

STATE
versus
CLIVE MAKOTO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE; 4th & 5th June 2025

Criminal trial

D. H Chesa, for the State
M. Mudara, for the accused

MUREMBA J:

1. The accused faces a charge of murder as defined in s 47(1) of the Criminal Law Code, alleged to have been committed against Christopher Samu, a 37-year-old man, on 3 August 2019 at Nherera Mine in Shamva.
2. The prosecution alleges that the accused was part of a gang that included Onias Sindura, Robert Sindura, Tinashe Zvinairo, Bhaureni Chingwaru, Lloyd Kafena, Charles Mhako, Kudakwashe Gutsa, Kudakwashe Karima, and one Jabulani. The gang travelled to Nherera Mine in a Toyota Noah, intending to rob gold ore. Upon arrival, they encountered the deceased and his brother, Shame Samu, who were working at the mine. The gang manhandled the deceased, while Shame managed to escape. They then assaulted Christopher Samu indiscriminately using various weapons, before dragging him and disposing of his body in a shallow pit near the Mazowe River bank. His body was discovered the following day, 4 August 2019.
3. Of the six witnesses presented by the State, only Shame Samu, the brother of the deceased, testified in person during the trial. The remaining witness evidence was formally admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA). Some of these witnesses included police officers who attended the crime scene and conducted

investigations, as well as Dr. T. Javangwe, who examined the remains of the deceased and compiled the post-mortem report.

4. The post-mortem report states that death was due to hypovolemic shock, haemorrhage and stab wound on the left thigh. In simple terms, the deceased died from severe blood loss caused by a deep stab wound to the left thigh. The stab wound led to heavy bleeding (haemorrhage), which in turn caused hypovolemic shock—a life-threatening condition where the body loses too much blood, preventing the heart from pumping enough oxygen to vital organs.
5. Shame Samu's unchallenged testimony confirmed that the deceased was his elder brother. The two, along with their older sibling Claude Samu, were employed at Nherera Mine, owned by Mr. Milton Nherera. On 2 August 2019, while working at the mine, two vehicles arrived. One carried Mr. Shereni and Mr. Gutsa, while the silver Toyota Noah carried several young men. Gutsa convened a meeting, advising everyone to work together harmoniously, after which they were instructed to resume their tasks.
6. Some of the men from the Toyota Noah followed workers to their posts, eventually approaching a group of miners at a specific shaft. An altercation broke out, though Shame Samu was unaware of its cause. These men were armed with axes and knives. In an attempt to evade an axe hurled at him, Claude Samu fell into a pit, fracturing his arm upon impact.
7. Shame Samu and others rescued Claude from the pit and fled for their lives, taking him to the hospital that same day. On 3 August 2019, at 9 AM, Shame and the deceased returned to the mine to continue their work. Mr. Milton Nherera discouraged them, explaining that he had reported the previous day's incident to the police and was awaiting their arrival. He advised them to pack their equipment instead of resuming work.
8. While packing their equipment, they spotted the same silver Toyota Noah from the previous day approaching the mine. Three men jumped out of the moving vehicle, armed with axes and machetes, and charged toward them. At that

moment, the deceased was inside the mine shaft, packing up their tools, while Shame was outside. Reacting swiftly, Shame managed to escape and sought refuge in dense bushes nearby.

9. About 30 minutes later, after the intruders had left, Shame and others returned to the mine shaft to check whether the deceased had managed to escape. Despite their efforts, they were unable to locate him the entire day. The following morning, they resumed their search. Their first focus was the shaft where they had last seen him. They discovered drops of blood, which they began following. The blood trail gradually thickened, leading them further. Along the way, they noticed a blood-stained wooden handle, but they did not collect it and continued following the trail. Eventually, it led them to an old mine pit, where they found the deceased's body inside. The pit was less than a meter deep.
10. A police report was made, and officers attended the scene, subsequently transferring the body to the mortuary. Upon inspection of the body before it was ferried to the mortuary, Shame observed a deep stab wound on the deceased's left thigh, clearly inflicted by a knife in his opinion. Additional injuries included a cut above the eyebrow and another wound on his back. The deceased was buried on 7 August 2019.
11. Shame Samu had no prior acquaintance with the accused before 3 August 2019 and did not identify him among the gang inside the Toyota Noah on the day the deceased was killed. The only individual he recognized was Onias Sindura, the driver of the vehicle, who was from the same neighborhood. As a result, Shame was unable to confirm whether the accused had participated in the killing. Consequently, his testimony does not implicate the accused.
12. However, based on the available evidence, we are satisfied that the accused was involved in the killing of the deceased. This conclusion is supported by the fact that, from the moment of his arrest, the accused placed himself at the crime scene and admitted to assaulting the deceased alongside his associates. This admission was recorded in his confirmed warned and cautioned statement, which was submitted by consent during the trial.

13. In the confirmed warned and cautioned statement, the accused said:

“I admit the allegation levelled against me. I joined Onias Sindura (Tozeza), Lloyd, Robert Sindura, Tinashe Zvinairo, Bhaureni Chingwaru, Jabu, Mhako, Joseph and Kuda. We went to Nherera mine, Shamva on the 3rd of August 2019, with a white Toyota Noah driven by Onias Sindura (Tozeza) armed with axes, logs, catapults with an intention to rob gold ore which we could find extracted at this mine. Kuda, Lloyd, Tinashe Zvinairo, Onias Sindura, Mhako, Joseph and I were armed with axes. Jabu and Robert had catapults whilst Bhaureni had a log. We found seven men of whom four fled and we apprehended three. We started to assault the three whom we had apprehended with the weapons we had. I was striking one of them who later died, with the back of an axes(sic). We were hitting him all over until Onias Sindura (Tozeza) said, “These people should not be left, they have damaged my vehicle” meanwhile he was striking him around the neck with an axe and the now deceased fell down. After we saw that the now deceased was dead, Lloyd, Mhako and Tinashe carried and threw him in the grass. We all boarded the vehicle and went to Shamva.”

- 14 The accused’s statement amounts to a direct confession to the offence of murder because it contains several incriminating admissions. The accused began by admitting the allegation levelled against him, which signals acknowledgment of responsibility. He confirmed that he was part of a gang armed with weapons who went to Nherera Mine with the intent to commit robbery. He described how they attacked and assaulted multiple victims, including the now deceased. He explicitly stated that he was striking the deceased with the back of an axe, acknowledging inflicting direct physical harm. He further admitted that others continued assaulting the victim, showing collective intent to cause harm. He described how the deceased fell after being struck on the neck with an axe and acknowledged that they realized he was dead. Instead of seeking help or stopping the assault, the group discarded the body in the grass and fled. Rather than reporting the incident or attempting to assist the victim, the accused and his accomplices deliberately left the crime scene and returned to Shamva, showing a clear attempt to evade consequences. In the statement the accused did not attempt to deny involvement or distance himself from the act. He narrated the events in a way that shows active participation. This admission strengthens the State’s case, as it is a self-incriminating statement confirming his role in a premeditated violent act that resulted in death.

- 15 Although the confirmed warned and cautioned statement was produced by consent during the State case, the accused later sought to dispute its admissibility during the defence case, claiming he had given it to the police under duress. He alleged that the police officers who arrested him had assaulted him before recording his statement. Furthermore, he stated that he confirmed the statement in the Magistrates' Court because the same officers threatened to take him back to the police station and assault him if he refused to confirm it. He said for this reason he had the warned and cautioned statement confirmed by the magistrate. We take note that the accused did not challenge the propriety or validity of the confirmation proceedings but the confession / statement itself.
- 16 When the State applied to produce the statement, the defence raised no objection, leading to its production by consent. The production of the statement was in terms of s 256(2) of the CPEA which provide for the admissibility of confirmed statements by accused persons. The section reads;
- “A confession or statement confirmed in terms of subsection (3) of section one hundred and thirteen shall be received in evidence before any court upon its mere production by the prosecutor without further proof: Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose.”
- 17 This provision simplifies the process of admitting confirmed confessions or statements into evidence during a trial. If an accused person confirms a confession or statement before a magistrate under section 113(3), the prosecutor can present it in court without needing to prove its authenticity further. This means the statement is automatically accepted as evidence upon its production. This is what happened in the present case as the accused did not raise a challenge to the propriety or validity of the confirmation proceedings.
- 18 Under the proviso, the accused may challenge a confession or statement after the prosecutor has presented it in court. Initially, the statement is automatically admitted without requiring additional proof. However, if the accused disputes

its validity, they must prove on a balance of probabilities either that they did not make the statement or that it was not made freely and voluntarily, but rather under coercion or undue influence. This challenge is raised after the statement has been received as evidence (as an exhibit). If the accused raises such a challenge and the prosecutor determines that additional proof is needed to establish its validity, the State may reopen its case to provide further evidence supporting that the confession was properly obtained. See John Reid Rowland, *Criminal Procedure in Zimbabwe* (LRF, 1997) at p. 20-12, and *S v Chaira* HH 96/24. This may include calling witnesses, such as the police officers who recorded the confession, to verify that it was made voluntarily.

19 If the accused successfully challenges the confirmed statement, it cannot be used as evidence against them. The burden remains on the State to prove beyond reasonable doubt that the accused made the statement and that he /she did so freely and voluntarily, without undue influence. See John Reid-Rowland, *Criminal Procedure in Zimbabwe* (LRF, 1997) at p. 20-11, and *S v Woods & Ors* 1993 (2) ZLR 258 (S). Section 256(2) of the CPEA therefore ensures that only legally obtained and credible evidence is used to determine the guilt or innocence of the accused, while also giving the accused a fair opportunity to dispute the statement if necessary.

20 In this case, after the confirmed warned and cautioned statement was produced by consent, the accused challenged the confession during the defence case, claiming that he had not made it freely and voluntarily. He said he had been assaulted by the police before it was recorded. However, we reject this challenge, as it is clearly an afterthought. Had his claim been genuine, the defence would have raised it at the outset of the trial. The State's summary clearly indicated that his statement would be presented as evidence, yet the accused's defence outline made no mention of contesting its admissibility. Section 66(6)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] requires the accused to submit a defence outline, specifying the witnesses they intend to call and a summary of the evidence supporting their case. This process ensures that the Prosecutor-General is fully informed of the facts the accused

relies upon in their defence and adequately prepare. Additionally, section 67(2) strengthens this obligation by permitting the court to draw inferences if the accused fails to disclose relevant facts in their defence outline. If the accused could reasonably have been expected to include certain details but chooses to omit them, the court may interpret this omission as supporting the prosecution's case. Despite these clear provisions, the accused waited until the defence stage to raise a challenge to the confirmed warned and cautioned statement—well after the State had closed its case.

21 Furthermore, the defence consented to the production of the Investigating Officer's evidence under section 314 of the Criminal Procedure and Evidence Act (CPEA), which confirms that the accused's statement was properly recorded. If the statement had been obtained through coercion or undue influence, the defence would not have consented to its production under this provision. In his defence outline, the accused claimed that upon his arrest on 2 October 2019, Investigating Officer Happymore Mushunguasha and his colleagues assaulted him. However, he failed to specify why he was assaulted, at what stage of his arrest the alleged assault occurred, or whether his confession was a result of the alleged mistreatment. According to undisputed evidence from the Investigating Officer, Onias Sindura was the first to be arrested and subsequently implicated the accused and his accomplices. The accused offered only a vague assertion that he was assaulted and threatened, without providing clear details. Furthermore, his decision to confirm his warned and cautioned statement before a magistrate, despite his claim that he raised a complaint of police assault in court, undermines his credibility. His explanation that he confirmed the statement due to prior police threats is unconvincing, as it contradicts his claim that he reported the assault in court. If he was able to inform the magistrate of the alleged mistreatment, there is no reason why he could not have raised the same complaint during confirmation proceedings. Had he done so, the magistrate would not have confirmed the statement. Given the lack of specific details and the contradictions in his claims, the accused's version regarding the alleged assault and threats fails to support his challenge. Consequently, he did not prove, on a balance of probabilities, that he was

assaulted by the police before the statement was recorded or threatened before its confirmation in court. For these reasons, we reject his challenge to the confirmed statement.

- 22 The defence outline further supports the conclusion that the accused's challenge to the confirmed warned and cautioned statement is an afterthought. In the instructions he freely and voluntarily provided to his legal practitioner two days before trial, on 2 June 2025, in the absence of police, the accused incriminated himself. In Paragraph 5 of his defence outline it is stated that,

“...he then assaulted the deceased on his buttocks together with using the back of an axe which had been apprehended from the deceased.” (sic)

This statement from the accused's defence outline is self-incriminating, as it admits to physically assaulting the deceased. The accused explicitly stated that he struck the deceased using the back of an axe, showing direct participation in the attack. In his confirmed warned and cautioned statement, he admitted to striking the deceased multiple times, which aligns with this account. While the wording of Para 5 of the accused's defence outline is somewhat unclear, it nonetheless demonstrates active involvement in inflicting harm on the deceased. Even though the accused may have attempted to minimize his role, this statement still places him at the scene of the crime and confirms direct participation in the attack, which is consistent with what he said in the confirmed warned and cautioned statement. In view of the foregoing, the accused did not, on a balance of probabilities, successfully challenge his confirmed warned and cautioned statement. We are satisfied that the statement was made freely and voluntarily without undue influence. We will therefore use it against him.

- 23 The accused's defence outline (which the accused adopted as part of his evidence in chief) and his confirmed warned and cautioned statement both establish his direct participation in the assault of the deceased. In both accounts, he admits to striking the deceased using the back of an axe, clearly placing himself at the scene of the crime. His defence outline is consistent with his earlier statement to the police, reinforcing his admission of involvement.

Additionally, both statements confirm that Onias Sindura struck the deceased on the neck with an axe, causing him to fall, after which Lloyd, Mhako, and Tinashe carried the body and discarded it in the grass before fleeing to Shamva. These admissions collectively demonstrate that the accused played an active role in the attack and directly incriminated himself in the offence.

- 24 After the State closed its case, the accused changed his story during the defence case, presenting a completely fabricated account that contradicted both his confirmed warned and cautioned statement and defence outline, which were consistent. In this new version, he claimed that he had not been at the mine on 2 August 2019, but rather on 3 August, stating that Onias Sindura had hired him to pan gold for a fee of USD 20.00. He attempted to create the impression that his presence at the mine on 3 August was purely innocent and that he had no involvement in the violent events of 2 August 2019.
- 25 The accused further alleged that he did not know most of the individuals in Onias's vehicle, except for his two friends, Bhaureni and Kudakwashe, whom he had met at Tiparari Shops, where Onias had hired them for gold panning. However, this claim is entirely false. In both his defence outline and confirmed statement, the accused had listed the names of the other occupants, including Onias Sindura, Tinashe Zvinairo, Bhaureni Chingwaru, Charles Mhako, Kudakwashe Kurima, Kudakwashe Gutsa, and one Jabu. Furthermore, his defence outline clearly stated that the group had travelled to Nherera Mine in a Toyota Noah, driven by Onias, with the intention of meeting Milton Nherera. Notably, this meeting occurred on 2 August 2019, the day before the deceased was killed. The fact that the accused went to the mine for the meeting clearly shows that he was at the mine on the 2nd of August. This contradicts his claim of not being there and confirms that his return on 3 August was his second visit.
- 26 The accused's ability to identify the gang members by name further confirms his involvement. In his warned and cautioned statement, he admitted that on 3 August 2019, the group went to the mine armed with axes, logs, and catapults with the intent to rob gold ore. He detailed how each individual was equipped with weapons, stating that Kuda, Lloyd, Tinashe, Onias, Mhako, Joseph, and

himself were armed with axes, Bhaureni carried a log, and Jabu and Robert had catapults. He described how they attacked the deceased, striking him all over his body, before Onias fatally struck him on the neck with an axe. He even identified those who carried the deceased's body from the scene and discarded it in the location where it was later found. This detailed account constitutes a full confession, which the accused cannot refute.

27 Under section 273 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a court can convict an accused person based on their confession. It says:

“Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:

Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed.”

28 This law means that a court can convict a person based on their confession alone, even if there is no other evidence confirming the confession. However, there is one important condition—the crime itself must be proven by other reliable evidence. For example, if someone confesses to murder, but there is no proof that anyone was killed, the confession cannot be used to convict them. But if there is a body, forensic evidence, or witness testimony proving the murder happened, then the confession can be enough to convict. In *State v Chinembiri* HH 272-24 and at page 11, this court said,

“A confession or a statement made by an accused person is admissible in evidence if it meets the following conditions. It was freely and voluntarily made. The accused was not unduly influenced to make the confession or statement.”

29 This means that for a confession to be admissible under section 273, it must meet the conditions set out in *State v Chinembiri*. It must be freely and voluntarily made without coercion or undue influence. If the accused proves otherwise, the confession cannot be used against them. If a confession was obtained through assault, intimidation, or undue pressure, it cannot be used as evidence to convict the accused under section 273. In *casu* we have already made a finding that the confession was freely and voluntarily made without

undue influence. Therefore, on the basis of this confession we will convict the accused of murder. The discovery of the deceased's body in an old mine pit is evidence that the crime of murder actually happened.

30 During the defence case, the accused sought to distance himself from the assault, presenting a new and implausible version in which he claimed to have had no involvement in the attack on the deceased. He stated that he and his two friends, Bhaureni and Kudakwashe, merely stood by and observed as Onias and the other occupants of the vehicle assaulted the deceased. According to him, the three were taken by surprise by this sudden turn of events, which he asserted was contrary to the purpose for which Onias had hired them. He maintained that Onias struck the deceased on the neck, causing him to fall, and, for the first time, introduced the claim that Joseph had inflicted a blow to the hip with an axe.

31 We reject the accused's revised defence, as it directly contradicts his defence outline, which was prepared voluntarily two days before trial, in the absence of police influence. His defence outline and his testimony during the defence case are fundamentally inconsistent, despite both originating from the same person. Given that his defence outline aligns with his confirmed warned and cautioned statement, there is every reason to dismiss his new claims. Based on the accused's own prior admissions, which are further reinforced by his defence outline, we find that he actively participated in the assault and killing of the deceased.

32 The responsibility for preparing the defence outline rests with the accused, as clearly indicated in section 66(6)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. This provision explicitly states that the accused is requested to provide an outline of their defence, including the names of witnesses they intend to call and a summary of the evidence supporting their case. This ensures that the Prosecutor-General is informed of all material facts the accused relies on in their defence. Furthermore, section 67(2) reinforces this responsibility by allowing the court to draw inferences if the accused fails to mention relevant facts in their defence outline. If the accused could reasonably have been

expected to include certain facts but omits them, the court may treat this omission as corroborative evidence supporting the prosecution's case. It can therefore be said that the defence outline serves as a formal declaration of the accused's position, and inconsistencies or omissions may be used against him / her. The legal framework ensures that the accused takes ownership of his /her defence and provides all necessary details upfront.

33 If the accused's defence outline contains admissions that clearly demonstrate active participation in the attack, directly incriminating him in the offence, the court is entitled to rely on those admissions in assessing the accused's guilt and treat these admissions as significant evidence against him. This is because a defence outline is prepared voluntarily by the accused before trial, in the absence of police influence. When the accused later adopts the defence outline as part of his evidence in chief but contradicts himself when he gives *viva voce* evidence, attempting to distance himself from the assault, the court will likely view his new version as unreliable and an attempt to evade liability. The contradiction by the accused raises serious concerns about his credibility or truthfulness and may strengthen the prosecution's case. The court may conclude that the *viva voce* testimony is an afterthought, crafted solely to escape liability, rather than a genuine recollection of events. The court may give greater weight to the defence outline, especially if it aligns with other evidence, such as witness testimonies or forensic reports. The court is unlikely to give the accused the benefit of the doubt under such circumstances.

34 John Reid Rowland in *Criminal Procedure in Zimbabwe*, LRF 1997 at page 16-28 says,

“If the accused, in his evidence, departs significantly and without good explanation from the outline of the defence which he makes, this may be a matter for comment or even adverse conclusion.”

This means that if an accused substantially changes their version of events from the defence outline during trial, without providing a credible reason for the inconsistency, the court may view this discrepancy negatively and draw adverse conclusions about their credibility and honesty. The defence outline is expected

to reflect the truth, as it is submitted voluntarily and without external pressure. Courts regard the defence outline as a reliable initial account of the accused's side of the story. If an accused later contradicts his defence outline during *viva voce* evidence, the court is entitled to question why their story has changed.

35 A significant, unexplained departure from a defence outline does not automatically mean the accused is guilty, but it raises suspicion, affects credibility, and may strengthen the prosecution's case. Courts rely on consistent, truthful testimony, and when an accused's statements shift dramatically, their defence becomes questionable. A sudden shift such as initially admitting participation in an attack, then later denying any involvement raises serious doubts about the accused's credibility. Courts expect a logical and plausible explanation for such a change. If none is provided, the court may disregard the new version and rely on the initial outline. This is the scenario that we are faced with in the present case. The accused's sudden shift during the defence case was not explained. Since the defence outline was prepared voluntarily and aligns with other evidence, the accused's confirmed warned and cautioned statement, its contents are likely more truthful than the contradictory testimony the accused gave later during the defence case under pressure.

36 The post-mortem report shows that the stab wound to the deceased's left thigh was the fatal blow. The identity of the individual who inflicted the fatal blow to the hip remains uncertain. The accused's claim that Joseph was responsible lacks credibility, as he never mentioned this in his confirmed warned and cautioned statement or in his defence outline, only introducing it for the first time during the defence case. Given that the accused was not truthful in his defence, his testimony cannot be relied upon. However, in cases where a group acts with a common purpose, the specific identity of the individual who delivered the fatal blow is legally immaterial.

37 Section 196A of the Criminal Law Code establishes the principle of equal liability for individuals who commit a crime together. All participants in a crime can be held equally responsible, even if it is unclear who actually carried out the

criminal act. If two or more people commit a crime together, they can all be convicted, as long as the State proves that each of them had the necessary criminal intent (*mens rea*). This intent can be shown if they planned the crime, knew it would happen, or realized there was a real risk that the crime would be committed. Even if one person physically commits the crime, the law treats the actions of that person as the actions of everyone involved. This means that all co-perpetrators are equally guilty, whether or not they personally carried out the act. See *S v Muzadzi and 3 Others* (306 of 2023) [2023] ZWHHC 217 (8 May 2023).

38 The following factors help prove that individuals acted together in committing the crime. They were present at the crime scene in circumstances that suggest involvement. They helped plan or prepare for the crime. They engaged in criminal behaviour as a group before committing the crime. This law ensures that criminals cannot escape liability by claiming they did not personally commit the act, as long as they were actively involved in the crime. In *casu* the accused is equally liable for the actions of the person who inflicted the fatal blow as he was an active participant in the premeditated assault that resulted in the deceased's death. He was part of the coordinated attack and shared the criminal intent with his associates. In his confession the accused said they went to the mine armed with various weapons with the intent to rob gold ore. They severely assaulted the deceased with him actively assaulting the deceased using the back of the axe. He said they only stopped after noticing that the deceased had died. That is when they discarded the body and left the scene. Clearly, the accused shared the same criminal intent with his colleagues. It does not matter that the accused is not the one who inflicted the fatal blow.

39 The defence counsel, Mr. *Mudara*, argued that the accused should be found not guilty and acquitted of murder, but his submission lacks merit, as it is entirely based on the false narrative the accused fabricated during the defence case. Mr. *Mudara* contended that the accused did not participate in the assault, yet he failed to address the contents of the confirmed warned and cautioned statement, where the accused explicitly incriminated himself. Additionally, he made no

attempt to reconcile the glaring discrepancies between the defence outline and the testimony given during the defence case. Mr. *Mudara's* argument further faltered when he suggested that only Onias Sindura should be held accountable for the deceased's death, on the basis that he delivered the fatal blow to the neck. This claim was evidently misguided, as it relied solely on the accused's statement that Onias struck the deceased on the neck with an axe, causing him to fall. However, Mr. *Mudara* entirely overlooked the post-mortem report, which conclusively determined that the cause of death was a stab wound to the left thigh, with no mention of a fatal neck injury.

- 40 We will find the accused guilty of murder with actual intent, based on his confession in the confirmed warned and cautioned statement. The circumstances of the crime demonstrate clear premeditation and deliberate execution. The gang set out for Nherera Mine with the intention to commit robbery, fully aware that they would need to use force against anyone present. They equipped themselves with deadly weapons, including seven axes, two catapults, and a log, demonstrating preparedness for violence. Upon arrival, they encountered seven men. Four managed to escape, but they apprehended three, whom they viciously assaulted using the weapons.
- 41 The attack on the deceased was particularly brutal and intentional. He was repeatedly struck with axes across his body. Someone inflicted the fatal blow to the hip, while Onias delivered the final axe strike to the neck. Such targeted, forceful attacks with lethal weapons show that the perpetrators foresaw and intended the victim's death. After confirming that the deceased was dead, Lloyd, Mhako, and Tinashe disposed of his body, tossing it into the grass before the gang fled the scene. This deliberate act solidifies intent, as they made no effort to assist the victim or seek medical attention. Instead, they abandoned him, ensuring his demise.
- 42 The accused's admission of participation in the fatal assault, coupled with the group's armed preparation, coordinated attack, and disposal of the body, establishes murder with actual intent beyond reasonable doubt. State counsel, Mr. *Chesa*, submitted that the accused should be found guilty of murder under

section 47(1)(b) of the Criminal Law Code, as he recognized the real risk or possibility that his actions could cause death and yet continued to engage in reckless, life-threatening conduct. This provision applies where an accused person, despite foreseeing the potentially fatal consequences of their actions, proceeds regardless, thereby demonstrating constructive intent to kill.

43 However, where an accused deliberately causes death, the appropriate conviction falls under section 47(1)(a) of the Criminal Law Code, which applies to murder with actual intent. If the circumstances of the present case do not qualify as actual intent to commit murder, then it is difficult to imagine what would. The accused and his accomplices clearly intended to kill the deceased, as evidenced by their deliberate and relentless assault using lethal weapons. They only ceased their attack once the victim had died, ensuring that he did not survive. Furthermore, their actions did not stop at the killing itself, they disposed of his body by dumping it in a pit, a move indicative of their certainty that he was dead. The sequence of events, from the premeditated attack, continued violence, and deliberate disposal of the body, leaves no doubt that the accused and his gang fully intended to cause death, making this a clear case of murder with actual intent under section 47(1)(a) of the Criminal Law Code. Accordingly, the accused is found guilty of murder.

SENTENCING JUDGMENT

44 This murder was committed under aggravating circumstances by a gang of gold panners that premeditated and planned a robbery of gold ore extracted from the mine where the deceased was working. The murder occurred in the process of committing this robbery, making it particularly severe and intentional. The offence was premeditated and this is an aggravating circumstance. See the Sentencing Guidelines and s 47 (3) of the Criminal Law Code.

45 The previous day, the same gang had visited the mine, causing chaos. During the altercation, the deceased's brother fractured his arm after falling into a pit while trying to dodge an axe that had been thrown at him. On the day the deceased was murdered, the gang arrived armed with seven axes, brutally

assaulting the deceased indiscriminately using axes and logs, ceasing only after confirming he was dead. They then carried his body and discarded it in a pit. The fact that this was a gang attack further aggravates the gravity of the murder. The deceased had committed no offence against the accused and his gang. His only crime was being present at the mine.

- 46 The applicable presumptive penalty in terms of the sentencing guidelines is 20 years' imprisonment, while the statutory penalty in terms of s 47 (4) of the Criminal Law Code ranges from 20 years to life imprisonment, meaning the accused cannot receive a sentence of less than 20 years.
- 47 The defence proposed a sentence not exceeding 20 years, citing the accused's age at the time of the offence. He was 18 years old and is now 24. It was argued that he succumbed to peer pressure due to his youthfulness. Furthermore, it was submitted that the accused who is a gold panner has since married and had a child, tying the knot in 2021 while out on bail.
- 48 However, we agree with the State counsel's submission that the lawlessness in mining communities is a serious concern. People engaged in gold panning often show no respect for human life, resorting to violence without hesitation. While the accused was young, he willfully participated in an organized gang, engaging in murder during a robbery—a crime that demands severe punishment, regardless of age, to deter others from exploiting youthfulness as an excuse for criminal behaviour.
- 49 Given the devastating impact of this murder on the deceased's family, a sentence beyond 20 years' imprisonment is warranted. The deceased's firstborn was unable to sit for O-Level examinations due to financial hardship. His widow and three children are struggling, forced to survive on menial jobs, while his elderly mother, once dependent on him, has developed a heart condition following his death. The family's financial stability was shattered, leaving them in dire circumstances.

50 Neither the accused nor his gang members have offered any compensation or contributed towards funeral expenses, further exacerbating the family's struggle. A sentence of 30 years' imprisonment as proposed by the State is just and necessary, reflecting the gravity of the offence and its lasting consequences. The sentence has been influenced by the fact that the accused is a first offender and was 18 years old at the time of the offence. Had he been older, we would have readily imposed a life sentence, especially now that the death penalty has been abolished. Before its abolishment, capital punishment was the appropriate and fitting penalty for murder committed in the course of a robbery.

51 Accordingly, the accused is sentenced to 30 years' imprisonment.

MUREMBA J:

*National Prosecuting Authority, the State's legal practitioners
Legal Aid Directorate, Accused's legal practitioners*