

THE STATE
versus
GODFREY MAROWA
and
TRYMORE TIRIVAVI
and
DAVID MUPANDAWANA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 17 January & 13 June 2024

Assessors: *Mr. Gweme*
Dr. Mushonga

Criminal Trial

D.H. Chesa, for the state
T. Mutema, for first accused
Y. Chourombo, for second accused
V. Chipamaunga, for third accused

MUTEVEDZI J: Criminality, particularly of the violent type, is often associated with daftness. That perception is however slowly proving less and less accurate. The sophistication with which some crimes are being committed in recent times smacks of the advent of an avant-garde criminal world. Investigators and prosecutors must keep abreast with such developments lest they are left struggling to link criminals to the crimes. In this case, a man doing everything to fend for his family was murdered in cold blood yet there was no one with a clue as to who had killed him. The suspects were remotely connected to the murder leaving the prosecution's case hanging by a thread. They were arrested for committing a robbery in an episode completely detached from the murder. Once the prosecutor decided to charge them with the killing of the deceased it must have occurred to him that the accused must, in addition to that crime, have been charged with the robbery for which they were arrested. The offences were committed separately. Adding the robbery count would not have amounted to an improper splitting of charges.

- [1] What happened is that, David Chimbambo (the deceased) left his house on the night of 26 September 2022 around 2100 hours. After advising his wife that he would return in no time, he drove out his black Honda Fit car with registration numbers AFW 7534 intending to leave it at a secure parking lot at Machipisa shopping centre presumably to ward off thieves. If only he had known, he would have chosen to park the car at his house and let the thieves vandalise or steal it if they wished because his effort to protect the car directly led to his death. When he arrived at the shopping centre, he was attracted to commuters who appeared stranded at a bus stop. He must have thought that he could make a quick dollar before returning home. He decided to take a few who could fit into his car into town. It is doubtful if he ever laid his hands on any such money. What is certain is that he did not return home alive. His corpse was found on the morning of 27 September 2022 in front of stand number 3/99 Casino Avenue Waterfalls Harare. His motor vehicle was later recovered at a place called Epworth. The three accused persons in this case were apprehended allegedly using that car in the commission of a spate of robberies after pretending that ‘their’ car was one of the many pirate taxis notoriously called *mushikashikas* which paradoxically terrorise but at the same time appear to afford great convenience to many commuters in Harare and other towns. In the last of their robberies, so the state alleged, the accused had enticed their victims to board their car. Once on board, the victims were violently stripped of their belongings and dumped at some farm outside Epworth. The accused made their escape. Their luck ran out when the victims quickly got assistance from a passing commuter omnibus. They narrated their ordeal to the driver. He decided to pursue the robbers’ vehicle and at the same time alerted his colleagues who plied the same route to look out for the black Honda Fit. It worked because some distance ahead, the Honda Fit car was cornered. Some of the robbers rode their luck and managed to escape. Accused one Godfrey Marowa was not equally fortunate. He must have been sluggish and was trapped by his pursuers whilst he was still in the car. They effected a citizens’ arrest and took him to the police at Epworth. He later led to the arrest of his colleagues.
- [2] When the body of the deceased was recovered, the police took it for a post mortem examination to determine the cause of his death. The autopsy established that the deceased had died as a result of *Brain damage, contusive focus in occipital area and, head trauma due to assault.*

- [3] It was on the basis of the above chain of events that the three accused persons Godfrey Marowa (accused one), Trymore Tirivavi (accused two) and David Mupandawana (accused 3) were brought before this court facing a charge of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleged that on 26 September 2022 along Highfield Road, Harare, the accused persons, one or more of them unlawfully and intentionally or realizing that there was a real risk or possibility that their conduct may cause death and continuing to engage in that conduct despite the risk or possibility, assaulted David Chimbambo with open hands, fists and other unknown objects. The deceased sustained mortal wounds from which he died.
- [4] As will be demonstrated later in the judgment, in his defence outline the first accused spun a yarn which seemed to embroil him in a web of untruths. He denied the allegations. His story was that on the material date he was in Harare. He had come to seek medical attention for injuries he had sustained in a road traffic accident on 14 August 2022. Soon after the accident he had undergone an operation to treat a ruptured diaphragm. He had been admitted into hospital from 14 to 29 August 2022. After his discharge from hospital, he was scheduled to return for a review on the 14 September 2022 to enable the doctors to assess his recovery. During that period, he said he remained under the care of his wife and sister-in-law at number 377 Makomo Extension, in Epworth. On the 27 September the first accused alleged that he left the house around 0400 hours to seek medical attention. On his way to where he intended to get transport, he observed two vehicles driving at high speed towards him. The cars both came to an abrupt halt a few meters in front of him. There was pandemonium as passengers jostled to disembark from the black Honda Fit vehicle. They sped off in different directions. The occupants of the commuter omnibuses which had been chasing the Honda Fit also disembarked. In his perception they appeared to be in hot pursuit of those who had fled. In an unexpected turn of events, the people who had disembarked from the commuter omnibus started assaulting the first accused making all kinds of allegations against him. He knew nothing about what they were accusing him of. He tried in vain to explain that he was simply a bystander who knew nothing about the alleged robbery. He tried to tell them that he did not have in his possession any of the items which had allegedly been stolen from the victims. Notwithstanding his protestations, his captors took him to the police at Epworth. He was later taken to

Waterfalls Police where he was once again assaulted and forced to confess to a crime he had not committed. The officers forced him to implicate his co-accused and to make indications regarding how the offence had been committed.

[5] The second accused also denied the murder charge. His story was even more intriguing than that of the first accused. It was not only that he did not participate in the death of the accused and the events that followed but also that he had never in his entire life, met the deceased. He denied having boarded the deceased's vehicle in the Harare CBD headed for Machipisa Shopping Centre on the material day or at any other time. His misfortune began when on the 24 October 2022, he travelled from Mamina in Mhondoro where his rural home is to Solani Shops in Epworth. He intended to sell his marijuana to his regular customers. He was then searched by the police who identified themselves as detectives from CID Homicide. They found on him, illegal drugs. He was arrested and spent the night at Harare Central police station. The following day, the detectives took him to his rural home, where on arrival, they searched his house and recovered more marijuana. The third accused who is his brother was present at the homestead. He was also arrested in connection with the illicit drugs.

[6] The third accused equally distanced himself from the crime. He said he knew nothing about its commission; that he does not reside in Harare but in Mhondoro where he always is. He was arrested when the police came to their homestead with accused two from whom they were demanding a bribe in lieu of his release for possessing mbanje. It was only after accused two had failed to avail the bribe that the police arrested him (accused three). The detectives drove both of them to Harare where they were lodged into cells at Harare Central. He further alleged that it was only then that he realised that the detectives had abandoned the dagga allegations and were now accusing him of the murder of the deceased. He alleged that to prove his defence he would lead evidence from various witnesses who included his wife Ought Forishi, his nephew called Tafirenyika and a religious leader called Madzibaba Mushipe. He emphasised that his daily schedule is fairly routine in that he goes to his workplace where he and Tafirenyika mould bricks for sale. Their work keeps them there until around 1700 hours when they go back home. At home his wife Ought and the children will always be waiting for him. On Sundays, he goes to church which is led by Madzibaba Mushipe. On the date and time in question he was in Mhondoro as stated. There is

therefore no way he could be linked to the murder which occurred in Harare. He does not know the first accused whom he only met for the first time at court and was advised he was their co-accused in the murder case. He added that he would challenge all evidence that the state threatened to adduce on the basis that it was obtained through torture and duress. The confirmation of his warned and cautioned statement was not done in accordance with the law.

State Case

[7] The prosecutor sought and obtained with the consent of the defence, the formal admission into evidence in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (the Code) of the testimonies of witnesses Maidei Tenza, Ashwin Muzvondiwa Mugwisi and Dr. Martinez. The evidence was admitted as it appeared on the state's summary of evidence. In brief the evidence was as follows:

Maidei Tenza

[8] She is the deceased's widow. Her story was that the deceased went out to secure the car at the parking lot. He called a few minutes later to advise that he had picked some commuters whom he was taking into town but would be back home in no time. He didn't return. His cellphone became unreachable until the next morning. She was worried sick and made a police report that he was missing at daybreak. She was worried because it was out of character for the deceased to sleep out. After filing the report, she went to her workplace. Around 1000 hours she received a call from a company called Attitude Finance which had been contacted by the police who were looking for the deceased's next of kin. She went to their offices from where she was taken to Waterfalls Police station. There she identified the deceased's motor vehicle by its registration numbers. She only learnt about the deceased's death around 1900 hours on the same day.

Ashwin Muzvondiwa Mugwisi

[9] He is a police officer based at Waterfalls station. In the company of constable Mochumi he attended the scene where the deceased's body was discovered. It was opposite house number 3/26 Casino Avenue, Malvern, Waterfalls, Harare. At the scene, he observed that the deceased's body lay facing upwards. His left leg was folded behind his back. He was bare-footed and bleeding from the nose. He also had bruises on the back. Part of a mutton cloth was tied to his left hand. Another part of

the same cloth was strapped on the right ankle. The indication was that the deceased's hands and legs had at one time been tied together before he managed to partly free himself. The officer said he searched the deceased but found nothing on the body. He then took the body to the mortuary Sally Mugabe Hospital.

Doctor Laurelien-Malagon Martinez

[10] He carried out the autopsy which determined the cause of the deceased's death. His conclusion was that the deceased met his death as a result of brain damage; contusive focus in occipital area and head trauma due to assault. There was no question therefore that deceased had died violently.

Regarding the viva voce testimonies, the prosecutor first called **Rumbidzai Olinda Matare**. It was crucial. Paraphrased her evidence was that: -

[11] Very early in the morning of 27 September 2022 she proceeded to Solani bus stop in Epworth. She intended to travel into town. In fact, she said it was before 0500 hours. She was in the company of a man called Tatenda who is a tenant at her house. They found Freedom Dzepete already at the bus stop. A black Honda fit then arrived. It had reg No. AFW 7354. Freedom got into the car but the witness said she remained standing outside the car waiting for Tatenda who had gone back to the house to collect his jersey. An occupant of the car was touting for passengers saying they were going to town. When Tatenda returned they both boarded the car. She said she sat on the front passenger seat where accused two already was. It made three of them in the front including the driver. She told the court that it was how the pirate taxis are loaded. It does not matter that there is only a single passenger seat in the front. Tatenda sat at the back together with Freedom and another of the accused. Apart from the three passengers, there were five occupants in the car. One of them was seated in the car's boot which is considered not as a luggage holding compartment but as extra seating space. The vehicle took off and travelled along Overspill dam until it got to the Quarry dam before Chiremba Road. Accused two then asked the witness to wind up the window. She complied but soon thereafter he told her that she and her colleagues had boarded the 'wrong' car. He added that their troubles had started because they had boarded a thugs' car. He immediately attacked her. She had two hundred and forty United States dollars in her bra. He assaulted her with bare hands. At Chiremba road the car turned towards Muza farm. The other assailants attacked Freedom and Tatenda at the back seats. They later also turned on her because she was

resisting. One of them took the witness's hands and held them from her back. Accused two then searched her entire body. He took the witness's phone, and another USD ten dollars from her bag. She looked at his face but he kept hitting her until the car got to Muza farm. Near a bushy area in the farm, the car pulled off the road and stopped. The assailants instructed them to promptly and silently disembark. The witness and her colleagues complied.

[12] The car took off in the direction of Harare City. Just after it left a commuter omnibus fortuitously approached. With their hands above their heads, they all ran on to the road. The omnibus stopped. They advised the commuter omnibus driver called Michael Zvoushe that they had just been robbed. He asked the terrified trio to jump in and he quickly took off in pursuit of the robbers. He called his friend who was driving a commuter omnibus ahead of his. He requested his friend to block the robbers' car. The pursuit continued. After some distance, Michael's friend managed to block the Honda Fit but the driver suddenly made a turn and proceeded towards a road called Glenwood. The two commuter omnibuses drivers did not relent. They followed into Glenwood until Domoboramwari.

[13] Michael's friend managed to finally fully block the Honda vehicle whilst Michael's bus was following close behind. The robbers were cornered. Some of them alighted and sped off on foot. The driver unfortunately couldn't get out of the car in time. When he did, the conductor of Michael's commuter omnibus tripped him down. Some of the residents in the area woke up because of the noises. They brought all sorts of weapons to attack the thugs.

[14] The driver of the Honda Fit was apprehended by Tatenda and the mob. That driver turned out to be accused one. He was taken into the bus to shield him from the irate crowd which was baying for his blood. He was sandwiched between Tatenda and Freedom.

[15] Michael drove the Honda fit which had been used for the robbery to Dombo police station. The driver had left the keys on the ignition. On arrival the witness said they literally dragged accused one into the charge office. There were other people who when the first accused was brought in equally pointed out that they had been robbed by him and his gang. They left the first accused with the police who asked them to return at 0800 hours.

[16] Herself, Tatenda and Freedom all later returned to the police station. When they arrived, the car was no longer there. When they enquired, they were told that the car belonged to a deceased person and that it had been taken by CID Homicide. It was only later that they were informed of the arrest of the other accused persons.

[17] The witness was very positive in the identification of the three accused. She said accused one was the driver of the car. Accused two was the one who had molested her and took her belongings. He was sitting closest to her. Accused three had been sitting at the back with the witness's colleagues. She said she vividly remembered the second accused's face because he was sitting right next to her. She had clearly seen him before the attacks started. They had travelled together for a considerable distance. In describing the attacks, the witness said the second accused banged her head against the car's left side of the dashboard, hit her with clenched fists and open hands forcing her to look downwards. She equally claimed to have seen accused three's face. She had observed him at the time her hands were held from the back. She could see his face from between the seats. Their ordeal had taken about twenty minutes. All in all, she lost two hundred and fifty US dollars and a cell phone to which she didn't mention any value.

[18] Under cross examination by counsel for accused one, Olinda did not flinch. She was adamant that she clearly observed the assailants. When she was asked how many people were in the car before they boarded it, she said there were about five. Those included the driver who is accused one, accused two whom she was sitting next to, accused three who was sitting with her colleagues in the back seat behind the driver and another one who was in the boot but who was not before the court. When it was put to her that the car was therefore already full by the time they boarded it, she said by pirate taxi standards it was not. She conceded that their assailants were all wearing caps except accused one the driver. It was further suggested to her that accused one was apprehended standing outside the car in the mob that had gathered and was not part of the robbers. Her answer was that the first accused was tripped as he opened the door to disembark from the car. He was the driver. She had seen and observed him from the moment she boarded the car. She added that although this happened before sunrise, visibility was already good. In any case, the inside of the car was lit by the car lights.

[19] During cross examination by counsel for accused two she admitted that she did not know any of the accused prior to the attack. She insisted however that she had taken a good look at all of them at the time she was outside the car waiting for Tatenda who had returned to the house to collect his jersey. The interior of the car was illuminated. In the car although the robbers wanted them to look away, they were foolish enough not to hide their faces. She maintained that she had had all the opportunity to observe accused two. She once more rubbished the suggestion that accused one was part of the crowd which gathered and said that the crowd came about five minutes after the accused had already been apprehended. Not much came from the witness's cross examination by counsel for accused three.

Freedom Dzepete

[20] His testimony was that on the day in question, he had gotten to the bus stop before 0500 hours. The sun had not risen. Whilst at the bus stop the black Honda Fit which was driven by the accused persons passed but soon made a U-turn and stopped. Like Rumbidzai, he said the occupants of the car were touting for passengers. He said he got into the car. He used the door on the rear right side and sat directly behind the driver. There were three men on the same seat but one of them immediately alighted and then jumped into the boot of the car. Two of the men remained on the rear seat. Rumbidzai later came into the car. She occupied the front passenger seat where there was the driver and another passenger. Tatenda came in last and sat with him and two of the robbers at the back. All in all, the witness said there were eight people in the car. That tallied with the number mentioned by Olinda Rumbidzai. It took off. About three hundred metres from Solani, they got to a place called Hoti. His phone rang and he answered it. Soon after answering it, the phone was snatched from him. Rumbidzai was at the same time being accosted. The sitting arrangement in the car had been that the two robbers on the back seat were on one side whilst the witness and Tatenda were on the other. But when the attacks commenced one of the robbers went and sat on Tatenda's left such that the two victims were sandwiched between their assailants. Freedom further described that he was held by the neck by the robber who was sitting in the boot. They demanded the passengers' valuables. They had no choice but to comply. He said he begged them to take away all the money but leave his identity card. Rumbidzai refused to give in. They assaulted her. The driver threatened that they would rape her if she didn't give them money. The car was headed towards Muza

farm. The robbers held the passengers' heads down so that they would not look at them. At Muza they were dumped outside and the muggers took off. Soon after they had been left, they rushed onto the road with their hands up.

[21] From there on he described the events in exactly the same way Rumbidzai Olinda had. There is therefore no need to recite all his evidence. The only notable additions were that the road into which the Honda Fit turned when it was blocked was littered with potholes. That significantly reduced the robbers' car's chances of evading the pursuers and led to the apprehension of the first accused. The witness also added that when he disembarked from the bus, he picked a brick and went after the robbers who were fleeing. The conductor of the bus also came out. The driver of the Honda fit wasn't fast enough. When he tried to come out of the car he was tripped and was apprehended. The chase of the others was however fruitless. The witness said when he returned a mob had gathered. The people in the crowd were agitated. The witness said he advised his colleagues that the robber they had apprehended could be attacked and killed if they were not careful. They put him in one of the commuter omnibuses and took him to Dombo police station. He confirmed the events at the charge office as stated by Rumbidzai. Accused one was the person he described as the driver of the Honda Fit car. They had taken him to Dombo in broad day light. The witness further stated that when he got into the car there was light and he noted the faces of the occupants. Accused 2 was seated in the front passenger seat. They were all wearing caps except the driver. The third accused was seated next to Tatenda. He added that the thug who had snatched his phone was not in court.

[22] Under cross examination by counsel for the first accused the witness emphasised that although it was around 0500 hours and the sun had not risen visibility had become clear and one could see for about fifteen to twenty metres away. In any case, he said there was a light which illuminated the interior of the car. He saw accused one's face clearly at the time that he turned around and instructed his colleagues to rape Rumbidzai for her resistance to hand over her valuables. He added that it was not true that accused one was a by-stander who was wrongly implicated in the robbery because when he (the witness) alighted from the omnibus the first accused was driving the Honda Fit. He had seen him drive it before and during the robbery. He had already been apprehended when the witness started chasing the fleeing

robbers. The witness said he had focussed on the fleeing thugs because his colleagues had already caught and subdued the first accused person.

[23] During cross examination by counsel for accused two the witness insisted having clearly observed the second accused particularly at the time he assaulted Rumbidzai. Because he and Tatenda had quickly submitted to the demands of the robbers, they were not assaulted. There had been light in the car all along. He said he had also observed and heard the voice of accused three because he was the one who touted for passengers when they boarded the pirate taxi. The witness was subjected to further cross examination by counsel for accused three but once again nothing significant arose.

Bester Chihuri

[24] He is a police detective. He interviewed the first accused after he was arrested and brought to CID homicide by police officers from Epworth on charges of robbery and murder. The first accused gave out his accomplices in the crimes as Chikonan'ombe who is Trymore Tirivavi (accused two), accused three David Mupandawana and Raymond Chirombo who is not before the court. With those names accused one led a team of detectives to a certain house in Epworth at which accused two was allegedly staying. He wasn't around when the detectives visited but they established that his real name was Trymore Tirivavi. On 24 November 2022 the witness said they received information that accused two was going to meet someone at Solani business centre. Prior to that tip off he said they had visited several homesteads but couldn't locate the accused. They had even visited the second accused's relatives in a suburb called Southlea Park. After receiving the intelligence, the detectives went to Solani shops around 1330 hours and waited for accused two's arrival. The wait lasted several hours but they were patient. Around 1900 hours accused two arrived. They immediately arrested him and whisked him to CID Homicide. He added that the officers had obtained the second accused's details from accused one and from one of accused two's relatives at the Epworth bouse they had earlier visited. That relative had also confided in them that the second accused person used to stay at that house but was nomadic. He hoped from one place to another. Accused one had pointed the house in question to the detectives.

[25] During the witness's cross examination by counsel for accused one he said that he established that that Chikonan'ombe was accused two but that his real name is

Trymore Tirivavi. Accused one had simply told him that he knew him by his moniker cum totem of Chikonan'ombe. A relative, Sharon Dhimbiri confirmed that Chikonan'ombe who resided at the house pointed out by accused one is Trymore Tirivavi. In addition, the first accused had also supplied accused two's phone number. Counsel then further suggested that the phone number had been forced out of accused one due to threats of torture and assault.

[26] Under cross examination by accused two's counsel, the witness admitted that at one time, the second accused had led them to a person to whom he had sold a stolen phone. It however turned out that that phone was not connected to the murder case under trial or the robberies directly linked to this case.

Moses Mangani

[27] He is a police officer based at CID Homicide in Harare. He was part of the team which investigated this murder particularly the arrest of accused three. He said the detectives were led to accused three's place by accused two. He took them to Mhondoro and pointed out accused three's residence. When the officers stormed the residence, they found accused three seated on the veranda of the house with his wife. They identified themselves and advised him that they were investigating a murder case in which it was suspected he had participated. He did not resist arrest. They took him to Harare. They decided to take accused two to Mhondoro because from their investigations, he was related to accused three in that they were half-brothers as having been born of the same mother.

[28] Counsel for accused one chose not to cross examine the witness. When quizzed by counsel for accused two with the suggestion that both accused two and three resided in Mhondoro and not Harare the witness said it was true that the two grew up together in Mhondoro. From their investigations accused two had come to Harare first. He rented a house in Epworth where he then invited his brother accused three. When accused one was arrested, he divulged that his accomplice was Chikonaz which was an alias for accused two. It led the detectives to accused two's rented property in Epworth. Under cross examination by counsel for accused three the officer denied that they were investigating a case of possession of drugs against either accused two or three because the homicide section does not investigate drug cases. The ZRP has a specialised unit that deals with such cases. Their domain is homicide.

Tatenda Besamu

[29] As already stated, he boarded the same Honda Fit with Rumbidzai Olinda and Freedom. He described the events in exactly the same way as the other two witnesses. He added that he lost a *techno spark 7* cellphone, a smaller *itel* phone, sixty-two United States dollars cash and a black cap. It is important that we also indicate that the witness was equally emphatic that accused one was the driver of the Honda Fit whose occupants robbed them; that when that car was chased down and the chase ended, accused one had tried to alight from that car but was tripped and apprehended by the conductor of Michael Zvoushe's omnibus. The witness said he was right at the scene when this occurred. He assisted by holding the first accused's legs. Freedom ran after the other fleeing robbers. He added that visibility was good at the time because it was almost daybreak. They had boarded the car around 0500 hours. It had taken them about forty-five minutes to travel from Solani up to the point accused one was apprehended.

Douglas Makoni

[30] He was the investigating officer. He is an experienced detective. He also led the team which conducted indications with the accused persons. All the accused participated in the indications. Accused one made the indications in March 2023. Accused two and three did so in September 2023. Accused two and three made the indications one after another because they were arrested at the same time. Before commencing the indications, the officer said he had properly warned the accused persons that they were not compelled to make the indications and that they could only do so freely and voluntarily. In the end, he was satisfied that their participation was free and voluntary. He assembled a team of five officers. Accused one pointed a place near Zuva service station along Machipisa road from where they took control of the deceased's vehicle. He led the detectives to the corner of Malvern and Casino roads in waterfalls where he once more pointed the position at which they had dumped the deceased. The police got to those places at the direction of the first accused.

[31] In respect of accused two the indications commenced at ZRP Machipisa. He led the officers to a place near Glen Norah C community hall from which he said they had taken charge of the deceased's car. He further led them to an area in waterfalls along the new Mbudzi round about road. He pointed a place where the deceased's body was dumped.

[32] Accused three did not indicate any place. His indications commenced and ended at ZRP Machipisa as he never left the station. He appeared not conversant with directions in Harare. The officer said he found from his investigations that the third accused's visits to Harare were infrequent. The witness added that although he wasn't part of the team which had recovered the deceased's body, from the information he had the second and first accused persons pointed at different places from that where the corpse of the deceased had been recovered although the places were close to each other. He disputed the suggestion that the indications were induced by duress. He said there was no reason for his team to force the accused to make indications because they were not the team which was investigating the murder. It was the job of other officers.

Marshal Mwedziukawara

[33] He was the investigating officer in the case. His evidence was that the deceased's body was recovered at corner Malvern and Casino roads in waterfalls Harare. When he visited the scene, the body had already been removed. He was aware that some of the accused had later made indications. He said accused one pointed out a place close to where the body had been recovered but accused two had pointed a position about two kilometres away. From his investigations and calculations, the deceased must have been murdered between 2100 hours on 26 September 2022 and 0900 hours on 27 September 2022. The variances in the places indicated by the accused attest to the fact that the indications had not been forced upon them. If they had been, they would have led to the same outcome which the police desired. He added that it was not the indications which linked the accused to the commission of the offence but their possession of the deceased's car. He refuted the contention by the first and second accused that they had advised him that they were not in Harare at the time of commission of the crime. They had never advised him of that fact at the time of their arrest.

[34] The investigating officer corroborated the evidence of the other police details that after his arrest, they had taken accused one to Epworth because he had advised them that he knew where Chikonaz resided. He pointed out Chikonaz's house. The detectives went into the house. Although they could not find Chikonaz one Anesu Dimbiri and Chikonaz's sister called Sharon Dimbiri were present. At first the detectives thought Anesu was the person called Chikonaz. He however produced his

identity card to prove who he was. He said he knew the Chikonaz they were looking for because he was his brother. He advised them that Chikonaz's real names were Trymore Tichaenda Tirivavi. The detectives were not convinced and took Anesu to the car where accused one was. They asked accused one whether Anesu was Chikonaz but he said Anesu wasn't Chikonaz. In turn Anesu confirmed that accused one was friends with his brother meaning accused two. It was from that episode that the detectives became convinced that accused two was the person who used the nickname Chikonaz and was the person that accused one alleged to be his accomplice.

[35] With the evidence of the investigating officer, the prosecutor was done calling oral testimonies. He requested the court to expunge the evidence of Michael Zvoushe from the summary of the state's evidence because the police had failed to locate him. None of the counsels for the accused persons objected. The evidence was duly excluded. In addition, the prosecutor asked for permission to produce the autopsy report which detailed the cause of the deceased's death. It was once more unopposed and was admitted as exhibit one in the trial. Soon thereafter he closed his case.

The Defence Cases

Godfrey Marowa

[36] He maintained his story as stated in his defence outline. He said on the night of the alleged murder he was asleep at a house in Epworth. Ordinarily, he stays in Bindura at Plot No. 41 Dundry Farm Matepatepa. He had left Bindura on 13 September 2022 coming to Harare to buy plastics for resale. He had spent that day in the city centre buying plastics. He said he went back to his sister-in-law's place in Epworth at the end of the day. On 14 September 2022 he left his in-law's place intending to go into town. Unfortunately, he was involved in a road traffic accident. At first, he thought he had not been injured although he was feeling weak. He went back to his in-law's house. After a few hours the pain intensified. The sister-in-law contacted the accused's wife who was in Bindura. She came to Epworth that evening and took accused one to Chitungwiza hospital from where he was referred to Parirenyatwa hospital. He stayed in hospital until 29 September 2022. After his discharge he went back to his in-law's place. On 27 August 2022 he said he left his in-law's place around 4 am intending to go and seek treatment at Chitungwiza. On his way to catch a bus, he saw two cars coming from the opposite direction. When they got close to where he was, they stopped. People streamed out, running in all directions

from the vehicle which was in front and the others which were behind. The people from the second vehicle approached him and apprehend him alleging that he had stolen from them. He said he tried to explain where he had come from and where he was going but they didn't believe it. They took him to the police at Dombo accusing him of robbery.

[37] The next morning, he said he was transferred from Dombo police to Waterfalls police. From there he was taken to Harare Central police station. Murder charges were preferred against him. He was assaulted and forced to disclose his accomplices in the commission of the crime. He pointed out a house in Epworth where it was written Chikonaz although he knew nobody at that place. He said he knew nothing about the murder; had not participated in the alleged robberies and had not been found in possession of the deceased's car. He admitted that he had gone to Epworth with the police but it was not true that there was a person who had said he knew him. He had not implicated either of his two accused persons in the commission of the crime. He could not drive because he didn't have a driver's licence.

[38] During cross examination by the prosecutor, the first accused said that the accident from which he was injured involved a commuter omnibus and a private car. It occurred at the corner of Nelson Mandela and 2nd streets. He could not explain however why that detail was missing from his defence outline. He once more insisted that he was admitted into hospital from 14 September 2022 to 29 September 2022. The prosecutor took him head on in cross examination. He asked him why he had not disclosed his alibi to the police at the time of arrest among many other issues. After token questions in cross examination by counsels for his co-accused, the court sought to clarify something which appeared confusing from the first accused's testimony. The accused could not possibly have been in hospital on 27 September 2022 but he insisted he was. He argued that he had been apprehended in Epworth on 27 August 2022 and not 27 September 2022. He had no record to prove his hospitalisation. He had no police report to show that he had been involved in the accident he claimed. Much as he wasn't expected to prove his innocence, he did not call anyone to vouch for his alibi. We will later return to deal with this and other issues.

Trymore Tichaenda Tirivavi

[39] He said on 26 September 2022 he was at his rural home in Mamina, Mhondoro. His story was that on 24 November 2022 he left Mhondoro around 1500

hours headed to Solani shopping centre in Epworth. His business was to sell Marijuana to his customers. He got arrested there on his arrival. He had just sold his marijuana and remained with a little. At the time they did not inform him of the reason for his arrest. They simply indicated that they were police details. They searched his bag and recovered some dagga. He explained that he had come to sell the dagga to his regular customers. He said he inquired from the police whether they did not have other mechanisms to spare him the arrest. The officers said they wanted a bribe of six-hundred dollars. The second accused said he didn't have such money on his person but could only get it at his home in Mhondoro. The officers agreed to take him to Mhondoro for him to get the money and at the same time to conduct more searches for dagga at his homestead.

[40] We note the contradiction in his evidence. It would not have been necessary for the police to search his house if all they wanted was the bribe money. He went on to say, from Solani, they took him to Harare Central police station. He was lodged into the cells where he spent the night. The next day in the afternoon they left with him for Mhondoro. On arrival, they found accused three who is his brother at home with his wife and children. The police got into the house and started searching. Unfortunately, accused three had spent the money which accused two hoped to use for the bribe on buying fertilisers as it was during the farming season. Accused two had no choice but to tell the police that the money he had promised them had been used. They became angry. They came out of the house in which he slept with more dagga. It amounted to about 25 kg. They accused both him and accused three of growing dagga and that he was also under arrest. Both were taken to Harare police station. Along the way the police accused them of having taken them to Mhondoro for nothing. At Central they were locked up. The next morning, the second accused said he was forced to sign some documents with information that he had no knowledge about. He had not read the information. He was in pain and ended up signing the papers.

[41] At court, he however told the truth of what he knew. He denied that he ever stayed at 530 Muguta in Epworth. He denied knowing the first accused prior to their first court appearance. He had not at any time stayed in Southlea Park. His only names were Trymore Tichaenda Tirivavi and the name Chikonaz was not his. He alleged that he neither knew Anesu nor Sharon.

David Mupandawana

[42] He said he stays in Mamina in Mhondoro Ngezi. On the day of the alleged murder and the subsequent robberies, the third accused said he was in Mhondoro engaged in his brick moulding venture all day. In the evening, he was asleep at his home with his wife and children. He refuted having any relatives in Epworth but admitted that accused two was his brother. At the time that he was arrested he was at home with his wife. The police arrived and demanded money for the release of accused two who had been arrested for possession of dagga. They went into the house and searched the rooms. From accused two's room they came out with dagga weighing about 25kg. They told him he was also under arrest for cultivating dagga. Both him and accused two were later taken to Harare and lodged in cells. The next day they were taken into some office where he was shown some document which he didn't understand. He was ordered to sign it. The police threatened that he would be killed if he refused to sign. They were eventually taken to court where he denied the charge. He admitted that he knew that accused two was into the business of cultivating mbanje before his arrest. He disowned the indications which the police alleged he made. He was not familiar with Epworth although he often came to Harare to buy clothes for his children.

[43] All the three accused persons did not call any witnesses to support their cases. They each closed their cases soon after giving their testimonies.

The Issues

[44] The accused are charged with the crime of murdering the deceased. No one saw how the deceased was murdered. There is no direct evidence that any of the accused committed that crime. The evidence available is that they allegedly staged a robbery in the morning of 27 September 2022 after giving a lift to the victims of that robbery. It is not in doubt that the robbers in question were using the deceased's car. So, the only issue which the court must determine in this case is whether the accused persons were in possession of the deceased's car. If they were, whether that sufficiently links them to the commission of the murder.

[45] The evidence relating to each of the three accused in the commission of the robberies in question is slightly differentiated by the circumstances of their arrests. But as will be shown, the identification of the accused by the witnesses seems to be an open and shut issue.

The Law on Identification

[46] The law relating to identification is fairly straight- forward. It is that when identification is good, no corroboration of it is required. But when it is poor some corroboration will be required. See the cases of *S v Nkomo* 1989 (3) ZLR 117 (S) and *S v Dhliwayo and Anor* 1985 (2) ZLR 101 (S) in which DUMBUTSHENA CJ held that:

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

[47] I take it from the above authorities that it is possible for a witness to be honest but at the same time mistaken about the identity of a person accused of crime. The factors enumerated for consideration above therefore play a central role in testing the reliability of a witness’s evidence of identification. In reality the gravest danger in identification evidence relates to the fact that it comes from witnesses who are honest, convinced and certain about their identification yet they still remain mistaken. Their testimony can easily convince the court because of the honesty behind it. To guard against that the court must be aware that the accuracy of that type of evidence cannot and must not be measured by resorting to the usual assessment of a witness’s credibility. Rather the court must rely on the assessment of other issues.

[48] The Canadian Court of Appeal case of *R v Atfield* [1983] AJ. No. 870 emphasised this aspect when it said:

“In cases where the criminal act is not contested and the identity of the perpetrator is the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. The correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavourable, or supporting evidence is lacking or weak, honesty of the witness will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe...”

Application of the law to the facts

[49] In this case, there is no questioning the honesty and credibility of the three victims of the robbery as already stated. But as cautioned, that on its own is not enough. What we find important here is that the three witnesses all had extensive

opportunity to observe their abductors. It is particularly critical that the observations started before the attacks commenced. Rumbidzai Olinda said she waited outside the car in full observance of the first accused and the other robbers for about five or six minutes. She later got into the car and sat rubbing shoulders with accused two. She looked accused two right in the face when they conversed and before he subdued her. In fact, she resisted his commands to look down when he started attacking her. Freedom and Tatenda actually considered it dangerous that she continued resisting. Despite the danger she was subjecting herself to, it remains a fact that she took time to observe the second accused. He spoke and they all heard his voice. They all saw what he was wearing. The first accused was the driver. Given the size of the car described as a Honda Fit which the court takes judicial notice of there is no denying that the best description of the distance between the first accused from Rumbidzai Olinda is that they were just sitting together. There was a light which illuminated the inside of the car. It was daybreak outside and as said by the witnesses one could see for a distance of fifteen to twenty metres. Equally, the first accused also spoke when he directed his colleagues to rape Rumbidzai Olinda if she continued resisting. His fate is sealed by his arrest at the crime scene. He was arrested whilst trying to get out of the car. He was slower than his colleagues in escaping. That sluggishness may be explained by the injuries he had on his body. He had extensive stitches on his abdomen. He showed them to the court. His explanation for how he sustained the injuries is what further exposes him and betrays his defence as a false narrative.

[50] The first accused claims to have been involved in a road traffic accident and that he was subsequently hospitalised. The dates on which he alleges that detention in hospital do not make sense. He said that it was from 14 September 2022 to 29 September 2022. He further argues that he was arrested on 27 August 2022. We conclude that this does not add up because when he was arrested, he was already injured. Everyone associated with the arrest except him is agreed that the first accused was apprehended on 27 September 2022. He could not therefore have been detained at Parirenyatwa Hospital. In any case, the deceased had not yet lost the car which the first accused was allegedly found driving. The deceased was still alive then.

[51] We are aware and accept that the accused has no responsibility to prove his innocence. The state must prove his guilt. But when an accused proffers a defence, at the very least, he must lay a basis, a foundation for that defence to stick. In his case,

the first accused merely mentions the accident but everything else he said thereafter trashes that averment. He did not produce even the most basic document to prove his hospitalisation. He could not even show the court a police report or any other document showing his involvement in a road traffic accident which would have shifted the onus to prosecution to disprove the defence. He portrayed himself as a bystander at the time he was arrested. He said he was going to seek medical treatment. He must have been carrying medical cards given that he had just been released from hospital and was going for review. He had previously been treated at Parirenyatwa but said he was going to Chitungwiza. The expectation would have been that if he was going for review then it would have been at the same hospital where he had been treated unless there is something he did not advise the court.

[52] The same goes for his and the other two accused persons' defence of alibi. As it is currently formulated, the defence of alibi appears in the dicta of MCNALLY JA in the case of *State v Musakwa* 1995 (1) ZLR 1 at p 3 D-E, where he remarked that:

“What no-one seems to have realised is that the defence raised was that of an alibi. The appellant was saying that he had only just arrived when he was accused. So, he was not there when the confidence trick was set in motion. The appellant said so right from the beginning. So why did the police not check whether he was being truthful... Why did they not check how long it takes to walk from there to the spot where the offence was committed... The court should have been alive to the importance of these matters.”

[53] The essence of the defence is simple. An accused alleges that he could not have possibly committed the crime because at the time it was committed, he was at some other place away from the crime scene. This court has previously bemoaned the ease with which that defence can be raised. I described it in the case of *S v Ashton Tadiwanashe Mandaza* HH 116/24 as a low hanging fruit for those charged with crimes because as it stands all that an accused needs to say is that he/she was at some other place and no more. The requirement that the prosecution must be given prior notice where such defence will be raised is not part of our law. We believe once more, that it is high time that such progressive measures are brought into our law to ensure that the interests of justice are not jeopardised.

[54] It is indisputable that where the accused's defence is that of an alibi, the police are required to investigate that alibi. It equally follows that the prosecution bears the same responsibility. The truthfulness or otherwise of that defence must be interrogated. More importantly, the alibi is the accused's defence. The police or

prosecution cannot second guess its existence. The accused must right at the time that he/she is arrested disclose his/her alibi to allow the police time and opportunity to investigate it. Maintaining silence over the issue in the hope of ambushing prosecution and leveraging on the non-investigation of the alibi at trial is self-defeating. Granted that the accused is not disbarred from raising the defence at his trial but it comes at a cost. The Supreme Court of Canada seems to have settled that issue in the case of *R v Clerghorn* [1995] 3 SCR 175 where it held that:

“The requirement that disclosure of an alibi defence be made is one of expediency, not of law. If the police are not given adequate notice to allow for an investigation of the alibi, the trial judge may draw a negative inference given the potential for fabricating alibi evidence...Disclosure need only be made in sufficient time for the police to be able to investigate...”

[55] In addition to early disclosure, the expectation is that an accused will proffer sufficient detail about his/her alibi. He/she must disclose the location, the persons he alleges to have been with, the times he alleges to have been at the alibi location and any other records such as entry logs into particular places, cellphone records, passage of vehicles through tollgates among others which may show that indeed he was at that location at the relevant time. A bare statement at the late stage of giving his/her defence outline would need to be supplemented by other cogent evidence for it to be credible and assuage the bruises inflicted by the failure to state the alibi at the time of arrest.

[56] In this case, the evidence we have is that none of the accused disclosed his alibi at the time of arrest. The police could not have possibly investigated the alibis without knowing about them. As is clear for instance, even at this late stage, accused one presents a muddled story. In one breath he alleges that at the time of commission of this offence he was asleep at his relative's home in Epworth whereas in another he argues that he was admitted in Parirenyatwa hospital for treatment after sustaining injuries in a road traffic accident. That confusion simply supports the police's assertion that he did not disclose any alibi at the time of his arrest. The inevitable conclusion is that he ambushed prosecution with it at trial. He was therefore required to do more than just state it. He was expected to at least show the court his records of admission at the hospital or call his relatives to support his claim of having been asleep at home in Epworth at the relevant time which in turn has its own challenges. The offence was committed in Epworth at a time the first accused admits to having

been in the same location. The alibi claim does not therefore help him in any way. We deal with the accused's case in other paragraphs of this judgment where in equal measure we show the incredulity of the accused's defence and illustrate that it is palpably false.

[57] We have already said the second and third accused's alibis are afflicted with the same ailment. They equally didn't disclose them to the police at the time of their arrest. Both of them alleged in their evidence to making warned and cautioned statements. We believe if their claims were genuine, the alibis would have appeared in those statements. It was a question of just producing them in court to show that the police deliberately did not investigate the alibis. Once again, elsewhere in this judgment we illustrate that the second accused frequently stayed in Epworth and that he occasionally invited his brother to join him. It puts paid to both their alibis.

[58] It is on the background of the corroborated evidence of identification by the witnesses and the apparent incredulity of the first accused's story that we find that his defence is not only unreasonable but palpably false. If he had been charged with the offence of robbing his victims, we would have convicted him of that crime without much ado. It was proved beyond reasonable doubt that he committed it. But he was not.

[59] Robbery is not a competent verdict of murder. We are not sure why the prosecutor chose to ignore the crime of robbery which was apparent from the facts of the case. Most of the witnesses' testimonies had nothing to do with the murder but proved the robbery. Our hope is that the accused are still facing that charge in the Magistrates' Court. Much as prosecutors are *dominus litis* and are free to choose when and in which court to prefer charges against an accused, in instances like this one it is not only more effective but also convenient for witnesses to come to one court and testify in one session rather than to give the same evidence in instalments where in one breath the state seeks to prove a murder and in the other it attempts to prove robbery. We hope that some prosecutors do not labour under the mistaken belief that the High Court only tries murder cases.

[60] That aside, it suffices to state that we are in no doubt that the first accused participated in the robberies in Epworth and was found in possession of the deceased's car.

[61] We have equally dealt with the identification of accused two above. In relation to accused three, Rumbidzai Olinda alleges that she saw him among the robbers in the car. Her identification of the third accused was rather poor because she said she saw him through between the seats when he was grappling with her colleagues in the back seat. But that poor observation found sufficient support from Freedom and Tatenda. They both sat with the third accused in the back seat. Freedom had gotten into the car earlier as they waited for Tatenda to return. He said that it was the third accused who touted for passengers. He observed his facial appearance. He could clearly see the face because the third accused had his head out of the window. He was illuminated by the lights at the shopping centre. Although they were brawling and he must have been afraid, they travelled together for a considerable distance. The witnesses had ample time and opportunity for observation in an environment where the interior of the car was illuminated and the accused's faces were exposed.

[62] Both accused two and three's cases are made more damning by events which followed. After their alleged escape from the scene, the police did not stop investigating. It turned out that they stumbled upon further evidence. Accused one revealed that he had committed the offence in the company of accused two whom he knew as Chikonaz and his younger brother whose name he did not know. That to me and to everyone else amounted to a confession. It is so because it is a statement which incriminated accused one. He made it out of court to a police officer who is a person in authority. Ordinarily that would be a statement inadmissible against the second and third accused persons in terms of s 256 of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CP & E Act). But any apprehension is removed by what followed. The state does not seek to crucify the two accused on the basis of the utterances made by accused one. Instead, the prosecutor contends that the two are annexed to the Epworth robbery by what the police discovered after they were led to number 530 Muguta, Epworth by accused one. There the police discovered that Chikonaz was Trymore Tirivavi. It was nickname. They also discovered that the second accused used to stay there; that his relatives Anesu and Sharon were still staying at the premises. They also discovered that Anesu was known to accused one. Those discoveries connected accused one and accused two.

[63] The admissibility of those discoveries is a non-issue if resort is had to s 258 of the CP & E Act. The provision appears to place indications into a special category of extra curial statements. It provides that: -

“258 Admissibility of facts discovered by means of inadmissible confession

(1) ...

(2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or **that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial**” (Bolding is for emphasis)

[64] Broken down, s 258 simply means that where the police discover a fact or a thing as a result of information they would have obtained from an inadmissible statement by an accused, such fact or thing discovered shall be admissible in evidence. It is immaterial that the police obtained further evidence as a result of an accused’s inadmissible confession. That evidence remains admissible. What is not is the confession itself which can only be used against the maker pursuant to the fulfillment of all the prerequisites and the other considerations outlined in s 274 of the CP & E Act. In this case, accused one pointed out a house in Epworth where it was alleged that accused two resided. The police discovered as a result that indeed accused two lived there. That discovery is admissible. They further discovered that the people who resided there were related to accused two. That again is admissible. See the case of *S v Tafadzwa Shamba and Anor* HH 396/23.

[65] It was from the above information that the detectives waylaid and arrested accused two when he returned to Epworth to sell marijuana. We are not raising these issues to say because of that then the accused persons are guilty of murder. The point we make is that proving the relationship between the second and third accused persons on one hand to the first accused on the other corroborates the stories of the three robbery victims that when that crime was committed, they identified the three accused as part of the gang that perpetrated it. It is certainly not a coincidence that the witnesses said that they saw and identified all the accused during the robbery and that it turned out that the accused were known to each other; it is equally remarkable that accused one pointed out a house where he said his co-accused used to reside and it turned out that that same person is the one that the witnesses alleged to have robbed them. Needless to state, accused two then led to the arrest of accused three. He too happened to have been identified by the witnesses as described earlier. In our view,

such scenarios must be added to the list of factors stated in *S v Nkomo* (*supra*) which corroborate evidence of identification.

The Accused's recent possession of the deceased's car

[66] Proof that an accused person was caught in possession of property recently stolen may be used as incriminating evidence suggesting that he/she was either the thief or the receiver of the property. To rebut that presumption, the accused is required to give a reasonable explanation of his/her possession of the recently stolen property. If he/she fails to give an explanation at all or gives what in the court's view amounts to a cock and bull story the court is then entitled in the absence of a reasonably possible account, to draw the inference that he/she either stole it or received it knowing that it had been stolen.¹ As can be seen, it may be misleading to call this principle the '*doctrine of recent possession.*' I draw that conclusion because it appears the issue has got nothing to do with recent possession. Rather it has everything to do with possession of recently stolen property. It is only if it is viewed from that perspective that it could be understood better. See the case of *R v Abramovitch* [1914–15] All ER 204.

In Zimbabwe and other Roman- Dutch jurisdictions the doctrine has been explained in several authorities. For instance, the case of *Nollan Kawadza v The State* HH 5/06, approved the dicta in *S v Parrow* 1973 (1) SA 603 (A) where HOLMES JA said: -

“I pause here to refer briefly to the so-called doctrine of recent possession of stolen property. In so far as here relevant, it usually takes this form. On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which might be reasonably true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property. (Whether the further inference can be drawn that he broke into the premises in a charge such as the present one will depend on the circumstances). The onus of proof remains on the State throughout. Hence, even if after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so for the law demands proof beyond reasonable doubt.”

In the case of *S v Saymore Dzimauta* HH 202/24, MUNGWARI J agreed that on the reasoning in *Nollan Kawadza* it could not be disputed that when it was formulated, the doctrine was intended to cover cases of theft and those of receiving

¹ https://www.judcom.nsw.gov.au/publications/benchbks/criminal/recent_possession.html

stolen property knowing it to have been stolen only. She also noted that in *Nollan Kawadza UCHENA J* (now JA) had properly reasoned that there was no reason why the concept could not be extended to cover instances of robbery in as much as it covered cases of housebreaking with intent to steal and theft which has since evolved in our law to become the crime of unlawful entry into premises in aggravating circumstances. To UCHENA J the issue was simply whether or not the evidence of recent possession proved that the accused is the thief? If it did, and the stealing was during a robbery, then it will have been proved that he was the robber just as such evidence can be used to prove that the thief is the housebreaker. In *Dzimauta (supra)* HER LADYSHIP took that matter further and categorically found that on the same basis the rule was elastic enough to apply even to cases of murder. In the case of *The State v Lucky Sibanda* HB 106/22 DUBE - BANDA J was of the same persuasion when he said:

“The doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property stole such property. If he cannot give an innocent explanation of his possession then the inference that he stole the property becomes the only reasonable inference that can be drawn from such possession. In other words, recent possession can be used to anchor a conviction if the court after sifting through the whole evidence before it finds that the only reasonable inference which can be drawn from the recent possession is that the accused stole the property. Our view is that this doctrine can be used in a case of murder committed in the course of robbery, as in this case.”

[67] I fully agree with all the learned judges’ observations and findings. I wish to add that in Zimbabwe whilst this rule used to be a common law principle it found its way into our statutes at the time that the bulk of the criminal law was codified. ZISENGWE J observed as much in the case of *Cephas Makaripe v The State* HMA 11/23, where commenting on the doctrine of recent possession, he remarked that:

“Although this doctrine has its origin in the common law it has since found its way into the Criminal Law (Codification and Reform) Act, [Chapter 9:23].” (the Code)

Section 123 of the Code provides that:

“123 Recent possession of stolen property

(1) Subject to subsection (2), where a person is found in possession of property that has recently been stolen and the circumstances of the person’s possession are such that he or she may reasonably be expected to give an explanation for his or her possession, a court may infer that the person is guilty of either theft of the property or

stock, or of receiving it knowing it to have been stolen, whichever crime is more appropriate on the evidence, if the person

(a) cannot explain his or her possession; or

(b) gives an explanation of his or her possession which is false or unreasonable

(2) A court shall not draw the inference referred to in subsection (1) unless the circumstances of the person's possession of the property are such that, in the absence of an explanation from him or her, the only reasonable inference is that he or she is guilty of theft, stock theft or receiving stolen property knowing it to have been stolen, as the case may be."

[68] To me there is no difference between the common law and the statutory essence of the doctrine except that the statute added stock theft to the list of offences to which the principle must be applied. Stock theft, although separately provided for in the Code remains a species of the crime of theft. That however is not important. What I think is crucial is the addition I wish to make to the position reached by this court in the cases of *Nollan Kawadza*, *Saymore Dzimauta* and *Lucky Sibanda*.

[69] The addition is that the doctrine is not a standalone concept in the law of evidence but simply a part of the principles of circumstantial evidence. Its application in murder cases cannot and does not directly lead to conviction like it does with cases of theft or receiving stolen property knowing it to have been stolen.

[70] My view is that, there are two separate inquiries which must be undertaken. The first is the ordinary one where an accused found in possession of recently stolen property in circumstances where he is reasonably expected to give an explanation, is required to explain his possession of the property. If he fails to give any explanation or his explanation is false or unreasonable, the court then draws the inference that he either stole the property or received it knowing that it had been stolen. If that is established the fact that the accused stole the property in circumstances where the owner or custodian of the property was murdered is circumstantial evidence that the accused was the murderer. To summarise these arguments, my conception is simply that an accused cannot be convicted of murder on the sole consideration that he/she was in possession of recently stolen property because it is a principle applicable to theft, stock theft and receiving stolen property knowing it to have been stolen crimes. To work in the resolution of murder cases, it must be cojoined to the principle of circumstantial evidence.

[71] Once regarded as such, there can be no argument that being found in possession of property which was recently stolen can be stretched and used in the

resolution of more offences than those indicated in s 123 of the Code including the crime of murder. The only requirement for that extension is that a theft or a robbery (which in addition to the use of violence or threats thereof obviously comprises of all the essential elements of theft) must have occurred during or after the commission of the principal crime preferred by prosecution.

[72] We have already said the principle revolves around possession of recently stolen property. Besides the general explanations on how the principle operates and must be applied in this jurisdiction, it appears there is no clear definition of the term *possession of recently stolen property*. It is therefore necessary to interrogate what it means that property was recently stolen; what is meant by being in possession of the property; what is a reasonably possible explanation and in what circumstances may an inference of guilt be drawn? I begin with the first question.

Recently Stolen Property

[73] The Oxford Languages Dictionary ² defines the word recent as meaning:

“having happened, begun, or been done not long ago; belonging to a past period comparatively close to the present.”

Its synonyms are new, latest, current and contemporary among others. I discern from that meaning that when considering if property was recently stolen the period which has lapsed between the time it was stolen and when it was recovered in the possession of the accused is critical. If the period is long, it may afford the accused a variety of explanations whose reasonableness cannot easily be discounted. The nature and the value of the property stolen becomes equally important. Those considerations are key because they inform a court on whether or not it can be expected that the accused came to be in innocent possession of the property so soon after it was stolen. For instance, common items can change hands rapidly and possessors or purchasers can quickly forget how and where they acquired them.

[74] In the case of *S v Chitsinde* 1982 2 ZLR 91 GEORGES JA held that where the prosecution seeks to rely on the doctrine of recent possession to prove an allegation of

² [https://www.google.com/search?q=recent+meaning&og=recent+mea&gs_lcrp=EgZjaHJvbWUqBwgAEAAYgAQyBwgAEAAYgAQyBggBEEUYOTIHCAlQABiABDIHCAMQABiABDIHCAQQABiABDIHCAUQABiABDIHCAYQABiABDIHCACQABiABDIHCAgQABiABDIHCAkQABiABKgCCLACAQ&sourceid=chrome&ie=UTF-](https://www.google.com/search?q=recent+meaning&og=recent+mea&gs_lcrp=EgZjaHJvbWUqBwgAEAAYgAQyBwgAEAAYgAQyBggBEEUYOTIHCAlQABiABDIHCAMQABiABDIHCAQQABiABDIHCAUQABiABDIHCAYQABiABDIHCACQABiABDIHCAgQABiABDIHCAkQABiABKgCCLACAQ&sourceid=chrome&ie=UTF-;);

theft the nature of the articles stolen affects what is meant by 'recent.' If the article is one which would easily pass from one person to another in a short time, it may not be possible to draw the inference that the accused was the thief. He added that for instance possession of a pair of trousers some ten and a half months after they were stolen would not allow the doctrine to be invoked but possession of a television set three and half months after its theft would.

[75] In *R v Mandele* 1929 C.P.D. at paragraph 98 GARDINER JP held as follows:
“Everything depends on what is recent and recent possession must vary very much with the nature of the articles stolen.”

[76] In the case of *R v Smale* (15/8/86, NSWCCA) police officers found a stolen car in the accused's garage five months after it had been stolen. The Court of Criminal Appeal held that the five months were well within the concept of recency. The court added that in cases of motor vehicle theft the gradation or standard of recent possession is not expected to be nearly as close as that in the theft of more common items such as bank notes. It emphasised that the meaning of 'recently' must not be equated to that of "very recently" except in cases where the nature of the property itself demands so.³

[77] There is usually no difficulty in relation to situations where the property is recovered from an accused either instantly or very shortly after the theft such as where the accused is apprehended at the crime scene or just after leaving it. Complications arise where a considerable period would have passed. It is in such scenarios that courts are admonished not to prescribe any yardstick but to recognise that each case will depend on its own circumstances. All the considerations are intricately tied to the explanation given by the accused. The circumstances under which the accused was found in possession of the property must be explored. It is not safe to convict an accused solely on the basis of his/her possession. A court must weigh whether or not it is possible that the accused could genuinely forget the circumstances under which he/she obtained the property.

The property was in the accused's possession

³ See also the case of *R v Mahoney* (2000) 114 A Crim R 130

[78] Granted that Possession is a very nebulous concept. That imprecision stems from the fact that it does not have a fixed definition. In the case of *Simon Chimbo v The State* HH 56/15 HUNGWE J (now JA) discussing possession remarked that:

“The typical definition of possession equates possession with ownership, but generally speaking the legal definition of possession is much broader than that. There are two facets of legal possession; the one that most closely equates with the dictionary definition is known as actual possession. This is when the accused is in physical contact with the object which forms subject of possession; for example, when the accused has the dagga in his pocket or some such contraband in his hands or bag next to him. The second type of possession is called constructive possession. This is the legal tenet which covers instances where an accused can be held to possess something which is under his or her control even if that object or thing is not in his immediate possession. Here, knowledge of the thing and control of that thing will largely determine whether at law a person can be said to have possessed that thing. Thus, one can be charged for illegal possession of dagga where the dagga is found in one’s motor vehicle boot and at the time the driver was outside the vehicle.”

In *R v Jeremani* 1968(2) RLR 236 the High Court held that courts must always be wary that the doctrine of recent possession may be of doubtful application in certain circumstances. In order to lay a foundation for its application, there must be clear evidence of the precise locality of where the property was found.

[79] Once again, the authorities demonstrate that possession is dependent on the circumstances of each case and the nature of the property involved. I therefore do not conceptualise any difference between what prosecution needs to prove in cases of possession such in possession of dangerous drugs and possession relating to recently stolen property. The prosecutor must establish some form of physical possession or control over the property. Where the property is in the accused’s actual possession, the state’s burden is lightened. But where possession is imputed on the basis that the accused had control of the property a lot more may be required. To control means to be in charge; to manage; to direct; to steer; to command; dominate or to reign over among many other definitions. It should suffice therefore that although he was not in physical possession, an accused had control of the property in the senses that I have highlighted above. As such where the stolen property was in the possession of a person over whom the accused had sufficient control or with whom the accused had a relationship and it is shown that he/she was in control the application of the doctrine may be triggered. To illustrate the principles, it will be sufficient proof of possession where for instance, an accused is apprehended driving a stolen vehicle. The same

reasoning would however apply where a stolen motor vehicle was found parked in the accused's premises or garage where it is proved that only him or persons over whom he has sufficient control have access.

The explanation

[80] Section 123 of the Code requires an accused found in possession of recently stolen property to give an explanation of his/her possession of the property. He is presumed to be the thief if he/she, either fails to give an explanation at all or at his trial it turns out that his explanation is false or unreasonable. The statutory provision created a shift from the common law position regarding this requirement. In *R v Sitoli* 1967 RLR 302, this court held the following:

“Where a person charged with theft gives a false explanation of his possession of the property concerned, the strength of this feature as a strand in the *corpus delicti* depends on circumstances. If there is a competing rational hypothesis for the false explanation consistent with innocence, then its force may be neutralised.”

My understanding of the above is that a court may rationalise lies told by an accused regarding his/her possession of recently stolen property. That an accused could be dishonesty in his explanation of the possession and still be innocent. The principle stemmed from the older case of *R v Nel* 1937 C.P.D 327 where it was held that:

“It is well known that accused persons may give false explanations in an endeavour to divert attention from themselves when they think the circumstances tend to bring suspicion upon them.”

[81] I don't intend to debate the correctness or otherwise of the assertions in both the above authorities for two reasons. First because the position laid therein was the common law understanding of the doctrine. The codification of the doctrine in s 123 of the Code appears to have overridden the courts' interpretation. It clearly states that the accused is presumed the thief if he gives a *false* or an *unreasonable* explanation. The second reason is that the case before me does not turn on a consideration of the truthfulness or otherwise of the accused's explanation. I would therefore leave this as an argument for another day. Suffice to say s 123 demands that an accused must give an explanation of his possession of recently stolen goods. If he does not, in circumstances where he is expected to do so, he is presumed to be the thief.

Application of the law to the facts

[82] We said earlier that the accused participated in the Epworth robbery. We said we were satisfied that the victims of the robbery properly and satisfactorily identified them all. The black Honda Fit motor vehicle with registration numbers AFW 7534 which they were using to further their criminal activities had not only been stolen from the deceased person in this case but that the deceased had apparently lost his life at the time the car was stolen from him. There is no doubt at all about that fact. We arrive at that conclusion because from the evidence of Ashwin Mugwisi who is the police detail who attended the scene where the deceased's body was found and that of the pathologist, the deceased had not died a natural death. Mugwisi said at the scene, he noted that the deceased's body lay on its back with the left leg folded behind its back. The body was bare-footed and bleeding from the nose. It had bruises on the back. One part of a mutton cloth was tied to its left hand with another part of the same cloth still strapped to the right ankle. His conclusion was that it all indicated that the deceased's hands and legs had at one time been tied together before he managed to partly free himself. The deceased had been stripped of all his possessions. And that included the car. His testimony got corroboration, if it needed any, from the pathologist Doctor Laurelien-Malagon Martinez who carried out the autopsy which determined the cause of the deceased's death. From his results, the deceased suffered brain damage; contusive focus in occipital area and head trauma **due to assault**. The deceased died violently. The only reasonable inference in the circumstances is that the deceased was murdered. The people who robbed him must have been the same people who killed him. He had died violently.

[83] The only questions which remain therefore are whether or not the deceased's car could be said to have been recently stolen when it was recovered; whether the three accused could all in turn be said to have been in possession of the deceased's stolen vehicle; and whether any of them gave an explanation of their possession of the car?

[84] To answer the first question, the indisputable facts are that the deceased had left his residence around 2100 hours on the night of 26 September 2022. He never returned alive. In fact, his body was discovered on the morning of 27 September 2022 in Waterfalls meaning he had met his death sometime between that time and the morning of 27 September 2022. The accused were seen in Epworth driving the deceased's vehicle as early as 0500 hours on 27 September 2022. It could therefore

safely be said that they had the deceased's car immediately after it was stolen. The recency of their possession of the vehicle is not debatable. Given the nature of a car and the value it has (no matter how insignificant it may seem to some people) it is not an article that is expected to change hands as rapidly as appears to have been the case here.

[85] On the question of possession, the only discussion can pertain to the second and the third accused persons. The first accused person was apprehended in actual possession of the car. He was driving and was in full control of it. When his victims and their helpers apprehended him, he was still in the car. His case is therefore an open and shut one in relation to whether or not he had possession of the article.

[86] Debate, if there should be any, surrounds the circumstances of the second and third accused persons. They were both in the vehicle being driven by the first accused. The evidence before us shows that they were not mere passengers. The third accused for instance was the tout for the car. He is the one who lured the three robbery victims to board the vehicle. In the car, he fully participated in the robbery betraying the fact that he was acting in common purpose with the first accused who was the driver. The second accused was seated on the front passenger seat when the victims got into the car. He is the one who signalled the commencement of the robbery. He advised the passengers that they had boarded a robbers' car. He manhandled Rumbidzai Olinda, confiscated her phones and cash. He participated in inducing the victims who were in the back seat to surrender their property. His actions showed that he was not only together with the other gangsters in the car but that he must have been one of the ring leaders as well.

[87] From the above conception, it cannot be doubted that both the second and the third accused persons were in full control of the vehicle although it was being driven by the first accused. We don't expect that the three of them should have been all driving at the same time. They were in constructive possession of the car. It was their equipment which they used in the commission of the robbery or robberies.

[88] On the last aspect, we searched high and low in the record of proceedings to find if there was anything which approximated an explanation of the accused's possession of the stolen car. There is none. The accused persons' defence outlines and their evidence in chief are all bereft of any such explanation. By choosing to deny that they were in possession of the car in circumstances where to do so was hoping against

hope, the accused persons divested themselves of any opportunity to give an explanation of how they came to be in the possession of the deceased's car if they were not the ones who killed him. Without any explanation, the accused fell foul of s 123 of the Code which required them where it is reasonably expected to do so like in this case, to give an explanation. Against the above background, we are satisfied that the accused persons were the ones who robbed the deceased of his vehicle.

The murder

[89] Admittedly, no one witnessed the murder of the deceased. There is not a shred of direct evidence linking the accused persons to the murder. What does is the conclusive finding we made above that all of them were found in possession of the deceased's vehicle a few hours after he was murdered. That would have been enough if the accused persons were facing a charge of robbery, theft or receiving stolen property knowing it to have been stolen. Unfortunately, they are not. They were charged with murder. The evidence therefore becomes circumstantial in relation to the murder. It follows that for us to return a verdict of guilty in this case, the evidence must satisfy the requirements of circumstantial evidence.

The law on circumstantial evidence

[90] Circumstantial evidence in our law, has been explained times without number and in many ways. In yet another way I would say it is simply derivative evidence. The guilt of an accused is pointed out not directly but through some inference drawn from happenings elsewhere. It is indirect proof. Standing alone, it cannot prove the fact in issue. The benefit it accords is that it results in a logical deduction of the existence of the fact. It remains evidence, at par with any other form of evidence. At times it can lead to more conclusive results than direct evidence itself. What a court must consider before giving reliance to circumstantial evidence in this jurisdiction has, for some time, been an open secret. Perhaps that approach was best expressed by this court in the case of *Muyanga v The State* HH 79/13 in which the following was held:

“The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and
- (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. See *S v Shoniwa* 1987 (1) 215 (SC) and the cases therein cited.”

Two principles stick out from the above dicta. First the admonition is that do not draw the conclusion sought if it is not in harmony with all the facts proven in the case. Second, the facts proven must be such that they exclude every other reasonable inference from them save the one to be drawn. If they are open to other reasonable inferences, it puts into doubt the correctness of the inference sought to be drawn. Put simply, the rule is that where the proved facts point to more than one reasonable inference a court must not convict on the basis of circumstantial evidence.

[91] **In this case**, it was firmly and cogently established that:

- a. the deceased left his home on the night of 26 September 2022 intending to secure his car at a guarded parking lot
- b. He picked some commuters and decided to take them into town from the suburb he resided in
- c. He did not come back home. Instead, he was found dead a long way from his neighbourhood
- d. His body showed signs of a violent death. In fact, the pathologist confirmed that he had suffered mortal injuries consistent with a violent assault
- e. His possessions, including his car were stolen
- f. The accused persons were found in possession of that car a few hours later
- g. They could not in any way account for their possession of the car

[92] It must follow therefore that the accused persons either got the car from someone who took it from the deceased or **they** took it from him. The first assumption however appears so farfetched that it becomes illogical. If the accused had gotten the car from someone else, it would have just taken a mention of that person’s name to

exonerate themselves. We do not see how else they would fail to do so given their appreciation of the gravity of the offence they faced. If it is them who disgorged the deceased of the car, it is unimaginable that someone else then later killed the deceased. The pointers are that they and only they killed him.

[93] If there was any doubt regarding the above deductions then it is all removed by the circumstances in Epworth. The accused were found not in innocent possession of the car. They were apprehended using it to commit violent crimes. It is hard to accept that the accused who are robbers were caught a few hours later using a murdered man's car, committing similarly violent crimes were, in innocent possession of that car. The situation is compounded by their failure to give any explanation as to how they got possession of that car. The court equally takes judicial notice of the close proximity of the place of Epworth where the car was found, to the location of Waterfalls where the deceased's body was recovered. The two suburbs are literally a stone's throw away from each other. If regard is had to that the chain which the circumstances create is so complete that there is no escaping from the inference that in all human probability the accused killed the deceased and dumped his body in Waterfalls before driving across to commit robberies using the car in Epworth. We do not find here any other probable explanation of their possession of the deceased's car other than that they are guilty of the murder. Counsels for the accused persons did not suggest or point to the probability of the existence of any other hypotheses.

Disposition

[94] From the above synopsis of the events, the various conclusions we made and the inferences logically drawn from the circumstances, our final view is that the accused persons acting together must have at some point after the deceased left his home and decided to pick commuters into town, hijacked his vehicle either killed him and dumped his body in Waterfalls or drove him to Waterfalls before killing him and dumping his body there. They stole all his possessions and decided to use the car to commit robberies. Their luck ran out after their victims took matters into their own hands and fearlessly pursued them. The first accused was apprehended. His arrest triggered the events which led to the arrest of the other two. As such, we are convinced that the state managed to prove beyond reasonable doubt that the accused are all guilty of the murder charge they face. Accordingly, we are enjoined to find as

we hereby do that all the three accused are guilty of murder in terms of s 47(1) of the Code as charged.

MUTEVEDZI J:.....

National Prosecuting Authority, state's legal practitioners
Masango Seda Mutema Attorneys, first accused's legal practitioners
Maruwa Machanzi Attorneys, second accused's legal practitioners
Marufu Misi Law Chambers, third accused's legal practitioners