THE STATE

Versus

IGNATIOUS MEHLULI MHLANGA

HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors E Mashingaidze and J Sobantu
BULAWAYO 9, 10 AND 15 JUNE 2020

Criminal Trial

K. Ndlovu, for the state
L. Ngwenya, for accused

DUBE-BANDA J: The accused is charged with the crime of murder, committed in aggravating circumstances, as defined in section 47 of the Criminal Law (Codification and Reform) Chapter 9:23. It is alleged that on the 10th of February 2013, and at Mutize and Sons Flea Market, Bulawayo, the accused person acting in common purpose with Isaac Nyakurerwa and Mduduzi Timothy Mathema, one or more or all of them, assaulted Vengai Murisi with a wooden plank on the head and strangled him with a wire intending to kill him or realizing that there is a risk or possibility that his conduct may cause the death of such person, a male adult in his life there being.

The accused pleaded not guilty to the charge. He was legally represented throughout the trial.

At the commencement of trial, the summary of the evidence of State witnesses was produced and marked Annexure 'A'. The defense outline of the accused person was produced and marked Annexures 'B'. The Affidavit Statement compiled in terms of section 260(4) of the Criminal Procedure and Evidence Act was tendered and received by this court as an exhibit. It was marked Exhibit 1. Also a post mortem report was tendered and received as an exhibit by this court. It was marked Exhibit 2.

The prosecutor sought admissions from the accused's counsel in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. First, the admissions sought were the following:

i. Whether it is admitted that on the 10th February 2013, the accused was in the company of *Isaac* Nyakurerwa and Mduduzi Timothy Mathema.

ii. Whether accused took part in the robbery that took place at Mutize Flea market.

iii. Whether it is admitted that they took and stole three shangani bags from the same Flea Market.

iv. Whether accused got a share from the stolen property, which he sold to members of the public.

The admissions were made, making it unnecessary for the state to lead evidence in respect of the admitted facts.

Second, the admission of the evidence of certain witnesses as contained in the summary of the state case was sought. That is, the evidence of Dr Sanganai Pesani, who examined the remains of the deceased and recorded a post mortem report. The evidence of Sidanisile Ncube at whose house the accused, Isaac Nyakurerwa and Mduduzi Timothy Mathema, shared certain property, comprising clothing and footwear, which was contained in three carrier bags. The three told the witness that the property was from Botswana. They gave the witness some items to sell on their behalf. The evidence of Pretty Lindiwe Khumalo who saw accused and Mduduz*i* selling items of clothing to the members of the public. She saw the accused and Mduduzi in possession of a big carrier bag full of clothes and footwear. She saw accused holding some cell phones in his hand. The evidence of Siyazuza Ncube, the Investigating officer. He was allocated a murder docket to investigate. During the course of the investigations, the witness managed to account for Isaac Nyakurerwa and Mduduzi. The accused remained at large and was only accounted for of the 11 October 2019.

The admissions were duly made hence dispensing with the need for the prosecutor to lead evidence from these witnesses.

The accused filed a detailed defense outline, and the material part of the outline reads as follows:

1. He will state that the deceased died as a result of the direct actions of *Isaac* Nyakurerwa and Mduduzi Timothy Mathema, who had tied him with wires on the hands, feet and neck during the robbery. Accused had no intention to cause the death of Vengai Murisi.

2. Accused will further state that prior to the fateful day, he did not know Isaac Nyakurerwa, but the same was known to Mduduzi Timothy Mathema.

3. Accused and Mduduzi Timothy Mathema had been drinking beer together at Royal Hotel, where they met Isaac Nyakurerwa, who was known to Mduduzi Timothy Mathema.

4. Accused and Mduduzi Timothy Mathema were just common pick-pockets and after they left Royal Hotel, their mission was to go around pickpocketing unsuspecting individuals and drunks.

5. After they failed to find a victim, it is Isaac Nyakurerwa who spoke to Mduduzi Timothy Mathema and informed him that there was an unguarded flea market that they could break into that had an assortment of valuables they could sell. He was later roped in by the two after being convinced that the area was unguarded.

6. They went to the site and when they were inside the flea market they were startled by the deceased who attempted to apprehend them. During the scuffle, accused struck the deceased with a plank twice on the forehead and his blow had the effect of disorienting the deceased who was then held by Isaac Nyakurerwa and Mduduzi Timothy Mathema.

7. The two requested his assistance to hold him down and proceeded to tie him up with wires from coat hangers on the scene. After tying him up, he and Mduduzi Timothy Mathema were left to guard him while Isaac Nyakurerwa, who knew the place better had gone to ransack the flea market.

8. The two were drunk and it was Mduduzi Timothy Mathema who then noticed that Vengai Murisi was dead and went on to alert the accused and Isaac Nyakurerwa. The trio then took the property that had already been taken by Isaac Nyakurerwa and found a taxi, leaving the scene.

9. Accused will reiterate that he had no intention to murder the deceased and failed to appreciate that his accomplices had tied up the deceased in such a manner that he could not breath.

The state case

The State led *viva-voce* evidence from three witnesses, Langton Mutindi, Mduduzi Thimothy Mathema (Mduduzi*)* and Precious Mathema. The first was Langton Mutindi and

his evidence can be summarized as follows: he is a member of the Zimbabwe Republic Police (ZRP). At the material time, he was stationed at Bulawayo Central Police Station, attached to the charge office duties. On the 11 February 2013, in the morning hours, a report of a murder case was received by the police. In the company of two other police details and the informant, the witness proceeded to the scene of the murder, at Mutize Flea market, situated along Lobengula Street, between 5th Avenue extension and Leopold Takawira Street, Bulawayo. At the scene, the informant showed the police details the body of a male person, on a steel table, lying facing upwards. The hands were tied to the table using a wire from a coat hanger. The feet were tied together using a coat hanger wire. Thereafter both feet were tied to a metal table. Another coat hanger wire was used to tie the neck to the table. There was a jacket string around the neck. There was a plank on the scene with blood stains. There was blood on the ground. When the police removed the wire around the neck, blood started coming out of the mouth. The police details then conveyed the body to United Bulawayo Hospitals.

The second witness to give *viva-voce* evidence was Mduduzi. After this witness was sworn in, the prosecutor informed the court, that he was a convicted accomplice, who was serving a prison term. The court warned the witness in terms of section 267 of the Criminal Procedure and Evidence Act.

This witness told the court that at the material time, he knew both the accused and Isaac Nyakurerwa, they were his friends. He told the court that on the date in question, he was with his two friends, Isaac Nyakurerwa and the accused drinking beer in town. From Royal Hotel, they went to a club called Esiqongweni, and continued drinking beer. According to this witness, they were all drunk, however he was aware of what he was doing. Before mid-night they left the Esiqongweni club for their homes.

On the way, they decided to jump the wall into the Mutize Flea market for the purposes of stealing. They had no money, so they wanted to steal property and sell so that they will have money. The witness said they all agreed with the plan. They thought there was no one inside the Flea Market. Inside the market, they discovered that there was security guard inside. They caught him and tied him. When he was tied, the accused hit him three times with a plank on the head. He was hit with the plank after he was tied. The plank was found inside the market. It was approximately 50 – 70 centimeters in length and 7 – 10 centimeters in width.

He says the reason the guards neck was tied, is because he was crying, they wanted to stop him from making noise. He says at the time they were tying him, he did not realize that he would die, since he was drunk. According to this witness, the three accomplices were all assisting each other to subdue the security guard, who is now the deceased.

After subduing the security guard, the accused was left guarding him, whilst the witness and Isaac Nyakurerwa proceeded to steal from the market. They took three carrier bags, colloquially referred to as shangani bags. They threw the bags outside the durawall of the market. They looked for a vehicle to carry the bags. A vehicle was found and the bags were taken to Makokoba Township, Bulawayo.

They shared the loot and sold some stolen items. The witness says, he could not recall whether it was the following day, or not, while having a braai at a place called Mashumba, they leant that a person was killed at a place where they committed the crime, they then fled.

The third witness to give *viva-voce* evidence was Precious Mathema. She is sister to Mduduzi. She told the court that, she was given a carrier bag by Mduduzi and the accused to keep. The bag contained clothes inside. When asked where they got the clothes, accused and Mduduzi said they had travelled to Botswana, suggesting that it is where they got clothes contained in the bag. Then they told the witness that they killed a security guard at the Flea market, in town.

After the conclusion of the testimony of Precious Mathema, the prosecution closed its case.

Defense case

The trial proceeded to the defense case with the accused taking to the witness stand. He testified that on the date in question, the three accomplices were drinking alcohol in town. They decided to go to the Flea Market to look for some money. He says the idea to steal from the Flea Market came from Isaac Nyakurerwa. Furthermore, Isaac Nyakurerwa was the first enter Market, followed by Mduduzi, and he was the last to enter. When they were walking inside the Market, a security guard woke up and started screaming. In addition, he said Isaac Nyakurerwa tried to stop the guard from screaming. Accused then saw a plank, picked it up and tapped the now deceased on his head, to make him silent. He says he tapped him on the forehead. That is when Isaac Nyakurerwa and Mduduzi tied the security guard.

The accused says he did not know how tight the guard was tied because he was drunk. He says after he was tied, Isaac Nyakurerwa left to look for property to steal. He and Mduduzi remained guarding the security guard. He testified that Mduduzi is the one who noticed that the guard had died.

He testified that Isaac Nyakurerwa saw three bags, then called and informed accused and Mduduzi of the bags. The bags were taken and thrown outside the durawall of the market. They got a taxi which carried them and their loot to Makokoba Township, Bulawayo.

Under cross-examination, he testified that Mduduzi lied when he said the accused hit the guard with a plank after he had been tied. He says it is a lie that when the two where tying the security guard, he(accused) was holding him down. He says when the guard was being tied, he was tasked to guard and to see people who might enter the Market. He says, he was 2 to 3 meters away from the place where the security guard was being tied. Furthermore, he said he was drunk, he was staggering as he was walking. Moreover, he says even if he knew that the market was guarded, he would have still gone, because he wanted money.

The accused conceded that when inside the market, they decided to rob the security guard. When the guard saw them, he started screaming, calling for help. The guard did not try to arrest the accused and his accomplices. The guard was apprehended. He says he hit the guard with a plank, not to injure him, but to ensure he stopped screaming. He says the guard was fighting them and that is why he hit him with a plank. He accepted, that once the guard was tied to the table, he became subdued. He accepts that there is no way he could have stopped the robbery.

The accused says he was drunk, and could not see his accomplices tie the guard in the neck. He says he did not know that the guard was dying. He testified that he did not check whether the guard was breathing or not. He accepted in cross examination that he was not acting under compulsion from his two colleagues. In re-examination, he told the court that the whole scene lasted for 15 minutes.

After his testimony, the accused closed his case.

Analysis of the evidence

After the witness Mduduzi was sworn-in, the prosecutor informed the court that he was a convicted and serving accomplice. As a result the court warned him in terms of section 267 of the Criminal Procedure and Evidence Act. The witness was informed that

exaggerating the part allegedly played by the accused or minimizing his own role will not affect his sentence in any way. He confirmed that he understood the warning.

Mduduzi is a single state witness in respect of the events that took place inside the Flea Market, resulting in the death of the security guard.

Where the case against accused rests on the evidence of one single accomplice, section 270 Criminal Procedure and Evidence Act applies. This section provides that a court may convict an accused on the basis of the evidence of a single accomplice, provided there is competent evidence other than the single and unconfirmed evidence of the accomplice which proves to the satisfaction of the court that the crime was actually committed.

This Court is alive to the basic principles relating to the evidence of an accomplice witness, as was stated in *S v Masuku* 1969 (2) SA 375 (N.P.D) at 376 by LEON J: under the heading "Caution in dealing with the evidence of an accomplice:"

> (1) an accomplice is a witness with a possible motive to tell lies about an innocent accused; for example, to shield some other person, or to obtain immunity for himself (2) corroboration, not implicating the accused but merely in regard to the details of the crime, not implicating the accused, is not conclusive of the truthfulness of the accomplice. The very fact of his being an accomplice enables him to furnish the court with details of the crime which is apt to give the court the impression that he is in all respects a satisfactory witness, or, as had been described "to convince the unwary that his lies are the truth". (3) Accordingly, to satisfy the cautionary rule, if corroboration is ought, it must be corroboration directly implicating the accused in the commission of the offence. (5) Such corroboration may, however, be found in the evidence of accomplice provided that the latter is a reliable witness. (5) Where there is no such corroboration, there must be some other assurance that the evidence of the accomplice is reliable. (6) That assurance may be found where the accused is a lying witness, or where he does not give evidence. (7) The risk of false incrimination will also, I think, be reduced in a proper case where the accomplice is a friend of the accused. (8) In the absence of any of the aforementioned features, it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits of the accomplice as a witness, and the demerits of the accused as a witness are beyond question. (9) Where the corroboration of an accomplice is offered by the evidence of another accomplice, the latter remains an accomplice and the court is not relieved of its duty to examine his evidence with caution. He, like the other accomplice, still has a possible motive to tell lies. He, like the accomplice, because he is an

> accomplice, is in a position to furnish the court with details of the crime which is apt to give the court, if unwary, the impression that he is a satisfactory witness in all respects.'

The courts have interpreted section 270 of the Criminal Procedure and Evidence Act to mean that even where there is no proof *aliunde* of the commission of the offence, accused can still be convicted if there is corroboration in a material respect of the evidence of the accomplice. In *Mubaiwa* 1980 ZLR 477 (A) at 479H-480A this is stated as follows:

> the purpose of this section is that the court must be satisfied that the crime to which the accomplice testifies has, in fact, been committed. If not, there can be no conviction at all. Even where there is no proof *aliunde* that the crime has been committed, the statutory requirement can still be satisfied if there is corroboration in a material respect which convinces the court that the accomplice can safely be relied on when he or she says the crime was committed, though it need not directly implicate accused. In such a case, the requirement is satisfied because, despite the lack of proof *aliunde* of the commission of the offence, the accomplice is no longer 'single and unconfirmed'."

In *Lawrence & Anor* 1989 (1) ZLR 29 (S), the Supreme Court laid down that with single accomplice testimony, there should be a two-pronged inquiry. The court must first satisfy itself that the offence with which accused is charged has been committed before convicting. Secondly, the court must look for corroboration, for if there is no evidence *aliunde* proving the commission of the offence then there can still be a conviction if the court is satisfied that there is corroboration of the evidence of the accomplice sufficient to satisfy the court that the witness is to be believed. See also *Moyo* 1989 (3) ZLR 250 (S).

Thus, if the evidence of the accomplice is single and unconfirmed there must be proof *aliunde* of the commission of the offence. If, on the other hand, there is material corroboration of the testimony of the accomplice, the evidence is no longer single and unconfirmed and there need not be proof *aliunde* of the commission of the offence.

Was the offence with which the accused is charged committed? According to the evidence of Langton Mutindi, a member of the ZRP, in the morning of the 11 February 2013, he was shown the body of the deceased. The body was lying on the top of a steel table. The hands and legs were tied to the steel table with coat hanger wires. Deceased's neck was also tied to the table with another hanger wire. There was a plank beside the body. There was blood on the ground, just below the deceased's head. The post mortem, Exhibit 2, shows that the cause of the death of the guard was asphyxia caused by strangulation.

Furthermore, accused admitted in terms of section 314 of the Criminal Procedure and Evidence Act, that on the 10th February 2013, he was in the company of the two accomplices, and that he took part in the robbery that took place at Mutize Flea market. This is the Flea market where the body of the deceased was found by Langton Mutindi. Therefore, the crime of murder, to which Mduduzi testified was indeed committed.

Is there evidence *aliunde* proving the commission of the offence? The evidence of Langton Mutindi, the existence of the body of the deceased, the cause of the death, admissions made by the accused, the accused defense outline, where he says the security guard died as a result of the direct actions of Isaac Nyakurerwa and Mduduzi, who had tied him with wires on the hands, feet and neck during the robbery, amounts to evidence *aliunde*, proving the commission of the offence.

In *S v Makanyanga*1996 (2) ZLR 231, the court said the cautionary rule in respect of accomplice evidence is a rule of practice. Evidence of an accomplice may be relied on if there is a safeguard which excludes the danger of false incrimination. The evidence must be corroborated by some other independent evidence which shows its truthfulness and that the evidence is worthy of belief.

Mduduzi did not seek to exaggerate or magnify the role played by the accused in the commission of the offence. He does not say it was accused's idea to go and steal at the Flea Market. He does not say it is the accused who tied the security. He easily conceded that the accused did tie the security guard. Mduduzi did not minimize the role he played in the death of the security. He easily accepted that it is him and Isaac Nya*kurerwa* who tied the security guard. They tied his feet together, and tied them to the steel table. Tied his neck with a wire, which is the immediate cause of the death. In fact, his evidence is in sync with accused's defense outline. We accept his evidence in its material respects, as representing the truth of what happened at the Flea Market, leading to the death of the security guard.

In his evidence the accused was trying to escape from his defense outline, received by this court and marked Annexure B. He also tried to minimize the role he played in the events that resulted in the death of the security guard. In cross-examination, he was evasive, started to introduce the issue of compulsion by the other two accomplices. We refuse to accept the case of compulsion. It was just an afterthought. After the robbery and the tying of the security guard, he continued in the company of the two accomplices. He even went with Mduduzi to

the house of Precious Mathema, a witness in this court and a sister to Mduduzi. He said to Precious Mathema that he had travelled to Botswana, where he got the stolen clothes. He participated in the sharing and the sale of the loot. He did not report the matter to the police. This is not the conduct of a person who was under compulsion.

Accused tried to exaggerate his level of drunkenness, saying he did not know what was happening. He testified that he was staggering due to drunkenness, we note that he managed to climb over the perimeter wall at the Flea market. He managed to hit the security with three heavy blows with a plank. In his defense outline, he says the blows disoriented the security guard. These must have been heavy blows indeed, which could not come from someone who was very drunk as the accused would want this court to believe.

In his evidence, the accused now says he was "tapping" the now deceased with a plank. We find that this is a falsehood. In his defense outline he says "he struck the deceased with a plank twice on the forehead and his blows had the effect of disorienting the deceased," this could not have been tapping. Tapping is in fact a light blow, which could not have had the effect of disorienting the security guard.

The accused further testified that he was standing guard 2 – 3 meters away from the point where his accomplices were tying the security guard, this again is a falsehood. It was introduced as an afterthought, in order to distance himself from the strangulation that caused the death of the security guard. In fact it contradicts his defense outline, where he says the two accomplices requested his assistance to hold the guard down when he was being tied with wires from coat hangers on the scene. His defense outline is consistent with Mduduzi's version that the accused helped to subdue the guard as he was being tied up.

Finally, we have had the opportunity of watching all the state witnesses as well as the accused when they testified in this court. All the state witnesses gave their evidence in a calm, sequential and relaxed manner. We distinctly formed an impression that they were truthful, honest and reliable witnesses in this court. We can say here without any shadow of doubt that the state witnesses did not embellish their version to disadvantage the accused.

On the contrary, the accused was a woeful witness in the witness stand. He contradicted what was put to state witnesses on his behalf and even came up with new versions that were at odds with his entire testimony. He did not hesitate to deny what was contained in his defense outline. We distinctly formed an impression that the accused was evading the truth and trying to mislead this court, for the purposes of minimizing his role in

the events that led to the death of the security guard. The evidence of the accused, where it contradicts that of the state witnesses, we reject it as false.

Onus of proof

It is trite law that in a criminal trial the *onus* is on the State to prove the commission of the offence beyond reasonable doubt and that there is no *onus* on an accused person to prove his innocence.

This court is alive to the basic principles to be applied in dealing with the version of an accused. In *S v Kuiper* 2000 (1) ZLR 113 (S) at 118B-D:- the court said the test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in *R v Difford* 1937 AD 370. At 373, the learned judge said:-

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

Similarly, in *R v M* 1946 AD 1023, DAVIS AJA said the following at 1027:

> And, I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.

In casu, we find that the accused version, to the extent that it contradicts the evidence of other witness, false. It is thus rejected as false insofar as it is in conflict with the state evidence. It cannot be said to be reasonably possibly true.

Common purpose

The state alleges that the accused person acting in common purpose with the two other accomplices, assaulted Vengai Murisi with a wooden plank on the head and strangled him with a wire intending to kill him or realizing that there is a risk or possibility that his conduct may cause the death of such person. In such a case, the state must prove the existence of a common purpose to commit the crime charged, i.e. murder.

In terms of section 196A of the Criminal Law [Codification and Reform] Act, the doctrine of common purpose is part of our law. In *S v Thebus and Another*2003 (2) SACR 319(CC) the Constitutional Court in South Africa had the following to say:

> The reliability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, expressed or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.

The evidence before court is that the accused and his accomplices went to the Flea market for the purposes of stealing. The evidence is that they were of the view that the market was not guarded, in the sense that there was no guard to be found there. It is only when they were inside that they saw the guard. The guard started screaming, then they decided to subdue him and stop him from screaming. The evidence does not show that there was a prior agreement, expressed or implied, to commit the crime of murder.

In the absence of prior agreement, liability arises from active association and participation in the criminal design. In this case, the issue is, was there active association and participation in a common criminal design with the requisite blameworthy state of mind? In *S v Mgedezi and Others*1989 (1) SA 687 (AD) at 705I-706C, Botha JA stated the following regarding concept of common purpose:

> In the absence of proof of a prior agreement, accused no. 6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; in respect of the killing of the deceased, he must have intended them to be killed and performed his own act of association with recklessness as to whether or not death was to ensue.

Was the accused present at the scene of the crime? The deceased was murdered at the Mthize Flea Market. The evidence of the Mduduzi, places the accused at the scene. According to this witness, the three accomplices, climbed over the perimeter wall and entered the Flea Market. Initially, they thought there was no one at the market, while inside they discovered there was someone, that someone is the security guard, the now deceased person. They caught him and tied him. Accused hit him with a plank. The security was found dead at the same Flea market. The body of the security guard was found by Langton Mutindi.

The accused corroborates Mduduzi's evidence, as to his (accused) presence at the scene of crime. First, in his defense outline he says:

1. They went to the site and when they were inside the flea market they were startled by the deceased who attempted to apprehend them. During the scuffle accused struck the deceased with a plank twice on the forehead and his blow had the effect of disorienting the deceased who was then held by Isaac Nyakurerwa and Mduduzi Thimothy Mathema.
2. The two requested his assistance to hold him down and proceeded to tie him up with wires from coat hangers on the scene. After tying him up he and Mduduzi Thimothy Mathema were left to guard him while Isaac Nyakurerwa, who knew the place better had gone to ransack the flea market.

Furthermore, in his evidence in court he testified that when they were walking inside the Flea Market, they saw a security guard. The security guard woke up and started screaming, they then moved towards him. Isaac Nyakurerwa tried to stop the guard from screaming. Accused says he saw a plank, picked it and tapped the now deceased on his head. Therefore, the evidence shows, and we find as a proved fact, that the accused was present at the scene of crime.

Secondly, was the accused aware of the assault on the security guard? The evidence of Mduduzi, is that it is the accused who hit the deceased with a plank. In his evidence in chief, Mduduzi testified that:

Q. What was his (now deceased) position when you tied him?
A. He was lying on a stand at the Flea Market, which is similar to a table.
Q. Was he able to wake up in that position?
A. We had subdued him in that position.
Q. Where was the accused person?
A. He was there, we were assisting each other.
Q. What do you mean, by assisting each other? What did accused do?
A. We were assisting each other in everything. Accused was assisting us to subdue the person, that is why he hit him with a plank.

The accused in his defense outline and evidence in court, corroborates the fact that he is the one who hit the security guard with a plank. In cross examination, Mduduzi, was asked as follows:

Q. Accused will further tell the court that you commanded him to hold down the now deceased whilst you were tying him on the table?
A. Is not true.
Q. Confirm that accused played no role in tying the now deceased?
A. Is not true that there is no role he played in tying the now deceased. We did that together.

Earlier the witness was asked:

Q. He will tell the court that the tying on the neck was the direct cause of death.

A. I will not comment on the cause of death, only the doctor can say that. We were together with accused person. After hitting him with a plank, he was not standing. He was assisting to subdue him.

Again, we find as factually proved that the accused was aware and participated in the assault on the security guard.

Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. His actions of hitting the security guard with a plank, and helping to subdue the guard when he was being tied up, shows that he intended to make common cause with the two accomplices who actually tied up the guard. They tied the neck of the guard, which caused the death. He was assisting to subdue the guard to be tied up. We find that he intended to make common cause with the other two accomplices.

Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. He manifested his sharing of the common purpose by hitting the security guard with a plank, and helping to subdue him as he was being tied up, as described above.

Fifthly, he must have had the requisite *mens rea*; in respect of the killing of the deceased, he must have intended for him to be killed and performed his own act of association with recklessness as to whether or not death was to ensue. As outlined above, he hit the now deceased with a plank. Subdued him as his neck was being tied to a metal table and his mouth was tied with a cloth outside. He saw the deceased being placed on the top of a steel table, his hands tied to a steel table with coat hanger wires, his feet tied together with coat hanger wires which was tied to the steel table, and his neck tied to a steel table with coat hanger wires. In cross examination, it was put to him that, when you held down the deceased, you directly associated yourself with your colleagues who were tying him, whose actions brought about the death, and all accused could say was, “I was not thinking that way.”He must have seen that the wire around neck will strangulate the security guard. Therefore, we are satisfied that the accused had the requisite *mens rea*; in respect of the killing of the guard, he must have intended him to be killed and performed his own act of association with recklessness as to whether or not death was to ensue.

Disassociation may be raised as a defense in respect of a criminal charge anchored on common purpose. In *S v Ndebu and Another*1986 (2) SA 133 (ZSC) the court, as per MCNALLY JA, expressed itself as follows at 135F:

> It would seem clear that English law requires more than a simple last minute withdrawal to enable a participant to escape a verdict of guilty on the main offence, e.g. a declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse.'

In casu, the accused did not dissociate himself from the common criminal enterprise perpetrated by him and his accomplices. He did not step on the fuse. Therefore, we find that the accused acted in common purpose with the other two accomplices, to cause the death of the security guard.

Conclusion

The prosecution has invited this court to convict the accused of murder in terms of section 47 (1) (a) of the Criminal Law (Codification and Reform) Act, which provides thatany person who causes the death of another person - intending to kill the other person; shall be guilty of murder. In terms of section 47 (1) (a) the accused desires death. Death is the aim and object or death is not aim and object but in the process of engaging in some activity foresee death as a substantially certain result of that activity and proceeds regardless as to whether this consequence ensues.

The accused and his accomplices decided to go and steal at the Flea Market, because they believed that the place was not guarded. They did not expect to find a person at Market. Upon seeing the security guard at the market, who screamed, calling for help, they then tried to stop him from screaming. Mduduzi testified that the security guard cried and they tied his neck so that he stops making noise. Tying him with wires was to ensure that he does not scream. The accused was left guarding the guard because it was thought he would untie himself, and cause trouble for the robbers.

On these facts, we are not satisfied that it can be said beyond a reasonable doubt, that the accused and his accomplices desired the death, and that death was their aim and object. We are further not satisfied beyond a reasonable doubt that the only reasonable inference to be drawn is that the accused and his accomplices did foresee the death of the security guard as a substantially certain consequence of their activity. We cannot, therefore conclude that the accused's avowed intention was to cause death.

We now turn to section 47 (1) (b)of the Criminal Law (Codification and Reform) Act. The test for realization of real risk or possibility is subjective and is provided in section 15 of the Act. It has two components, namely-

(a) Awareness that there is a risk or possibility that the conduct embarked on might result in the relevant consequence and the relevant fact or circumstance existed when the accused engaged in the conduct.
(b) Recklessness. This entails that despite the real risk or possibility the person whose conduct is complained of continued to engage in such conduct.

In terms of s 15 (2) of the Act, recklessness is implicit in the term realization of risk or possibility. Where awareness of real risk or possibility is proved, recklessness shall be inferred from the fact that the relevant fact or circumstance actually existed when the accused engaged in the conduct.

It is incumbent upon the prosecution to prove that the accused was aware of the real risk or possibility of death and despite that realization he persisted in the unlawful conduct which caused the death. In the present case the following facts are relevant to the determination of the accused's realization of the real risk of death.

In the post mortem report, Exhibit 2, the following appears:

> Marks of violence
> Friction bruises on the right frontal region with swelling. High oblique groove present on the neck +-8m long consistent with the string. Both legs tied with a wire together. Wire on the left hand. String around the neck.
>
> Other remarks
> The bruises and the scalp haematoma are suggestive that the deceased sustained blunt force trauma to the head which in incapacitated him when he was tied with wires and the strangulated with the string.
>
> Cause of death
> Asphyxia
> Strangulation
> Blunt force trauma head
> Homicide

There is evidence before court that it is the accused who hit the security guard with a plank three times on the head. According to the post mortem report, a blunt force trauma on the head, incapacitated the security guard. This is the injury that was inflicted by the accused

with his strike using a plank. This strike caused a scalp haematoma (this occurs on the outside of the skull, and often can be felt as a bump on the head). This is suggestive that severe force was used in hitting the security guard with a plank on the head. This puts to naught, the accused version in court that he merely "tapped" the guard on the head, he hit the guard three times on the head. This strike was so forceful that it incapacitated the guard. In fact, this is what the accused says in his own defense outline.

The immediate cause of death is said to be *asphyxia,* this is a condition arising when the body is deprived of oxygen, causing unconsciousness or death; suffocation. There is evidence before court that a coat hanger wire was used to tie the security guard's neck, the neck was tied to the steel table. The body was deprived of oxygen. This act was the immediate cause of death.

To deliberately embark on an assault of another person, depriving him of oxygen, with a wire on the neck, entails an awareness of the real risk or possibility of death. The accused must have realized the real risk or possibility of the fatal consequences of his conduct.

These facts, in our view, are sufficient to establish beyond a reasonable doubt a realization by the accused that there was a real risk or possibility that the conduct embarked on by him may result in the death of the security guard and he continued to engage in that conduct despite the awareness of the risk or possibility of death.

In conclusion, from the totality of the evidence presented in this court, inclusive of the accused's version, we have been persuaded that the state has been able to prove its case against the accused beyond a reasonable doubt.

Verdict

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

Sentence

Mr *Mhlanga*, this Court must now decide what sentence is appropriate for the offence for which you have been found guilty. To arrive at the appropriate sentence to be imposed,

this Court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, factor in the interests of society, weigh same against the others and then blend them with the requisite measure of mercy.

The offence for which you have been convicted of is a grave and serious offence. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all of the rights vested in that person: the right to dignity, the right to equality and freedom, and the right to life itself. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged. It is for this reason that the rule of law requires that the perpetrator should generally be visited with harsh punishment.

The act of punishment serves as retribution. It serves also to signify that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator.

This is the task that a sentencing court is called upon to carry out. It is required to take proper cognisance of the nature of the crime and to determine a sentence which balances the competing interests of the society and the individual perpetrator while meeting the objectives of punishment. It does so in the context of the fundamental values that underpin our legal system. It is a task rightly considered to be very difficult.

Guidance is to be derived from the empowering legislative provisions. It is also to be derived from the principles encapsulated in judicial precedent, while taking into account the particular facts before court.

In this instance section 47 (4) (a) of the Criminal Law [Codification and Reform] Act provides that a person convicted of murder shall be liable—(*a*) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], be sentenced to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances.

The murder you have been convicted of was committed in the course of robbery, and therefore, in the terms of section 47 (2) (iii) of the Criminal Law [Codification and Reform] Act, it was committed in aggravating circumstances.

At the time of the commission of the crime, you were 19 years old. In of terms of section 48 (2) (c) (i) of the Constitution of Zimbabwe (Amendment (No. 20) Act 2013, the death penalty must not be imposed on a person— who was less than twenty-one years old

when the offence was committed. By virtue of your age at the time of the commission of this offence, the death penalty is out of consideration.

What remains to be considered is imprisonment for life or imprisonment for any definite period of not less than twenty years. In your favour is that at the time of the commission of the offence, you were 19 years old. You were just a teenager. You were the youngest in the group of three robbers. Prior to the commission of the crime you had been taking alcohol. There is evidence from Mduduzi, that all the three accomplices were intoxicated, but not to a degree as to make you not aware of what you were doing. Again, we factor into the equation that the murder was not pre-meditated. You intention of entering the Flea Market, was not to kill, but to steal.

The mitigating factors in your favour come into insignificance when consideration is given to the nature of the crime. The evidence shows that an extraordinary degree of violence was deployed against a defenseless human being, who had done you no wrong, and who was merely working for himself and his family. The violence that preceded the killing the deceased was such as to place this crime in the category of the most serious. It is difficult to conceive the degree of violence that you meted out against the security guard, and what the victim experienced in his last moments. He was tied with very strong wires. His hands tied to a steel table. His feet tied to a steel table. His neck tied to a steel table. He was crying, calling for help. This plea of mercy by the security guard did not move you to spare his life.

What a horrible way to end the life of another human being. All this was done for you to make money. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand, against this wanton violence and destruction of life. Such conduct must be punished, and punished severely.

However, after taking all factors in to account, we do not intend to remove you permanently from society. We leave you with a window, to enable you to reform and participate in the development of society. In the result:

You are sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mathonsi Ncube Law Chambers, accused's legal practitioners