

**THE STATE**

**Versus**

**BUTHOLEZWE TSHUMA**

**And**

**WELCOME MICHAEL NCUBE**

**And**

**NOMORE MEHLULI PHIRI**

**And**

**GEE MOYO alias YENZANI MOYO alias GERALD TSHUMA**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 22, 23, 24 APRIL AND 10, 11, 12, 13 AND 20 MAY 2011

*K. Ndlovu* for state counsel

*N. Nyathi* for the 1<sup>st</sup> accused

*Ms J. Gororo* for the 2<sup>nd</sup> accused

*L. Ncube* for 3<sup>rd</sup> accused

*Ms J. Misaba* for the 4<sup>th</sup> accused

Criminal Trial

**KAMOCHA J:** The four accused are aged 28 years, 27 years, 34 years and 33 years respectively. They were jointly charged with the crime of murder. It being alleged that on 24 January 2009 at Tashas Superettee Pelandaba suburb, Bulawayo, they did wrongfully and intentionally kill and murder Andrick Matebese a male adult in his lifetime there being. They all tendered pleas of not guilty.

The state line was read and produced as exhibit one while their respective defence outlines were read and produced as exhibits 2, 3, 4 and 5. Exhibit 6 was a spent cartridge which was found at the scene of the robbery by Constable Godfrey Muzungu shortly after the crime was committed. The spent cartridge bore similar characteristics to test cases fired from exhibit 10 the 9mm Z88 pistol serial number erased FB62/2009 which was recovered from accused 3 Nomore Mehluli Phiri. The 7<sup>th</sup> exhibit was an affidavit by Constable Binha who identified the

body of the deceased to doctor Jekonya who examined the remains of the deceased and compiled exhibit 8 the post mortem report.

The doctor found that the deceased had bruised back, haemorrhages on both sides of his brain, right haemothorax of 600mls of blood and that the right lung was traumatized. He remarked that severe forces were used to inflict the injuries. He further opined in evidence that the bruise on the back could have resulted from a fall.

Exhibit number 9 was a forensic ballistics report relating to exhibit 10 the 9mm Z288 pistol recovered from the third accused from which exhibit 6 the spent cartridge had been fired.

The confirmed extra curial statements made by the accused were produced as exhibit 11, 12, 13 and 14 respectively.

In his statement the first accused placed himself at the scene but denied assaulting the deceased. Instead he alleged that he had assaulted a woman inside the shop by hitting her with a tin of baked beans and with an open hand. It was his story that he had entered the shop with the second and third accused intending to rob the shop. He went on to state that he and accused 3 had firearms and the third accused was the one who fired a shot at the scene. He confirmed that Thandekile Nkomo had gone with them. When asked who had assaulted the deceased he said he did not know but he believed it could have either have been accused 2 or accused 3 since they were the ones who entered the shop with him.

His story changed when he outlined his case. He alleged that he was nowhere near the scene when the crime was committed as he was at his rural home in Tsholotsho on 24 January 2009.

He averred that on 18 February 2009 he was mugged by some unknown people who viciously assaulted him until he was unconscious. He only gained consciousness when he was in the hands of the police. He therefore could not remember the circumstances under which he was arrested.

The police took him for indications at Pelandaba shopping centre where they told members of the public that he had been responsible for the robbery that took place at Tashas Supermarket.

He went on to allege that he had been tortured by members of the police namely Zhou, Mbano and MaNcube resulting in him implicating all his co-accused persons. Detective Zhou went further and threatened him with death. That caused him to sign statements without even reading them.

In his confirmed extra curial statement the second accused denied the allegations that were preferred against him. He however, placed himself at the scene of the crime. He stated in his statement that he had proceeded to Pelandaba shopping centre with his three co-accused to steal. On arrival they left the first and third accused at the shops. He himself went to wait for them in the car. After a short time they returned to the car.

In answer to the questions asked by the recording officer he said Thandekile Nkomo was with them on the day in question when they went to Pelandaba shopping centre and went on to tell the police that the first and third accused were the ones who had firearms.

His story changed in the outline of his defence case wherein he alleged that on 24 January 2009 he was not in Zimbabwe but was in South Africa. He only came to Zimbabwe on 17 February 2009 with the first accused.

On the way he asked the accused to drive because he himself was feeling tired. When the first accused was driving he hit a wild animal causing minor damage to the car. On arrival in Bulawayo they left the car with the 4<sup>th</sup> accused in Njube. He then proceeded to his home in Gwalabanda where he phone his mechanic who is the 3<sup>rd</sup> accused and arranged with him to meet in Njube the next day.

The next day was 18 February 2009, as he was still asleep the police arrived with accused 1 and 3. The 3<sup>rd</sup> accused had been shot. He was then taken to Bulawayo Central Police Station where he was assaulted until he was unconscious. Thereafter he was initially charged with armed robbery but two weeks later a charge of murder was added. He allegedly was forced to admit the charges. He claimed to have been implicated by the first accused. He finally stated that he would challenge the admissibility of the confirmed extra curial statements in the circumstances.

The third accused raised an alibi from the onset. He denied killing the deceased in his confirmed extra curial statement, because on 24 January 2009 he was in South Arica.

In answer to the questions by the police he said he only started knowing Thandekile Nkomo in February 2009 from her house through accused one was she was his girlfriend. He denied ever seeing her in January 2009 as he did not even know her by then. He went on to deny knowing the fourth accused.

He said the first accused came to Bulawayo during the month of January 2009 but denied giving him his firearm. He said the first accused had his own firearm. Although he admitted coming to Bulawayo once during the month of January 2009 he denied ever going anywhere with Thandekile during that month as he had not known her yet.

He maintained his defence of an alibi in the outline of his case alleging that he was in South Africa on the day to offence was committed and only left that country on 10 February 2009 and arrived in Bulawayo on 11 February 2009.

On 17 February 2009 accused 2 phoned him requesting him to go and attend to his car which needed some repair following an accident he had. The 3<sup>rd</sup> accused said he was a panel beater by profession.

The following day which was 18 February 2009 he proceeded to number C42 Njube, where the second accused stayed. On arrival he noticed that the house looked deserted but the main door and gate were wide open. He entered the house only to find two men who turned out to be police in plain clothes standing inside the house armed with AK47 rifles. He retreated but the two men caught hold of him. One of them went behind him and shot him five times on the left leg and once on his left shoulder. He fell down and was then put in a pick-up truck and taken to Bulawayo Central Police Station where he was severely assaulted. He was also allegedly assaulted at CID Homicide offices in CABS Building. Thereafter he was hospitalized in Khami Prison Hospital but was later transferred to United Bulawayo Hospitals.

It was only after about 3 to 4 months that he was informed that he would be charged with the crimes of murder and armed robbery when a remand court was convened at United Bulawayo Hospitals to remand him while he was in his hospital bed.

He alleged that he had been forced to admit the charges and would deny them. He would also contest the admissibility of his confirmed extra curial statement on the basis that it had been extracted from him after he was allegedly severely tortured and threatened with death.

He denied knowing the first and fourth accused and also denied ever owning a gun and was never in possession of one as alleged.

It should be noted that despite the alleged severe assaults and torture the accused flatly denied any involvement in the commission of the crime.

The fourth accused in his confirmed extra curial statement placed himself and all his three co-accused at the scene. He, however, sought to minimize the role he played. His story was that on the day in question he had left his home in the company of his three co-accused and Sithandekile Nkomo going to Pelandaba. They travelled in the second accused's car driven by the second accused. On arrival at the shopping centre he alighted from the car and went to buy a packet of 500ml Chimombe milk and returned to the car. He sat in the car watching television. Accused 1 and 3 went into the shop but came out of the shop after a while being pursued by members of the public. Accused 3 – Mehluli fired into the air. The second accused

then allegedly instructed him to start the car. The first and third accused entered the car and he drove away heading in the direction of Entumbane. He did not see anyone being assaulted. He only heard about the death of the deceased when he was in Khami Prison after his arrest.

In his defence outline he stated that he would contest his confirmed extra curial statement on the basis that it was not made freely and voluntarily as he was allegedly severely assaulted prior to making it.

He said he had just arrived from South Africa in January 2009 and was delivering goods to locals in Bulawayo. He went to the first accused's home to make a delivery to him. The two then decided to go out together for a braai. They agreed to pick up accused's girlfriend Sithandekile Nkomo and the second accused on their way.

On the way they fortuitously met the third accused whom he had never met before. The third accused agreed to join them for an outing.

They then drove towards Western Commonage and went to Tashas supermarket in Pelandaba. On arrival accused 1, 2 and 3 left the car to get drinks and he remained in the car with his girlfriend watching DVDs.

In a short while the third accused returned and informed them that there was a long queue and he preferred to also wait in the car for the other friends. As they waited accused 1 and 2 came out of the supermarket with a group of noisy people as if there had been a fight. He never understood why there had been noise in the supermarket. He was also allegedly unaware of the intended robbery. Had he known he would not have invited his girlfriend for an outing as that would have been dangerous for her.

He further alleged that when two of his co-accused emerged from the shop with a noisy group of people the third accused who was the owner of the car in which they were, instructed him to drive off fearing that they might be caught up in cross-fire. He said he never disembarked from the car let alone entering Tashas supermarket at any point. He was never involved in any fight at the supermarket. He had never met the deceased in his lifetime.

The accused has confused accused 3 with accused 2. The correct position according to the evidence is that the car they used belonged to accused two. It was accused two who returned to the car after seeing his relative at the shop.

All accused had indicated that they would be challenging the admissibility of their confirmed extra curial statements in their defence outline but later consented to their production without demur.

The state led viva voce evidence from 7 witnesses. In my view the key witness was Sithandekile Nkomo. She was an unconvicted accomplice whose house was used as a hiding place by the accused persons. They planned the crime from there. The customary warning was administered to her in terms of section 267 of the code. Her evidence had to be cautiously approached.

She testified that she lived at C243 Njube, Bulawayo. She is a cross border trader.

The fourth accused used to be her boyfriend from 2000 to 2003 when they parted ways. Despite going their separate ways they remained good friends. They did not have children together. She knew the other three accused persons through her former boyfriend.

On 24 January 2009 the fourth accused visited her at around 1300 hours. He arrived in a red car which he parked outside and entered the house to have a chat with her. He then requested her to accompany him to Entumbane and she acceded to the request.

When she got out of the house she discovered that accused 4 had left accused 1 and 3 sitting in his car when he entered the house. The fourth accused then drove towards Entumbane and turned at the traffic lights and a white Corolla went and stopped near them. Whereupon the first and third accused got out and went to the white Corolla which was being driven by the second accused. They entered into the Corolla and talked to accused 2 for a long time. Thereafter the third accused returned to the car being driven by accused 4 but accused 1 remained in the white Corolla being driven by accused 2. The two cars drove following each other towards Manyewu Primary School in Entumbane and stopped at house opposite the school gate. The second accused dropped some passengers there.

The two cars then turned and proceeded to the witness's house in Njube where the 4<sup>th</sup> accused parked his car inside the premises. She went into the house while accused 1, 3 and 4 went to the Corolla. They were there for a long time. Thereafter accused 4 returned to his car to remove the car radio and papers relating to his car and gave them to the witness for safe keeping in the house. Thereafter he requested her to accompany him to some undisclosed destination. She once more acceded to the request.

She joined the four accused persons and the five of them got into accused 2's white Corolla. The second accused drove to Pelandaba and when they got to the clinic he turned at the second row of houses and stopped at the end of it.

The first, second and third accused persons got out of the vehicle and went straight to the shops while she remained in the car with her former boyfriend – accused 4. The second accused returned to the car after about ten minutes. He explained to the fourth accused that he had not entered the shop because he had met his uncle as he was about to do so. As a

result only the first and third accused had entered the shop. The second accused then joined the witness and accused 4 in the car.

After about a period of about 7 to 10 minutes accused 1 and 3 came running to the car. They entered the car and the fourth accused then drove away towards the traffic lights at Pelandaba. He turned left and took a right turn and drove towards Total Garage. He then turned into Nketa Drive and drove towards Entumbane and drove straight to the house opposite the gate of Manyewu primary. Accused 4 went into the premises and parked the vehicle. All the four accused persons got out of the car and went into the house leaving her sitting in the car.

While the car was being driven away from the scene accused 1 started telling the fourth accused that they had got very little money from the tills because the girl who had the money had run into the storeroom and locked herself inside.

After they had been in the house for a while accused 4 went out to call the witness. When they were all in the house accused 1 produced all the money he had from his pockets and placed it on the table and accused 3 also did the same. The money was counted and shared amongst all of them and the witness. Her share was R450 which was handed to her by the fourth accused.

After the sharing accused 1, 3 and 4 and the witness then walked from Entumbane to her house in Njube. The fourth accused collected his car radio and documents relating to the car. He thereafter collected his car and left with accused 1 and 3.

Accused 4 and 3 returned to her house in the evening around 8 pm and requested her to accommodate accused 3 for the night. She agreed. Accused 4 then left.

The next morning accused 1 arrived and collected the third accused. After they had left accused 4 arrived on foot and was told that accused 3 had been collected by accused 1. Accused 4 then told the witness that he was leaving for South Africa but was not taking his car with him. He would leave it somewhere. Before he left he told her that she should tell accused 1 and 3 to also return to South Africa as the police were looking for them. She accordingly gave them the message when they returned.

The first accused went away leaving accused 3 at the witness's house. He returned travelling in a white twin cab. The two collected their belongings and left for South Africa.

They were away for some time and only returned on or about the time they were arrested on 18 February 2009. They arrived at about 5am on a Wednesday in the white Corolla belonging to accused 2. The car had damaged windscreen and bonnet. The group consisted of

Butholezwe accused 1, Welcome Michael Ncube – accused 2, Mehluli Phiri – accused 3 and one Douglas and one Maphila. Accused 2 and Douglas went to accused 2's house in Gwabalanda. The other three remained at her house.

Accused 2 and Douglas returned in the afternoon and the group started working on the bonnet of the car.

Later she told accused one that she wanted to go to Lobengula. Accused one said he also wanted to go there. The six of them got into accused 2's Corolla whose bonnet had been repaired but the windscreen had not.

When they got into Masiyephambili Drive they turned to go to Tashas Supermarket Lobengula when they got to a certain point four of them got out of the car leaving accused 2 who was driving and the witness in the car. When the 4 went away accused 2 drove to a spot near the hall and waited there with the witness. Because the accused's car had a damaged windscreen he felt it could be easily be identified and decided to move it from near the hall and went to park 3 rows of houses away.

While they were there accused 3 emerged running from a maize patch. Accused 2 then allegedly told the witness to meet accused 3 and tell him that he would be picked up along Masiyephambili Drive near the hill which she did. She then returned to the car and accused 2 drove along Masiyephambili but accused 3 was nowhere to be seen.

The second accused drove to the house of the witness in Njube only to find that accused 3 had not yet arrived. The second accused told the witness that they should drive along Luveve road in an effort to meet him. As they drove along Luveve road they met him at the traffic lights opposite Entumbane shopping complex. They then drove to the house of the witness in Njube.

Accused 3 suggested to the witness that they should accompany accused 2 to the bus stop so that he could catch a bus to Gwabalanda. They walked to the bus stop and accused 2 got a lift and left.

The third accused was accommodated at the house of the witness in Njube. During the early hours of the morning around 4am the police arrived at the house but the third accused was no longer there. The police allegedly assaulted every one at that house and said they wanted the second accused. They were taken to a car where they found accused 1 who told the police that the witness was the one who could show them the house opposite Manyewu School. Some police officers remained guarding the witness's house.



They proceeded to that house and collected everybody who was in the house and amongst them was a young man who knew where accused 2 lived. They proceeded there and collected accused 2 and his wife.

While they were on their way to Central Police Station and were at Emakhandeni one of the police officers in the vehicle received a call to the effect that the third accused had been sighted but was on the run. They drove in that direction. When they were 3 block of houses from her house they found the police officers with accused 3 who was lying down injured on the leg. They were then taken to Central Police Station.

She gave the registration number of the Corolla as RCL 012 G.P.

After the 3<sup>rd</sup> accused had left the car and went to Tashas supermarket at Pelandaba the fourth accused told her that they had gone to look for some money from the shop meaning that they had gone to rob the shop using firearms. This was after a shot had been fired.

After she and accused 2 had located accused 3 along Luveve road he told the second accused that accused 1 may have been apprehended at Tashas Supermarket in Lobengula which turned to be the correct.

The witness finally emphasized that all the 4 accused persons were at Tashas Supermarket at Pelandaba on 24 January 2009. She had no reason to lie against any one of them.

The witness was cross examined by all the legal practitioners representing the four accused persons but was not shaken at all. Her account of what happened remained intact. She gave her evidence clearly and in a straight forward manner. Under cross examination she denied that accused 3 was shot while she was present and emphasized that he had already been shot when they found him with the police. She also told the court that all the people who had been picked up by the police had been assaulted including herself and the second accused's wife. She, however, told the court that her evidence was not as a result of the assault. She was merely narrating what took place.

She was a truthful witness who was worth to be believed. Her evidence was corroborated on all material points by other witnesses who testified for the state.

The evidence of Detective Inspector Admire Mutizwa confirmed that the forearm recovered from accused 3 at the time of his arrest was the one that fired the spent cartridge that was found at the scene of the crime at Pelandaba Tashas Supermarket. That evidence placed the third accused at the scene.

Mthokozisi Gumbo was a security guard at a butchery at the shopping centre went into the toilet at the shopping centre and found 3 men who appeared to be planning to rob the shops as he noticed one of them cocking a firearm. One of them was saying they had to act fast. He came out of the toilet to go and close shop where he was employed.

The 3 men came out of the toilet and went towards Tashas supermarket but one of them later moved away from the shops going towards the car park. Two of them remained at the shop.

Mthokozisi Gumbo confirmed Sithandekile's story that the second accused returned from the shop after seeing his uncle.

Mthokozisi Gumbo said accused 3 had a firearm thereby corroborating ballistic evidence that the firearm fired the spent cartridge at the scene. Gumbo said the accused fired into the air when the crowd was about to apprehend him. The third accused was one of the armed robbers.

Pauline Mpofo who was employed at Tashas Supermarket as a cashier told the court that on 24 January 2009 she was on duty at the Pelandaba branch which was what is called a counter shop. At about 1730 hours when the shop was about to be closed she saw a person assaulting one of the customers by the corner of the shop. While she was still stunned by what was happening the man went to her side of the counter. She noticed that he had a gun in one hand. He was still pushing and shoving the woman customer he was assaulting.

He then ordered everybody to sit down including the deceased who moved from the fridge and sat down. The deceased was a security guard at Tashas Supermarket Pelandaba.

The person pushed the woman customer towards the door to the storeroom and ordered her to open it. When she said she did not work there he ordered her to sit down too.

The person then turned to the workers and said, "Where are the Keys?" The workers did not answer because the person with the keys had locked herself inside the storeroom. That infuriated the person who then struck the deceased with an open hand. He also struck one Chieza with an open hand.

He then ordered the deceased to get up and took him to the storeroom door and ordered him to open it. The deceased tried to open it and knocked at the door but the lady inside did not open. The person then removed him from there and made him sit down and kicked him once in the face while he was sitting down. The kick knocked him down.

The person then dragged a worker called Shelter and ordered her to open the till but she said she had no keys to the till. The person then vented his anger by hitting Pauline Mpofo

with a tin of baked beans on the head. He then opened the till himself took some money and left. She later heard a gun being fired.

The witness said the person who was doing all these things was accused 1. She said she had seen the accused and could not be mistaken. She was vehement that he was not in South Africa on that day but was at the scene. Her evidence therefore corroborated that of Sithandekile. The accused himself corroborates this evidence in his extra curial statement wherein he admits assaulting a woman with a tin of baked beans.

The evidence of Shelter Manto which was admitted in terms of section 314 of the Code is also corroborative. The accused kicked the deceased on the head. The court accordingly makes a specific finding that accused 1 delivered the fatal blow.

Constable Godfrey Muzungu was at the shops when the robbery took place. He is the one who recovered the spent cartridge fired from accused 3's pistol. He told the court that the robbers left the scene in a white small car at a very high speed confirming Sithandekile's evidence that the robbers had used a white Corolla.

The evidence of Pauline Mpofu and Shelter Manto was that accused one did not find a lot of money from the tills. That piece of evidence corroborates Sithandekile Nkomo who told the court that while the car was being driven away accused 1 informed the fourth accused person that he had not looted a lot of money because the lady with the money had locked herself in the storeroom.

The investigating officer Detective Assistant Inspector Albert Zhou told the court that accused 1 was arrested by members of the public after he had been involved in yet another robbery at Tashas Supermarket in Lobengula on 18 February 2009. Members of the public had administered instant mob justice by assaulting him severely until he was unconscious. When the accused was handed over to him he was semi-conscious with a swollen face - his eyes opening slightly.

The accused was later taken for interviews to establish whether or not he had been involved in other robberies which had occurred the previous month. The accused implicated accused 2 and 3 and led the police to house number C243 Njube where he alleged the two could be found.

During the early hours of 19 February 2009 the police raided house number C 243 Njube but the two accused were not there. The witness left some police officers guarding the house. The police then picked up Sithandekile Nkomo to go and indicate accused 2's house in Entumbane just opposite Manyewu School. They found accused 2's relatives who informed the police that he lived in Gwabalanda. They drove towards Gwabalanda but before getting there

one of the officers guarding C 243 Njube called him and reported that accused 3 had arrived at the house and there was a gun battle between him and the police. He u-turned and proceeded to the scene but by the time he arrived the police has lost sight of the accused who had hidden himself at number C143. The police condoned off the area and started searching for the accused. On realizing that the net was closing on him he jumped in the neighbouring property.

The police opened fire at him forcing him to drop the pistol he had and surrendered. The witness went closer to him and picked it. It was loaded with 11 rounds and one of them was already in the chamber. The witness discovered that the accused had been shot on the leg. He then took the accused into the truck and proceeded to number 7069 Gwabalanda where he arrested the second accused who was taken to the police station while accused 3 was taken to United Bulawayo Hospitals for treatment.

The accused's pistol was the one that had been used to fire the spent cartridge which was picked up by Constable Godfrey Muzungu at Tashas Supermarket Pelandaba.

The witness went on to tell the court that Sithandekile was the one who gave shelter to the accused persons during the period they committed the crimes. The getaway car was recovered at her house.

The witness gave his evidence well and is worth to be believed. He was not shaken under cross examination.

The court finds that all the state witnesses testified well. Their evidence is accepted. Wherever their evidence conflicts with that of the accused persons the court prefers theirs.

All the accused persons fared badly in their respective cases. They contradicted themselves and were clearly being untruthful in numerous respects. They are not worth to be believed.

Accused 1 tried to distance himself from the scene and told the court that he was at his rural home in Plumtree on 24 January 2009 which was contrary to what he had said in his defence outline wherein he had said he was in Tsholotsho. In his confirmed extra curial statement he confirmed being at the scene assaulting a woman with a tin of baked beans. That is where the truth lies. That is confirmed by the victim of the assault Pauline Mpofu. The court has already found that he was at the scene and delivered the fatal blow.

The second accused denied ever being at Tashas Supermarket in Pelandaba on the day in question. He said he was at his house in Gwabalanda contradicting what is in his defence outline wherein he alleged that he was in South Africa on 24 January 2009 which is clearly false.

The truth is found in his confirmed extra curial statement wherein he stated that he went with his co-accused to steal from the supermarket.

The third accused maintained his alibi that he was in South Africa on 24 January 2009. His story is completely false. There is overwhelming evidence that he was in the country. He teamed up with his co-accused and went to Tashas Supermarket Pelandaba and fired a shot from his pistol when members of the public wanted to apprehend him and accused 1. He had gone into the shop with accused 1. Both of them were armed with firearms.

The fourth accused's story had a ring of truth in it. He however, was untruthful by suggesting that they teamed up to go to Pelandaba for a braai. The truth was that they had gone there to rob Tashas Supermarket of some money. Sithandekile told the court that he told her that they had gone to make money through robbery.

He tried to underplay the role he played when he in fact played a vital role of driving the gate-away car from the scene. That was a role which needed a very experienced driver. The accused is an experienced driver since he is in the business of transporting goods from people working in South Africa to their homes in this country. Umalayitsha. That seems to be the reason why he had to drive the car although the owner was present. He had returned to the car after seeing his uncle at the shop. He would have drive his car if there had been no prior arrangement that the fourth accused would drive it when getting away from the scene.

This court makes a specific finding that the accused persons carefully planned to go and rob Tashas Supermarket at Pelandaba. During the robbery the deceased was kicked on the head causing hemorrhage on both sides of the brain. |The kick to the head could have independently caused the death of the deceased according to Doctor Jekonya. The right lung was traumatized resulting in right haemothorax of 600mls of blood which could also have independently resulted in death. It is however not clear how this injury was inflicted. Doctor Jekonya opined that it could have resulted from a fall. The doctor concluded that death was due to the combined effect of the two following the assault.

What then are the accused guilty of? Although the accused persons took the firearms to go and commit the robbery they did not use the weapons. Accused 1 had the firearm in one hand while he assaulted his victim in the shop using the other hand. Accused 3 who was guarding the entrance armed with another firearm also did not use is on the people. Both accused according to Constable Muzungu did not fire at members of the public who attempted to apprehend them. Instead accused 3 fired into the air.

The state counsel conceded that it could not be said the accused persons subjectively foresaw the possibility of their actions causing death and were reckless as to whether death

resulted or not. Consequently it was submitted that the intention to murder was not proved. The concession was, in my view, proper. The state counsel further submitted that the accused were guilty of culpable homicide. There is merit in the submission which was supported by the legal representatives of all the accused persons.

In the result all the four accused persons are found guilty of culpable homicide.

Sithandekile Nkomo is hereby discharged from all liability to prosecution for this particular offence in terms of section 267(2) of the Criminal procedure and Evidence Act [Chapter 9:07].

### **Sentence**

All that needed to be said in favour of each accused had been put forward by their legal representatives. Their personal circumstances have been taken into account.

Other than that nothing further can be said in the accused persons favour.

They carefully planned the robbery and in the process they caused the death of the deceased who was doing his work at the supermarket. The deceased did not resist them in any way. He did not try to foil the robbery instead he went to the door of the storeroom. He knocked at the door and tried to open it to no avail. He had no control over the lady who had locked herself inside. There was therefore no need to assault him. The assault was a vicious one. The doctor opined that severe force was used to inflict the injuries.

A life was unnecessarily lost. This court always guards jealously the sanctity of human life.

Regrettably the crime of armed robbery seems to be on a sharp increase. There is now a high frequency of cases where innocent people are being killed during robberies. There is need to curb this by imposing deterrent sentences to deter the offenders and others with like minds.

Had the accused been convicted of murder there was a likelihood that capital punishment would have been imposed since the killing was during the commission of a robbery. The law provides that a person found guilty of is liable to life imprisonment or any other less sentence depending on the circumstances.

This is a culpable homicide committed during the commission of a robbery which is a bad one committed with contempt in broad day light.

The accused committed it out of greed rather than need.

The accused acted a gang and allocated each other roles to play during the commission of the offence.

In the circumstances the justice of the case will be met by the following sentence.

Each accused is sentenced to:-

- 1) 25 years imprisonment;
- 2) The pistol recovered from accused 3 shall be forfeited to the state;
- 3) The Toyota Corolla registration number RCL 012 GP used in the commission of the offence shall be forfeited to the state.

*Criminal Division, Attorney General's Office, applicant's legal practitioners*

*Lazarus & Sariff, 1<sup>st</sup> and 4<sup>th</sup> accused legal practitioners*

*Maronedze, Mukuku, Ndove & Partners, 2<sup>nd</sup> accused's legal practitioners*

*James, Moyo-Majwabu & Nyoni, 3<sup>rd</sup> accused's legal practitioners*