THE STATE
versus
PROSPER PRINCE ESAU
and
TICHAONA CHIRUME

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 16 February 2022, 24 & 28 November 2022

Criminal Trial

Assessors: Mr *Mhandu*
Mr *Mabandla*

H Muringani, for the State
H Mawema, for the first accused
K Mabhandi, for the second accused

MUNGWARI J: A 40 year old man, Fashion Chakanetsa (herein after referred to as "the deceased") met his tragic demise at the hands of five assailants. The men are alleged to have assaulted him and made off with his motor vehicle, a Toyota Wish. He subsequently died from the injuries sustained during the assaults. Two of the men, Prosper Prince Esau (herein after referred to as "the first accused") and Tichaona Chirume (hereinafter referred to as the "second accused") were later arrested and arraigned before this court to answer a charge of murder in contravention of s 47(1)(a) of the Criminal law (Codification and reform) Act [*Chapter 9:23*] hereinafter referred to as the "Code". The state alleged that on 31 October 2020 they both or one of them, unlawfully and intentionally killed the deceased.

In detail, the state alleged that on 31October 2020, the two accused persons together with *Munyaradzi Rusere,Takudzwa Hlanhla* and *Nyasha Tapfuma* assaulted the deceased with unknown objects all over the body. The deceased lost consciousness and the five men dumped his body along a dusty road in Glenwood, Park Epworth in Harare. They then made off with the deceased's motor vehicle a Toyota Wish registration number AET 6292. They were later involved in an accident with the car. The first accused was driving the motor

vehicle when that accident occurred along Simon Mazorodze Street in Harare. He was lucky to survive, was rescued from the wreckage and ferried to hospital where he was admitted. Unfortunately, his luck was also the beginning of his challenges as immediately after hospitalization the police arrested him on allegations of murdering the deceased. *Munyaradzi Rusere,Takudzwa Hlanhla* and *Nyasha Tapfuma* died on the spot. The second accused escaped unhurt and disappeared from the accident scene. He was arrested at the funeral of one his accomplices who had perished in the accident.

A post mortem examination on the remains of the deceased established the cause of death as intracranial hypertension; global subdural hematoma; right parietal occipital bones fracture (lineal) and severe head trauma.

First and second accused both pleaded not guilty to the offence.

In his defence outline, the first accused gave his account of events as follows: At around 3 am of the fateful day he was at Matute bar drinking beer. He then met his longtime friend Nyasha Tapfuma (Nyasha) who was in the company of two individuals who were not known to him. It later turned out that their names were Munyaradzi Rusere (Munyaradzi) and Takudzwa Hlahla(Takudzwa). Nyasha who was driving a Toyota Wish, started bragging to him that he had recently acquired the motor vehicle from the proceeds of his successful mining activities in Mazowe. In the midst of singing his own praises, Nyasha offered to buy first accused drinks and invited him to drink with them, which offer the accused says he accepted. The four men imbibed until the bar closed. Thereafter they all agreed to move to a different bar. As a result, they all piled into the Toyota Wish with Nyasha the purported owner at the steering wheel. By then the first accused said he was inebriated. At around 0400hours whilst on their way to the other bar, the 4 men were involved in an accident which claimed the lives of *Nyasha, Munyaradzi* and T*akudzwa*. As earlier stated, the first accused was rescued and ferried to Parirenyatwa hospital where he was admitted for observation and treatment. All this time he was confused and lost as to what had transpired and was transpiring. He further stated that he does not remember making any warned and cautioned statement and even when the statement was confirmed he was not in a sound state of mind. He denied having caused the deceased's death nor inflicted any injuries upon the deceased nor having an intention to kill him. He prayed for an acquittal in the circumstances.

On the other hand, the second accused's defence outline was to the effect that, he was in the business of selling vegetables at Mbare. On the day in question at around 1600hours

his two friends *Munyaradzi* and *Takudzwa* came to his vending stall. They were in a grey Toyota Wish with three other unknown people. His two friends then invited him for a drink and he agreed to join them. They all went to a bar in Mbare. After sometime he took his leave and left his friends drinking in the bar. As he walked along the road he saw them follow him in the Toyota Wish motor vehicle and they invited him to come along. He declined the offer as he was keen to spend a night with his girlfriend Kelly at her place. Later on he was informed by Angela Chiwara that his friend *Takudzwa* was involved in a car accident. He reacted by calling Olysta Hlahla, *Takudzwa's* father and informed him of the accident in which his son had perished. He subsequently offered to assist in the funeral arrangements of his friend. He was arrested at *Takudzwa*'s funeral because Takudzwa's father was suspicious of him. He never met the deceased and did not participate in his death. He was neither involved in any accident nor sustained any injuries. He was merely implicated because he had boarded the motor vehicle earlier in the day. He emphasized that he was in Mbare at the time of the alleged offence.

In essence second accused proffered a defence of an alibi.

Issue to be resolved

Both accused denied having met or caused the death of the deceased. The issue for resolution is therefore whether each or both of them was in contact with the deceased before his death and if so whether they caused his death.

We now turn to analyse the evidence.

THE STATE CASE

With the consent of the defence, the state opened its case by tendering the autopsy which was sworn to by a pathologist, Dr. Yoandry Olay Mayedo on 17 November 2020. The court admitted the report in terms of s 278 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CP&E Act) and marked it as Exhibit 1. It was not in dispute that Dr. Mayedo had examined the deceased's remains with a view to establishing the cause of his death at Parirenyatwa Hospital on 3 November 2020 at 1200 hours. His observations were that the deceased's body had injuries in particular a fractured scalp, abrasions on the right thigh, and multiple wounds. He observed the following on the skull and brain of the deceased:

1. Right parieto

2. Decipated lineal bone fracture

3. Global subdural haematoma

He concluded that the death of the deceased was a result of intracranial hypertension, brought on by global subdural hematoma, right parieto occipital bones fracture (lineal) and severe head trauma. The injuries were signs of violence that was perpetrated upon the body of deceased and which caused his demise.

The Prosecution also sought to introduce in evidence, the first accused's warned and cautioned statement. The defence expressed reservations on the production of the confirmed statement. The basis being that the first accused had no recollection of having made the statement and as a result did not make it. The statement was confirmed by a magistrate and was provisionally admitted by the court in terms of s 256 (2) of the CP&E Act. It was marked as exhibit 2. In that confession the first accused stated as follows:

> "I have understood the nature of the caution for the allegations and I do admit. We hired a car to take us from Glenwood to Overspill. Along the way, one Nyasha who was among us then seized the driver. The driver then came out of the car and started fleeing away. Nyasha began pursuing with some of us the likes of Tichaona Chirume, Takudzwa and Munyaradzi following. He struck him upon the head with a metal object and he fell down as others were arriving where he had fallen. I did not see what they did to him since I remained sitting in the car. I shouted and they came running to the car but the owner of the car did not come back with them. They got into the car and we drove off with me driving the car. We drove to Epworth and an argument ensued over money and two of our accomplices withdrew and refused to continue with us. I alighted from the car and warned them that nothing positive was going to come out of what they were doing. We all got into the car and left. We were eventually involved in an accident. I do not remember where this accident occurred as I was drunk"

Section 256(2) of the CP&E Act provides that a confession or statement made by an accused person and confirmed before a magistrate is admissible in evidence before any court upon its mere production by the prosecutor without further proof. *In casu* the first accused in a perfunctory manner challenged the admission by saying that because he does not remember making the confirmed warned and cautioned statement then it is possible that he might not have made it. He was undecided on whether to say he did not make it or that he might not have made it. As a sign of the indecision on the part of the first accused he then turned around and accepted the evidence of the police officer who recorded the statement without issue in terms of s 314 of the CP&E Act as will be demonstrated below. It became common cause that the statement was recorded in accordance with the law. Meanwhile, the statement was provisionally accepted and its acceptance meant that the first accused bore the *onus* to prove on a balance of probabilities that he did not make it and as a result it is inadmissible. We will revert to the confirmed warned and cautioned statement later in this judgment.

In addition to the above, the evidence of all the 8 state witnesses namely Barbara Zhangazha, Trust Mutava, David Mazorodze, Angela Chiwara, Olysta Hlanhla, Garikai Jambwa, Givemore Tinago and Doctor Yoandry Olay Mayedo was formally admitted in terms of s 314 of the CP &E Act as it appears in the state outline. The evidence of those witnesses established the following relevant facts:

1. On 30 October 2020 the deceased borrowed a Toyota Wish motor vehicle with registration number AET6292 grey in colour from Trust Mutava a workmate. They agreed to meet on 1 November 2020 for the return of the car.
2. At around 8 pm the deceased met with his friend David Mazorodze a private taxi operator at Glenwood shopping centre at Toriro bar. Deceased came driving a Toyota Wish. He left the bar with a lady friend sometime later.
3. The motor vehicle was involved in an accident before the deceased had returned it to Trust Mutuva
4. On 1 November 2020 at around 5.30 am, Barbra Zhangazha found the deceased alive and lying in a pool of blood at an open space in Glenwood Epworth. She caused him to be ferried to the police camp. The deceased had visible head injuries and was unable to communicate.
5. Both accused persons were known to Angela Chiwara as they were friends with her boyfriend Munyaradzi one of the alleged assailants. On 31 October 2020 at around midnight Angela was at home in Mbare when both accused came in the company of Munyaradzi, Nyasha and Takudzwa. She spoke to her boyfriend Munyaradzi but declined the invitation to join the five men who then left thereafter. She went back to sleep. At around 5am of the following morning she was notified of the accident and that Munyaradzi had died. Her evidence was useful in that it placed both accused in the motor vehicle –after midnight-which was later involved in the accident.
6. Olysta Hlanhla learnt that his son had been involved in a car accident with a stolen Toyota Wish from the second accused who strangely phoned him every now and again volunteering information on the whereabouts of his deceased son's body. He caused the arrest of the second accused at his son's funeral.
7. Garikai Jambwa a duly attested member of the Zimbabwe Republic Police was the investigating officer in a charge of culpable homicide involving a grey Toyota Wish registration number AET6292 allegedly driven by accused 1 and in which three people perished. From his investigations he discovered that the deceased had been

assaulted and robbed of a motor vehicle and was left to die at the place where his body was discovered. He also ascertained that the robbers got involved in a road accident and three of them perished on the spot but one had escaped unhurt whilst another was rescued and ferried to hospital where he was hospitalized. When he went to see first accused at hospital he seemed to have no recollection of what had happened. He immediately placed him under police guard. He also learnt from the relatives of *Takudzwa* that an anonymous caller with intricate details of the incident was persistently calling the father. As a result he caused the arrest of second accused who turned out to be the anonymous caller. He interviewed the second accused who disclosed that they were five occupants in the car when the offence was committed and that first accused was the one driving the motor vehicle when they had an accident. He then recorded a statement from him. His evidence was crucial in that it placed both accused at the scene of crime at the material time. First accused was the driver in the deceased's motor vehicle whilst second accused was a passenger.

8. A warned and cautioned statement was recorded from the accused by Givemore Tinarwo according to the law.

The state then closed its case with the 8 state witnesses' evidence having been formally admitted with the consent of the defence. The following factors then became common cause:

- On 31 October in the early hours, five men namely first and second accused, Nyasha, Munyaradzi and Takudzwa assaulted the deceased and robbed him of his motor vehicle a Toyota Wish registration number AET6292.
- They dumped his body in Glenwood Epworth and left him for dead.
- The deceased died a few hours later as a result of the mortal injuries sustained from the violent attack on his person
- Along Simon Mazorodze Street they had an accident. First and second accused survived the car crash. Munyardzi, Nyasha and Takudzwa were not as lucky because they perished on the spot.
- First accused was arrested at the hospital after he was rescued from the wreckage. After release from hospital he gave his warned and cautioned statement. The police officer who administered it did so in accordance with the law.

- Second accused escaped unhurt and disappeared from the accident scene before anyone had seen him. He was arrested at Takudzwa's funeral

DEFENCE CASE

First Accused's Defence -Prosper Prince Esau

Surprisingly, the first accused in his evidence in chief elected to stand by what he had told the court in his defence outline despite the fact that he had agreed to the formal admission of the evidence of several witnesses which made many issues common cause. Regardless of that self-defeating approach by him, we proceed to restate and analyse his evidence in detail.

The first accused told the court that he was at Matute bar in Mbare from 8pm to around 3 am with Nyasha,Takudzwa and Munyaradzi . After the bar closed the four of them decided to drive to a place called Zindoga for more beer. They travelled in Nyasha's car the Toyota Wish that he had earlier shown him. In his version the second accused was not with them. Nyasha was driving at an excessive speed which forced the accused to reprimand him. A short while later Nyasha lost control of the motor vehicle resulting in them being involved in a road accident. He said he lost consciousness soon thereafter. He was rescued from the wreckage of the motor vehicle and ferried to hospital. He informed the court that though he doesn't recall it was suggested to him that he was arrested in hospital. He only got to know about the arrest when he was at the police station.

Whilst he was informed of the charge at the police station, he maintained that he did not quite understand it. He conceded that at that stage he was now conscious and not on any medication. He said he attempted to tell the police officers his side of the story but they would have none of it. They assaulted and harassed him. The police insisted that he was the driver at the time the motor vehicle was involved in an accident. He ended up agreeing to everything they said so as to minimize the assaults. He was clear that the perpetrator of the assaults was Givemore Tinarwo. He distanced himself from the confirmed warned and cautioned statement and said he was not the one who provided the information contained therein.

During cross examination accused made a volte-face and alleged that he did not make the statement at all. State counsel probed further on his state of mind when he went before

the magistrate for confirmation of the warned and cautioned statement. The witness confirmed having a recollection of all that happened. In his own words he told the court that he knew what was happening. He was fully alive to the proceedings but was in so much fear due to the police beatings. He however could not remember the number of policemen who took him to the court for confirmation proceedings. He also could not remember if any of the policemen were in court. He equally confirmed that he did not tell the magistrate about any of the harassment he alleged to have been subjected to by the police officers. In fact he had told the magistrate that it was his statement. It did not occur to him to tell the magistrate even when he realized that he wasn't going back to police cells and he was being led to the prison cells that what he had said was not true. When faced with the fact that Tinarwo the officer who witnessed the recording of his statement had his evidence admitted without any contestation the accused denied having agreed to that.

The accused stated that he had no evidence of second accused's participation in the murder of the deceased because the second accused was not known to him prior to his arrest. In essence the first accused's testimony was a confirmation of his defence outline. The greater part of his testimony was taken up by his insistence that the confirmed warned and cautioned statement be held to be inadmissible. No evidence was placed before the court by the first accused to discharge the onus that was upon him. Regardless of that failure, prosecutor out of an abundance of caution and after the evidence of the first accused realized the need to apply for the reopening of the state case for the sole purpose of resolving the separate preliminary issue of fact arising from the accused's challenge of the confirmed warned cautioned statement. In his application which was not challenged the state counsel highlighted that from the beginning of the trial first accused challenged the admission of the confirmed warned and cautioned statement on the ground that he did not make the statement. Through his defence evidence the form of the challenge had now mutated as it sought to impugn the confirmation proceedings as well. The state implored the court to allow it to reopen its case in terms of s 256 (2) of the CP&E A so that the state could place evidence before the court to resolve whether:

a. First accused made the statement
b. If he did, whether he did so freely and voluntarily
c. The confirmation proceedings were conducted as per the dictates of the law

The application was granted with the consent of the first accused's defence counsel. To this end the state led *viva voce* evidence from Alan Tafirei, Givemore Tinarwo and Judith Taruvinga.

Alan Tafirei (Alan)

The witness is a duly attested member of the Zimbabwe Republic Police with 12 years' experience in the force holding the rank of detective constable. He told the court that on 5 November 2020 he recorded a statement from the first accused in accordance with set down procedures. He explained that he read the allegations and explained them to accused. He further explained that the accused was expected to respond to the allegations and that he would record his response. This the accused did. After recording the response he gave it to accused to read and check its accuracy. The accused was in agreement with the statement. He signed it to confirm that agreement. The signing was witnessed by Givemore Tinarwo the investigating officer. The witness told the court that accused was in sound and sober senses. He was not induced or influenced in any way to make the statement. The accused's denial of his warned and cautioned statement was therefore nothing but an afterthought.

No meaningful cross examination of this witness was conducted. The question of whether the first accused made the statement was never put to the witness. If anything counsel only cross examined on whether the statement was made freely, implying that it was made by the first accused. The cross examination on whether the statement was made freely and voluntarily simply elicited firmer and solid responses from the witness that indeed it had been. The witness proved to be credible. We accepted his evidence as the truth and found that the accused made the impugned statement.

Givemore Tinago (Givemore)

The witness had been fingered as one of the perpetrators of the alleged assaults on the accused. He is an attested member of the police force stationed at CID Homicide with 16 years' experience. He told the court that he only knew the accused in connection with the offence. He confirmed having witnessed the recording of the statement. He was clear that he witnessed that the statement was given by the accused himself. It was a response to the caution and allegations. He was in sound and sober senses to the extent that he could give a response to the allegations levelled against him. The witness denied assaulting the accused. There was also no sign that he could have been assaulted by the details who arrested him. The only signs of injury that he saw on the accused when he was handed over to him were

from the road traffic accident. The witness said that accused gave his statement freely and voluntarily without any inducement. He denied having threatened to assault him if he refused to have the statement confirmed before a magistrate. Whilst he did accompany accused to court he told the court that they were ordered to vacate the courtroom before the confirmation proceedings began. He was therefore not present in court when the confirmation proceedings were conducted.

From the witness's evidence it was clear that the statement was made freely and voluntarily without any fear or inducement.

Judith Taruvunga(Judith)

Judith Taruvunga is a magistrate with 13 years' experience on the bench. She is currently stationed at Harare Magistrate court where she confirmed first accused's extra curial statement. On 6 November 2020 accused appeared before her. After the prosecutor had explained the purpose of accused's attendance at court she in turn cleared the courtroom. She made sure that all the police officers were removed from the courtroom. She then explained to the accused the procedure to be undertaken. She first explained the importance of the statement. She then explained to him the requirement that the statement must have been made freely and voluntarily. She explained the consequences of the confirmation of the statement particularly that it could be admitted into evidence upon its mere production by the prosecutor. After the explanations she asked the accused if he understood the explanations. He said he did. The questions and all explanations which were made were being interpreted in the Shona language which the accused had chosen to use by an official court interpreter. The statement was then read to accused. She said she remembered expressly asking the accused if had made the statement. Accused confirmed having made the statement and also that he made it freely and voluntarily without any inducements. She asked him whether he had been assaulted or if he had any injuries inflicted upon his person because of the statement to which he responded in the negative. She then proceeded to confirm the statement by signing and stamping it. She said the accused's demeanour depicted a person fully alive to the proceedings. He appeared sober and of a sound mind. She did not see any blood stained clothes or else she would have questioned him about it. According to the witness, accused appeared comfortable. Not a single policeman was in the courtroom gallery. The witness's evidence was not shaken by any cross examination. The confirmation proceedings were therefore conducted as per the dictates of the law.

The law on confirmed warned and cautioned statements

In a long line of decided cases, the steps that a court must take where an accused person challenges a confirmed warned and caution statement is settled. Where an accused raises a potentially sustainable challenge to the propriety of the confirmation proceedings, the court is obliged to determine the validity of that issue as a separate issue of fact. The onus is on the state to prove the absence of any irregularity. If the state discharges the onus, the statement is provisionally admissible and the onus shifts to the accused to rebut the presumption that the statement is admissible. The *onus* of proof on the accused is to prove on a balance of probabilities that the statements are inadmissible.

In the case of *S* v *John Scenara* HH 849/22 MUTEVEDZI J discussed the procedure of and an accused's participation in the confirmation of warned and cautioned statements and concluded that at p.4 of the cyclostyled judgment that:

> "… it is undoubted that confirmation of a warned and cautioned statement is a procedure which is painstakingly followed by the courts to ensure that an accused person understands the implications and that he/she opens up if the statement was illegally obtained from him. As already said the procedure is carried out in the absence of police officers. Accused persons who are genuine in their complaints more often than not open up to the magistrate and reveal any form of undue influence exerted upon them to make the statement. An accused who deliberately spurns that opportunity can only have themselves to blame for it."

In this case, the accused had the opportunity to advise the magistrate that he had not made the statement which was sought to be confirmed. He did not. Instead he confirmed to the magistrate that he had done so freely and voluntarily without having been unduly influenced. His feeble challenge of the propriety of the statement can be construed as nothing but an afterthought. The first accused failed to discharge the onus placed on him by s 256 (2) of the CP&E Act to show on a balance of probabilities, that the confirmed warned and cautioned was not made by him or was not made freely and voluntarily or that the confirmation proceedings were improperly done.

We find therefore that the first accused's statement was freely and voluntarily made. It was properly confirmed and is therefore admissible.

Second Accused's Defence -Tichaona Munyaradzi Chirume

The second accused also maintained his defence evidence and added that he had been drinking with Takudzwa Hlahla and Munyaradzi Rusere at Matute bar in Mbare until late. His girlfriend Kelly came and invited him to go home with him. She pulled and dragged him until he had no choice but to go with her. They went to block 6. He saw a vehicle coming

from behind and the vehicle was speeding. It stopped besides him. There was loud music coming from the motor vehicle. He identified Angela Chiwara Takudzwa Hlahla and Munyaradzi Rusero as the occupants of the motor vehicle. They invited him to come along with them but he refused. He went and slept at his girlfriend Kelly's place and only left the house in the morning when he went to Epworth. Upon arrival in Epworth Angela Chiwara called him on the phone and informed him that Takudzwa and Munyaradzi had been involved in a road traffic accident in Houghton Park. He added that when the accident is alleged to have happened around 0400 hours he was in Mbare at Kelly's house asleep. He claimed that he neither knew nor had ever met Fashion Chakanetsa or Prosper the first accused. The only three people in the car that he knew were Angela, Munyaradzi and Takudzwa. The other 2 people were strangers to him. He said he also remembered that the driver of the car was a giant bespectacled man. The other was sitting on the passenger seat.

Analysis of Evidence

The evidence of 8 state witnesses which was formally admitted with the consent of the defence made the majority of issues for resolution common cause. In addition to that evidence we have already held 1st accused's warned and cautioned statement admissible. The statement, exhibit 2, not only places the first accused at the scene of crime but outlines his role in the murder of the deceased. It also implicates the second accused and outlines his role in the charge contrary to his later assertions that he had not met nor known the second accused prior to his arrest. Exhibit 2 makes it clear that the second accused was complicit in this crime.

The court is fully aware of the principle that an accused's confession cannot be used against another accused. In *S* v *Sibanda* 1992(2) ZLR438(S) however, the Supreme Court said that there two exceptional situations under which an extra-curial statement by one accused may be admitted as evidence not only against its maker but also against a co-accused. The first is where the co-accused, by words or conduct, accepts the truth of the statement so as to make all or part of it his own. The second exception applies in the case of conspiracy or any crime committed in furtherance of a conspiracy. *In casu*, the second accused by his conduct and words accepted the truth of the first accused's statement. We will in the paragraphs below, demonstrate this.

The first accused was rescued from the wreckage of the deceased's stolen car and ferried to the hospital. He had the misfortune of being caught at the scene and red handed so to speak. That alone speaks volumes on his role in the robbery and murder of the deceased.

In his defence evidence he chose to keep mum over the reason for his attendance in the motor vehicle. His biggest undoing was in being injured in the accident and then rescued alive.

According to police investigations particularly the undisputed evidence of Garikai Jambwa one of the assailants escaped from the wreckage unhurt. That put accused 2 into the picture. This would explain why he had not been hospitalised and had no injuries. The second accused argues that he was not injured because he was not in the car. That however is in direct conflict with the evidence of Angela Chiwara who said accused 2 had earlier been in the same vehicle. That period during which he was in the same vehicle as the perished accomplices was after midnight of the fateful day. It was Angela's evidence that she had seen accused 2 in the company of first accused and the others when they visited her place of residence in Mbare and invited her to go with them on a joy ride. She had declined the offer. She claimed that the first and second accused were both known to her as they were friends with her boyfriend Munyaradzi. She therefore could not have been mistaken as to their identity. Because the evidence was tendered without issue, we accepted her evidence as the truth. Angela's testimony showed that the two accused were known to each other and were in each other's company on the fateful day. They were also together in the Toyota Wish the subject of the robbery after midnight. Second accused was therefore placed firmly into the deceased's motor vehicle with the first accused, Munyaradzi, Nyasha and Takudzwa. We are fortified in our contention because second accused himself, in his testimony confessed to having seen Angela that night albeit that he said he saw her in the motor vehicle with the other men which we have already held from Angela's testimony to be untrue. We found it untrue therefore that the second accused was with Kelly at the time the offence occurred.

What further compounds issues for both accused is that their own evidence is self-defeating. Both claimed to have each been in the company of Munyaradzi and Takudzwa that fateful night, drinking at Matute bar in Mbare. It defies logic therefore that they would not have seen each other that night and yet they had been drinking with the same people at the same bar. It could only mean one thing. They were together with Munyaradzi and Takudzwa at Matute bar. It only goes to show the fallacy of their defences.

Second accused very cautiously did not mention times in his defence outline in trying to build up his defence of an alibi. He only mentioned that he was at a bar in Mbare from 4 pm and that he left later. In his evidence he stated that he left the bar late. It can only leave one possible inference and that is that after the motor vehicle accident in which he escaped unhurt

the second accused might then have gone to Kelly's place. Before the accident he was seen in the motor vehicle with the four other assailants.

Circumstantial Evidence

The proper use of circumstantial evidence can be regarded as settled in our jurisdiction. There are 2 rules governing the use of such evidence in criminal proceedings. They are that:

1. The inference sought to be drawn must be consistent with all the proven facts and
2. The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

It is important to note there was a confession to the commission of this crime. It was however not the only evidence linking the second accused to the commission of the offence. Evidence stacked against the second accused is that he was seen by Angela Chiwara after midnight and in the company of the first accused. Further common cause evidence of Garikai Jambwa placed him at the scene with the other four assailants. The only reasonable inference which can be drawn from those circumstances is that he was in the vehicle at the time it was involved in the accident. If his being in the car was innocent, he should have given that innocent explanation instead of completely dissociating himself from the accident.

Second Accused's alibi

Second accused alleges that he was at his girlfriend Kelly's place at the time the accident occurred. He thus raised the defence of an alibi. What is striking is that he did not raise that with the police at the time of investigations to allow the police to fully investigate the alibi. He only mentioned it for the first time in court. Where that happens, an accused cannot seek to hide behind the allegation that the police did not investigate the alibi. In any case, he was seen by Angela in the company of accused 1 and others around the time the accident occurred. His decision to keep quiet about the time when he was in the bar, when he left and when he arrived at Kelly's place buttresses the dishonesty behind his claim of an alibi. We have shown above that he is the assailant who escaped unhurt from the motor vehicle wreckage and made good his escape. Further, he could not have phoned Olysta Hlahla with intricate details of the accident unless he knew about them. It can, in our view,

be assumed that the second accused had knowledge of the murder because he was one of the assailants. In the circumstances his claim of alibi is futile and cannot succeed.

In the end, the proven facts are reinforced by the accused's admission of them as the truth. Both accused were in the car which crashed along Simon Mazorodze road on the fateful night. That car had been robbed from the deceased before he was left for dead. Accused 1 in a statement admitted by the court confessed to how the crime was committed. That confession gels in with other independent evidence which shows that even outside it, accused 2 participated in the commission of the offence. That both of them deny knowing each other in the face of irrefutable evidence that they did can only heighten the court's conviction that they were lying to the court. A witness or an accused who lies to the court on one aspect of his testimony cannot expect the court to believe him on any other. We therefore found that the accused's defences were not only improbable but that they were palpably false.

Disposition

Given the above, we are convinced that the prosecution managed to prove their case beyond reasonable doubt. Accordingly both accused are found guilty of murder.

Sentence

Both accused stand convicted of murder. Second accused is quite a youthful offender at only 21 years. He is right on the border of the age below which a court cannot sentence an offender to death. In fact because this offence was committed in 2020 it can only mean that he was about 19 years at the time of commission of the offence. Accused 2 is equally youthful. He was 21 at the time the offence was committed. We agree with counsel for the accused persons on their submission that youthfulness usually comes with immaturity, thoughtlessness and the taking of rash decisions with costly consequences. The accused persons' participation in this offence betrays the immaturity in them. Their choice to go on a drinking spree with their accomplices soon after committing this barbaric crime equally illustrates the thoughtlessness we alluded to above. First accused is a family man with a wife and a three year old child. It appears he married very early. The second accused was said to be also a breadwinner as he looks after his two younger brothers after the death of their parents. The above however seem to be all that can be said in the accused's favour.

The approach in sentencing where an accused stands convicted of murder is for the court to assess whether the offence was committed in aggravating circumstances. This is so

because where it was, the court's discretion is curtailed. Counsel for first accused went all over in seeking to convince the court that there existed extenuating circumstances in favour of the accused. The second accused's counsel equally implored the court to suspend a significant portion of the accused's sentence on condition of good behaviour. Clearly both counsel took very wrong approaches to sentencing. Firstly the sentences applicable to accused convicted of murder are prescribed in s 47 of the Code. Only if the court does not find that the murder was committed in aggravating circumstances will it resort to considering the general aspects in mitigation.

Section 47 (4) Code provides as follows:

> "(4) A person convicted of murder shall be liable—
> (*a*) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
> (b) in any other case to imprisonment for any definite period."

As already stated the above provision serves to circumscribe the court's discretion in sentencing. It follows that where the court finds that a murder was committed in aggravating circumstances, it only has three choices open to it. These are to pass a sentence of death or imprisonment for life or some determinate prison term but which is not less than 20 years.

Secondly a sentence of imprisonment imposed for a murder conviction cannot be suspended. Its suspension is proscribed by s 358 (2) of the CP&EAct. See also the case of *S* v *Zimondi* HH179/15.

In determining the issue of aggravation the court is enjoined to take into account the factors described in s 47 (2) and (3) of the Code. It must consider as an aggravating circumstance that the murder was committed in the course of commission of any of the offences listed in s 47 (2) (a) (iii). There is no question that this murder was committed in the course of a robbery. It is nonsensical to argue that a robbery can be committed where there is no premeditation. By its nature robbery more often than not involves careful planning. The circumstances of this case are clear that the accused persons pretended to hire the deceased's taxi. They asked him to drive them all the way from Harare to Epworth where they then killed him before taking his car. The deceased died a violent and painful death. It is clear therefore that this murder was premeditated as envisaged in s 47 (3) (a). It was committed in the course of a robbery as envisaged in s 47 (2) (a) (iii). There is therefore the existence not

of only one aggravating factor but a combination of two of them. It certainly increases the accused persons' moral blameworthiness.

We have already stated that the accused are very youthful. A sentence of death would not serve any purpose in this case. Neither would life imprisonment.

In the circumstances, each accused is sentenced to 25 years imprisonment.

W O M Simango, first accused's legal practitioners
Hove and Associates, second accused's legal practitioners