

THE STATE
versus
CHRISTOPHER KUFAKWEMBA
and
GODFREY MASENHU
and
BENSON JOEL
and
LANGTON NYAKUDIRWA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 2 September 2013 -8 December 2016

ASSESSORS: 1. Mr Gonzo
 2. Mr Chakuvinga

Criminal Trial

C Chimbari, Nyazamba, for the State
M Moyo, for the 1st accused
S Rugwaro, Uchena for the 2nd accused
Kunze, for the 3rd accused
Mboko, for the 4th accused

CHATUKUTA J: The accused persons were charged with contravening section 47 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. It was alleged that on the 19th of November 2011, accused persons proceeded to 10 Gardner Road, Ruwa, where they assaulted one Aldo Carlo (hereinafter referred to as the deceased), by knocking his head on to the floor, kicking him with booted feet and striking him all over the body with a log. The deceased sustained injuries from which he died on 6th January 2012.

The accused were alleged to have stolen more than USD 2 500, three fire arms, a Colt pistol 45, a Webley revolver.22 and Smith & Wesson revolver 357. They ransacked the house and stole various clothing items and a Nokia 5230 cellphone. They also took the deceased's Isuzu KB 280 which they used to flee from the scene. On the same night, that is the 19th of

November 2011, the vehicle was recovered by the police abandoned in Epworth Harare and the deceased's Webley Revolver was recovered in the vehicle.

The 1st accused was arrested at Number 2505, Glen Norah A, Harare on 2nd January 2012. The accused led to the recovery of a Nokia 5230 cellphone in the accused's possession and the deceased's Colt Pistol. The pistol was hidden under his bed. The 1st accused implicated the 2nd accused and led to his arrest. The 2nd accused led to the arrest of the 3rd accused. The 2nd and 3rd accused persons led to the recovery of the deceased's Smith & Wesson revolver. It had been concealed in a disused hut at the 3rd accused's homestead in Goromonzi. The 3rd accused led to the arrest of the 4th accused also in Goromonzi.

The accused persons pleaded not guilty. All the four accused persons stated in their defence outlines that they were nowhere near 10 Gardner Road, Ruwa on the 19th of November 2011. The 1st accused stated that he was at his home in Glen Norah. He was going to call one Vengai Kufakwemba as a witness in support of his defence that he was at home. He admitted having been found in possession of the deceased's Colt pistol and he stated that he had been given the pistol by the 2nd accused for safe-keeping. He denied any knowledge of the 3rd and 4th accused persons.

The 2nd accused person admitted in his defence outline that he was at some stage in possession of both the deceased's Colt pistol and the Smith & Wesson revolver. He stated that he guns were in a bag which had been left for safe-keeping by one James Jimmy Maisiri. At the time that he was given the bag, he was not aware that it contained the guns. He denied assaulting the deceased and he disputed that the deceased had died from the injuries sustained in the assault on 19th November 2011.

The 3rd accused admitted being found in possession of the Smith & Wesson Revolver. He stated that the gun had been left in his custody by the 2nd accused for safe-keeping and he did not know the 1st accused person prior to his arrest.

The 4th accused person stated that he did not know the 1st and 2nd accused persons prior to his arrest. He stated that he had previously under-taken construction work for the deceased at the latter's residence. On the 19th of November 2011, he was at his home with his wife, sister, one Cephas Nyakudarika and Mike Mutandwa. He stated that he was going to call the four as witnesses.

The state called a number of witnesses, the first one being Leas Pfungwadzapera (Pfungwadzapera). He was employed by the deceased as a security guard. The second witness was Godfrey Kayii. The third witness was Blessing Munetsi. Both the second and third witnesses were also employed by the deceased. The fourth witness was Davidson Chatukuta. The fifth witness was Milward Tozivepi. The sixth witness was George Pfidze and the seventh witness being Previous Mutata. The fourth to the seventh witnesses were all police officers who were involved in the investigation of this case. Each accused person also testified, and none of the accused persons called any witnesses.

The following facts are common cause arising from the evidence that was adduced from the state witnesses and the accused person. There was a housebreaking at the deceased's home on 19 November 2011. The deceased was about 80 years old. The persons who broke into the deceased's house severely assaulted the deceased and Pfungwadzapera. The deceased was taken to hospital and he subsequently died on the 6th of January 2011. According to the post mortem report, the pathologist observed that the deceased had intra-cerebral haematoma in the frontal region and subdural haematoma. He concluded that the cause of death was brain damage due to severe head injuries secondary to assault. Pfungwadzapera was also taken to hospital where he was admitted for about ten days after sustaining head injuries.

The 1st and 2nd accused persons were known to each other. The 2nd and 3rd accused persons were also known to each other, the 3rd and 4th accused persons were equally known to each other. The 4th accused person knew the deceased prior to the date of the robbery. He had done, as indicated earlier, some construction work for him. The 4th accused person and the 1st state witness, that is Pfungwadzapera, knew each other as they had worked together at the deceased's home. The 3rd and 4th accused persons resided in the same area that is in Goromonzi. They were both in the construction industry.

It was also common cause that one of the guns, the colt pistol belonging to the deceased was recovered at the 1st accused's home concealed under a bed. The second gun was recovered at the 3rd accused's homestead concealed in a disused hut. It is also common cause that the 1st accused led to the arrest of the 2nd accused, the 2nd accused led to the arrest of the 3rd accused and the recovery of the revolver from the 3rd accused and the 3rd accused led to the arrest of the 4th accused person.

The issue for determination before us is in our view whether or not the accused persons were the persons who broke into the deceased's home and fatally assaulted him and robbed him of his property. In other words the issue for determination is the identity of the assailants.

The only person who witnessed the robbery and assault and was able to identify the assailants was Pfungwadzapera. The following is his evidence. He was aged 71 when the trial commenced, on 2nd September 2013. On the 19th of November 2011, he had just reported for duty in the early evening when he saw the 2nd accused and the 3rd accused person. They called out to him by name. They were putting on police uniform. When he approached them, they started assaulting him, they grabbed him and hand-cuffed him on allegations that he was cultivating dagga. The accused force-marched him to the deceased's home and knocked on the door. The deceased opened the door holding a gun. Upon enquiring from the two accused persons the nature of their business, the accused told the deceased that they had arrested the witness for cultivating dagga. The deceased invited the accused inside the house to discuss the issue. When inside the house, the 2nd accused grabbed the deceased and a struggle ensued.. The 2nd and 3rd accused disarmed him and the gun went off during the struggle. The accused handcuffed the witness and the deceased together. The 2nd accused started assaulting them all over the body using hands and sticks. The 3rd accused appeared on the scene and joined in assaulting the deceased and Pfungwadzapera. The witness was assaulted on the head and legs. The deceased was assaulted mainly on the head. The accused would assault the witness whenever he attempted to look at the accused in the face.

The accused got keys from the deceased to the safe in the house, they took some money from the safe and they further searched the deceased and took some more money from him. The accused left in the deceased's vehicle after having ransacked the house. The witness identified the 1st, 2nd and 3rd accused as the assailants. He testified that he did not see the 4th accused at all at the scene. The witness was taken to hospital with injuries to his head, he was hospitalized for about ten days. The deceased who was still alive at the time was also taken to hospital. The witness testified that there was no electricity on the day in question and the deceased was using a generator to light the interior of their house. He was able to identify the accused persons because of the lights in the house. He was able to identify the 2nd accused person, more particularly because he is the one who hand-cuffed him outside the house.

Despite his age, the witness gave his evidence well and related the ordeal that he and the deceased went through. He withstood vigorous cross-examination. He was honest enough to admit that he did not observe the 4th accused at the scene. It would have been easier for him to implicate the 4th accused person as he is the only one that he knew prior to the robbery, but he did not do so. It is clear that he was able to identify the other three accused persons as the assailants as they were inside the house and there was lighting in the house despite. The assault on the witness and the deceased was for a lengthy period from outside where it was dark and into the house where there was light. We accordingly make the finding that the witness was credible.

The evidence of Godfrey Makeyi and Blessing Munetsi merely confirms that a robbery took place. They were alerted by the deceased's dogs barking incessantly and the discharge of a firearm that something was wrong at the deceased's residence. They went to the scene to investigate the noise. Upon arrival, they witnessed the assault on the deceased and Pfungwadzapera. They observed that one of the assailants was wearing police uniform and holding a firearm. Upon seeing the firearm, they ran away with the intention of alerting a neighbor of the robbery. As indicated earlier, the fact that a robbery did take place is not in dispute. The witnesses however did not identify the assailant. Their evidence therefore does not assist us in determining the issue before us and that is the issue regarding the identity of the assailants. However, their evidence corroborates Pfungwadzapera's evidence that one of the assailants was wearing police uniform and was armed during the robbery. They also confirmed the evidence that at one time there was a discharge of a firearm.

The State further called the police details who attended to the scene after the robbery and investigated the matter. Davidson Chatukuta gave a detailed account of the arrest of each accused person and the recovery of the property which was stolen during the robbery. His evidence was corroborated by Tozivepi Reward and George Pfidze who were also investigators in the matter. As alluded to earlier, the arrest of the accused persons and the recovery of some of the stolen property is not in issue.

The State also sought to rely on a video recording of the indications that were made by the 1st, 2nd and 4th accused persons. The 1st, 2nd and 4th accused persons raised allegations of severe assault perpetrated upon them by the police who took them for indications, among the police officers being Chatukuta, Pfidze, Mututa, Kachidza, Mwakamhenhi. It is common cause that the 3rd accused person did not make any indications. It was the accused persons' evidence

that the 3rd accused person was not able to give indications on the day in question because of the severe assault perpetrated upon him.

The police officers accepted that when conducting indications the procedure involves:

- (a) warning an accused of the charges he is facing and the circumstances surrounding the commission of the offence;
- (b) advising the accused of his rights, and that he is not obliged to make the indication and should do so freely and voluntarily;
- (c) inquiring from the accused if he/she has understood the charge and the caution; and
- (d) the accused signing on the documents used for indications that he has understood the charge and the caution and is willing to make the indications.

As rightly observed by the accused persons in their closing submissions, the first three stages were not recorded yet they are paramount in establishing the voluntariness of the indications. Only the fourth stage was recorded with respect to the 1st, 2nd and 4th accused persons.

It is quite apparent that the recording had been interfered with.

There were other pauses and missing portions of the footage giving the inescapable impression that the footage had been tampered with. For example, it appeared on the recording that when the 2nd accused person made his indications, he walked along a tarmac road for a considerable distance and time. However, a truck suddenly appeared briefly at the end of the road, ahead of the accused person from nowhere. No vehicle was observed or heard passing the accused and the police officers as they walked. The police details were not able to explain how and from where the vehicle appeared on the recording without having passed them on the same road.

It was the evidence of the police officers that the accused indicated to them that when they arrived at the scene, the 3rd accused temporarily remained on guard as the 1st and 2nd accused proceeded to the residence. During the indications captured on the video, the 1st and 2nd accused persons pointed at different spots where the 3rd accused person was alleged to have been hiding as the sentry. Whilst the 1st accused person pointed at a spot close to the gate at the entrance to the deceased's premises, the 2nd accused person walked a visibly long distance to a totally different spot.

The police details indicated that the accused persons were advised of the purpose of the visit to Goromonzi albeit for indications and they were so advised at Harare Central Police Station. It is common cause that the police also took the 3rd accused to Goromonzi. It is also common cause that the 3rd accused did not appear on the video recording making any indications. It was stated by the police details that he refused to make the indications. It was not, however, satisfactorily explained by all the police officers who testified why, if the 3rd accused person was advised of the indications and he had not consented to give the indications, he was also brought all the way to Goromonzi with the other accused persons. In fact, there was no recording of the police warning him of the indications and his refusal to participate. Such warning was not also recorded from the other three accused persons. His non-appearance in the video raise questions as to his state just before the other accused proceeded to the scene and gives credence to the accused persons' allegations that the 3rd accused had been severely assaulted and was not in a state to give indications. It cannot be ruled out that the other accused persons had also been assaulted and made indications in fear of being assaulted by the police and end up in the same state as the 3rd accused.

Although the video recording was produced with the consent of the accused persons, it is clear that the indications were not freely and voluntarily made. It was also clear that the footage did not reflect everything that transpired on the day as the important preliminary stages to conducting indications were not record. Additionally, the footage was tampered with. We therefore find that the indications are not admissible.

Turning to the evidence of the accused persons, it is not in issue that the 1st accused person was found in possession of one of the firearms that was stolen from the deceased's home. The third accused was also found in possession of the other firearm. Both the 1st and the 3rd accused persons allege that they were given the firearms by the 2nd accused person. The 2nd accused person admits giving the firearms to the 1st and the 3rd accused persons.

However, the circumstances under which the accused persons allege that they were given the firearms were not satisfactorily explained. The 1st accused's explained that he knew the 2nd accused as they worked together at Machipisa, Highfield from around the year 2000. The 2nd accused person sold electrical and plumbing ware. He was given the firearm by the 2nd accused for safekeeping. The 2nd accused was going to Mufakose to visit his ailing child. He did not inquire from the 2nd accused where he had obtained the firearm neither could he explain why the

2nd accused could not take the firearm to Mufakose. When he was arrested by the police he had had the firearm in his possession for a week. He did not dispute that the firearm was recovered by the police concealed under his bed. A gun is a dangerous weapon. It was inconceivable that the 1st accused accepted such a dangerous weapon from a friend whose day to day job was selling electrical and plumbing ware. A firearm cannot be described as an electrical or plumbing item that the 2nd accused would have had during the normal course of his employment. The 1st accused should surely have been curious from the time the firearm was left in his custody as to where the 2nd accused had obtained such a weapon. The lack of interest is indicative of the fact that he knew where the firearm had come from, and that is from the deceased's home.

The 1st accused stated that he bought the cellphone that was also recovered from him. He did not offer any other explanation as to how he came to buy the cellphone. However, the coincidence was great that he was found in possession of both the cellphone and the firearm belonging to the deceased.

The 2nd accused's evidence was that he is the one who gave the firearms to the 1st and the 3rd accused persons. He testified that he got a bag with the firearms from one James Jimmy Maisiri. James Jimmy Maisiri owed him some money. He brought some electrical items and asked him to off-set against the amount owing. There was still a sizeable balance outstanding after the set-off. James Jimmy Maisiri left the bag with him on the understanding that he was going to collect the balance. He was not aware of the contents of the bag. When he later opened the bag, he was not worried that it contained guns as James Jimmy Maisiri had promised that he was returning soon. James Jimmy Maisiri never came back to collect his bag and the guns up to date.

The lack of curiosity as to how James Jimmy Maisiri came to be in possession of firearms and that the firearms were left in his custody is also as surprising as the 1st accused's alleged innocent possession. It is surprising that both accused persons were unruffled when persons who did not have any cause to possess such dangerous weapons were just leaving them for safekeeping at every turn.

It is clear from the evidence of the Police Officers that they were not advised of this James Jimmy Maisiri. The police would have made the necessary follow ups on who James Jimmy Maisiri was and how he came to be in possession of the firearms. What is more absurd is the 1st accused's evidence that, after he became aware of what was in the bag, he started moving

around with the firearms. Instead of handing the firearms to the police, he decided that one gun should be left with the 1st accused person in Glen Norah for safe-keeping and the other gun should be left with the 3rd accused person in Goromonzi. The accused resided in Chitungwiza and he had to travel to Glen Norah carrying the bag intending to go and give the bag back to James Jimmy Maisiri. Both guns were in the bag. He decided to leave one gun with the 1st accused and later took the other firearm to Goromonzi. The accused could not satisfactorily explain why he chose to leave one gun with the 1st accused.

He neither was able to satisfactorily explain why he took the second gun to the 3rd accused in Goromonzi. His explanation was that he had carried the bag with the gun again intending to hand it over to James Jimmy Maisiri. He ended up in Goromonzi visiting his uncle the 3rd accused. He left the gun for safekeeping, again, when he went to the shops. Whilst at the shops, he received a call and left for Harare without the bag. The explanation was equally incredible.

The court became aware of how the 1st accused came into possession of the deceased's cellphone from the 2nd accused. The 2nd accused testified that James Jimmy Maisiri wanted to sell him the cellphone. He however recalled that the 1st accused wanted a cellphone. He referred James Jimmy Maisiri to the 2nd accused and the latter purchased the cellphone from James Jimmy Maisiri. It is incredible that the 1st accused could not give this explanation when was asked to explain his possession under cross examination.

The explanation by the 3rd accused as to how he came to be in possession of the gun was equally unbelievable. The 3rd accused testified that had known the 2nd accused person since 1998. The 2nd accused was married to his niece. The 3rd accused was aware that the 2nd accused worked at Machipisa selling electrical and plumbing appliances. The gun was found hidden in a disused hut. The 3rd accused was a family man with a wife and children and was willing to accept an item which he admitted to be a dangerous item for safe-keeping. The accused was also aware of the nature of the 2nd accused person's employment. The nature of employment was such that the possession should have triggered alarm bells that the possession was not lawful. This was more particularly so in light of the fact that the 2nd accused person had come all the way from Harare carrying the weapon and it appears on public transport, but he would then want to leave it for safe-keeping at the 3rd accused's home for just a brief period whilst they went to the shops. Any

reasonable person would have taken the gun to the police instead of concealing it in a disused hut.

The court does not find the 1st, 2nd and 3rd accused to be credible witnesses. The only conclusion that can be derived from the absurd explanations given by the 1st, 2nd and 3rd accused persons, is that the 1st accused person and the 2nd accused person had at all times had the guns which were found in their possession after having robbed the deceased. They were not given the guns by the 2nd accused person, despite the 2nd accused person's assertion. All the three accused persons were therefore linked to the robbery.

Turning to the 4th accused person, it is common cause that Pfunzwadzapera did not see him at the scene on the day of the robbery. As far as Pfunzwadzapera was concerned there were only three assailants. The 4th accused person comes into the picture as a result of being implicated by the 3rd accused as having been with the 3rd accused on the day of the robbery. The police were not aware of him either, given the evidence of Pfunzwadzapera. Had the 3rd accused not implicated him, no one would have known about him. Was it a mere coincidence that the 4th accused person is the one who had been at the deceased's residence prior to the robbery, who knew the lay out, the security arrangements for the place, knew that Pfunzwadzapera was employed as a security guard at the premise. Was it also a mere coincident that the 1st and 2nd accused persons call Pfunzwadzapera by name when they pretended to be police officer when they "arrested" him and despite not having met before? We do not believe so.

As rightly submitted by the State, it appears each accused person had a role to play. The 4th accused person's role was to identify the target and provide the relevant information relating to the target. It is clear that the 4th accused person as a result of the role that he played conspired with the other accused persons as envisaged in terms of s 188 of the Criminal Law Code. Section 188 provides as follows:

"188 Conspiracy

- (1) Any person who enters into an agreement with one or more other persons for the commission of a crime, whether in terms of this Code or any other enactment
 - (a) intending by the agreement to bring about the commission of the crime; or
 - (b) realising that there is a real risk or possibility that the agreement may bring about the commission of the crime;
- shall be guilty of conspiracy to commit the crime concerned."

As observed earlier, the other three accused persons required the information on the set up of deceased's premises and the persons who worked at the premises. The accused persons knew of Pfunzwadzapera and called him by name. They knew the layout of the inside of the house and that there was a safe. The 4th accused was the only one who had prior knowledge of the premises having worked for the deceased before.

Finally, all the accused persons raised the defence of alibi. Whilst the onus indeed rests with the State to disprove the defence, the accused persons must place before the Court the requisite facts that must be rebutted. It does not suffice for an accused person to proffer a bare defence of alibi. Apart from simply saying that they were not at the scene, the accused persons did not place any other evidence that would have raised a basis for the rebuttal by the State. The state placed the 1st, 2nd and 3rd accused persons at the scene through Pfunzwadzapera's evidence and through the recovery of the stolen firearms and the cellphone. In fact, the 1st accused person and the 3rd accused person had intended to call witnesses to support their defence. They failed to do so. The 2nd accused indicated that he would not call any witnesses alleging that the police had intimidated them not to testify. He however did not persist with his desire to call the witnesses. That on its own is a clear indication that the accused were aware of the limitations of their defence of alibi.

The accused also sought to persuade us that they assaulted the deceased and Pfunzwadzapera, in self defence to ward off the assault by Pfunzwadzapera and the threat posed by the deceased who was holding a firearm. The accused persons were the assailants, who had intruded into the deceased's home. The deceased and Pfunzwadzapera would have been expected to ward off the intruders. The severe assault on two old men who were handcuffed cannot be said to have been perpetrated in self defence.

It is our finding that given the totality of the evidence adduced, the only inference that can be drawn is that the accused persons were the assailants who were at the deceased's residence on 19 November 2011 with the intention to commit robbery. The accused were willing to use force in order to achieve their goal. They severely and indiscriminately assaulted the deceased well aware that their conduct might result in the death of the deceased. The possibility of death of the deceased was not remote given the nature of the assault. We are therefore of the view that the State proved its case beyond reasonable doubt.

We accordingly find all the four accused persons guilty of contravening Section 47 (1)(b) of the Criminal Law Code.

APPLICATION TO ARREST JUDGMENT

On 17 March 2016, after the handing down of the verdict, the 2nd accused filed an application headed “SECOND ACCUSED’S COURT APPLICATION FOR LEAVE TO APPEAL AGAINST JUDGMENT”. A perusal of the application revealed that the application was for the arrest of judgment. The other accused persons followed suit soon thereafter. All four accused person filed their applications without the assistance of their *pro deo* counsel. Given the seriousness of the charge they had been convicted of, the court allowed the applications. Before determination of the applications but after oral submissions by the accused, the 1st, 3rd and 4th accused abandoned their applications and urged the court to proceed with the sentence. The 2nd accused persisted with the application.

The accused submitted that they were seeking the arrest of the judgment to enable them to appeal against the decision to convict them. They submitted that the judgment did not reflect their defences and the evidence adduced during the trial.

The applications were opposed by the State. Mr *Nyazamba* submitted that the applications were ill-advised and ill-timed. He further submitted that the arrest of a judgment can only be done in terms of s 331 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] where an accused alleges that the indictment does not disclose an offence. None of the accused persons had alleged that the indictment did not disclose an offence. He further submitted that the accused could appeal against the decision after sentence.

It appears that the applications were indeed premised on s 331 which provides that:

- “1) A person convicted of an offence by the High Court, whether on his plea of guilty or otherwise, may at any time before sentence apply to that court that judgment be arrested on the ground that the indictment does not disclose any offence.
- (2) Upon the hearing of the application, the court may allow any such amendment of the indictment as it might have allowed before verdict.
- (3) The court may either hear and determine the application forthwith or may reserve the question of law for the consideration of the Supreme Court and may nevertheless pass sentence forthwith.”

It is clear from the above, and as rightly submitted by Mr *Nyazamba*, that a judgment can only be arrested before sentence where the indictment does not disclose an offence. In an application of this nature, an accused must therefore attack the indictment. The accused did not allege that indictment was in any way defective and did not disclose an offence. It was apparent from their applications that they were querying the findings of fact arrived at by the court. In other words they were dissatisfied with the reasoning of the court and not with the indictment.

Having failed to lay a legal basis for their applications, the applications were accordingly dismissed.

SENTENCE

The starting point in determining the sentence to be imposed is s 48 of the Constitution. Section 48 (2) of the Constitution provides that:

“A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstance, and –

(a) the law must permit the court a discretion whether or not to impose the penalty;”

The issue that has exercised the minds of this court of late with the advent of the new Constitution is whether or not there is a law that defines what constitutes aggravating circumstances and consequently whether or not this court can impose the death sentence.

There has been a divergence of views starting with the decision of HUNGWE J in *S v Mutsinze* HH 645-14. After finding that the murder was committed in aggravated circumstances, HUNGWE J decided not to impose the death penalty. His decision was premised on the fact that the law on the imposition of death penalty was changed by the advent of the new Constitution and that there was no law defining what constitutes aggravating circumstances. HUNGWE J observed at p14 that:

“The omission of reference to extenuating circumstances and the introduction of aggravate circumstances in our view must be interpreted to mean that what is envisaged is an Act of Parliament which will define the terms on which courts will impose the death penalty. Alternatively and in any event, the absence of the definition of the term or what amounts to

"aggravated circumstances" must mean that these were to be defined in the envisaged law. Before such an Act of Parliament is enacted, I interpret the legal position to be that, in keeping with its international obligations and international best practices Zimbabwe intent to move away from the death penalty. Therefore, unless the State applies for a finding that aggravated circumstances exist, the court cannot impose this penalty in the spirit of the new law. In our view the accused must benefit from the absence of a specific law setting out the exact definition of what constitutes special circumstances."

KUDYA J in *State v Malundu* HH 68/15, agreed with the views expressed by HUNGWE J in *Mutsinza* that the contemplated law that complies with the constitutional provision is not yet in place.

The import of the remarks by HUNGWE J is that:

1. the law noted in section 48 (2) is an Act of Parliament;
2. there is an absence of the definition of the term or what amounts to aggravating circumstances and this has to be defined in an Act of Parliament ;
3. the court cannot impose the death sentence until a specific law is enacted; and
4. the absence of such an Act shows the legislature's intent to move away from the death penalty.

It appears that the term "law" was narrowly perceived by Hungwe J in *Mutsinze (supra)* to refer to an Act of Parliament. He appears to have stated that unless the legislature enacts a statute which clearly defines and outlines what constitutes aggravating circumstances, only then can the death penalty be imposed. The question that arises is whether the legislature intended to limit the definition of the term "law" to an Act of Parliament.

Section 332 of the Constitution provides the meaning of the term "law". It states that the term means:

- a) Any provision of this Constitution or an Act of Parliament;
- b) Any provision of a statutory instrument;
- c) **Any unwritten law in force in Zimbabwe, including customary law.**"(own emphasis).

As provided in the above section, an Act of Parliament is among the many other "laws" applicable in Zimbabwe. It is therefore clear that the term "law" must be interpreted in a broad

sense and not be confined to an Act of Parliament. (*Chinamora v Angwa Furnishers (Pvt) Ltd & Ors* 1996 (2) ZLR 664 (SC) 682 B-E See *Re: Chinamasa* 2000 (2) ZLR 322 (SC) and *L Ltd & Ors*, GUBBAY CJ (as he then was) in discussing s 113 of the old Constitution (which is similar to section 331) stated at 682 B-D that:

“Second, the decree can only be made to secure the fulfilment of "an obligation imposed on him by law". This means, in my view, an obligation placed upon a person by the law as distinct from any other type of obligation, such as social, moral, ethical or religious, which may be imposed upon him.

The law imposes obligations in several ways: unilaterally by means of legislation; by order of court; or the imposition may arise by virtue of the common law. These obligations are ties whereby one person is bound to perform for the benefit of another. In every instance, it is the law that fastens the knot. Thus, under the common law - which, as the unwritten law in force in Zimbabwe, falls within para (c) of the definition of "law" - there is an obligation to observe a duty of care towards others; an obligation to abide by the terms of a contract entered into with another party; and an obligation arising from a family relationship, such as the reciprocal duty of support between husband and wife, and a duty upon parents to maintain their minor or dependent children.”

My view that the legislature did not mean an Act of Parliament only is further bolstered by the wording of the subsequent s 48 (3) of the Constitution. The section provides

“An Act of Parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law.”

The subsection clearly expresses an intention of the legislature that the protection of the unborn children should be provided for under an Act of Parliament and not the other laws as defined in s 332. The legislature must have been mindful of the different sources of law when it enacted the various subsection to s 48. Had it intended that the law envisaged in subsection (2) be an Act of Parliament, it would have stated so as it did in subsection (3). This cannot have been by omission but by design.

In *S v Mlambo* HH 351-15, BERE J held similar views that the law envisaged in s 48 (3) of the Constitution is common law and that our courts have defined what constitutes aggravating circumstances. He stated the following at p 12:

“There is no need to pretend that until s 48 (*supra*) was enacted our common law position through precedent had not defined “aggravating circumstances” Our courts have always expressed the view that murder committed in the furtherance of other crimes such as rape or robbery amounts to murder committed in “aggravating circumstances” to warrant the imposition of death penalty. I

shudder to think that the enactment of s 48 (2) of the Constitution should be interpreted to have changed our common law position. That argument does not sound attractive to me because the legislature could not have intended to create such a *lacuna* in our law. There are numerous instances in our law when the Courts have determined and made specific findings of the existence of aggravating circumstances and went on to impose death penalty.”

Similar sentiments were echoed by MUSAKWA J in *S v Palaza* HH 111-16 where he observed at p 7 that:

“The law referred to in s 48 of the Constitution which provides for the passing of the death penalty already exists. The framers of the present Constitution could not have been oblivious of that fact. The only snag is the absence of what constitutes aggravating circumstances. That notwithstanding, the common law which is also part of our law provides for what constitutes aggravating circumstances in the commission of a crime as a plethora of decisions of the superior courts demonstrate. Notwithstanding the absence of a definition of aggravating circumstances it is possible, from the particular facts of a case, to make a finding of what constitutes aggravating circumstances. Within a legal context aggravating circumstances are ordinarily understood to be those circumstances that reduce an accused person’s moral blameworthiness.” (See also MUSAKWA J’s remarks in *S v Chihota* HH 234-15 at pp 10-12).

MUSAKWA J proceeded to give other instances where the imposition of sentence is dependent on factors that have not been defined in the respective statutes. Examples given are where statutes provide for the imposition of a minimum mandatory sentence unless a court finds that special circumstances exist. The examples of the crimes identified at p 7 are:

- “a) Stock theft in contravention of s 114 (2) as read with subs (3) of the Criminal Law (Codification and Reform) Act.
- b) Unlawful dealing in or possession of precious stones in contravention of s 3 (1) of the Precious Stones Trade Act [*Chapter 21:06*]”

Prior to the promulgation of the new Constitution, the sentence for murder was considered in terms of s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] without question. The section provides for the imposition of the death sentence unless the court finds that there are no extenuating circumstances. There is no definition of what constitutes extenuating circumstances in the Criminal Procedure and Evidence Act. This court has not however been

constrained by this absence from not imposing the death sentence. Extenuating circumstances have been found to be those circumstances that lessen the accused's moral blameworthiness. (*Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (SC) 278 A-B.)

Aggravating circumstances, being circumstances that worsen the accused's moral blameworthiness, are the converse of extenuating circumstances. In the absence of extenuating circumstances, and of necessity the presence of aggravating circumstances, our courts have imposed the death penalty. One circumstance that has been found to be aggravating, warranting the imposition of the death penalty, is the murder of a person during the commission of a robbery. There is a plethora of case authority on this point. (See *S v Chihota* HH 234/15, *S v Chauke & Anor* 2000 (2) ZLR, *S v Mubaiwa & Anor* 1992 (2) ZLR 362 (SC), *S v Masuku* SC 234/96, *S v Ncube* SC 179/1998, *S v Sibanda* 1992 (2) 438. *Masimba Mbaya & Anor v The State* SC 23/10, *Lovemore Majaradha v The State* SC 71/06, *Elijah Mabhena Chimurenga v The State* SC 35/2000 and *Onias Makuya Ndlovu & Anor v The State* SC 73/2000, *Morgen Matondo Matongo & Ors v The State* SC 61/05, *Irvine Kanhumwa & Ors v The State* SC 71/07) *S v Mlambo* HH 351-15. In most of these cases, the courts have given their approval to the remarks by GUBBAY CJ (as he then was) in *S v Sibanda (supra)* at 443 F-H:

“Warnings have frequently been given that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty. This is because, as observed in *S v Ndlovu* S-34-85 (unreported):

‘... it is the duty of the courts to protect members of the public against this type of offence which has become disturbingly prevalent. People must feel that it is possible for them to enjoy the sanctity of their homes, to attend at their business premises, or to go abroad, without being subjected to unlawful interference and attack.’”

It is evident from the above that what constitutes aggravating circumstances can be gleaned from our common law and in particular from precedence. As such, the law envisaged in section 48 (2) already exists in other sources of law other than an act of parliament. In the present case, the 1st to 3rd accused's legal practitioner conceded that common law could have been the law perceived by the legislature in section 48. It is only Mr *Mboko*, who persisted that the law envisaged was an Act of Parliament yet to be promulgated.

In any event, the legislature has already provided in the Criminal Law (Codification and Reform) Act that killing a person during the course of a robbery is an aggravating circumstance. Section 126 (3) provides that:

- (3) For the purposes of subsection (2), robbery is committed in aggravating circumstances if the convicted person or an accomplice of the convicted person-
- (a) possessed a firearm or a dangerous weapon; or
 - (b) inflicted or threatened to inflict serious bodily injury upon any person; or
 - (c) **killed a person;**
- on the occasion on which the crime was committed.

This has been reaffirmed in the General Laws Amendment Act (Act No. 3 of 2016) (the Amendment Act) perceived to be the law envisaged in s 48 of the Constitution. On 1 July 2016, the Amendment Act was promulgated, amending the Criminal Law Codification Act. Section 8 (2) (under Part XX of the Amendment Act), clearly and elaborately outlines what constitute aggravating circumstances in determining an appropriate sentence for murder. It provides

“(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 circumstance 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 of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime) –
 - (i) an act of insurgency, banditry, sabotage or terrorism; or
 - (ii) the rape or other sexual assault of the victim; or
 - (iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody;”

The Amendment Act came into effect after the commission of the present murder and the new Constitution and does not in my view have retrospective effect. Although its enactment is said to be an alignment with the Constitution (see the preamble to the Act), the Act, it appears to me that it merely restate or reconfirm what have always been considered to be aggravating circumstances. The murder during the commission of another offence has always been considered as such. The Amendment Act should therefore not be considered as filling any lacuna created by the new Constitution because none existed. One can say that it is cosmetic.

It further appears from the Amendment Act that it was not the intention of the Legislature in the Constitution to move away from the death penalty as suggested by HUNGWE J. Had the legislature intended to move away from the death sentence, it would not have made provision for what constitutes aggravating circumstances in murder cases.

However, whilst the Constitution recognizes that the law that defines aggravating circumstances is in existence, the Constitution has changed the law in two respects. The first is that a court now has a discretion whether or not to impose a death sentence even where there are aggravating circumstances. Secondly, the onus to prove whether or not the death penalty should or should not be imposed has been shifted to the State. Section 337 of the Criminal Procedure and Evidence Act makes it mandatory that in the absence of extenuation, the court must impose the death penalty. It further places the onus on the accused to satisfy the court that the death penalty should not be imposed. Section 48 (2) of the Constitution has shifted the burden of proof to the State. The shift is understandable given that the onus to prove an accused guilty rests with the state. The onus to prove that the death penalty is warranted should equally rest on the State and not on the accused. (See *Capital Sentencing Discretion in Southern Africa: A Human Right Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases* (Chapter 2 Vol1) [2014] AHRLJ (African Human Rights Law Journal) by Andrew Navok.)

In order to give effect to this shift, s 337 must be read in conformity with the Constitution as enjoined in terms of paragraph 10 of Part IV of the Sixth Schedule of the Constitution. Paragraph 10 provides that-

“10. *Continuation of existing laws*

Subject to this Schedule, all existing laws continue in force but must be construed in conformity with this Constitution.” (Also see *State v Malundu (supra)*.)

It therefore follows that the state must now satisfy the court that there exist aggravating circumstances warranting the imposition of the death penalty.

The submission by the State in the present matter is that the murder was committed in aggravating circumstances as it was committed during a robbery. It was submitted that the imposition of the death penalty is therefore warranted. The State referred to some of the cases alluded to earlier that murder during the commission of a robbery is aggravating.

The following is a summary of the factors that the accused have submitted as constituting extenuating circumstances:

1. The real intention of the accused was merely to rob the deceased and not to murder him;
2. The accused persons were not armed at the time they arrived at the deceased's residence;
3. The accused acted in self-defence;
4. The trial had taken long to conclude;
5. With regards to the 4th accused, that his role was limited to furnishing the other accused persons with the background information of the scene of murder and that he did not realise that a murder would be committed by the other accused persons; and
6. The accused were found guilty of contravening section 47 (1) (b) (equivalent of what used to be constructive intent) as opposed to s 47 (1) (a) (murder with actual intent).

In their submissions on extenuation, all the accused submitted that that their intention was simply to rob the deceased. They seem to have overlooked the fact that in order for one to be found guilty of robbery, one must have intentionally used violence or threatened to use violence either immediately before or during the time he or she takes the property. The fact that they were unarmed at the time that they arrived does not therefore reduce their blameworthiness. The accused must have been aware from the information supplied by the 4th accused that the premises were guarded. They would have realised that there was a possibility that they would be met with resistance and were prepared to deal with that resistance.

The manner of assault on the deceased (then 80 years old) and Pfunzwadzapera (then 69 years old) was indiscriminate and callous. The accused subdued the two men and handcuffed them together. They fell them to the floor. The 1st, 2nd and 3rd accused persons assaulted the two with hands and a log, still handcuffed, all over the body. The blows were indiscriminate as testified by Pfunzwadzapera with some of the blows being directed on the head. The deceased and Pfunzwadzapera posed no threat to the accused after having been subdued and handcuffed. Three young men took turns to assault two helpless old men. Whilst Pfunzwadzapera survived the assault, he still had to be hospitalised for a period of 10 days. Unfortunately his employer succumbed to the injuries sustained in the assault.

The robbery was well schemed with the accused pretending to be police officers in order to have the confidence of the deceased so as to be allowed access into the house. In the process the accused were tarnishing the image of and the confidence of the public in the police.

There was an attempt by the deceased to struggle leading to the discharge of the firearm. The deceased was overpowered. Pfungwadzapera also attempted to by hitting back at the accused. It appears the accused were blaming the deceased for having possessed a firearm and which he had produced presumably with the intention of protecting himself and his property. Had the accused not visited the deceased's home, the latter would not have produced the firearm. In fact upon being convinced that the 2nd and 3rd accused were police officers, he threw away his guard and invited them into the house to resolve the allegations that Pfungwadzapera had been growing dagga. Any assault by Pfungwadzapera was intended to ward off the accused who had intruded into his employer's house. That is what he was employed to do. He cannot therefore be said to have been an aggressor and that the accused were acting in self-defence to ward off the intruders.

The robbery was well schemed. The role of each accused was described in the main judgment. The deceased resided in a secluded place. He was old and guarded by an equally old person. The robbery could not have been successful without the participation of each of the accused.

Whilst the trial has proceeded for the past four years, the accused contributed to the delays in the finalisation of this matter and cannot be seen to benefit from the delay. In any event, it is our view that the delay is entirely irrelevant to the commission of that offence. The same applies to the medical condition of the accused and particularly the 4th accused.

The conviction of the accused under s 47 (1) (b) may amount to an extenuating circumstance. However, it does not necessarily entail that a death penalty must not be imposed as suggested by the accused. (*Masimba Mbaya & Anor v The State* SC 23/10). The circumstances of this case would in our view, warrant the imposition of a death penalty.

It is our finding that this murder was committed in aggravating circumstances as envisaged by s 48 (2) and calls for the death penalty.

The accused shall therefore be returned to custody where the sentence of death shall be executed in accordance with the law.

Prosecuting Authority, respondent's legal practitioners
Dube Banda, Nzarayapenga & Partners, 1st accused's legal practitioners
Baera & Company, 2nd accused's legal practitioners
Chihambakwe, Mutizwa & Partners, 3rd accused's legal practitioners
Donsa Nkomo, 4th accused's legal practitioners