

**THE STATE**

**Versus**

**MDUDUZI TIMOTHY MATHEMA**

**And**

**ISAAC NYAKURERWA**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J with Assessors Mr Damba & Mr Dewa  
BULAWAYO 29 & 30 MAY; 4 JUNE & 2 JULY 2018

**Criminal Trial**

*Mrs N. Matumbu*, for 1<sup>st</sup> accused  
*K. Ngwenya*, for 2<sup>nd</sup> accused  
*W. Mabhaudi* for the state

**MAKONESE J:** The deceased was aged 35 at the time he met his death. During his lifetime he was employed as a private security guard at Mutize & Sons Flea market, located between Leopold Takawira Extension and 8<sup>th</sup> Avenue, Bulawayo. The deceased's brother one George Gwachari was also employed as a guard at the flea market. On 10<sup>th</sup> February 2013 at 1900 hours, George Gwachari handed over guard duties to the deceased who was on night shift. That was the last time he saw his brother alive. On the morning of the 11<sup>th</sup> February 2013 around 0600 hours the deceased was to hand over the guard duties to his brother. This was not to be. Deceased's brother arrived at the flea market and had to climb over the gate after he got no response. He saw the gate keys placed on a platform. He took the keys and opened the main gate. As he entered the flea market, he noticed to his utter horror the deceased's lifeless body at stand 92. The deceased's legs and hands were tied by pieces of wire and there was a jacket string around his neck. Deceased's Nokia 1208 handset was missing. Some of the clothes in shangaan bags that he was looking after were missing. The state alleges that the accused persons killed and murdered the deceased. The accused persons have pleaded not guilty to the charge of murder. They deny murdering the deceased. It is however important to note that on 5<sup>th</sup> May 2013 accused one through his defence counsel *G. Nyoni* filed a detailed defence outline in

compliance with section 66 (8) of the Criminal Procedure and Evidence Act (Chapter 9:07). Accused two also filed a detailed defence outline on the 6<sup>th</sup> June 2013. His legal practitioner at the time was *Mr Chamunorwa*. On the 15<sup>th</sup> June 2013 the trial failed to kick off due to accused one's behaviour. He behaved in rather unusual fashion, and the presiding judge, the late MUTEWA J ordered that the accused be medically examined. On 22 February 2018 the matter was set down again for trial before BERE J (as he then was). Accused one filed a notice of withdrawal of his defence outline. On this occasion, once again the 1<sup>st</sup> accused made it impossible for the trial to commence. The court ordered that a second medical report on Accused one's mental condition be compiled and made available to the court. In the meantime, Accused two declared that he had personal differences with his defence counsel, *Mr Chamunorwa*. The lawyer was excused by the court to enable accused to engage another *pro deo* counsel.

Finally, on the 29<sup>th</sup> May 2018, the trial commenced before this court. Accused one was now being represented by *Mrs Matumbu*, while Accused two was being represented by *Mr Ngwenya*.

The state tendered into the record of proceedings the state outline. The following witnesses' testimony as contained in the summary of the state outline was admitted into the record as evidence by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act;

1. George Gwachari
2. Julius Chanzenza
3. Nyashadzashe Chinoda
4. Langton Mutindi
5. Siphelile Dube
6. Ntombiyebandla Ngara
7. Beverley Duduzile Mathema
8. Edward Majawa

9. Saul Utete
10. Saul Maepaire
11. Godwin Ndlovu
12. Ruth Makombe
13. Queen Kinos Dube
14. Honest Sibanda
15. Evangelista Tawonehama
16. Thokozile Ndlovu
17. Luwen Ndebele
18. Christopher Dube
19. Melusi Tshabalala
20. Khesiwe Ngwenya
21. Merjury Nhende
22. Beauty Nyoni
23. Andrew Muwani
24. Gift Mhlanga
25. Melody Maphosa
26. Rita Ndlovu

The bulk of the evidence of these witnesses relates to police officers who attended the crime scene and persons who bought clothing items from the accused persons. The evidence of the following witnesses was admitted into evidence in terms of section 278 (2) of the Criminal Procedure and Evidence Act,

- (a) Dr Magande
- (b) Constable Edson Chikangaru
- (c) Doctor S. Pesanai

Accused one indicated that he was withdrawing his first defence outline and tendered a fresh one which materially departed from his initial version. It is important to set out accused's first defence outline, which is in the following terms:

- “1. He did not murder or cause the death of the late Vengesai Murisi. He was assaulted and threatened by the police in an effort to force him to confess that he is the one who murdered the deceased with his co-accused and one Ignatius Mehluli Mhlanga who is reportedly still on the run.
2. He will further state that he had no reason or motive to murder or cause the deceased's death.
3. On the day in question, i.e. the 10<sup>th</sup> of February 2013, he was selling mobile phone recharge cards with his co-accused Isaac Nyakurerwa near Tredgold Building in Bulawayo when he was approached by one Ignatius Mehluli Mhlanga.
4. He is not sure of the exact time they were approached by the said Ignatius Mehluli Mhlanga but it was around midnight.
5. He will state that Ignatius who was travelling in a white taxi, indicated that he intended proceeding to Hwange but he was short of money. To this end, he intended selling some of his wares he had brought from Botswana to anyone who desired buying them.
6. The 1<sup>st</sup> accused will tell the court that, he together with his co-accused then took Ignatius to Mkokoba particularly to Sidanisile Ncube's house. They knew that she was a vendor and would most likely be interested in buying the various items of clothing and footwear that Ignatius was selling.
7. When they got to Sidanisile's place, she indeed bought some of the wares and they in turn, bought some of the items of clothing and footwear that Ignatius was selling. They paid part of the purchase price and Ignatius was due to come and collect his balance at a later date.
8. The 1<sup>st</sup> accused will deny that he stole the said clothing items and footwear from Mutize Flea Market or anywhere else bought them from Ignatius.
9. The 1<sup>st</sup> accused will confirm that indeed he did sell most of the items of footwear and clothing listed in the state papers after he had bought them from Ignatius and there was nothing wrong with that.
10. The accused person will state that inside the bag that contained clothes that they had bought from Ignatius, they found a Nokia 1208 mobile phone which he left with one Mara Sibanda to be using while he contemplated the registration process for his mobile Sim card.  
The accused will deny that the Samsung mobile phone that is alleged to have been found or recovered as stolen a he was given that particular mobile phone by his sister Precious Mathema.
11. The accused person will state that he is aware that some of the key state witnesses were arrested as suspects and assaulted by the police. Their statements were therefore not freely and voluntarily given.

12. The accused, accordingly will deny that he ever went to Mutize Flea Market on the 10<sup>th</sup> February 2013. He will however confirm that the police took him to the said flea market and particularly to the scene of the crime. There was only one vending stall that was empty and he, as a result of threats he had received was asked to make indications and he pointed to the empty stall. One of the police officers indicated to the other that it was not the right stall but his colleague replied saying they were just the same. He will deny that he led police officers to the scene of the crime but the police officers took him there. He will further deny that he tied the deceased Vengesai Murisi as alleged. He will state that he had no reason to act as alleged.
13. The 1<sup>st</sup> accused will accordingly dispute all allegations of fact levelled against him and pray that a verdict of not guilty be retained.”

Accused one produced a new defence outline wherein he tendered a plea of not guilty by reason of insanity. Accused one alleged that he could not recall the events of the night in question by reason of his mental disorder. He prayed that a special verdict of not guilty by reason of insanity be returned in terms of section 29 of the Mental Health Act (Chapter 15:12).

The Accused two tendered a defence outline denying any involvement in the murder. It shall not be necessary to recount his defence outline in detail, save to say for all intents and purposes, Accused two's defence outline was similar in every respect to Accused one's initial defence outline I have set out earlier. Accused two averred that he had met Ignatius around midnight on the 10<sup>th</sup> February 2013. He was selling re-charge cards. Ignatius had clothing items for sale. He and Accused one took some of the clothing items to Makokoba. They met Sidanisile Ncube and gave her some clothing and footwear. Accused two confirmed that in one of the shangaan bags there was a Nokia 1208 handset. Accused two denied any involvement in the gruesome murder.

The state tendered into the record the Post Mortem report. The report was compiled by Dr S. Pesanai after he examined the remains of the deceased. The cause of death is listed in the report as:

- (a) Asphyxia
- (b) Strangulation
- (c) Blunt force trauma

## (d) Homicide

The pathologist observed that on marks of violence there was evidence of friction bruises on the right frontal region with swelling. There was a high oblique groove present on the neck <sup>+</sup>/<sub>7</sub>. 8cm long consistent with the string. Both legs were tied with a wire and a string from the jacket. There was scalp haematoma on the right frontal region.

The state then tendered a confirmed warned and cautioned statement recorded from Accused two at CID Homicide offices in Bulawayo. Accused two tried to distance himself from the contents of the statement, alleging that he had been threatened by the police before making the statement. It is necessary to set out in detail the contents of the Accused two's warned and cautioned statement, which is in the following terms:

*“My name is Isaac Nyakurerwa. I admit the charge of killing Mutize’s flea market security guard. On 10th February 2013, myself, Isaac Nyakurerwa and my friend Mduduzi and Gina met at a Nite Club along 13<sup>th</sup> Avenue. We left the nite club when it was closed and we arranged to look for money in town. We failed to get it. Gina said we should go to a certain flea market which he knew was along Lobengula Avenue. We all agreed to that. On arrival we gained entry by jumping over. While we were inside, we found a security guard sleeping on top of a display stand. We got near, he woke up. We held his hands and legs and we closed his mouth. We then tied his hands and legs and neck with a wire. When we had tied him up he tried to scream. Gina then picked a plank and struck him thrice on the head and he fainted. Mduduzi then took the security guard’s cell phone. After that we took the keys and tried to open the doors and we failed. Meanwhile, Gina was guarding the security guard. Myself and Mduduzi then saw shangaan bags which contained clothes and then we started shifting them to the gate until they were three. We then started throwing the bags over the gate and then went out. We then sought for a taxi to ferry the bags and we found it. We came with it and loaded all the items. Mduduzi then said we should proceed to Makokoba to 3<sup>rd</sup> Street at Falala’s place. We arrived there and offloaded all the items and went inside the house. We began to share the items amongst ourselves until we finished. We gave the woman the owner of the house some of the property.*

*We also gave some of the property to the other man who stays at that place whilst this other woman who is a tenant at that place bought a certain pair of shoes. When we had finished we called for a taxi which carried all the items and we got into the car. We separated at Food 4 Less, I then went to Old Pumula at my friend's place Dumisani where I arrived with the clothes. I then knocked and got out of the house. We then began to sell the clothes. I took two pairs of shoes and two pairs of trousers, one skirt and two for women. I gave some of the clothes to Dumisani. From the items sold, I collected the money but could not collect the other money because the other items were sold by individuals who reside in those areas. After sunset, I boarded a commuter omnibus and left for hospital to visit my wife after seeing her, I then went home."*

### **The State case**

The state led *viva voce* evidence from six witnesses.

### **Siphilisiwe Lubimbi**

This witness testified that she resides at Burombo flats, Thorngrove. She was accused one's girlfriend at the relevant time. She stated that before the arrest of accused persons accused one approached her and asked her to accompany him to his sister's place where he had left some clothes. The witness told the court that she advised accused one that she was busy since there was a bereavement in the family. The following day she boarded a kombi and went to accused one's sister's place in Tshabalala. As soon as she arrived, accused and Ignatius arrived at the house. Accused indicated that there were various clothes for sale which he had left in the custody of his sister Precious Mathema. Accused took some of the clothes and they left together with the witness and went to Pumula. As soon as they got to their destination accused and his colleague, Ignatius told her to wait for them and that they would return after a short while. The witness waited for a long time and after midnight she decided to leave Pumula.

Siphilisiwe testified that after the arrest of the accused persons, she received a letter from accused one. The letter was brought by a young man who had just been released from Khami Prison. The letter was handwritten in Ndebele and the translated version of the letter is in the following terms:

*“Juju*

*How are you, I am fine. Listen Juju please I beg you, Isaac and I said about the property that we met Gina saying he/she was from Botswana so if you are called to court just say there is nothing you know in connection with the property and that Gina is the one who gave Rethi’s mother the property so that she sells it. I am not the one who gave Rethi’s mother or if you love do not come to court there is a chance that I may be released/acquitted because Gina was not arrested, my love please tell Rethi’s mother that if she is called she should say she was given the property by Gina and that she did not know that we killed someone. She does not know the location of the police she was afraid of being assaulted, you should say that you had been assaulted but you know nothing which you can testify about the death of a person.*

*Or at most do not come to court on 13<sup>th</sup> June just default. Friend we survived well together I beg you to do as such because if you do not do this the sentence is severe. But at the High Court if you say you know nothing and that the person who gave the property to Pretty is Gina I will be released soon. Homicide is no longer involved since we were arrested.*

*Then go to Falale tell Falale’s wife to say that the person who gave them the property is Gina. Isaac and I are saying we bought some of the property intending to resell it. So I beg you to try or even send someone to Khami before 13<sup>th</sup> June so that I explain to him/her, he/she can come without anything, \$5 is enough for him/her to come because I am in danger, but if you do that I tell you very soon I will be out.*

*Yours Mdue*

*You were saying this is mine!!  
Still I am yours, please save my life, dear”*

The witness, Siphilisiwe, confirmed that she understood the contents of the letter and instructions that were being given to her to obstruct the murder investigation. The witness decided to hand over the letter to the police as she was not prepared to subvert the course of justice.

The evidence of this witness was not seriously controverted under cross-examination. The witness was calm and composed and her testimony was not challenged in any material respects.

**Mara Sibanda**

The second state witness was Mara Sibanda. She is 67 years old and took to the witness stand with some difficulty. She is asthmatic, suffers from high blood pressure and has a kidney problem. Accused one is her young sister's son. She testified that sometime in February 2013 accused one came to her house in Makokoba in the company of another person. They arrived at night and they were using a taxi. They left some clothes at her residence. There was an assortment of clothing items including shoes, children's clothes and pairs of trousers. The following day accused one returned with two mobile phones. Accused gave her a Nokia mobile phone. A few days later the police came and recovered the Nokia cellphone. They informed her that the accused had been arrested.

The court found the evidence of this witness to be honest and straight forward. Her evidence was not seriously challenged under cross-examination.

**Pretty Lindiwe Khumalo**

The third state witness is aged 44 years old. She resides in Thorngrove. At the relevant time her boyfriend's young sister was in a love relationship with accused one. The witness was referring to Siphilisiwe Lubimbi. She told the court that sometime in February 2013 accused one and Ignatius (known as Gina) arrived at her residence with a bag full of clothes. She stated that accused one knew that she was a cross-border trader and that she could sell the clothes they were in possession of. She said after making a quick sale of a few clothes they raised a sum of US\$25. They decided to go and have a braai at Mashumba Bar. After buying some food and drinks and before they could settle down, Siphilisiwe received a phone call. After her telephone conversation Siphilisiwe informed accused one that there was a murder investigation involving a murder which occurred at a certain flea market. At that stage, accused one stepped back and uttered words to the effect that he knew how homicide detectives operated. Immediately thereafter, accused one and Ignatius left the shopping centre. The witness and Siphilisiwe had no choice but to go back home. Accused one and Ignatius revealed that they were going to Pumula but they had to pass through Sotshangane Flats. Upon arrival at the flats, Ignatius went upstairs

and when he came back he had three mobile phones. Accused one requested the witness to go and collect his shangaan bag. The witness observed that at that stage the accused and Ignatius were restless and wanted to have nothing to do with them. The accused and his colleague immediately left. The witness later came to learn that accused one and his colleague had been arrested on murder allegations. The witness confirmed that she was aware of the letter that had been given to Siphilisiwe and that it had been delivered by a young man who had been released from Khami Prison.

The court found the evidence of this witness to be credible and easy to follow. There was no exaggeration on her part in all material respects.

#### **Dr Nemache Mawere**

The fourth witness for the state was Dr Nemache Mawere. He is employed as a Psychiatrist at Mlondolozhi Special Institution under the Department of Prisons and Correctional Services. He holds a degree in medicine (MBChB) and a Diploma in mental Psychiatry (UZ). He has practiced medicine since 1982. He prepared a report on accused one's mental condition at the request of the court. On the 13<sup>th</sup> February 2018 and 13<sup>th</sup> March 2018 and at Khami Remand Prison the witness examined the first accused. He testified that he was not able to obtain a recent family affidavit from accused's family members. The accused confirmed that he was born normally and had a normal childhood. He narrated that he had abused alcohol and cannabis at school. He left for neighbouring South Africa after completing form 4. He indicated that he had been detained in any mental institution in South Africa. There was however no proof of the accused's assertions regarding his treatment for a mental illness whilst in South Africa.

The report of Dr Nemache Mawere concludes that at the time of the alleged offence the accused was not mentally disordered. In the doctor's opinion, the accused suffered from anti-social personality disorder. This is a condition where an individual performs activities against the norms of society. The doctor opined that a personality problem (disorder), or having an abnormal personality does not mean that the person has a mental disorder. The conclusion reached by the expert witness was that accused person was criminally liable for his action. He

indicated that accused had told him in detail how he had committed the offence in the company of his colleagues. The witness refuted the conclusion reached by Dr Elena Poskotchinova that accused was suffering from a mental defect for the following reasons:

Mental disorders are complex and should have at least four aspects present in the accused's behaviour, namely:

- (a) abnormal thoughts
- (b) abnormal behaviour (conduct against moral norms)
- (c) abnormal perceptions (hearing voices, seeing visions, abnormal smells, abnormal sense on body)
- (d) abnormal speech (incoherent speech, new words, volume of speech, tone of speech)

The witness insisted that the accused did not suffer from a mental disorder because he did not display the above symptoms. He insisted that accused's record in prison is that he had a violent temper and that he had been given sedatives to control his violent nature. His overall view was that at the material time accused was in full control of his mental faculties.

More crucially, though, the witness testified that he had caused an EEG (electroencephalogram) to be conducted on the accused. This was done on 13<sup>th</sup> February 2018 and the result was that accused was normal. In spite of robust and intrusive cross-examination by defence counsel the witness maintained that anti-social personality disorder is not a mental illness. The witness was fortified in his view because accused's conduct before, during and after the murder indicated that he was in control of his mind.

### **Sidanisile Ncube**

The fifth witness for the state was Sidanisile Ncube. She is 35 years old. She was released from hospital to come to court to testify. She appeared to be in some pain. She however indicated that she was able to narrate the events related to this matter. She told the court that on or about 10<sup>th</sup> February 2013, and around 3am accused one and his colleagues

arrived at her residence in Pumula South. They were in possession of two shangaan bags full of clothes. They requested to share the clothes and she allowed them to do so. They shared the clothes, with each person picking the items they were interested in. Accused one and his associates indicated that they had brought the clothes from Botswana. After two days, the police arrived at her residence. She was taken in for questioning in connection with the clothes which she had been given by accused to sell. The witness was later advised that the accused persons were implicated in a case of murder involving the death of a guard at a flea market.

The evidence of this witness was credible. The witness though of ill-health gave her evidence clearly and was not contradicted under cross-examination.

### **Precious Mathema**

The sixth witness for the state, Precious Mathema, is accused one's sibling. Accused one is her blood brother. She confirmed, as was done by previous witnesses that on the night of 10<sup>th</sup> February 2013, accused one and his colleagues brought various items of clothing to her at Makokoba. Accused one asked the witness to hand a small bag containing some clothes to Siphilisiwe (accused's girlfriend). A day later accused one and Ignatius came to her residence but did not remain there for long. The witness was later informed that accused one was being investigated in a case of murder. The police recovered all the goods they had received from accused. The witness noticed, however, before the goods were recovered that there were several pairs of shoes which were for the left foot only. The clothes were new and some even had tags on them.

The witness was given an opportunity to comment on accused one's upbringing. She indicated that accused grew up as an intelligent young man. She denied that accused had been dropped by their father when he was young. She stated that accused had only gone up to form 3 before dropping out of school. She admitted that accused abused drugs and alcohol when he was in South Africa. She disputed the suggestion that accused started abusing drugs whilst at school. She confirmed that when accused one returned from South Africa he was taken to a traditional healer in Gwanda. The treatment was in respect of the accused's abuse of drugs.

The witness was not subjected to extensive cross-examination. Her evidence was credible in material respects.

The state closed its case.

### **Defence case**

The defence opened its case by calling **Mduduzi Mathema** (Accused 1)

Accused pretended to be hearing some strange voices and claimed to be suffering from some form of amnesia. The accused stated that he did not remember anything at all. The accused then asked the court to adjourn as he needed to relieve himself. The court obliged and adjourned for a few minutes. No sooner had the proceedings resumed, accused indicated that he was feeling sleepy and he wanted to sleep. When the court indicated that the trial had to proceed, the accused feigned seeing some persons behind him. He started making some noises and the court was forced to adjourn proceedings.

On resumption of proceedings, accused one indicated that he suffered from amnesia at some point while in prison. He claimed he could no longer remember the events surrounding the commission of the offence. After brief examination in chief, accused was subjected to cross-examination by state counsel. The accused conceded that he could not dispute the evidence of the psychiatrists which tended to show that he had anti-social personality disorder. Accused was able to respond meaningfully to all the questions put to him and the court's impression is that the accused was desperate to fake mental illness and escape criminal liability. The court was not impressed by accused's demeanour and theatrics. The accused was not able to explain why he had lied that he had been dropped by his father when he was young. The accused was also unable to explain why the EEG examination had shown a normal result. Accused was not able to explain why he had written a letter addressed to "Juju" asking her to interfere with the investigations. The accused could not explain why he would have given a detailed defence outline to his first defence counsel, *Mr Nyoni*, if he had not given such instructions and could not remember the events surrounding the matter. Accused had no explanation to most of the

falsehoods in his defence case except to say he lost his memory. When he was asked why he was arrested at Mbalabala if he was not absconding to South Africa, his response was simply that he did not know why he had gone there.

### **Dr Elena Poskotchinova**

The defence then called Dr Elena Poskotchinova as its witness. She is a psychiatrist stationed at Ingutsheni Central Hospital in Bulawayo. Her qualifications include a Medical Degree and Specialist Degree in Psychiatry (Russian Medical Academy, Moscow, Russia). She is registered with the Health Professions Council, Zimbabwe. She examined the accused, Mduduzi Timothy Mathema in July, August, September and December 2014. She also examined the accused in February 2015. She relied to a large extent on what she was told by accused's family members and what the accused himself narrated as his poor upbringing. The expert witness however, indicated that accused did not display any type of hallucination and did not have symptoms of delusional behaviour. The accused did not show any decline in memory or intellect. According to reports by prison staff she gathered that the accused had episodes of violent behaviour, was very irritable, short tempered and was secluded. The witness concluded that there was a reasonable possibility that at the time of the alleged crime the accused was suffering from mental disorder (anti-social personality disorder, substance abuse disorder). The report goes on to conclude that accused was in a state of diminished responsibility, and was fit to stand trial.

Under extensive cross-examination the witness stuck to her opinion that anti-social personality disorder is a form of mental illness. She conceded however, that she would not recommend a special verdict because the accused was aware of his conduct at the material time and ought to be held criminally liable. The witness further underlined that in her opinion, the accused was in a state of diminished responsibility.

What became clear from the evidence of Dr Elena Poskotchinova is that she based her opinion on what she was told by accused and by his family members. She did not interrogate the fact that accused was able to explain to her in detail how the murder was committed. She did not

consider the fact that apart from what accused told her about his abuse of drugs and alcohol his EEG examination proved that his brain was normal. She did not consider the fact that accused had no symptoms of hallucinations. The accused did not display the other aspects of mental disorder that is;

- (a) abnormal thoughts
- (b) abnormal perceptions
- (c) abnormal speech
- (d) abnormal behaviour

Indeed, in her evidence the witness did concede that accused did not qualify for a special verdict.

The court shall analyse the two reports from the experts later in the judgment.

### **Isaac Nyakurewa (Accused 2)**

The second accused gave evidence under oath. He like accused one, made an attempt to disrupt the proceedings at the commencement of this trial. He made unsubstantiated allegations that state counsel was out to get him and that he wanted a different prosecutor to handle his trial. Not finding any support from his own defence counsel on these assertions, accused had no option but to allow proceedings to commence. Accused two's defence outline was similar in every respect to accused one's first defence outline which I quoted in *extenso* earlier. It ought to be noted that accused two's defence outline details how he sold clothes to various persons mentioned in this trial. In his confirmed warned and cautioned statement accused two gives a detailed account of how the offence was committed. That narration fits in with the letter addressed to "Juju" by accused one whilst at Khami Prison. Accused did not deny that on the night in question he got possession of property that had its origin from the scene of deceased's murder. He however, contended that he bought such property from Ignatius. He was an innocent purchaser. The contents of accused's warned and cautioned statement were confirmed by independent state witnesses in all material respects. In the warned and cautioned statement

the accused states that they were three during the commission of the offence. That fact was confirmed by Sidanisile Ncube who confirmed that they were indeed three persons who arrived at Makokoba at night to share the property in question. In his statement to the police accused states that on arrival at the flea market they jumped over the wall. George Gwachari stated in his version admitted in evidence by way of formal admissions that on his arrival at the flea market he found the gate locked and he had to jump over a wall into the market. Accused stated in his statement that upon entering the flea market they observed the deceased lying on a display stand. The deceased's body was found on top of a display at stand 92. The accused states in his statement that after they entered the flea market they tied the deceased with pieces of wire. It is a fact that the deceased was found dead tied up with pieces of wire. The accused states in his statement that accused took the deceased's cellphone. Mara Sibanda confirmed that she had been given a mobile phone by accused one. Accused states in his statement that they stole three shangaan bags and hired a taxi. This piece of evidence was confirmed by Sidanisile Ncube who said the three men arrived with three bags full of clothes. The sale of the stolen loot is confirmed by the various state witnesses who testified. The accused told the court that he had simply copied accused one's warned and cautioned statement in order to come up with his own detailed statement. This was in total contrast to what accused one said as his reasons for withdrawing his first defence outline, that is, that he had been told by accused two what had happened on the night in question.

The witness like accused one was very unreliable. He tried to shift his position by denying that he met Ignatius around midnight. He then moved the time of meeting to 4:30am. The change in the meeting time is understandable because he wanted to distance himself from the proximate time of the commission of the offence. His attempt to change the time they met Ignatius could not be reconciled by the unchallenged evidence of Sidanisile Ncube who said the accused persons arrived at Makokoba around 3am.

This court makes a specific finding that accused two was an unreliable and inconsistent witness. His demeanor was poor. His story that he met Ignatius who had brought clothes from Botswana, is simply not consistent with the proved facts. It is a lie.

### **Analysis of the evidence**

The state case is based on circumstantial evidence. This court is alive to the fact that there is no direct eye-witness account in this matter. The law on circumstantial evidence is well settled. The case of *R v Blom* 1939 AD 202 laid down the requirements for circumstantial evidence and how such evidence should be applied. See also, *S v Marange & Ors* 1991 (1) ZLR 244 (SC). When dealing with circumstantial evidence the court is enjoined to look at the evidence cumulatively. The court is not expected to exclude each and every possibility before the guilt of the accused is proven. What is essential is that all the proven facts must be consistent with the guilt of the accused. The state's burden is to show that from all the cumulative and proven facts the accused is indeed guilty of the offence beyond reasonable doubt.

In *S v Ntsale* 1998 (2) SACR 178, it was held that where a court is dealing with circumstantial evidence, it need not consider every fragment of evidence individually to determine what weight to attach to it. It is the cumulative impression which taken collectively should be considered to determine if the accused's guilt is proven beyond reasonable doubt.

### **Medical evidence**

Dr Nemache Mawere came to the conclusion that the accused was suffering from anti-social personality disorder which is not a mental disorder. Features of such behaviour are having a bad temper and being prone to violent and aggressive tendencies. Accused was put on medication to control his violent behaviour.

Dr Poskotchnova concluded that 1<sup>st</sup> accused was suffering from mental disorder (anti-social personality disorder). In her opinion the accused was criminally liable for his conduct. She suggested that there was a case for diminished responsibility arising from the anti-social behaviour.

In my view, where medical evidence points to the fact that an accused is raising the defence of insanity in circumstances where he was clearly and consciously aware of the nature

and consequences of his conduct at the material time, the court is entitled to reject the defence of insanity. Where there are seemingly contradictory reports on the mental condition of the accused person, the court must assess all the evidence adduced in court, in making a determination whether or not the defence of insanity is available to the accused. The medical report is essentially the opinion of the expert and the court has to make its own finding on whether or not the accused possessed the requisite *mens rea* to commit the alleged offence, after analyzing, the circumstances of the case as well as the medical evidence.

In terms of our law, it is settled that to establish a defence on the grounds of insanity, it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of the mind, as not to know and appreciate the nature of his conduct. This is provided under section 29 of the Mental Health Act. Both medical experts came to the conclusion that accused one was criminally liable for his conduct. There was no evidence to support the assertion that the accused one had diminished responsibility. Accused narrated clearly the details of the murder to both Dr Mawere and Dr Poskotchinova. He gave a detailed defence outline to his first defence counsel. He was clearly feigning amnesia to avoid the consequences of his conduct. His demeanour in court indicated that he was play-acting and even tried to disrupt court proceedings.

## **Conclusion**

The court is satisfied that the evidence adduced by the state in this matter is credible. All the state witnesses gave evidence fairly without exaggeration. The evidence proves beyond doubt that on the night of the murder, the accused persons were in possession of an assortment of clothing items. The origin of the clothes was traced to the murdered security guard at the flea market. The accused persons gave an incredulous and unbelievable explanation of how they suddenly got possession of three shangaan bags. It is clear that once Ignatius was on the run the accused persons realised an opportunity to shift most of the blame to Ignatius.

Counsel for the accused persons argued that the state failed to prove its case beyond reasonable doubt. The case of *R v Difford* 1937 AD 370 was relied upon for the assertion that

the accused persons did not have the onus to prove their defence. The court is aware that there is no onus on an accused person to prove the truthfulness of his defence. However, the evidence against accused persons in this matter is credible and reliable. The accused persons did not proffer a defence that is reasonably possibly true.

I must comment on the issue related to the defence outline “withdrawn” by accused one at the commencement of the trial. The provisions of section 66 (6) of the Criminal Procedure and Evidence Act accord with the provisions of section 70 (1) (b) of the Constitution of Zimbabwe Amendment (No. 20), 2013 which provides that an accused has the right to be promptly informed of the charge in sufficient detail to enable him to answer to it. The defence outline does not however constitute evidence, but is a summary of the evidence the accused intends to produce during the trial. See, *S v Nyandoro* 1987 (2) ZLR 66 (S).

Before drafting a defence outline, a defence lawyer must have studied carefully the contents of the outline of the state case. He must be fully conversant with the essential elements of the crime or charge. The defence lawyer must then interview the accused and take detailed instructions on the nature of accused’s defence. The defence outline is critical to the accused’s defence case in that the details contained in the outline are not a creation by the lawyer, but rather, the accused’s response to the allegations. The relevance of the summaries of the state case and defence case is that each side will be able to appreciate and analyse the evidence which either side seeks to adduce. See the remarks of the learned judge in *Re: Simbarashe Chivaura* HB-113-10, regarding the relevance of a defence outline.

In the present matter, there can be no doubt that Accused one’s first lawyer carried out his instructions professionally and filed a detailed defence outline on 5<sup>th</sup> June 2013. In his notice of withdrawal of the first defence outline, Accused one states as follows:

*“TAKE NOTICE THAT, the 1<sup>st</sup> accused withdraws his defence outline dated 5<sup>th</sup> June 2013 and all contents thereof having been told to him as he could not and still cannot personally recall any of those events and is not in a position to tell the court the contents thereof.”*

Accused one's defence outline was filed in terms of section 66(8) of the Criminal Procedure and Evidence Act. Upon its receipt by the Registrar it became part of the court record. The court cannot ignore its contents entirely. In this matter what is curious is that both Dr Mawere and Dr Poskotchnova attest to the fact that Accused one gave details of how the murder was committed. The accused was not under any undue pressure when he did so. The psychiatrists were not challenged on this aspect of their evidence. Accused one's disruptive behaviour in court and his claim of loss of memory are not consistent with the detailed defence outline filed on 5<sup>th</sup> of June by an officer of this court. Its contents cannot be wished away and the court may not ignore it. It is part of the court record.

In closing, the court is satisfied that the state proved its case against both accused persons beyond reasonable doubt.

In the result, and accordingly both accused persons are found guilty of murder with actual intent.

**Sentence:** Both accused persons are each sentenced to life imprisonment.

*National Prosecuting Authority*, state's legal practitioners  
*Moyo & Nyoni*, 1<sup>st</sup> accused's legal practitioners  
*T. J. Mabhikwa & Partners*, 2<sup>nd</sup> accused's legal practitioners