THE STATE

Versus

BEKITHEMBA DUBE

And

LOOKOUT MOYO

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr. P. Damba and Mr. E. Mashingaidze
BULAWAYO, 6, 7 & 8 June 2023

Criminal trial

B. Gundani, assisted by Ms. D. E. Kanengoni, for the State
Ms. N. Ndlovu, assisted by Ms. N Ndlovu, for the accused 1
Ms. N. Moyo, for accused 2

DUBE-BANDA J:

[1] The accused persons, Mr Bekithemba Dube and Mr Lookout Moyo, are appearing before this court charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act Chapter 9:23 (Criminal Code). It being alleged that on 27 November 2021 they unlawfully caused the death of Thembelani Ngwenya (deceased) intending to kill him or realising that there is a real risk or possibility that their conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused persons were represented throughout the trial. The first accused pleaded not guilty to murder, and tended a plea of guilty to the lesser offence of assault, and the second accused pleaded not guilty to murder, and tendered a plea of guilty to the lesser offence of culpable homicide. The State did not accept the pleas to the lesser offences and the matter proceeded to trial on the charge of murder.

[3] The State tendered an outline of the summary of the State case (Annexure A), which was read into the record. Accused 1 and 2 tendered defence outlines and were marked Annexure B and Annexure C respectively. The defence outlines were read into the record. Accused 1

admitted that he had an altercation with the deceased which resulted in him beating the deceased with open hands. Accused 2 admitted that he stabbed the deceased resulting in his death. He pleads intoxication.

[4] The following admissions by the accused persons were noted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case. That is the evidence of:

[4.1] The evidence of Dr S Pesanai. His evidence is that he is a registered medical practitioner. He examined the remains of the deceased and compiled a post mortem report (Exhibit 1) depicting the injuries sustained by the deceased and concluded that the cause of death was: haemorrhagic shock; stab wound in the heart, and assault.

[4.2] The evidence of Qalisani Sibanda. He received a report that his brother-in-law had died at the Shopping Centre. As a result of the report, he quickly went to the scene and observed the body of the deceased lying lifeless on the ground, and was bleeding on the chest. He picked a blood-stained knife which was about 13 metres from the body, he handed it over to the police.

[4.3] The evidence of Bernard Zulu. His evidence is that on 27 November 2021 at about 2200 hours, he was drinking beer at Hope Valley Bottle Store when he saw the first accused assaulting the deceased with open hands on the face. He saw one Onias Dube trying to refrain the first accused from further assaulting the deceased. After that he heard commotion outside the Bottle Store the radio was switched off. He went outside the Bottle Store and saw the deceased lying on the ground in a pool of blood.

[4.4] The evidence of Tendai Phiri. His evidence is that on 27 November 2021 at about 2000 hours he was refreshing at Hope Valley Bottle Store. As he was drinking his beer, he heard the deceased insulting the first accused saying "*msunu kanyoko*" meaning "your mother's clitoris." The first accused then began to assault the deceased with open hands.

[4.5] The evidence of Philip Chaka. His evidence is that he is a member of the Zimbabwe Republic Police (ZRP). On 28 November 2021 at around 2200 hours, he was on duty when this case was reported by Mengesi Phiri over the phone. He and other police officers attended to the scene, he noticed the body of the deceased lying in a pool

of blood facing upwards. He saw blood coming from a chest wound. He conveyed the body of the deceased to United Bulawayo Hospital.

[4.6] The evidence of Reggis Chisekochevana. He is a member of the ZRP, stationed at CID Homicide Squad, Bulawayo. His evidence is that on 28 November 2021 he attended a murder scene, was handed a blood-stained okapi knife, and he booked it as an exhibit.

[4.7] The evidence of Blessing Zagija. His evidence is that he is a member of the ZRP. He is the investigating officer in this matter. He recorded a warned and cautioned statement from the accused persons. At the time he recorded the statements, the accused persons were in their sound and sober senses, and gave their statements freely and voluntarily and without any undue influence being exerted on them.

[5] State Counsel Mr *Gundani* asked the court to expunge from the record the summary of the evidence of Onias Dube and Lungisani Moyo as it appears in the summary of the State case. These summaries had already been read into the record. State Counsel must not allow a summary of the evidence of a witness it does not intend to call to be read into the record. Such evidence must not even appear in the summary of the State case. The summary must only contain evidence of witnesses that the State shall call, and no more. If it means the court must be stood-down to allow the preparation of a new summary that excludes witnesses that will not be called, such must be done. The accused are entitled to a fair trial, and there must be nothing in record which might prejudice the accused's right to a fair trial. However, on the facts of this case no prejudice occurred.

[6] The State, with the consent of the accused persons tendered the following documentary and real exhibits: a Post Mortem Report compiled by Dr S Pesanai (Exhibit 1). Accused 1's confirmed warned and cautioned statement marked Exhibit 2. Accused 2's confirmed warned and cautioned statement marked Exhibit 3. An okapi knife (Exhibit 4), with the following measurements: weight 30 grammes; length of blade 8cm; and widest part of blade 2cm.

[7] The State called one *viva voce* witness and the accused persons testified in their defence. We will summarise the evidence briefly.

[8] The State adduced evidence of Mengesi Phiri. This witness testified that he was a member of the Neighbourhood Watch. On 27 November 2021 at Hope Valley Bottle Store, in the company of a colleague he saw accused 2 in possession of an okapi knife, and accused 1, whom he referred to as Stephen carrying an axe. Around 7 pm he saw the accused 2 sharpening the knife and at that time it had a handle, and accused 1 was sharpening an axe. Accused 2 said "this knife wants blood," and the witness asked them to surrender their weapons for safe keeping, and they refused. The witness and his colleague attempted to search them, accused 2 said they must first produce a search warrant. He testified that accused 1 threatened to assault him and cut his throat like a goat. A scuffle ensued and accused 1 took out a wallet from the witness's trouser pocket. At that stage the member who was in the company of this witness escaped.

[9] He testified further that a person called Jackson Nyoni insulted accused 1, and an altercation ensued and accused 1 started assaulting the deceased. Accused 1 had a piece of asbestos sheet and he used it to strike the deceased on the forehead. The deceased ran away, and accused 1 and 2 pursued him, and accused 2's brothers joined the pursuit. During the pursuit, the deceased was running slowly due to his drunkenness, and accused 1 was assaulting him in the process. He testified that he received a report, and a result of the report he proceeded towards the direction where the deceased had fled. When he got to the scene accused 2 fled, and accused 1 remained holding a piece of a brick. The deceased was walking in reverse and was holding a knife which was stuck on his chest. The deceased pulled out the knife and removed it from his chest, walked for a short distance and fell down. As the deceased was walking in reverse accused 1 said he was pretending and threatened to strike him with a brick. He testified that at that point he apprehended accused I and handcuffed him. The deceased was dead. He reported the incident to the police. A police officer picked a knife from the scene, it had blood and soil. It was whitish in colour and did not have a handle. The witness identified Exhibit 4 as the knife that was picked from the scene of crime.

[10] Under cross examination by Counsel for accused 1, he testified that although his statement does not mention that accused 1 was armed with an axe, he informed the police of this fact. He testified that he was present at the time the events he testified to unfolded. He confirmed that it was accused 2 who stabbed the deceased.

[11] Under cross examination by Counsel for accused 2, he testified that he could not dispute that accused 2 was drinking alcohol called hot-stuff. The incident occurred at the Hall which is close to the Bottle Store, the two are three metres apart. The Hall was full of people. Accused 2 was sharpening a knife on the cement floor. He said the deceased was a brother-in-law to his cousin. He testified that he saw everything that happened on that day, and outside the Hall visibility was good as there was an outside light that was illuminating the area. He testified that he was not intoxicated as he had taken one bottle of beer.

[12] In re-examination he testified that he had taken one bottle of black label beer, a 750 ml bottle. He was not intoxicated. In answer to a question by the court he testified that when accused 2 was sharpening his knife, he saw that it had a brown handle.

[13] Counsel for the accused 1 and 2 cross-examined the witness on the contents of the statement he made to the police. It is trite that cross examination on the basis of a statement must start with identification of the statement. The court must know that the statement in issue is the statement given by the witness to the police. To just cross examine a witness without first identifying the statement is incorrect. After the court intervened the statement was identified, as the statement the witness gave to the police.

[14] The copy of the statement was not handed in as an exhibit. It is trite that a cross examiner may cross-examine on a document without handing it in as an exhibit. However, if there is cross examination on the content itself, or if it is used to contradict the witness, the document must be handed in. See: Pretorius JP *Cross-Examination in South African Law* (LexisNexis Butterworths 1977) 315. Otherwise, there would be no way the court may accept that the version of the witness has changed or that he has contradicted himself. Counsel did not hand in the statement as an exhibit. There is no way this court can assess the alleged contradictions without the statements having been tendered in as exhibit. Just reading excerpts of the statements into the record is inadequate. The court must have the entire document to ascertain whether the excerpts have been correctly read and in proper context. Failure to hand in the statement renders the cross-examination valueless. This is what happened in this case, we attach no weight to the alleged discrepancies between the statement to the police and the witness's evidence in court.

[15] Counsel for accused 2 argued that Mr Mengesi Phiri is not a credible witness. Counsel submitted that under cross examination he refused that he was a member of the Neighbourhood Watch, when the evidence shows that he was. Our understanding of the evidence is that he is not an attested member of the Neighbourhood Watch, but as a former police officer he does duties of such a member and the community considers him as such. He is the one who arrested and handcuffed accused 1, and was present when accused 2 was arrested. He reported this matter to the police. That is what a member of the Neighbourhood Watch does. Nothing turns on this criticism. Phiri was criticised further for testifying in his evidence in chief that he was not related to the deceased, and later said deceased was a cousin to his brother-in-law. This is just too distant and remote a relationship; we agree with Phiri that he was not related to the deceased. And in any event his evidence was not coloured by the fact of this remote relationship. Again, Phiri was criticised that he failed to explain who lifted him up during the melee at the bar. Our view is that the incident at the bar was a moving scene, the witness was being threatened with assaults and to have his throat cut like that of a goat. He could not be expected to give a meticulous description of what happened as if he was recording in a diary. He was not recording. In the circumstances of this case the criticisms levelled against the credibility of Mengesi Phiri is unjustified and of no consequence. We are satisfied that the truth was told.

[16] Mengesi Phiri appeared to be a credible and honest witness. He gave a correct version of what he saw. He was honest that he did not see accused 2 stabbing the deceased. And that when accused 1 was threatening to assault him, it was accused 2 who protected him. We accept his account of what happened on 27 November 2021 leading and surrounding the death of the deceased.

[17] After the evidence of Mengesi Phiri the State closed its case, and accused 1 opened his defence case.

[18] Accused 1 testified in his defence. He testified that on 27 November 2021 he was drinking beer and dancing at the Hall. The deceased stepped on him several times, and insulted him. He testified that he slapped the deceased and he retaliated. He was not carrying a weapon, if he had a weapon, he could have used it. Accused 2 was in the Hall but was seated elsewhere. Some patrons noticed that there was a fight and intervened to stop the fight. The other patrons got

hold of him and deceased ran away for about ten to fifteen metres. He saw accused 2 stabbing the deceased. He testified that Mengesi Phiri the State witness was called and when he arrived, he took him from the Hall and made him sit next to the body of the deceased. Mengesi Phiri handcuffed him. The crowd that was guarding him stripped him naked and assaulted him. At that time accused 2 had fled. He testified that accused 2 was not in the habit of carrying a knife.

[19] Under cross examination by Counsel for accused 2, he testified that accused 2 is not his friend, they are workmates. They did not go to the bar together, they met at the beer drinking place, i.e., the Hall. He saw accused 2 stabbing the deceased. under cross examination by Counsel for the State, he testified that he found accused 2 at the bar. He did not know the deceased. He testified that when the fight stopped, the deceased ran away, and he said may be was going to look for weapons. When deceased ran away, he only pursued him inside the bar up to the exit door, and accused 2 pursued him to outside the bar. He disputed that when the deceased was walking in reverse, he threatened to strike him with a brick alleging that he was pretending. He did not see the deceased pulling out the knife from his chest. He disputed that Mengesi Phiri was present at the bar, he said he was called after the deceased had been stabbed. He accepted that Mengesi Phiri handcuffed him and made him sit next to the body of the deceased. He testified that he did not know that accused 2 was in possession of a knife. He did not see him sharpening a knife.

[20] In his evidence the accused 1 was in some instances peddling falsehoods. He lied that he did not know that accused 2 had a knife. Mengesi Phiri saw accused 2 sharpening a knife in the presence of accused 1. He lied that he pursued the deceased only inside the hall up to the exit door. In his own confirmed warned and cautioned statement he said "after that (*sic*) others pursued him, he went outside and ran away. We pursued him, lookout is the one who stabbed him." This corroborates the version of Mengesi Phiri that accused 1 together with accused 2 pursued the deceased outside the hall. Again, accused 2 was clear that the two i.e.; accused 1 and accused 2 pursued the deceased outside the hall. Accused 1 lied that he was not present at the point where deceased was stabbed. Mengesi Phiri and accused 2 say he was present. He lied that Mengesi Phiri was not at the bar and was only called after the stabbing, when the evidence is clear that Mengesi Phiri was at the bar. In his own defence outline he says it is Mengesi Phiri and others who informed him that the deceased had been stabbed, showing that Mengesi Phiri was at the bar. He lied that he is not a friend to accused 2, when the evidence is

clear the two are friends. In fact, accused 2 intervened in this fight to the extent of stabbing the deceased for the sake accused 1. It is unthinkable that accused 2 could join a fight and stab someone just for a work mate. Accused 1was not an honest and credible witness, his evidence, where it is at variance with other evidence and the probabilities of the case, it is rejected.

[21] After testifying accused 1 closed his case, and accused 2 opened his defence case.

[22] Accused 2 testified in his defence. He testified that on 27 November 2021 at around 4 pm he knocked off duty and in the company of his friends proceeded to Hope Valley Bar to drink beer. His friends were accused 1 and others. He was drinking beer called black label and hot stuff. He does not know the quantity of beer he drank on that day. He was intoxicated. He had the knife in his possession, and denied that he sharpened it and said it wanted blood. It was a silver knife with a brown handle. He testified that he went to buy beer at the bottle store, as he was leaving the bottle store, after the hall entrance he saw accused 1 and the deceased chasing each other. He joined intending to intervene and stop the fight, and then stabbed the deceased. And did not notice which part of the body he stabbed. He left the scene before the deceased died.

[23] Under cross examination by the Counsel for accused 1, he testified and confirmed that it was accused 1 who was fighting with the deceased. Accused 1 was his friend. He testified that he was not part of the fight, he merely joined in a bid to stop the fight. And he accidentally stabbed the deceased in a bid to stop the fight. He only produced the knife at the time he was stabbing the deceased, and accused 1 did not know that he was in possession of a knife.

[24] Under cross examination by Counsel for the State, he testified that he was using the knife at work and when he knocked off duty, he forgot to leave it at home. The last time he saw the knife it had a handle. He does not know what happened to the handle. He confirmed that the knife (Exhibit 4) in court has no handle. He disputed that he produced the knife at the hall. He said Mengesi Phiri knew that the knife had a brown handle because he saw it after the stabbing of the deceased. He saw the splinter of the handle. And that it is known that such type of a knife has a brown handle. He disputed that he said his knife wanted blood.

[25] He testified further that as he was leaving the bottle store, he saw accused 1 and deceased chasing each other. He met them soon after they left the entrance of the bar. Accused 1 was chasing the deceased. He joined when accused 1 had caught up with the deceased and was clapping him with open hands. Deceased ran eight metres before he was caught by accused 1. When he got to them, he tried to separate them and the he stabbed the deceased. He produced the knife and stabbed the deceased because he was intoxicated. After stabbing the deceased, he left the scene and returned to the mine. He did not run away, he left because a lot of people were coming to the scene, he thought that they would assault him. He testified that he did not notice whether he left the knife stuck in the deceased's chest or not. When he stabbed the deceased, accused 1 was present at the scene. After he got hold of the deceased, accused 1 stopped assaulting him.

[26] In his evidence the accused 2 was in some instances also peddling falsehoods and exaggerating. He lied that he did not sharpen his knife at the Hall. He lied that he saw Mengesi Phiri for the first time on 28 November when he was arrested. Where his evidence is at variance with that of Mengesi Phri and the established facts, it is rejected.

[27] After testifying accused 2 closed his case.

[28] Counsel for accused 2 argued that Mengesi Phiri is a single witness. We reject this submission that Mengesi Phiri is a single witness, he is not. There is the evidence of Qalisani Sibanda; Bernard Zulu; Tendai Phiri admitted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 7:09]. It is evidence. Even if Mengesi Phiri is the only witness on certain issues, we are satisfied that his evidence was clear and satisfactory in every material respect and that the truth has been told.

[29] We find the following facts established: that the deceased and the accused persons were at Hope Valley Shopping Centre, Kensington drinking beer. They were buying beer from a bottle store, and drinking at a hall a few metres from the bottle store. Accused 2 sharpened his okapi knife on the floor. It had a brown handle. Accused 1 sharpened an axe. Accused 2 was heard saying his knife wanted blood. A misunderstanding ensued between accused 1 and deceased. Accused 1 assaulted the deceased. The deceased fled from the accused 1 and exited the Hall. Accused 1 pursued him, and the deceased could not run fast as he was drunk. As the deceased

was fleeing, accused 1 was assaulting him. Accused 2 joined the pursuit. Deceased ran approximately eight metres or more from the Hall, before he stopped fleeing. When accused 2 caught up with both accused 1 and deceased, he stabbed the deceased, causing his death on the spot. After he stabbed the deceased, accused 2 fled and Mengesi Phiri arrested and handcuffed accused 1.

[30] It is trite law that the onus rests on the State to prove the guilty of the accused beyond a reasonable doubt in order to secure a conviction. There is no *onus* on the accused to prove his innocence. If the accused's version is reasonably possibly true, he is entitled to an acquittal. This principle is trite in our law.

[31] We first turn to accused 2. It is common cause that accused 2 stabbed the deceased with an okapi knife. Under marks of violence, the post mortem report says: stab wound right upper chest (5 x 2cm) 3cm from right clavicle 1.5cm from midline, 6cm from right nipple. On other remarks the report says: stab wound went through right intercostal space. Under cause of death, the report says: haemorrhagic shock; stab wound heart; and assault. The evidence shows that the injuries inflicted on the deceased were caused by the accused 2. The injuries inflicted by the accused 2 caused the death of the deceased.

[32] The question that remains is whether accused 2 was badly intoxicated to the extent that he acted without realising at all what he was doing. Was the accused 2 so intoxicated that he had a blackout resulting from the intoxication? This is an accused person who was demonstrably in control of all his mental faculties. He had the presence of mind inconsistent with one who did not know what he was doing. He remembers clearly that on 27 November 2021 he knocked off at work at 4 pm and proceed straight to the Hope valley Shopping Centre, Kensington without passing through home to change clothes, and that he was carrying an okapi knife with a brown handle. He even remembers the exact pocket in which he had put the knife. And that as he returned to the hall from buying a bottle of black label beer, he saw accused 1 pursuing the deceased. He joined the pursuit and was able to run to catch up with accused 1 and the deceased. He recalls clearly that when he caught up with them, accused 1 stopped assaulting the deceased. He gave a graphic demonstration of which hand he used to remove the life and from which pocket. The hand he used to stab the deceased and the hand that was holding his bottle of beer. That he stabbed the deceased when the two were facing each other, and that what

happened thereafter to his bottle of black label beer. He had the presence of mind to sense danger when a crowd was approaching, and he fled back to the mine, where he was going to be safe. He remembers when he was arrested and that Mengesi Phiri was present at arrest.

[33] The accused's recall of events is so clear that it could not be said that he was so beside himself with intoxication as not really to know what he was doing. He knew what he was doing. He did not suffer a blackout as a result of intoxication. In the circumstances, we conclude that the accused was indeed capable of formulating an intention, knowledge or realization as required by the law. Therefore, the defence of intoxication as provided for in Part IV of the Criminal Code is not available to him in whatever form as a defence. It is accordingly rejected.

[34] We turn to accused 1. It is common cause that accused 1 did not stab the deceased. The State contends that he associated himself and acted in common purpose with the accused 1 in causing the death of the deceased. Section 196A of the Criminal Code deal with the liability of co-perpetrators who knowingly associate for common purpose of committing a crime or crimes. It provides as follows:

> "196A Liability of co-perpetrators
>
> (1) If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the co- perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
>
> (2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they-
>
> (a) were present at or in the vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or
>
> (b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or

(c) engaged in any criminal behavior as a team or group prior to the conduct which resulted in the crime for which they are charged."

[35] Accused 1 is a friend and work mate of accused 2. On 27 November 2021 they proceeded together to Hope Valley to drink beer. The established facts show that the two were in what could be described as a violent disposition. Accused 1 was seen sharpening an axe, while accused 2 was sharpening an okapi knife, which he used to stab the deceased. In the presence of accused 1, accused 2 made clear what their intention on that day was, when he said his knife wanted blood.

[36] Accused 1 started an altercation inside the Bar. He was assaulting the deceased. Other patrons restrained him from continuing to assault the deceased, this afforded the deceased a window of opportunity to escape the assault. He ran out of the Bar, accused 1 pursued him, assaulting him as he was running. Accused 2 joins the pursuit of the deceased. When accused 2 catches up with them, accused 1 stops the assaults. Accused 2 draws a knife and stab the deceased to death.

[37] Accused 1 was present at the scene of crime in circumstances that implicate him directly in the commission of this crime. In fact, he is the one who caught up with the deceased, and was assaulting him until the accused 2 arrived to stab him to death. Accused 1 knew that accused 2 had an okapi knife. The two work together at the mine, the knife was used at work, and from work they proceeded straight to Hope Valley to drink beer, accused did not pass through his home to leave the knife. Again, accused 1 was present when accused 2 was sharpening the knife. The knife was sharpened so that it will be effective when used, and it was in that one stab was enough to inflict the serious injuries described in the post mortem report. In fact, after accused 2 stabbed the deceased, accused 1 wanted to strike deceased with a brick contending that he was just pretending to be hurt. The purpose of this was to finish him off. We are satisfied that accused 1 and 2 associated together in the conduct that was preparatory to the conduct which resulted in stabbing of the deceased, and that they engaged in criminal behavior as a team which resulted in the stabbing of the deceased leading to his death on the spot.

[38] The facts of this case is distinguishable from the case of *The State v Ndlovu* HB 39/17, where the court said:

> To the extent that it was unknown to the three accused persons that Duke Ndlovu was armed and that he had, in the melee, used a knife to stab the deceased on the abdomen, and to the extent that the deceased died as a result of that stab wound and nothing else, we are of the view that the concession by the state has been properly made. There is no way the conduct of Duke Ndlovu could be imputed on the three and they cannot be said to be either co-perpetrators, accomplices or accessories in the stabbing.

[39] In this case, accused 1 knew that accused 2 was in possession of an okapi knife. He was present when accused 2 was sharpening it. It is a deadly knife. Accused 1 caught up with deceased who was fleeing, assaulted him and only stopped when accused 2 arrived with the knife. He was present when accused 2 stabbed the deceased, and he actually saw the stabbing. Thereafter, he wanted to finish off the deceased with a brick. The conduct of accused 2 in stabbing the deceased is imputed on accused 1. In this case the liability of co-perpetrators as provided in s 196A is satisfied. Accused 1 had the knowledge that the deceased would be stabbed or he had the realization of a real risk or possibility that he will be stabbed.

[40] The accused persons are charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. It is no longer necessary in our law to specify whether the accused is guilty of murder in terms of s 47(1) (a) or (b). See: *Mapfoche & Another v The State* SC 84/21.

[41] Having carefully weighed the evidence adduced as a whole in this trial we are satisfied that the State has proved it case beyond a reasonable doubt against accused 1 and 2. In the result, accused 1 and accused 2 are found guilty of murder as defined in section 47 (1) of the Criminal Law (Codification & Reform Act) [Chapter 9:23].

Sentence

[42] Mr. Dube and Mr Moyo, this Court found you guilty of the crime of murder as defined in s 47(1) of the Criminal Code. The murder you have been convicted of was not committed in aggravating circumstances.

[43] It is now the task of this court to impose an appropriate sentence. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, this court will have regard to the triad of factors that have to be considered as set out in

case law, e.g., in the case of *S v Zinn* 1969 (2) SA 537 (A). This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. It is trite that a sentence must be blended with mercy. See: *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H. The right balance must be achieved. As sentence that is too light is as wrong as sentence too heavy. Both can bring the criminal justice system into disrepute. See: *S v Matika* (HB 17 of 2006) [2006] ZWBHC 17 (15 March 2006). It is also trite as stated in case law that true mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself. See: *S v Matika* (supra); *Graham v Odendaal* 1972(2) SA 611A at 614. Mercy must not be allowed to lead to condonation or minimisation of serious offences. See: *S v Van der Westhuizen* 1974(4) SA 61(c) and *A guide to Sentencing in Zimbabwe* by G Feltoe at pages 2-3.

[44] This means that a court should consider the objectives of punishment which is that of prevention, deterrence, reformation and retribution and a court must decide what punishment would best serve the interests of justice. A court should also be cautious in weighing the elements under consideration and not unnecessarily elevate one element of above others, rather, a balance must be struck amongst these factors and between the interests of the accused and that of society.

[45] This court now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State in the light of the above principles.

[46] In mitigation of sentence, Counsel for accused 1 addressed the court and placed factors which they urged this court to take into account in order to impose a lesser sentence in respect of the crime of which you had been convicted. Your personal circumstances are as follows: accused 1; you are 25 years old, and you were 23 years old. You are not married; however, you have two minor children aged six and five. At the time of the commission of this offence you were employed as a general worker at Mhuno Mine earning a salary of US$200.00 per month. You are a first offender. You have been in pre-trial incarceration for one year. You had taken some alcohol and you were relatively drunk and you had been provoked by the deceased.

[47] Regarding accused 2, you are 26 years old, and was 24 years at the time of the commission of this offence. You are not married and you have a five-year-old child. Like accused 1 you

were also employed as a general worker at Mhuno Mine earning a salary of US$200.00 per month. You have been in pre-trial incarceration for a period of eighteen months. You are a first offender. You were drunk.

[48] On the other hand Counsel for the State submitted that a life was needlessly lost, and the prevalence of the crimes of murder require this court to pass a deterrent and exemplary sentence. This court was urged to emphasise the sanctity of human life.

[49] The two of you stand convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. A lethal weapon with excessive force against another human being. From the moment you got to the Bar you were in a violent disposition and looking for a fight. You were busy sharpening dangerous weapons in view of the patrons of the Bar. You violently resisted an attempt to disarm you. Your behaviour on that day was surely going to end in a tragedy and it did.

[50] The attack was brutal and savage. The kind of brutality you exhibited on the day in question is alarming indeed. The deceased died a violent death. You displayed a high degree of callousness. The injuries which you inflicted on the deceased were callous and brutal. You used lethal weapon and attacked the most delicate and vulnerable part of the human body, i.e., the chest. The extent of the force which you used was so excessive that you managed to stab the heart. If offenders of such crimes are punished too lightly society would lose confidence in our Courts and so too would law and order be undermined.

There is no basis to differentiate between the two of you regarding sentence. In the circumstances we are of the view that the following sentence will meet the justice of this case:

Accused 1 you are sentenced to 15 years imprisonment.

Accused 2 you are sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Ndlovu Dube and Associates, accused 1's legal practitioners
Advocate SKM Sibanda and Partners, accused 2's legal practitioners