

DISTRIBUTABLE (88)

**TAPIWA MADYA
v
THE STATE**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & BHUNU JA
HARARE, 9 JUNE 2022**

R. E Nyamayemombe, for the appellant

R. Chikosha, for the respondent

MAVANGIRA JA:

**Judgment No. SC 88/23
Civil Appeal No. SC 799/17**

1

1. This is an automatic appeal against the decision of the court *a quo* convicting the appellant of murder in terms of s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ('the Act') and sentencing him to death.
2. After hearing submissions from both counsel, the Court, for reasons to be availed later, dismissed the appeal against both conviction and sentence. The said reasons now appear hereunder.

FACTUAL BACKGROUND

3. The appellant and one Taurai Tsikudzawo (also sometimes spelt as Tsikuzawo in the record of proceedings) were charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). The allegations against them were that on the 7th of December 2010 and at around 2100hrs, the appellant and his co-accused, while pretending to be customers, entered Zemba Store, a shop belonging to one

Alex Jomboro (the deceased) at Kandeya Township, Mt Darwin. The deceased was behind the counter when one of the accused persons jumped over the counter and demanded cash from him. The deceased failed to produce any money and one of the accused persons shot him.

4. Tazvitya Dzimbire, the deceased's security guard, escaped from the shop before the shooting happened, leaving the accused persons alone with the deceased. One Detective Sergeant Mutyambizi who was at Kandeya Township heard the gun shots and rushed to the deceased's shop. He found the deceased lying in a pool of blood. The accused persons had fled. The detective also found two spent cartridge cases from a pistol. He proceeded to contact and inform the Police (ZRP) at Mt Darwin of the incident and facilitated the movement of the deceased to Mt Darwin Hospital where he was confirmed dead on arrival by Doctor Gwagwa who on 8 December 2010 carried out a post mortem examination of the deceased's remains.

Judgment No. SC 88/23
Civil Appeal No. SC 799/17

2

5. The post mortem report recorded that the examination had established that the deceased had died from a gunshot wound to the head. A bullet was recovered from the deceased's head and was referred to CID Forensic Ballistics department for examination. The forensic examination of the bullet established that it had been fired from a CZ pistol serial number 9136T which had been stolen from one Bakaris Kostantinos Costas, the owner of a supermarket in Ruwa on 23 June 2010.

THE APPELLANT'S ARREST

6. Sometime during the period spanning 1 March 2011 to 3 March 2011, the appellant was arrested together with one Justin Momela, Thembinkosi Matutu and Taurai Tsikudzawo by the ZRP Criminal Investigation Department (CID), Harare in connection with crimes of robbery and murder. The four accused were interviewed by the CID officers and the

appellant confessed to have been in possession of the CZ pistol serial number 9136T, this being the firearm with which the deceased was shot and killed.

7. Evidence adduced by the State was to the effect that on 3 March, 2011, the appellant volunteered to lead police details to a place near Ruwa Rehabilitation Centre where he claimed and indicated that he had hidden the firearm that had been stolen from the owner of Ruwa Supermarket during the execution of a robbery.
8. The appellant failed to locate the firearm at that place and advised the police that the firearm may have been taken by Taurai Tsikudzawo who was with him when he hid it. He thereafter led the police to Tsikudzawo's residence which was about 20/25 to 30 metres away from his own. Tsikudzawo was arrested after which he led the police to a place where he had hidden the firearm after learning of the appellant's arrest. The place where it was recovered was about 1.5 km from their residences which, as already stated, are within 25 to 30 metres of each other.

Judgment No. SC 88/23
Civil Appeal No. SC 799/17

3

THE APPELLANT'S DEFENCE

9. The appellant raised the defence of *alibi*, claiming that he had spent all his days, including the day of the deceased's murder, helping his brother, Marvellous Madya, who is a mechanic, repairing motor vehicles. As to how he became implicated in this case, his explanation was that one Justin Momela brought a motor vehicle for repairs to be carried out by the appellant's brother. Justin Momela was advised that the motor vehicle required another battery. The appellant then gave Justin Momela a second-hand battery and in return, Justin Momela gave the appellant a mobile phone as security, pending payment for the battery. When Justin Momela failed to pay for the battery, the appellant sold the mobile phone to one Spencer Muuya. When Spencer Muuya was found in possession of the mobile phone, he implicated the appellant. He further stated, significantly, and rather

curiously too, that he only got to know Taurai Tsikudzawo after the latter was arrested through Justin Momela, who, as it turned out and according to the appellant himself, is also known as Justin Tsikudzawo. He denied having led the police to the recovery of the firearm, claiming that he was only seated in the police vehicle when the police were led by Taurai Tsikudzawo to the place where the weapon was hidden. He further averred that he was arrested on the basis that he had had in his possession a phone which had been stolen during a robbery.

THE JUDGMENT OF THE COURT A QUO

10. The court *a quo* noted that in his defence outline, the appellant stated that Justin Momela is also known as Justin Tsikudzawo. The court was of the view that this meant that the said Justin Momela was probably related to Taurai Tsikudzawo. The court *a quo* also noted that although the appellant stated in his defence outline that on the date that the offence was committed he was in Ruwa and spent the night with his brother Marvellous Madya, the said brother was not called to testify. In addition, the appellant was, in his oral evidence before the court, non-committal regarding his whereabouts or movements on that day, including the evening. After analysing all the evidence adduced before it, the court *a quo* found:

“that the accused (appellant) is the one who had possession of the firearm used to murder the deceased, and that he had hidden it but found it having been removed by Taurai Tsikudzawo, and that he was able to lead the police to the person who had changed the place where the weapon was hidden, the absence of any explanation as to how he came to be in possession of the firearm renders any suggestion that another person may have used the weapon to kill the deceased fanciful and speculative. The court is convinced that beyond reasonable doubt the case against the accused person has been proved, namely, that he is the one who unlawfully and intentionally killed Alex Jomboro. In the result, the accused is found guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].”

11. The appellant was thereafter sentenced to death.

THIS APPEAL

12. This appeal is against both conviction and sentence and the following grounds of appeal have been raised:

GROUND OF APPEAL

“1. The court *a quo* erred in finding that the appellant murdered the deceased as he is the one who led the Police to Taurai from whom the firearm was recovered. Such circumstantial evidence was improperly admitted as the fact sought to be proved that the appellant was in possession of the firearm therefore he is the one who shot the deceased was not consistent with all proven facts and there are other reasonable inferences that can be drawn particularly considering that at one time Taurai was in possession of the gun. The court *a quo* erred in finding that indeed Taurai came into possession of the firearm and the date thereof against the date on which the offence was committed so as to determine if the appellant was in physical possession of the firearm on the date the offense was committed or it was Taurai Tsikudzawo who allegedly came into possession of the gun and skipped bail upon arrest.

2. The court *a quo* erred in dismissing the appellant’s *alibi* on the basis that he failed to explain what he was doing around 21:00 hrs on the 10th of December 2010 when the offense was committed. The appellant’s explanation was concrete and the Court ought to have considered the lapse of time which rendered it difficult for Appellant to recall what he was doing on a date more than 6 years ago, the Court should not have relied on the appellant’s failure to state exactly what he was doing on that date and at that particular time in dismissing his *alibi*

considering the appellant's right to a fair trial within a reasonable time whilst he still recollect (sic) events time and dates.

3. The court *a quo* erred in exercising its discretion by sentencing the appellant to death notwithstanding the extenuating circumstances and the mitigatory factors advanced by the appellant particularly his youthfulness.”

13. The relief sought by the appellant was for his conviction to be set aside and that he be found not guilty and acquitted. Alternatively, that the sentence of death be set aside and substituted with “any other custodial sentence the court deems appropriate.”

SUBMISSIONS BEFORE THIS COURT

The appellant's submissions

14. Mr *Nyamayemombe*, for the appellant submitted that the conviction was not justified, regard being had to the rules and principles relating to the assessment and treatment of circumstantial evidence. Reliance was placed on *R v Blom* 1939 AD 188 per WATERMEYER JA and *State v Muyanga* HH79/13 per HUNGWE J. In *R v Blom* (*supra*) the requirements were formulated in the following manner:

- (a) the inference sought to be drawn must be consistent with all the proven facts: if it is not, the inference cannot be drawn.
- (b) the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn:
if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

15. In *State v Muyanga* (*supra*), the requirements for a conviction to be justified in a case that rests upon circumstantial evidence were articulated thus:

- “(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 the 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 the 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.”

16. Counsel submitted that the court *a quo* erred in finding that the appellant failed to explain his possession of the firearm which was used to commit the crime. He argued that the firearm was recovered in Ruwa on the indications of Taurai Tsikudzawo and that the appellant had no control of it at the time when the crime was committed because it had been removed from the place where he had initially hidden it near Ruwa Rehabilitation Centre.

Judgment No. SC 88/23
Civil Appeal No. SC 799/17

7

17. Counsel maintained that the ballistics report in itself was not proof of the appellant having been in possession of the firearm at the time of the commission of the crime. He also submitted that the appellant denied or disputed the evidence of Detective Assistant Inspector Mutata, the investigating officer, who testified that the appellant admitted that he had committed the robbery at Ruwa Supermarket where a CZ pistol and cash were stolen and also offered to, and did lead the police officers to the place where he claimed to have hidden the pistol, at some spot along the pre-cast wall at Ruwa Rehabilitation Centre. With regards to the appellant’s defence of *alibi*, counsel argued that the court *a quo* ought to have appreciated that the appellant had forgotten some of the events of the day when the crime was committed due to passage of time.

18. It was also submitted that as there was no *onus* on the appellant to convince the court of any explanation, he ought to have been acquitted as there was a possibility of his

explanation being true. For this proposition reliance was placed on *R v Difford* 1937 AD 370 where it was stated that there is no *onus* that rests on the accused to convince the court of any explanation even if that explanation is improbable. Further, that the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but beyond doubt that it is false. It was also stated therein that if there is any possibility of the explanation being true, then the accused has to be acquitted.

19. The judgment of the court *a quo* was further criticized on the basis that the State ought to have, but did not place before the court, the court record CRB 685/11 which would have shown that evidence was led to the effect that the appellant was not charged for the Ruwa Supermarket robbery as he was exonerated by the other accused persons. The mainstay of the criticism was that there was a second person who had control over the firearm and who could have used it on the day of the murder. Furthermore, that any other person could have used the firearm and without evidence of the appellant's possession of it prior to the commission of the murder, it left the evidence "short of the thread of beyond reasonable doubt." The court *a quo* was thus criticized for having unfairly dismissed the appellant's *alibi*.
20. With regard to sentence, the contention made on behalf of the appellant was that the court *a quo* erred by paying lip service to the delay in bringing the appellant to trial; the trial having commenced and ended in 2017, after a period of 7 years.

Judgment No. SC 88/23
Civil Appeal No. SC 799/17

8

THE RESPONDENT'S SUBMISSIONS

21. *Per contra*, Mr *Chikosha*, for the respondent, contended that the court *a quo* did not misdirect itself when it found that, beyond reasonable doubt, the appellant was the one who unlawfully and intentionally killed the deceased and as a result, returned a verdict

of guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act.

22. Counsel for the respondent submitted that the court *a quo* did not err in its finding that the appellant was guilty of the charge of murder. Counsel argued that the appellant was fabricating his story as he stated before the court *a quo* that he was not involved in the robbery in Ruwa, denied leading the police to the place where he hid the firearm and leading the police to Taurai Tsikudzawo. However, before this Court the appellant changed his story and stated that he hid the firearm which was later removed from the place where he had hidden it and that he was only involved in the robbery in Ruwa and not the murder in Mount Darwin.
23. It was submitted on behalf of the respondent that the authorities are clear that “beyond reasonable doubt” does not mean “beyond a shadow of doubt.” It was also submitted that the absence of any explanation by the appellant as to how **Judgment No. SC 88/23** **Civil Appeal No. SC 799/17** the firearm, renders any suggestion and insinuation that another person may have used the weapon to kill the deceased, fanciful and speculative. It was also argued that it was significant that the appellant knew the person who had removed the firearm from a particular place and was the one who led the police to that person and consequently, the recovery of the firearm. The other significant factor was the fact that the appellant’s and Taurai Tsikudzawo’s residences are within the same area. Counsel submitted that the fact that the appellant led the police to Taurai Tsikudzawo showed that he knew him. Counsel also submitted that the appellant’s connection with the firearm was established by the evidence led before the court *a quo*. Thus, in the absence of an explanation of his possession of the firearm, the court properly came to the conclusion that it was the appellant who fired the shot that killed the deceased.

24. Counsel submitted that the appellant's testimony could not be trusted. On the issue of the *alibi*, counsel submitted that the appellant ought to have called his brother to testify at the trial as his brother could have supported his version of events.

ISSUE FOR DETERMINATION BEFORE THIS COURT

25. The issue for determination before this court is whether or not the court *a quo* erred in finding the appellant guilty of murder in terms of s 47 of the Act and thereafter sentencing him to death.

ANALYSIS

(i) Conviction

26. It is common cause that as there was no direct evidence of the shooting of the deceased on the night in question, the appellant was convicted on the basis of circumstantial evidence.

**Judgment No. SC 88/23
Civil Appeal No. SC 799/17**

10

27. The court *a quo* in convicting the appellant of murder, weighed the totality of the evidence placed before it. From a perusal of the court *a quo*'s judgment, as confirmed by the record of proceedings, the following facts are common cause, or stand uncontroverted. That on 7 December 2010, the deceased died as a result of injuries which he sustained after being shot with a gun; that the persons who shot the deceased entered his shop at night and demanded money before shooting him; that the weapon used to shoot the deceased was confirmed by a ballistics examination to be the one that the police recovered at Ruwa and that the exact location of the firearm when it was recovered was pointed out by, or more accurately, with the active participation of Taurai Tsikudzawo.

28. The court *a quo* aptly commented:

“What is in contention is whether the police who were investigating the issue of the firearm were led to its recovery by the accused person. If the accused indeed led the police to recover the firearm the next issue arises, namely, whether the recovery of the firearm through the indications of the accused person links him to the murder of the deceased. The evidence of Previous Mutata (the investigating officer) was that the accused person is the one who led them to Ruwa and when he failed to locate the firearm at the place where he had hidden it he then led the police to the residence of his friend, Taurai Tsikudzawo whom he believed to have removed the pistol to some other place. Through the involvement of Taurai Tsikudzawo the police were then able to recover the firearm. That evidence has not been challenged by the accused person. What the accused sought to do was to suggest that he himself was not the one who pointed out the place where the firearm was. The accused person did not dispute that he is the one who led the police to the residence of Taurai Tsikudzawo. He states that he was only seated in the motor vehicle when the police were led by Taurai Tsikudzawo to the place where the weapon was hidden. That version accords with the evidence of Previous Mutata insofar as it illustrates that the accused person was indeed present when Tsikudzawo went with the police to the place where he had hidden the firearm following the arrest of the accused. The accused suggests that he was only arrested because he had been given a mobile phone belonging to Justin Momela to whom he had sold a car battery.”

The court further noted:

“His connection to the recovery of the firearm was established by the evidence led. If he was not the one leading them to Ruwa and Taurai Tsikudzawo’s residence the police officers would have had no reason to have him in their motor vehicle. He does not explain what he was doing in that motor vehicle. The accused exhibited so much knowledge about the other cases involving Justin Momela and Taurai Tsikudzawo, **but does not explain his connection to them.** The evidence placed before this court shows that his residence is within the same area as that of Taurai Tsikudzawo. It makes sense then that he knew Taurai Tsikudzawo, and is the one who led the police to his residence. It does not matter that he is not the one who actually pointed out where the firearm had been hidden. He would not have known that since, as Previous Mutata explained, it had been removed by Taurai Tsikudzawo. If, as the accused would like the court to believe, the police had intended to falsely implicate him they would have simply stated that he is the one who pointed out where the firearm was to them without involving Taurai Tsikudzawo. The accused is the one who knew the person who had removed the firearm. He led the police to that person, and the firearm was recovered. He has not explained his possession of that firearm or how he came to be involved with it. The firearm is the weapon that was used to kill the deceased. The evidence of the Forensic Ballistics Reports was not challenged. In the absence of an explanation of his possession of the firearm, the court is entitled to come to the conclusion that the accused is the one who fired the shot that killed the deceased.” (the emphasis is added)

Judgment No. SC 88/23

Civil Appeal No. SC 799/17

29. The court *a quo* further made the observation that proof beyond reasonable doubt does not mean proof beyond any shadow of doubt. The court found that a combination of the following factors pointed to the appellant's guilt. These are: that the appellant was the one who had possession of the firearm used to murder the deceased; and that he had hidden it but found it having been removed by Taurai Tsikudzawo; and that he was able to lead the police to the person (Taurai Tsikudzawo) who had changed the place where the weapon was previously hidden; the absence of any explanation as to how he (appellant) came to be in possession of the firearm, rendering any suggestion that another person may have used the weapon to kill the deceased fanciful, speculative and not worthy of belief. The court *a quo* also rightly noted, against the appellant, that he failed to explain what he was doing in the police motor vehicle or his connection to Justin Momela and Taurai Tsikudzawo although he had exhibited so much knowledge about the other cases involving them.

Judgment No. SC 88/23
Civil Appeal No. SC 799/17

12

30. These factual findings were made by the court *a quo* based on the evidence placed before it. The trial court had the privilege of watching the witnesses on the stand including the appellant himself. It had the privilege of assessing their demeanour and credibility. This Court cannot interfere with the findings of fact made by the trial court in the absence of gross misdirection thereof. In *IDBZ v Engen Petroleum Zimbabwe (Pvt) Ltd* SC 16/20 the Court held that:

“It is a settled principle that the Court will not easily interfere with factual findings made by a lower court unless the findings are grossly unreasonable (see *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S), *Hama v NRZ* 1996 (1) ZLR 664 (S), *Reserve Bank of Zimbabwe v Corrine Granger & Anor* SC 34/01).”

31. At the end of the day, the court *a quo* found that the State had proved beyond reasonable doubt the allegations against the appellant and therefore convicted him accordingly. To

the court, it therefore did not matter that he was not the one who actually pointed out where the firearm had been hidden. Also of significance was the fact that the firearm was obtained through a robbery that occurred in June, 2010. The appellant confessed that he was in possession of the firearm thereafter but hid it and Taurai Tsikudzawo only removed it from where he had hidden it after the appellant was arrested in March, 2011. As already stated earlier, the court *a quo* finally stated:

“The court is convinced that beyond reasonable doubt the case against the accused person has been proved, namely, that he is the one who unlawfully and intentionally killed the deceased Alex Jomboro. In the result, the accused is found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].”

32. The court *a quo*'s analysis cannot be faulted. Its cogency is borne out by the evidence on record. In attempting to analyse the judgment of the court *a quo*, it is realized that because of its cogency, there is a grave risk of merely further regurgitating or reiterating the court *a quo*'s analysis. That, in the court's view, **Judgment No. SC 88/23** Civil Appeal No. SC 199/17 **13** inference that can be drawn from the totality of the evidence that was adduced before the court *a quo* is that the appellant committed the offence. The court *a quo* has not been shown to have misdirected itself. The cumulative effect of the facts elicited from the evidence placed before the court *a quo* is, in the court's view, to show that the respondent managed to prove, beyond a reasonable doubt, that the appellant indeed committed the murder as alleged. The court *a quo*'s analysis of the evidence placed before it stands solid and unshaken even in the face of the scrutiny urged by the grounds of appeal and submissions made on behalf of the appellant.
33. It can also be said that the appellant's failure, **in the particular circumstances of this case**, to call his brother to testify as a witness in support of his *alibi*, tends to negate his defence in the face of the cogent evidence adduced by the State against him.

34. The appellant dismally failed in his evidence before the court *a quo*, to give a clear account of where he was on that particular day. In addition, he did not call his brother to testify or lead any further evidence to substantiate his defence that he was with his brother on that fateful day. The court *a quo* was thus left with no other option but to consider the evidence placed before it and finally coming to the conclusion that culminated in the conviction of the appellant. In the court's view, the court *a quo* did not misdirect itself in any way. More damning for him, the appellant failed to give an explanation on how he knew where the gun was hidden or who had removed it from that place. Against all this background, it can safely be said that he led the police to its recovery.

35. In *S v Muyanga* H-H-79-13 the court stated the following:

“The correct approach is first to **determine what facts are established by the evidence**. The court must then consider all of those facts together, SC 88/20 and ask whether it can be concluded, from those facts, that the accused is guilty of the offence charged. If such a conclusion does not reasonably arise, SC 799/17 then the State's circumstantial case fails because there is no proof of guilt beyond reasonable doubt.

But if the court finds that such a conclusion is a reasonable one to draw based upon a combination of those established facts then, before it can convict the accused, it must determine **whether there is any other reasonable conclusion arising from those facts that is inconsistent with the conclusion the State says is established. If there is any other reasonable conclusion arising from those facts that is inconsistent with the guilt of the accused, the circumstantial case fails because there is no proof beyond reasonable doubt** of the accused's guilt.” (my own emphasis)

36. The appellant's conviction is safe and this court, as an appellate court, finds no justification for interfering with it. The conviction is therefore hereby confirmed.

(ii) Sentence

37. The appellant having been convicted of murder in the course of a robbery, the court *a quo* went on to assess and determine the appropriate sentence in the circumstances. The court *a quo* stated that “[T]he murder was clearly committed in aggravating circumstances, as it was committed in the course of a robbery.” It also commented as follows:

“While the court accepts that the Constitution of Zimbabwe 2013 gives it a discretion not to impose the death penalty, and that the law was subsequently amended to give statutory recognition to that discretion, the court considers that there are no grounds justifying the imposition of a penalty less than sentence of death. It would be an improper exercise of judicial discretion for the court to impose a sentence less than death in the circumstances of this case.

.....

In all the circumstances, the court finds that the accused has not shown good reasons or cause why sentence of death should not be passed upon him.

In the result, sentence of death is passed upon the accused.”

38. While the court *a quo* made reference to the 2013 Constitution and also made an oblique reference to the General Laws Amendment Act 3 of 2016 which made provision for the amendment of s 47 of the Act (Criminal Law Code), such was not necessary. This is so because s 18 (9) of the 6th Schedule to the 2013 Constitution provides as follows:

“(9) All cases, other than pending constitutional cases, that were pending before any court before the effective date may be continued before that court or the equivalent court established by this Constitution, as the case may be, as if this Constitution had been in force when the cases were commenced, but—

(a) the procedure to be followed in those cases must be the procedure that was applicable to them immediately before the effective date;
and

(b) the procedure referred to in subparagraph (a) applies to those cases even if it is contrary to any provision of Chapter 4 of this Constitution.

(10) For the purposes of subparagraph (9)—

(a) a criminal case is deemed to have commenced when the accused person pleaded to the charge;

(b) a civil case is deemed to have commenced when the summons was issued or the application was filed, as the case may be.” (the underlining is for emphasis)

39. In *casu*, the offence having been committed in 2010, the court *a quo* ought to have relied on the procedure that was applicable as at that time. The 2013 Constitution and the amendments made to s 47 of the Act (CL(C&R) Act) and ss 337 and 338 of the Criminal Procedure and Evidence Act, [Chapter 9:07], had no role to play in the matter that was before it.

40. In terms of the applicable law, the court had no discretion but to pass a sentence of death on a conviction for murder where there were no extenuating factors. A reading of the facts in this matter leaves no doubt that there were no extenuating factors attendant on the murder for which the appellant was convicted. The appellant and his accomplice who was still at large when the appellant was brought to trial agreed and planned to commit a robbery. They purposely embarked on a journey to Mt Darwin where they entered the deceased's shop at night. They were armed. One of them jumped over the counter, demanded money from the deceased before callously shooting him at close range after failing to get the desired response to his demand. The deceased was minding his own personal and lawful business of running his shop. The appellant and his colleague brazenly and unashamedly felt entitled to the proceeds of the deceased's sweat. They showed no respect for the sanctity of human life. The deceased needlessly and unfairly lost his life merely because he was working to earn a living as all law-abiding citizens must do. Undoubtedly, his family was negatively affected in various ways by this untimely demise. In current parlance, Zimbabwe is open for business. It is open for business not only to foreigners but also, if not more so, to Zimbabwean nationals. The adage that crime does not pay is not a hollow statement. Money is not snatched from those who have worked for it; it is earned by hard work. The appellant was at the relevant time of an age that would normally be expected to have all the energy to work

in order to lawfully earn a living. The deceased who was far older was terrorised and killed by the appellant in a show of callous disregard to the deceased's right to life and to property.

41. In *casu*, the finding by the court *a quo* that the murder of the deceased was committed in aggravating circumstances cannot be faulted. The appellant shot the deceased point blank in the course of a robbery. Murder committed in the course of a robbery has always been viewed by these courts as murder committed in aggravating circumstances. The court *a quo* cannot be faulted in viewing it accordingly. The deceased succumbed to the gun shot. The appellant had pre-meditated this offence by arming himself with the firearm before entering the deceased's shop for purposes of committing a robbery.

42. Before the court *a quo*, the appellant sought, in mitigation, to rely on the fact that he was 25 years of age at the time of the commission of the murder hence his youthfulness ought to have been taken into consideration. In *Norman Sibanda v The State* SC 39/17, SC 4799/17 for the State successfully argued, and the appellants's counsel properly conceded, that youthfulness would ordinarily constitute an extenuating circumstance only if the actions of the offender are consistent with immaturity. However, *in casu*, the appellant cannot take refuge behind his age. On the aspect of the appellant having been 25 years old at the time that he committed the offence in 2010, the court did not accept that at the age of 25 the appellant failed to appreciate the implications and consequences of his conduct when he carried a firearm and deliberately shot his victim. We find no fault in this assessment by the court *a quo*. It is also the court's view that at 25 years of age, a person has the capacity to decipher wrong from right. In any event, the facts of this matter are not consistent with immaturity emanating from youthfulness. To hold otherwise would only serve to create a state of chaos in society given the prevalence of the commission of offences by those of youthful age. It is significant in this regard, that the court *a quo* also

noted that there was careful planning and execution of the murder as the appellant carried the weapon himself to the scene of the crime. That type of conduct is consistent with adulthood rather than juvenile immaturity.

43. In the court's view, the appellant did not succeed in showing that the sentence imposed by the court *a quo* warranted interference by the appeal court. As has been already alluded to, this is a case where a robbery escalated to murder in aggravating circumstances. The appellant's appeal against sentence thus lacks merit and ought to be dismissed.

44. No misdirection on the part of the court *a quo* having been shown, this court accordingly issued an order dismissing the appeal in its entirety, as indicated at the beginning of this judgment.

Judgment No. SC 88/23
Civil Appeal No. SC 799/17

18

GUVAVA JA : I agree

BHUNU JA : I agree

M.C. Mukome, appellant's legal practitioners.

The National Prosecuting Authority, respondent's legal practitioners