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THE STATE
versus
SHEPHERD CHINHARA
and
KUDAKWASHE NYASHANU
and
NEEDMORE CHIPOTERWA
and
EDSON DONZA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 28 March, 16, 17, 26 May & 17 June, 2022

B.E. Mathose for the state
O. Mafa for accused 1
Accused 2 in person
Ms C. Chuma for accused 3
Ms P. Dube for accused 4

Assessors

1. Mr Gweru
2. Mr Mutomba

Criminal Trial

MAWADZE J: All the four accused are facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act [*Cap 9:23*]).

The charge is that on 4 January, 2021 at Wimpy Mining Site situate in the outskirts of Masvingo town each of the accused or all of them unlawfully caused the death of Rutendo Ndega by throwing her into a mine shaft intending to kill her or realizing that there was a real risk or

possibility that their conduct might cause death and continued to engage in that conduct despite the risk of possibility.

At the commencement of the trial accused 2 Kudakwashe Nyashanu indicated that he did not want to be represented by either any counsel of choice or the *pro deo* counsel *Mr T. Mbwachena*. He indicated that he was comfortable to conduct his defence in person throughout the trial. Accused 2 Kudakwashe Nyashanu's (hereinafter Kudakwashe) wish was granted. Indeed he ably prosecuted his case and even filed closing written submissions timeously. This is not surprising as accused 2 Kudakwashe has an impressive education and working experience. He possess a degree in Business Administration. His working experience include being a property valuer and at some point was an Accounts and Customer Services Manager at OK Zimbabwe. Accused 2 Kudakwashe has an excellent command of English.

Accused 1 Shepherd Chinhara (hereinafter Shepherd) is an ex officer of the Prisons and Correctional Services Department which he joined in 2002 and was based at Mutimurefu Prison, Masvingo before he was discharged in February 2017 after 14 years of service. Interestingly accused 2 Kudakwashe, accused 3 Needmore Chipoterwa (hereinafter Needmore) and accused 4 Edson Donza (hereinafter Edson) were all inmates at Mutimurefu Prison when accused 1 Shepherd was a serving Prison Officer. Infact it has now been revealed by both accused 1 Shepherd and accused 2 Kudakwashe that accused 1 Shepherd was discharged from the Prisons and Correctional Services Department for allegedly assisting accused 2 Kudakwashe in escaping from the said prison. Further to that accused 2 Kudakwashe disclosed that accused 1 Shepherd was his business partner after the two formed a partnership to farm at accused 1 Shepherd's piece of land in 2013.

On the other hand accused 3 Needmore and accused 4 Edson are also well known to each other as at one point they both attended school at neighbouring schools in Bikita, Masvingo where they at one time stayed.

Accused 3 Needmore is a vendor based at Nyika Growth Point, Bikita, Masvingo where he also resides.

Accused 4 Edson was once a petrol attendant at Total Service Station along Simon Mazorodze road in Harare. Currently he stays in Dzivarasekwa Township in Harare. Accused 4 Edson said he infact became accused 1 Shepherd's friend when accused 1 Shepherd used to get fuel at the Service Station where accused 4 Edson worked.

At the material time accused 1 Shepherd was residing in Kuwadzana Extension, Harare. Accused 2 Kudakwashe was residing in Waterfalls, Harare [although the State alleges he was also residing in Kuwadzana Extension, Harare]. Accused 3 Needmore was residing near Nyika Growth Point, Bikita, Masvingo. Lastly accused 4 Edson was residing in Dzivarasekwa.

Accused 1 Shepherd is 44 years and his other address is given as No. 3503, Musaneta Street, Rujeko, Masvingo.

Accused 2 Kudakwashe is 37 years old and his address is given as No. 15122, Kuwadzana Extension, Harare.

Accused 3 Needmore is 27 years old and resides on Bhadharai Village, Chief Mukanganwi, Bikita, Masvingo.

Accused 4 Edson hails from Gonhori Village, Chief Chikwanda, Masvingo but as already said at the material time he was residing in Dzivarasekwa, Harare.

The now deceased Rutendo Ndega was aged 36 years and residing with her husband Obvious Nhokovedzo at No. 7120, Kopje Street, Target Kopje, Masvingo. This residence had a durawall and was gated. This couple owned General Dealer Shops in Chikarudzo and Muchakata rural areas of Masvingo. This couple would buy various groceries for their shops, store them at their residence before distributing it to their various shops as and when the need arises. At the material time there was a lodger who stayed at their cottage. Their children were not at home at the material time hence only the now deceased and her husband were staying at their said residence.

During the trial the State led evidence from the now deceased husband Obvious Nhokovedzo, his young brother Polite Nhokovedzo who was residing and working in Harare; D/Sgt Simbarashe Zvinogona of CID Homicide, Harare; and retired D/Ass Inspector Power Gwande who at the material time was the member in charge CID Homicide, Masvingo.

The evidence of Jairos Marandera, Elton Jingini, Nicholas Sithole and Dr Godfrey Zimbwa was admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [*Cap 9:07*]. All the accused gave evidence and did not call any witnesses.

A total of 4 exhibits were produced by consent. They are as follows;

Exhibit 1 is the post mortem report done by Dr Godfrey Zimbwa on 16 January, 2021 two days after the deceased's death. It is also in tandem with Dr Godfrey Zimbwa's evidence. The doctor made the following observations;

- “1. *Extensive scalp, facial and truncal bruising.*
2. *Fractured neck*
3. *Abdominal distention*
4. *Body covered in red soil”*

The doctor concluded that death was due head injury and neck fracture. The cause of the now deceased's death is not in issue.

Exhibit 2 is Form of Indemnity. It lists the groceries and all items recovered after accused persons' arrest which property belong to the now deceased and her husband Obvious Nhokovedzo (hereinafter Obvious). The list is very long as it covers 3 pages. I find no useful purpose to itemise all the property therein save to mention the 55 inch Plasma TV; Obvious's driver's licence, 2 Huawei cellphones, Infinix cell phone; 2 plate stove, open view decoder, numerous groceries and household goods. Again it is common cause that these recovered items belong to the now deceased and her husband Obvious.

Exhibit 3(1) to (30) are photographs of each of the accused persons making indications to the police after their arrest. The indications start at the now deceased and her husband Obvious's residence in Target Kopje, Masvingo upto the mine shaft where the now deceased was retrieved already dead with the husband Obvious who was alive but seriously injured. The accused persons alleged that these captured indications were choreographed as the police brutally assaulted them after which they were forced to make the indications. As a result all the accused persons said they declined to sign for these improperly done indications and also declined to have their warned and cautioned statements confirmed. The investigating officer on the other hand disputed the allegations of undue influence and use of any force insisting that all the accused persons freely and voluntarily made the indications only to turn around later and declined to sign for them and having their statements confirmed. The accused persons are saying that not probative value should be placed on exhibit 3(1) to (30) [the photographs].

Exhibit 4 is ZRP Form 390 which is the Exhibits Seizure Confirmation Receipt relating to items recovered from accused 3 Needmore. Accused 3 Needmore confirmed that indeed these

items were recovered from him but contends that it does not cover the full list and that some of the items actually belonged to him. The investigating officer said indeed one page is missing. It matters not whether exhibit 4 is a complete list. The important evidential value is that these listed items on exhibit 4 belong to the now deceased and her husband Obvious and were recovered whilst in possession of accused 3 Needmore.

The factual issues in this matter are largely common cause save for the key and material question of whether any of the accused or all of them are the culprits or it is Nyasha Sango as accused 1 Shepherd and accused 4 Edson suggest. Now let us simply outline the uncontested sequence of events in this matter.

On 14 January 2021, Obvious left his wife the now deceased at their home as he proceeded to Jerera, Zaka in the morning. In his absence a gang of intruders entered his residence, subdued the now deceased, blind folded her, tied her hands and legs and bundled her into one of the rooms. The culprits waited for the return of the now deceased's husband. At around 3.30 pm the now deceased's husband arrived home driving a Nissan Caravan Reg No. AFF 1599. He sounded the horn but his wife could not attend to the gate as she was now a captive. One of the culprits attended to the gate and misrepresented that he, the culprit, had visited one Shava who stays at the cottage. Unaware of that he was falling into a well calculated trap the now deceased's husband drove into the yard and parked his vehicle at its normal place. He proceeded into the house.

As the now deceased was walking along the corridor inside his house two men pounced on him from both the back and the front. The now deceased's husband Obvious could not even identify them unlike the one who hand opened the gate for him. He was immediately blind folded, his legs were tied and hands also tied after which he was bundled into a separate room from his wife the now deceased.

The said culprits proceeded to interrogate him on the nature of his business, where he kept the money and the cash he had. The now deceased's husband Obvious had no much money as he had sent money via Mukuru. The culprits then ransacked the house taking groceries and household goods loading them in the Nissan Caravan Reg No. AFF 1599 driving in and out of the yard.

When it was now dark the now deceased and her husband Obvious were bundled into their own vehicle the Nissan Caravan still blind folded, hands tied. One of the culprits drove the Nissan Caravan, the other occupied the front seat and the other sat facing the now deceased and her

husband Obvious. The now deceased's husband Obvious could barely see all this. They were driven to an area near Wimpy up the hills where there are water tanks. The now deceased and her husband were taken out of the Nissan Caravan and they could not sit because they were tied so they lay on their back. The now deceased was thrown into the mine shaft most probably headlong still blind folded and tied. The now deceased's husband Obvious was also thrown into this mine shaft, legs first but also still blind folded and tied.

The description of this mine shaft is that it was very deep probably some \pm 20m deep. It was at an isolated place on top of a hill. Its opening was small hence one could only be shoved in head first or legs first. The rescue team comprising of the Police, Fire Brigade and Ministry of Mines had to use a rope in addition to a ladder in order to reach both the now deceased's body and the now deceased's husband Obvious.

The admitted evidence of Jairos Marandera, Elton Jingini and Nicholas Sithole simply explains how the now deceased and her husband Obvious were discovered and rescued. It is simply as follows;

Jairos Marandera (Jairos)

Jairos said the following day after the incident on 15 January, 2021 at about 0900 hrs he was walking past the mine shaft when he heard a distress call inside the mine shaft. Upon inquiring the now deceased's husband Obvious identified himself, explained what had befallen him and his wife the now deceased the previous night. Jairos called Elton Jingini who was also within the vicinity. Obvious asked them to telephone his employee a driver Nicholas Sithole which they did and Nicholas Sithole later came to the scene with the police and Fire Brigade who rescued Obvious and retrieved the now deceased's body.

Elton Jingini (Elton)

Elton confirmed being called to the mine shaft by Jairos and confirms how Obvious explained his ordeal and how Obvious was rescued and the body of his wife retrieved.

Nicholas Sithole (Nicholas)

Nicholas an employee of the now deceased's family confirmed being telephoned by Jairos and Elton and being advised that his employer and his wife had been thrown into a mine shaft. He reported to the police and was present when Obvious was rescued and the now deceased's body retrieved.

Dr Godfrey Zimbwa

Dr Zimbwa carried out an autopsy of the now deceased and compiled exhibit 1 the post mortem report.

All the evidence I have outlined above is not disputed.

Let me now turn to some material aspects of Obvious's evidence.

Obvious Nhokovedzo (Obvious)

When Obvious testified he was clearly stressed and traumatised. At some point as he explained his ordeal inside the mine shaft he broke down crying and the court had to adjourn.

Obvious said the only person he is able to identify is accused 2 Kudakwashe who opened the gate of his house and lied that he had visited a lodger at the cottage. He said despite putting the normal Covid 19 mask he was able to clearly identify accused 2 Kudakwashe as most of his face besides the mouth and nose were not covered. It was also during daylight around 1600 hrs and he briefly spoke to accused 2 Kudakwashe. He even said he vividly recalls accused 2 Kudakwashe's appearance, facial features and voice. This is the first piece of evidence which links accused 2 Kudakwashe to this offence.

Obvious said upon being thrown into the mine shaft he fell unconscious. When he gained consciousness he could hear his wife the now deceased breathing heavily and groaning in pain. After a short while his wife the now deceased stopped breathing and he believed she had died.

Throughout the night Obvious said he struggled to untie his hands by squeezing the rope against the walls of the mine shaft. Despite the injuries he sustained he managed to untie himself but it was still dark. He waited until he saw a glimpse of light filtering into the mine shaft as he was walking around inside the mine shaft. Later he heard a person answering to his distress call and narrated his ordeal. This is how he was rescued and the lifeless body of his wife the now deceased retrieved.

After some time Obvious said police recovered his stolen Nissan Caravan vehicle and the property listed in exhibit 2. Obvious said while inside the house his captors demanded the pin numbers of all his cell phones, ecocash account and bank account and he gave them. When he was rescued he learnt that the culprits had sent sms messages using his mobile number to all his acquaintances lying that he had gone to South Africa and would only contact them upon his return.

Further he also realised that money had been withdrawn from his ecocash account in Chivhu on 15 January, 2021.

Obvious is still a tormented soul. He has relocated to Mvuma. The trauma he experienced is palpable. He was also injured and had to be hospitalised. He still suffers from painful back. It is not an exaggeration that he survived by the grace of God. His wife the now deceased was unfortunate.

From the evidence of Obvious, the description of the said mine shaft by state witnesses and how Obvious and the now deceased were thrown into the mine shaft it is clear that the culprits wanted to kill them. We say so because of the following reasons;

- (i) they were thrown into the mine shaft at night hence no immediate help could be obtained
- (ii) the mine shaft is at an isolated place on top of a hill
- (iii) the manner in which they were thrown in the mine shaft headlong or legs first
- (iv) they were blind folded, hands tied at the back and legs tied hence they were immobilised and could not help themselves
- (v) the mine shaft was \pm 20m deep and the culprits could not possible know how its bottom was like
- (vi) the culprits sent misleading text messages to Obvious and the now deceased's associates to ensure no one would look for them in the foreseeable future

It is therefore our finding that the culprits desired that death should result and indeed the now deceased died. There was therefore actual intent to cause death.

The only narrow issue to be resolved is whether any or all of the accused are linked to this offence. Put differently are the accused the said culprits?

The sum total of the evidence of the accused especially accused 1 Shepherd and accused 4 Edson is that one Nyasha Sango, a fugitive from justice is the culprit together with some unknown persons. We shall examine this possibility.

Accused 1 Shepherd's case

Accused 1 Shepherd said he was in Harare when Nyasha Sango his friend telephoned him and asked him to come from Harare to Masvingo. Nyasha said had a vehicle the Nissan Caravan loaded with groceries which Nyasha Sango wanted accused 1 Shepherd to take to Harare. Nyasha

Sango as per accused 1 Shepherd wanted to proceed to Chipinge. Accused 1 then enlisted the company of his friend accused 4 Edson and the two travelled to Masvingo where they met Nyasha Sango at Exor Service Station. They all drove some 100 km along Mutare road to Nyika Growth Point where they sold part of the groceries to accused 3 Needmore on instructions of Nyasha Sango to raise money for fuel to Harare. Nyasha Sango then proceeded to Chipinge and accused 1 and accused 4 Edson proceeded to Harare. By then accused 1 Shepherd had been paid in kind by Nyasha Sango with the groceries in Masvingo which he in turn gave his in laws in Rujeko Township, Masvingo.

Accused 1 said the said Nissan Caravan developed a mechanical fault after the toll gate along Masvingo – Harare road near Harare and they enlisted the services of accused 2 Kudakwashe. Accused 1 Shepherd said after a mechanic fixed the vehicle accused 1 again asked accused 2 Kudakwashe to test drive it and accused 2 Kudakwashe was the first to be arrested in possession of the said vehicle leading to accused's arrest.

The following emerged from accused 1 Shepherd's evidence;

- (i) despite being a former prisoner officer he said he still kept company of persons whom he knew had criminal background inclusive of accused 2 whom it is alleged he assisted to escape from prison leading to his dismissal from Prisons and Correctional Services Department
- (ii) accused 1 admitted that Nyasha Sango is a blacklisted criminal wanted for a different case of murder
- (iii) apparently Nyasha Sango allowed the dissipation of the very groceries he had made all efforts for accused 1 to ferry to Harare. Accused 1 was lent some groceries to give to accused 1's in laws in Rujeko, Masvingo. Some of the groceries was sold to accused 3 Needmore at Nyika Growth Point. Accused 4 Edson was also given a token of appreciation in form of the groceries. Some groceries was found at accused 1's residence in Harare
- (iv) accused 1 sold the TV set to Sandi Shonhiwa in Mbare ostensibly on instructions of Nyasha Sango

- (v) accused 1 gave the said motor vehicle to accused 2 Kudakwashe to test drive despite that he himself could have done so and had driven the said vehicle from Masvingo to Harare
- (vi) accused 1 had no explanation as to who withdrew cash from Obvious's ecocash account in Chivhu the very next day after the robbery in Masvingo, more so as Nyasha Sango had gone to Chipinge.

Accused 2 Kudakwashe's case

Accused 2 Kudakwashe was arrested on 19 January 2021 in Harare driving Obvious vehicle stolen in Masvingo on 14 January, 2021.

Accused 2 Kudakwashe said on 15 January, 2021 he was called to go near Boka in Harare by accused 1 Shepherd and accused 4 Edson after the said vehicle had developed a mechanical fault on their way from Masvingo. He denies being in Masvingo or committing the said offence. Accused 2 Kudakwashe said he only led police to accused 1 Shepherd who had given him the vehicle to test drive and no other property was recovered from him or on his indications. He confirmed that Obvious's driver's licence was found in the dashboard of the said vehicle.

Accused 2 Kudakwashe vehemently disputed that Obvious the deceased's husband identified him at Obvious's residence the day the offence was committed. He denied trying to flee from the police at a road block when he was arrested saying he was given the green light to bypass the drums as he had given a lift to a police officer who was taken suspects to court.

The following emerges from accused 2 Kudakwashe's evidence;

- (i) he was known to accused 1 Shepherd and accused 4 Edson prior to his arrest
- (ii) he was arrested few days in Harare at a police road block in possession of the stolen vehicle from Masvingo
- (iii) he led to the arrest of accused 1 Shepherd
- (iv) he denies being identified by Obvious deceased's husband during the commission of the offence in Masvingo on 14 February, 2021
- (v) he denies trying to flee from the police at a road block when he was arrested driving the said vehicle

Accused 3 Needmore's case

Accused 3 said he was only known to accused 4 Edson and that it is accused 4 Edson and accused 1 Shepherd who sold him some groceries at Nyika Growth Point for US\$40. He later was surprised to be arrested in connection with this offence because he was never in Masvingo and knew nothing about the case of murder.

The following facts emerged from accused 3's evidence;

- (i) accused 4 Edson was well known to him prior to the commission of the offence
- (ii) sometime in 2015 he was a fellow inmate with accused 2 Kudakwashe at Mutimurefu prison where accused 1 Shepherd was a member of the Prisons Service
- (iii) he could not give any specific reason as to why accused 1 Shepherd and accused 4 Edson would drive 100 km to Nyika Growth Point from Masvingo and only pick on him to sell some groceries valued at a paltry US\$40
- (iv) he conceded that Nyika Growth Point is clearly off route as accused 1 Shepherd and accused 4 Edson wanted to proceed to Harare which they eventually did

Accused 4 Edson's case

According to accused 4 Edson the said Nyasha Sango is a brother in law to accused 1 Shepherd.

Accused 4 said he accompanied accused 1 Shepherd to Masvingo where they arrived at 1800 hrs and met Nyasha Sango and one Murehwa who had in their possession the said vehicle loaded with groceries and household goods. He said Nyasha Sango gave him some groceries as a token of appreciation. They proceeded to Nyika Growth Point and sold groceries to accused 3 Needmore on instructions of Nyasha Sango in order to buy fuel.

Accused 4 in fact said they proceeded to Birchnough bridge with Nyasha Sango where some groceries were again off loaded after which Nyasha Sango left and accused 4 Edson proceeded to Harare with accused 1 Shepherd driving the Nissan Caravan. After the Beatrice toll gate he said accused 1 called accused 2 Kudakwashe after they had a breakdown and accused 2 referred them to Taurai a mechanic.

Accused 4 Edson said Nyasha Sango again authorised them to sell some of the groceries to raise money to fix the said vehicle and accused 4 Edson opted to buy the home theatre and give

the mechanic US\$30 as fee for fixing the vehicle instead. Police later recovered the groceries given to him as token of appreciation and the home theatre he bought.

The following emerge from accused 4's evidence;

- (i) accused 4 Edson links the possession of the said vehicle Nissan Caravan to Nyasha Sango together with the groceries and household goods
- (ii) accused 4 said from Masvingo they travelled to Nyika Growth Point, then further to Birchenough bridge and then back to Harare
- (iii) accused 4 confirmed that the groceries were disposed of in Rujeko Township in Masvingo, Nyika Growth Point, Birchenough bridge and in Harare
- (iv) accused 4 Edson also got his share of groceries and said he bought the home theatre
- (v) accused 4 confirmed he was an inmate at Mutimurefu with a accused 2 Kudakwashe and accused 3 Needmore where accused 1 Shepherd was a Prison Officer

How were the accused persons arrested and what transpired thereafter? This emerged from the evidence of Polite Nhokovedzo (Polite), D/Sgt Simbarashe Zvinogona and retired D/Ass Inspection Power Gwande.

Polite Nhokovedzo (Polite)

Polite is Obvious's young brother. On 19 January, 2021 whilst driving into town he fortuitously saw the Nissan Caravan vehicle stolen from his brother Obvious in Masvingo on 14 January, 2021 which led to the now deceased's death. This was near a police road block along Samora Machel Avenue and he shouted to have the vehicle stopped. He said the driver upon being stopped tried to flee hitting the drums but was blocked by other motorists and arrested. The said driver is accused 2 Kudakwashe. He said a driver's licence of his brother Obvious was recovered in the dash board of the said vehicle.

We find no reason to disbelieve Polite on how accused 2 Kudakwashe was arrested. It is a fact that he was arrested at Polite's instance. Indeed the State could have, for completeness of the circumstances call any other officer who was at that road block. This omission cannot however distract from Polite's evidence

D/Sgt Simbarashe Zvinogona (D/Sgt Zvinogona)

D/Sgt Zvinogona said accused 2 Kudakwashe was handed over to him for questioning after his arrest at a road block in possession of a stolen vehicle. He said accused 2 then implicated the

3 other accused persons and led them to Kuwadzana Extension where they arrested accused 1 Shepherd and accused 4 Edson at some house. They recovered specific items he outlined in the room accused 1 Shepherd was using. Accused 4 Edson then led them to No. 131 Nhoru Road, Dzivarasekwa where they recovered the victims cellphone sold to Nesbert Mupasi. He said still in Dzivarasekwa accused 4 Edson led them to his lodgings where they recovered the stolen property which he itemised. Thereafter he said accused 2 Kudakwashe led them to Mbare where recovered a 55 inch Plasma TV sold to Shonhiwa Sandi. Thereafter they handed over accused 1 Shepherd, accused 2 Kudakwashe and accused 4 Edson to CID Homicide, Masvingo together with the recovered exhibits or property.

What is clear from D/Sgt Zvinogona is that none of the accused ever mentioned Nyasha Sango who is now central to their defence. In fact he said it is accused 2 Kudakwashe who simply led them to his accomplices.

D/Ass Insp. Power Gwande

D/Ass Insp Gwande participated in the rescue of Obvious and his wife the now deceased and by then no arrests had been save the establishment of the withdrawal of cash in Chivhu from Obvious's eco cash account.

He said accused 1 Shepherd, accused 2 Kudakwashe and accused 4 Edson were handed over to them by CID Homicide Harare Details. He said it is accused 4 Edson who led them to the arrest of accused 3 Needmore at Nyika Growth Point which resulted in the recovery of some stolen groceries. Accused 1 Shepherd also led them to his in laws in Rujeko Township where groceries were recovered in Masvingo. Thereafter he took all 4 accused persons for indications as per exhibit 3(1) to (30) which they later refused to sign and also declined to have their warned and cautioned statement confirmed.

Again D/Ass Insp. Power Gwande said none of the accused ever mentioned Nyasha Sango to him as being involved in this matter in any manner. In fact he said Nyasha Sango as per Police Intelligence Reports in which he was heavily involved fled to South Africa well before commission of this offence as he is wanted for the murder of a Zimbabwe National Army Officer and would dare not set foot in Zimbabwe as the police have planted informers all over to ensure his arrest upon his return to Zimbabwe.

The evidence of D/Ass Insp. Power Gwande was not only clear and coherent but fairly straightforward.

In this matter there is a combination of both direct and circumstantial evidence linking the accused to the offence.

The direct evidence relate to the identification of accused 2 Kudakwashe by Obvious at Obvious's residence on the very date Obvious was misled and the offence committed on 14 January, 2021. There are no factors which militated in any reasonable manner as to why Obvious would fail to identify a person who opened the gate for him at around 1600 hrs and talked to him. Further we find no motive for him to specifically pick on accused 2 Kudakwashe as the person he saw and he identified amongst the other accused persons. Once we accept that direct evidence it means accused 2 Kudakwashe would have told a material lie that he was not in Masvingo on the day in question. An adverse inference would be drawn. Further that direct evidence places him at the scene of crime. In fact it makes the whole case of other accused persons very difficult.

The celebrated case of *R v Blom* 1939 AD 188 at 202-3 outlines how the court should treat circumstantial evidence in a criminal matter.

There are 2 cardinal principles which are;

- (a) that the inference sought to be drawn must be consistent with all proved facts. If not the inference cannot be drawn, and
- (b) that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is a correct one.

This approach had long been accepted in our criminal justice system see *State v Marange & Ors* 1991 (1) ZLR 244 (S); *State v Tambo* 2007 (2) ZLR 33 (H).

It is also competent for a court to found a conviction in a criminal trial solely on circumstantial evidence see *S v Shonhiwa* 1987 (1) ZLR 215 (S); *S v Vhera* 2003 (1) ZLR 668 (H) at 680 C.

Now what are the facts proved in this case.

- (i) that the crime of murder of the now deceased was committed in a manner already explained in Masvingo on 14 January, 2021
- (ii) that the commission of the offence involve more than one person

- (iii) that various property including the Nissan Caravan vehicle was robbed or stolen from the now deceased and her husband Obvious during the commission of the offence
- (iv) that accused person were persons who were known to each other in one way or the other prior to the date of commission of the offence
- (v) that accused 2 Kudakwashe was arrested in Harare on 19 January, 2021 in the manner explained driving the said stolen Nissan Caravan vehicle
- (vi) that upon their arrest each of the 4 accused led to the recovery of the now deceased and her husband's stolen property taken when the offence was committed. This property was recovered in various suburbs of Harare, at Nyika Growth Point and in Rujeko, Masvingo
- (vii) that each of the accused was found in possession of part of the said stolen property
- (viii) that accused 1 Shepherd and accused 4 Edson told a material lie about Nyasha Sango's involvement in this matter
- (ix) accused 1 Shepherd and accused 4 Edson agree were in Masvingo at the relevant time

At the end of the day once accused 2 Kudakwashe is placed at the scene of crime in a direct manner [and it is found he tried to flee at a police road block in Harare] and that the whole story of Nyasha Sango is a blatant lie the case of accused persons crumbles like a deck of cards. Further it is patently improbable that Nyasha Sango would take all the effort to buy groceries in South Africa [or even get it through robbery] and proceed to distribute it like cakes at a wedding in the manner accused persons tried to convince this court. Worse still would he be that daft to simply go at length to commit such a crime, get the loot and recklessly abandon it for the benefit of others. The defence by accused persons who are acquaintances is poorly throughout and is dismissed as false.

It is our finding that the accused persons robbed the now deceased and her husband in the manner explained. Thereafter they shared the loot which was found in their possession.

In conclusion, the manner the accused persons dumped the now deceased in the mine shaft clearly shows that they intended to cause death which they did. The guilty of all accused person who clearly acted in common purpose is proved beyond reasonable doubt.

Accordingly we find all the 4 accused persons guilty of murder with actual intent.

VERDICT

Guilty of contravening section 47(1) (a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]:- Murder with actual intent.

SENTENCE

You all stand convicted of murder with actual intent as per s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. This was after a protracted trial.

It is not correct that you are first offenders as it emerged in mitigation that each one of you is serving 22 years for the attempted murder and robbery linked to this case. Further evidence led during the trial shows you were at some point inmates at Mutimurefu Prison save for accused 1 Shepherd. It is the duty of the State to produce all such relevant information to assist the court in properly assessing sentence.

The State said the said convictions not linked to this case are of a minor nature but nonetheless they should have been availed. Further the conviction in the Regional Court for attempted murder and robbery should have been availed although I would not have placed any weight on it.

I also note that you were tried in a piece meal manner. While the State is *dominus litis* it was prudent to just combine this case of murder and those of attempted murder and robbery to ensure a holistic and non-repetitive leading of evidence. Indeed prejudice would also have been avoided in assessing the appropriate.

Nothing meaningful can be said in mitigation besides your personal circumstances. I find no reason also to treat you differently.

In mitigation the court has considered that, you are all married with family responsibilities. You are persons of limited means with no savings nor assets. I am alive to the fact that you have been in prison since your arrest in 2021 and that you are currently saddled each with a 22 year long jail term. This probably explains why accused 2 Kudakwashe pleaded with the court to order whatever sentence it will impose to run concurrently with the 22 years.

There is nothing mitigatory in relation to factors surrounding the commission of the offence.

This was a gang offence which was well planned and executed. You chose your victim carefully, the time to strike and how to dispose of the victims. It is by the grace of God that the matter came to light and you were arrested otherwise no one would have known what had befallen the victims.

The callousness and cruelty you exhibited in this matter is shocking. It sends shivers down one's spine. If such conduct is not nipped in the bud then no one is safe even in their own house. One wonders why you simply did not take the property and leave the victims in their house even tied as they were.

There is clearly an element of premeditation envisaged in s 47(3) of the Criminal Law Code [Cap 9:23]. As per s 47(2) (iii) this was murder committed in aggravating circumstances. The penalty for such an offence as per s 47(4) of the Criminal Law Code [Cap 9:23] is a death penalty, life imprisonment or a sentence not less than 20 year.

I agonised whether to impose a death penalty in this matter. You are all clearly a danger to society in all respects. This case should have sent shock waves within the populace of peace loving Masvingo residents.

Indeed the now deceased died a painful death. The reason why she lost her life is simply your greed. One wonders what has become of your society.

In the exercise of my discretion I shall spare you a death penalty but impose the next possible sentence.

Accordingly each one of you is sentenced as follows;

Each accused:-

Each accused is sentenced to imprisonment for life.

National Prosecuting Authority, counsel for the state

Mutendi, Mudisi & Shumba, pro deo counsel for accused 1

Accused 2 in person

Chuma, Gurajena & Partners, pro deo counsel for accused 3

Mangwana & Partners, pro deo counsel for accused 4