THE STATE
versus
LEEROY MHUNZA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE 22 September 2022 & 16 May 2023

Assessors: Mr Mpofu
Mrs Chitsiga

Criminal Trial

T M Havazvidi, for the State
*R J T Kadani,*for the accused

MUTEVEDZI J: Porinah Nyamayaro (the deceased), a septuagenarian lived in complete peace and relative comfort at her modest rural homestead. Ironically she died a violent death at the hands of an assailant who attacked her at night after she had disturbed him from stealing her property. Leeroy Mhunza (the accused), was apprehended on the same night that the deceased was assaulted and left for dead. He was charged with the crime of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9: 23*] (the Criminal Law Code). It was alleged that on 7 February 2022 at Kagande Village, Chief Masembura, Bindura he unlawfully and with intent to kill or realising that there was a real risk or possibility that that his conduct could lead to death and continuing to engage in that conduct despite the realisation of the risk or possibility, caused the death of the deceased by hitting her with a walking stick all over her body and striking her with stones and bricks several times on the head and the body. The attack caused serious injuries from which the deceased died.

The accused denied the charge. He said he knew nothing about the death of the deceased. He was never at the deceased's homestead at the material time. He did not enter her homestead as alleged. He only knew the deceased as a member of the community in which he lived. The deceased also knew him such that if he had been the perpetrator, the deceased ought to have mentioned him by name. He further explained that on the night in question, he was

returning from a beer drink at the local township when he was apprehended whilst walking home by people who accused him of having murdered the deceased. His captors beat him. He was later handed over to the police who also beat him and forced him to make indications at the crime scene. He prayed for his acquittal.

State case

At the commencement of the case for the prosecution, the state sought the formal admission into the evidence of several witnesses' testimonies in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP &E Act). The defence did not oppose the application. The evidence of witnesses Sylvester Mandizvidza Mhunza, Ben Chinyanga and Cuthbert Mukombwe was formally admitted into evidence as it appeared on the summary of the state's evidence in terms of s 314. The important aspects of each of the witnesses' testimonies is as stated below.

Sylvester Mandizvidza Mhunza

He passed close to the deceased's homestead on the material date and time. He heard the deceased person's hue and cry. She was shouting that someone was killing her. He rushed to the nearest shopping centre where he informed two men called Norest and Kupukai about the attack. Together with those men, they rushed to the deceased's homestead. They found her badly injured.

Ben Chinyanga

He proceeded to the deceased's homestead after being informed of the incident. His major role was that he assisted in ferrying the deceased to hospital with the assistance of one Lloyd.

Cuthbert Mukombwe

He is a nurse at Chiriseri Clinic. He was on duty when the deceased was brought to the clinic injured. She advised him that she had been attacked by the accused. The injuries he observed were a deep cut on the forehead, lacerations on both hands and legs. She was also bleeding from the head and was vomiting. He assisted her.

In addition to the above evidence the prosecutor also applied to tender the post mortem report compiled by the pathologist who examined the deceased's remains. His conclusion was that death was due to severe head trauma. The cause of the deceased's death was not contentious. Several other exhibits were also admitted with the consent of the defence. These included the weapons allegedly used during the attack. They comprised of a log which weighed

about 300 grams, a half brick with a weight of 1.1 kilograms and three pieces of stone with a combined weight of 7.1 kilograms.

Thereafter, the prosecutor led oral evidence from a number of witnesses. Below we deal with that evidence.

Ivy Masvosva(Ivy)

She was a neighbour to the deceased. The important part of her evidence was that her residence is roughly two hundred metres from that of the deceased. On the fateful night she heard the deceased shouting that there was a thief and she needed help! Accompanied by her uncle Earnest Masvosva, they rushed to the deceased's homestead. They found her seated but injured. She was bleeding from the head. She could still talk. She described to Ivy and her uncle, the person who had attacked her. In her own words *"The assailant was a young male, had tinted hair, had a torch on the forehead and was wearing a black vest with some yellow inscriptions and a pair of shorts."* The witness said the deceased did not however specifically incriminate the accused as in mentioning him by name.

What struck the court was that the prosecutor seemed oblivious of the imperfections of the above testimony. Evidence of what the witness was told by the deceased is all hearsay evidence and is generally inadmissible. As will be illustrated later, it can only be admitted if it qualifies as one of the several exceptions to the rule against hearsay.

Tendai Nyamayaro

He is the deceased's son. He saw the deceased when she was already at the clinic. Besides what the deceased had already told the other witnesses, she added to this witness that the assailant had a bag around his waist. She also did not mention the accused by name.

Vincent Marunya

He is the investigating officer. His evidence was immaterial. At times we are left wondering whether prosecutors think that it is a requirement that investigating officers must always testify. It is not. When they have nothing independent from what they were told by witnesses which could possibly add value to the state's case, there is no reason why they should be called to court. To appear in court and simply parrot the testimonies of witnesses adds no value. The danger it poses is apparent. Prosecutors seek to introduce hearsay evidence via the backdoor. It equally results in a lot of haggling about introduction of extra curial statements without following the prescribed procedures.

Samuel Makonese

He is the police officer who recorded the deceased person's statement. The officer alleges that in it and in addition to the earlier descriptions, the deceased specifically mentioned that the person who had attacked her was the accused.

Francis Karape

On the night in question the witness heard the information that someone had stolen from the deceased's homestead. He was at his residence and preparing to take a bath. His wife advised him that there was someone with a torch who was approaching their homestead. He checked and saw the light. The person who bore the torch light heard their voices and suddenly stopped. The witness then inquired who the stranger was. Instead of answering, the person hid behind a bush. The torch light unfortunately still illuminated the bush and was visible. The witness drew closer to the bush where he threw stones towards it. The person took off. He pursued him. Dogs at homesteads around the area started barking. During that time the witness said he then called the aid of his friend called *Shingirai* who came out armed with a catapult. Together, they followed the light and went ahead of the person to ambush him. Oblivious of their presence ahead of him, the person then heard some sound from the bush. He increased the beam of his torch. The witness and *Shingirai* got the opportunity to jump out from their hiding place and apprehended the person. He turned out to be the accused. They knew him as a local resident. There was a struggle. At one time the accused actually grabbed the witness's privates. They ultimately subdued him. What surprised them was that the accused was wearing clothes belonging to one of their neighbours on top of his own. The witness described the clothes as a white shirt, orange cap and a black trousers. He had tinted hair. When they apprehended him, he was going in the direction opposite to where his homestead was. The point at which they apprehended him was about two kilometres from the accused's homestead. They then took him to Chiriseri clinic as narrated earlier. Nothing material came out of the witness's cross examination by accused's counsel. The witness's evidence remained largely intact. This was a witness who did not know what had transpired at the deceased's homestead. He was not even aware that the deceased had been severely assaulted. All that he knew was that there was a thief who had stolen from that residence. He appeared very forthright. His demeanour depicted confidence in what he narrated to the court. He was honest not to delve into matters in which he had no knowledge. Even the accused himself could not allege any motive for the witness to falsely incriminate him. The court fully believed his testimony. It was credible.

The defence case

The accused was the sole witness in his defence. He stood by his defence outline. He added that his homestead is about two hundred metres away from that of the deceased. He actually referred to the deceased as his grandmother. He had known her for over two decades. On the fateful night he was drinking beer at Chiriseri nightclub a local drinking joint in the area. He left the beer hall with the intention to go home around 2000 hours. The usual road from the shopping centre to his homestead passes through the deceased's residence. That evening he used a longer route which did not pass through the deceased's homestead. His explanation for that detour was that he intended to see his workmates to discuss a job they wanted to undertake. It was when he was on his way to his colleague's place that *Francis Karape* and *Shingirai* apprehended him. Contrary to his captors' testimony, he did not have any torch on his person at the time they apprehended him. He admitted however that he was wearing a black vest, a pair of trousers and that his hair was tinted. Francis and *Shingirai* took him to Chiriseri Clinic where he was assaulted by a mob which had gathered there. He was taken inside the clinic where the deceased was. She was still alive but did not mention that he was the assailant either by name or by identifying him. He then closed his case.

In her closing submissions the prosecutor rightly pointed out that her case depended largely on circumstantial evidence. She further argued that the hearsay evidence she had adduced was admissible on the basis of the exception of dying declarations as provided in s 254 of the CP & E Act. Counsel for the accused also agreed that resolution of the matter revolved around the sufficiency of the circumstantial evidence which was available. He made no submission in relation to the admissibility of the hearsay evidence on which the entire case is hinged. Both counsel referred the court to several authorities dealing with circumstantial evidence. The court is grateful for their assistance in that regard.

The issues for determination

There are two issues which stand out for discussion in this case. The first one relates to the admissibility of the hearsay evidence relating to what the deceased told *Ivy Masvosva* and other witnesses concerning the description of the person who had attacked her. If that evidence is admissible the next issue is whether it was the accused who attacked the deceased on the night of 7 February 2022.

As already stated, the prosecutor argued that the hearsay evidence relating to the deceased's description of her assailant to *Ivy Masvosva* qualifies for admission under the exception of dying declarations. The court's considered view is that it does not. She sought to

rely on the case of *S* v *Julius Dhabeti* HMA 53/18 which outlined what is expected for a statement to qualify as a dying declaration. The first of those is that at the time the statement was made the declarant must have been dangerously ill, was suffering from an apprehension of death and had no hope of recovery. *Ivy Masvosva* advised the court that at the time she arrived at her residence, the deceased was seated although she appeared badly injured. There was no time that the deceased expressed hopelessness of living. In fact she must have been very hopeful because she only passed on seven days after the incident. In most instances where statements are admitted as dying declarations the declarant would have specifically expressed his/her apprehension of death. Admittedly the hopelessness can be inferred from the declarant's state of health. See the case of *S* v *Last Mbizi* HH 453/22. In this case however even the witness Ivy did not think that the old lady was not going to make it alive. It is difficult to see how the deceased's description of her assailant would qualify as a dying declaration. For those reasons the court is convinced that the prosecutor identified the wrong exception under which the hearsay evidence would qualify for admission. Instead the statement can more properly be described as part of the *res gestae*.

The doctrine of *res gestae*

The requirement of the law is that hearsay evidence is not admissible. In other words a court must not admit as evidence statements that a witness says he or she heard another person say. Hearsay evidence is testimony whose value is tied to the believability of another person other than the one testifying in court. *See* - Schwikkard P.J. & Van der Merwe S.E. *Principles of Evidence,* 3rd Edition, 2009, Juta at p 269. In our law, the CP &E Act specifically outlaws the admission of hearsay evidence. Section 253 thereof provides as follows:

> **253 Hearsay evidence**
> (1) No evidence which is of the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England.

As is evident from s 253, the application of this rule in Zimbabwean law is intrinsic to its operation in the Supreme Court of Judicature in England. In the case of S v *Wellington Gurumombe* HH 405/22, I remarked, in relation to dying declarations, that the approach taken by the drafters of the CP & E Act of tying the law to the practices of other jurisdictions is unhelpful. The English common law relating to all the exceptions against hearsay evidence was overhauled and supplanted by the Criminal Justice Act, 2003.[1] It follows that the practice that

[1] https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/res-gestae

guided the Supreme Court of Judicature of England was discontinued. By virtue of s 318 of the CP & E Act following the legislated practice of the English is impermissible. Section 318 of the CP & E Act provides that:

> **"318 English laws applicable**
> The laws in force in the Supreme Court of Judicature in England which are applied by this Act shall not include any amendment thereto made on or after the 1st June, 1927, by any statute of England."

Be that as it may the admissibility of the hearsay evidence of a statement which is part of the *res gestae* remains part of our law. This court draws guidance from the abundant body of authorities available on the subject in this jurisdiction. The exclusionary provision in s 253 is expansive. To mitigate the far reaching repercussions attendant upon it, the law developed mechanisms that made it possible for hearsay evidence under certain circumstances to become admissible. The apparatus are varied. They are collectively called exceptions to the rule against hearsay. A discussion of many of them in this judgment is not necessary. The only one which concerns the facts at hand is the doctrine of *res gestae.* Put simply *res gestae* refers to second-hand statements viewed as so reliable that they could be admitted as evidence in a trial where they are repeated by a witness for the reason that they were made as a result of a sudden impulse or inclination without premeditation and at the same time as the event occurred.
Recently in the case of *S* v *Mutsure* SC 62/21, the Supreme Court cited with approval the dicta in *R* v *Andrews* [1987] 1 All ER 513 that:

> "Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the *res gestae*, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event. If there was a special feature, eg malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. However, the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility. Since the victim's statement to the police was made by a seriously injured man in circumstances which were spontaneous and contemporaneous with the attack and there was no possibility of any concoction or fabrication of identification, the statement had been rightly admitted in evidence."

I discern from the above, that the requirements of sufficient spontaneity and contemporaneity of the words and the event recur. These are meant to exclude the possibility of fabrication and concoction of events. In many instances, the measurement therefore is

always the time-lapse between the event and the words uttered. The reasoning was that the victim's mind had to be under the domination of the event to remove the possibility of fabrication, reconstruction or adaptation of the events. But in the same case of *S v Mutsure* (supra) the Supreme Court again cited with approval the remarks of Lord WILBERFORCE in *Ratten* v *R* [1971] 3 All ER 801 at p 807 a-e that:

> "The person testifying to the words used is liable to cross-examination: the accused person … can give his own account if different. There is no such difference in kind or substance between what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.
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> The possibility of concoction or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should not be the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should not be the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression '*res gestae*' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings."

My understanding of the above remarks is that there must be a shift from the approach that concoction or fabrication can only be excluded by proximity of the words uttered by the victim to the occurrence of the event. Rather what is important are the following:

a. Whatever the time-lapse between the event and the words of the victim is, the crucial consideration by the court must be the possibility of fabrication and concoction
b. The test of whether the making of the statement was in some sense part of the event or transaction is an unreliable one because it is difficult to establish
c. For statements made after the event it is the responsibility of the judge to decide if they were made under such spontaneity or involvement in or with the event that the chance that there could be concoction can be disregarded

d. Where the statement is a narrative of a disconnected or a dispassionate earlier or later occurrence to enable the speaker to reconstruct or adapt his account, the court must exclude the statement
e. Usually what informs these issues is the spectacle that happens after the event has started, built pressure and ferocity that the only conclusion is that the words are a true reflection of what was happening

The Supreme Court in *Mutsure* concluded by ringing the caution that courts must resort to the application of various standards when dealing with the admissibility of the hearsay statement. They must avoid obsession with the less transparent and less imprecise Latin phrase *res gestae*. Instead concentration must be focussed on the principal reason for excluding statements of hearsay evidence of this nature. That rationale is split into two namely:

(a) There could be uncertainty in relation to the precise words uttered by the declarant because of the usual unreliability of oral transmission of statements from one person to another.
(b) The second is that there is always a danger of fabrication, concoction, reconstruction or adaptation of evidence by a victim of assault or accident

There is no argument in this case, that indeed the deceased uttered the words repeated by Ivy in her testimony describing her assailant. The question which the court must answer is whether or not there is risk of fabrication or concoction of the evidence. Ivy arrived at the deceased's homestead immediately after hearing her cries that there was a thief and that she needed help. The witness found the old woman injured and in distress. It would be fanciful and stretching the rules too far to argue or imagine that it was not in the heat of the moment. The deceased's narration of what had happened was not a description of a disconnected or dispassionate earlier event. She was living it at that moment. She felt the intensity and the pressure of the attack. Her description of her attacker could only be the truth of what she had observed. We considered the possibility that the deceased's description could have been affected by fear, her age and poor visibility on the night in question. We discounted that given how the events had unfolded. The person who attacked her had initially been a simple intruder who possibly wanted to steal. He entered the hut which she used as a kitchen. She confronted him and clearly saw him standing in the doorway illuminated by the torch which was strapped on his forehead. We have also already stated that the deceased was an old woman above seventy

years. Unless she was extra ordinarily crafty, it is difficult to imagine that she concocted such a complex description of the person who attacked her. In any case, if she was that type of person it would have been very easy for her to falsely incriminate the accused. She revealed to Ivy that she could not facially identify her attacker. The truthfulness of her description is supported by the fact that she only stuck to what she had observed and did not seek to draw conclusions from those observations.

As rightly argued by counsel for the accused the evidence of *Samuel Makonese,* the police officer who purportedly recorded a written statement from the deceased is suspect. He is the only one amongst all the witnesses who then said the deceased mentioned the accused by name. Its weakness is that he alleges that the statement was recorded at hospital. We note that then the accused had been apprehended and taken to the clinic where the deceased was. There was a large mob gathered there. We presume that everyone was saying everything in that commotion. The possibility that someone had directly mentioned the accused's name to the deceased and planted ideas in her mind is very high. At that stage, she had opportunity to reflect and reconstruct the evidence. If the prosecutor had sought to depend on that part of the statement we would have had no hesitation to reject it. What however *Samuel Makonese's* testimony does is simply to illustrate the point we make that when she described the attacker to Ivy it was still during a part of the entire event.

For the reasons explained above, the court is convinced that the witness Ivy repeated the precise description which was narrated to her by the deceased. Further we have no apprehension that there could not have been any fabrication, concoction or falsification of evidence by the deceased. It is on that basis that the court holds the hearsay evidence regarding the deceased's statement as part of the *res gestae* of the attack on her and therefore admissible.

The law on circumstantial evidence

Circumstantial evidence is indirect proof. On its own, it does not prove a fact in issue. Its value is that it leads to a logical inference of the existence of the fact. It must not however be regarded as less valuable than other forms of evidence. The approach which a court must take when relying on and assessing circumstantial evidence is trite. One of the leading authorities on the subject is the case of *Muyanga v The State* HH 79/13 in which this court explained the principles which govern the use of circumstantial evidence in the following terms:

> "The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

> (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
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> (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
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> (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and
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> (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. See *S* v *Shoniwa* 1987 (1) 215 (SC) and the cases therein cited."

Perhaps MATHONSI J (as he then was) in the case of *Arthur Kazangarare* v *The State* HB 9 /16 citing with approval the authors Hoffman and Zeffert put it in simpler terms when he remarked at p 5 of the cyclostyled judgment that:

> "Again the rules governing the use of circumstantial evidence are fairly simple. As stated by the learned authors Hoffman and Zeffert, *The South African Law of Evidence,* third edition, Butterworths, at pp 589-90:
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> In *R* v *Blom*, WATERMEYER JA referred to two cardinal rules of logic which governed the use of circumstantial evidence in a criminal trial:
>
> 1. The inference sought to be drawn must be consistent with all the proved facts. If it is not then the inference cannot be drawn.
> 2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

It follows that where the proved facts point to more than one reasonable inference a court must not convict on the basis of circumstantial evidence. The question which the court seeks to answer in this case is whether it is the accused person who attacked the deceased. The undisputed facts are that the deceased was assaulted and died from the injuries she sustained during the assault. No one witnessed that assault. The best that the deceased could do was to describe the person she had seen attacking her. We have already restated her description of that person. What it means therefore is that there is no direct evidence linking the accused as the person who attacked the deceased. The evidence which is there is largely circumstantial. It is that:

a. On the same night that the deceased was attacked, in fact about an hour or so later, the accused was apprehended. He was wearing a pair of black shorts and a black vest with yellow inscriptions on it. He had a torch strapped to his forehead. His hair was tinted. Tellingly these clothes and his appearance matched the description of the assailant

which had earlier been given by the deceased. Yet the persons who apprehended the accused had no information about the attacker's clothes or appearance. This own its own unfortunately would not have been enough. But there was more to it.

b. The accused had earlier been spotted close to witness *Francis Karape's* residence after Francis was alerted by his wife. Francis confronted him in the darkness and demanded to know who he was. The accused refused to identify himself. Instead he fled. If he was innocent as he alleges and was simply going to his friend's residence there was no reason for him to hide his identity. This is so especially given that he resided in the same village and was known to Francis. The accused did not dispute this evidence from Francis. He did not give any explanation for that strange behaviour. The only reasonable inference which can be drawn from his refusal to identify himself is that he did not want Francis to know who he was. He did not want his presence in that part of the community at that time to be known.

c. When he fled, Francis pursued him and later enlisted the aid of his friend *Shingirai.* They waylaid the accused and apprehended him. That he continued running away buttresses the finding we made above that he did not want his identity revealed.

d. Francis and *Shingirai* discovered that the accused was wearing clothes which belonged to one of their neighbours. They enquired why he was wearing those clothes but once again the accused did not give any plausible explanation. Even in court the accused could not explain why he was wearing those clothes. Underneath the neighbour's garments, the accused was wearing the clothes which we earlier described as matching the description given by the deceased. The witness said they then took the accused to the residence of the neighbour whose clothes he was wearing. It was confirmed that he had no authority to be wearing the clothes. The only reasonable inference that can be drawn from this set of facts is that once again, the accused wanted to disguise his appearance

e. At the time of his apprehension, the accused was running in the direction opposite to his own residence. The explanation he gave was that he was going to his residence using a longer route because he intended to pass through his friend's place to discuss work they wanted to do. What is incomprehensible about his explanation is that he was not going to his homestead but away from it. In court, he did not mention the name of the friend to whose place he was going. He did not request the court to have the 'friend' called as a witness to come and support his assertion. The accused's place was about

two kilometres in the opposite direction from where he was apprehended. From this set of facts the only logical conclusion is that the accused did not have any such friend like he mentioned in his explanation. He was not going to a friend's place but running away from identification by his pursuers.

We have drawn several inferences from the different sets of facts as outlined above but as stated in the case of *R* v *Sibanda & Others* 1965 (4) SA 241 (R.A.) at p 246 when assessing the adequacy of the circumstantial evidence available to it, a court must remain alive to the fact that:

> "Generally speaking, when a large number of facts taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt. It is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together prove the guilt of an accused beyond a reasonable doubt."

The approach suggested above is invaluable. We fully subscribe to it. In this case the facts which we found proven as stated above all occurred in a single transaction. They were so close to each other and so close to the crime scene both in terms of distance and time to ground sufficient reason for the court to take them into consideration not in isolation but in their totality. In our view those facts taken as a unit point beyond a reasonable doubt, to the guilt of the accused. We are aware that the accused had no onus to convince the court of the truth of the explanation that he was going to his friend's residence. See the case of R v *Difford* 1937 AD 370 at 373 for that proposition. He was however required to show that there is a reasonable possibility that his explanation may be substantially true. See *S* v *Kuiper* 2000 (1) ZLR 113 (S) at 118C-D. In this case, we have shown that the accused's explanation is not only not reasonably possible but that it is incomprehensible.

In summing-up, the court's view is that no other conclusion other than his guilt can be drawn from the fact of an accused who is found wearing clothes which match those described by an old woman who had just been attacked; with an appearance exactly like that of the assailant; is running away from the direction of the victim's homestead and away from the direction of his own residence. In addition he is caught wearing stolen clothes in order to camouflage the apparel he was wearing at the time the deceased identified him. The clothes were stolen from a neighbour to the deceased who had left his home unguarded as he rushed to rescue the distressed old woman; an accused who in those circumstances then gives a cock and bull story and refuses to name the friend to whose place he said he was going. We agree these

facts do not reach the threshold of certainty. They however carry a very high degree of probability that it is the accused who attacked the deceased. They leave only a remote possibility in his favour.

Against the above background, we are convinced that it is the accused who attacked the deceased on the night of 7 February 2022. In the circumstances, we are convinced that the state managed to prove that the accused is guilty of the crime charged beyond reasonable doubt. Accordingly we have no choice but to find as we hereby do, **the accused person guilty of the crime of murder as charge.**

National Prosecuting Authority, state's legal practitioners
Atherstone & Cook, accused's legal practitioners