

THE STATE

Versus

BONGANI MKHWANANZI

And

NKOSANA NCUBE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr J. Sobantu & Mr Ndlovu
BULAWAYO 18, 19, 20 & 21 JANUARY 2022

Criminal trial

K. M. Nyoni assisted by *B. Gundani* for the State
C. Nyathi for Accused 1
N. Ncube for Accused 2

DUBE-BANDA J: The two accused persons are charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) act [Chapter 9:23]. It being alleged that on the 16th January 2021 at Umzingwane River, Esigodini the accused persons struck Remember Moyo (deceased) on the head with a metal bar intending to kill him or realising that there was a real risk or possibility that their conduct may cause his death continued to engage in that conduct despite the risk or possibility.

The accused 1 pleaded guilty to the crime of culpable homicide and accused 2 pleaded not guilty to the charge. This court recorded pleas of not guilty. The two accused persons were legally represented throughout the trial.

The State tendered an outline of the State case, which is before court and marked Annexure A. It shall not be necessary to repeat the entire contents of the State outline. It now forms part of the record. The accused persons tendered into the record written outlines of their defences. Accused 1's defence outline is before court and marked Annexure B and Accused 2's defence outline in marked Annexure C.

State case

At the commencement of the trial the prosecutor (Mr. *Nyoni*) with the consent of both defence counsel tendered the following documentary exhibits: Affidavit of Constable Shava marked Exhibit 1; Post-Mortem Report number 16/14/2021 marked Exhibit 2; and Accused 2's warned and cautioned statement which is before court as Exhibit 3. Accused 1 in his defence case tendered into evidence his unconfirmed warned and cautioned statement which is before court and marked Exhibit 4.

The prosecutor sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). These related to the evidence of certain witnesses as contained in the summary of the state case, i.e. the evidence of Dr I Jekeny, who examined the remains of the deceased and recorded a post mortem report.

Also sought and admitted in terms of section 314 of the CP & E Act is the evidence of Andile Mlauzi. Her evidence is that she knew the deceased during his lifetime and she knows the accused persons. On the 16 January 2021 she left Ncema River in the company of the deceased, Nomalanga Sibanda and Silindeni Nkala going to Mawabeni Village. When they got to Umzimgwane River she crossed the river in the company of Silindeni Nkala. When they were still in the middle of the river she heard a sound which suggested that people were being attacked and when they tried to establish what was happening the accused persons started throwing stones at them. They fled to the homestead where Nomalanga Sibanda used to reside. A few minutes later Nomalanga Sibanda arrived seriously injured and her face covered with blood. Also sought and admitted in terms of section 314 of the CP & E Act is the evidence of Charles Ndlovu. He ferried Nomalanga Sibanda and the deceased to hospital.

The state called three witnesses. We are going to briefly summarise their evidence. The 1st witness to testify was Nomalanga Sibanda (1st witness). This witness testified that in November 2020 one Mlamuleli Ncube threatened her that he would hire people to kill her. This Mlamuleli Ncube like this witness was in the business of buying gold from artisanal miners. It is said he was complaining that this witness was getting all the customers and he was getting none.

This witness testified that she knew the deceased during his lifetime and she used call to him uncle. She knew the accused persons prior to the commission of this offence. They were among artisanal miners who used to sell her gold. On a Saturday the 16th January 2021 she left Ncema River in the company of deceased and two ladies, i.e. Ms Nkala and Ms Mlauzi. When they got to Umzimgwane River the water level was high and it was flooded. The two ladies i.e. Nkala and Mlauzi crossed the river and this witness and deceased remained at the banks of the river. The deceased bent down folding his trousers so that they could cross the river, at that time four persons approached them from behind. In this group there was accused 1 whom she referred to as Mandevu, Godfrey Sithole and the other two whose names she did not know but was familiar to them as they were all her customers.

This witness testified that accused 1 struck the deceased on the head with an iron bar also called a crow bar. The brain matter oozed from the head. The deceased was struck while still in a bending position still folding his trousers. The deceased fell to the ground. At the point of attack deceased did not utter any word. When the witness turned to look at accused 1, he struck her on the head with a machete, an axe and stabbed her with a sharp instrument. She fractured her finger and two ribs. She got seriously injured.

During the attack she cried out calling out the name of accused 1 saying “*Mandevu why are you killing me.*” At that point someone who was standing behind this witness said “do not kill them.” She does not know who among the three accomplices said these words. Accused 1 answered that it was impossible not to kill them because one Mlamuleli Ncube said they must be killed.

One of the attackers whom she could not identify because he was behind her twisted her hand to force her to let go the bag. At that point her hand bag taken. It was taken by accused 1. Inside the bag there was a purse containing RTGS 3000.00, USD900.00, 30 grams of gold, her cell phone and Identity Card. She became powerless and unconscious then she was thrown into Umzimgwane River. When the attackers had left she regained consciousness and crossed the river and finally got to the homestead where she used to stay. Finally she was taken to hospital in the company of the deceased.

Under cross examination by counsel for accused 1 (Mr. *Nyathi*) this witness testified that the attack happened between 5 O'clock and 6 O'clock in the evening. She said it was still visible that one could identify a person though cloudy and drizzling. She testified that accused 1 was carrying a crow-bar and was handed a machete by one of the accomplices. Deceased was struck once using a crow-bar in the middle of the head by accused 1. She described a crow-bar as a long and straight iron-bar used by artisanal miners when digging at the mine. She did not witness accused 1 using a machete or axe on the deceased. She said of the four two assailants attacked her while the other two were just standing. The accomplice who twisted her arm is the one who handed accused 1 the axe.

Under cross examination by counsel of the accused 2 (Mr. *Ncube*) this witness testified that she knows accused 2 because he used to work with accused 1 at the Ncema River. Accused number 2 was not standing close to accused 1, he was at a distance with another person. She could neither deny nor confirm that the person who said "do not kill them" is accused 2. She did not see accused 2 doing anything at the scene of crime, but testified that the assailants were together and their intention was to kill her, and that includes accused 2.

The second witness to give oral evidence for the State was Silindeni Nkala. This witness testified that she left Ncema River in the company of deceased, Nomalanga Sibanda (1st witness) and one Andile Mlauzi. The quartet arrived at Umzingwane River between 5 p.m. and 6 p.m. It was dark. The river was flooded and the water was at knee level. She is the one who started to cross the river and Andile Mlauzi followed her. The 1st witness and the deceased remained on the bank of the river. After crossing she heard something falling into the river, she thought someone had fallen into the river. She heard 1st witness crying saying "Oh mother people have killed me." Someone started to throw stones at her and Andile Mlauzi and they fled and proceeded to the villages. The 1st witness (Nomalanga Sibanda) arrived at the homestead and she was injured. The 1st witness and the deceased were then ferried to hospital.

Under cross examination by Mr *Nyathi* this witness testified that her group arrived at Umzingwane River between 5 p m and 6 p m and it was dark and drizzling at that time. She said at the point where they crossed the river it is between 25 metres and 30 metres wide. She

said when screaming the 1st witness said “Oh mother people are killing me” and she did not hear her mention the name of the accused 1. Mr *Ncube* did not cross examine this witness.

The third witness to give oral evidence for the State is the investigation officer. In his evidence in chief this witness merely testified that he carried out investigations that led to the arrest of Accused 1. Accused 1 was arrested on the 19th February 2021 and no weapon was recovered from him.

Twice when the investigating officer in his evidence in chief was about to testify in respect of a statement he said he obtained from accused 1, Mr *Nyoni* reprimanded and stopped him. What was about to happen was that the investigating officer was going to testify in chief about a statement he says he obtained from accused 1 without first satisfying the rules about admissibility of such evidence. Such is irregular and inappropriate. See: *S v Nkomo* 1989 (3) ZLR 117 (SC).

Under cross examination by Mr *Nyathi* the investigating officer was asked as follows: Q. You arrested accused 1 on the 19th February 2021. A. Yes. Q. Did you question him? A. I questioned him. Q. In questioning him what did he reveal to you pertaining the incident of the 16th February 2021? At that point the witness testified about the statement he says he obtained from accused 1.

What Mr *Nyathi* did amounts to cross-examination on inadmissible evidence. In general, where inadmissible evidence is elicited by the cross examiner himself, and it is adduced in evidence as a result of a fair, reasonable and legitimate answer to a question posed by the cross-examiner it becomes admissible and may be used in the consideration of guilty.¹ This is what occurred in this case and such evidence is admissible against accused 1.

Under cross examination by Mr *Nyathi* this witness testified that accused 1 narrated to him how this offence was committed. This is what accused 1 is alleged to have narrated, that on the 15 January 2021 in the morning he was in the company of one Trymore Ndlovu, one Godfrey Sithole and Nkosana Ncube (Accused 2) at Ncema River panning gold. They were approached by a man called Mlamuleli Ncube who requested them to assault and rob deceased and Nomalanga Sibanda (1st State witness). Ncube paid them USD250.00 which

¹ Pretorius JP *Cross-Examination in South African Law* (LexisNexis Butterworths 1997) 248-249.

amount they shared amongst themselves. The four agreed to do the job. On the 16th January they then followed the deceased and Nomalanga Sibanda from Ncema River and caught up with them at Umzimgwane River. He then assaulted deceased with a wooden pick handle on his arm. His accomplices joined and assaulted deceased with stones, sticks and an axe. Mr Nyathi merely adduced this evidence and not challenge it.

With the evidence of this witness the State it's closed its case and accused 2 applied for a discharge. I dismissed that application in an *ex tempore* ruling and one of the reasons I mentioned therein was that accused 2 had been implicated by accused 1 in the statement given to this witness. Although it had been given as one of the reasons to refuse a discharge such evidence was not admissible against accused 2. That notwithstanding there was evidence that called for an answer from accused 1. Hence the dismissal of his application for a discharge at the close of State case.

Defence case - accused 1.

Accused 1 testified that he first met deceased on the 16 June 2021 at around 10 O'clock in the morning. He demanded payment of money owned to him by the deceased. Deceased said they were to meet later and discuss the issue of the debt owed to accused 1. They did not meet at the appointed time and only met at around 8 O'clock in the evening. They met at Umzimgwane River. This accused testified that he then asked deceased the reason he did not make it at the appointed time, deceased is alleged to have said "are we fighting." He testified that at that point deceased slapped him on his face with an open hand. This accused said at that point he retaliated by using a pick handle and struck deceased on the arm. He testified that it is at this point that his accomplices joined the fight. Accused 1 said he then struck Nomalanga Sibanda (1st witness) once. Accused said he then crossed the river and went away.

This accused testified that he was in the company of three other persons, i.e. one Trymore Ndlovu who was carrying an axe, one Godfrey Sithole who was carrying a machete and Accused 2 who was carrying a stick. He said after he struck deceased he realised that he might die as a result of the injury he had sustained.

Under cross examination by Mr *Ncube* this accused testified that Accused 2 was aware of the debt dispute with deceased. He said Accused 2 participated in the assault of the deceased and the 1st State witness. He was using a stick that he was carrying. He testified that Accused 2 was close to him so he could see what she was doing. When it was put to him that Accused 2 did not participate in the assault of the deceased and the 1st witness, he disagreed.

Under cross examination by Mr *Nyoni* Accused 1 disputed that he used an axe to strike deceased and the 1st witness. He denied that he knows one Mlamuleli Ncube. He said deceased was owing him USD90.00. The reason he assaulted 1st witness is that she insulted him. He said when he struck deceased Accused 2 was approximately a metre away.

Accused 1 testified that his group arrived at Umzimgwane River at the same time with deceased and his group. He disputed that he robbed the 1st witness of her money, gold and cell phone. He testified that it is one Trymore Sithole who struck deceased on the head. He disputed that he intended to cause the death of the deceased.

Defence case – accused 2

Accused 2 testified that he knows Accused 1, one Trymore Ndlovu and one Godfrey Nyoni. He used to work with them at Ncema River. He worked with them for three days prior to the events of the 16 January 2021. He testified that his group was the first to leave Ncema River, and deceased's group overtook them on the way. However Accused 2's group caught up deceased's group as it was preparing to cross Umzimgwane River. It was becoming dark. He heard as if they were people who were fighting. He then saw Accused 1 assaulting the deceased. Accused 1 struck deceased with a crow-bar on the head, and he also struck the 1st State witness. He says he tried to reprimand accused 1, but was threatened by Godfrey Nyoni and Trymore Ndlovu. At that point he parted ways with his group and proceeded home.

Accused 2 testified that he does not know one Mlamuleli Ncube. He does not know about the money this Mlamuleli Ncube is alleged to have paid for the assault and robbing of the deceased and the 1st witness. He did not know that deceased was owing accused 1 some money. He was not carrying a stick. He did not participate in the assault of the deceased and 1st witness. He did not see whether a sharp object was used because it was dark.

Under cross examination by Mr *Nyathi*, this witness testified that at the scene of crime he was carrying a satchel and his colleagues were carrying a shovel, crow-bar and a pick.

Accused 1 was carrying a crow-bar and one Godfrey Sithole a shovel. One Trymore Nyoni was in the habit of carrying an axe but on that that day he did not see the axe.

Under cross examination by Mr *Nyoni* Accused 2 testified that he was about four metres from where the Accused 1 was assaulting deceased and 1st State witness. He did not hear the 1st State witness insulting the accused 1. He did not see the bag that was said to be carried by the 1st State witness. He reprimanded Accused 1 when he was assaulting deceased and 1st State witness. He did not report the matter to the police.

Analysis of the evidence

In the evaluation of the evidential material this court will observe the following principles; evidence must be weighed in its totality; probabilities and inferences must be distinguished from conjecture and speculation. The court must sift truth from falsehood. There is no *onus* on the accused to prove the truthfulness of any explanation which he gives or to convince the court that he is innocent. Any reasonable doubt regarding his guilty must be afforded to the accused. See: *S v Jochems* 1991 (1) SACR 208 (A), *S v Jaffer* 1988 (2) SA 84 (C), *S v Kubeka* 1982 (1) SA 534 (W) at 537 F-H.

During the course of this trial we had the opportunity of watching all the State witnesses as well as the accused persons when they testified in this court. We distinctly formed an impression that the State witnesses were truthful, honest and reliable as witnesses in this court. We can say here without any shadow of doubt that the State witnesses did not embellish their versions to disadvantage the accused persons herein. We have no reason to reject or disregard their testimonies. We accept it as representing the truth.

The 1st State witness was so truthful and credible in that she even gave evidence favourable to the accused persons. Under cross examination she answered all questions even giving answers that are favourable to the accused persons. She testified that she did not see Accused 1 striking deceased with axe. She said she saw Accused 1 striking deceased once with an iron bar or crow bar. Even when she was told that the post-mortem report indicates that deceased had two axe injuries on his head, she maintained that she saw one strike with an iron bar on the head. She testified that she did not see Accused 2 doing anything. She said she only saw Accused 1 carrying an iron bar. She said Accused 1 was handed a machete by someone but did not say who did so. She said she did not know where Accused 1 got the axe from. She said one of the assailants was twisting her arm to let go the bag, but answered that

she did not identify the assailant who was doing this because he was behind her. She said two assailants were attacking her while the other two were standing. She said Accused 2 was not standing close to Accused 1 during the attack, he was at a distance with another person. She could not deny nor admit that the person who said “do not kill them” is accused 2. We accept her evidence in its totality as representing the truth.

Silindeni Nkala was also a credible witness. It was not her intention to incriminate the accused persons. She said she did not witness what happened to deceased and Nomalanga Sibanda because she was on the other side of the river. As she was crossing the river stones were thrown at her. She was clear that she did not see the person or persons who threw the stones.

Under cross examination by Mr *Nyathi* the investigating officer (Badson Ndlovu) testified about a statement given to him by Accused 1. We could not dictate any exaggeration in the testimony of this witness. We are satisfied that he told the truth and we have no hesitation in accepting his evidence.

On the other hand we distinctly formed an impression that the accused persons were very selective with their evidence. They were either choosing to exonerate themselves or down play their involvement in the events that resulted in the death of the deceased. As it is said that the truth does not cease to exist because of an attempt to suppress it, we noted that in some instances the truth bolted from these two accused persons.

On the evidence on record we have no doubt that Accused 1 told a falsehood that deceased was owing him USD 90.00. We say so because he does not say this in his defence outline nor was it put to the witness in cross-examination. Accused 1 lied when he testified that he struck deceased once on his arm with wooden pick handle. We say so because there is evidence that he used an iron bar. He then said after striking the deceased he realised that he would die, how could he possibly die from being struck with a wood pick handle in the arm? This is just a falsehood. He said deceased slapped him with an open hand and he then retaliated with a wooden pick handle, this cannot be the truth. We say so because the 1st State witness testified that deceased was taken by surprise, without a word or warning he was struck while he was in a bending position. Accused 2 who was present did not see deceased slapping Accused 1. Accused 1 lied when he said he did not see the bag that was being carried by the 1st State witness. Again he lied when he said they did not rob the 1st State

witness. In his defence outline and his confirmed warned and cautioned statement (Exhibit 3) Accused 2 revealed that 1st witness's bag was taken by one Trymore Ndlovu. He lied when he said the two groups arrived at the same time at Umzimwane River.

The truth bolted out from Accused 1 when he testified that his colleagues joined in and assaulted the deceased and that one of them actually used an axe. The truth again bolted out when he said after striking the deceased he realised that he was going to die. It bolted out when he said Accused 2 participated in assaulting the deceased.

Accused number 2 peddled a falsehood when he said he did not see the bag that was carried by 1st State witness. We say so because in his defence outline and in his confirmed warned and cautioned statement (Exhibit 3) he said one Trymore Ndlovu took away a small bag from Nomalanga Sibanda. He lied when he said he did not participate in the assault of the deceased.

The truth bolted out from Accused 2 when he said Accused 1 struck deceased with an iron bar on the head. It bolted out when he accepted that deceased and his group arrived first at Umzimwane River. It bolted out when he said he did not hear the 1st State witness insulting Accused 1.

Therefore where the evidence of the accused persons contradicts or is at variance with the evidence of State witness we reject it as false. We in turn accept the evidence of State witnesses as representing the truth.

On the evidence before court, testified in this trial and solely for the purposes of this trial and nothing more ² we find it proved that one Mlamuleli Ncube hired Accused 1, Accused 2, one Godfrey Sithole and one Trymore Ndlovu to harm the 1st State witness. We say so because of the following reasons: the 1st State witness whom we already have found to be credible and truthful witness testified that for two months preceding the attack she was threatened by a person called Mlamuleli Ncube. This Mlamuleli Ncube was in the same line of business with the 1st State witness i.e. of buying gold from artisanal miners. Mlamuleli Ncube alleged that the 1st State witness was getting more customers than him. He said he would hire people to kill the 1st State witness. Further, the 1st State witness testified that during

² We flag and highlight this point because this one Mlamuleli Ncube was not before us and we do not know his version. We are making findings only on the basis of the evidence before us. We cannot ignore evidence that has been adduced in court.

the attack one of the assailants said “do not kill them” and Accused 1 answered that it was not possible not to kill them because Mlamuleli Ncube said they must be killed.

The investigating officer whom we have found to be a truthful and honest witness testified that he obtained an oral statement from Accused 1. In the statement Accused 1 said on the 15th January 2021 he and Accused 2, one Godfrey Sithole and one Trymore Ndlovu were hired by one Mlamuleli Ncube to assault and rob the deceased and the 1st State witness. The attackers were paid USD\$250.00 which they shared amongst themselves. The attack was executed on the 16th January 2021. This evidence was not elicited in evidence in chief. It was adduced in cross examination by Mr *Nyathi* for Accused 1. It was not challenged at all. We accept this evidence as representing the truth about the oral statement made to the investigating officer by Accused 1. It is admissible against the accused 1.

Again Accused 1 tendered his unconfirmed written warned and cautioned statement (Exhibit 4) given to the investigating team. The statement details the circumstances leading the murder of the deceased. The involvement of one Mlamuleli Ncube and the USD\$250 00 he paid the attackers for the purpose of harming the deceased and the 1st State witness. Exhibit 4 incriminates Accused 2 in the commission of this offence and it is admissible against him on the basis that it was adduced during the evidence in chief of Accused 1. It is also admissible against Accused 1. He tendered it in his evidence in chief. Mr *Ncube* did not cross examine Accused 1 in respect of this statement. It was not challenged. This statement corroborates the evidence of the 1st State witness in material respects.

Further we find it proved that when the 1st State witness and the deceased where about to cross the flooded Umzingwane River, and deceased had bent down folding his trousers four men approached them from behind. In this group there was Accused 1, Accused 2, one Godfrey Sithole and one Trymore Ndlovu.

When the deceased was still in a bending position folding his trousers Accused 1 without a word, without a warning struck him on the head with an iron bar and the brain matter oozed from his head. The deceased fell to the ground. This evidence is corroborated in material respects by Accused 2 who testified that Accused 1 strike deceased with a crow-bar on the head. In some measure this evidence is also corroborated by Accused 1 himself, who said in his evidence that after striking the deceased he realised that he might die as a result of the injury he had sustained. It is also corroborated by Accused 1’s statement i.e. Exhibit 4.

Andile Mlauzi whose evidence was admitted in terms of section 314 of the CP & E Act said when she and Silindeni Nkala were still in the middle of the river she heard a sound which suggested that people were being attacked and when they tried to establish what was happening the accused persons started throwing stones at them. This evidence corroborates the evidence of the 1st State witness and that of Silindeni Nkala and it implicates both Accused 1 and Accused 2 in the commission of this offence. It is the accused persons who were attacking deceased and 1st State witness. We find that the reason they were throwing stones against these witness is because did they not want them to witness the attack on deceased and 1st State witness.

We also find it proved that the attackers had in their possession an iron bar, axe, stick and a machete. We find it proved that it is Accused 1, Accused 2 and the other accomplices caused deceased injuries which led to his death. The injuries observed by the Pathologist are consistent as having been caused by the weapons in the possession of the attackers. We find it proved that one of the fatal injuries on the head of the deceased was inflicted by Accused 1 using an iron bar. He struck the deceased so hard with much force that the brain matter oozed from the head. No evidence was led about the identity of the assailant who inflicted the second injury observed by the Pathologist. This is inconsequential as we will show later in this judgment.

The State contends that the Accused 1 and Accused 2 acted in common purpose with other persons still at large to murder and rob deceased and Nomalanga Sibanda (1st State witness). Section 196A of the Criminal Law (Codification and Reform) Act deals with the liability of co-perpetrators who knowingly associate for common purpose of committing a crime or crimes.

There is evidence that Accused 1 and Accused 2 were present at the scene of crime. The evidence of the 1st State witness speaks to this, she testified that both were present at the scene of crime. In his evidence Accused 1 testified that he was present at the scene of crime and he struck deceased with a wooden pick handle. Accused 2 testified that he was present at the scene of crime. The evidence implicates them directly in the commission of the offence of murder. There is evidence that they were hired by Mlamuleli Ncube to assault and rob

deceased and the 1st State witness. There is evidence that Accused 1 struck deceased on the head with a crow bar. There is evidence that Accused 2 assaulted deceased with a stick. It is inconsequential that the strike by Accused 2 is not mentioned in the post mortem report as the cause of death.

In his defence outline Accused 1 says he struck deceased with wooden pick handle and the deceased fell down. It is when he was down that the other attackers who included Accused 2 joined to assault the deceased. Accused 1 repeats this version in his written statement (Exhibit 4) which we have found admissible against Accused 2. Which was not challenged at all by Accused 2 in cross examination.

According to the Post Mortem Report (Exhibit 2) there are two head injuries that caused the death of the deceased. There is evidence that one injury was inflicted by Accused 1 with a crow bar. It is inconsequential that there is no direct evidence in respect of who inflicted the second injury. It is clear that this injury was inflicted by one of the attackers. The conduct of the attacker who inflicted the second injury is deemed to be the conduct of Accused 1 and Accused 2.

Accused 1 did not withdraw from the commission of crime of murder. Accused 2 did not withdraw from the commission of the crime of murder. Accused 1 and Accused 2 did not report of this crime to the police. Accused 2 did not timeously inform his father of this crime.

We take the view that the State adduced evidence to show that each of the accused persons had the requisite *mens rea* to commit the crime of murder by virtue of having the intention to commit the crime or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of murder would be committed. On the evidence adduced in this trial we find it proved that Accused 1 and Accused 2 acted in purpose to commit the crime of murder.

Mr *Nyoni* invited this court to find accused persons guilty of murder in terms of section 47(1) (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. In *S v Mugwanda* SC 19/2002 the court held thus:

On the basis of the above authorities it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that either the accused desired to bring about the death of his victim and succeeded in

completing his purpose; or while pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.

For this court to return a verdict of murder with actual intent, we must be satisfied that the accused persons desired death and that death was their aim and object or if death was not their aim and object but in the process of assaulting the deceased foresaw death as a substantially certain result of that activity and proceeded regardless as to whether death occurs.

The evidence shows that this was a pre-planned murder. The accused persons followed deceased and 1st State witness from Ncema River to Umzingwane River. Carried out a vicious assault on the deceased and the 1st State witness. The 1st State witness was robbed of cash, 30 grams of gold and a cell phone. The deceased was attacked when he was in a bending position folding his trousers to cross the river. Accused 1 struck him on the head with an iron bar and the brain matter oozed from the head. The iron bar is about a metre long. The deceased fell to the ground. Accused 1 testified that after he struck deceased he realised that he might die as a result of the injury he had sustained.

The Pathologist who conducted a post mortem report observed that the skull bones were fractured with a 2cm to 3 cm depression. The brain was damaged and the axe could have travelled for about 6cm deep into the brain. The sagittal sinus was severed with haemorrhage and the brain was traumatised and fragmented. From the scale/skull finding at least two strikes/axing were done to cause these injuries. The Pathologist concluded that severe force was used to cause the injuries. It is concluded that the cause of death was severe brain traumatic injury, head injury and severe axing.

The evidence shows that the deceased was subjected to a violent and vicious attack. Striking a human being on the head using a lethal weapon and with so much force, fracturing the skull and damaging the brain leads to one conclusion i.e. an intention to kill. We are satisfied on the evidence before us that the accused persons are guilty of murder with actual intent.

Verdict

Having carefully weighed the evidence adduced as a whole in this trial: both accused persons i.e. Accused 1 and Accused 2 are found guilty of murder with actual intent as

defined in terms section 47 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

Mr Mkhwananzi and Mr Ncube 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 the 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 law requires that the perpetrator should generally be visited with a severe punishment.

Punishment serves to signify that such crimes will not be tolerated and that there is a significant and serious consequence to be suffered by the perpetrators. 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.

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.

Mr *Nyoni* argued that this crime was committed in aggravating circumstances. We agree. This murder was committed in the course of a violent robbery. Where extreme violence was used to subdue the victims. Counsel invited the court to pass a sentence of death against the accused persons. No meaningful submissions were made by both counsel of the accused. In fact counsel were very unhelpful in this regard. They started talking about extenuating circumstances which is no longer part of our law.

We have discounted the death penalty for the following reasons: that Accused 1 is a relatively young person. He is just 24 years old. We did not think it would be in the interests of justice to impose the death sentence against him. Although Accused 2 is much older – he is 28 years old. We take the view that it will not be in the interests of justice to impose the death penalty on him alone and let Accused 1 off the hook.

Other than that the mitigating factors in your favour pale into insignificance when consideration is given to the nature of this 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. The post mortem report gives graphic details of the injuries suffered by the deceased. His skull was fractured and fragmented and brain matter oozed out. No word and no warning preceded the attack. He was taken by surprise. He was attacked as he was in a bending position folding his trousers to cross the river. You say you are sorry but we do not see that remorse, in fact we just see arrogance.

What a horrible way to end the life of another human being. 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 into account we do not intend to remove you permanently from society. We intend to leave you with a window to enable you to reform and participate in the development of society. However the sentence must still reflect the seriousness of this offence. No human being must be subjected to this violence. It is heinous. In the result:

Each accused is sentenced to 30 years imprisonment.

National Prosecuting Authority State's legal practitioners
Matatu, Masamvu & Da Silver-Gustavo Law Chambers Accused 1's legal practitioners
Ncube and Partners Accused 2's legal practitioners