

THE STATE

Versus

LUCKY SIBANDA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr. Mashingaidze and Mr. Ndlovu
BULAWAYO 22, 23 February 2022 & 30 March 2022

Criminal trial

K.M. Guveya, for the State
Ms. Nkomo, with Mrs. Sibanda, for the accused

DUBE-BANDA J: The accused person is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 27th August 2019, and at around Compouns in Firststar and Spring Farm, Llwelin, Bulawayo accused struck Tsisti Theodora Hove (deceased) with a brick on the head intending kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty to the charge. He was legally represented throughout the trial. The State tendered an Outline of the State Case, which is before court and marked Annexure A, and the accused tendered into the record an Outline of his defence case, which is before court and marked Annexure B.

State case

The State produced a post mortem report compiled by Dr S. Pesanai, at United Bulawayo Hospitals on the 23 September 2019. The report is before court and marked Exhibit 1, it shows that the cause of death was unascertainable due to the advanced decomposition of the body of the deceased. The State further produced and tendered into evidence a Samsung JL Cell Phone. It is before court as a real exhibit and marked Exhibit 2. Further the State produced a photograph and it was received by consent and accused admitted in evidence that is a true likeness of the person it purports to represent, i.e. himself. The photograph is before court and is marked Exhibit 3.

The prosecutor sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). These related to the evidence of certain witnesses as contained in the summary of the State Case, i.e. Annexure A.

The evidence of Dr S. Pesanai was admitted. His evidence is that he is a duly qualified medical doctor. He conducted a post mortem examination on the body of the deceased and concluded that the cause of death could not be ascertained due to its advanced state of decomposition.

The evidence of Never Ndlovu was also admitted. This witness did not know the deceased during her lifetime, and only knows the accused in connection with this case. On the 20th September 2019, at approximately 1200 hours he was herding his employer's cattle when he spotted an object within some thickets. He discovered that it was a body of a human being in a state of advanced state of decomposition. On his way to the farm house to inform his employer he saw a navy blue T-shirt which was stashed in some bushes about 30 metres from the body, and a few metres away, there was a white plastic bucket which was damaged. This witness then reported his findings to his employer.

Again to be admitted was the evidence of Gibson Malinga. He did not know the deceased during her lifetime, and only knows accused in connection with this case. On the 20th September 2019, at approximately 1200 hours Never Ndlovu informed him of the human body he had seen in the bushes. He went to the scene and the body was pointed to him by Never Ndlovu. The body was stashed in thickets and covered with some tree branches. The deceased was putting on a white top with black spots and a black skirt. This witness was shown a T-shirt which was about 30 metres from the body. There was also a damaged white plastic container in the vicinity.

The evidence of Pardon Chimhere was also admitted. He is a member of the Zimbabwe Republic Police (ZRP) stationed at Fairbridge. On the 18 January 2020, on the basis of certain information his team arrested accused. The accused was informed of the offence he was arrested for, i.e. murder. An informal identification parade was held and Tapiwa Nkani, from whom the deceased's cell phone was recovered identified the accused as the person who sold him the cell phone, i.e. Exhibit 2.

The evidence of Regis Chisekochevana was also admitted in terms of section 314 of the CP & E Act. He is the investigating officer. His evidence is that the body of the deceased was discovered in a state of advanced decomposition by a worker at Middlelands Farm, Llewelin. During investigations a court order was obtained compelling Econet Wireless Zimbabwe to supply an IMEI number as well as a call history and identify particulars in respect of deceased's cell phone which had gone missing. The investigations established that the cell phone was being used by one Tapiwa Nkani. Tapiwa Nkani was interviewed and he indicated that he bought the cell phone from the accused. The recovered cell phone was given to deceased's husband Kudakwashe Mushonga.

His admitted evidence is that Kudakwashe Mushonga later returned to his office with a photograph of a male adult that was stored inside the cell phone (Exhibit 2). Mushonga said he did not know the person whose photograph was in the cell phone. Tapiwa Nkani confirmed that the person on the photograph was the one who sold him the cell phone. The accused was arrested on the 18th January 2020. On the 19th January 2020, the accused who was in his sound and sober senses and without any undue pressure being brought to bear on him made indications at the scene of crime. On the 20th January 2020, this witness recorded a warned and cautioned statement from the accused. The accused was in his sober senses, freely and voluntarily without any undue pressure being brought to bear on him when he gave his statement.

The evidence of Mbekezeli Bukhosi Dube was also admitted. His evidence is that on the 19th January 2020, he was part of a team that witnessed the indications made by the accused person at the scene of crime. The indications were made voluntarily and without any undue influence. On the 20th January 2020, he witnessed the recording of a warned and cautioned statement, and the accused who was in his sound and sober senses, gave his answers freely and voluntarily and without any undue influence being brought to bear on his person.

The state called the oral evidence of four witnesses. We are going to briefly summarise their evidence. The first to testify was Kudakwashe Mushonga. Deceased was his wife. Early in the morning on the 27 August 2019, deceased left home to sell tomatoes. When she left home she was carrying a white bucket with tomatoes inside. She was putting on a dress, a top and sandals pink in colour. She had a blue J1 Samsung cell phone, which was in a brown cover. The witness left home around 8 a.m. to sell maize cobs. He got back home around 7 p.m. and the neighbours asked him whether he had spoken to the deceased during the day because her

phone was not reachable. He tried calling the cell phone and it was not reachable. The following day he reported a missing person at Cement Police Station.

A month later he learnt that a body had been found at a nearby farm. He went to Queen's Park Police Station, there he was shown a bucket, a black tight, and a brown jacket, with different colours inside. He managed to identify the clothes and the bucket as things that deceased had when she left home on the 27th August 2019. He went to United Bulawayo Hospitals to check whether he could identify the body that was found at nearby farm. He identified the body as that of the deceased. Deceased had a certain mark on her leg, which helped the witness to identify the body as that of the deceased. The face had decomposed. He identified the top part of the dress she was wearing, and the bottom part had changed colour because of blood.

This witness identified Exhibit 2 as the cell phone deceased was using and had in her possession when she went missing. The police working with Econet Wireless recovered the cell phone that was used by the deceased. In the cell phone he saw one photograph of a person he could not recognise. The police printed the photograph, and it is before court as Exhibit 3. One day he saw a person whose features looked like the person in Exhibit 3. He alerted the police and this person was then arrested. The person who was arrested is the accused before court.

In cross examination he confirmed that the deceased went missing on the 27 August 2019, and that she had her cell phone with her. He confirmed that he identified the clothes deceased was wearing when she went missing. He identified the body of the deceased though the face had decomposed. The deceased had a mark which helped him identify the body. He did not check when the photograph (Exhibit 3) was shot.

Mr Kudakwashe Mushonga came across as a witness who had a reasonable recall of events. His evidence was not challenged in any material respects and there is no reason not to accept it.

The second witness to testify was Tapiwa Nkani. He testified that he knew accused person for some time as a vendor. He used to sell sugar, fish and chunks etc. He used to buy things from him. On the 27 August, at around 9 a.m. he bought a Samsung J1 blue/silver cell phone from the accused. He said he was not sure whether it was 2019 or 2020. Accused said the phone was \$300.00 bond notes, however the witness gave him 150 bond notes. It was

agreed that the balance would be paid after two days. This witness sold to the accused a work-suite for 70 bond notes. The balance that remained due to the accused for the cell phone was 80 bond notes. It was agreed that accused would come collect his balance, but he never came. The witness did not see the accused after he sold him the cell phone, until he was called by the police to identify him at the police station. He identified him as the person who sold him the cell phone.

This witness further testified that he asked the accused about the ownership of the cell phone, accused said he was a supervisor at the mine, he was selling the phone to cover his problems. Accused removed his sim card from the cell phone and again said his number was not connected to the ecocash payment system.

In cross examination this witness testified that accused sold him the cell phone on the 27 August, but he was not sure of the year. He testified that he believed it was on the 27 August because it was three days before he was paid his salary. He said he bought the cell phone on the 27 August around 9 am to 10 am.

The third witness to testify was Khulekani Ncube. Khulekani Ncube is one of the witnesses whose evidence as it appears in the State Outline was admitted in terms of section 314 of the Criminal Procedure and Evidence Act. He is employed by Econet Wireless Zimbabwe as a Regional securing and investigations partner. He is based at the Bulawayo office. He holds a Bachelor of Technology in Security and Risk Management. He has skills to analyse call records.

On the basis of a court order, he supplied the IMEI number of a Samsung JI cell phone which was using number 0779031175. He supplied the particulars of the current user of the cell phone as well as a call history for the period 27 August 2019 to 23rd September 2019. The tracking system picked up IMEI number at 354273091457950 and that it was used by subscriber number 0786841081, registered under Tapiwa Nkani.

Through this witness the State placed before court a Call History or Call Detail Record (Exhibit 4). The call history gives the following information: caller number, called number, record type (incoming or outgoing call), duration of the call, date and time of the call, equipment number (gadget or phone used), IMSI/ESN number (identity number of sim card used), geographic position, call type (e.g. local) and service type (e.g. voice call or sms).

This call history (Exhibit 4) is in respect of equipment number 354273091457950 (J1 Samsung cell phone or Exhibit 2). The court order required Econet Wireless to provide the current user of the cell phone (Exhibit 2). The current user of the cell phone was subscriber number 0786841081, registered in the name of Tapiwa Nkani of ZRP Fairbridge Support Unit. The call history start date is 27 August 2019 and end date is 23 September 2019.

The call history shows that on the 27 August 2019, there were three call transactions related to subscriber number 07790311175 (this is the number that was inserted on the cell phone). They were two outgoing calls made by 0779031175. The first outgoing call was at 5:53 and the second was at 5:55. The calls were associated with Cement Siding Base Station. The third call was incoming made at 5:55. These are the calls that are associated with the deceased.

From 28 August 2019 to 30 August 2019 the cell phone was being used by subscriber number 0788349504. The subscriber was Sibusisiwe Nkomo of Plot 11 Fairstar, Bulawayo. The first was an incoming call on the 28 August 2019 at 16:18. The last was an outgoing call on the 30 August 2019 at 13:27.

On the 31st August 2019, at 12:28 the cell phone was used by subscriber number 0788073299. The name of this subscriber was not identified. Again on the same date at 17:31 the cell phone was used by subscriber number 0786841081. This was Sidudzile Msipa (Tapiwa Nkani's wife).

In cross examination this witness testified that between 27 August 2019 and 31 August 2019, there were four subscribers who used the cell phone. Out of the four, subscriber number 07790311175 belonged to the original owner, i.e. the deceased. Subscriber number 0788349504 registered under the name of Sibusisiwe Nkomo. Third subscriber number 0788073299 used the cell phone from 30 August 2019 at 17:48 to 31 August 2019 at 12:28. The name of this subscriber was not identified. Fourth subscriber number 0786841081 registered in the name of Sidudzile Msipa. The witness explained that subscriber number 0786841081 in the Voice Platform Mobile network Operator (MNO) was registered in the name of Tapiwa Nkani, and in the Ecocash Platform in the name of Sidudzile Msipa.

Mr Khulekani Ncube was a very good witness, clear thinking and obviously very well trained expert. His evidence was not challenged in any material respect and we accept it without qualification.

The last State witness to testify was Regis Chisekochevana. His evidence as contained in the State outline was also admitted in terms of section 314 of the CP & E Act. He is the investigating officer in this case. The body of the deceased was discovered at a farm in Llewelin on the 20th September 2019, and was identified by husband of the deceased (Mushonga) on the 21st September 2019. When the body was discovered the murderer was unknown. The deceased's husband told the police that deceased's cell phone was also missing. The police then obtained a court order to compel Econet Wireless to provide the Call History of the cell phone based on the sim card last used by the deceased. Econet provided the Call History, i.e. Exhibit 4.

He testified that the police interviewed one Douglas Sibanda who was the last person to receive and call the deceased on the 27 August 2019, between 5:53 and 5:55. Thereafter the police interviewed Sibusisiwe Nkomo who used the cell phone of the deceased from the 28 August 2019. She explained that she wanted to buy the cell phone from a person she knew facially, but later decided not to buy it. She said she knew the person who was selling the cell phone as Mdawini, and also known as Sibanda. This person used to sell beans and chunks. This witness testified that thereafter Sidudzile Msipa and Tapiwa Nkani were interviewed, and the cell phone was recovered from Tapiwa Nkani.

In cross examination when it was put to him that Tapiwa Nkani said he bought the cell phone from the accused on the 27 August 2019, his answer was that all he could say was that Nkani forget the correct date.

Mr Regis Chisekochevana the investigating officer appeared to be a credible and honest witness. He was not challenged in material respects in cross-examination and we accept his account of what happened without qualification. At the conclusion of the testimony of the investigating officer, the prosecutor closed the State case.

Defence case

Accused testified in his defence. He testified that he is a vendor, he normally sells his goods at the mines, and he also does artisanal mining. On the 27 August 2019, he was panning for gold at a mine. It is not a registered mine and anyone could come and do gold panning. Towards the end of August 2019, when he was panning for gold at the mine, one Micheal Mbewe, also an artisanal miner approached him selling a cell phone. Just before Mbewe approached him he (Mbewe) as in a group of people who were viewing a cell phone he was

selling. A Mr Gumbo wanted to buy the cell phone, but offered less than him (accused) who offered more. Mbewe had asked for 300 South African Rands (Rands), however accused offered 200 Rands. He bought the phone for 200 Rands intending to sell it and make a profit. He was showing the cell phone to anyone who showed interest in buying it.

Tapiwa Nkani showed interest in buying the cell phone. Nkani was also selling work suits, accused suggested that Nkani buys the cell phone, pays part of the purchase price by a work suit and the balance in cash. He does not remember the exact date of the sale but it was towards the end of August 2019. After buying the cell phone (Exhibit 2) he sold it to Tapiwa Nkani. Tapiwa Nkani paid \$150.00 cash and gave accused work suits. Nkani remained owing \$50.00. Nkani said he had the balance of \$50.00 in his ecocash account, however the reason he could not pay using this account is because accused had no ecocash account. He was using a net one number. They went to a shebeen to drink beer, Nkani would alternate in paying using his ecocash account, i.e. pay from his money and then pay from accused's balance of \$50.00. Asked whether he knew one Sibusisiwe Nkomo, his answer was that he does not know the first name. He could know her by another name, or her child's name.

Under cross examination he testified that he knew Nkani for two months before he sold him the cell phone, they used to drink beer at the same place. They used to chat during beer drinks, although Nkani would be seated with his wife. He said Nkani was not his friend. He said the balance that remained from the \$50.00 after buying beer was \$12.00. He asked Nkani to give him a work suit for the balance of \$12.00 that was remaining after buying beer, and that he accused would remain owing the balance of this work suit, but Nkani refused saying \$12.00 deposit was very little. He was reminded of the evidence of Tapiwa that the balance was \$80.00, his answer was that Nkani lied. Asked the reason Nkani would lie about the balance, his answer was he might have forgotten the details or was outright lying.

He testified in cross examination that he sold the cell phone for \$300.00, Nkani paid \$150.00 and with two work suits, for \$50.00 each, leaving a balance of \$50.00. He was reminded that according Nkani's version he was paid \$150.00, plus a work suit and the balance was \$80.00. He disagreed. He was asked that going by Nkani's version, why did he not go to collect his balance of \$80.00, his answer was there was no balance owing. It was put to him that the reason he did not go to collect his balance was that he feared arrest, he disagreed.

Asked for how long he had the phone before selling it, his answer was it has been a while he could not recall, may be a day, two days or three days. He approached three people selling the phone before it was bought by Nkani. Of the three people whom he tried to sell the cell phone to, one inserted a sim card on the phone. When put to him that Michael Mbewe is a creation of his own imagination, his answer was Mbewe is exists, he is from Binga. Asked whether he could call Mbewe to testify for him, his answer was Mbewe will not agree. He says when he was arrested Mbewe was present. He told the police that he bought the phone from Mbewe, the police refused and said he should not teach them how to do their job.

Asked whether he used the phone himself, his answer was he only used it to take a picture of himself. He agreed that Exhibit 3 is his photograph he took using the cell phone. He said Gumbo who also wanted to buy the phone from Mbewe could testify on his behalf.

Asked by the court he said he arrived at the mine on the 24th August 2019, and returned to his place of residence on the 27th August 2019. He said Mr Gumbo can testify that he was at the mine during the days he mentioned. He gave his counsel Gumbo's mobile number to contact him. Asked about the name of the mine, he said it is between a place called Killarney and another called Cement Side.

The trial was postponed for a number of days to enable the defence to secure the attendance of this Mr Gumbo. On the date the trial resumed, Ms. *Nkomo* counsel for the accused informed the court that this Mr Gumbo is an artisanal miner, and he has moved from his last known address. His whereabouts were now unknown. The defence then closed its case.

Analysis of the evidence

There is no direct evidence on how the deceased met her death. The State seeks to rely on circumstantial evidence. When dealing with circumstantial evidence the enquiry before the court is whether on the evidence before it, it could reasonably come to the conclusion that it was indeed the accused who committed the offence in question. See: *S v Nduna* 2011 (1) SACR 115 (SCA). This involves a determination of whether the two cardinal rules of logic in *R v Blom* 1939 AD had been satisfied: firstly, whether the inference sought to be drawn is consistent with all the proven facts because if not, then the inference cannot be drawn; and secondly, whether the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. If the proved facts do not so exclude all other

reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

The accused predicated his defence upon a denial of being the perpetrator. He has not sought to put in issue the evidence of the State witnesses relating to the circumstances of the offence, and he only attempted, rather, to contest that evidence only to the extent to which it may implicate him as the perpetrator of this crime. Because of the uncontested nature of the salient facts surrounding the commission of this offence, the court is able to state with complete confidence that the following facts have been established.

On the 27 August 2019, at approximately 6 O'clock in the morning the deceased left home to sell vegetables at Springs Farm. Deceased's husband also left home at around 8 in the morning. The husband got back home at around 7 O'clock in the evening and the neighbours asked him whether he had spoken to deceased during the day because her phone was not reachable. He tried calling her cell phone and it was not reachable. The following day he reported a missing person at Cement Police Station.

Deceased did not return home and was never seen alive again. Her body was discovered by a head boy at Middlelands Farm, Llwelin, Bulawayo. The body was in an advanced state of decomposition. Notwithstanding that the body was in an advanced state of decomposition, it was positively identified as that of the deceased. It was identified by deceased's husband. The doctor who carried out an autopsy on the body of the deceased could not ascertain the cause of death. This was because of its advanced state of decomposition.

The body of the deceased was found in the bush stashed in thickets and covered by some tree branches. The bottom part of the dress deceased was wearing when she met her death had changed colour because of blood. Because of this evidence we find that deceased bled profusely immediately before she died. This bleeding was so serious that it changed the colour of the bottom part of her dress. We entertain no doubt that someone violently caused her death, and that the body was stashed in the thickets and covered by tree branches for the purposes of hiding it. Because of the manner the body was hidden, it took approximately three weeks for it to be discovered. Again it was discovered by a head-boy in the bush. In the circumstances of this case, and on the basis of the undisputed evidence we find it proved that the deceased was murdered.

We further entertain no doubt that the person who murdered the deceased robbed her of her cell phone (Exhibit 2). The only question we have to answer is whether the State has proved beyond a reasonable doubt that it is the accused who murdered the deceased and robbed her of her cell phone.

At the time of her disappearance deceased was in possession of a cell phone, a Samsung J1 (Exhibit 2). She last used her cell phone on the 27th August 2019 at 5:55 in the morning, i.e. the day she went missing. During the day, i.e. 27 August 2019, her neighbours tried to reach her *via* her cell phone, her phone was not reachable. Her cell phone disappeared from the network until it re-emerged on the 28th August 2019, at 16:18 in the afternoon. The cell phone was then used from 28 August 2019 to 30 August 2019 by subscriber number 0788349504. The name of the subscriber was Sibusisiwe Nkomo. The first was an incoming call on the 28 August 2019 at 16:18. The last was at outgoing call on the 30 August 2019 at 13:27.

The investigating officer testified that she interviewed Sibusisiwe Nkomo. In the interview she told the officer that she was intending to buy the cell phone from a male adult she knew facially. The person was a vendor who used to sell chunks and beans. He is known as Sibanda and also Mdawini. She decided not to buy it, because she was not certain of its origins. Sibusisiwe Nkomo didnot testify in this trial. Defence counsel did not object when this evidence was adduced. She argued at the end of the trial that this evidence is inadmissible hearsay.

This evidence is admissible on the principle of completeness. The principle of completeness is a common law exception to the hearsay rule. This exception permits the introduction of hearsay evidence to provide context to the evidence of a witness. In *casu* this evidence of the investigating officer provides context to his evidence. It explains the reason he continued his with investigating after interviewing Sibusisiwe Nkomo, until he got to Tapiwa Nkani from whom the cell phone was recovered. It also provides context to the evidence of Khulekani Ncube, the expert from Econet Wireless, that the cell phone was used by Sibusisiwe Nkomo from 28 August 2019 at 16:18 to the 30 August 2019 at 13:27.

Again accused testified that he tried to sell the cell phone to three people before it was bought by Nkani, and some of the persons he tried to sell the phone to inserted their sim cards on to the phone. Even in cross examination he accepted that some of these potential buyers inserted their sim cards on the cell phone. Again in his evidence in chief accused did not deny

having tried to sell the cell phone to Sibusisiwe Nkomo, all he said was he did not know her first name, he could know her by another name, or her child's name. Further Sibusisiwe Nkomo described the accused to the policeman, the description corroborates the one given by Tapiwa Nkani that accused is a vendor, selling beans, chunks etc. He is Sibanda. Accused also testified that he is a vendor. He testified that he tried to sell the cell phone to three people before he sold it to Nkani. Sibusisiwe Nkomo is one of them. It is for these reasons that we received the evidence of the investigating officer in respect of what he was told by Sibusisiwe Nkomo.

Further the undisputed evidence is that Sibusisiwe Nkomo, being subscriber number 0788349504 used the cell phone from the 28 August 2019, at 16:18 to the 30th August 2019, at 13:27. We find it proved that accused tried to sell the cell phone to Sibusisiwe Nkomo, being subscriber number 0788349504, and to subscriber number 0788073299, whose name was not identified, before he sold it to Nkani.

Deceased last used her cell phone on the 27 August 2019, at 5:55 in the morning. The phone disappeared from the network and emerged approximately 34 hours later now being used by Sibusisiwe Nkomo, who was trying to buy it from the accused. On the 31st August 2019, at 12:28 the cell phone was used by subscriber number 0788073299. The name of this subscriber was not identified. Again on the same date at 17:31 the cell phone was used by subscriber number 0786841081. This was Sidudzile Msipa, who is Tapiwa Nkani's wife. The police recovered the cell phone from Tapiwa Nkani.

There is no evidence of the time deceased met her death, however the evidence shows that it was on the 27 August 2019. She last used the cell phone on the 27th August 2019, at 5:55 in the morning. In the afternoon her cell phone was no longer reachable. On the evidence before court we have no hesitation in finding that in the afternoon of the 27 Augusts 2019, she was already dead.

On the 28th August 2019, at 16:18 her cell phone was now being used by Sibusisiwe Nkomo, who was trying to buy it from the accused. There is no evidence of the date and time Sibusisiwe Nkomo took possession of the phone, all we know is that she first used it on the 28th August 2019, at 16:28. This was approximately 34 hours after deceased last used it.

It is trite that having been found to be the person who was selling deceased cell phone, approximately 34 hours after she had used it, the doctrine of recent possession applies to the accused. The doctrine of recent possession is based on an inference being drawn that the

possessor of recently stolen property stole such property. If he cannot give an innocent explanation of his possession then the inference that he stole the property becomes the only reasonable inference that can be drawn from such possession. In other words recent possession can be used to anchor a conviction if the court after sifting through the whole evidence before it finds that the only reasonable inference which can be drawn from the recent possession is that the accused stole the property. Our view is that this doctrine can be used in a case of murder committed in the course of robbery, as in this case.

The accused testified that his possession of the cell phone was innocent. Defence counsel argued that accused has no *onus* to discharge. Counsel cited *R v Difford* 1937 AD 370 at 373, where the court held thus:

No *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

It is trite that the *onus* to prove the guilty of the accused rests with the State. See. *S v Kuiper* 2000 (1) ZLR 113 (S). The doctrine of recent possession as codified in section 123 of the Criminal Law (Codification and Reform) Act Chapter 9:23 does not shift the *onus* to the accused. It merely casts an evidential burden on the accused, and this happens every day in criminal trials. The law requires the court to infer guilty if the accused cannot explain his possession or gives an explanation which is false or unreasonable.

Accused testified that towards the end of August 2019, he bought the cell phone from one Micheal Mbewe. He says he was in possession of the cell phone for one, or two or three days before he sold it. He was non-committal. The evidence shows that the cell phone was taken from the deceased after 6:55 in the morning on 27 August 2019. Even during the day on the 27 August her cell phone was no longer reachable. Approximately 34 hours later the phone was now being used by Sibusisiwe Nkomo, who was intending to buy it from the accused. This means the accused had the cell phone well before 16:18 on the 28th August 2019.

Accused says he bought the phone at mine. According to him there must have been a lot of people working at that mine. We say so because he testified that before he bought the cell phone a lot of people had surrounded this Michael Mbewe viewing this cell phone. He cannot give the name of the mine. He says it is just somewhere between Cement Side and

Killarney. Even if they are artisanal miners working at such mine, it must still have a name. At the least it must have a name that it is known by. We do not accept that he was panning for gold at a mine that has no name. It just cannot be true. We find that accused is being untruthful when he says on the 27 August 2019, he was panning for gold at this mine. He is creating this mine with no name to remove himself from the crime.

Accused testified that at the time of his arrest he showed the arresting police officers this Micheal Mbewe. This version cannot be correct for the following reasons: the evidence of Pardon Chemhere, a member of the ZRP and part of the arresting team was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. His evidence is that the accused was spotted at No. 6 Main Avenue, Cement Siding, the witness and his team reacted swiftly and arrested him. If this witness and his team were shown this Micheal Mbewe he could have said so. Again we do not accept that the police could have let this Michael Mbewe escape. The defence did not seek that this witness be called to give oral evidence so that this issue of letting this Mbewe escape is put to him in cross examination. We have no hesitation in finding that the alleged presence of this Micheal Mbewe at the scene of arrest of the accused is a falsehood.

We are fortified in this finding in that this version was not put to the investigating officer in cross examination. Even if the investigating officer was not part of the arresting team, it should have been put to him that the police let this Micheal Mbewe escape. We have no doubt that the alleged presence of this Micheal Mbewe at the scene of arrest of the accused is just a recent fabrication. It is a falsehood.

Further accused's evidence relating to the amount he sold the cell phone to Nkani is riddled with falsehoods. Nkani was a credible and reliable witness, he had no reason or motive to lie to this court. He merely bought a cell phone from the accused, and at the time he bought the cell phone he did not know of its origins. When he says he bought the cell phone on the 27 August 2019, at approximately 9 O'clock, we accept that he was just mistaken as to the date. He is just an innocent purchaser who did not know that at some point he might have to testify about the date he bought this cell phone. In the circumstances of this case we accept that Nkani made an error, and not every error made by a witness affects his credibility.

We distinctly formed an impression that the accused was not telling the truth to this court. There are so many inconsistencies and improbabilities in the accused's version that we

can say without any doubt that he was an untruthful, unreliable and untrustworthy witness whose evidence cannot be relied on. His version of events is so improbable that it cannot be accepted as representing the truth. Where his evidence is in conflict with that of Nkani, we reject his and accept that of Nkani.

Accused says he sold the phone to Nkani for \$300.00, was paid \$150.00 cash, given two work suits for \$50.00 each, and part of the remaining balance was used to buy beer. Nkani testified that indeed he bought the cell phone for \$300.00, paid \$150.00 cash, paid the part of the balance with a work suit for \$70.00, and remained with a balance of \$80.00 which amount accused was supposed to collect after three days. In the circumstances of this case we accept Nkani's version and reject that of the accused as false. He did not go to collect his balance of \$80.00 because he feared an arrest. Even on his own false version, he was still owed \$12.00 by Nkani, he did not make an effort to collect it. He was only arrested on the 18 January 2020, approximately five months from the date he sold the phone to Nkani. He does not explain the reason he did not on his own version try to collect the \$12.00 owing by Nkani.

We have no hesitation in rejecting accused's version and defence. He lied that he bought the cell phone from one Michael Mbewe. It is a falsehood that this Michael Mbewe was present when accused was arrested. He did not seek to collect his balance of \$80.00 because he feared an arrest. When deceased was murdered on the 27 Augusts 2019 her cell phone was taken. On the 28th August 2019, accused was now busy selling deceased's cell phone. He had to explain his possession of the cell phone, in attempting to do so he created a character called Micheal Mbewe. In our view, even if there is a person answering to the name of Micheal Mbewe, accused did not buy this cell phone from such a person. He lied that when he was arrested this Michael Mbewe was present and the police refused to arrests him. The accused's lies were deliberate, they relate to material issues and are motivated by a realisation of guilty and the fear of the truth.

Furthermore the evidence of Regis Chisekochevana, the investigating officer which was admitted in terms of section 314 of the CP &E Act is that accused was arrested on the 18th January 2020. On the 19th January 2020, he made indications at the scene of crime. This evidence is corroborated by the evidence of Mbekezeli Bukhosi Dube, also admitted in terms of section 314 of the CP & E Act. Regis Chisekochevana again testified in court, he was not challenged in cross examination in respect of the indications made by the accused. Indications at the scene of crime amounts to a mute confession. The only reason he was able to make

indications at the scene of crime is because he had knowledge of the scene. One cannot make indications on a scene he does not know. Indications means he had been at that scene before the date of the indications. We find that he was able to make indications because he caused the death of the deceased at that scene.

The inference sought to be drawn is that the accused is murderer. We accept that the inference sought to be drawn is consistent with all the proven facts. Again we accept that the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. An accused's claim to the benefit of a doubt when it might be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case. There is no evidence that suggests that accused is entitled to the benefit of doubt. In fact there is sufficient circumstantial evidence to come to the conclusion that the accused robbed the deceased of her cell phone, and violently killed the deceased.

Mr *Guveya* State counsel submitted that this court finds accused guilty of murder in terms of section 47(1) (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. For this court to return a verdict of murder with actual intent, we must be satisfied that the accused desired death, and that death was his aim and object or death was not his aim and object but in process of stabbing the deceased he foresaw death as a substantially certain result of that activity and proceeded regardless as to whether death ensues. See: *S v Mugwanda* SC 215/01.

Accused protested his innocence throughout the trial. This is his constitutional entitlement. However the circumstantial evidence is overwhelmingly that the accused caused the death of the deceased and robbed her of her cell phone. There is evidence that she died a violent death. Her clothes were bloody. Showing that she bleed profusely before she died. Her body was found in the bush stashed in thickets and covered by some tree branches. It was being hidden. He hid the body to hide his crime. The accused wanted to ensure that her body would not be discovered. We have no explanation from the accused why he killed the deceased. It is not speculation to find that he killed her to rob her of her cell phone. After killing the deceased he started the selling the cell phone and finally sold it to Nkani. Our conclusion is that the

accused desired death, and death was his aim and object, and he achieved his aim and object which was the death of the deceased. We are satisfied on the evidence before us, that the accused is guilty of murder with actual intent.

Having carefully weighed the evidence adduced as a whole in this trial: the accused is found guilty of murder with actual intent as defined in terms section 47 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

It is firmly established that in determining upon an appropriate sentence a court should have regard to the nature of the crime the accused has committed, the interests of the community and the individual circumstances of the accused. These considerations are commonly referred to as the '*Zinn triad*' after the often quoted decision of the Appellate Division that authoritatively confirmed them to be the relevant compass points. See: *S v Zinn* 1969 (2) SA 537 (A). Despite the horrific conduct underpinning this conviction the sentence we intend imposing must be the product of sober, unemotional and considered deliberation.

The accused did not lead evidence in mitigation of sentence. He placed the following personal circumstances before the court through the medium of his legal practitioner. He is 42 years old, and he was 40 years old at the time of the commission of this offence. He is married and has five children. He is the sole provider of his family. He has been in custody for a period of 2 years and 2 months awaiting for this trial. He is a first offender.

The mitigating factors in favour of the accused pale into insignificance when consideration is given to the nature of this crime. Accused killed a defenceless human being,

who had done him no wrong, and who was merely working for herself and her family. She left home at approximately 6 am to go and work for her family, and accused used that opportunity to rob and kill her. The accused committed a barbaric act of mindless brutality directed at a helpless and vulnerable woman. The interests of society are significantly implicated in a case such as this that involves violence of an extremely serious degree against a woman. As violence against woman generally is prevalent, society is entitled to expect of courts to impose sentences that send a message clearly that violence against the weak and vulnerable in our society will not be tolerated.

The violence that preceded the killing the deceased was such as to place this crime in the category of the most serious. It is difficult to conceive the degree of violence that accused meted out against the deceased, and what the victim experienced in her last moments. What a horrible way to end the life of another human being. All this was done for you to make money. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand, against this wanton violence and destruction of life. Such conduct must be punished, and punished severely.

We have no explanation for what you did, you have displayed no remorse. Your conduct warrants a severe penalty. Society expects no less. Society expects violent crimes to be evaluated with sufficient seriousness and stringent penalties imposed. The only leniency we can show is to spare the accused the ultimate penalty. Accused has to be removed permanently from society. Society needs protection from the likes of the accused. This murder was committed in aggravating circumstances. In the result; the following sentence will meet the justice of this case.

Accused is sentenced to life imprisonment.

National Prosecuting Authority State's legal practitioners
Ncube Attorney accused's legal practitioners