified his actions by saying they should not sympathise with a thief, and he continued to assault the deceased indiscriminately with the aluminium pipe using excessive force. The sixth accused said he kept pleading with the fourth accused to

stop hitting the deceased but he would not listen and threatened to also assault him if he kept telling him to stop. It was clear to the sixth accused that the fourth accused had now deviated from the goal of just apprehending the thieves to a motive of his own, and so in fear he moved away from the scene and stood at a distance. When he realized that deceased had sustained a broken leg from the assaults, he made a last-minute effort to call out to the fourth accused and asked him why he was still assaulting the deceased when he was already hurt. It was at that point that the fourth accused stopped assaulting the deceased and threw the aluminium pipe to the ground. The sixth accused said he then moved closer to the scene and took the aluminium pipe and two bags belonging to the thieves and proceeded to the road leaving the first and fourth accused still in the bush.

[28] During cross examination by the state, Agreement confirmed that the findings by the doctor in the post- mortem report were accurate since he had personally witnessed the severe assault on the deceased by the fourth accused. He was clear that the deceased died due to assaults on his person by the fourth accused. While the first accused had assaulted the deceased, Agreement stated that he did so moderately and with the intention to rescue the fourth accused from the deceased's clutches. It was his testimony that the second, third and fifth accused were not privy to this event as they were not present.

[29] The sixth accused person maintained his composure throughout the proceedings, showing sincerity at all material times and stuck to his narrative unwaveringly even under intense cross examination from the state counsel for first and fourth accused. He essentially digressed from the previous statements that he had given in his warned and cautioned statement as well as in the defence outline. We are inclined to believe his narrative because firstly, the fourth accused himself, the chief culprit had already exonerated him in his testimony. He had no reason therefore to fabricate any story against him. Secondly all the six accused persons' warned and cautioned statements and defence outlines are similar and tell the same story of the deceased not having been assaulted and yet the doctors report is clear that the deceased died from assault injuries. This in itself indicates collusion on their part and lends credence to the sixth accused's narrative that they colluded to tell the same story possibly under duress. As happened during trial, some of the accused started hinting in their evidence that some amongst themselves would better than others, know what had happened to

the deceased. From the deliberate hints we are certain that they knew about the assault but because of the pact between them waited for those who apprehended the deceased to tell their story. The first accused did not say anything, the fourth accused also did not. By the time the fifth accused took the witness stand he let rip that the fourth accused was angry and he wanted to assault Joseph the same way he had assaulted the deceased in the bush. He then backtracked on that assertion leaving the sixth accused to tell the whole story and not in bits and pieces as the others before him had. His departure from his previous assertions was necessitated by the fact that he did not want himself and other co-accused, to take the fall for a crime that they did not commit. His evidence revealed what happened at Avonda farm. He had no reason to falsify any evidence against the first and fourth accused. Until that point they had been speaking with one voice and none of them suggested otherwise. We believed his narrative particularly because it was also corroborated by Joseph's testimony and in part by Tendai Mukati as well as the other three accused persons

#### **COMMON CAUSE FACTS**

[30] The issues which are not in dispute in this trial are that:

- a. On the fateful day the deceased, Joseph and their colleague who is on the run attempted to steal some irrigation pipes from Geluck farm
- b. The accused who are all farmworkers pursued the thieves to nearby Avonda farm and identified their hiding place. They were therefore all at the scene.
- c. The thieves, after being discovered, fled in different directions
- d. The first, fourth and sixth accused apprehended the deceased
- e. The second, third and fifth accused apprehended Joseph. They insisted that the first, fourth and sixth accused would know what happened to the deceased since they were the ones who apprehended him.
- f. The deceased was heavily assaulted.
- g. The deceased sustained severe injuries from which he died.

#### **Issues to be resolved**

[31] When the evidence adduced by the state, the defense's arguments and the common cause issues outlined above are put together it is apparent that the only narrow issue for determination is whether each of the accused participated in the fatal assault of the now deceased and if they did:

- a. the extent to which they participated and

b. whether they acted in common purpose or individually

[32] In his closing submissions the first accused conceded to having assaulted the deceased for the sake of rescuing the fourth accused. He stated that he immediately stopped after he had succeeded. He prayed that he be convicted of assault. The fourth accused on the other hand also conceded to the assault and that he caused the death of the deceased. He however argued that he did not intend to cause his death. He prayed that he be found guilty of culpable homicide instead. The other accused maintained their stance and pleaded their innocence in the assault of the deceased. We can therefore only resolve the issue by analyzing the principles of the common law doctrine of common purpose which was imported almost wholesale into the Criminal Law Code under s 196A which deals with the liability of co-perpetrators.

### **THE LAW ON LIABILITY OF CO-PERPETRATORS**

[33] We have already stated that the liability of co-perpetrators is anchored on the doctrine of common purpose as it existed at common law and as was modified after codification of the criminal law in Zimbabwe. In the case of *S v Mubaiwa* 1992(2)362(S) the Supreme Court said the guiding principles on common purpose are that:

1. “Each individual in a common purpose case is to be judged on his own *mens rea*
2. The *actus reus* of the accused, on which his criminal responsibility for the murder is founded, consists, not necessarily in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill”

[34] It therefore meant that even at common law, prosecution was required to prove each of the accused in a common purpose formulated the requisite intention to commit the murder.

[35] In the recent case of *S v Madzokere & 3 Ors* SC 71/21 MAKARAU JA (as she then was) dealt with and defined the doctrine of common purpose as:

“a principle that deems the participation of two or more persons in the commission of a crime where the two or more persons associate with a common intent to commit the crime and one of them does commit the crime. It thus provides for co-perpetrators of crime with a common intent. In essence, the doctrine provides that if two or more people act together in pursuance of a common intent, every act done by one of them in furtherance of that common intent is deemed at law to be the act of them all.”

[36] We have also already stated that the liability of co-perpetrators is provided for under s 196 A of the Criminal Law Code in the following terms:

**“196 A 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.

(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.”

[37] Clearly, it is once more evident where the liability of co-perpetrators is founded on their common purpose prosecution bears the onus of proving that each perpetrator possessed the requisite intention to commit the alleged crime. The prosecutor can discharge that burden by showing that each accused either had the direct intention or had the knowledge that the offence would be committed or realised that there was a real risk or possibility that the crime or another kindred offence would be committed. If successfully done, the actions of one perpetrator can then be imputed as the actions of the rest of them. The modification to the common law understanding of common purpose, which was then brought in by statute in s196 A (2) of the Criminal Law Code is that the legislature provided circumstances which if proved, will assist prosecution in showing the mental attitude of each perpetrator. In other words, the presence of the stipulated circumstances creates a presumption that the co-perpetrators had the required *mens rea* to commit in the crime in question. The factors are that *mens rea* is assumed where:

- a. there is evidence that the co-perpetrators were present or were in the immediate vicinity of the crime scene in circumstances where they are directly or indirectly implicated in the commission of the crime; or

- b. the co-perpetrators are linked in association to any conduct in the course of anything which may be deemed as conduct preparatory to any action or omission which results in the crime that they are charged with; or
- c. Where the co-perpetrators participated in any criminal behaviour as a collective before the conduct which resulted in the crime for which they are charged.

[38] Yet it must not be forgotten that in all this, at common law a co-perpetrator was permitted to withdraw from or to dissociate himself with the criminal enterprise. That same concept as with liability of co-perpetrators was carried into the Code under s 200 which provides that:

**“200 Withdrawal from crime by principal, co-perpetrator or accomplice**

(1) A person shall not be guilty as a principal, co-perpetrator or accomplice of a crime committed by an actual perpetrator if, before the crime has been committed, the person prevents the commission of the crime, whether by having given timely warning to a police officer to enable the police officer or other person to prevent its commission, or otherwise:

Provided that the fact that a principal, co-perpetrator or accomplice succeeded in stopping the crime authorised by him or her or with which he or she was associated does not relieve the principal or co-perpetrator of liability for an attempt, incitement or conspiracy to commit the crime.

(2) The fact that a principal, co-perpetrator or accomplice of a crime changes his or her mind and unsuccessfully took action to prevent the actual perpetrator from committing the crime shall not relieve the principal or co-perpetrator from liability for the crime:

Provided that a court shall, among other relevant considerations, mitigate the sentence that may be imposed on the principal, co-perpetrator or accomplice if—

- (a) the principal, co-perpetrator or accomplice, before the commission of the crime, took all possible steps within his or her power to stop the actual perpetrator from committing the crime; and
- (b) in the absence of the circumstances that intervened to frustrate the prevention of the crime, the steps actually taken would have stopped the crime from being committed; and
- (c) the circumstances that intervened to frustrate the prevention of the crime were not reasonably foreseeable.” (underlining is my emphasis.)

[39] Before its amendment by Act No. by Part XX of Act No. 3 of 2016, the above provision read differently. It was couched as follows:

**“200 Withdrawal from crime by accomplice**

An accomplice shall not be guilty of a crime committed by an actual perpetrator if, before the crime has been committed, the accomplice voluntarily desists



from further incitement of, conspiracy with, or authorization or assistance to the actual perpetrator and either-

- a) renders wholly ineffective his or her previous incitement, conspiracy, authorization or assistance; or,
- b) gives warning of the crime to a police officer or other person with authority to prevent the commission of the crime, in sufficient time to enable the police officer or other person to prevent its commission.”

[39] As can be seen, the pre-2016 provision related to accomplices only and not to principal offenders and co-perpetrators. The current provision broadened the ambit of withdrawal to accommodate all manner of perpetrators. Further the requirement to for the withdrawing party to render wholly ineffective his/her previous incitement, conspiracy or authorisation or assistance appears to have been dropped. The fact however remains that where a co-perpetrator wishes to show that he/she withdrew from or dissociated himself/herself with the crime committed he/she is required to have acted to prevent the commission of the crime before it was committed. That action includes informing a police officer or some other relevant person with capacity to stop the commission of the crime. Nonetheless, such conduct will not absolve the co-perpetrator from liability for an attempt or conspiracy to commit the crime.

[40] In the case of *S v Ncube* SC 58/14 HLATSHWAYO JA (as he then was) cited with approval the comments of COMRIE AJA in *Musingadi*, 2005 (1) SACR 395 where he summarized some of the factors relevant to a dissociation inquiry as follows:

“Much will depend on the circumstances: On the manner and degree of the accused’s participation; on how far the commission of the crime has proceeded; on the manner and timing of the disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime... The greater the accused’s participation, and the further the commission of the crime has progressed, then much more would be required of an accused to constitute an effective dissociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment.”

### **APPLICATION OF THE LAW TO THE FACTS**

[41] From our analysis of the various witnesses’ evidence and pitting it against that of each of the accused’s defences we concluded that there is irrefutable evidence that the first and fourth accused participated in one way or another in the assault. The rest of the accused were away from the point where the assault occurred,

chasing after the other thieves. What remains is for us to determine whether the two men's participation as well as the other accused can be regarded as having been in common purpose with each other.

[42] In simpler terms, the question is whether the prosecutor established any one or more of the three considerations stated above from which the court can impute the intention of each of the six accused. The language which the legislature employed illustrates that there is no requirement for the state to establish the existence of all the three considerations at the same time. The proof of one or more of them suffices.

[43] We have already discussed and found beyond reasonable doubt that first, fourth and sixth accused were present at the scene of crime but that the others were not. We however remain aware that the provision states that the establishment of each or more of the factors is not in itself necessarily decisive. What that means is that usually more is required for the co-perpetrators to be liable. For instance, not everyone who was present when the deceased was assaulted can be held as a co-perpetrator of the murder without more. There must be other evidence which implicates an accused. In this case, we have already held that the sixth accused did not in any way participate in assaulting the deceased. If anything, he tried to restrain the first and fourth accused from doing so. The first accused took heed but the fourth did not. The first accused assaulted the deceased but was motivated not by a desire to kill him but to rescue the fourth accused. When the rescue was complete he discontinued his assault.

[44] We mustn't also forget that all the six accused had set out to apprehend the thieves. They had not set their sights on killing any one of them. When they apprehend the thieves, their colleague the fourth accused deviated from the plan of bringing the thieves to justice. He became unnecessarily violent and attacked the deceased indiscriminately with an aluminium pipe. He must have foreseen the real risk or possibility that his actions could result in the deceased's death.

[45] As held in *S v Ncube (supra)* the fourth and sixth accused's dissociation from the actions of their colleague depended on the circumstances of the case, their degree of participation in the first place; how far the crime had proceeded at the time they sought to dissociate themselves from it; what steps they took or could have taken to stop the commission of the crime. These considerations only come

into play in circumstances where the accused acting in common purpose, would have agreed in the first place to commit an offence. In this case, the agreement was not to commit any offence but to lawfully apprehend the suspected, in fact self-confessed thieves and to bring them to justice. The sixth accused could be regarded as a passive participant in this case. All he did was assist in the chase of the deceased in the understanding that they wanted to effect a citizen's arrest. He admits having aided the first and fourth accused to run down the deceased. As already stated, the first accused assaulted the deceased in order to rescue the fourth accused who was being pinned down by the thief. The sixth accused's degree of participation was therefore minimal as it were. When the fourth accused was severely assaulting the deceased, the first and the sixth accused pleaded and reprimanded him to stop. He threatened them with assaults too. It became clear at that stage that he was on a frolic of his own completely outside the mandate they had agreed in the first place. For some reason the fourth accused appeared to wield some power over the others. It is for the same reason that the sixth accused said he was afraid of him and couldn't tell the truth earlier on. Apart from physically confronting their colleague to restrain him from continuing the assault on the deceased, we do not see what else the first and fourth accused could have done in this case. In our sensible and value judgment, we find that their disentanglement from the crime was enough. The prosecutor proved that the first and the fourth accused were in the vicinity of the crime scene but did not adduce any other evidence that would have shown that they had the requisite *mens rea* to make them liable for the death of the deceased. The two of them had not lit the fuse and there was no need for them to literally step on it to douse the fire.

[46] As for the fourth accused he clearly had the intention or knowledge that murder could be committed. At the very least there is no denying that he realised that there was a real risk or possibility that the indiscriminate beating of the deceased could result in death but was nonetheless reckless as to the consequences of his actions. There is therefore besides his presence at the scene, a causal link between the deceased's death and his actions. There is proof that the death was a consequence of the assault of the deceased. It is therefore our finding that the fourth accused assaulted the deceased. The assault was severe, indiscriminate and prolonged. The fourth accused was upset and furious that the deceased had the audacity to try and

attack him even after having attempted to steal from the farm. He was bent on teaching him a lesson hence his utterance in the face of restraint that no mercy should be shown to thieves. In the end only the first accused and not the fourth or the sixth accused can be held liable for the murder.

[47] In conclusion, it is clear that the second, third, fifth and sixth accused did not participate in the assault of the deceased. Their behaviour cannot be brought into the realm of co-perpetrators through the employment of the doctrine of liability of co-perpetrators as discussed above. The first accused assaulted the deceased with the objective of rescuing his colleague the fourth accused. Against that background, we are convinced that prosecution managed to prove their case against the fourth accused beyond reasonable doubt. The unavoidable conclusion is that:

- a. Prosecution managed to prove their case beyond reasonable doubt against the fourth accused. He is accordingly found **guilty of murder as charged**.
- b. The evidence against the first accused is that he simply committed an assault upon the deceased. He is accordingly found not guilty and acquitted of murder but **guilty of the competent verdict of assault** for reasons explained above.
- c. Prosecution failed to prove that the second, third, fifth and sixth accused are beyond reasonable doubt, guilty of the crime of murder. They are in the circumstances, all found **not guilty and acquitted**.

### **SENTENCING JUDGMENT**

#### **FIRST AND FOURTH ACCUSED**

[48] The offenders were part of a six-man gang that reacted to news of an attempted theft at Geluck farm where they worked. Armed with catapults and stones, the men pursued the deceased and his accomplices to Avonda farm. In the early hours of the morning the gang detected the thieves' hiding place and thereafter pursued them. The third unnamed thief made good his escape while the deceased and Joseph Mugwambiwa were not so lucky. They were apprehended and assaulted. Tragically the deceased succumbed to the assaults while Joseph Mugwambiwa lived to tell his story.

[49] The six offenders were arrested and were all charged with the murder of the deceased. They all denied having participated in the assault of the deceased. After a full trial we upheld the defences of four of the accused men and acquitted them of murder and all its competent verdicts. We threw away the defences of the first and fourth offenders and found that the first offender was guilty of assault because although without the intention to kill he had assaulted the deceased. We found the fourth accused guilty of murder. We found as a fact that the fourth offender had indiscriminately and severely assaulted the deceased for a prolonged period.

**The first offender**

[50] In mitigation counsel for the offender informed us that the offender is 42 years old. That he is a first offender who is a polygamist with two wives and six children who are all below the age of 18 years. One of the six children has special needs. He cannot walk and needs constant care and management to help him go through the day to day rigours of just living. His incarceration will only serve to heap more misery on these dependants. The offender himself has a leg which constantly pains him and requires medical attention.

[51] In addition to this while we found him guilty of assault, counsel said in the community he lives in he will forever be viewed as a murderer by his peers who might not be able to differentiate between a conviction of murder and assault. This on its own is punishment as he will forever be hounded by the events of this day. Counsel for the accused prayed that he be sentenced to a level 4 fine or alternatively to community service.

[52] Counsel for the offender also informed the court of the accused's remorse and explained that his only intention was to protect and safeguard the interests of his employer and his work. He expressed regrets on being stingy with the truth and attributed this to his level of education and being swayed by the others to pursue a narrative that all the accused had agreed to. She stated that there is no chance that he will re-offend as he now understands that when a thief has been apprehended he should be taken to the authorities and nothing more. Counsel for the state Mrs *Chigwedere* on the other hand also surprisingly mitigated on behalf of the offender who she said assaulted the deceased in the process of trying to rescue the fourth accused. He assaulted the deceased moderately and within the acceptable range. She however threw away the suggested penalty of a level 4 fine and urged the court

to consider a wholly suspended sentence of 3 years plus a fine. What both counsels seem to have forgotten or deliberately omitted to mention is the weapon that the accused chose to assault the deceased with. He used a steel pipe. That on its own is aggravatory and takes the assault away from the realm of being a simple assault. It must therefore attract a sentence that discourages assaults of such a nature.

[53] In the circumstances the offender is sentenced to 12 months imp of which 6 months imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving violence on the person of another for which upon conviction he will be sentenced to imprisonment without the option of a fine.

#### **The fourth offender**

[54] Both counsels agreed that the murder was not committed in aggravating circumstances. The court also agrees that none of the factors listed in s47(2) and (3) of the Code are present. This was a classic case of an overzealous farm hand who went overboard in trying to protect his employer's property and got consumed by the desire to fix the thieves and avenge their brazenness while teaching them a lesson. It however ended tragically. His zealotry is evident in that he assaulted both the deceased and Joseph who then concluded that he was the leader of the gang. That unbridled zeal cannot however be classified as falling under aggravating factors. Our conclusion is therefore that the murder was not committed in aggravating circumstances.

[55] Counsel for the offender informed the court that he is 38 years of age married and has four children. He also has an extended family that he takes care of. He is an unsophisticated farm labourer who is almost illiterate. Counsel prayed for a sentence in the range of 10 to 15 years.

[56] On her part, the prosecutor bemoaned the loss of life which once lost cannot be brought back. She implored the court to impose a sentence that shows its displeasure at the needless termination of life. She said what is also aggravatory is the fact that the accused was cautioned against thrashing the deceased but did not listen to anyone. She for those reasons, implored the court to sentence the offender to 15 years imprisonment in line with the findings in *S v Mudzengerere and 2 Ors* HH 123/24.

[57] S47(4) of the Code is clear on the sentences to impose in murder matters. It specifically provides for sentences where the murder was not committed in aggravating circumstances. They are generally less than 20 years imprisonment. *In casu* the deceased to some extent contributed to his own death. He attempted to steal at the farm and as if that was not enough he tried to overpower the fourth accused who had arrested him as he resisted arrest.

[58] A consideration of all these factors leads us to conclude a sentence of 15 years imprisonment will suit the justice of the case. Accordingly, the fourth accused is sentenced to **15 years imprisonment.**

**MUNGWARI J:** .....

*National Prosecuting Authority, State's legal practitioners*  
*Rubaya – Chinuwo Law Chambers, first accused's legal practitioners*  
*Rusinahama – Rabvukwa Attorneys Brentwood Chambers, second accused's legal practitioners*  
*Rujukwa Attorneys, third accused's legal practitioners*  
*Ruth Zimvumi Legal Practice, fourth accused's legal practitioners*  
*Jiti Law Chambers, fifth accused's legal practitioners*  
*Mufari & Paradzayi Legal Practitioners, sixth accused's legal practitioners*