HB 221/16
HC (CRB) 137/15

THE STATE

Versus

REFIAS MASUNA

IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr P.M. Damba & Mrs A. Dhlula
BULAWAYO 17 – 20 MAY; 19-20 JULY & 4 & 10 AUGUST 2016

Criminal Trial

Miss S. Ndlovu for the state
T. Thondhlanga for the accused

BERE J: The accused stands charged of the crime of the murder of the deceased (Ernest Mudenda) in violation of section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The accused pleaded not guilty to the charge.

The facts of this case which are not in dispute can be summarised as follows: The accused was employed as an operations manager of a security company called Manifest Security (Pvt) Ltd which had been employed to provide security services to an entity in which one Blessing Ndiweni is the managing director. Blessing Ndiweni has had a long standing dispute over the control of a mine called Zulu 8 Mine, in Fort Rixon, Matabeleland South, with one Wilson Nyamiwa. This conflict over the control of Zulu 8 Mine culminated in a court order which resulted in the eviction of Blessing Ndiweni's company from the mine in issue, thereby firmly placing its possession and or ownership in the hands of Wilson Nyamiwa on 11 December 2014. Consequently Blessing Ndiweni's employees were evicted from the mine and temporarily took shelter at some distance from the mine which was situated at the summit of a hill, which mine was now occupied by Nyamiwa's employees.

The developments at Zulu 8 Mine did not go down well with Blessing Ndiweni who responded by roping in the accused and 5 additional security guards from the accused's company to provide additional security on the very day the eviction took place. The accused, Ndiweni and the additional security headed for Zulu 8 Mine in the evening of the 11 of December 2014.

There is no agreement between the accused and Ndiweni as to why they travelled to the mine that evening.

The accused said that he went to the mine to collect and ensure the safety of Blessing Ndiweni's gold ore and equipment which had been shifted from the mine by the messenger of court as part of the eviction process. On the other hand, Blessing Ndiweni said he had gone to the mine to collect the court order that had led to the eviction of his company from the mine. It is common cause that when the two got to the mine no gold ore was collected and there was no discussion about the security of this gold ore. It is also clear that Blessing Ndiweni did not discuss the issue of the court order let alone collect same.

In the middle of the night in question the deceased was shot at with a gun and he succumbed on the following day. The post mortem report compiled by Dr S. Pesanai concluded that the deceased died due to: Haemopneumothorax caused by a gun shot. Haemopneumothorax, in simple terms is the accumulation of blood and air in the chest cavity which was caused by the gunshot wound. The accused was alleged to have shot at the deceased and caused his death, an allegation which he denied leading to this trial.

The narrow issue which the court had to determine in this case was whether or not it had been established beyond a reasonable doubt if indeed the accused was responsible for the untimely death of the deceased.

In his denial of the allegations the accused gave a fairly elaborate defence outline which I propose to reproduce *in extenso*. The accused's defence was given as follows:

> "1. The accused denies the allegations being levelled against him.
> 2. He will state that on the 11th of December 2014 he went to Zulu 8 mine, Fort Rixon after being called by a client, Blessing Ndiweni who wanted to secure his gold ore against theft by one Nyamiwa and his employees who also claimed ownership of the mine.

3. On reaching Fort Rixon the car which he was using got stuck in the mud and they left it at a homestead where Ndiweni's employees were camped after being evicted by the Messenger of Court in the afternoon of 11 December 2014.
4. Ndiweni and some of his employees took a short cut to get to the mine. The mine is located at the top of a hill. The accused and some guards that were accompanying him followed to the mine after Ndiweni and his employees had already gone.
5. On their way to the mine the accused and the guards in his company met Ndiweni and his employees at the foot of the hill who said Nyamiwa's employees were throwing stones at them.
6. The accused and the five guards in his company including Ndiweni and his employees went to place where Cleverness Ngwenya and Edson Sungai were guarding Ndiweni's equipment. On realising that Nyamiwa's employees were advancing towards them and throwing stones, accused took a gun from Cleverness Ngwenya and moved a few metres away from his guards and fired on warning shot into the air to scare away Nyamiwa's employees. Accused tried to fire a second warning shot but the gun did not discharge the second round and he cocked the gun to remove the blockage and one bullet was lost in the process as it fell onto the ground. Accused returned to where his guards were standing and handed over the gun to Cleverness Ngwenya after advising him that one bullet had been lost.
7. The accused then advised Ndiweni that it was not safe for him to remove the gold ore at that time and they both left for Bulawayo.
8. Accused will further tell the court that in the morning of 12 December 2014 he was advised that there had been disturbances at the mine involving Nyamiwa's employees and guards who were guarding Ndiweni's equipment and that shots had been fired by Cleverness Ngwenya.
9. The accused will therefore deny the charge of murder that he is facing mainly on the following basis,
    (a) He did not fire a shot into the fleeing crowd. Instead he fired a warning shot into the air.
    (b) If deceased had been shot at midnight as alleged he must have died around that time if regard is had to the nature of the injuries sustained.
    (c) The shooting incident on the morning of 12 December 2014 was not properly investigated to establish if it cannot be linked to the death.
    (d) Ndiweni was not properly interrogated to establish if he was not in possession of a gun when he got to the top of the hill.
    (e) The post mortem report lacks in certain material respects namely time of death and proximate cause of death to the extent that it is rendered unhelpful. In this respect expert evidence from a pathologist will be led.
    (f) The CID Forensic Ballistics Report does not link him to the offence.
10. The accused will further state that the police did not properly investigate the matter."

In dealing with this case the state case was built around the evidence of the following witnesses who gave *viva voce* evidence: Blessing Ndiweni, Cleverness Ngwenya, Intellect Moyo, Swikani Tshuma, Tinashe Basera, Lovemore Bindira, Tirivamwe Matsika, Doctor Pesanai and Admire Mutizwa.

In addition to relying on the viva voce evidence from the above-stated witnesses, the state sought to rely on the following exhibits; 9 x 19mm norinco pistol bearing serial number 48107296, 1 x 9 x 19mm spent cartridge case, 4 x 4 x 9 x 19mm spent cartridge cases, the ballistics report, the post mortem report and photographs of some of the recorded cartridges.

The accused person was the sole witness for the defence.

The evidence

It became clear during the trial that none of the witnesses called by the state actually saw the accused shooting the deceased. At the end of it all the court had to rely on circumstantial evidence and I will come back to deal with the legal issues involved with circumstantial evidence later in this judgment.

It also became clear during the course of this trial that on the day of the deceased's fatal shooting Blessing Ndiweni and the accused, went together to Zulu 8 Mine and came back together. This was despite them not being in agreement as to why they decided to go to the mine in the evening. Ndiweni said he had gone to the mine to collect the court order that had been used to evict his company from the mine. On the other hand the accused maintained throughout the trial that the purpose of going to the mine was to secure Blessing Ndiweni's gold ore as well as the other property which had been shifted from its usual place as a result of the eviction.

Despite their lack of unanimity on their reason for going to the mine, the evidence suggests that the two were deeply affected by the developments at the mine as evidenced by their discussions prior to going to the mine and their subsequent decision to go to the mine at night and on a rainy day when even to get to the mine presented them with a serious challenge.

Blessing Ndiweni took us through the developments on that day and how him and the accused ended up at the mine. Blessing told the court that upon arrival at the mine both him, the accused and the security guards got a brief of what had happened during that day leading to the eviction from a bespectacled security guard whom we now know as Cleverness Ngwenya who was the most senior member of Manifest Security guards on site.

This witness confirmed that when their group which included the accused got to the base of the hill where they got the briefing from Ngwenya, Nyamiwa's employees who had taken over the mine and were uphill were restless on seeing torches which Ndiweni and others in his group were using. His evidence was that Nyamiwa's employees started pelting them with stones and that at this stage the accused was in their company. The witness further denied that he ever went uphill on this day and that he did not see or know that the accused discharged or fired a gun. He further said he did not even know where the accused was when the gun was fired. He gave the impression that after being pelted with stones he and his group dispersed, heard the sound of a gun and went away with nothing serious having taken place at the mine. We now know that this is not what happened.

Under cross-examination the witness was emphatic that he, together with his group never went up the hill that day and he also maintained that the sole reason why they went to the mine was to collect a court order and nothing more. Ndiweni's strategy was to deny everything that tended to put him closer to the exact scene of crime. He denied even seeing the accused collecting the firearm from Ngwenya. Surprisingly, almost every witness who testified confirmed seeing the accused being handed a firearm by Ngwenya upon demand.

Further, under cross-examination Ndiweni conceded that at one stage he was a suspect of this murder and was let off when the police could not get evidence he ever owned a firearm. It was only when one of the assessors asked him that the witness disclosed that when he and the accused were heading to Bulawayo that the latter disclosed to him that he was the one who had discharged the firearm to disperse Nyamiwa's employees. In this witness's testimony, one sees a stout effort to shield the accused at all costs. The witness did not impress us at all.

It is significant that despite the accused's defence outline casting some strong suspicion on Ndiweni as a possible culprit in this case, no pointed questions in that regard were put to the witness in order to elicit his commence from him since the possible involvement of Ndiweni was central to the accused's defence to the charge of murder preferred against him.

Contrary to Ndiweni's denials that he never saw Cleverness Ngwenya, a guard gunner with Manifest Security handing over the firearm to the accused, Cleverness Ngwenya himself exposed Ndiweni when he said that he was present when the accused demanded the firearm from him before walking in the general direction of the uphill in the company of among other people Ndiweni himself.

The evidence of Ngwenya gives us a hint as to what was probably in the mind of the accused when after being briefed of the eviction, the accused demanded the firearm from him in a harsh manner and immediately headed towards the hill where Nyamiwa's employees were. The accused was evidently annoyed by the eviction of Ndiweni's company and by the relocation of his security guards to a spot away from the mine which was up the hill. This in our view explains why the accused asked Ngwenya in a high toned voice why they had moved from the mine and immediately demanded the gun from Ngwenya.

That this was so is further confirmed by the accused's counsel in his cross-examination of this witness when he drew the witness' attention to paragraph 9 of his recorded statement which reaffirmed that the accused had harshly demanded to know what was happening. As a court, we get the impression that the accused was already in a no-nonsense mood in dealing with the employees of Nyamiwa. He was showing signs of a great desire to punish them for the eviction process.

Cleverness Ngwenya stated in his evidence that upon handing over the firearm to the accused the accused together with Ndiweni and the other group within the vicinity headed towards the general direction of the summit of the hill where the deceased and his fellow workers were based at.

The witness further stated that as the accused, Ndiweni and those in that group left, after about 20 or so minutes he heard a voice saying "I will shoot you". He said he was unable to attribute that voice to anyone but that immediately after such words were uttered the firearm was discharged.

Asked in cross-examination to comment on the evidence of Sungai, the witness retorted as follows:

"I am not here to comment or speak on behalf of Sungai, let him speak for himself."

To us, this on its own speaks volumes on this witness's credibility.

In general, we were unable to find any meaningful flaws in his testimony. Despite minor short-comings in his testimony like his reference to the firearm as an automatic weapon that would release two bullets at a time and his description of how he fired the gun on the morning of 12 December 2014 and the firing range of the weapon, we are satisfied that his evidence was generally acceptable and pointed to the truth on material issues.

We were particularly impressed by this witness's evidence despite a concerted effort by the defence to blame him for the shooting of the deceased. There was overwhelming evidence showing that the deceased could not possibly have been shot at in the morning of 12 December 2014.

It is not easy in the majority of criminal cases to find clean evidence or evidence which is spotlessly clean. Almost every witness will have portions or aspects of his/her evidence raising many questions. Some of the shortcomings are due to specific motives to mislead the court but some might be due to human nature which is often given to exaggeration.

The evidence of Ngwenya is incapable of being white washed. It had its own challenges but on the whole, we are satisfied it was generally truthful. If there was need to find corroboration of his testimony which clearly destroyed the fallacy of the accused's speculation

that the deceased was shot at in the morning of 12 December 2014, then one must turn to the evidence of Tinashe Basera and Lovemore Bindira.

Both these witnesses confirmed that despite the denials by the accused and even Ndiweni, that they did not go up the hill, their evidence generally points to the contrary. They both testified that Ndiweni and his group which according to the other witnesses included the accused walked up to the hill where the deceased was shot at.

But again one cannot overlook the evidence of Tinashe Basera who said Ngwenya had two fire arms. It is not difficult to reject that part of his evidence because none of all the witnesses who testified could confirm that. Even the accused confirmed that Ngwenya had only one firearm. We accept it as a finding of this court that Ngwenya had only one firearm.

Tinashe and Lovemore, although they could not confirm seeing the accused in the company of Ndiweni, when the latter moved up the hill where the mine was located, were conscious that Ndiweni was in the company of this gang. Our position as we will later demonstrate in this judgment is that the accused must have been one of those who went closer to the deceased before the shooting.

It will be noted that although Lovemore Bindira speculated that Ndiweni may have shot at the deceased, he did not see him shooting. His conclusion was arrived at as a result of the threats of shooting that he attributed to Ndiweni and the fact that he believed he was leading the group that went up the hill.

But this witness's evidence cannot be looked at in isolation. It has to be juxtaposed with the rest of the evidence gathered in this trial. Swikani Tshuma, a former employee of the accused's company confirmed that the accused, who was armed with a firearm walked up the hill for a distance he could not ascertain before the accused fired. He said he saw the accused in front of the group and that when he saw him he was in the company of Ndiweni and their group. In this witness's own words referring to the accused, he said "Accused suggested we go up the hill for them. He went further to say he wanted to stop the noise."

The witness further stated that when the accused returned the firearm to Ngwenya he said hehad managed to quieten the people who were pelting stones. Our view is that the accused could only have boastfully stated this because he knew that he had shot at the deceased. This probably explains why immediately after the discharge of the firearm, the accused swiftly joined with Ndiweni and headed for Bulawayo without either of them addressing the reasons that had prompted them to go to the mine in the middle of the night. Their going back to Bulawayo was indicative of the successful completion of the mission which they had set out to achieve before going to the mine.

The evidence of Intellect Moyo is one of the few pieces of evidence which tended to support the view that the accused did not go up the hill. This is understandable given the relationship the two had at the time. The accused was this witness's senior and it is not unexpected that he would have been instinctively trying to exonerate the accused.

But despite, this it is also significant that he stated that Ndiweni and the accused were together when the firearm was discharged.

The difficult with Intellect's evidence is that of all the witnesses who testified he is the only one who gives the impression that the accused was at some spot where not even a single cartridge was recovered. Our view is that because that piece of his evidence was not consistent with the rest of the evidence accepted by the court, it be rejected. This witness must therefore have been trying to mislead the court. We reject this part of his evidence.

The evidence of Tirivamwe Matsika the investigating officer was quite of significance in that it was through his team that the five spent cartridges were recovered.

The four recovered spent cartridges confirm beyond doubt the truthfulness of Ngwenya's evidence as these were recovered close to where he said he was when he said he fired the gun as he fled from the marauding crowd who were threatening to avenge the deceased's death.

The officer also testified on the recovery of the single spent cartridge that was found about 13 metres from where the deceased's body was. The officer further confirmed that the area where they recovered this cartridge had been contaminated by footprints of people who appeared to have been walking unrestrained all over the crime scene.

It is quite significant in the court's view that despite this witness's evidence that they combed through the whole area for any evidence to assist them, there was no spent cartridge recovered around the spot where the accused claimed to have been when he discharged the firearm into the air. We have no hesitation in concluding that the accused was not where he claimed to have been when he discharged the firearm.

Doctor Pesanai's evidence was not without criticism. The import of his evidence was to expand on the cause of death but the evidence created some confusion when the post mortem report approximated the time of death to have been 0100 hours on 12 December 2014.

In the light of the evidence of Tinashe Basera and Lovemore Bandira both of whom testified that the deceased died in the morning of 12 December 2014 as a result of a gun shot in the night of 11 December 2014, the doctor's approximation of time of death could not have made sense. The doctor explained himself out by stating that he made the mistake by taking the time as stated to him in the application for a post mortem report made by Fort Rixon police.

Of significance was the explanation given by the doctor that there was nothing unusual for the deceased to have survived from a gun-shot of mid-night on 11 December 2014 to the morning of 12 December 2014. The doctor explained that the bullet that killed the deceased created an entrance wound on the left deltoide region, that went through the left armpit and exited through the right forearm.

The doctor's explanation for the delayed death of the deceased was that because the major injuries were in the lungs and the heart had been spared. He expressed the view that the lungs could have allowed the deceased to bleed slowly until he succumbed on the following morning after the shooting. We accept the evidence of the doctor as representing the truth.

The evidence of Admire Mutizwa the ballistics expert generated much debate in this case and was indeed relevant to the main issue in this trial. The court had to recall this witness to clarify issues because of the technical nature of his evidence. It was through this witness that exhibit 2 was produced. The issue that generated so much debate with this witness's testimony was to do with the spent cartridge that was recovered about 13 metres away from the deceased's body.

The witness's testimony was that whilst this spent cartridge which he labelled as exhibit (b) in his report bore similar class characteristics and matched the test cases from the 4 other recovered spent cartridges he could not state with 100% certainity that that cartridge had originated from the norinco pistol which is suspected to be the murder weapon. The defence's view was initially that the findings of the expert witness had completely excluded that spent cartridge from having been fired from the norinco pistol. Upon his recalling the witness said that what he meant was that his examination provided "50 – 50 chance" that the cartridge may have been dropped from the suspected murder weapon.

It was equally of significance to us that this witness removed the myth that had been created by Ngwenya about the nature of the firearm which Ngwenya had projected as an automatic weapon which could only release two bullets at a time. The expert said this was a semi-automatic weapon which could release a bullet at a time.

It was on the basis of this witness' testimony that we were able to disregard the effective firing range of the firearm as initially given to us by Ngwenya. It was also important that through this witness we learnt that when exhibit I, the firearm in question is fired at any position it drops its spent cartridge within a radius of 2 -3 metres.

Before I conclude my analysis of the evidence led by the prosecution, there is one issue that I wish to deal with. This issue arises from the alleged discrepancies between the recorded statements of the state witnesses and the same witness's evidence as recorded in court. In this case when Intellect Moyo was asked during cross-examination to explain the discrepancies between his recorded statement at the police and his evidence in chief the witness responded as

follows: "when my statement was being recorded I was using IsiNdebele and they were translating it into English. I do not know what they wrote."

The response by the witness is indicative of serious challenges that characterise many criminal investigations in this country. The sad reality is that almost invariably when witnesses are invited to give a summary of what happened in a particular case as part of police investigations they give their explanations in their vernacular languages and the investigating officer does the translation into the official language which is English. Therein lies a serious problem in my view. The investigating officer who assumes the role of translating the witness's version to the English language is not a trained interpreter. What often goes into the witness's statement and consequently forming the foundation of the summary of the state case becomes the mutilated or contaminated version of the witness's statement-mutilated in the sense that not all our police officers are proficient in English. In court the witness then finds himself at the mercy of an aggressive legal practitioner triumphantly waving his statement and asking him to explain the discrepancies which have really nothing to do with the witness but have anything to do with the shortcomings of the investigating officer. My view is that this could be avoided if the witness's original version is submitted to the prosecution attached with the translated version so that if there is a conflict between what the witness said to the police and his evidence in court, the court through the aid of a qualified interpreter can have the benefit of both statements.

I now come to deal with the accused person's evidence in chief and his defence in general.

Throughout his defence the accused pleaded innocence. Originally his main thrust was to put the blame of the shooting on either Blessing Ndiweni or Cleverness Ngwenya.

Clearly the accused's attempt to blame Ngwenya hit a brick wall in the light of the clear evidence of Tinashe Basera and Lovemore Bindira, who were with the deceased during the night he was shot at, i.e on 11 December 2014. Both witnesses testified to the satisfaction of the court that the deceased died as a result of having been shot at on the night of 11 December 2014 and

that the shooting of the 12 December 2014 by Ngwenya did not cause the deceased's death and that no one was shot on that day.

The blame game against Ngwenya having hit a snag, I must now deal with the blame on Blessing Ndiweni as the alleged direct author of the deceased's demise.

To start with, the accused, through his cross-examination of Ndiweni (whom I must confirm was a poor witness) his counsel never suggested to him that he had personally shot at the deceased.

The accused had the opportunity to interact and travel with Ndiweni on the night of 11 December 2014 to and from Zulu 8 Mine on the date of the shooting before and after the shooting. The accused did not see him with a firearm. None of all the witnesses who testified in this case saw Ndiweni armed. More poignantly, the accused and Ndiweni appeared to have been singing from the same hymn book from the time they discussed the idea of going to Zulu 8 Mine, going there and coming back to Bulawayo together in the same vehicle. In fact indications are that whatever they were doing on this day they were doing so in the same brotherly spirit. They were acting in common purpose. Whether it was Ndiweni or the accused who was heard shouting threatening to shoot before the shooting ceases to matter because of their common objective. Our clear finding as a court is that the two had conspired to kill any of Nyamiwa's workers as evidenced by the threats uttered just before the shooting. In this regard we recommend that fresh investigations be opened against Ndiweni with a view to charging him as one of the conspirators in the murder of the deceased.

It will be noted in this trial that up until the accused person started being cross-examined by the state counsel, the understanding had been that there was a single gunshot at Zulu 8 Mine on the night of 11 December 2014. In fact all the witnesses testified to hearing of a single gunshot. These witnesses included Intellect who appeared to be sympathetic to the accused in this case.

Much to our dismay the accused shifted goal posts, not in his evidence in chief but only when he was being cross-examined by state counsel, to suddenly suggest that two gunshots were fired on the evening of 11 December 2014. This new page to his defence must have surprised even his counsel.

The accused was the only one who heard this gunshot and he remembered hearing it in his defence case because if this had been his position throughout the trial his counsel would not have failed to cross-examine not even a single witness on this point.

To compound his position even Intellect Moyo who claimed to have been the closet to the accused at the time of firing, and appeared to be supportive of the accused only heard one gunshot.

Our unanimous view as a court is that this two gun shots theory was clearly an after-thought after the accused realised that if the evidence that only one gun shot was fired on the night of 11 December 2014 was accepted by the court the net would surely close on him, as the single shooting would inevitably be traced to him. Indeed it must be the position that he is the only person who discharged a firearm on that night.

There is another hurdle which the accused has to deal with if he says he only fired in the air whilst at the base of the hill, some 200 or so metres away from where the deceased was. Given the evidence of the investigating officer Tirivamwe Matsika that they made a sustainable search of the area for possible recovery of more spent cartridges and recovered none, it can only mean that the accused must be disbelieved when he said he fired from point B on the sketch plan, exhibit 4.

In the light of the evidence of the ballistics expert, the spent cartridge must have been recovered within a radius of 2 – 3 metres from 200 or so metres indicated by the accused. None was found, and clearly the accused could not have fired from that spot.

It is accepted and taken as a factual finding of this court that there was only one shot fired on the night of the 11 December 2014. The accused admitted to have fired on the same day and time. No one else fired a gun during that time but the accused. Surely even, without the recovery of the controversial spent cartridge found about 13 metres from the deceased's body, the arrow of guilty must inevitably point to the accused person.

To seal the accused's fate, several witnesses saw accused "demanding" a firearm from Ngwenya and immediately heading towards the general direction of the mine where the deceased was, subsequently a discharge was heard which discharge the accused says he caused. I do not see how the accused can escape liability or responsibility for the death of the deceased. The situation could have been different if any other shot had been fired on this day. None was fired.

I must at this stage deal with the evidence of the ballistics expert with specific reference to the recovered single spent cartridge about 13 metres away from the deceased's remains. The expert said that there were 50% chances that that spent cartridge may have been dropped by the murder weapon. He said the mark on the recovered cartridge which made it 50% likely to have been dropped by the murder weapon was probably due to contamination of the exhibit before it was recovered. The investigating officer Tirivamwe Matsika confirmed that before they recovered the spent cartridges, the crime scene had been contaminated by people who "appeared to have been walking unrestrained all over the crime scene". The evidence suggests there were over 80 employees around the mine. Our unanimous view as a court is that this spent cartridge must be linked to the murder of the deceased.

The fact that a spent cartridge was recovered about 13 metres from where the deceased's body was, presupposes in our view that the accused must have fired at the deceased at close range hence the cartridge had to drop within a radius of 2 – 3 metres from the shooting position.

The accused must therefore not be believed when he says he fired from a distance and into the air.

If the accused had fired into the air to scare away Nyamiwa's employees then the deceased would not have met his fate.

We must now determine the possible verdict.

Like I said, the accused was in a no nonsense mood when he conversed with Ngwenya and it was that mood that informed his actions. The act of demanding a gun in a harsh manner and immediately arming himself and heading towards where his adversaries were speaks volumes of his avowed aim or intention.

Circumstantial evidence has been well traversed in our jurisdiction. Whenever guilt by circumstantial evidence is contemplated, the wise and instructive words by WATERMEYER (JA) must come to the fore as per *R* v *Blom*. The learned judge made the following observations:

> "(a) the inference sought to be drawn must be consistent with all the proved facts. It is not the inference cannot be drawn.[1]
> (b) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inference, then there must be doubt whether the inference sought to be drawn is correct."
>
> See also the case of *S* v *Marange* per KORSAH JA[2]

In this case the inference that we are obliged to draw is consistent with the cumulative effect of the evidence led in this court.

The proved facts in this case as highlighted in this judgment point to no any other person but the accused person as the one who discharged the firearm in an uncompromising mood.

Given the nature of the injuries suffered by the deceased and given the fact that the firing was done within a range of 13 metres or so, the accused must have intended to kill the deceased, indeed, killing he did.

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[1] . 1939 AD 188

[2] . 1999 (1) ZLR 244 SC at p249

Verdict – guilty of murder with actual intent

Aggravating circumstances

The General Laws Amendment Act No. 3 of 2016 was gazetted on 1 July 2016 and we must assume that its effective date of operation is that date. It is quite debatable whether or not that piece of legislation would be applicable to this case. I do not wish to be detained by these arguments in this matter.

In the case of *S* v *Isaac Mlambo*[3] I had occasion to consider what I perceive the law entails when it comes to determining the existence or otherwise of aggravating circumstances. I agree with defence counsel that even the general laws amendment is an acknowledgement of the common law position on this issue.

I accept that generally a murder committed in the furtherance of another criminal enterprise like rape and robbery could be considered as aggravatory. I must add caution and say these are mere guidelines to the court but are never meant to be exhaustive. The principles of our law are never static but dynamic. New issues will always arise.

In the instant case, our findings by inference point to a conspiracy to murder by the accused and Ndiweni. That conspiracy centered around their grievance emanating from the court order that spoke to the eviction of Ndiweni's people from the mine and the realization that the mine was now firmly in the hands of one Nyamiwa. It was that realization which prompted the two to go to the mine to effectively deal with Nyamiwa's employees or whoever supported the eviction of Ndiweni. This explains why before the shooting there was a clear warning that someone was to be killed and killing was achieved as per the two's common objective.

As courts we have a natural obligation to protect the court processes to their logical conclusion. Anyone who chooses to kill merely because he does not agree with a court process

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or order shows total disregard of the law and a killing in such circumstances would qualify to be murder committed in aggravating circumstances.

Premeditation to this murder runs through the proceedings in this matter and this is crowned by the shooting that occurred, which killing was preceded by threats to kill. Given our findings that the shooting was at close range, it becomes inescapable that the murder in this case was committed in aggravating circumstances.

We do not buy the state's argument in this case coming in the 11th hour of the proceedings that the accused overreacted. The accused never stated that. In fact, the nature of his defence disabled him from raising such a defence. In passing we wish to point out that it is not the function of the prosecution to provide a defence to an accused or to make concessions which are not supported by evidence.

Consequently, our finding is that this murder was indeed committed in aggravating circumstances.

Sentence

In our approach to sentence we will be guided by the submissions made both in mitigation and in aggravation. We accept that the accused has no criminal record and that as an adult aged 50 years this is a notable consideration. The accused has fairly heavy family responsibilities. We accept that those from the deceased's company were engaged in throwing stones at the accused and his group and that this factor cannot be overlooked when one considers the total circumstances under which this offence was committed.

In aggravation, we are concerned that an innocent life was needlessly lost in circumstances which show total disregard of a court order. That total disregard of the law calls for stiffer penalty.

Those who decide to kill merely because they disagree with a court order as in this case are clearly a danger to society and they must not expect mercy from our courts.

To compound matters, the accused is not an ordinary citizen. Through his profession he had committed himself to maintaining law and order as a highly ranked police officer. According to him he was an expert in the use of fire arms like the one he used in this murder. He said he had been so exposed to the use of firearms for the past 18 years. He should not have retorted to the use of such a dangerous weapon on an innocent civilian who was not even the owner of the disputed mine but an ordinary worker who was trying to earn a living.

By any standard, this was brutal murder and under normal circumstance this offence should attract capital punishment. However, we do accept that there are indeed compelling factors in mitigation, the most pronounced being the fact that almost everyone who testified confirmed there were stone throwings by Nyamiwa's employees.

As a court we are unanimous that the accused be spared the agony of capital punishment but instead be sentenced to life imprisonment.

Consequently, the sentence of the court is that the accused be committed to life imprisonment.

The National Prosecuting Authority, state's legal practitioners
Thondhlanga & Associates, accused's legal practitioners