

THE STATE
versus
ROMEO JAMBURA
and
NOREST TAMANGANI
and
DALLENA MARY MAKUPE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 March 2020 & 10 June 2020

Criminal Trial – Murder

**Assessors: Jemwa
Mabandla**

D Chesa, for the State
M Ncube, for the 1st accused
C Daitai, for the 2nd accused

CHITAPI J: The 3 accused persons all of Harare are charged with the crime of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The details of the indictment are that the trio unlawfully and with intent to kill assaulted a taxi driver namely Taruvinga Mutiza (deceased) all over the body using unknown objects. The indictment further alleged that the trio dumped the deceased's body along Acacia Road in Westgate and thereafter stole the deceased's driven taxi and his property comprising USB cables and chargers, modulators, deceased's cell phone, wallet and they drove away. The incident is said to have occurred on the night of 19 November 2018.

The remains of the deceased were examined by two forensic pathologists namely doctor Iglesias and Gurano on 21 November 2018 at Parirenyatwa Hospital. The doctors prepared a report of their observations and conclusions as to the cause of death. The report was produced in evidence by consent as exh 9. The doctors observed that the deceased was bleeding from both eyes and nostrils. The deceased had multiple bruises and abrasions all over his body. The

internal examination revealed left parietal haemorrhage infiltrate. There were some signs of meningitis observed in the brain and side brain oedema as well dilation of brain vessels.

The neck had haemorrhage on the left side inside the trachea which was described as severe. The haemorrhage was observed as well in the larynx, trachea and bronchi. The Doctors concluded that the deceased died of mechanical asphyxia, neck constriction and hand strangulation. The cause of death not being in issue the court had to determine whether or not the accused persons are the ones responsible for bringing about the death of the deceased.

The accused persons pleaded not guilty to the charge and filed their defence outline. The 1st accused denied having anything to do with the deceased. He outlined that on the date of the murder of the deceased on 19 November 2018, he, the 1st accused, did not enter Harare Business District but spent the day and night in Domboshava. In the evening he outlined that he was in the company of the 2nd accused and one Nordikah Tamangani. The 2nd accused for his part outlined in his defence outline that he had no knowledge of the offence and was not involved in the deceased's death. He outlined that he spent the day of 19 November 2018 in Domboshava. He was only arrested on 20 November 2018 in Domboshava together with the 3rd accused who was his girlfriend. The 3rd accused outlined that she and the 1st and 2nd accused were together on the night of 19 November 2018 and that they had an encounter with the deceased during which the deceased was assaulted and robbed of his taxi and property by the 1st and 2nd accused and another person, only known as Last who was not arrested. The 3rd accused outlined that she did not act in common purpose with the 1st and 2nd accused but that she was a victim of circumstances.

Certain evidence of witnesses was admitted by the accused persons in terms of s 314 of the Criminal Procedure and Evidence Act. Their evidence is on the periphery in regard to the determination of whether or not the accused persons are the ones who attacked the deceased and stole his taxi and personal valuables. The admitted evidence is however relevant to complete the chain of evidence. The witness Tracy Mangwenjere's admitted evidence was that she received a report from some person that there was a dead body of a person near her house at 1 Acacia Road, Westgate. She advised a security guard nearby to check on the veracity of the report. Upon confirmation of the presence of the dead body, she and the guard reported the discovery to the police. The witness Kind Simbanegavi is a taxi driver who advised the deceased's employer of a photo of the deceased circulating on social media. The deceased's employer is Paul Dombo whose evidence will be separately considered. Mawoneyi Masora's evidence though admitted was wholly irrelevant and should not have been outlined at all. The

law officer who prepared the summaries of evidence of State witnesses should stand advised that only relevant evidence is admissible and useful in a trial and when preparing an indictment document unnecessary, irrelevant and immaterial evidence should be omitted. Mawoneyi Masora's irrelevant evidence as captured in the state summary of evidence was to the effect that she is the deceased's cousin and that upon receiving news of the deceased's death, she contacted other family members to advise them. Witness Victor Zaradope is a police officer who was on duty at Westgate Police Station. On 20 November 2018 he received the report of the discovery of the deceased. He attended the scene with another police detail. He noted injuries on the body of the deceased. He then ferried the body to Parirenyatwa Hospital. Witness Tinotenda Raronga's evidence was to corroborate that of Victor Zaradope. Karonga is also a police officer who worked with Zaradope. As already indicated the evidence of these witnesses was to complete the chain of evidence.

The first witness to testify orally was Obert Matiza a brother to the deceased. His evidence was not really contentious. He was telephoned and informed of the deceased's death. He identified the deceased's body at Parirenyatwa Hospital as well as the deceased's property shown to him by police. The property was produced as exh 1, a black/brown wallet inscribed Wofu; exh 2 a Samsung GTS5350 cell phone handset; charging cables and USB output charger was exh 3; a modulator as exh 4 and grey trainer shoes inscribed X Tep as exh 5. The witness had last seen the deceased about a week before the deceased's death. The cross examination of the witness was eventless. The witness maintained that he personally knew the deceased's property which he produced.

The evidence of Elisha Munatsi the second State witness was important. He is a police officer with CID Vehicle Theft Squad Crack Team. His team, arrested the 1st accused in a trap on 20 November 2018 in pursuance of a separate investigation involving a robbery of a Toyota Fun Cargo vehicle. Upon the 1st accused's arrest and interrogation, the 1st accused then led police to Domboshava where 2nd accused and 3rd accused were arrested. The witness recovered from the house used by the 2nd and 3rd accused, various items of property some of which belonged to the deceased, namely, the deceased's shoes, wallet, car charging modulators and USB cables. The witnesses stated that on questioning the 2nd accused on the ownership of the recovered property, the 2nd accused made certain confessions before leading the police to Gunyere Village in Domboshava where the deceased's driven taxi at the time of his death, a honda fit registration No. AEP 6641 was recovered. The witness then secured the car by arranging with a villager Jeremiah Gunyere to keep the vehicle in safe custody until police

towed it. The witness identified the property exh 1 – 5 which the witness Obert Matiza also identified, as the property which the witness and his team recovered from 2nd and 3rd accused's home.

This witness was examined at length by counsel for 1st and 2nd accused. The witness did not detract from his testimony. The cross examination centred on putting the 1st and 2nd accused's position that they were never in possession of the deceased's property. The witness was also cross examined on allegation that he assaulted the 3rd accused, an allegation which he denied. The witness was steadfast under cross examination that the three accused led police to the recovery of the deceased's driven Honda Fit vehicle at Gunyere villager where it had been left by the accused persons after the accused had been involved in an accident. The witness was not shaken by the cross examination. He also admitted that he could have made a mistake in recording the recovered items in the police note book but insisted that the exhibits shown to him were the ones recovered from 2nd and 3rd accused's house and from 1st accused, a cell phone.

The witness Munetsi was cross examined at length by counsel for 3rd accused. The witness stuck to his story about how the accused persons were arrested, that is, firstly, 1st accused in Epworth and 2nd and 3rd accused in Domboshava on indications by the 1st accused. He denied allegations that he and his team assaulted the 3rd accused leading her to suffer a broken tooth. The witness confirmed that the 3rd accused was co-operative and gave a narration of how the murder of the deceased was executed and how the deceased's driven vehicle ended up with the accused persons. He confirmed that the 3rd accused had upon confessing what took place indicated that she was a victim of circumstances as her attempts to dissociate herself from the commission of the offence were to no avail.

The 3rd witness was Paul Dombo, the deceased's employer. After receiving social media reports on the fate of the deceased he attended at Mabelreign Police Station on follow up. He identified the deceased from the photographs shown to him. He helped identify the deceased's body at Parirenyatwa Hospital where the deceased's remains had been ferried to. At the hospital – the witness was shown exhibits recovered by police. The witness identified the deceased's brown shoes, black wallet, USB cable and Samsung phone. The witness stated that he knew the exhibits prior to their recovery because he always saw the exhibits in the possession of the deceased whom he met daily when he came to cash in the day's takings from the taxi hire. The witness was examined by counsel in an endeavour to test the reliability of his identification of the exhibits. He remained steadfast. The cross examination on this aspect was

in any event not of evidential value in view of the 1st and 2nd accused's defence that they knew nothing about the case and the exhibits. The position would have been otherwise if any of the accused were laying claim to any of the exhibits. The witness' evidence remained unscathed and intact.

Jeremiah Gunyere was the fourth state witness. He resides at Gunyere Homestead, Nzungu Village, Chinamhora Domboshava. He was at home in the early hours of the morning around 6.00 am on 20 November 2018. He witnessed a motor vehicle crush into the hedge of his homestead. He attended the scene and noted that the vehicle tyres had deflated. He was made to understand that a woman had been driving. The persons involved in the accident and were the three accused persons. He was requested by the accused persons to safeguard the vehicle until they returned. The witness then saw the three accused around sunset now in the company of police officers. He was requested by police to safe keep the vehicle which they pushed into the yard from the hedge. Under cross examination, the witness stuck to his testimony that the three accused had requested him to keep watch over the vehicle before they returned in company of police. As regards the opportunity of observing the accused persons, he said that on the initial occasion following the accident, he observed the three for about forty minutes. The cross examination of the witness did not change his testimony. In fact, in the court's observation and review of this witness' evidence, the witness was just a simple villager who came into the picture to help after the accident in a show of benevolence. He had nothing to gain by making up a story against the accused persons. His evidence was simple and straight forward. Besides, he gave his evidence without hesitation and the court was satisfied beyond reproach that he was an honest and reliable witness.

The fifth witness Brian Maigeta is the investigating officer. He took over investigations and brought the three accused to CID Homicide Offices together with exhibits said to have been recovered upon the arrest of the accused persons. He identified the exhibits. The witness collected the accused persons from Southerton Police Station where they had been locked up by the arresting police team. The witness recorded warned and cautioned statements from the accused persons. The witness took the court through what he did during the course of investigations from the time he took over the matter. The investigations included taking the accused persons for initial remand, and obtaining telephone call histories to link the accused to each other. As regards warned and cautioned statements, the witness testified that the accused persons wrote down their own statements. The cross examination of the witness did not alter his testimony. The call history indicated that the 2nd and 3rd accused had been in communication

on the date of the offence, 19 November 2018. The witness in regard to the role of the 3rd accused stated that she acted in common purpose with 1st and 2nd accused and a 4th outstanding accused. He said that the 3rd accused was co-operative and volunteered information during investigations. The witness was again not shaken in cross examination. His evidence was straight forward. He took over investigations involving the murder of the deceased and charged the accused persons, recovered the motor vehicle from Gunyere homestead and applied for call histories of the accused's phone numbers. He also recorded witness statements. There was really nothing controversial in his testimony. The court believed the witness evidence as truthful.

The prosecutor closed the state case. The 3rd accused's counsel indicated that she wished to file a written application for the discharge of the accused person at the close of the State case in terms of s 198 (3) of the Criminal Procedure & Evidence Act. She did so and filed the application on 19 May 2020. The application was ill-advised for the reason that once the 3rd accused had been linked to the taxi which the deceased had been driving prior to his death by reason of possession of the vehicle, she had an evidential duty to offer an innocent explanation for the possession. In other words, there was a *prima facie* case against her which if left un rebutted could lead to a guilty inference being drawn against her. Indeed, it was a case of a hyena defecating white hair when a white haired old woman had gone missing. In the absence of acceptable rebuttal, the hyena by reasonable inference becomes the suspect and consequently will be guilty of consuming the old woman. 3rd accused's counsel was well advised not to persist with the application and withdrew it. Counsel is to be commended for that. The trial proceeded to the defence case.

The three accused persons all testified on oath. The 1st and 2nd accused offered *alibis* in which they averred that they spent the whole of 19 November, 2018 at the home of the 2nd accused with the 3rd accused present in Domboshava. The two averred that they spent the night of 19 November 2018 in the 2nd accused's residence. It was on the following morning on 20 November 2018 that the 1st accused received a phone call from his girlfriend in Epworth. The girlfriend purported that her mother had died and that she required assistance. Unbeknown to the accused, the girlfriend was being used by police in a trap to woo the accused to get to the girlfriend's house where police had called in looking for the 1st accused. It is common cause that the 1st accused was subsequently arrested at the girlfriend's place in Epworth when he arrived there from Domboshava, as he alleged.

Upon his arrest, the 1st accused averred that police then took away his Samsung S5 cell phone and 42 ZWL. When asked where he obtained the Samsung cell phone, he alleged that he bought the phone from vendors a year back which would have been in November, 2017. 1st accused complained that police assaulted him and forced him to depose to statements which police further forced him to sign. It is really not necessary to delve further into the alleged making of forced statements because the prosecution did not produce any statement by any of the accused in proof of the state case. 1st accused stated that police took him to Domboshava where 2nd and 3rd accused were arrested. After the arrest of all the three of them, the 1st accused testified that police drove them in their car to a place which he was not familiar with, where there was a vehicle which the police accused the accused persons of having stolen. 1st accused stated that police then pushed the vehicle into the yard of the homestead which he again had no knowledge of.

Under cross examination by counsel for 3rd accused it was put to him that the 3rd accused would testify that the three of them were in contact with the deceased contrary to his denial. The 1st accused disputed that. The 1st accused's evidence was therefore at tangent with the evidence of 3rd accused though consistent with that of the 2nd accused. 1st accused stated that the 2nd accused was his ("brother") cousin since their mothers were sisters. He said that he knew the 3rd accused since 12 November in 2018 as the 2nd accused's wife. The 2nd accused introduced the 3rd accused to the 1st accused as his wife. When asked why the 3rd accused would falsely incriminate him, the 1st accused responded that he did not know why and that it was up to the 3rd accused to suggest the reason. He denied that the police recovered any of the deceased's property from him including the phone which he insisted was his, since he had bought it a year before the commission of the offence in *casu*. He denied that the Samsung phone produced in court was recovered from him and stated that his handset and \$42 ZWL must have been converted by the police for their benefit.

The 2nd accused testified that the 3rd accused was his live in wife since he had not performed any marriage rights. He stated that he was at home on 18 and 19 November. His evidence and that of the 1st accused was similar in pleading *alibi* and being together with 3rd accused as well in Domboshava. He averred that he was surprised to be arrested on 20 November, 2018 at his sister's place in Domboshava where the 3rd accused had gone to before him, it having been the arrangement that the 3rd accused and him would have breakfast at the sister's place. The police took the 1st accused person to the 2nd and 3rd accused's house. He stated that police only recovered his wallet and \$19 ZWL. He denied knowledge of exhibit 6

on which he allegedly signed for the items listed thereon. He denied that they were recovered from the 2nd and 3rd accused's house. When asked whether he knew Jeremiah Gunyere, the 1st accused responded that he was seeing the witness for the first time in court. He testified that he did not even see the witness when the police drove them to where the deceased's taxi was. 2nd accused denied that he had ever set foot in the motor vehicle. In regard to ownership of cell No. 0776 623 893 in the name of his brother Ranjis Wilmar Tamangani, the 1st accused denied ever having used that phone line although he admitted that Tamangani was his brother.

In regard to the allegation that on 19 November, 2018 there was communication between Tamangani's line and 3rd accused's phone, he said that it was not him who used the phone because he was using the 3rd accused's phone with a line belonging to the 3rd accused. He however stated that Tamangani was well known to the 3rd accused. He denied knowledge of exhibits produced in court. When it was put to him that the 3rd accused was alleging that him and the 1st accused were involved in assaulting the deceased and robbing him, the 1st accused responded as follows:

"I do not know the deceased. I do not know where, she (3rd accused) got it from."

The 2nd accused testified that his relationship with the 3rd accused was good.

Under cross examination by counsel for 3rd accused, he said that he never owned a mobile phone. During the time that he was cohabiting with his ex-wife, he would use her phone for communication. Ever since the 3rd accused and him stated staying together, he would use the 3rd accused's phone. When he was shown exh 7, the call history between Tamangani's phone and the 3rd accused's phone, the 2nd accused responded that he was Norest Tamangani and not Ranjis Tamangani. When asked whether he telephoned Ranjis on 19 November, 2018, he responded that he could not recall but if he did so, he would have used the 3rd accused's phone. He denied that he ever left Domboshava on 19 November, 2018 and stated that he did not know where the 3rd accused was getting the story from. State counsel in cross examination asked the 2nd accused why the 3rd accused would throw at him mud given that they were cohabiting as husband and wife, the 2nd accused stated that the two had a misunderstanding rooted in the fact that 3rd accused did not want the 2nd accused to communicate with his ex-wife. After his arrest, the 2nd accused then had another argument with the 3rd accused after she discovered that she was communicating with another inmate at the prison where the 3rd accused was locked up. He said that the 3rd accused had retorted that the 2nd accused's life was in the 3rd accused's hands. When asked if he had gone to Jeremiah Gunyere's place, he confirmed so. He stated that he went there once in the company of the police and that none of the three of

them as accused persons directed the police there. The police just drove directly to the place according to him. He was steadfast that police did not recover anything from his shared residence with 3rd accused. When questioned by the court to suggest a reason for Jeremiah Gunyere to lie the 2nd accused responded that he did not know why because he saw Gunyere for the first time in court.

The 3rd accused testified that on the fateful day, she was telephoned by the 2nd accused to come into town and pick up foodstuffs which he had bought. The 1st and 2nd accused had been at her residence before they left for the city. When the 2nd accused left home with the 1st accused he had indicated that he intended to go to Murewa for orders. She came into town and met with the 1st and 2nd accused who were in the company of another person who was introduced to her as Last. It was the first time that the witness met Last. The witness gave a detailed account of how the 2nd accused flagged down a taxi after he had previously been saying that the taxi he wanted had gone into the city centre. The witness asked the 2nd accused whether the foodstuffs he promised were in the taxi which he had flagged down. The accused simply replied that that taxi had returned into town. She however got into the deceased's taxi. The taxi was driven to Kuwadzana before the driver was directed to turn into some suburbs on the left side of the road. The driver was ordered to stop the vehicle. The deceased was then attacked by the 1st and 2nd accused and Last.

The 3rd accused testified that the deceased cried out and she also screamed but Last shouted at the 2nd accused saying "tell your prostitute to keep quite." Last held the deceased from the back after the 2nd accused shouted at Last to do so. The 1st accused for his part struck the deceased with a beer bottle ordering the deceased to keep quiet. Last continued to throttle the deceased. The 1st accused searched the deceased's pockets and removed the contents. 1st accused also removed the deceased shoes. The 2nd accused then took over the motor vehicle controls and drove the vehicle to some place which she could not make out. The deceased was then dumped after pulling him out of the motor vehicle. 3rd accused testified that the 2nd accused enquired as to how much money had been recovered from the deceased. The 1st and 2nd accused and Last agreed that the stolen money be used to purchase fuel. The 2nd accused then drove into a filling station and the car was refuelled. The 2nd accused thereafter drove the vehicle towards Domboshava.

The 3rd accused testified that she asked the 2nd accused to drop her home. Last then enquired whether the 3rd accused if dropped home would not open up. When she did not respond, Last then said that she would not be dropped home because she had not committed to

keep the incident to herself. She stated that the 2nd accused was speaking to someone on the phone saying that they had managed to get the vehicle. She testified that she was then ordered to drive the vehicle and she obliged because she was now afraid for her life after what she had seen being done to the deceased. She decided to play along for her life's sake. She said that she was directed to stop and park the vehicle outside a bar in Domboshava and she obliged. It was now late at night. She was left in the vehicle but could not run away because she was scared and did not know people around the area. She also did not have any money to catch a lift. She said that she must have dozed off. The 1st and 2nd accused returned from the bar without Last. 2nd Accused said that the person whom they had intended to meet with the vehicle had deferred their meeting to the following day.

The 3rd accused continued with her testimony and stated that the 1st and 2nd accused did not take long in the car before they dozed off to sleep. She then decided to take the opportunity to drive home whilst the two were asleep. As she drove, the 1st accused suddenly woke up and also woke up the 2nd accused shouting that "maiguru" (sister in law) is driving. The 2nd accused then suddenly got hold of the handbrake and pulled it up. The 3rd accused lost control of the vehicle, veered off the road and crushed into Gunyere's hedge which surrounded Gunyere's homestead. After the accident the 2nd accused according to the 3rd accused, requested Gunyere to safe keep the vehicle until he returned to collect it. She said that the three of them hiked a combi and went home. On arrival home, the 3rd accused testified that she proceeded to the homestead of the 2nd accused's sister within the locality and reported what had transpired. The sister then telephoned the accused to come over to her place. Upon the 2nd accused's arrival, she asked the accused as to what had happened. The accused did not respond but instead retired into his sister's house and went to sleep. Police came and arrested her and the 2nd accused at the sister's homestead.

The police then requested that the 3rd accused should lead them to her shared homestead with the 2nd accused. She was asked to point out property which did not belong in the house. She showed the police the items which had been forcibly taken from the deceased when he was assaulted and robbed of the motor vehicle. She also showed the police the satchel which the 1st accused had come with when she saw him on the 18 November 2018. She said that the three of them led police to Gunyere's homestead where police arranged for safe keeping of the vehicle by Gunyere. The 3rd accused then narrated how the trio were taken to Southerton Police station and assaulted by police before CID Homicide took over the matter for investigation. She produced medical records to corroborate her claim that police assaulted her. The issue of

assaults is one that this court cannot resolve in this trial save to advise the 3rd accused to take the matter up and make a formal complaint to the police hierarchy in regard thereto.

In regard to cross-examination, the state counsel had no cross examination for the 3rd accused. The 1st and 2nd accused counsel cross examined the witness. The 3rd accused stuck to her testimony as given in her evidence in chief. Counsel for 1st accused sought to establish what part the 1st accused played in the robbery of the deceased of his personal property and the taxi. The 3rd accused testified that 1st accused assaulted the deceased on the knees with a bottle. Counsel for 2nd accused did not make any headway in cross examination of the 3rd accused. She testified that the cell line which the 2nd accused used was registered in the name of his brother Ranjis. The accused himself could not purchase a cell line because he did not possess a national identity card. When asked as to why she did not dissociate herself from the 1st and 2nd accused at Domboshava Bar when she remained in the car, the 3rd accused responded that the other accused persons had locked her in the vehicle and taken the car keys with them. She could not in any event escape to her home because it was late at night. Further, there was no transport to her home. She also did not have any money to hike even if she had found transport. The witness maintained her evidence that it was the 1st and 2nd accused and Last who attacked the deceased and robbed him of his personal property and the taxi. She also stated that the trio of 1st and 2nd accused and Last shared their loot at Mangate bus stop. She also said that the 2nd accused did not want her to drive in the direction which she had taken to go to her homestead and that the 2nd accused pulled up the handbrake intending to stop the vehicle. She also testified that she did not confess to the crime because of beatings by the police but out of her own volition. She however said that the beatings upset her because she did not appreciate why after having told the police everything that happened, the police at Southerton Police Station turned physical on her. Counsel also put it to the 3rd witness that the 2nd accused never participated in the commission of the crime. This was her answer:

“He drove the motor vehicle from the time the deceased was removed from the wheel. Romeo assaulted the deceased with a bottle on the knees. Last throttled him until he was dumped.”

The accused persons did not call any witnesses. In terms of demeanour and credibility, the 1st and 2nd accused persons did not impress the court. They had nothing to say in their defence save to give a bare denial. Their supposed *alibi* was just a fleshless denial. It was simply to the effect that they spent the day at the home of the 2nd accused. They did not advance any reason as to why the witness Gunyere would lie against them. They equally could not advance any reason as to why the 3rd accused lied against them in her evidence. The evidence

adduced by the State was sufficient to remove any reasonable doubt in the mind of the court that the accused were connected to the commission of the offence. Both 1st and 2nd accused were found in possession of the deceased's personal property on the morning following the night of the deceased's murder. The three accused were proved beyond any reasonable doubt to have been in possession of the deceased's driven taxi which he had been in charge of on the night of the deceased's murder. They were involved in an accident with the vehicle by Gunyere's homestead as testified to by Gunyere. Gunyere had no motive to lie against the three accused. Gunyere and the accused persons did not know each other prior to the morning that the accident involving the three accused occurred. Gunyere's evidence on the occurrence of the accident was corroborated by the evidence of the 3rd accused. The police evidence in regard to recovery of the taxi motor vehicle and the recovery of the deceased's personal property from the 2nd accused was similarly corroborated by the third accused.

In regard to sufficiency of evidence against the three accused persons, the evidence against the 1st and 2nd accused was both circumstantial and direct. The direct link was brought in by the evidence of the 3rd accused who detailed how the deceased was murdered by the 1st and 2nd accused and their outstanding accomplice, Last. Circumstantial evidence relies on an inference or conclusion drawn from proven events or circumstances surrounding the commission of the charged offence. The proven circumstantial facts are cumulatively considered and if upon their considerations the only reasonable inference drawable therefrom is that the accused is guilty of the charged offence, then the court returns a guilty verdict. If, however more than one reasonable inference is drawable, then the accused gets the benefit of doubt (See *S v Muyanga* HH 79/13; *R v Blom* 1939 AD 188 at 202-203; *S v Reddy & Ors* 1996 (2) SACR 1 (A) at 8 C-D; *S v Jekiseni* HB 106/08; *S v Jumo* HH 247/16).

Once there was evidence led connecting the accused to the commission of the offence, the accused were required to provide an innocent explanation of their possession of the deceased's personal goods and the motor vehicle. An innocent explanation would have to be reasonably possibly true. The 1st and 2nd accused inadvisably so, decided to stand by a bare denial. The inadvisability of standing by a bare denial is that facts alleged against the accused if the court then determines to be proved, are accepted without qualification. The accused loses the chance to qualify them or water down their impact. The court therefore accepted the evidence against the accused as given by the state witnesses including the evidence of the 3rd accused.

As far as the 3rd accused's involvement was concerned, she advisedly decided to come out clean. She narrated her involvement and that of the 1st and 2nd accused and Last. The State counsel conceded that the 3rd accused was a victim of circumstances and that she was not involved in the planning and actual execution of the murder of the deceased.

The 3rd accused by her admission of involvement was an accomplice. An accomplice's liability is determined based on the accomplice's own *mens rea* though in regard to *actus reus*. The evidence shows that in whatever manner she became involved, the 3rd accused had no intention to make cause with 1st and 2nd accused and Last. She tried to persuade the co-accused to desist from their unlawful conduct. She drove the vehicle of the deceased for fear of being harmed as she had been threatened. When she took to the road during their unlawful conduct, she drove the vehicle of the deceased for fear of being harmed as she had been threatened. When she took to the road from Domboshava road, she took advantage that the 1st and 2nd accused had dozed off. She then drove the vehicle hoping that she could get to her house and complete her intention which was to dissociate herself from their company. The act of one accomplice is imputed on the other accomplice as well if the accomplices have the requisite *mens rea*. The accident took place after the 2nd accused had applied the handbrake to stop the vehicle without warning the 3rd accused who was driving. She confessed what had happened to the accused's sister at the first opportunity. Under the circumstances, the State's concession was properly made. As for the 1st and 2nd accused, evidence led against them shows that they assaulted the deceased as charged in the indictment in circumstances where they did foresee the possibility or a real risk that their conduct would result in serious injury or death to the deceased but persisted in their unlawful conduct despite such realization. The court reached a unanimous verdict as follows:

- 1. The 1st and 2nd accused are each guilty of the murder of the deceased Taruvinga Mutiza with constructive intent as defined in section 47 (1) (b) of the Criminal Law Codification and Reform Act [Chapter 9:23].**
- 2. The 3rd accused is found not guilty on the indictment and accordingly is acquitted.**

Sentence

Both counsel for 1st and 2nd accused conceded that the accused committed the murder they stand convicted of in aggravating circumstances. Section 47 (2) of the Criminal Law (Codification & Reform) Act, in so far as its provisions are relevant to this case, read as follows:

“(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstances if-

- (a) The murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or if any act constituting an essential element of any such crime (whether or not the deceased was also charged with or convicted of such crime)-
 - (i) ... or
 - (ii) ...or
 - (iii) Kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody
 - (iv) ...or
- (b) ...or
- (c) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim.
- (d) ...
- (3) (a) the murder was premeditated.

In casu, the deceased was the victim of a kidnap, a robbery and hijack or illegal detention. The deceased's constitutional rights to privacy; dignity, personal security and not to be subjected to physical torture or to cruel and inhuman or degrading treatment were violated by the conduct of the accused persons. The deceased was lured by the accused under pretext of hiring his taxi yet the accused had planned on committing various crimes as evidence revealed. The conduct of the accused persons showed a resolve to accomplish their deliberate plan to rob the deceased of the motor vehicle or steal his personal property. After taking the vehicle they dumped the deceased as if he was refuse. The offence was premeditated and was not committed by chance.

The accused throughout the trial did not exhibit any remorse. Whatever any one said against them was to them a lie even in circumstances where the accused persons could not advance any reason for witnesses including the 3rd accused to lie against them. The conduct of the accused persons was reprehensible and abhorrent. They did not really care to preserve life. Counsel for both accused submitted that the finding that the murder was committed with constructive intent watered down the seriousness of the murder. I agree that generally speaking murder with intent is viewed more seriously than murder with constructive intent. I also agree that in a proper depending on the circumstances of the specific case, the fact that an accused has acted with constructive intent further mitigates the accused moral blameworthiness. However, *in casu*, as observed in the judgment, the accused persons acted with "*dolus eventualis*". They did not care not as to the possibility of their conduct resulting in death. After the deceased had been strangled and disabled, none of the accused person was concerned as to whether he was still alive or whether he would survive or not. He was dumped with reckless abandon.

Section 47 (4) of the Criminal Law (Codification and Reform) Act provides as follows in regard to sentence following a conviction of the accused for murder:

- “(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.”

In the current case, the murder having been committed in aggravating circumstances, the court has a discretion to impose any of the three sentences provided for in paragraph (a) of subsection (4) as quoted above. The court exercised a judicious discretion on the appropriate sentence to impose taking into account the circumstances of the murder and balancing them with the personal circumstances of the accused. To be taken into account too is the societal interest in ensuring that a serious crime is adequately punished. The logical approach in my view is to start from the bottom end of the scale. In this respect the court must consider the suitability or otherwise of the least sentence in that order to the severest of the sentences which is death. In the view of the court the aggravating circumstances in this case totally eclipsed the mitigatory factors. It was always going to be difficult for the accused person to submit meaningful mitigation surrounding the circumstances of the commission of the offence in that their alibi defences precluded them from giving evidence connected with the commission of the offence. Accordingly, the only mitigatory circumstances advanced was in the form of their personal circumstances which consisted in their youthfulness at ages 29 and 31 years and the usual family responsibilities.

As regards remorse which they did not readily show, the accused persons only stated that they were sorry that the deceased died after the court had asked counsel whether in view of the court’s findings that the accused persons were guilty, they had anything to say in regard to regretting their proven culpability. The accused’s counsel then took instructions and submitted in turn that the accused regretted the death of the deceased. It is important for counsel and accused persons, to appreciate that once a court has convicted the accused in any case where the accused was denying the offence, the accused has to tailor his or her mitigation to relate to proven facts as given in the reasons for judgment even though the accused does not agree with the conviction and is minded to appeal. The court that has passed judgment remains bound by its judgment and will consider aggravation and mitigation within the parameters of the facts of the case as found by it to have been proved. The accused who has been convicted

has to mitigate on the acceptance (though only for mitigation) that the judgment which the accused may not be in agreement with is correct.

The court considered the manner of commission of the offence, the preplanning, the theft of the deceased's personal property and car, the vicious attack on the deceased and strangulation, the dumping of the deceased where he could not get help, the conduct of the accused after the crime of going to drink alcohol and being merry without ever looking back on what they had done and the want of remorse, as showing a high level of moral blameworthiness. The two accused persons had a previous conviction which was for robbery of a motor vehicle. It turned out by the accused persons' admission that they had on 18 November, 2018, a day before they committed the present offence, committed a similar offence wherein, the vehicle driver was however not killed but lost his vehicle, a fun cargo and personal property.

It has to be accepted that murders committed in the course of a robbery have invariably attracted the death penalty in the absence of weighty mitigatory circumstances. (see *S v Kufakwemba* HH 795/16; *S v Marijo* SC 150/04; *S v Makaika Milanzi and Ors* HH 398/17). The court considered imposing imprisonment for life but felt that this sentence would also not be adequate. That left the ultimate sentence of death. The imposition of the death penalty is a topical and controversial issue with proponents in favour of and against the sentence argue on daily. The court takes judicial notice that apart from the debate aforesaid, there has been no execution of the death sentence since 2005. This speaks to the lack of appetite by the Executive to carry the sentence into execution. Argument was submitted that there was no point to be served by imposing a penalty which will not be executed.

The fact that the debate on the desirability of retaining the death penalty on the statute books is ongoing should not cloud the court when assessing sentence for murder. This court is a court of law. The law must be applied as it is given. The issue here is not whether the judge is a proponent of the death penalty or not. The judge must apply the law of the day. Until the death penalty is removed from the Constitution and statute books, the judge would be abrogating his or her sworn oath to uphold the constitution and the law were he or she to refrain from passing a competent sentence befitting a particular offence because public opinion is against the imposition of that type of sentence. The argument that no death row prisoners are being hanged anyway is an issue for the executive which is charged with carrying out the executions. The court does not direct them to carry out the executions. The court becomes *functus officio* upon pronouncing its judgment and sentence

In the final analysis, for the reasons which have been given in the reasons for sentence, the court was inclined to sentence both accused to death. In the absence of the accused advancing any reason why the death sentence could not be imposed upon them, the accused would be sentenced as follows:

1. Each of the two accused is sentenced to death. Each of the two accused shall be returned to prison, there to be held until the execution of the sentence.
2. The accused have been advised that there is an automatic appeal to the Supreme Court and that they are encouraged to pursue the same and file grounds of appeal.

National Prosecuting Authority, State's legal practitioners
Devitte, Rudolf and Timba, 1st accused's legal practitioners (Pro Deo)
Magwaliba and Kwirira, 2nd accused's legal practitioners (Pro Deo)
Mambosasa, 3rd accused's legal practitioners (Pro Deo)