Judgment No. HB 74/2003
Case No. CRB 50/2002

THE STATE

Versus

JOB VHERA

IN THE HIGH COURT OF ZIMBABWE
NDOU J *(with Assessors Mr Ndlovu & Ms Baye)*
BULAWAYO 19, 24, 27 SEPTEMBER 2002, 20
DECEMBER 2002 AND APRIL 2003 AND 20 JUNE 2003

Mrs D Malunga for the state
T Mutandi for the accused

Criminal Trial

NDOU J: The 27 year old accused person is before us on a charge of murder. He appeared before us at the Gweru High Court Circuit. The accused person pleaded not guilty to the charge. Most facts seems to be common cause. The only issue is the identity of the deceased person's assaulting. The salient facts are that the deceased was aged 23 at the time he met his untimely death. The accused and the deceased persons were known to each other during the lifetime of the deceased. The accused person resided and was employed by one Leon Pieter Burger at Sherwood Park Estate in Kwekwe as a crop guard. The deceased resided and was employed at Machakwi Estate in Kwekwe. Sherwood Park and Machakwi Estates are next to each other. Sometime in October 1999 the accused and deceased had a misunderstanding at a football match and as a result the deceased assaulted the accused resulting in the latter sustaining injuries. The accused made a report to the Kwekwe Rural Police who advised the deceased to pay a deposit fine of $250 for his offence. On 10 December 1999, the deceased left his home proceeding to Kwekwe Rural Police Station to pay the deposit fine in respect of the assault charges upon the accused. The deceased did not reach the police but instead was shot dead on the way. He was shot and killed as

he approached Sherwood Road turnoff. The place where deceased was shot is some two (2) kilometres from where the accused was carrying out his duties as crop guard.

The accused was armed with a shotgun on the day in question. The state, on the one hand, alleges that it is the accused who shot the deceased. The defence, on the other hand alleges that the accused was not at the scene and, therefore, did not shoot the deceased.

State case

The state called a number of witnesses in support of its case. We propose to name them, highlight the material aspects of their testimony and our findings on their demeanour.

Sinanzeni Moyo

She was the deceased's wife of three years. She stated that she knew the accused as crop guard at Sherwood Park Farm. She stated that there was bad blood between the deceased and accused as a consequence of an incident that occurred at a football match. During the match the accused assaulted the deceased saying the Ndebele speaking people should go back to Bulawayo where they apparently came from. This did not go down well with deceased who retaliated and overcame the accused. After being defeated by the deceased, the accused ran away saying he was going to his house to get a gun and come back to shoot the deceased. The accused did not get the gun and upon his return he proceeded to the clinic for treatment and later to the police to report the assault. The police did not immediately come but after about four months they came back on 9 December 1999 in the evening around 2100 hours and collected the deceased and took him to the accused's place. The deceased

returned the same evening and said the police invited a $250 deposit fine from him for the assault on the accused. Early the following morning at around 0530 hours the deceased left for Kwekwe to pay the $250 fine. He also had $100 to buy paraffin and a 10 litre empty container. Under cross examination she stated that she had seen the accused wearing a "Nike" hat similar to Ex 6. This witness was subjected to some determined and meaningful cross examination. She was, in our view, not shaken under cross examination. She did not seem to exaggerate the sour relationship between the deceased and the accused. She satisfactorily explained the source of the bad blood between the two. We hold the view that she is a credible witness.

Michael Gutuza

He knows the accused very well. They are neighbours and they attend church together and indeed socialise together. He stated that the accused had previously worked for his family herding cattle. He, however, only knew the deceased by sight. He did not attend the football match on 31 October 1999 where the accused was assaulted by the deceased. He received a report from the accused's wife and he consequently followed the accused at the clinic. He met the accused by the gate of the clinic. The accused told him that a certain young man had assaulted him on the head with a log/stick. They proceeded together to the accused's employer and found he had already summoned an ambulance. The accused was ferried to the hospital. Upon his return from the hospital, the accused came and informed him a case of assault was being handled by the police. The accused then pointed in the direction of the deceased's house and uttered "I will shoot him on the head." He advised the accused that that will not help he would rather leave the matter in the hands of the police as he had already done. He did not take this utterance seriously as he thought

that the accused made it in the heat of the moment due to anger. On 10 December 1999 he heard about the death of the deceased. The accused person was taken by the police in the course of their investigations in the morning. In the evening when he (i.e. the witness) and four others were at the beer-hall the accused joined them. The accused told him that he had $300 to spend on the beer. He asked the accused where he got the money from. The accused informed him that he had got the money from his employer. The accused exhibited his generosity by purchasing about eight litres of opaque bear at a cost of $20 per 2 litre container. Under cross examination he was asked if the accused was a violent person. He respondent – "I would not say so, but he used to be involved in certain misunderstandings. He paid fines for fighting twice or thrice" He conceded that he did see the $300 cash that the accused announced that he had in his possession. He said that there was nothing unusual in the manner the accused purchased the beer nor the fact that he got the $300 from his employer. Our unanimous finding is that this witness is credible. He did not seek to paint the accused in a bad light. He conceded a lot of facts favourable to the accused under cross examination.

Mathew Mandaza

He is a member of the Zimbabwe Republic Police stationed at Kwekwe Rural Police Station. He testified that on the night of 9 December 1999 he was on night duty. He had reason to investigate a docket in which the now deceased was charged with the assault on the accused person. He, as a result, visited Sherwood Park Farm at around 2100hours. At Sherwood Park he located the accused who confirmed that he was indeed the victim of an assault perpetrated upon him by the deceased person. The accused person directed him to the deceased's placed of abode. He traced the

deceased and took him to the accused and took him to the accused person's work station. The latter confirmed that the deceased was indeed his assailant. In the presence of the accused person he informed the deceased person to come and pay $250 deposit fine for the assault and that he should arrive the following morning before 0800 hours. He then left. The deceased did not show up the following day as instructed until his dismissal from duty at 0800 hours. This officer was briefly cross examined. We are of the view that he gave his evidence well.

Foreman Bhebhe

This witness resides in Mbizo township, Kwekwe and cycles to his place of employment at Sherwood Park Estates. He is employed there as a tailor. He knows the accused very well as he had worked at Sherwood Park Farm for eight years. He stated that on 10 December 1999 he left home for work at around 0500 hours. He got to Sherwood turnoff at about 0545 hours. As he was cycling he observed a person by the road side. When this person greeted him he noticed that it was the accused person. The accused was about six metres from him when they exchanged greetings. As a person he knows well he was able to identify the accused person as visibility was good although it was before sunrise. He saw that the accused person was putting a yellow raincoat and clutching a bag. Under the raincoat he could only see something dark but was not sure whether it was a pair of trousers or overalls. He then proceeded with his journey and after cycling for about five hundred (500) metres he met the deceased person going in the direction where he had met the accused person. The deceased was holding a green 5 litre container. He could not recall the deceased person's attire. They exchanged greetings and he proceeded with his journey. After about five hundred (500) metres he saw a woman by the roadside. He greeted her and

proceeded to work. At about 1000 hours or 1100 hours he later learnt of the death of the deceased person. We are also satisfied that this witness is credible. We, however, cautioned ourselves against the possibility of mistaken identity. It is not uncommon for a credible witness to make a genuine error on the question of identity. The accuracy of such evidence depends upon the trustworthiness of witnesses' observation, recollection and narration. These elements are affected by various factors. The relevant factor, *in casu*, is the circumstances in which this witness allegedly saw the accused; the state of the light, how far away he was, whether he was able to see from an advantageous position and how long he had the accused under observation – see *South African Law of Evidence* by Hoffmann and Zeffert 3rd Edition at pages 478-479, *R* v *Mputing* 1960 (1) SA 785(T); *S* v *Mehlaphe* 1963(2) SA 29 A and *S* v *M* 1963 (3) SA 183 (T) at 185E. Mr Bhebhe stated that although it was before sunrise he met the accused around 0545 hours. As this incident occurred in summer (i.e. 10 December) we took judicial notice of the fact that at that time it would normally be clear unless if it was a cloudy and overcast day. He was cycling along a tarred road and the accused was about 6 metres away according to his estimation but in essence the accused was on one side of the road he was cycling on the other. The question of proximity has to be considered in this case. The accused is well known to the witness. He and the accused person have been in Sherwood Park Farm for a number of years. The accused holds a prominent position of a security guard. All these factors reduce the danger of mistaken identity. We recognise that direct evidence of identification based upon a witness' re-collections of a person's appearance is dangerously unreliable unless supported by other evidence. In *S* v *Mthetwa* 1970 (3) SA 766 (A) at page 768 HOLMES JA stated –

> "Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities."

From what we alluded to earlier on, it is clear that we have found witness Bhebhe to be honest. What remains is the reliability of his observation. From the above list articulated by HOLMES JA some are relevant for the determination of this question of identity. Lighting is the first one. According to the witness he met the accused at around 0545 hours. At that time there must have been sufficient light. He was able to describe the accused's attire. Not only that, but he met the deceased person soon after meeting the accused person and observed that he was carrying a plastic 5 litre container. The latter evidence was confirmed by that of the deceased's wife and other witnesses who saw this container.

It is clear that visibility was good at the time. Further, he had an opportunity to observe the accused person at the time they exchanged greetings. There was nothing between the observing witness and the object of the observation (i.e. the accused. The two were opposite sides of the same road. The accused and this witness were previously known to each other so the questions of identifying marks, of facial characteristics and of clothing are much less important than in cases where there was no previous acquaintance. What is important in such cases is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to

the circumstances in which it was made – see *R* v *Dladla* 1962(1) SA 307(A) at 310. The accuracy of Bhebhe's observation is, therefore, reliable.

Bhebhe's original impression cannot be doubted. Time-lag is not a problem as he gave his statement to police relatively soon after the incident. This was an unusual incident which made it likely that Bhebhe's impression would be preserved. The same day that he had met the accused person and the deceased person he, within four to five hours, became aware that the deceased was killed in the general vicinity of the area where he met them. In such circumstances his recollection cannot be doubted. Mr Bhebhe gave an ungarbled account of what he saw and he was doing so honestly.

Lameck Mahachi

He has known the accused for between two to three years. They are both security guards. He was on duty on 9 December 1999, when the police came looking for the deceased person and the accused person. He indicated the deceased person's house to them. On the following day i.e. 10 December 1999, police came and showed him a hat. He identified the hat as belonging to the accused person. He also made a statement to the police to the effect that the accused told him that he was going to injure the deceased person before Christmas. The accused person made these utterances from the day he was assaulted by the deceased person at the game of football and on several subsequent days. The accused spoke harshly or aggressively and as such he did not ask for any elaboration on these utterances. He, under cross examination, stated that the accused person was a violent character who assaulted many people in the area. He also confirmed that the accused person was Michael Gutuza's friend and the two drank beer together. He denied that he was falsely incriminating the accused person out of jealousy because the latter was liked by their

employer and has use of a shot gun in carrying out his duties whereas the former and other security guards used baton sticks. He was adamant that the accused person uttered the above mentioned statements and that the hat exhibited belonged to him. Having weighed his merits as a witness against factors which militate against his credibility, we make a positive finding on his trustworthiness. We see no reason why he would lie about the hat and the utterances. As he worked with the accused person his identification of the latter's hat is reliable.

Lean Pieter Burger

He stated that he employed the accused as a security guard. He issued the accused with a shotgun to use in the course of his duties. On the night of 10 December 1999 the accused was on night duty and armed with the single barrel shot gun. Exhibit 4. He was issued with "SSG" pellets for the shotgun. Although he was not certain on the number of pellets issued to the accused on that day he however, testified that he usually issued the accused with four (4) pellets. He, however, indicated that he did not keep a reliable record of the pellets issued to the accused. He stated that he was not sure whether or not he gave the accused money on that day. He confirmed what other witnesses said that the accused was not a popular person because of the number of arrests that he effected. He recalls that the accused was dressed in blue overalls and long black raincoat i.e. the standard issue for security guards. He however, could not recall whether the accused was wearing a hat. He testified that he could not remember whether on 10 December 1999 the accused handed over the shotgun to him because at times the accused handed the shotgun but there were instances where he took the shotgun to his place of abode. The accused was, however, in charge of the shotgun most of the time. He agreed that it is possible

that “LG” pellets could be used in that shotgun as long as they are 12 bore calibre. He stated that it was not possible to hear the shotgun fire from the scene of the deceased’s killing if one is at his homestead on account of the distance between the two points. The evidence of this witness was not challenged in any material respects. This is not surprising considering that it does not seem to take the case any further.

Jonifasi Muguzumbi

He is aged 64 years. He was the cook at the Burger homestead at the time of the murder. He did not know the deceased person in his lifetime. On 10 December 1999 he went to work at 0600 hours. He found the accused at the Burger homestead. He recalls that the accused was wearing overalls. He exchanged greetings with the accused. After that the accused said to him “Uncle I have done a bad thing. I killed someone.” He responded by telling the accused that he did not want to hear such utterances. He was scared by these utterances. He stated he, unlike other people on the farm, enjoyed good relations with the accused. They treated each other like relatives. He denied suggestions that he was improperly influenced by the police to testify against the accused. He was subjected to determined and tactful cross examination. We are of the view that this old man gave a truthful account of what transpired. He is, in our view, a credible witness. He was not shaken under cross examination and has no motive to lie against the accused. He and the accused got along very well like relatives. It is common cause that the accused was unpopular on the farm but this witness was one of the few people who related well with accused person.

Japhet Ndlovu

He is a member of the Zimbabwe Republic Police stationed at Kwekwe Rural. He knows the accused as a member of the Neighbourhood Watch Committee attached to their police station. He did not know the deceased in his lifetime. On 10 December 1999 he attended the murder scene in the company of Sergeant Nhepera. They arrived at the scene around 0800 hours. At the scene he observed blood on the tarmac and a blood drag trail. He followed the drag marks up to a point where he traced the deceased's body about six (6) metres from the spot on the tarmac where there was blood. The pool of blood was mainly located almost at the centre of the tarred road. Next to the body he observed and retrieved a khakhi sun hat inscribed "Nike" i.e. exhibit 6 and a black pair of shoes, Ex 7. The deceased was putting on a white stripped shirt and he could not recall the colour of his pants. His shoes had been removed and one of the trousers pocket had been pulled inside out indicating that the contents had been emptied. He observed that the deceased had wounds on his neck and head. He searched the scene and retrieved circular papers used in pellets with "LG" inscriptions. These circular papers were scattered by the impact of the shot and got scattered in the area where the pellet was fired. He also saw a plastic container. He approached the deceased's wife and she stated that the pair of shoes did not belong to the deceased. He later arrested the accused and handed him to details at the Criminal Investigations Department for further investigations. He also confirmed the testimony of Mr Burger that the "LG" pellets, like "SSG" pellets are 12 bore shotgun calibre used by the firearm that the accused had in his possession. In fact "LG" and "SSG" are brand names of the same calibre pellets. We are satisfied that this evidence by Ndlovu is credible. Most of it is in any event beyond dispute.

Sauro Mdiki Moyo

He knew both the accused and the deceased as they worked in the same place. On 10 December 1999 he left home going to work in the company of David, Ben and others. They got to the scene of the murder and received a report from a certain woman. They saw the plastic container, the blood and followed the blood trail and the drag marks up to where they saw the deceased person's body. By the time the police arrived at the scene they had already left the scene. He said he knew the accused as aggressive or violent to others and used to arrest them for poaching fish on the farm. He was arrested in this case after the accused implicated him after his (i.e. accused's) arrest. He stated that the accused had told the police that he (i.e the witness) had assisted him to drag the deceased's body from the road. He was however, released after they were taken to the local public prosecutor after the accused indicated to the latter that he (the witness) was innocent and that he had only implicated him under duress as the police were torturing him. He stated that although he was not assaulted by the policeman, they however threatened him and pushed him around. Most of this testimony is common cause. We will not attach any weight to the fact that the accused implicated him as this was done under circumstances of duress by the police.

Biton Longwe

He is a detective with Kwekwe (CID) police. He is the investigating officer. He was assigned the matter on 23 December 1999. He proceeded to Sherwood Park and located witness Bhebhe and recorded a statement from him. He was also present at the scene and witnessed when Detective Sergeant Chinhondo recorded indications from the accused. He took the hat and the shoes to Sherwood Farm. Lameck

Mahachi identified the hat as belonging to the accused. He denied assaulting the accused or threatening witness Moyo. We hold the view that he is not being truthful in this regard. We prefer the testimony of Sauro Moyo who seemed to be unbiased.

Tendai Mufazembe

She only knew both the deceased and the accused only in connection with this case. She arrived at Sherwood/Sebakwe Farm junction at about 0500 hours to wait for the bread delivery vehicle. She saw a person at a distance from where she was pacing up and down crossing the road. The person would stand up from the rock on which he was sitting, cross the road and cross back to where he was sitting. She observed this person make about three such crossings to and from before the deceased person arrived. She spoke to the deceased and asked him if he had seen the bread delivery vehicle. He said he had not. She stated that she saw the deceased at around 0530 hours. The deceased then walked in the direction of the person who was making the crossings and sitting on the rock. The deceased met with another person cycling in the opposite direction. Thereafter the deceased got to where the "crossing" person was. The deceased and this "crossing" person "sort of stopped". She thereafter saw them walking together down the slope. After that she "then heard a sound like a tyre burst". Thereafter certain young men came running towards Sherwood Clinic. She proceeded to the scene and saw the plastic container and blood but she did not get close to the body because of fear and shock. She stated the distance between where she was and the scene was about 500 – 600 metres. We should point out that she had some difficult in indicating the distance on account of her lack of familiarity with the town of Gweru where we are sitting.

The issue of identification arises here. It was put to her that when she saw the deceased it must have still been dark. Her undisputed testimony seems to point to the existence of sufficient light. As previously pointed out that at 0530 hours in summer there would be sufficient light. It would be a clear morning. We are fortified in this regard as the witness was able to clearly recognise the deceased's attire. She stated that he had a white shirt, red vest and darkish pair of trousers. Surely for her to make such an observation on the deceased's attire there must have been sufficient light. We appreciate she had another opportunity to see the deceased's attire at the time she went to the scene. She, however, categorically stated that when she got to the scene of the murder she saw the plastic container and the pool of blood she was too shocked to follow the blood or drag marks, as it dawned to her that the person she had spoken to a few minutes earlier had been harmed. This aspect of her testimony is beyond dispute. She conceded that from where she was she was unable to say whether the "crossing" person was male or female.

Defence Case

Job Vhera (i.e. the accused)

He admitted the fight with the deceased at the football game. The deceased assaulted him resulting in him making a report to the police the same day i.e. 31 October 1999. From that time up to 9 December 1999 he did not make any follow-up on the case. He stated that he was waiting for police instructions. During this period he met the deceased many times at the beer-hall and around the village. He did not talk to the deceased because he had made a report to the police and he was afraid that if he spoke to him the latter would attack him. He confirmed that he met witness Gutuza on 31 October 1999 after the assault. He told Gutuza how he got injured. He

denied that he told Gutuza that he would kill the deceased. He disputed that when the police brought the deceased to him after the latter's arrest on 9 October 1999, he heard them instruct him to come to Kwekwe Rural Police to pay a deposit fine of $250,00 the following morning before 0800 hours. All the police did was to ask him to identify the deceased as his assailant. He responded positively and they said they were placing him under arrest. He said the police did not mention the time that the deceased was supposed to pay the deposit fine in his presence. He stated that on the fateful day he was wearing "a part of black overalls", green jersey, a shirt with red and white stripes, light green track suit bottom, a green hat and combat shoes commonly referred at "MAZ" and a black rain coat as it was cloudy. It was not raining. He was armed with the shotgun exhibit 4. He had been issued with four pellets but in the morning he had only three pellets as he had used one pellet some two weeks prior to this incident. They were red in colour and "SSG" type. He stated that in his three years as a security guard he never used "LG" type pellets. He also disputed that the hat produced belonged to him or that he wore it on 10 December 1999. He stated that he did not fire the shotgun in the morning of this day. He confirmed that he met witness Jonifasi Muguzumbi and exchanged greetings around 0605 hours. He denied ever making any further utterances about having killed a person to this witness. He did not hear the gunshot. He disputed Bhebhe's testimony that he met him around the murder scene and spoke to him., He said up to the time of his arrest for this case he related well with Bhebhe. He has no idea why Bhebhe would falsely incriminate him. He conceded that he used to be friends with witness Michael Gutuza and also had no idea why he was falsely implicating him. The same

applies to witness Lameck Mahachi. He conceded that he has a history of fighting others on the farm. He categorically denied killing the deceased. He was extremely evasive on what the police said on the night of 9 December 1999 about the deposit fine by the deceased. Generally, we hold the view that accused did not tell the truth. We make a negative finding on his credibility.

Assessment of evidence

In this case the state is relying on circumstantial evidence. In the circumstances the issues cannot simply be resolved by making findings on the demeanour of the witnesses. The approach to circumstantial evidence is captured by the learned authors Hoffman and D T Zeffert *(supra)* in the following terms on page 464 –

> "The possibility of error in direct evidence lies in the fact that the witness may be mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of fact is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot be legitimately be inferred. In *R* v *Blom* 1939 AD 188 at 202, 203, WATERMEYER JA referred to "two cardinal rules of logic" which govern the use of circumstantial evidence in a criminal trial:
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> "(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 they must be a doubt whether the inference sought to be drawn is correct."
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> "The second rule in *R* v *Blom* is, of course, a statement of the criminal standard of proof."

From the above, it is clear that the cogency of circumstantial evidence usually arises from the number of independent circumstances which all point to the same conclusion. Further, KORSAH JA in *S* v *Marange & Ors* 1991(1) ZLR 244 (SC) at 249 referred to an English case as follows-

> "Lord Normad observed in *Teper* v *R* [1952] AC 480 at 489 that:
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> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another … It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are not other co-existing circumstances which would weaken or destroy the inference."

The court can convict on wholly circumstantial evidence provided it is sufficient to preclude every reasonable inference of the innocence of the accused – see *S* v *Shoniwa* 1987(1)ZLR 215 (SC) at 218F; *R* v *Onufrejczyk* [1955] I ALL ER 247 (CA); *R* v *Harry* [1952] NZLR 111; *McGreevy* v *Director of Public Prosecution* [1973] 1 ALL ER 5003 (HL).

In casu, the proved facts are:

(a) **Motive** – Around five (5) weeks prior to killing of the deceased, the latter had assaulted the accused at a football ground where a game of soccer was taking place. Prior to this it is common cause that the accused had been involved in many fights on the farm where he was the resultant victor. In his fight with the deceased he came out second best. In fact he lost badly in front of the locals and ended up in hospital. He did not speak to the deceased thereafter. That he harboured animosity towards the deceased is beyond dispute. On the day of the assault he pointed at the deceased's place of abode and

declared to Michael Gutuza that he was going "to shoot the deceased on the head". The latter advised him to leave the matter in the capable hands of the police. The accused also made repeated utterances to fellow security guard Lameck Mahachi that he was going to injure the deceased before Christmas. Mahachi stated that the accused was harsh or aggressive each time he made these utterances. These utterances were made after the accused was assaulted by deceased at the football game.

(b) **Accused's presence at the scene:** Foreman Bhebhe saw the accused at the scene of the murder at around 0545 hours. They exchanged greetings. About five hundred (500) metres from where Bhebhe met the accused he met the deceased going in the direction of the point where he had seen the accused. Further, the accused's hat was found next to the deceased's corpse soon after the murder.

(c) **Accused's utterances soon after the murder** – Soon after the murder i.e. within thirty (30) minutes of the murder the accused told Jonisafi Muguzumbi: "Uncle I have done a bad thing. I have killed someone" Muguzumbi, aged 64 years, is someone the accused confided in and regarded as a relative.

(d) **Person observed crossing up and down the road by Tendai Mufazembe -** The actions of this person is consistent with someone waiting. The person would cross the road to and from, sit down on a rock, stand up and repeat the crossing. Mufazembe saw and spoke with the deceased as he passed where she was seated. She later

observed the deceased sort of talking to former. The two walked together and shortly thereafter she heard tyre burst type sound. She went to the scene and saw what happened.

(e) **Circular papers inscribed "LG" used for securing pellets in 12 bore shotgun rounds found at the scene -** This shows that a 12 bore shotgun was fired at the scene and "LG" pellets used. The "LG" indicates that the crime cartridge was loaded with LG buckshot pellets, which, according to ballistic evidence, 9mm in diameter.

(f) **Forensic ballistic evidence -** Firearms Examiner Haley found that the shotgun that the accused had on day in question had in fact been fired because the barrel had been fouled. He examined this shotgun some four (4) days after the shooting of the deceased. He was, however, unable to determine when the shotgun was fired.

(g) **Post Mortem Report by Dr P Mandava -** Dr Mandava removed two pellets from the deceased's corpse. From the examination the doctor concluded that the cause of death was severe head injury secondary to gun shot wounds.

(h) **Accused's false evidence -** The accused lied on a number of material respects. It is trite that in the face of such lies we may infer that there is something which he wishes to hide. But, we are not entitled to say that because he has been proved to be a liar, he is therefore likely to be a criminal – see *R* v *Nel* 1937 CPD 327 at 330; *R* v *Gani* 1958 (1) SA 102(A) and *Broadhurst* v *R* [1964] AC 441,[1964] I ALL ER III at 119-20B. It is possible that an innocent person may put up a false

story because he thinks that the truth is unlikely to be sufficiently plausible – see *Maharaj* v *Parandaya* 1939 NPD 239. These lies, however, constitute an additional factor against the accused that has to be taken into consideration with all other relevant evidence. Such lies are a relevant fact which we will take into account -–see *R* v *Mawaz Khan* [1967] I AC 454, [1967] I ALL ER 80.

In our view the cumulative effect of these various proved facts all point to same conclusion of guilt of the accused. The evidence before us as a whole furnishes sufficient proof of guilt – see *R* v *Sibanda* 1963(4) SA 182 (SR) at 188. The accused was armed with a shotgun, the shotgun was fired more else during the time. The deceased was killed by gun shots. Accused's hat was found next to the body of the deceased. He was seen by a person who knows him very well about 500 metres from where the deceased was last seen alive. He harboured confessed animosity towards the deceased after losing to him village or farm compound heroism. He told a confidant that he had killed someone within 30 minutes of the killing of the deceased. He knew that the deceased was going to Kwekwe Police early in the morning to go and pay a deposit fine for the assault that the deceased inflicted upon his person. He must have been the person seen pacing from one side of the road and back if one takes the evidence of Foreman Bhebhe and Tendai Mufazembe cumulatively. There are two facts which the accused's counsel highlighted as being consistent with innocence. First, the "LG" paper shotgun wad indicated that deceased was shot with 12 bore shotgun pellets of "LG" brand name. The

evidence of Burger is that he usually uses pellets with the "SSG" brand name. He however, did not discard ever using pellets with the "LG" brand name but stated that he would have done so a long time ago. If the accused planned to kill the deceased from the time he became aware that he would be going to Kwekwe Police he would have been prudent to cover his tracks. "LG" and "SSG" pellets do not only differ in brand names, they also differ in the colour of the paper wad. He obviously chose a different colour from the one that he commonly used. Second, a black pair of shoes was found at the scene. The investigation could not establish who the shoes belong to. They certainly did not belong to the deceased according to his widow. None of the witnesses linked the pair to the accused and he obviously denied that they were his. While the shoes were not linked to accused that does not necessarily mean he did not introduce them at the scene of the murder. The existence of the pair of shoes does not necessarily contradict any of the evidence led. This court is not obliged to consider these two factors in isolation. They must be considered in the context of the evidence as a whole. In *R* v *Mtembu* 1950(1) SA 670 (A) at 679-80 SCHRIENER JA coined the approach in the following terms-

> "I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected, then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though, if the

> existence of each such fact were to be tested by the test of reasonable doubt, mere probabilities in favour of the accused would have to be assumed to be certainties."

Having considered all the facts in this matter, the evidence as a whole furnished sufficient proof of guilt of the accused beyond reasonable doubt.

We, therefore, find the accused person guilty of murder with actual intent.

Attorney-General, state's legal practitioner
Chakanetsa & Associates accused's legal practitioners