THE STATE
versus
KILLIAN TAGARIRA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 8, 11, 17 February, 3 March & 21 July 2022

Assessors
Mr Chakuvinga
Mr Kunaka

Criminal Trial

J Mugebe, for the State
ET Mujaya, for the accused

MUTEVEDZI J: The determination of this murder turned on nothing but the facts.

Killian Tagarira (herein after "the accused"), appeared before this court facing a charge of Murder in terms of s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The allegations against him were that on 8 November 2019, he struck Bernard Shonhai Majaji (herein after the "deceased"), with an axe several times on the head causing injuries from which the deceased met his quietus.

The accused denied the allegations. In outlining his defence, he said the deceased and his (accused's) father were brothers. On the fateful day he had earlier received a message that his grandmother, one Tabeth Benhura had passed on. He decided to go and inform the deceased about the bereavement. When he got to the deceased's homestead, he found the deceased and his children enmeshed in a tempestuous brawl. When the accused enquired from Talkmore Tagarira, a son to the deceased, Talkmore answered that the accused was the person they were actually looking for. From nowhere, he was struck with a sharp object on the leg. The strike immobilized him instantly. Whilst he was on the ground, a battery of kicks, fists and stone throws upon him followed. Whilst he lay crippled on the ground, he heard a shout from the deceased's wife Erica Nyakudya commanding her sons to "hide the weapons, they are known to and indefinable by our neighbours that they are ours!" Thereafter the accused says he

became unconscious and woke up whilst being ferried by the police to Makumbe Hospital. From the hospital, he was taken back to police custody and later to the crime scene at the deceased's homestead. At the crime scene, the accused says his recollection of what transpired is hazy because he felt dizzy and was in excruciating pain from the injuries he had sustained during the assault. He was intermittently drifting into and out of consciousness. He had lost and continued to lose a lot of blood. He denied that he had wielded or possessed an axe let alone strike the deceased with it. He did not even engage the deceased in a physical tussle because he was incapacitated.

The State' Case

Prosecution opened its case with an application to produce, as an exhibit, the autopsy report compiled by Doctor Lauleen Malagai Martinez, a pathologist who on 11 November 2019, examined the remains of the deceased to ascertain the cause of his death. With the consent of the defence, the postmortem report was accepted by the court as the first exhibit in the trial. The cause of the deceased's death was uncontentious. He died as a result of brain injury, fracture of the skull bone, subarachnoid hemorrhage and severe head trauma. The prosecutor also sought the formal admission of the following witnesses' evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (herein after the Code). The witnesses were:

i. John Jonasi - a motorist who was requested to ferry the deceased to Makumbe Hospital and;
ii. Sylvia Mapfumo - a police officer at Warren Park Police Station. She received the report of the deceased's death from Suburban Hospital

The State led *viva voce* evidence from six witnesses. Below we summarize, analyse and make findings of credibility or otherwise of the witnesses' evidence one after the other:

1. **Expensive Tagarira (Expensive)**

   The witness's evidence is crucial to the determination of this case in many respects. He is a blood brother to the accused. They share the same parents. His testimony was that on the night of the murder he was drinking beer at their local shops when the accused approached him in the early hours of the morning. It was around 0100 hours. The accused requested the witness to accompany him to Mverechena business centre where he intended to see some people. The accused also intimated that there were people at Mverechena who had attacked him. His head was heavily bandaged. The witness said he turned down the request because he was drunk and it was late. Before the witness refused to go to Mverechena, he

alleges the accused had given him ZW$15. After he turned down the request, the accused demanded his money back. The accused then later suggested that the witness accompany him to Chirodzero where he wanted to see his wife. Expensive agreed and they set off on the journey on foot. As already said it was late. The witness said the accused was drunk and was shouting obscenities on top of his voice. He continued hurling profanities, calling out the deceased's name and threatening to kill the deceased. The accused also called out the names of Raymond and Mudhebhe saying he was done with Mudhebhe. Apparently, Raymond and Mudhebhe are both the accused and the witness's uncles. They were older and younger brothers to the accused's father respectively. The witness further told the court that his efforts to restrain the accused and his warning that what the accused was doing was wrong all hit a brick wall. The accused continued walking towards the deceased's homestead. Expensive followed behind him from a distance. The accused finally got to the deceased's homestead. Expensive remained about 20 metres behind the accused. He then heard a sound which he thought was a door being broken down. He said he kept that distance away because he was scared of the accused who appeared very belligerent and made noise shouting that he wanted to kill the deceased. Quizzed by the prosecutor, the witness told the court that he neither saw anyone outside the houses at the homestead nor heard any noise except the sound of the breaking door. The accused was standing at the verandah of the house whose door sounded like it was being knocked down. The witness could see what was going on because there was moonlight. He saw the deceased falling down and accused was holding what looked like an axe. The witness said after that he panicked and left the scene. On being asked if he indeed saw the accused holding an axe, the witness vouched that what the accused was holding was an axe although he didn't know where he had gotten it because when they set off from the shops to the deceased's homestead, the accused didn't have that axe. He further stated that the accused struck the deceased with the axe three times on the head. The deceased did not make any sound. When he panicked and left the scene, he only heard the accused crying when he was some distance away.

Importantly, Expensive says when the accused arrived at the deceased's homestead he did not see Talkmore Tagarira. On the allegations that the accused was injured on the head and legs, it was the witness's testimony that the accused was already injured on the head at the time he came from Mverechena to where Expensive was imbibing. He however did not

check his legs to see if they were injured too but from his gait, there was no indication that the accused was injured on the legs.

The defence sought to discredit this witness's evidence on the basis that:

a) It came out during cross examination that the accused and the witness were not walking one behind the other but side by side on their way from the shopping centre to the deceased's homestead
b) The sketch plan illustrated that it was not possible for Expensive, from point Z, where he was standing, to have witnessed the assault on the deceased by the accused
c) The witness alleged that the accused and the deceased fought but Erica the only other witness to have seen the assault did not mention any fighting. Rather she said the accused dragged the deceased. The deceased did not resist or scream in any way until he was slain
d) The witness accepted that from the time they met at the bar and walked to the homestead, the accused was not limping meaning the injuries on his legs were inflicted after his arrival at the homestead and not before

Analysis of Expensive's Testimony

As already stated, Expensive and the accused are brothers. They were close before the murder. Their relationship was a normal siblings relationship. In fact, to demonstrate that brotherly love, when the accused was attacked by undisclosed assailants at Mverechena, he turned to his brother Expensive to accompany him to Mverechena to confront his assailants. Throughout Expensive's cross examination there was no allegation that there could have been bad blood between the two brothers. The only accusation was the clearly feeble and imagined suggestion that Expensive was aggrieved after the accused had cautioned him against joining a group of Nyau dancers. The court was left with no doubt that Expensive had no motive whatsoever to falsely incriminate his own brother in the commission of the crime. The attack by the defence on the witness's credibility appeared half-hearted and unmerited. Looking at the criticisms one by one, the following is revealed.

Even it were to be accepted that the accused and the witness were walking side by side and not one behind the other on their way to the deceased's homestead, the importance of that order is lost to the court. It does not change the fact that the witness walked with the accused as he went to attack the deceased. The witness was there when accused uttered the threats to kill the deceased. He saw the accused attacking the deceased. The witness

was clear that the accused appeared very violent. He was helpless as long as his pleas to the accused to desist from proceeding to attack the deceased went unheeded.

A sketch plan, in criminal prosecutions, just like the word implies, is a tentative, rough drawing representing the main features of a crime scene. In essence, it is an attempt to reconstruct the crime scene. It is usually done way after the crime is committed and is dependent on the accused and the witnesses' recollection of what transpired. It is evidence which is more complex than an ordinary narration of events. Even in narrative statements more often than not witnesses deny some aspects of the statement. This is because the statement is usually drawn by a police officer and the witness simply asked to sign it. Ordinary witnesses are not alive to the fact that they may be crucified to those statements in court. It therefore will be remiss of any court to throw out a witness's testimony on the basis of insignificant variances in the witness's testimony. It has to be shown that a witness's evidence is so contradictory that it is irreconcilable. See the case of *Prosecutor General of Zimbabwe* v *Shumbayarerwa and Anor* HH 405/15.

In this case, on the sketch plan produced in court, the point where Expensive was standing at the time he says he observed the accused attacking the deceased is not shown. Point **Z**, contrary to the allegation by counsel for the accused, is not described as the point where Expensive was standing. In fact, it is not illustrated on the key to the sketch plan. In his evidence under cross examination, the witness said even if it is taken that point **Z** represents where he was standing, he was not stationery but walking all the time. He reiterated that he had a clear view of the assault on the deceased. It is therefore an empty argument to say on the basis of the sketch plan, the testimony that Expensive saw the accused commit the assault on the deceased must be disregarded.

In his testimony, we also did not hear Expensive say that there was a fight between the accused and the deceased. All he said was that he saw the accused strike the deceased three times and the deceased fell down. There is no contradiction with Erica's evidence as will be shown later. She saw the accused dragging the deceased before he murdered him. We find as a fact that the criticism of Expensive's testimony on that basis is misplaced.

It is true that the witness said he did not see the accused limp from the time they walked from the shops until they reached the deceased's homestead. He also accepted that he did not see the injuries on accused's legs. But again that does not make his testimony unworthy of belief. It is not conclusive where and when the accused sustained the injuries on his legs. There is no doubt he was injured. There are two possibilities how he sustained the

injuries. He either had been engaged in a fight at Mverechena or had simply been assaulted there. In his anger and drunkenness he could have underestimated the severity of those injuries. It is also possible that he was injured in the commotion which followed the assault on the deceased. The evidence we have is that he was apprehended by the deceased's children. In the emotive scenes that followed, he could have been assaulted and got injured at that point. Expensive says he heard the accused cry way after the deceased had been struck and fallen down. That the accused cried may indicate that it was at that time that he got injured.

Having dealt with the defence's accusations against Expensive we are left with a witness whose testimony is as clear and as truthful as they come. We accept that the witness confessed that he had been drinking alcohol and was drunk. He had taken what he called three containers of opaque beer. Neither their size nor the alcohol content of each container was revealed to the court. He however maintained that he was not very drunk because he was drinking opaque beer. His narration of events also persuaded the court to accept that despite having been imbibing he remained in full control of his faculties to appreciate what was going on. His testimony puts the accused at the deceased's homestead. It reveals that the accused came to the deceased's homestead not in peace as he claimed but boiling with anger and resentment for the deceased. The accused alleged that he intended to advise the deceased about the passing on of his grandmother Tabeth Benhura. Asked by the court if there had been any bereavement in their family, the witness indicated that the only bereavement had been the loss of a cousin sometime before this murder. This witness is a brother to the accused. If their maternal grandmother had died on the afternoon preceding the murder, he would have been one of the first people to know. The accused had not mentioned the death to this witness and sought to have the court believe that he wanted to go and inform an uncle without informing his own brother about it. In fact, if indeed the grandmother had died the witness would have subsequently known about it and advised the court. He didn't. It clearly was a lie.

Lastly, the witness's testimony rubbished the accused's contention that the deceased had been attacked by his own children. When the accused and the witness arrived at deceased's homestead, the only noise that could be heard were the rantings of the accused. In accused's version there had been so much commotion from the alleged father and children fight. As corroborated by all the other witnesses in this case, that assertion could only have been in accused's imagination at best or an utter fabrication at worst.

As earlier indicated, we had no apprehension in accepting the evidence of this witness. It was very credible.

2. **Kudakwashe Shonhiwa(Kudakwashe)**

He is the deceased's youngest son. He was at home on the fateful night. His testimony was that the accused arrived at their homestead late in the night. Only his mother, the deceased and he were at the homestead. The accused announced his arrival. When the witness went out, he saw the accused dragging the deceased and striking him three times. Although it was dark, he could see the accused striking the deceased. He however did not see what weapon the accused was using. The witness said once he saw what had happened, he ran off to inform his brothers Robert and Talkmore who lived about one hundred metres from the deceased's homestead that the accused was attacking their father. He returned with his brothers who then apprehended the accused. He also saw that the accused was injured because his head was bandaged.

In cross examination, the defence contended and attacked the witness's evidence on the basis that:

a. It was not possible that throughout the attack he simply watched a man kill his father without doing anything
b. He could not see the weapon being used
c. It is not logical that the accused just stood at the crime scene after committing the offence

Analysis of Kudakwashe's evidence

The young man appeared deeply affected by his father's death although his testimony was coming years after this occurred. He appeared to have had deep respect for the accused whom he called brother before the murder. He could not understand why the accused had killed their father. As shown by the defence's major points of departure from accused's testimony there was nothing to discredit the witness on. The first point that the defence took issue with, is to the court, an armchair approach to an evolving murder scene. They accused the witness of simply watching his father being killed. What the defence appears oblivious to is that the witness says when he got out, the accused was already dragging the deceased outside the house. The accused struck the deceased three times. The witness was terrified. In fact, in our view it would have been utter stupidity for the witness to have attempted anything other than to run to seek help from his brothers. From our own observations in court, the witness Kudakwashe is a tiny, pint sized young man. In contrast,

the accused is heavily built, sturdy, muscular and way older than the witness. Barring any special physical training, the witness would have stood no chance against the accused. It is also not like the murder was a prolonged spectacle. From the testimonies of the witnesses it was quick. Even the deceased did not have any chance to call for help.

Kudakwashe was honest that he did not see the weapon used by the accused. In the darkness all he could see was that the accused struck the deceased three times. That version of events is completely normal unless one is talking of someone with extraordinary courage. Gripped with fear, coming out of sleep and confused to see a close relative crush the skull of his father the witness could be forgiven not to stand idle and investigate what weapon the accused was using.

As revealed already, the accused was injured, he had fought or had been beaten earlier, he had walked some distance from the shops to the deceased's homestead, possibly on injured legs, and he then allegedly butchered his octogenarian uncle for no apparent reason. In those circumstances, it is not for the witness to explain why the accused did not run away from the scene. As suggested above, there could be a myriad of reasons to explain that stance. All that is important to us is the evidence that when the witness and his brothers returned the accused was apprehended next to the dead body. That dispels any notions or arguments of mistaken identity which could have arisen were that not the case.

Crucially, the evidence of this witness corroborated Expensive's evidence in material aspects. He confirmed that the allegation that the deceased was attacked by his own children is fallacious because besides the deceased only he and his mother were at the homestead. Further, he made it clear that Talkmore and Robert were not at the homestead when the accused arrived. They only reacted to his call for help. That supports Expensive's version that there wasn't any noise at the homestead when he and his aggressive brother arrived. Secondly, the witness's testimony is the same as that of Expensive in relation to the number of times which the deceased was struck by the accused. Both saw accused strike the deceased three times.

3. **Erica Nyakudya (Erica)**

She is the deceased's widow. Her testimony was that the accused came to their homestead on the night in question. On arrival, the accused shouted if anyone was home. The deceased answered and enquired what the problem was for accused to visit at that ungodly hour. The accused then indicated that it was the deceased he had come for. Like a bull in a china shop, he raged and broke down the door to the deceased's bedroom. The witness was

sleeping in another room next to the deceased's bedroom. She then peeped through the window overlooking the outside toilet. She could see what was going on outside because there was moonlight. She said she then heard the noise of something breaking. She immediately realized that accused had come to kill her husband. She did not scream for fear that the accused would flee from the scene. She saw the accused strike the deceased and heard him uttering that he was not going to leave until he was sure the deceased was dead. She also did not see the weapon which was used although the sounds of the deceased being struck were unmistakable. She heard three strikes. The deceased said nothing. She suspected that he was severely injured by the first blow and was unable to speak thereafter. She later saw Robert her son, followed by Talkmore, Appronia and Kudakwashe arrive. They apprehended the accused. She said she could not get out. She was scared of the accused being the old woman she is. She confirmed that the accused was injured because his head was bandaged. She did not know where the accused got the weapon he used. Up to now she has not seen it because it was never recovered. She was completely taken aback by the accused's behavior as relationships between their families were cordial before the barbaric attack.

During cross examination her testimony was attacked on the basis of the following:

a. She did not scream seeing her husband being bludgeoned to death
b. She saw everything whilst seated on a sofa in the dining room
c. She denied squabbles existed within her own family
d. Her demeanor was not impressive

Analysis of Erica's Evidence

Erica's evidence further corroborated the number of blows which hit the deceased. She confirmed that the accused broke down the door to the deceased's bedroom, dragged him outside and attacked him. She also endorsed the earlier testimonies by Expensive and Kudakwashe that there was no noise at the homestead at the time accused invaded the place. She supported Kudakwashe's testimony that the only persons who were at the homestead that night were herself, Kudakwashe and the deceased. Talkmore and Robert only came after Kudakwashe called for their help.

The condemnation of her evidence on the ground that she did not scream when her husband was being murdered appeared divorced from the reality of what was taking place on the ground. She repeatedly said it and it was apparent, that she is an old woman. She was petrified the moment the accused arrived at the homestead. We have already said the

accused struck us as a fierce character. Our assessment is supported by the accused's own younger brother who is far more able bodied and younger than this widow but was equally if not more afraid of the accused. He could not stand to restrain the accused or shout for help for fear of his own life. The same trepidation must have gotten the better of the old woman. In addition to the fear she said that she thought if she screamed the accused would flee from the scene.

The second ground of the opprobrium against her evidence is that she alleged that she saw everything seated on a couch. From our analysis, that allegation is untrue. The evidence on record is that when the accused shouted if anyone was home, the witness woke up and sat on the sofa. Later, she peeped through the window which overlooked the outside toilet and saw the accused dragging and finally striking the deceased. The accusation is therefore contrary to the evidence on record is an unfortunate misrepresentation.

As for her demeanor we sincerely hope counsel for accused understands the meaning of that word. It simply means a witness's deportment. The outward manifestation of her attitude. Erica struck us as a bereaved widow, obviously angry at accused but more importantly perturbed about his unexplained aggression on the night in question given that their relationship was not strained in anyway before that. The accused tried in vain to portray a picture of bad blood between himself and this witness based on some competition for the right to be head of the village they stayed in. That to us was far-fetched and a typical case of clutching at straws. He could not explain why he would come to his arch enemy's homestead in the dead of the night. If we take the accused's version that he wanted to announce the death of his own grandmother, it is indicative of cordial relations between the families and serves to besmirch his claim of false incrimination.

In the end we found that Erica had no reason to lie. Her evidence was simple, truthful and credible. We believed it.

4. **Robert Tagarira (Robert)**

He is one of the deceased's sons. His narration of how he came to the crime scene is exactly as stated by Kudakwashe. There is therefore no need to repeat that part. When he arrived, he found accused standing at the verandah staring in the direction of the deceased's bedroom. The witness said he immediately jumped onto the accused and grabbed him with both hands. He had not seen the deceased then. He simply acted because Kudakashe had told him that the accused was killing their father. The accused was holding an axe which fell to the ground when he grabbed him. The witness said he was positive that it was an axe

because it fell on his feet. As he held the accused he was calling out for help from the others. The accused threatened that he had a knife and that he was going to stab the witness. Robert however said that he was unrelenting. He held the accused firmly until they both fell to the ground. Robert's sister called Appronia shouted for someone to bring a rope to tie the accused who appeared exhausted. The rope was brought. Accused was finally subdued and tied. Robert said it was at that point that he heard the deceased sighing and gasping for air. With the others, he rushed to attempt to assist the deceased. He said he later left the scene to rush the deceased to hospital. He does not know what became of the axe.

Counsel for the accused urged the court to reject Robert's evidence on the basis that:

a. His bravery of approaching a man who had just killed someone was surreal
b. He should know the whereabouts of the axe allegedly used by the deceased
c. His testimony betrays a choreographed story by the deceased's family members who formed the majority of the state witnesses.

Analysis of Robert's Evidence

His testimony was plain and precise. The allegation that he exaggerated his bravery has no basis. He had been advised that the accused was attacking their father. He said as a result adrenalin pumped through his veins and made him oblivious of the danger posed by the accused. To the court, there was nothing abnormal about that behavior. Once the accused was subdued the witness said he turned his attention to assisting his maimed father. He did not see what became of the axe which the accused was holding. In our assessment, it is again preposterous to expect a man whose father is critically injured to worry about securing a murder weapon. If Robert had been a police officer attending a crime scene then he would have been expected to act in the manner suggested by counsel for the accused. He wasn't. He was the child of the dying man who needed urgent help. His actions were normal in the circumstances. Lastly, it was not the witness's problem that the majority of witnesses were members of his family. The murder occurred at the family's homestead. It was inevitable that they would be witnesses to it. The family members who lived away from the homestead were the first to be called for help and arrived before other neighbours did. It is noteworthy that they did not live miles away. Their places were approximately a hundred metres away from the deceased's homestead.

5. **Laison Mulika**

The witness is a police officer who participated in the investigation of the murder. The material part of his testimony was that when he joined the investigations the accused was

already in custody. The accused was injured and he assisted to take him to Makumbe Hospital for treatment where he was treated and released back into police custody. He added that despite the leg injuries, the accused could walk on his own. The witness together with other police officers who included detective constable Munyoro later took accused to the crime scene for him to make indications. Whilst at the scene, the accused refused to make indications. Among many other observations which the witness made were blood stains on the ground in front of the toilet at the homestead. He also noted that the door to the deceased's bedroom had been forcibly brought down. He made that conclusion because the hinges to the door were loose, a sign that they had been forced out. The witness also indicated that they did not recover the murder weapon despite diligent search for it.

As can be gleaned from the evidence, the witness's testimony did not add anything material to the state's case.

6. **Tafadzwa Munyoro (Munyoro)**

He was the investigating officer in the case. He went to the crime scene early on the morning of the murder. There were many people at the scene to the extent that he and his colleagues could not recover the weapon used in the commission of the murder. He observed blood stains and struggle marks at the spot where the deceased had allegedly been killed. He also observed that the door to the deceased's bedroom was broken. The accused had a wound on his head which was bandaged. His legs were also injured. The witness added that in the course of investigations he drew a sketch plan of the crime scene but accused had refused to sign the drawing to confirm it as a true reconstruction of the scene. His reconstruction was aided by the testimonies and indications of Expensive Tagarira, Erica Nyakudya and a third witness whom he said was son to the deceased.

Analysis of Munyoro's evidence

What is important from this witness's evidence is that he corroborated other witnesses on some aspects of the case. To begin with, his evidence supports that of Laison Mulika that the accused was injured on the legs but could still walk on his own. The accused's argument therefore that he could not have committed the offence because of the injuries to his legs becomes baseless. The witness also supported the evidence of Erica Nyakudya, Expemnsive Tagarira and Laison Mulika that the door to the deceased's bedroom had been broken down. If it was it confirms the allegation that the accused forcibly entered the room and dragged out the deceased. The witness further confirmed the disappearance of the murder weapon from the crime scene. Clearly, there was no way of securing the crime

scene in the aftermath of the assault on the deceased. Because of the sheer numbers of the people who came to the scene and that no one took charge of the scene before the police arrived anything could have happened to that weapon.

With the evidence of Munyoro, the state closed its case.

The Accused's Defence

The accused largely maintained the averments he had made in his defence outline which he incorporated into his evidence. He said that when he approached the deceased's homestead after he had decided to go to inform him of the passing on of his grandmother, he heard people shouting at each other. He stopped to make out what the commotion was about. He picked out the deceased's voice. The deceased was swearing loudly that "you cannot be a village head in my area as you are from another village and that it cannot happen whilst I am still alive." The accused said those words were directed at the deceased's wife Erica. He continued his testimony and told the court that he could also hear the voices of the deceased's sons who supported their mother. He shouted to herald his arrival. One of the deceased's sons called Talkmore then answered back and asked who it was. The accused answered back that it was him Killian. It was then that Talkmore asked him what he wanted at that time of the night and that he was actually the person they wanted. The accused said he was suddenly attacked by being hit on both the head and the legs. He couldn't see what weapon was being used. What he clearly remembers is seeing Talkmore striking him. He fell down. He also remembers that Robert, another of the deceased's sons came and bandaged his head which was bleeding profusely. He started feeling weak, possibly as a result of the bleeding. Before he passed out he says he heard Erica instruct someone to hide the weapons which had been used to 'injure people.' She further instructed that after hiding the weapons, one of her sons had to go to the police to report that he (accused) had attacked the deceased. Thereafter, he lost consciousness and does not remember anything else. He remembered waking up surrounded by police officers. They took him to hospital where he was treated. They literally carried him into the vehicle because his legs were immobile. The police returned to pick him up as they intended to take him to the deceased's homestead. They advised him that the deceased had passed on. He said when they got to the crime scene, he couldn't comprehend what was going on due to the amount of blood he had lost. The police took him back to the police station where he was detained. He complained that he slept without receiving any treatment and went to court the next day.

Quizzed by his counsel why his own brother Expensive would conspire to falsely incriminate him for committing this offence, the accused alleged it was because he had previously cautioned Expensive against joining a group of Nyau dancers.

In summary, those were the critical aspects of the accused's evidence. After a full analysis of the testimony, we agreed that the story was surreal. There were several aspects of his chronology of events which did not add up.

To start with, when he was asked about the death of Tabeth Benhura, his grandmother, he says only Expensive and Erica would have known her. Both those witnesses denied knowledge of that person. We have already said it was illogical for the accused to have sought to go and advise the deceased of Tabeth's death given that his evidence pointed to a deep seated grudge between himself and the generality of deceased's Family. It was not necessary because the chances were that the deceased and his family would not commiserate with him were high. From his own testimony, they did not know Tabeth.

The coincidence that the accused chose to go and deliver a bereavement message at 0200 hours and then found Erica and her sons in the process of murdering the deceased is so remarkable that it is unbelievable. As if that was not enough, the accused alleges that the murder was over a simple quarrel of who was supposed to be the head of their village. Surely, it was not the kind of discussion that a family would ordinarily choose to have around midnight. The accused's version of events at the crime scene betrays his dishonesty. He alleges that he heard the quarrel between the deceased and his family before he got to where they actually were. From that distance, he could tell that the verbal threats by the deceased were aimed at Erica Nyakudya. That in our view was impossible. The accused did not know who else was at the scene for him to conclude that the words were targeted at Erica. His testimony appears tailored to suit his story that Erica wanted to be village head. Once that is accepted, it would buttress his allegation of the animosity that Erica haboured towards him. But those slips in the testimony betray the untruthfulness of it.

The accused further alleged that he was attacked and injured at the scene of crime. That evidence flies in the face of several witnesses. He alleged that Robert bandaged his head which was bleeding heavily at the scene but the court accepted as credible the evidence of Expensive who testified that from the time they met at Mungate shopping centre, the accused's head was injured and bandaged. Both Kudakwashe and Erica also said when accused arrived at their homestead his head was bandaged. Talkmore supported that same evidence when he said when he arrived to apprehend him, the accused's head was bandaged. To allege that it was Robert

who bandaged his head presupposes that Robert somehow knew that the accused was going to come to the deceased's homestead that night. Robert knew that he together with his brothers were going to attack the accused so badly that they would need to bandage him. He then carried a bandage with him for that eventuality. That chain of events is clearly make–believe. It is self-deception by the accused.

It was because of these lies, half-truths and inconsistencies in his evidence that we arrived at the decision to reject the accused's testimony as palpably false.

Dr. Blessing Dhoropa

The accused called Doctor Blessing Dhoropa to testify on his behalf. The doctor treated the accused when he was detained at Harare Remand prison. His testimony therefore simply served to confirm the accused's injuries. It assisted the court in a little way if any. We dealt with the issue of accused's injuries basing on the testimonies of those who were with him before the commission of this offence. They said he was perfectly walking on his own. He attacked the deceased in full view of three witnesses. He cannot therefore plead incapacitation. The court concluded that the possibility was high that the accused could have been injured in the aftermath of the assault on the deceased possibly at the time he was apprehended. Robert described the struggle that went on between him and the accused until they both fell to the ground. It is equally possible that he was injured before the attack on the deceased but the injuries were then aggravated after he assaulted the deceased. Even if he had injuries to his legs before he arrived at deceased's homestead, any such injuries apparently did not prevent him from attacking the deceased. We make these conclusions because the law allows a court to draw inferences even from so-called direct evidence. In the case of *Prosecutor General of Zimbabwe* v *Shumbayarerwa & Anor* HH 405-15 at p 5 the High Court expressed the view that:

> "The point of the illustration is only to draw one's attention to the fact that even given what appears to be a straightforward case of direct evidence, one must nevertheless draw inferences. The point ultimately is that all evidence requires a court in considering its verdict to draw inferences from the evidence. Zeffertt and Paizes explain that: "All evidence requires the trier of fact to engage in inferential reasoning." (The South African Law of Evidence, p 99). Some evidence requires fewer inferences, this would be traditionally so-called direct evidence whereas other evidence, traditionally circumstantial evidence, will require more inferences."

The state did not deny that the accused had injuries but contested the time the injuries were sustained. The doctor unfortunately could not also tell on which side of the divide the accused got injured. It is for these reasons that it is an empty call to ask the court to exonerate the accused on the basis of the doctor's testimony.

The Law on Murder

The crime of murder is defined in s 47(1) of the Criminal Law Code as:

> "**47 Murder**
> (1) Any person who causes the death of another person
> (*a*) intending to kill the other person; or
> (*b*) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder."

In the case of *Tafadzwa Watson Mapfoche* v *The State* SC 84/21, MAKARAU JA (as she then was) made a finding that significantly shifted the understanding of an accused's intention in murder cases. Her LADYSHIP held that because of the codification of the Zimbabwean criminal law, the common law position where actual and constructive intention to kill were distinguished no longer applied. Put differently, she emphasised that it is no longer necessary, as was the case under the common law, to find an accused guilty of murder with either actual intent or with constructive intent. A court therefore need not make a specific finding whether an accused has been found guilty of murder under s 47 (1) (a) or (b) because murder is defined therein as causing the death of another with either of the two intentions. The common law distinction of the intentions was material for purposes of sentencing an accused. Because the sentences have also been codified, the distinction becomes even more blurred.

The *actus reas* of the offence is less problematic particularly in cases where the accused assaulted the deceased. It would be less straightforward in instances where without directly assaulting the deceased an accused engages in some conduct whilst realising the risk or possibility that death might occur which leads to deceased's death.

Application of the Law to the Facts

In his closing submissions Mr *Mujaya* for the accused made the argument that the *mens rea* for murder had not been proved. In other words, he argued that the state had not proved that the accused had the requisite intention to commit murder. He based that contention on the fact that the murder weapon was not found. The argument unfortunately cannot stick because of many reasons.

1. Throughout their journey from Mungate shopping centre to the deceased's homestead, the accused intimated, in fact made it known to anyone who cared to have heard, that he wanted to kill the deceased. He specifically addressed his own brother Expensive that he was going to kill the deceased. Despite Expensive's protestations the accused persisted and ultimately executed his plan. A person who walks a fairly long journey to execute a plan to kill another

and openly brags of his intention can never be said to lack the intention to kill. In addition at the deceased's homestead Erica said whilst dragging and attacking the deceased, the accused was shouting that he was not going to leave until the deceased was dead. That buttresses my conviction that the accused had long intended to murder the deceased before the assault even begun.

(i) The violence with which he entered the deceased's bedroom and dragged him out supports the allegation that he arrived at the deceased's homestead prepared to kill the old man.

(ii) Expensive saw the accused attacking the deceased with an axe three times on the head. Although the axe was never found, his observation is given credence by the pathologist's conclusions in the autopsy that the cause of death was brain injury, fracture of skull bone and severe head trauma. Those observations are synonymous with an object having been used to attack the deceased on the head. Kudakwashe said he observed the accused striking the deceased three times on the head with an object which he could not identify from where he was standing. Erica equally says she heard the sound of three blows landing on the deceased. In such circumstances, the kind of weapon that the accused may have used ceases to matter. That he used an object to attack a vulnerable part of the deceased's body after openly expressing his intention to murder him leaves me with no doubt that the accused intended nothing other than to kill the deceased.

We have already dealt with the issue of the disappearance of the weapon and concluded that because the scene was not secured immediately after the assault, anything could have happened to the weapon used in the commission of the offence. But as demonstrated above, it need not have been there for the accused's intention to be proved. In my view, this is one case in which the intention to kill was apparent throughout. It cannot detain the court.

Disposition

The position of the law in relation to the standard of proof required in criminal trials is so settled that no authority is required for it. The State has the onus to prove the guilt of an accused beyond reasonable doubt. The proof must relate to each of the essential elements of the offence preferred by prosecution. The case against an accused and the evidence led against him must be taken holistically by the court in its evaluation of the guilt or innocence of the accused. The court must be satisfied that the accused either desired to bring about the death of the victim and he proceeded to kill or that he reasonably foresaw that as a result of his conduct death would

result but nonetheless persisted with the conduct. See *Tafadzwa Mapfoche* v *The State* (Supra). In *casu*, we have already found as a fact that the accused set out to kill the deceased. He proceeded to strike him with some object possibly an axe three times on the head in circumstances where he had no right to do so. We are therefore satisfied that both the mental and physical elements of the crime of murder were proven by prosecution.

Against the above background, it is our finding that in the totality of the evidence before us, the State managed to prove its case against the accused beyond reasonable doubt. He is accordingly found guilty of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act.

Reasons for Sentence

In mitigation, counsel for the accused submitted that the accused is 49 years old, has a wife and 5 children among other ordinary issues. He further added that the accused is severely traumatised by the commission of this offence as his community and family now shun him. Counsel then urged the court to spare the accused from imprisonment and referred this court to several precedents which caution the courts against resorting to imprisonment. Amongst those cases is the case of *S* v *Rosemary Manyevere* HB 38-03 which held that the proper aim of criminal procedure is to reform the offender so that he may conform to the social order.

The above submissions are correct when applied in appropriate contexts. What the accused and his counsel appear either unaware of or deliberately chose to be unconcerned with is that unlike during the common law times, sentences for murder just like the crime itself are now codified. See *Tafadzwa Mapfoche* v *The State* SC 84/21.

The first step in the assessment of sentence in murder cases is for a court to make a finding of whether or not the murder was committed in aggravating circumstances. In equal measure, legal practitioners must be aware that it is imperative for them to address the court in relation to that aspect before resorting to the generalised submissions in mitigation. Only if the court does not find that the murder was in aggravating circumstances will the general aspects in mitigation work in favour of the accused.

Section 47(4) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] 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.

From the above provision, the court's hands are to a very large extent tied in relation to the sentence it can pass after a conviction for murder where it finds that the killing was committed in aggravating circumstances. In that case, the court only has three options namely to pass a sentence of death or imprisonment for life or some determinate prison term but which is not less than 20 years. Given the severity of even the minimum sentence impossible on an offender under those circumstances, there cannot be any debate that the theory of retribution has supplanted the rest of the justifications for punishment in murder cases. This court is of the view that it is only logical to draw that conclusion. The death sentence does not serve any other purpose in criminal law other than retribution. Statistics of people convicted of murder have thrown into serious doubt, the argument that the fear of death deters would be murderers from committing the offence. A person who spends his/her entire life in prison spends their whole life in captivity. You cannot reform an individual under such conditions. In any case, the purpose of reformation is not to prepare the accused for after life but for reintegration into society after serving time in a penitentiary. That is not possible where the accused is expected to die in prison. Twenty years imprisonment is in some jurisdictions equated to the condemnation of spending one's natural life in jail. Against that background, the argument that the accused in this case can be reformed is illusory. There cannot be any other justification except retribution for the imposition of the sentences prescribed in s 47 (4) (a).

What aggravates this crime is that this was a callous murder of a defenceless octogenarian without any provocation. The 87 year old was awoken from his sleep at the ungodly hour of 0200. The accused broke down a door to the deceased's bedroom and dragged him out. He mercilessly bludgeoned him to death. The savagery and barbarism of the attack was unmitigated. The accused gave the deceased no opportunity for survival as illustrated by the fact that the deceased failed to even cry out for help. Although the examination was in death, the pathologist said the deceased was old and emaciated. He stood no chance with the raging bull that the accused appeared to have been. The old man certainly died a painful death and a very frightened man.

The accused was determined to kill the deceased. He did not take heed of his own brother's pleas to desist from his aggression towards the deceased. We are not sure who had assaulted the accused earlier on the day he murdered the deceased. It however appears the accused vented his bottled anger on the deceased.

The court is required to consider the factors enumerated in s 47 (2) and (3) of the Code, in the course of assessing an appropriate sentence following a conviction of murder. Firstly it

is enjoined to take as an aggravating circumstance that the murder was committed in the course of or in connection with or as a result of the commission of an unlawful entry into a dwelling house. The evidence before us is that the accused arrived at the deceased's homestead, broke down the door to the deceased's bedroom and unlawfully entered the dwelling house before pulling out the deceased. That behaviour brought him squarely into the ambit of the aggravating circumstance of unlawful entry into a dwelling house.

There is no question that this murder was premeditated as envisaged in s 47 (3) (a). From the time the accused met his brother Expensive and set off to the deceased's homestead, the evidence that is there shows that he had planned the murder beforehand. Throughout that journey he shouted obscenities aimed at the deceased, accused him of all kinds of evil and threatened that he was going to kill him. At the time he was assaulting the deceased he continued uttering profanities and that he was not going to leave until his victim was dead. He ultimately accomplished his objective.

The deceased was 87 years old. That age came out in the evidence before us. In his post-mortem report the doctor also confirmed that the deceased was 87 years old. It is equally an aggravating circumstance where the victim of a murder is of or above the age of 70 years.

There is therefore in this case, the sad reality of a combination of aggravating circumstances under which the murder was perpetrated. That increases the accused's moral blameworthiness to levels that barely miss the tipping point for us to impose the ultimate sentence. Needless to say, in these circumstances, our discretion relating to sentence is constricted by s 47(4)(a) which prescribes that a person convicted of murder in aggravating circumstances such as in this case shall be sentence to death, or to imprisonment for life or to imprisonment for any determinate period not less than 20 years.

Accordingly the accused is sentenced to **30 years imprisonment.**

National Prosecuting Authority, State's legal practitioners
Pundu and Company, accused's legal practitioners