THE STATE
versus
MAXWELL GOVERNOR
and
EDMORE GOVERNOR

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 5, 8-9 February, 4-5, 7 April, 23-24, 26-27 October,
14 November 2006 and 5 March 2007

CRIMINAL TRIAL

Assessors: 1) Mr *Chidyausiku*
2) Mr *Musengezi*

Mr *Kumire*, for the State
Mr *Makoni*, for the first accused
Mr *Matizanadzo*, for the second accused

BHUNU J: Both accused are charged with murder it being alleged by the state that on the 10th of January 2005 and at number one Latham road, Avondale both accused persons one or more of them unlawfully and with intent to kill stabbed Lisa Jane Veron on the chest with a sharp instrument thereby inflicting injuries from which the said Lisa Veron died.

The bulk of the issues in this case are not in dispute. It is common cause that the late Lisa Veron and her husband one Martin Brunner were foreign nationals of Swiss extraction working for non governmental organizations in this country. The deceased was employed by the World Health Organisation, an organ of the United Nations whereas her husband was employed by Doctors without Borders working in Tsholotsho but based in Harare.

The couple employed the first accused Maxwell Governor as a domestic worker whereas the second accused Edmore Governor is his brother who was a frequent visitor at number one Latham road Avondale. The first accused resided in the domestic quarters at the premises.

The deceased's husband used to be away from home for lengthy periods of time in Tsholotsho on business but used to meet the deceased in Bulawayo from time to time. He had left home in November 2004 but had last seen the deceased on the 1st of January 2005 in Bulawayo. The two used to communicate daily by cell phone. They had last communicated on the fateful 10th January 2005 at around

5pm.Shortly thereafter the deceased drove to the gymnasium in Highlands in a Daihatsu Texious registration number 240-TCE-197.

On the same day at around 20:30 hours Charles Chinyama a prominent lawyer and resident of Mount Pleasant was driving along The Chase towards Avonlea in the company of his sister. As they approached the Old Mutual Centre they observed the deceased's car overturned in a ditch with the deceased trapped inside, still strapped to the front passenger seat by seat belts. They were shortly thereafter joined by fellow motorists who assisted in an attempt to rescue the deceased to no avail as she was already dead. A search of her handbag which was still in the motor vehicle yielded no valuables save for a number of various business cards. There was no cash, jewellery or cell phone.

The fire brigade and ambulance crew with the aid of search lights established that the deceased was not breathing and had no pulse. They however observed some wounds on the chest and bruises on the neck. The deceased had blood on the chest, back and face. No further injuries were caused when the body was conveyed to the mortuary.

In the early hours of the following day the 11th of January 2005 the first accused telephoned the deceased's husband on his cell phone between 4 and 5 am advising him that something terrible had happened. His wife had not returned from shopping the previous day. The first accused then implored him to come back home urgently. When he enquired as to what had happened the first accused did not answer. Martin Brunner frantically tried to contact his wife by cell phone in vain as the phone had been switched off.

At around 7:45am he managed to contact the deceased's workmates who broke the news of his wife's death. Half an hour later he was phoned by the United Nations Security officer who confirmed the deceased's death.

The deceased's husband immediately proceeded to Harare arriving at around 5pm. He immediately proceeded to the mortuary. Upon examining the deceased's body he observed strange wounds and bruises on the sides of the neck which could not possibly have been sustained in a road accident. He observed cuts on the chest which were 2 to 3 cm in diameter. He further observed that all her jewellery was missing that is to say her wedding ring, diamonds with an inscription inside and a second ring. Her silver neck lace which she was probably wearing was also missing.

When he examined the motor vehicle at the vehicle inspection depot he observed that it had sustained minor damages. The airbag had not been activated

indicating that the impact was not severe. Meanwhile as the deceased's husband was busy examining his wife's remains and the scene of the accident and the damaged motor vehicle another drama related to his wife's death was unfolding at Chikonyora farm in Guruve where the accuseds' father William Governor resides and works.

It was William Governor's uncontroverted evidence that on the 11th of January 2005 he was rudely awakened by a knock at the door around 7am. He was aware of the time because there was a working clock in the house.

When he opened the door he was surprised to see the second accused clutching an expensive grey cell phone and wearing an expensive watch. He then produced a camera and commenced to take photographs of his father and the family. When the witness enquired where he had obtained the items from, the second accused insisted that it was his. It was later established that the items had been stolen from the deceased and her husband.

Both accused admitted stealing the items from the Brunner's but denied that it was stolen in the course of the alleged robbery and murder of the deceased.

Martin Brunner the deceased's husband went to his residence on the 15th of January 2005, he looked for the camera which was normally kept in the house but could not find it because it had been stolen by the accused.

He eventually left for Switzerland without having located the camera. Before leaving for the funeral in Switzerland he left the first accused in charge of the home. He instructed him to look after the two dogs and not to touch any of his wife's property as he wanted to come and have a closer look at the property when he returned.

He came back on the 16th of March 2005 to find that contrary to his instructions his wife's property had been tampered with. Her handbags were missing. His computer printer, some clothes and a hi-fi set were missing from the house.

The first accused was now living with a woman and a baby in the main house. Someone else was now living in the staff quarters. In short the first accused had plundered and invaded the whole place with brazen impunity. A report to the police led to his arrest and recovery of most of the stolen property including the printer, camera and the deceased's cell phone which he had already sold.

The deceased's husband positively identified her cell phone by its unique ringing tone which he had installed in that particular cell phone.

It is also a matter of common cause that the stolen camera had a device which recorded the date the photographs where taken. When the camera was recovered and the film processed it produced Exhibit "11B" which is a photograph of the second accused's family and Martin Brunner's stolen watch. The photograph further shows that it was taken on the 11th of January 2005. Exhibit 11D is another photograph which depicts one of the accused's family members using the deceased's cell phone while wearing her husband's wrist watch.

The first accuseds story is that the deceased arrived home around 6:15pm that fateful day. Shortly thereafter she left leaving behind her satchel bag she had been using during the day. He later searched and stole the cell phone which he gave to his young brother the following morning together with the camera and Martin Brunner's wrist watch

It is highly unlikely and not in the least probable that the deceased could have gone out at night without her cell phone with the full knowledge that she had to be in constant contact with her husband in Tsholotsho.

It is also highly improbable that she could have kept her cell phone in the satchel bag together with her clothes and not in the hand bag which was found at the scene of the murder.

It is common cause that the deceased was murdered between 6pm and 8.30pm. Her husband had telephoned her around 5pm and subsequent telephone calls were not answered as the cell phone had been switched off and the deceased was already dead.

It is therefore logical to conclude that the deceased had her cell phone with her when she met her death. We therefore find as a fact proved beyond question that the deceased had her cell phone with her when she met her death.

Both accused admitted having stolen and sold the deceased's cell phone among other things. The second accused was seen in possession of the deceased's cell phone by his own father shortly after the deceased's murder. The deceased's body was discovered around 8.30pm and the second accused was found with the cell phone a hundred kilometers away in Guruve around seven am the following morning hardly ten hours after the deceased's murder.

During the trial both accused initially admitted their father's evidence to the effect that the second accused arrived at Chikonyora farm in Guruve around 7am on the 11th of January 2005.

They later recanted and sought to deny that he had arrived in Guruve at 7 am as he had only left Harare around 9am that day. Counsel for the first accused then applied for the recalling of William Governor in terms of section 232 of the *Criminal Procedure and Evidence Act,* [*Chapter 9:07*]. The Section reads:

"The Court:-

(a) May at any stage subpoena any person as a witness though not subpoenaed as a witness or may recall and examine any person already examined.

(b) Shall subpoena and examine or recall any person already re-examined, if his evidence appears to it essential to the just decision of the case."*(my emphasis)*

I dismissed the application pointing out that the decision to recall a witness in terms of that Section is vested in the Court. There is no provision for an application by either party to recall a witness. In any case the second accused was yet to give evidence and enlighten the Court as to when exactly he arrived at the farm in Guruve.

Having perused the evidence we were of the unanimous view that it was not necessary to resolve that factual dispute because both accused where still admitting that the second accused arrived at Chikonyora farm in Guruve early that morning. A difference of two or so hours would not make any material difference.

By his own admission the first accused confessed having come into possession of the deceased's cell phone at or about the time she was murdered.

We come to that unanimous decision because the first accused came into possession of the cell phone between 6.30pm and 8.30pm on the 10th of January 2005. This is the time during which the deceased was murdered. That being the case we find as a fact proved beyond question that the first accused came into possession of the deceased's cell phone at or about the time she was murdered.

It is therefore the deceased's cell phone which provides a direct link between the two accused and the deceased's murder. As we have already concluded that the deceased had her cell phone with her at the time of her death, the compelling irresistible inference to be drawn is that whoever stole the deceased's cell phone is the murderer. By his own admission the first accused stole the deceased's cell phone at or about the time she was murdered.

His conduct in immediately embarking on a plunder of the deceased and her husbands property aided and abetted by the second accused betrays knowledge

that she had died. The accused persons were unlikely to behave in that manner had they known that she was coming back later that night. The first accuseds conduct in panicking and imploring the deceased's husband to come back home as something terrible had happened to his wife betrays knowledge of the deceased's death before he had been informed of her death.

According to the post mortem report the deceased was of slight built. She was 168 centimeters tall and weighing only 70kgs. She is unlikely to have posed any meaningful resistance to the robbery. It appears that the only reason she was killed is that she knew her assailants. The killing was therefore a brutal cover up meant to silence her forever. It is common cause that the deceased knew the first accused very well as her domestic worker. He could not therefore, rob her and hope to escape recognition and hence the motive for the murder was a cover up of the robbery and theft.

It does not surprise us that the first accused continued to work and reside at the deceased's residence. This is because they had thrown what they considered a perfect ruse by disposing of the body in circumstances where it appeared she had died in a car accident in the course of a robbery. An anonymous letter was also written suggesting that she had been murdered by colleagues at work. The police then went on a wild goose chase arresting the deceased's former colleagues without suspecting the two accused persons at all.

The first accused also suggested the deceased could have been killed by government or ruling party agents for dabbling in opposition politics. All this was denied by the deceased's husband.

It therefore does not surprise us that both accused were not constrained to flee or go into hiding following the deceased's murder. The circumstances were such that they were confident of evading detection, fleeing could only have helped to draw suspicion to themselves.

Following their arrest both accused persons made warned and cautioned statements to the police. They also made indications during the course of investigations.

The first accused made his warned and cautioned statement on the 21st of March 2005 whereas the second accused made his on the 20th of March 2005. The year was however recorded in error as 2004. Nothing much turns on that patent error.

Both accused subsequently appeared before a magistrate for confirmation of their respective warned and cautioned statements. Accused 1 objected to the confirmation of his warned and cautioned statement arguing that it was not made freely and voluntarily.

He pointed out that to establish his lack of free volition he had deliberately falsified and misrepresented signature on his warned and cautioned statement. As a result the presiding magistrate quite correctly did not confirm the warned and cautioned statement as it had been challenged.

Unlike the first accused the second accused confessed before the trial magistrate that he had no complaints against the police and that he made his warned and cautioned statement freely and voluntarily without having been unduly influenced thereto. The magistrate then dully confirmed the second accused's warned and cautioned statement according to law. That being the case, the statement became admissible in any court upon its mere production by the prosecutor in terms of the *Criminal Procedure and Evidence Act* [*Chapter 9:09*].

As already stated, apart from the warned and cautioned statements both accused made indications to the police on the 21st of March 2005. Both accused persons however challenged the admissibility of their respective indications to the police which were captured on video tapes thereby necessitating a trial within a trial.

At the end of the trial within a trial I held that the first accused's warned and cautioned statement of the 21st of March 2005 was inadmissible. In my judgment of the 17th of November 2006, I gave detailed, good and sufficient reasons for my verdict in this respect. There is no need to repeat them, but just to recap, I shall briefly summaries the reasons. The video tapes were played in open court. Both accused persons were observed volunteering and freely electing to go and make the indications. At no time did the Court observe force, duress or undue influence being applied on either accused person. The first accused unlike in his warned and cautioned statement had signed his genuine signature thereby authenticating the indications. The signature is identical to the one he signed when he was initially arrested for theft, a charge which he still admits.

The first accused was unable to explain why he signed his genuine signature on the indications transcript if the indications were not genuine.

Although the two accused persons made their indications separately, their indications tallied and fitted together like a jig saw puzzle. Although the first accused was in handcuffs during the course of the indications the Court accepted the police's

explanation that this was because the first accused had previously displayed suicidal tendencies when being taken for indications. Both accused said that their indications were identical and no improper conduct was displayed on the screen because the police had forced them to rehearse the indications the pervious day. Apart from their mere say so there was however no evidence of any rehearsals having taken place the previous day. It is for these reasons that the Court held that the indications made by both accuseds to the police were admissible.

The police witnesses were found to be honest and credible witnesses worthy of belief.

The second accused's confirmed warned and cautioned statement provides an insight into the circumstances surrounding the deceased's death. This is what he had to say in his own words:

> *"On the 10th of January 2005 I left Chitungwiza at around 5pm heading for Avondale, where I arrived at around 6pm. I found Maxwell Governor alone and we exchanged greetings amicably. Brother Maxwell indicated that there was an issue he wanted us to discuss. He went on to say he had stolen some money from his employer. I enquired from him as to how much it was, to which he said three million dollars. He went on to say his employer had made enquiries about the money on the 9th day (of) January 2005. He also said she said the issue was to (be) put to rest between ourselves the following day.*
>
> *His employer arrived on the 10th at 6pm. My brother was then called to his employer's house. I remained alone in his lodgings, the servant's quarters. He went to the employer's house where they started quarrelling over the money in question. I then observed brother Maxwell coming to where I was at his lodgings, servants quarters, he called me saying he wanted me to go and see something. I enquired as to whether all was well.*
>
> *I went with him and observed his employer lying (down). I asked as to what had happened to her. Maxwell said he had only assaulted her with a fist. I asked further whether it was only the blow from the fist that had killed her, to which he replied in the affirmative. I asked him what he was going to do thereafter. Brother Maxwell pause (d) speaking. Maxwell then said he had come up with an idea. He asked me to help take the already dead white lady onto the car to which I refused. I later assisted him to lift the deceased from the ground and he carried her to the car on his own and placed her on the left seat.*
>
> *Maxwell took a knife and repeatedly stabbed the now deceased as she was in the car. I then got aboard and sat at the back of the car. Maxwell then drove the car.*
>
> *I asked him as to where we were heading to, to which he said he was to leave her by the road side. I asked him as to which road he was making reference to. He said any road where the volume of traffic was low.*

Maxwell, the slain white lady and I got onto the blue Daihatsu Taxious vehicle bearing registration number 240-TCE-197 we left the place at 8pm. We traveled along a road that lead(s) into Mazoe Road. When we got to Nandos we turned left, we got onto The Chase Road. As we were traveling Maxwell my brother looked back to the direction we were coming from, that is when the car overturned.

I was the first to come out of the car leaving Maxwell behind. I started running away taking the direction we had come from. I then encountered Maxwell in Lomagundi Road near St Anne's Hospital. We got home in each others company. When we got home I asked Maxwell to give me some money for transport to Chitungwiza, to which he refused saying that we would put up together at the white lady's residence.

Maxwell told me that he had some money and had searched the white lady's bag. I asked him as to how much he had found to which he said $120 000.00.

I asked him to give me some money so that I would travel to Guruve since he had indicated that he had much money.

He then gave me $80 000.00 so that I would go and look for my identification registration certificate. Maxwell then gave me a cell phone, watch and camera so that I would show off at my friends in our rural home. (sic)
When I got to our rural home I would take photographs of my friends, my father and my uncles. When I returned on the 12th of January 2005, I had to return the camera, watch and the cell phone to Maxwell before living for Chitungwiza where I resided at my aunt's residence Number 2906 Unit C Seke, Chitungwiza.

Maxwell phoned Taurai advising him that I procure a person (sic) who would buy a computer printer. I then went to collect the computer printer from the house of the white lady Maxwell had killed. When I got there Maxwell gave me the computer printer and he indicated that he wanted one million dollars for it. The buyer we procured (sic) tested it but it failed to function. Maxwell then phoned making enquires as to whether the printer had been bought. I indicated to him that it was defective, I also indicated to him that I had taken it to a repairer. I also told him that the repairer had advised that considering its defectiveness the computer printer would sell for $200 000.00.

I then took the whole amount of money to Maxwell. When I had taken the money to him Maxwell said I stay with him at the white lady's residence. I stayed with Maxwell at his residence until the husband of the white lady Maxwell had killed arrived at his residence.

When a cell phone was sold to Lewis Tsoka I was no longer present. I do not know where my brother Maxwell exchanged the watch for other items but I was only given two t-shirts, a blue and red long sleeved and another short sleeved red and white colours.

Signed

Edmore Governor"

The second accused then made indications to the police which tallied with his warned and cautioned statement in every material respect.

The first accused made similar almost identical indications which also tallied with the second accuseds indications in every material respect. Although the two made their indications separately and independent of each other.

The second accuseds confession that he ran away from the scene of the crime is amply corroborated by Tawanda December an independent witness whose evidence was to the effect that he saw a man running away from the scene in the same direction which the second accused says he took.

Dr Gideon Masokovere conducted a post mortem in which he examined the deceased's remains and compiled a report. He recorded that he observed blood marks on the deceased's neck, chest and back. There were multiple cuts and bruises on the neck and left chest wall. Light bruises in the right supracribital area. He further observed a penetration wound on the right breast through the pectorial muscle, intercostal muscle, ribs 6 and 7 through into the right lung. The wound had a depth of 15 centimeters.

There was another penetration wound on the sternal area through the pericardium into the right ventricle. About two liters of blood were observed in the chest wall. On the basis of the above observations Dr Masokovere concluded that the cause of death was due to haemopneumothorax which is an accumulation of air and blood suppressing breath and the 15 centimeter penetrating wound into the right ventricle and into the left lung.

In his opinion the injuries had been inflicted by a sharp and blunt object. The nature of the injuries observed by the Doctor generally fit the second accuseds description of the attack which he says was perpetrated on the deceased and are also consistent with the first accuseds indications.

The mortal wound could however, not have been inflicted by the knife produced in court as its blade would be too short.

The doctor explained that the deep penetration wound could have been caused by a home made screwdriver with a 40 centimeter shaft which was recovered from the first accuseds staff quarters or any other similar object. The bruises on the supracribital area could have been caused by a fist. The homemade screwdriver could however not be positively identified as the murder weapon

because what had appeared to the doctor to be blood stains on the screwdriver turned out to be something else other than blood upon forensic examination.

While we are unable to make a factual finding that the homemade screwdriver is the murder weapon, we come to the unanimous conclusion that the mortal wound was inflicted by a similar object.

Doctor Masokovere is a qualified doctor who has many years experience working in the police force as a pathologist. He gave his evidence well. He struck this court as an honest and credible witness. Although he was employed in the police force when examining the deceased's remains, he did so in his capacity as a professional pathologist. The mere fact that what he suspected to be blood on the suspected murder weapon turned out to be something else upon forensic examination does not in our view discredit the credibility of his evidence.

His observations regarding external injuries sustained by the deceased were consistent with observations made by the deceased's husband Martin Brunner and other State witnesses. His observations were also consistent with both accused's version of the attack in the admitted confession and indications to the police.

We are unable to accept that his encounter with the accused when carrying out other unrelated duties as a police officer could have influenced his findings as a professional pathologist. For that reason we accept his evidence in its entirety.

While the second accused may have been mistaken as to the exact nature and identity of the murder weapon he at least confirms the doctor's findings to the effect that sharp and blunt objects were used to inflict the multiple injuries sustained by the deceased. Considering that the events were taking place around sunset under horrific circumstances the second accused could easily have mistaken the murder weapon for a knife. Most probably the first accused could have used both a knife and an object resembling the home made screwdriver.

The first accused proffered a rather obscene and highly improbable defence to the effect that he could not possibly have murdered the deceased as she had now fallen in love with him and they were having an adulterous affair. It appears this was mainly meant to harass and confuse the deceased's husband. We however feel strongly that whether or not the first accused and the deceased were in love is an irrelevant consideration. We therefore do not feel constrained to resolve that issue.

The first accused further denied that he drove the deceased's motor vehicle to dispose of her body because he has no drivers licence and does not know how to drive.

We are of the firm view that most adults will have an idea of how a motor vehicle is driven as they would undoubtedly have seen other drivers driving. The deceased's husband only suspected that the deceased could have taught the first accused how to drive but had no concrete evidence to back up his suspicion. It was however the first accuseds testimony that on the 8th of January 2005 that is to say hardly two days before the murder he had gone to Jaggers and Spar Msasa with the deceased driving. He must therefore have observed the deceased driving. We are therefore convinced that the first accused must have had an idea as to how a motor vehicle is driven. He however lacked the competence and skill to drive a motor vehicle and hence the accident.

As already stated the first accused successfully challenged the admissibility of his warned and cautioned statement recorded on the 21st of March 2005 whereas the second accused had his confirmed warned and cautioned statement admitted upon its mere production by the prosecutor.

Relying on the dicta in *State v Sibanda 1992 (2) ZLR 438 (S)* counsel for the first accused has now submitted that the second accuseds confession and indications are inadmissible against his client. It is true that generally an extra curial statement is admissible only against its maker, but the rule is subject to two exceptions. The two exceptions were amply articulated by GUBBAY CJ at page 441 when the LEARNED CHIEF JUSTICE observed that:

> *"It is only in two exceptional situations that an extra curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused, by his words or conduct accepts the truth of the statement so as to make all or part of it a statement of his own.*
>
> *The second exception applies in the case of conspiracy. Statements of one or two conspirators made in the execution or furtherance of a common desire are admissible in evidence against any other party in the conspiracy.* ***See R v Miller and Anor*** *1939 AD 106 at page 115;* ***R v Mayet*** *1957 (1) SA 492(A) at 495F." (my emphasis)*

The evidence before us establishes quite clearly and beyond question that by his own conduct in making indications which tallied with the second accuseds extra-curial confessions and indications the first accused rendered the second accuseds extra curial statements and indications admissible against him. His conduct and words fall squarely in the 1st category of the two exceptions to the general rule in the *Sibanda* case (*supra*).

In his defence the first accused admitted having stolen the deceased's cell phone together with her husband's camera and watch at or around the time the deceased was murdered as stated by the second accused. He further admitted having handed over the items to the second accused as per the second accuseds confession. By so doing the first accused was adopting as his own those portions of the second accuseds confession which he admitted. The following exchanges between the first accused and the recording detail took place during the indications.

"Q. We are now at the home and out of the car, where do you want to take us to?

A. To the main house where I want to show you all what happened while we (were) inside. I want to start from here. The deceased came when I was inside by the window.

Q. Where exactly were you?

A. I was standing here when I saw her car driving in coming from her work.

Q. And what did you do when you saw the car getting into the yard?

A. I then went back and stood here by the corner.

Q What was your intention for standing at the corner?

A. I was way-laying her so that when (she) comes I would grab her one time. She came and threw her bag on the floor there. (Accused pointing.)

Q. Had she seen you?

A. when she threw the bag she had not seen me but when she lifted her head that is when she saw me and she panicked. I then grabbed her.

Q Where exactly did you grab her?

A. I grabbed her on the neck and we fell down together and she was lying by this side and the head at the drawer. (accused indicating)

Q. Were you still holding the neck?

A. I was still holding the neck

Q. Were you only holding the neck or you were pressing on her?

A. I was pressing on her.

Q. And then what happened

A. I then left her but she was already dead.

Q. And where did you go.

A. I went to the cottage where there was my brother.

Q. What did you want there?

A. I wanted him to come and see what I had done… I then told him what I had done. I said that I had a misunderstanding with Lisa and I grabbed her by the neck and I think she was dead.

Q. What did your brother say? Did he panic?

A. He was shocked and he asked me what I was going to do and I told him that the best thing was to put her into the car and take her somewhere and he said what will the police do.

Q. And what did you do?

A. We went back to the main house and took the keys on top of the refrigerator I went out and started the car… I parked the car here.

Q. Where was the car facing?

A. It was facing the garage.
Q. Did you leave the engine running?
A. I switched off the engine. I opened this door.
Q. And what did you do after opening this door?
A. I asked my young brother to lift the deceased and put her on my shoulder.
Q. And did he assist you?
A. Yes he assisted me and I went out lifting her. I opened the passenger door and placed her (down) and fastened the seat belt.
Q. And what did you do?
A. I went back into the house and gave my brother a cell phone and a watch.
Q. Do you mean to say you did not take anything else from this house to the car?
A. I took a knife.
Q. where did you take that knife from?
A. I took the knife from this drawer.
Q. And where is the knife right now?
A. I left it in the drawer but now it is not there. I do not know where it is because all the things were in the drawer.
Q Where did you last see the drawer?
A. First week of March.
Q. What else did you take that belonged to the deceased?
A. I took the cell phone which was here and the watch was also here (accused opening a drawer) and this is the camera.
Q. And what did you do with the property?
A. I gave them to my young brother and then we went out of the house.
Q. Where did you go?
A. I went back to the car and most of the things I will tell you later.
Q. We are now approaching an intersection how do we go?
A. Go straight.
Q. We are now at the intersection of Sam Nujoma and The Chase. How do we go?
A. Turn left.
Q. How fast were you driving?
A. Not very fast (after driving for a while along The Chase, the accused told us to stop at Old Mutual Complex)
Q. We have stopped here so what do you want to show us?
A. This is where we left the car.
Q. How did you leave it?
A. Behind us was a car following us and in front was another car but at a distance. The time I thought to stab the deceased that is when the car veered off the road. It went to the left into the ditch and turned upside down.
Q. Can you show us where the car overturned?
A. Yes I can. The car went off the road at this point, and went into the trench it went up and then down landing on its roof.
Q. Had you already stabbed the deceased?
A. Yes I had already stabbed the deceased
Q. Who actually stabbed the deceased?
A. Its me and that's when I lost control of the car and veered off the road." (my emphasis)

Both accused were shifty and unreliable witnesses. They demonstrated that they are prepared to misrepresent facts to suit their defence. This is amply illustrated when they sought to disown their father's evidence which they had initially admitted. We therefore reject their evidence wherever it contradicts the State case. It is however unthinkable that a father would lie against his children in circumstances where they are desperately fighting to evade the hangman's noose.

Martin Brunner was an honest and consistent witness. He kept his calm and told a simple and believable story under very stressful and provocative circumstances as he was forced to relive the murder of his wife.

The State and the police must also be commended for their thorough investigation of this matter and presentation of concrete empirical evidence before this court. By their commendable unwavering devotion to the call of duty, justice has prevailed in this intricate, horrific and brutal murder of an innocent soul.

The net result is that even without the accuseds confession and indications there is before us overwhelming evidence against both accused upon which the court may convict. A combination of that evidence and the accused's confession and indications however renders the State case watertight and unassailable.

On the totality of the evidence before us and the facts found proved, it is clear that although the second accused was present and witnessed the murder and participated in the theft of the deceased's property and disposal of her body, he had no hand in her murder. That being the case he can only be found guilty of the competent verdict of being an accessory after the fact of murder as properly conceded by the State.

On the other hand the proven facts coupled with the first accuseds own words and conduct unveils and exposes him as the chief architect and executioner of this despicable wicked murder.

In the final analysis this court comes to the unanimous verdict that the State has proved beyond reasonable doubt that the first accused is guilty of murder with actual intent whereas the second accused is found guilty of being an accessory after the fact of murder.

We now turn to consider the question of extenuation and sentence. It is convenient to start with the second accused's sentence before considering the question of the existence or otherwise of extenuating circumstances in respect of the first accused.

The second accused is a young first offender with no meaningful valuable assets. He had just found employment at the time of his arrest. At the time of his arrest he made a clean breast of it all thereby assisting the police and the State in unraveling this heinous crime.

His moral blameworthiness is however of a very high degree indeed. His brother murdered the deceased in his presence. The second accused instead of reporting to the police voluntarily and actively participated in the disposal and robbery of the deceased. He continued to actively participate in the thefts and plunder of the deceased's property long after she had been buried. He even had the audacity to go and reside at the deceased's premises after her elimination. That kind of conduct cannot be tolerated by the courts. A stiff and deterrent sentence is therefore called for. In the circumstances the second accused is sentenced to 17 years imprisonment.

As regards the first accused the law requires that in the absence of extenuating circumstances he be sentenced to death.

An extenuating circumstance has been defined as, "a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilty". See *S v Biyana* 1938 EDL 310. The definition and procedure in attempting to establish the existence or otherwise of special circumstances found further elaboration in the case of *S v Letholo* 1970 (3) SA 476 (AD) at F-H. In that case HOLMES JA had this to say:

> "Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider –
>
> (a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);
> (b) whether such facts in their cummulative effect probably had a bearing on the accused's state of mind in doing what he did;
> (c) whether such bearing was sufficiently appreciated to abate the moral blameworthiness of the accused in doing what he did.
>
> In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances."

In this case we have meticulously searched for extenuating circumstances but in vain.

Admittedly the accused is a young first offender. He was however a mature adult both at statute and common law. His conduct throughout the commission of this wicked crime exhibited some canning and mature determination to achieve his purpose without detection.

The court has already determined for good and sufficient reasons that the first accused murdered the deceased in the course of a robbery. It is now an established rule of our law that those who commit murder in the course of robbery cannot lightly escape the death sentence. The remarks of MUCHECHETERE JA in the case of *Emmanuel Ncube vs The State* SC 219-95 are appropriate. In that case the LEARNED JUDGE OF APPEAL observed that –

> "The law in cases where a murder is committed in the course of robbery is to the effect that the death sentence will be imposed unless there are weighty extenuating circumstances. See *S v Sibanda* 1992 (2) ZLR 439 (SC); *Dube vs S* SC 214/93; *Ngulube and Another vs S* SC 112/93."

Having said that His Lordship proceeded to deal with the issue of the accused's youthfulness as follows:-

> "The issue of youthfulness was raised. He was twenty-one years when he committed the crime. The learned judge's finding on the issue cannot be faulted. This was to the effect that although the Appellant was relatively young his actions and the whole circumstances of the offence are those of a mature person. He showed a brazen criminal resolve and he could not be deterred. His was a sheer determination to attain his objective of robbery and he succeeded. He stabbed an elderly woman sixty-three years old, six times with vicious blow."

In the case of *Enerst Masuka v The State* SC 234/96 the accused was 18 years 2 months of age. He was convicted of murder with actual intent in the course of a robbery. The rule again found expression in the words of GUBBAY JA, as he then was, when he observed that:

> "In the absence of weighty mitigating features murders committed in the course of robberies invariably attract the death sentence.
> ….
>
> His youthfulness is an important factor to be considered but the aggaravating features are such that I find myself unable to conclude that this was a suitable case for a finding of extenuating circumstances despite the appellant's youth."

Their Lordship's remarks in the above quoted two cases snuggly fit the first accused's conduct and circumstances in every material respect.

The accused murdered his employer, a defenceless woman left in his care and trust in the course of robbery. This was a premeditated vicious, diabolic and merciless attack on an innocent soul.

He waylaid her, disabled her with a first and stranguluation and then proceeded to repeatedly stab her with a sharp instrument on vital parts of the body thereby giving her no chance to survive. He then conjured up a trick to dispose of the body in a way suggesting that the deceased had been murdered in a robbery away from home. Thereafter he proceeded to rob and plunder the deceased's home and property. That type of conduct exhibits maturity and brazen wicked determination and resolve to archieve his purpose.

When caught the accused attempted to shift the blame on the ruling party, government and even the deceased's workmates. His conduct in this regard was most reprehensible for it tended to tarnish the good names of the ruling party, government and the deceased's colleagues. Some of the deceased's colleagues, had to endure humiliation and unwarranted arrest and detention.

The accused's victim was a foreign national on a mission under the world health organization to help the people of this country. Her sad loss is therefore not only a loss to her family but the whole country as well.

Zimbabwe as a member of the United Nations has to conform to public international law. It is a rule of contemporary public international law that whenever a state admits into its territory foreign nationals it is bound to extend to them the due protection of the law. See Cases and Materials on International Law by DJ Harris 5th edition 1998.

Zimbabwean law protects the right to life of both citizens and foreigners alike. Thus the lives of foreigners in our territory find equal protection of the law.

We are unable to accept the accused's submission that he struck the deceased with a first rendering her unconscious. He then launched the barbaric attack on her with a sharp instrument in the mistaken belief that she was already dead.

Even if we were to accept that version it would still not amount to an extenuating circumstance. Committing a murder in the process of covering up what one perceives to be a murder can hardly amount to a circumstance which reduces the accused's moral blameworthiness in the mind of the proverbial reasonable man.

That being the case we are unable to find any extenuating circumstance in this case. In the result the death sentence is unavoidable in respect of the first accused.

The sentence of the court is that accused 1 be returned to custody and that the death sentence be executed upon him according to law.

Criminal Division, Attorney-General's Office, legal practitioners for the State
Mbidzo Muchadehama & Makoni, legal practitioners for the 1st accused
Manase & Manase, legal practitioners for the 2nd accused