THE STATE
versus
TINASHE NGWERUME
And
OBVIOUS JEMITALA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE 27- 31 May & 12 June 2024

Criminal trial

Assessors: Mr Mhandu
Mr Chakuvinga

Mrs *K Chigwedere*, for the State
T Deme, for the 1st accused
Mrs *C Dube*, for the 2nd accused

MUREMBA J: The accused persons who are juveniles aged 16 years and 17 years respectively pleaded not guilty to the charge of murder as defined in s 47(1) of the Criminal Law Codification and Reform (Act) [*Chapter 9:23*] (the Criminal Law Code). The two accused persons who are cousins in that their mothers are blood sisters tendered pleas of guilty to the lesser charge of culpable homicide.

The State's allegations

On the evening of April 6, 2023, at around 2100 hours and at Nduna tuckshop within the SAS mine compound in Lowdale, Mazowe, the two accused persons were engaged in a card game when the second accused was addressed by the name "Goredema." Edward Karinda, who was present, inquired about the number of names the second accused had, leading to a heated verbal exchange. The conflict escalated, drawing in the first accused and Edward Karinda's friend, Takunda Beketi. The situation intensified when the now deceased, who had been observing the events, taunted the accused persons, resulting in a physical confrontation. The deceased slapped the second accused, prompting both accused to retaliate with concealed

weapons. In a violent turn, the first accused stabbed the deceased in the chest, while the second inflicted a wound on his back. The accused persons then departed, leaving the deceased to collapse. Bystanders quickly came to his aid, transporting him to his home. His father, Nyikadzino Maruza, took immediate action, rushing him to Christon Bank Clinic. There, medical personnel, including a nurse and the sister in charge, assessed his condition and referred him to Parirenyatwa Hospital for advanced care. Despite these efforts, upon arrival at the hospital, a doctor pronounced the deceased dead.

In their defence outlines the two accused persons did not dispute that they stabbed the deceased resulting in his death. Their pleas to culpable homicide are based on the grounds of youthfulness and provocation in terms of s 239 of the Criminal Law Code. The accused persons stated in their defence outlines that their lack of maturity and lack of education contributed to their spontaneous and impulsive behaviour at the time they stabbed the deceased. They stated that the deceased provoked them by mocking them when he questioned their manhood in a public place. To rub insult to injury the deceased went on to slap them. In the heat of the moment and without premeditation, the two accused persons reacted by stabbing the deceased, albeit with excess force in that they stabbed the deceased with sharp objects that were within their reach. The accused persons stated that they did not have the intention to commit the crime of murder.

The evidence of the State

With the consent of the second accused, the State produced the second accused's confirmed warned and cautioned statement which was marked as exhibit no.2. In that statement the second accused admitted that he stabbed the deceased twice, once in the chest and once in the back using an iron rod which he picked from the ground. The second accused said that he was acting in self-defence as the deceased had just started to assault him without any provocation. The first accused joined in the fight in order to assist him.

The State led evidence from five witnesses who were at the scene, namely Edward Karinda, Takunda Beketi, Nathan Mumba, Dennis Madima and Lawrence Mwale. It also led evidence from Costa Maonya who is a police officer and from Doctor Solomon Muzenda who examined the remains of the deceased and compiled the post mortem report.

Edward Karinda, an 18-year-old resident of Lowdale Farm Compound in Mazowe, recounted the events of the distressing evening at Nduna tuckshop. He and Takunda Beketi were awaiting Nathan Mumba. They intended to go to church. It was Easter. An altercation broke out with the two accused persons when someone referred to the second accused as

Goredema. The dispute began when Edward questioned the second accused about his multiple names, having known him only as Jemitala. This query was met with hostility, leading to a physical confrontation where Edward struck the second accused on the shoulder, as he emphasized that he was older than the second accused. The situation escalated when the first accused and Takunda Beketi started exchanging words and pushing each other. The first accused then uttered some threatening words to the effect that he would swallow Edward and Takunda. The words were implying a deadly intent. The accused persons left the tuckshop for a brief period of about ten minutes. When they returned, they came and stood near Edward and Takunda Beketi. The first accused person challenged them saying that they should go ahead and make fools of them as they were doing before. Takunda then pushed them in defiance. Edward intervened, suggesting they leave, which Takunda heeded and left.

Edward said as he prepared to depart, he overheard the deceased challenging the accused's bravado, to which the second accused threatened physical assault. The deceased had asked the accused persons why they were considering themselves bulls when they had failed to stand up to Takunda Beketi. Although Edward said that he was too distant to capture the entire exchange, he witnessed the deceased striking the second accused on the face, provoking a violent response. The second accused slapped back forcefully, and a scuffle ensued between them.

Edward Karinda observed the first accused push the deceased against a bamboo fence amidst the scuffle between the second accused and the deceased. In the dimly lit area, Edward saw the first accused draw a weapon from his pocket. However, he could not quite see what weapon it was. He just saw that it was a shiny weapon. He observed that the accused persons who were positioned on either side of the deceased, were making stabbing motions. This silent struggle lasted approximately two minutes before the accused persons left the scene, and the deceased staggered backward, collapsing onto a bench. Bystanders went to attend to him. Edward noted the deceased was bleeding from his back, a wound inflicted under his raised hooded jacket, seemingly from a single stab. He was uncertain when the stabbing occurred but he had witnessed both accused persons making stabbing motions, the first accused in front and the second accused behind the deceased. Edward further observed that the deceased's jacket bore a small, punctured tear near the heart. Edward said that after the incident, the deceased was carried home by Lawrence Mwale and Breeze, a short distance from the tuckshop. Edward believed the deceased had not provoked the accused but was merely mocking them for fearing

Takunda. He was unaware of any iron bar being used, affirming the stabbing took place in darkness.

During cross-examination, Edward Karinda clarified that he was unaware of any conflict involving a girl named Sabina who worked at Nduna's tuckshop, nor of any relationship between her and the first accused. When questioned about the term "Mabhuru," he explained it referred to individuals who are bullies or murderers. Additionally, the defence counsel for the second accused inquired about Edward's distance from the bamboo fence during the incident. Edward estimated it to be about 7 meters, stating that while he could discern hand movements, he could not definitively identify who delivered the fatal stab to the deceased.

Dennis Madima, a 24-year-old resident of SAS Mine in Mazowe, provided testimony regarding the events of April 6, 2023 as well. He has known the accused persons for two years and said that their residences are in proximity. On the evening in question, Dennis was en route to church for Easter when he encountered Edward Karinda, Takunda Beketi, and the two accused persons engaged in a loud disagreement outside Ngoni's shop. The shop owner reprimanded them. Edward and Takunda Beketi took heed. Takunda and Nathan Mumba then left the scene and went home. Dennis observed the deceased, who was seated with his friend Sydney on a bench, reproach the accused for disrespecting their elders. The deceased said, "You have the habit of patronising us those who are older than you yet you could not face those of the same age as you." In response the second accused said that they had the capacity to silence him. The deceased stood up and slapped the second accused on the face using moderate force. The second accused retreated into the darkness near Nduna's tuckshop. The two were now fighting. The first accused followed them, and both accused flanked the deceased in the shadows, where Dennis could not see the stabbing happening. When the trio reemerged into the light, they stood silently before the accused persons walked away. As they were about 8 metres away, the first accused brandished a knife, challenging onlookers, but Dennis could not provide a detailed description of the knife. He said as the first accused was brandishing the knife he was saying, "Is there anyone who can stand up to us?" The deceased remained motionless until he collapsed into Sydney's arms, making a groaning sound as he fell. Dennis affirmed that the conflict arose solely from the accused's condescending behaviour towards their elders, with no other issues contributing to the dispute.

During cross examination the witness said that he did not observe the first accused stab the deceased or use a knife on the deceased. He also mentioned that it was his first time witnessing the second accused engage in a fight or argument. The witness confirmed that the

two accused were cousins, often seen together, and known to be close as their mothers are sisters. Regarding their occupations, he said that the accused were artisanal miners, while the deceased worked at SAS mine. The witness agreed with the State counsel's suggestion that the accused had a reputation for bullying other people and forcibly taking ore from others, actions that went unchallenged in the community due to fear. He also clarified that an iron bar was unlikely to have been used by the accused persons in stabbing the deceased, as none were present at the location of the fight.

Nathan Mumba, a 19-year-old resident at SAS mine compound in Mazowe, testified about his familiarity with the accused, and their proximity of residence. His residence is 300m away from the second accused's. He recounted the events of the fateful night at Nduna's tuckshop. He however said that he left the place with Takunda Beketi before the misunderstanding the accused persons and the deceased had started. He said what had happened before they left was a dispute over a name which led to a heated exchange between Edward and the two accused persons. The accused persons had then briefly left the place and returned in less than 10 minutes speaking in a language the witness assumed to be Ndebele and concealing objects in their trousers. The objects were protruding from their trousers but they were covered by their t-shirts. Nathan, standing 3 meters away, could not see the objects but noted the accused's aggressive posture towards Edward. He left the scene with Takunda as the situation escalated. During cross-examination, Nathan mentioned the name "Goredema" as a point of contention, though he was unsure why it angered the second accused. He confirmed the accused persons' lack of respect for elders, highlighting a change in their behaviour some few years ago and a tendency to treat older individuals without due regard. Nathan's testimony highlighted the accused's aggressive behaviour in the community.

Takunda Beketi, a 17-year-old resident of SAS Mine Compound in Mazowe, provided a detailed account of his interactions with the accused persons. Known to him since childhood and recognized as cousins, the accused were always seen together and worked as artisanal miners. On April 6, 2023, Edward visited Takunda to invite him to church. While waiting for Nathan Mumba at Nduna's tuckshop in order to proceed to church, a confrontation with the accused persons ensued after the second accused was called "Goredema." There was a tense exchange of words and physical gestures between Edward and the second accused. Takunda attempted to deescalate the situation, advising Edward to avoid conflict and asking the first accused to caution the second accused. However, this led to an altercation between Takunda and the first accused. The two accused persons then left the place briefly for less than 10

minutes. When they returned, they were seemingly intent on fighting. Edward and Nathan persuaded Takunda to leave, which he did. Takunda said that he had noted a shift in the accused's behaviour over time. Once well-behaved, they had become feared bullies in the community, with a change in language and demeanour that alienated many, including the witness, who no longer felt in good standing with them. He said that he was also afraid of the accused persons because of their behaviour. During cross examination the witness said that when the accused persons left for about 10 minutes and came back, he did not observe anything on their bodies. He said that he even continued with the altercation. This testimony highlighted the accused's transformation from community members to intimidating figures.

Lawrence Mwale, a 23-year-old employee at SAS Mine and resident of Lowdale Farm, Mazowe, gave testimony regarding the incident. Mwale said he knew both accused since 2019, particularly the second accused, Obvious, whom he frequently encountered at beerhalls. On April 6, 2023, around 10 pm, Mwale arrived at Ngoni's bar to find the accused persons in a dispute with Edward, Takunda and Nathan. Mwale reprimanded the group, including the second accused, to cease the altercation. The deceased, a friend and coworker of Mwale, also intervened, urging the group to go home, which led to Nathan and Takunda leaving. The situation escalated when the deceased reprimanded the second accused, leading to a physical confrontation where the deceased pushed and slapped the second accused. Subsequently, the second accused dragged the deceased into the dark, with the first accused following into the dark. The first accused who was following behind the deceased then drew a long knife, whose blade was approximately 13 centimetres from the indications which he made. In the darkness, the first accused stabbed the deceased on the upper part of the back, and as the deceased turned, the second accused stabbed him by the waist from behind. The first accused then stabbed the deceased again in the chest from the front. After the stabbing, the accused fled with their knives, and the deceased collapsed. Mwale had also seen the knife the second accused had used to stab the deceased in the waist. It was smaller than that of the first accused. He had seen the second accused holding it with his hand dropped to the waist. The knife was pointing to the front. With the help of Breeze, Mwale said he carried the deceased to his home. They then took off the deceased's jacket. Mwale observed wounds on the deceased's chest, back, and waist, noting that each wound was about 2cm wide. He could not see how deep the wounds were. He also noted that the waist wound was bleeding but not profusely.

Lawrence Mwale testified that the accused persons were artisanal miners and members of a notorious group known for bullying, referred to as "MaShurugwi." He said that the group

speaks the "Karanga" dialect and is feared in the community for its intimidating nature. It is led by a person called Nyasha who is a mature family man. Mwale said that the accused persons were not provoked but were instead admonished by the deceased. Arriving last at the shop, Mwale said he was unaware of the events leading to the confrontation between the accused persons and Edward, Takunda, and Nathan. When questioned if the dispute between the deceased and the accused persons was over a girl named Sabina, Mwale stated he had not heard anything regarding her. Positioned approximately three metres from the place where the deceased was stabbed, Mwale said he witnessed the knives amidst the scuffle between the deceased and the accused persons. He attributed his clear observation of the knives to his vantage point, despite the darkness. Mwale said that the deceased was stabbed four times.

Costa Maonya a Constable in the Zimbabwe Republic Police, stationed at Marlborough Police Station testified as follows. On the 7th of April 2023 at around 7 am, he received a report at Marlborough Police Station that there had been a murder at SAS Mine Compound, Mazowe. The witness proceeded to Christonbank clinic where the deceased had been taken to. He observed that the deceased had deep cut injuries which were consistent with a sharp object. He took the deceased to Parirenyatwa Hospital in Harare and upon arrival, he was certified dead by a doctor. It was the witness's evidence that efforts to recover the weapons used by the accused persons to stab the deceased were in vain. The weapons were not found at the scene. The accused persons led the witness to a certain bush where they said they had thrown away the iron bars they had used but nothing was recovered. This witness said that he is not the one who interviewed the State witnesses. He was not the investigating officer. The witness was asked by the defence counsel for the first accused if it was possible that the weapons used were iron bars and not knives. He said that it was not possible because iron bars are blunt yet the injuries were from a sharp object.

Solomon Muzenda the pathologist who examined the remains of the deceased at Parirenyatwa Hospital, Harare, testified as follows. The deceased had four stab wounds. One was on the front aspect of the chest. Two were on the back and the fourth was on the left groin (the waist which is the pelvis). He concluded that the cause of death was the stab wound of the chest. This stab wound went through the skin, the underlying muscle, the chest cavity and punctured the left lung and also the left side of the heart. When he opened the chest, he noted that there was free air within the chest cavity which had accumulated under pressure. The condition is referred to as tension pneumothorax. He said that the free air in the chest was as a result of the punctured lung. As the deceased was breathing in, air was leaking from the

punctured lung into the chest. He also found 50ml of blood in the cavity that surrounds the heart. The blood was from the punctured wall of the heart. He described the stab wound to the chest as severe because it penetrated through the vital organs: the lung and the heart. He said that the other stab wounds were also deep but not as deep as to cause death. The doctor said that it was difficult for him to say with certainty the type of weapon which was used to inflict the injuries. He said whatever weapon was used, was sharp. When it was put to him that evidence before the court suggested two possible weapons: a knife and an iron bar, he said that a knife was possible because it is sharp. He said that an iron bar is also possible provided the perforating part of it was sharpened to such an extent that it could cut the skin. He said that the depth of the chest wound was at least 40mm, meaning that the cutting part of the weapon used to inflict it was at least 40mm long. When he looked at the pictures of the wound, he said that it was probable that an iron bar was used but it must have been well sharpened because the edges of the wound were clean cut. The injury was sharp because there were no contusions or bleeding under the skin. With a blunt instrument there will be bleeding under the skin because the person will be struggling to cut. The post mortem report was produced as exhibit one. The doctor's evidence was not challenged by any of the accused persons.

The evidence of Agreement Mulolanji and Roseline Muparutsa was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter* 9:07] (the CPEA). Agreement Mulolanji is the person who ferried the deceased in his car to Christonbank clinic. Roseline Muparutsa is the nurse who attended to the deceased at Christonbank clinic at 0025hours on 7 April 2023. She checked for the deceased's pulse and heartbeat. There was none and she referred him to Parirenyatwa hospital.

The evidence of the accused persons

The first accused person's evidence was as follows. He is 16 years old. He was born on 25 November 2007. He lives at Lowdale Farm with his parents. He did grade seven in 2021 and did not proceed to secondary school because of lack of school fees. He said that on the fateful night he was at Nduna shop with the second accused. He gave a narration of how the altercation between the second accused and Edward Karinda started. His explanation was not different from what the State witnesses narrated. He said that during this altercation, Takunda then ordered him to restrain the second accused or else he would assault him. The first accused said that that is when he exchanged words with Takunda Beketi asking him why he was threatening him when he was not involved in the altercation. The first accused said that it was at that juncture that the deceased intervened ordering him to be quiet. The deceased went on to

say that he was already nursing a grudge against him for having an affair with Sabina, the lady who was working in Nduna's tuckshop. The first accused said that he did not answer. The person who answered was the second accused who asked the deceased why he was begrudging the first accused. The second accused went on to tell the deceased that there was no love relationship between the two. The deceased rose from where he was seated and proceeded to assault the second accused with an open hand as he asked him if he was also involved in the matter. A fight then ensued between the deceased and the second accused. The first accused said that as the two were retreating, he approached them and got hold of the second accused as he asked him to let go so that they go home. The deceased then turned to face the first accused asking him if he wanted to involve himself in the fight. He then struck the first accused with a fist on the jaw. As the first accused retreated backwards, the deceased tripped him to the ground beside a cabin. At that place there were some pieces of iron bars which had been cut using a grinder. The first accused said that he then got hold of one of the pieces. He said as he tried to rise, the deceased kicked him and he fell back to the ground. The first accused said that he had to forcefully rise and struck the deceased twice on his back with the iron bar. He said upon being struck, the deceased retreated towards the second accused. The second accused tried to flee but he was tripped by the deceased and he fell to the ground. The second accused grabbed an iron bar from the ground. The deceased ran to the second accused and quickly stepped on the hand that had grabbed the iron bar. The deceased then sat on top of the second accused's legs. The second accused used force to swerve his hands and scratched the deceased's chest with the iron bar. The deceased moved off the second accused. The first accused said that he had to assist the second accused to get up. A lot of people had gathered at the place. Ngoni who is one of the shop owners at that place approached the two accused accusing them of having injured the deceased. He then went into his shop and came out wielding a machete. This prompted the two accused persons to leave the place running. The first accused disputed that they used knives to stab the deceased. He said that they threw away the iron bars they had used on the deceased as they were running away from the scene. He disputed that there was a time that the two of them briefly left the scene and returned armed with knives in their trousers. He disputed that he is into full time artisanal mining. He said that he once did artisanal mining for a very short period. He also denied that he is part of a notorious group called "MaShurugwi" which is notorious in the area for terrorising other artisanal miners and the community at large.

The second accused's defence counsel did not ask the first accused person any questions in cross examination. During cross examination by the State Counsel, the first accused said that

the incident happened at a well-lit place and in the full view of everyone. He said that when they struck the deceased, it was in retaliation. He said that they had to use iron bars as their strengths could not match his.

The second accused's testimony was as follows. He was born on 23 November 2006. He resides at Lowdale Farm with his mother and two siblings. He has never known his father and it pains him so much. His narration of the events of the fateful night at Nduna tuckshop are more or less the same as how the first accused narrated them. However, his description of how the fight happened with the deceased is totally different from the first accused's description. He said that when he asked the deceased why he was begrudging the first accused when the first accused was not in love with Sabina, the deceased slapped him (the second accused) on the face once with an open hand and once with a fist. The second accused said as he was retreating, he saw the first accused who was behind the deceased, pulling the deceased backwards. The deceased then tripped him (the second accused) and he fell to the ground. The second accused said that he saw an iron bar on the ground and he grabbed it. He stabbed the deceased in the groin with it as the deceased had turned to face the first accused. The deceased went and sat down and started drinking his beer. The second accused said that he only stabbed the deceased once.

The defence counsel for the first accused only asked the second accused one question. It was about how close he and the first accused is, to which he said that they are not very close. During cross examination by the State counsel, the second accused said that the first accused had lied to the court that he was also assaulted by the deceased and that it is the second accused who stabbed the deceased in the chest. The second accused said that after he was assaulted by the deceased his vision became blurred. It is at that time that he was seeing as if the first accused was pulling the deceased from behind. The second accused said that he is not sure if that is the time the first accused was stabbing the deceased on the upper part of his back. He said that the deceased then turned to face the first accused. He said that he could no longer see what was happening between the two as he was now behind them. He however said that since it was just the two of them who stabbed the deceased, it must be the first accused who stabbed the deceased in the chest. He said that he did not see what weapon the first accused used to stab the deceased. The second accused said that the iron bar that he used to assault the deceased with was not very sharp. He said that the iron bar was similar to the ones that are used for making burglar bars. He said that its sharp part was about 2cm. He said that its sides were not sharp. The second accused said that it was not true that they left the place running as the first

accused said. He said that they just walked away from the scene. He said that the person who had told the truth of what happened at the scene of crime was Lawrence Mwale. The second accused went on to say that he is not in good books with the first accused. He said that the first accused was in the habit of bullying him and assaulting him whenever they would meet. He said that the first accused had actually assaulted him on five occasions and in one of the incidents he actually lost consciousness. He said that the first accused is an artisanal miner and a violent person. The second accused said that he was going to school and was in Form three when this case happened. He said that had it not been for this case, he would be in Form four this year. As the second accused gave his evidence, he was showing that he had a lot of anger bottled in him. When the court asked him to explain his anger, he said that it was because this case had disturbed his schooling. He said that he had hoped that the first accused would tell the truth of what happened.

Analysis of evidence

We must say that we were disappointed by the State counsel' s closing submissions. They were just a regurgitation of the evidence that was led from the witnesses and the documentary exhibits that were produced. Thereafter there was a regurgitation of s 47(1) of the Criminal Law Code. Thereafter the State counsel wrote five sentences in five short paragraphs saying that the facts prove the following.

> "The two accused were present at the scene and they collectively took turns to stab the deceased causing the deceased injuries from which he died. It is immaterial who between them inflicted the fatal wound as they acted in common purpose. The accused persons realised the possibility that a person would die as they had left the scene and returned armed with lethal weapons whose use could cause death. The accused persons knowingly stabbed the deceased on vulnerable parts of his body with lethal weapons. The accused persons used a sharp object to stab the deceased. Whether it was a knife or an iron bar is immaterial. The fact remains that the weapon used was lethal and it severely pierced the heart and lungs of the deceased thereby causing his death. The accused were not provoked to warrant the stabbing of a person to death."

It is on the basis of this paragraph that the State counsel expects a conviction. Maybe the State counsel has no appreciation of the purpose of closing submissions. Closing submissions in a criminal trial are the final arguments made by the prosecution and defence after all the evidence has been presented. They are meant to summarize the key points of the case, highlight the strengths of one's own position, and address the weaknesses or counter the arguments of the opposing side. In *casu* the State counsel's closing submissions were inadequate because they merely repeated the evidence without analysing it in relation to the defences raised by the accused persons. In a well-crafted closing submission, the State counsel should:

- **Summarize the evidence**: Briefly recap the evidence presented during the trial, focusing on how it supports the charges.
- **Address the defences**: Specifically respond to the defences raised by the accused, explaining why they do not absolve the accused of guilt.
- **Link evidence to charges**: Clearly demonstrate how the evidence supports each element of the crime charged.
- **Persuade the court**: Use logical reasoning and legal authorities to argue why the court should convict the accused.
- **Apply the law**: Explain how the law applies to the facts of the case and argue for a conviction based on this application.

The State counsel is expected to do more than just list the facts of the matter. He or she must provide a compelling argument that weaves together the evidence and the law, directly confronting any defences raised, to persuade the court of the accused's guilt. In the present matter the State counsel failed to meet these expectations. It is essential for the State counsel to present a thorough and analytical closing that addresses all aspects of the case, including the defences, to effectively advocate for a conviction.

On the other hand, the defence counsel should effectively advocate for their client. Some of the key factors to consider in the closing submissions are as follows.

1. **Highlight inconsistencies**: Point out any inconsistencies or weaknesses in the prosecution's case. This could involve questioning the credibility of witnesses or the reliability of evidence.
2. **Emphasize the burden of proof**: Remind the court that the prosecution bears the burden of proving the accused's guilt beyond a reasonable doubt and that any doubt should result in a verdict of not guilty.
3. **Use legal precedents**: Cite relevant legal precedents that support the defence's position. This demonstrates a deep understanding of the law and its application to the case.
4. **Address the charge**: Go through the charge and explain why the evidence does not meet the legal standard for conviction.
5. **Reinforce the defence's narrative**: Present a compelling narrative that explains the accused's actions in a way that is consistent with innocence or a lesser charge.

6. **Engage with the defences raised**: Directly address the defences raised during the trial, explaining how they fit into the legal framework and why they should lead to an acquittal or reduced charges.
7. **Appeal to justice**: Make an appeal to justice, fairness, and the rights of the accused, emphasizing the serious consequences of a wrongful conviction.
8. **Be persuasive**: Use persuasive language and rhetorical devices to make the arguments more compelling. The closing should be clear, concise, and impactful.

Both the State and the defence counsels should remember that the goal of the closing submission is not only to summarize the case but also to persuade the court to view the case from their perspective.

The evidence presented during trial shows that there was a misunderstanding between the deceased and both accused persons or one of them. This resulted in the accused persons stabbing the deceased who sustained injuries from which he died. In the defence outlines the accused persons raised the defence of youthfulness and prayed for a conviction of culpable homicide on that basis. I made it clear to the defence counsels that youthfulness is not a partial defence to murder. Our law does not provide for such a partial defence. It appears that the defence counsels took heed as they did not persist with this defence. They did not deal with this defence in their closing submissions.

I will deal with the defence of provocation that both accused persons raised. The defence is provided for in s 239 of the Criminal Law Code. The provision reads:

> **'When provocation a partial defence to murder**
>
> (1) If, after being provoked, a person does or omits to do anything which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section *forty-seven*, the person shall be guilty of culpable homicide if, as a result of the provocation—
>
> (a) he or she does not have the intention or realisation referred to in section *forty-seven*; or
>
> (b) he or she has the intention or realisation referred to in section *forty-seven* but ~~he or she~~ has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.
>
> (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that—
>
> (a) he or she did have the intention or realisation referred to in section *forty-seven*; or
>
> (b) the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control;
>
> the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section *two hundred and thirty-eight*."

This provision outlines the concept of provocation as a partial defence to murder. It means that if a person commits an act that would be considered murder, but does so after being provoked, they may be found guilty of the lesser charge of culpable homicide instead of murder. This can happen if, due to the provocation: (a) The person did not have the intention or realization required for murder (as defined in section forty-seven), or (b) The person had the intention or realization but lost complete self-control, and the provocation was enough to make a reasonable person in the same situation also lose self-control. The defence has limitations. The court may decide that provocation is not a valid defence if: (a) the person still had the intention or realization required for murder, or (b) the provocation was not enough to make a reasonable person lose self-control. In such cases, provocation cannot be used as a partial defence. However, the court may consider it as a mitigating factor when deciding the sentence. The defence of provocation acknowledges human frailty and provides a possibility for a reduced charge if the accused acted in the heat of the moment due to provocation.

In the circumstances of the present case, it cannot be said that when the accused persons stabbed the deceased they acted in the heat of the moment. Before this they had just had an altercation with Edward and Takunda Beketi. The second accused had actually been assaulted by Edward. The four of them had exchanged harsh words before the accused persons left the scene for less than 10 minutes. When the accused persons returned, they now had weapons inside their trousers. Although the rest of the witnesses did not observe this, Nathan Mumba saw the weapons protruding in their trousers. He was however unable to identify what weapons they were because they were covered by the t-shirts the accused were wearing. The accused persons disputed that they briefly left the scene and came back. We do not believe them because Edward Karinda, Takunda Beketi and Nathan Mumba testified to this. The three witnesses could not have fabricated this. They corroborated each other and impressed the court as credible witnesses. These witnesses even observed that the accused persons were now more confident than before and they even challenged Edward and Takunda who are the persons they had had an altercation with before they left the scene. According to these State witnesses, the two accused persons were seemingly intent on fighting. Takunda said that unaware that they were now armed, he went on to push the two accused persons after they had challenged him and Edward. The second accused had uttered words to the effect that he could swallow Takunda Beketi. Fortunately, it was at that juncture that people intervened and restrained Takunda Beketi and told him to go home and he took heed and left the place. The accused persons remained at the scene. Our observation is that at this moment in time, the accused persons

were people who were already angry and in a fighting mood. They had left the scene in order to arm themselves.

From the evidence led from the State witnesses we are satisfied that the accused persons had come back armed with knives. We say this because at the time the accused persons were now flanking the deceased as they were pushing him towards the bamboo fence, Edward Karinda saw the first accused produce a shiny weapon from his trousers. Dennis Madima said that after the accused had stabbed the deceased and were now leaving the scene, the first accused brandished a knife as he asked if there was anyone who wanted to challenge them. Lawrence Mwale who was very close to the scene when the deceased was being stabbed saw the accused persons stabbing the deceased with knives. Lawrence Mwale was 3 metres away and his description of how the deceased was stabbed was apt. He observed how the deceased was stabbed by each of the two accused persons using knives. He said that the first accused's knife was bigger than that of the second accused. The stabbings that this witness observed are consistent with the injuries that were then observed on the deceased's body by the pathologist who examined the remains of the deceased. We found the evidence of Lawrence Mwale very impressive. Even the second accused corroborated the evidence of Lawrence Mwale when he was giving his evidence during the defence case. The second accused said that he was angry that the first accused had not told the court the truth of what happened. He said that he felt relieved when Lawrence Mwale testified because he told the truth of what happened.

If Lawrence Mwale told the truth of what happened, it means that he told the truth that the accused persons used knives. The second accused did not say that Lawrence Mwale lied about them having used knives to stab the deceased. The use of the knives is consistent with the observations made by the pathologist that sharp weapons had been used to inflict the injuries that he observed on the body of the deceased. Our conclusion that the accused persons used knives to stab the deceased, buttresses the point that the accused persons had briefly left the scene and came back armed with knives. A person who briefly leaves the scene of fighting angry, and comes back armed with a lethal weapon such as a knife, and ends up killing someone within a short period cannot argue that he or she acted in the heat of the moment. This conduct means that the person intended to kill or he did realise that there was a real risk that his conduct could cause death and continued to engage in that conduct despite the risk or possibility. In the circumstances of this case, we are satisfied that the accused persons intended to kill a person or they realised the risk. Initially the persons who were targeted were Edward and Takunda with whom they had had an altercation. When these were restrained, the deceased put himself

in the firing line by making remarks that ridiculed the accused persons. He basically challenged their bravado by saying that they were in the habit of patronising older people yet they had failed to stand up to Takunda Beketi who had challenged them and pushed them. His remarks were met with a challenge by the second accused who according to the State witnesses said that they could swallow him. The deceased who was 25 years old and much older than the second accused who was only 16 years old, did not take this response lightly. He slapped the second accused on the face and the second accused dragged or pulled the deceased into the dark. Some State witnesses said that there was a fight between the two. It is at that stage that the first accused followed from behind the deceased, the two flanked the deceased and stabbed him four times: twice on the upper part of the back, once in the groin and once in the chest in about two minutes.

We are also satisfied from the evidence of the state witnesses who were at the scene that there were no iron bars at this place. It is the accused persons alone who said there were iron bars at the place. The police officer who attended the scene did not see any iron bars. We thus find it difficult to believe the accused persons.

From the evidence led from the State witnesses, the deceased did not slap the first accused. The person that the deceased slapped was the second accused. The State witnesses said that the first accused followed the deceased at the time he was being dragged into the dark by the second accused. The first accused was the first person to stab the deceased on his back on the upper part. The second accused person even corroborated the evidence of the State witnesses that the first accused was never assaulted by the deceased. The second accused said this in his evidence in chief and in his confirmed warned and cautioned statement he said that the first accused joined in in order to assist him. The accused persons wanted to sell the story that the dispute with the deceased was over a lady, one Sabina whom the deceased was claiming to be in love with and accused the first accused of dating that lady as well. None of the State witnesses confirmed this story. They said there was no such issue on the night in question. We see no reason why the State witnesses would deny this if this was the cause of the dispute. With the first accused person not having been assaulted by the deceased as he wanted us to believe, the defence of provocation cannot suffice for him. His stabbing of the deceased was purely on the basis that the deceased had assaulted his first cousin and best friend. As the second accused correctly put it in his confirmed warned and cautioned statement, the first accused simply joined in the assault in order to help him. So, his killing of the deceased has no excuse. He has no defence to it.

As for the second accused person, the deceased had slapped him on the face after he had rudely responded to him. We make an observation that the second accused person despite being a juvenile, he seems to have a way of rudely responding to other people including those that are older than him. On the fateful night this is what he did to Edward Karinda in the first altercation and Edward slapped him. He did the same with the deceased and he was slapped. He even threatened to swallow the deceased. He was simply implying that he could kill him. He had no regard that these were people who were older than him. When he was slapped by Edward he went away and came back with a knife and started challenging Edward. It is clear that he wanted to fight Edward. When he was slapped by the deceased, he took it that he had been provoked and retaliated by stabbing the deceased with a knife. It is our conclusion in the circumstances of this case that in retaliating in the manner that he did, the second accused had the intention to cause death. However, even if it is accepted that he did not have the intention to cause death, the provocation was not enough to make a reasonable person lose self-control to the extent of stabbing the deceased with a lethal weapon such as a knife. The deceased was not armed with any weapon. So, retaliating with knives was not warranted. The defence of provocation does not suffice in the circumstances of his case.

The two accused persons acted in collusion and in common purpose when they stabbed the deceased. They are first cousins who are very close. Evidence led from the State witnesses show that an injury to one is an injury to both of them. This is why when the deceased assaulted the second accused, the first accused joined in and stabbed the deceased from behind. When the two accused felt defeated in the first altercation, they left the scene together and came back armed with knives and they were now intent on fighting. They gave varying versions of how they assaulted the deceased with iron bars. We do not believe either of those versions for two reasons. These versions were never put to the State witnesses for them to comment on them. The versions only came up for the very first time during the defence cases. It was clear that these were concocted stories. This conclusion is strengthened by the fact that the accused themselves gave conflicting accounts of the assault. If they were telling the truth, they would have given one story. As it is, they each blamed the other for having inflicted the fatal wound on the chest. At the end of the day, it does not matter who stabbed where and who between the two of them inflicted the fatal injury. Both are criminally liable for they were acting in common purpose right from the time they went to fetch the lethal weapons up to the time they stabbed the deceased.

In view of the foregoing, we are satisfied that the accused persons intentionally murdered the deceased. We find them guilty of murder as defined in s 47 (1) of the Criminal Law Code.

Sentencing Judgment

The accused persons who are male juvenile offenders aged 16 and 17 years were arraigned before this court facing a charge of murder as defined in section 47(1) of the Criminal Law Code. They pleaded not guilty but were convicted after a contested trial.

The facts that gave rise to their convictions are that on 6 April 2023 and at Nduna tuck shop, SAS Mine Compound, Lowdale, Mazowe in the evening, the accused persons had an altercation with one Edward Karinda and Takunda Beketi. The altercation came to an end when they were rebuked by onlookers. The accused persons then briefly left the scene and came back in less than 10 minutes with weapons concealed in their trousers and t-shirts. They were now more aggressive towards Edward Karinda and Takunda Beketi and spoiling for a fight. Takunda Beketi felt challenged and went on to push the two before he was restrained by Nathan Mumba. The deceased who had witnessed the altercation then taunted the accused persons alleging that they had failed to stand up to Takunda Beketi yet they considered themselves bulls and were in the habit of patronising older members of the community. The second accused responded rudely telling him that they were capable of silencing him. The deceased responded to this by slapping the second accused. This resulted in a scuffle between the two. Uninvited, the first accused then joined in the scuffle and the two accused persons who had knives stabbed the deceased in the chest, in the groin and on the upper part of his back twice. The deceased suffered four stab wounds. He was certified dead on arrival at Parirenyatwa Hospital. The deceased was 25 years old.

The present matter is a murder which was committed in aggravating circumstances for the following reasons. The accused persons used knives to stab the deceased four times. A knife is a lethal weapon. When murder is committed using a weapon, it amounts to a murder committed in aggravating circumstances - See the table of presumptive penalties in the sentencing guidelines S.I. 146 of 2023. In addition, this murder was premeditated. When the accused persons left the scene for less than 10 minutes and came back armed with knives, they had planned to commit murder. It does not matter that initially they wanted to fight Edward and Takunda with whom they had had an altercation earlier on. A person who leaves the

fighting scene and comes back armed with a knife and then ends up committing murder within a short space of time cannot argue that he had not planned to commit the murder. In terms of s 47 (3) (a) of the Criminal Law Code, a murder which is premeditated is classified as a murder committed in aggravating circumstances. In terms of s 47 (5) of the Criminal Law Code, the circumstances enumerated in s 47 (2) and (3) of the said Act, as being aggravating are not exhaustive. This means that the factors listed in sections 47 (2) and (3) are not the only ones that can be considered aggravating. There may be additional circumstances beyond those explicitly mentioned that could also worsen the seriousness of an offence. Therefore, the law recognizes that aggravating factors extend beyond the specific examples given, allowing for flexibility in assessing the severity of criminal conduct. In the circumstances of the present matter, an additional aggravating circumstance that is not explicitly mentioned in s 47 (2) and (3), but that comes out in the circumstances of the case is that the accused persons belonged to a notorious artisanal mining group referred to as 'MaShurugwi.' This group was notorious in the community for being violent and using threats of violence against other members of the community. Despite their young ages, the accused persons were known for being bullies and they were feared by many including those who were much older than them. They were menacing figures within their community. Their very presence would send shivers down spines. The State witnesses said that the accused persons would walk around with spines perpetually bent forward, fists clenched and arms outstretched as a signal of dominance. They were exploiting the community's vulnerability. They would seize gold ore from other artisanal miners by force, leaving them powerless and desperate. The community, shackled by fear, watched helplessly. On the fateful night, the deceased opted for defiance. He mocked the accused persons for being bullies and challenged their bravado. In response, they issued a chilling threat of death. Within mere minutes, they plunged their knives into him four times. As they departed the scene, the first accused flaunted his blade, challenging any onlookers who might question their dominance. At that moment the deceased was gasping for life. The bystanders, dared not say anything. Instead, they turned their attention to the deceased, desperate to offer what little aid they could. A murder which is committed in aggravating circumstances has a presumptive penalty of 20 years' imprisonment under the Sentencing guidelines S.I. 146 of 2023 and a mandatory minimum penalty of 20 years' imprisonment under s 47(4)(a) of the Criminal Law Code.

The State counsel proposed a sentence of five years' imprisonment. However, we take note that this proposal was based on an incorrect finding that the murder was not committed in aggravating circumstances. The first accused's defence counsel proposed three options. The first option is to place the first accused under the supervision of a probation officer in a juvenile training facility coupled with mandatory counselling and educational programmes. The second option is to place the first accused in a rehabilitative facility rather than a conventional prison so that he can receive specialised care and education tailored to his needs as a young offender. The third option is to sentence the first accused to perform community service along with attendance in educational or vocational training programmes so that he can maintain connections with his family and community. The defence counsel emphasised a rehabilitative approach and a sentence that will uphold the constitutional mandate to protect the welfare of children and recognize their potential for change. He submitted that a rehabilitative approach will serve the best interests of the juvenile. The second accused's defence counsel proposed that the second accused be placed in a juvenile rehabilitative facility as opposed to being placed in a conventional facility so that he can have an opportunity to receive counselling, specialised care and education as a young offender.

The thrust of the submissions by the State counsel and defence counsels was that the accused persons are juvenile offenders who in terms of the law should be treated with leniency. They cited several case authorities to support this averment. However, they all failed to realise or appreciate that this is a murder which was committed in aggravating circumstances and that in terms of s 47(4)(a) of the Criminal Law Code such an offence has a mandatory minimum sentence of 20 years' imprisonment. The provision reads,

> "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)."

In *S* v *Emelda Marazani* HH 212/23 MUTEVEDZI J in analysing this provision correctly observed that,

> "The sentencing regime which regulates the sentencing of offenders convicted of murder is somewhat rigid. It is so because the court's hands become tied and has little discretion where it finds that the murder was committed in aggravating circumstances. Needless to say, a court must therefore, before doing anything else in sentencing an accused, make a determination of whether or not the murder was committed in aggravating circumstances."

What is noticeable is that s 47(4) of the Criminal Law Code does not provide for the canvassing of special circumstances such that in a case where the court finds special circumstances it can impose a lesser sentence than the mandatory minimum sentence of 20 years' imprisonment. The provision also does not say that if the accused is a juvenile, he or she cannot be sentenced to the mandatory minimum sentence of 20 years' imprisonment. If the State counsel and defence counsels had correctly analysed the facts of this matter, they would have made a finding that this is a murder that was committed in aggravating circumstances. Their next course of action would have been to address us on how we should wriggle out of the mandatory minimum sentence of 20 years' imprisonment for the juvenile accused persons.

Referring us to several case authorities, many of which were decided before the penalty provision in the Criminal Law Code was amended in 2016 to provide for a mandatory minimum sentence of 20 years' imprisonment was erroneous. When a penalty provision is amended, it has the effect of establishing new sentencing trends and it can have the effect of rendering past cases or previous authorities redundant. See *S* v *Wallace Kufandada & Anor* HH 233/124. The amendment of the penalty provision in s 47 of the Criminal Law Code demands that there be a shift in our sentencing approach in murder cases. We cannot continue with old sentencing trends and to be guided by past cases which are not consistent with the amended penalty provision which provides for a mandatory minimum sentence. *In casu* both the State and the defence counsels failed to address this pertinent point.

The accused persons and their family members were interviewed by a probation officer who subsequently compiled reports. In his or her report, he or she made a recommendation that falls foul of s 47(4) of the Criminal Law Code and s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA) in that he or she recommended that the court sentences the accused persons to imprisonment but order the operation of the whole or part of it to be suspended for a period not exceeding five years on such conditions as the court may specify in terms of s 358(2)(b) of the Criminal Procedure and Evidence Act. Obviously, the probation officer does not appreciate that in terms of s 358(2) of the Criminal Procedure and Evidence Act, when a court convicts a person of an offence specified in the Eighth Schedule of the said Act, it is not permitted to suspend the sentence it imposes. Murder falls under the Eighth Schedule. Further to that, the murder offence carries a mandatory minimum sentence since it was committed in aggravating circumstances. Again, in terms of the Eighth Schedule of the CPEA, a mandatory minimum sentence cannot be suspended.

The accused persons being juveniles, we explored the provisions of s 351(2) of the Criminal Procedure and Evidence Act which provide for the manner of dealing with juveniles under the age of 19 years convicted of any offence. The provision provides that,

> "Any court before which a person under the age of nineteen years has been convicted of any offence may, instead of imposing a punishment of a fine or imprisonment for that offence, subject to subsection (1) of section three hundred and thirty-seven—
> (a) order that he shall be taken before a children's court and dealt with in terms of the Children's Act [Chapter 5:06]; or
> (b) after ascertaining from the Minister responsible for social welfare that accommodation is available, order that he shall be placed in a training institute in Zimbabwe or in a reform school in the Republic of South Africa for the period specified in subsection (1) of section three hundred and fifty-two."

The provision means that instead of imposing a fine or imprisonment, a court can choose to send the juvenile to the children's court to be dealt with in terms of the Children's Act [*Chapter 5:06*] or to place the juvenile in a training institute in Zimbabwe or in a reform school in South Africa for the period specified in s 352(1) if accommodation is available. What is pertinent in this provision is that the court exercises its discretion. It can go for the options provided in this provision if it decides not to sentence the juvenile to a fine or imprisonment. In exercising its discretion on what options to take the court can be guided by various factors such as: (i) the severity of the crime – if the crime committed is particularly serious (e.g. premeditated murder, rape or armed robbery), the court may opt for imprisonment to protect society and uphold justice; (ii) repeat offenders – if the juvenile has a history of repeated offences, the court might consider imprisonment as a deterrent and to prevent further criminal behaviour; (iii) public safety concerns – if the court believes that the juvenile poses a significant risk to public safety, imprisonment may be chosen; or (iv) lack of alternatives – if there are no suitable training or reform schools available, the court may resort to imprisonment. Whilst the primary goal in dealing with convicted juveniles is rehabilitation, these factors can influence the court's decision to impose a custodial sentence.

In the present case we are persuaded not to exercise or employ the options provided in s 351(2) of the CPEA, but opt for imprisonment for the following reasons. (i) The severity of the crime is significant. The accused persons not only killed the deceased, but did so in a brutal manner stabbing him multiple times within two minutes. The fatal wound to the lung and heart indicates a deliberate and violent act. Initially the accused persons were at the scene unarmed. However, after having an altercation with Edward and Takunda, they briefly left the scene for less than 10 minutes and came back armed with the knives. They then used these

knives to stab the deceased a short while later after engaging in a small argument and scuffle with him. (ii) In the interests of public safety, imprisonment is called for. Evidence from the State witnesses was that the accused persons were part of a notorious group referred to as 'MaShurugwi' that terrorised the community. Their actions posed a threat to public safety. Imprisonment will serve to protect others from potential harm. Despite the deceased being 25 years old and much older than the accused persons, the accused persons threatened him with death before stabbing him. To use their words, they said they would swallow him and that they were capable of silencing him and then they went on to do exactly that. The irony of it all is that the deceased had just told them that they were in the habit of patronising older people and regarded themselves as 'bulls' in the community. Instead of taking heed to his words, they chose to show the community that indeed they were bulls and had no respect for their elders.

Even when they were leaving the scene after fatally stabbing the deceased, the first accused who is the younger of the two accused persons brandished his knife and dared the onlookers if there was anyone who wanted to challenge them. This was a clear display and demonstration of lack of remorse and respect for anyone in their mining community. The accused persons' lack of remorse and disregard for human life is concerning and warrants imprisonment. (iii) Given the accused persons' behaviour and the threat they pose in the community they live, imprisonment will be a pre-emptive measure to prevent further violence and protect potential future victims. Imprisonment in the circumstances of this case, should act as a deterrent to the accused themselves and to others who might contemplate similar violent acts. Imprisonment should send a message to society in general and to mining communities in particular that such behaviour will not be tolerated by the courts. It is high time that those who consider themselves bulls or members of notorious groups brought themselves to order. In the circumstances of the present case, while rehabilitation is essential for the accused persons who are juvenile offenders, the severity of the case and the danger posed by the accused in society cause us to prioritize public safety by sentencing the accused persons to imprisonment. As this court said in *S* v *Wallace Kufandada, supra* the extent to which youthfulness can mitigate a sentence depends on the nature of the crime and the presence of aggravating factors. The higher rates of murder happening in the mining communities call for more stringent penalties which should act as a deterrent.

Now that we have opted for imprisonment of the accused persons, the question is: for how long should they be incarcerated? One of the juvenile justice principles that can be deduced from s 81(1)(i)(i) of the Constitution of Zimbabwe, 2013, is that when detention is

unavoidable, it should be for the shortest appropriate period. In other words, it should be for the minimum time necessary. However, the term of imprisonment that the court can impose in a particular matter is guided by the penalty provision for the offence the accused is convicted of. The court cannot impose any term of imprisonment as it pleases. The term of imprisonment cannot be outside the penalty provision of the particular offence. What this means is that while the Constitution says juveniles should be detained for the shortest time possible, in murder cases, the court has to be guided by the provisions of s 47(4) of the Criminal Law Code which provide for the penalties. As already stated elsewhere above, this provision provides for a mandatory minimum sentence of 20 years' imprisonment for a murder committed in aggravating circumstances. This means that this is the shortest appropriate period for murder cases committed in aggravating circumstances. With that, we will impose the mandatory minimum sentence of 20 years' imprisonment to the accused persons.

As already stated elsewhere above, it is interesting to note that according to the table of presumptive penalties in the sentencing guidelines - S.I. 146 of 2023, a murder that is committed in aggravating circumstances has a presumptive penalty of 20 years' imprisonment. A presumptive penalty is a fixed fine or imprisonment duration that falls between a more severe augmented penalty (which applies in aggravating situations or severe cases) and a less severe diminished penalty (which applies in mitigating situations or less severe cases). In other words, it is a middle-ground punishment. S 5 of the sentencing guidelines provides that courts must consider the guidelines when sentencing offenders. If the court deviates from the prescribed presumptive penalty, it must provide reasons for doing so. However, on the other hand, with a mandatory minimum penalty judicial officers must impose at least the minimum penalty, regardless of other factors. A mandatory minimum penalty is rigid and non-negotiable. What this means is that when an accused person commits an offence with both a mandatory minimum penalty of 20 years' imprisonment and a presumptive penalty of 20 years' imprisonment, the court must impose at least 20 years of imprisonment, as mandated by law. It does not have discretion to go below this minimum. With the presumptive penalty of 20 years' imprisonment, the court should consider individual circumstances, such as aggravating or mitigating factors. If the court believes these factors warrant a different sentence, it can deviate from the presumptive penalty going up only. It cannot deviate going down because of the mandatory minimum penalty of 20 years' imprisonment. Therefore, the court should weigh the mitigatory and aggravatory factors and decide whether to stick to the mandatory minimum penalty and the presumptive penalty. The court must provide reasons for any departure from the

presumptive penalty. In *casu* considering all the mitigatory factors enumerated in the submissions made by defence counsels and the probation officer such as provocation by the deceased in that he taunted the accused persons for being bullies and went on to slap the second accused, youthfulness, being first offenders, immaturity and lack of experience of life and lack of education, we find no reason to impose a sentence that is more than the presumptive penalty and the mandatory minimum penalty of 20 years' imprisonment.

We will not take issue with the fact that the State counsel did not furnish the victim impact statement because its absence will not change anything. The mandatory minimum sentence being 20 years' imprisonment, the statement cannot serve to reduce the accused's sentence. On the other hand, the sentence of 20 years' imprisonment being a heavy sentence in view of the accused's youthfulness, increasing this sentence on the basis of the victim impact statement can result in an unduly harsh sentence that will be excessively punitive.

In view of the foregoing, each accused is sentenced to 20 years' imprisonment."

National Prosecuting Authority, State's legal practitioners
Thoughts Deme Attorneys, first accused's legal practitioners
Tim Tanser Consultancy, second accused's legal practitioners