THE STATE
versus
BLESSMORE SHATEI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 19,20,22,30 June 2017and 5 July 2017

Murder Trial

Assessors: 1. Mr Chakuvinga
2. Mr Chivanda

A Masamha, for the applicant
I Goto, for the respondent

CHITAPI J: The accused is charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9.23*]. The indictment alleges that on 26 April, 2015 the accused acting with intent or realising the real risk or possibility that his actions might cause death and nonetheless continuing to engage in that conduct unlawfully shot the deceased Vena Bokosha once on the head with an AK rifle and caused the deceased's death. The shooting incident occurred at Manyame Airbase, Harare at an area referred to as the bomb dump. It is a security area where the Air Force of Zimbabwe stores its equipment and is guarded 24 hours of each day. During daytime one airforce officer is assigned to guard the area whilst at night time, two officers are assigned to guard it.

It is common cause that the deceased had been assigned as the day guard on 26 April, 2015. She was an airforce officer of the same rank as the accused person. Both of them held the rank of aircraftsman. The deceased had commenced her duties at 8.00am and was due to knock off or be relieved by the accused person and another officer at 6.00pm. On commencing duties, the deceased was armed with an AK rifle loaded with 30 rounds of ammunition. She also had

been issued with a communication radio which she would use to communicate with the base radio room.

The accused pleaded not guilty to the indictment. In his defence outline which was amended at the commencement of the trial, the accused denied "every fact and incident incriminating him relating to the alleged offence and put the State to strict proof thereof." He admitted meeting with the deceased on his way to the bomb dump but not "in the manner alleged or at all". He averred that his initial statement professing his innocence was destroyed by the police. He outlined that he later made a "false and less detailed admission of guilty to escape further intense interrogation from the investigators". He further outlined that he did not raise the issues with the magistrate at the confirmation proceedings because of fear of investigators.

It is pertinent to observe at this stage that, whilst an accused person in terms of s 70 (1) (i) of the Constitution has a right to remain silent and not to testify or be compelled to give self-incriminating evidence, once he elects that he will testify, he is then bound by the rules of procedure and evidence which govern the conduct of trial. The accused is required to give an outline of his defence to the charge and list his witnesses as well as provide a summary of their evidence. This is provided for in s 66 (10) of the Criminal Procedure and Evidence Act [Chapter 9:07]. Where the accused fails to comply with the provisions of the said section, he runs the risk that the court in assessing evidence against him may draw adverse inferences from such failure and treat such inferences as corroborative of any evidence given against him. The court is entitled to draw such inferences as described by virtue of the provisions of s 67 (2) of the Criminal Procedure & Evidence.

It is observed that s 66 (10) (b) (ii) provides that where an accused elects to remain silent, the same inferences as are provided for in s 67 (2) may be drawn. It appears to the court that there is sound basis for drawing the same adverse inferences where an accused has elected to remain silent in the face of incriminating evidence as with the accused's failure to mention facts which are relevant to his or her defence in the outline of his defence where such facts are known to the accused and would reasonably have been expected to be mentioned by him.

A criminal trial is not a game of hide and seek. It is a process in pursuit of justice. The State is obliged to disclose its evidence in support of its case against the accused. When the accused is served with the indictment, notice of trial and summary of evidence, the magistrate

serving him is required to ascertain from the accused person whether the accused understands the documents and their content. If he does not understand the same, the magistrate explains the same to the accused person. The accused is then informed of his right to remain silent which he can exercise by declining to give a defence outline or to disclose the names of his or her witnesses and the summaries of their evidence. The accused is then informed of the consequences of the provisions of s 67 (2) on the drawing of adverse inferences by the trial court.

Therefore in as much as the State is required to disclose its evidence to the accused, the accused in turn should where reasonably expected to, disclose his defence. The right to remain silent is a protected right of the accused person upon arrest in terms of s 50 (4) (a) of the Constitution. The protected right continues in safeguard even at trial in terms of s 70 (1) (i) of the constitution as already alluded to. In both cases, the right exists because of the presumption of innocence until the accused is proven guilty. The right also exists to ensure that the accused is not compelled to incriminate himself. Ultimately what is aimed to be achieved is a fair trial. Where therefore the accused is advised of the facts of a charge and evidence to be adduced against but elects to remain silent where he would reasonably be expected to exculpate himself, it is not unconstitutional for a court to draw an adverse inference from a silence or a failure to mention facts relevant to the accused's denial. It is really up to the accused. If for example he finds that the facts alleged against him do not constitute an offence or the evidence sought to be led does not incriminate him, he may reasonably be expected to maintain his silence. Where however he is incriminated, in as much as the State has disclosed its case to the accused, the accused will be expected to come clean by denying the offence and giving a basis for the denial. See *R* v *Masheble and Anor* 1944 AD 571, *S* v *Manamela and Anor* 2006 (3) SA/9(cc).

An inference of an accused's guilt arising from a failure by the accused to disclose his defence at trial is no less plausible than an inference of innocence. Depending on the nature of the evidence led, either inference may properly be drawn. In the case of S v Boesak 2001 (1) SA 912 (CC), LANGA DP drew a distinction between the application of the right to silence at different stages of a criminal prosecution. On arrest, the learned judge reasoned that the right to remain silent arose from the fact that a person should not be compelled to make a confession or admission which may later be used against him at trial. At trial the learned judge held that the fact the accused is not obliged to testify does not mean that no consequences will arise from such

failure. The learned judge at in para 24 of his judgment stated that "if there is evidence that requires a response and no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face of such evidence, the court may in the circumstances be justified in concluding that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. This will depend on the quality of the evidence and the weight given to the evidence by the court." I embrace the remarks by Langa D P as according with the position of the law in this jurisdiction.

The right to silence and in equal measure the right not to give a defence outline which includes material facts of the basis of an accused's defence is therefore not absolute. To remain silent is a gamble and an accused must carefully play his or her cards when choosing to exercise the right to silence. Section 70 (1) (c) of the Constitution provides that an accused "be given adequate time and facilities to prepare a defence". If the right to silence or to decline to provide a defence outline were absolute, the inclusion of s 70 (1) (c) of the Constitution would have been unnecessary. An accused person is therefore expected to prepare and present his or her defence to a charge where facts alleged against him call or cry for a refutal or an answer. If he fails to do so, he does so at his own peril.

In the case at hand, the accused failed to or elected not to present a defence outline dealing with material facts relevant to his defence. He was content to proffer bald denials and to put the State to the proof of its allegations. The allegations were given to the accused including the summarised evidence of witnesses. By simply denying the allegations, the accused placed himself in the same position as that of a person who has elected to remain silent. He therefore placed himself at the risk of the court drawing adverse inferences against him as provided for in s 67 (2) of the Criminal Procedure and Evidence Act if cogent evidence was led against him.

The accused person through cross examination of state witnesses and in his evidence raised the defence that the deceased accidentally shot herself. The defence came as a surprise to the court and from the blue because the defence outline did not capture it. The defence outline gave the impression that the accused had only met up with the deceased on his way to work and that therefore he had no knowledge of what could have happened to the deceased person, let alone, how she died. The court has therefore taken time to expound the law on the accused's right to remain silent and in similar vain, a failure to disclose his defence when reasonably

expected to because it considered that this was a proper case for the court to be alive to the provisions of s 66 (10) and 67 (2) of the Criminal Procedure and Evidence Act when assessing evidence led against the accused.

Most of the facts in this matter are common cause. The court will therefore not expend time on such facts. As already indicated, the accused and the deceased were workmates who were supposed to relieve each other of guard duties with the accused taking over from the deceased at 6.00pm. The accused would be joined by another air force detail from the dog section with the two standing guard over the bomb dump from 6.00pm – 8.00am. The deceased was discovered dead by another workmate Linda Rudo Makaza who also shared living quarters with the deceased. Linda Makaza as issuing officer had earlier issued the deceased with a duty communications radio. Linda was supposed to account for the radio, meaning that the deceased was supposed to have surrendered the radio on completing her duties at 6.00pm. Linda Makaza noted that the deceased had not returned to their shared room and thus not slept at home. She decided to check for the deceased at the bomb dump because the deceased's phone was not connecting through. Linda Makaza then discovered the body of the deceased in a bushy area between the bomb dump and married quarters. She raised alarm and this was how the case came about.

The State called several witnesses to prove its case. Before the court deals with the evidence of witnesses who gave oral testimony albeit in brief, it will deal with exhibits and other evidence admitted by consent of the state and defence. To begin with, the accused person's counsel applied to amend the defence outline by deleting and substituting paragraphs 4 – 9 of the same. Counsel was directed to and subsequently filed an amended defence outline.

Exhibit 1 was the post mortem report compiled by Doctor Mauricio Gonzales after examining the remains of the deceased on 28 April, 2015. The injuries observed on the deceased, all being ante-mortem were as follows:

1. Surface wound on the left ear 5cm in size
2. 2 x abdominal haematoma bruises
3. Scalp bruises
4. Subgaleal haematoma on the left temporal area and left parietal bones
5. Skull fracture on left temporal and parietal bones

6. Brain damage

The cause of death was recorded as brain damage, compound skull fracture and head trauma.

Exhibit 2 was a police forensic ballistic report compiled upon an examination of the AK riffle which had been issued to the deceased for her use in performing her guard duties on the day in question. The AK rifle was in turn produced as exhibit 3 and its spent cartridge case as exhibit 4. The fire arm was reportedly functional and had been fired. The fire arm bore serial no ZA 35434.

At the behest of the State counsel, the defence counsel admitted the evidence of the following witnesses as set out in the summary of the State case.

Beverley Chisure – a police officer stationed at police airport base. She conveyed the deceased's body to Parirenyatwa Hospital where the deceased was certified dead.

Doctor Raramai Maposhera – a medical doctor at Parirenyatwa Hospital. He certified the deceased dead.

Tendai Nzirawa – a police officer recorded the accused's warned and cautioned statement.

Inspector Mutizwa – is a police forensic ballistic and fire arms identification officer. He examined a spent cartridge picked up at the crime scene and matched it to exhibit 3, the AK rifle.

Doctor Mauricio Gonzalez – is a pathologist who compiled the post mortem report, exhibit 1 after examining the remains of the deceased.

Oral evidence was adduced from the following witnesses; Tawanda Prince Maposa - is a workmate of both the accused and deceased. He was the duty provost or head who booked the accused when he reported for duty at 6.00pm. The accused was booked to guard the bomb dump on 26 April, 2015. The accused proceeded to the duty site but returned after 20 minutes. The accused asked the witness for a cigarette on proceeding to duty but the witness had no cigarrettes. Upon the accused's return, the witness enquired of the accused whether he had managed to find cigarettes and he received a negative answer. The accused then told the witness that he was proceeding to the tuckshop to buy cigarettes. The accused did not return and the witness assumed that the accused had used a different route to return to his duty station which was about 1 kilometre from the provost post.

The witness said that the accused was supposed to be on duty the whole night with another officer called Muchinapo whom he had booked earlier than the accused. The two were supposed to relieve the deceased who had been on the day shift alone. Bookings are done on commencing or reporting for duty and not on completion of a shift.

The witness testified that the bomb dump can also be accessed through another entrance or route which passes through the band squadron and married quarters. There is a path which one can use to get to the bomb dump area. It is common cause from the admitted evidence that the deceased's body was found in a bushy area off this path.

The witness next saw the accused in the morning and on enquiring of the accused whether he had returned to take up his duties after visiting the tuckshop the accused responded that he had not done so. Instead the accused volunteered information to the witness that "there was a person who was said to have died at the bomb dump. When he sought further information on the accused's report the accused said that he did not have knowledge of what had taken place. This of course was an obvious lie as is now common cause going by the accused person's account of events and how the deceased reportedly died.

Under cross examination by the accused's counsel, the witness said that the accused did not appear unsettled at all on the day he reported for duty and on the following day and neither did he show any concern about the reported death of a person which he had told the witness about. It was put to him whether he could deny that the deceased and the accused had an altercation during which the deceased was violent towards the accused and wanting to shoot the accused. It was further put to the witness that the deceased had during the altercation with the accused accidentally shot herself. It was also put to the witness that the accused had been afraid to tell the truth out of fear of being made a suspect over a case of the person who had killed herself. The witness of course could not comment, admit or deny the assertions as he had no knowledge of what transpired.

It was this line of questioning which took the court by surprise because there had been no indication at all in the outline of the accused's defence that he was placing himself at the scene of the crime and pleading being a victim of a threatened shooting during which the deceased then accidentally shot herself. It then became apparent that in fact the defence position was that the accused was well aware of how the deceased had met her death. In the view of the court, the

omission by the accused to include the details of how the deceased met her death in the face of the state allegation that it was the accused who killed the deceased appeared to the court as one which went to the root of the accused's defence and as one which the accused was reasonably expected to disclose at the outset. The failure by the accused to disclose this material fact amounted to deliberately choosing to be silent about it. The court will draw such inference as appear to it proper in the light other evidence in determining the guilt or innocence of the accused.

The next state witness was Permit Chimucheka another workmate of the deceased and the accused. He was on duty at what he called the Base H/Q. He was due to finish work at 6.00 pm. The Base H/Q is some 300 – 400 metres from the bomb dump. Before he finished duty he was in the company of a colleague Wurayayi Sakupwanya when they heard a gunshot sound. They did not suspect that anything wrong had occurred because gunshots are fired when aircraft take off from the runway. They suspected that the gunshot had been fired from the runway.

The witness learnt about the deceased's death the following day around 8.30 am – 9.00 am. He went to the scene with his bosses. He was then tasked to guard the deceased's body which lay some 20 metres in the bushes from the footpath which leads to the bomb dump through the married quarters. He observed that the body of the deceased was semi-naked with her pair of trousers pulled down to knee level as well as her parties. He noted that the body was covered with tree shrubs which had dried leaves. The top part was dressed in the deceased's uniform jersey. He also observed that the deceased's fire-arm lay across her chest. There was a trail of blood from the footpath leading to where the deceased's body lay. The place where the body lay was some 150 metres from the bomb dump area. He guarded the body until it was removed by police later in the day.

In cross examination the witness was asked whether he could deny that the accused and the deceased were involved in an altercation during which the deceased shot herself. The witness simply responded that he was not present and could not comment. The witness was asked whether he saw any struggle marks at the scene and he responded that he did not notice any because in any event people gathered at the scene and were walking around. When it was put to him that the crime scene was contaminated or disturbed, the witness responded that it was

difficult to say at which place there could have been a struggle because the body of the deceased was in a bushy area.

Linda Rudo Makaza was the next state witness. Her evidence has already been touched upon. She is the person who first discovered the body of the deceased when she went out to look for her. She observed that the deceased's body lay some 10 metres from the footpath and her service radio lay some 2 metres from the body. She only managed to pick up the radio and in panic ran from the scene and reported what she had seen. She returned to the crime scene when the body of the deceased was being ferried by police. She was in extreme shock but managed to observe that the deceased's trousers and pant were pulled down to knee level. The witness said that she observed that there was a concentration of blood at a point along the footpath. The grass was flattened from that point and there was also a trail of blood from the same point to where the body lay.

Under cross examination, the witness said that the radio which she picked up had been switched off. It was not supposed to be switched off. The radio was supposed to have been handed over to the accused by the deceased on handover/takeover of guard duties.

When it was put to her that that there had been an altercation between the accused and the deceased, the witness said that she did not know. When it was also suggested to her that the deceased had been violent towards the accused she responded that whilst she was not present when the alleged altercation took place, the suggestion was a surprise to her because as someone who stayed with the deceased and knew her well, the deceased was not a person of a violent disposition. She disputed that the deceased could have been incensed by the accused's relieving her of duty late because delays were not something that could anger a person being relieved as there were other procedures like collection of fire-arms, booking in, dressing in uniform and inspections which one had to contend with before proceeding on duty. The relief officer would not have control over the processes and such processes led to delays.

The prosecutor next produced 9 photographs by consent. The photographs were marked exhibit 5 (A) – 5 (I). The photographs depict the crime scene as well as injuries observed on the deceased at the post-mortem examination. The court will not comment on each individual photograph. The photographs in summary depict the deceased's body lying in a bushy area with grown grass. She is depicted lying face up with her private parts exposed. Her denim trousers

and pants are pulled down to her ankles. There are some sanitary pads, 2 in number just below the trousers. The body is also depicted covered with gum tree dried shrubs and the deceased's service rifle beside her Photographs 5 E and 5 F are apposite. Another photograph 5 B depicts blood on the grass along the footpath which connects the bomb dump area with the married quarters. Photographs 5 G and 5 H depict a bullet wound just below the deceased's left ear as observed at the post-mortem examination.

Also produced by consent as exhibit 6 was the sketch plan of the crime scene. The plan was drawn on indications by the accused person, Linda Rudo Makaza and observations made by detective inspector Zhou. Of greater significance are the accused's indications. The accused indicated the point where he met up with the deceased and shot and killed her whilst he was wrestling with the deceased in an effort to disarm her of her service rifle. The point is marked A and is along the footpath from or to the bomb dump. Next to point A is a thick shrub. The plan shows that the accused dragged the deceased's body into the bushes for about 13 metres where he then left the body covered with gum tree shrubs. The plan shows as well the places near the deceased where her rifle and work radio were observed. For his part, detective inspector picked up the spent cartridge 1.20 metres away from the point that the accused indicated as the point at which he shot the deceased. Some 3 metres from the same point, the inspector picked up an empty cascade drink bottle which was blood stained. Some 7 metres away from the deceased's body the inspector recovered the deceased's camouflage hat. When the inspector examined the deceased's AK Rifle he noticed that it had 29 rounds meaning that one round had been discharge. Linda Makaza's indications related to the same points as observed by Inspector Zhou being the trail of blood from the footpath to where deceased's body was, the place where she picked up the communication radio and the place where the body of the deceased lay.

The accused's warned and cautioned statement was produced by consent as exhibit 7. The statement was confirmed by the magistrate on 19 August 2015. The effect of confirmation was that it became receivable or admissible in evidence in terms of s 115 B of the Criminal Procedure & Evidence Act on its mere production by the prosecutor. It is received by the court as *prima facie* evidence of its contents. In terms of s 115 of the said Act, if the accused at his trial denies making the statement or alleges that the same was not freely and voluntarily made without undue influence, and the accused did not make the allegations before the confirming magistrate,

the trial court may draw such inferences as appear proper and treat the same as evidence corroborating any other evidence against the accused person.

From a perusal of exhibit 7, the accused did not allege any impropriety by the police when he appeared before the magistrate for confirmation of his warned and cautioned statement. In the defence outline he alleged that police destroyed his initial statement in which he proferred his innocence. He averred that he then made a false and lesser detailed "admission of guilt in order to escape further intense interrogation." These are matters which he did not disclose to the magistrate. He was obliged to disclose them. He avers in the defence outline that he made a false statement. He does not deny that the alleged false statement was made by him. Therefore it was his statement whether a truthful one or a false one. The consent to the production of the statement implies that the confirmation proceedings were properly conducted.

Reverting to the contents of the statement itself the same reads as follows as the accused's response

> "I Blessmore Shatei have understood the allegations of murdering the deceased and I admit to the allegations.
> On this day I left home and proceeded to my work place, bomb dump, where I saw Vena Bokosha who is now deceased. I greeted her and she responded in a proper manner. I then said 'My friend I feel like sleeping with you,' and she refused. I then grabbed her and snatched fire arm then I shot her in the head. The deceased fell to the ground and I dragged her into the bush. When I was in the bush I then removed the deceased's pair of panties so that I could mount upon her but I saw that she had menstrual blood on her bottom. I did not mount her. I then took her fire-arm and placed it beside her. I returned to my room took off my uniform and placed it in the locker. I did not return to work on this date. I did not take deceased's phone."

The accused's statement was hand written by him in Shona. It was then translated to English by the Principal Interpreter at Harare Magistrate Court on 19 August 2015 on the same date that the statement was confirmed.

The prosecutor also produced by consent a transcript of the video of indications made by the accused on 29 April 2015 at the crime scene. In the indications transcript, the accused indicates the place where he met up with the deceased by coincidence as he was proceeding to the bomb dump. The accused is recorded as having exchanged greetings with the deceased who said that the accused was late. When asked what then happened the accused said "we started wrestling for the fire-arm and she eventually shot herself in the process." He said that the deceased wanted to shoot him for coming late to change over duties with her.

The accused was asked the following question by one of the police officers, Detective Assistant Gondo, "so the reason for wrestling the fire-arm was because you had come to change her late." The accused responded "Yes". Asked what he did after the deceased had shot herself, the accused said that he pulled her and placed her in the bush. The accused also said that the deceased's trousers, pants and cotton pad got pulled down in the process of wrestling for the fire-arm. He denied that he tried to be intimate with the deceased. He was asked as to why he took safety precautions to clear the deceased's fire-arm which he left beside her with the radio and the accused said "I just wanted it to be in safe condition."

The accused is recorded as saying that he proceeded to his room after the incident and it was around 6.00 pm. He said that he was afraid. He removed his blood stained clothes and placed them in a black suit case which he showed to the police. He said that he washed the clothes. The accused failed to find the deceased's phone which he said he had left in the suit case. When asked whether he had anything further to tell the police team he responded, "I was drunk."

The State counsel called three more witnesses namely Dought Makumu and Terence Muunze, Freddy Mushinipa. Their evidence is summarized below;

Dought Makumu

Was the security supervisor on 26 April 2015. He conducted the guards inspection and deployed the accused to the bomb dump as per the duty roster. The accused was equipped with an AK rifle and a radio. He was to commence duty at 6.00 pm until 8 am. He was to be assisted by a dog handler. The accused was supposed to take over duty from the deceased who was due to finish her shift at 6.00 pm. The witness followed up on the accused to confirm that the accused had assumed duty. The witness said that it was an offence for one to abandon one's duties as was done by the accused. The witness learnt of the deceased's death on 27 April 2015 between 10.00 and 11.00 am.

The cross examination of the witness was very brief and not eventful. In fact it would be fair to say that the witness was not subjected to any cross examination because he was asked to confirm whether he was a security supervisor and to comment on whether there was anything untoward which he noticed about the accused's behaviour. In short therefore, the evidence of the witness cannot be said to have been disputed.

Freddy Fritiz Gerald Muchinapa

He is an airforce of Zimbabwe detail. The deceased and accused were his workmates. He was assigned to partner the accused on the 6.00pm - 8.00am shift of guard duties at the bomb dump. His duty was to be the dog handler since the evening duties included the dog guard. The accused wanted to handover his radio to the witness prior to announcement of duty. The witness who formed the impression that the accused wanted to absent himself from duty refused to take the radio. The witness completed the shift alone because the accused absconded duty. The witness only saw the accused the next morning around 8:00am and the accused apologized for not showing up for duty. The witness however reported to the superiors that the accused had absconded duty. There was no meaningful cross examination of this witness which is worth commenting upon.

It is convenient at this stage to comment on the credibility and demeanour of the Airforce state witnesses. They all gave their evidence clearly without bias or malice. It came as no surprise that they were hardly cross examined because there was no controversy in their evidence. The court accepted their evidence and noted that none of them sought to implicate the accused in the commission of the offence. The witnesses gave evidence of the movements of the accused and were honest enough to maintain the neutral position that they could not commit to knowing what happened between the accused and the deceased nor how the deceased met her death.

The evidence of state witnesses Tawanda Makokwa, Lenin Nyamudo, Elisha Gondo and Emmerson Dzatswa Brodgia Mapanda was formally admitted by the defence counsel. The evidence of these witnesses do not really add anything new to the state case. Tawanda Makokwa and Lenin Nyamudo were roommates of the accused at the Manyame Airbases. They speak to the fact that the accused absconded his duties on the right of 26 April, 2015. Elisha Gondo was part of the police team which conducted indications which were video recorded. Emmerson Dzatwa was part of the police team. Brodgia Mapanda a police fire-arms identification officer matched the spent cartridge recovered at the crime scene to the deceased's A.K. rifle.

Detective Sergeant Muunze was one of the attending details at the crime scene. His evidence does not need repeating save to state that what he observed and testified to is the same as detailed in the indications by Detective Inspector Zhou as per the sketch plan exh 6 and the

photographs all produced by consent. The witness saw to the removal of the deceased's body to the mortuary and he also attended a post mortem examination of the deceased's body. Possession of the accused's clothes recovered from his room and all other exhibits. The witness said that blood sample results were outstanding. Notably, the witness said that the accused blamed his conduct on sexual arousal which had been induced by some concoction which he had taken. He also indicated that the accused had averred that there had been an accidental discharge of the deceased's firearm which had been slung on her shoulder.

The witness was asked whether the accused had made another warned and cautioned statement different from exh 7. The witness could not deny this but indicated that there may have been need to clarify issues, hence the need for a subsequent statement. The court will note in passing that there is no law which obliges police to record only one warned and cautioned from an accused person. What is important is that the accused's constitutional rights including the right to silence are safeguarded and that whatever statement the accused person makes is made freely and voluntarily made without any duress or undue influence.

When it was put to the witness that the accused was forced to admit to the charge, the witness disputed the suggestion and said that the accused never denied the charges and there was no reason for the use of force upon him. The witness however was not satisfied with the accused's assertion that there had been an accidental shooting because if that had been so, the accused would have been expected to report the mishap. The prosecutor closed the state case.

The accused elected to give evidence on oath. He testified that on 26 April, 2015 he collected his AK rifle and radio after which he went back to his quarters to dress in uniform. He then proceeded to his work station and met the deceased on the way between band squadron and the bomb dump. He greeted the deceased who responded that the accused was late. The accused apologized. It was around 6:00pm. The accused was carrying his fire-arm slung on his right shoulder. He then heard the deceased cock her fire-arm. She pointed it as the accused. He rushed towards the deceased and held the fire-arm with his right hand. The deceased then held the accused by the collar of his jersey. They struggled and the deceased fell down. When the deceased fell down, her fire arm feel across her chest and she shot herself. He said that the deceased fell down as the two were entangled during the struggle.

After the deceased had shot herself the accused said that he dragged her into the bush because he was afraid. He placed the deceased AK rifle across her chest, covered the deceased with gum tree shrubs and went away. When asked by his counsel as to why he covered the body with gum tree shrubs he responded that he was no longer conscious of what he was doing and was in shock. He said that he proceeded to his room and went to sleep around 7:00pm.

The accused said that when he woke up the next morning he went to Dankwezi bar out of the airbase complex. He was arrested around 12 noon. He was forced to admit to the offence of killing the deceased. Para military personnel assaulted him at the guardroom. He was assaulted with booted feet on his legs and ears and forced to admit being responsible since he was on duty. Police only came around 6:00pm and collected him. He was assaulted by the police with an empty coca-cola bottle on his right leg around the knee. On 28 April, 2015 he was booked from the cells and police recorded a statement from him. They tore up his statement saying it was not reflective of the truth.

On the following day, the 29th April, 2015, the accused said that he was taken to court after he had been beaten up with open hands on the mouth and had bled. He said that he admitted everything at court because the police said that he should admit. The court poses here and notes that the remand court record does not indicate that any admissions were sought from the accused person. He said that he was thereafter taken for indications. He subsequently returned to court on 19 August 2015 for confirmation of his statement.

In cross examination, the accused said that he was a trained military officer just like the deceased and was senior to the deceased by date of attestation into the force though they held the same rank of aircraftsman. He was taken to task to explain what time he reported at the bond dump for duty. He prevaricated because in evidence in chief he said that he met with the deceased around 6:00pm. When it was put to him that he could not have been late then, he then said did not have a watch and his phone battery was flat. He said that he did not check on the time. When it was put to him that his supervisor Makunu had checked on him and found him at his post around 6.00pm and that the witness evidence had not been challenged, he made no response.

The accused said that the deceased was some 60cm away from him when she raised the issue of his coming late for duty and that she cocked her fire-arm from that distance and drew

closer. The court will note in passing that the AK rifle is longer than 60cm in length. The accused said that he was shocked. He raised his hand and turned the rifle against the deceased so that it was now against her ear. He did not see how exactly the deceased shot herself. The accused was asked to demonstrate how the happenings he had explained unfolded by using the court orderly as a decoy taking the place of the deceased. The demonstration clearly showed that it was not possible for the deceased to have shot herself. Even the accused when it was put to him that his demonstration was untenable was content to admit that the demonstration was not consistent with accident but a deliberate act to shoot oneself and therefore a suicidal reaction. It will be noted by the court that the accused's demonstration was a complete departure from what he said in his evidence in chief that the deceased fell down with her fire arm across her chest and she shot herself.

The accused was asked as to why the gunshot wound did not hit the target diagonally as would have been expected basing on his demonstration and he had said that he did not know. The court and both counsel noted that the gunshot would on the deceased as depicted on the photographs was lineal.

When asked to explain how the deceased's trousers got lowered to ankle level as depicted on the photographs, the accused said that he had forgotten to mention that during the struggle with the deceased, the deceased's trousers got lowered and was lowered further after she shot herself and he was dragging her. It will be noted that from the photographs, post mortem report and witness evidence, there was nothing observed or said to suggest that there were any abrasions or any marks on the deceased's buttocks or back area to suggest that she could have been pulled or dragged on her buttocks or back area whilst naked.

The accused was asked to reconcile the version of events which he gave in the warned and cautioned statement with the version which he gave as per video indication. He again prevaricated. He first said that what he wrote in his hand written statement was the correct version and then he changed and said that he now stood by the video transcript version. He then said that police assaulted him and he did not tell the magistrate at confirmation proceedings that he had been assaulted because police officers were in court. The defence closed its case.

There was no eye witness to the commission of the offence. The case falls to be determined on the basis of circumstantial evidence. Circumstantial evidence will ground a

conviction where the court is faced with a large number of circumstantial or connected facts from which it can reach as the only the reasonable inference, the guilt of the accused. The facts are placed in one basket so to speak without separating them and determining whether each individual fact has been proven beyond a reasonable doubt. It is the totality of the facts put together which must lead the court to infer guilt. The courts have laid down the principles to be followed as a guide by the court when it assesses a case on the basis of circumstantial evidence.

In this and neighbouring jurisdictions where Roman Dutch Law was and/or is in application, the case of *R* v *Blom* 1939 AD 288 has consistently been followed in so far as it sets out what are called rules of logic and common sense which a court is guided by when dealing with circumstantial evidence: The first rule is that the inference sought to be drawn must be consistent with all proven facts. Secondly, the proven facts must be such that they exclude every reasonable inference see *S* v *Marange & Ors* 1991 (1) ZLR 244 (S). All evidence should be considered "in the light of the totality of the evidence in the case" see *R* v *Hlongwane* 1959 (3) SA 330A. Inferences must therefore be factually based and not speculative. *R* v *De Villiers* 1944 AD 493 at 508 it is stated that when dealing with circumstantial evidence the court should not consider each circumstance and draw an inference from it. The state has no onus to prove that each single fact is inconsistent with the innocence of the accused. The approach should be that the evidence is consistent with the accused's guilt and inconsistent with his innocence.

In the case of *Chamberlain* v *R* (2) [1984] 153 CLR 521 a case acclaimed internationally as the "*dinigo* case" the court cautioned that facts considered in isolation may not lead to any inference of guilt or innocence; however, when evidence is considered in its totality, its probative force is greatly increased. The court will be guided accordingly.

The accused does not deny that the deceased met her death in his presence. He attributed the death to an accidental discharge by the deceased of her fire-arm during an altercation with the accused. The nature of the altercation according to the accused had its roots in the deceased's annoyance with the accused reporting late to relieve her of guard duties. The accused however said that he met up with the deceased around 6:00pm which was the time of changeover of duties. There was evidence led from accused's workmates who include Makumu who deployed the accused to his duties and later checked on him that the accused had assumed duty on time. Linda Rudo Makaza said that a lateness for duty assumption could hardly be expected to result in

a quarrel because assuming duties was also dependent on pre-deployment processes. The accused failed to make an acceptable demonstration of how the deceased could have shot herself. The accused did not mention the issue of accidental shooting in his warned and cautioned statement. He did not do so in his defence outline yet he had been furnished with the detailed outline of state evidence. He raised the issue for the first time in cross-examination.

Even assuming in his favour that he raised the issue during indications recorded on 29 April, 2015, the court had no hesitation in dismissing the defence as made up. It was not only inherently improbable but did not accord with the proven facts which pointed to the fact that the accused did not report for duty late. Therefore there would have been no plausible reason as to why the deceased would have been annoyed and sought to turn violent towards the accused.

The accused's conduct after the shooting was wholly inconsistent with the defence which he raised late in his trial. The accused sought to hide the accident. He did not report the accident as one would have expected him to do since he was not in the wrong. He decided to conceal the deceased's body and thereafter went back to his quarters. The removal of the deceased's trousers and pants was not in the finding of the court accidental or a result of the accused dragging the deceased. There was no evidence to show that the deceased had been dragged in a semi-naked state. The accused's warned and cautioned statement provides the answer or explanation for the deceased's semi nudity. The accused had wanted to be intimate with the deceased after he had shot her. That he did not violate the deceased sexually was attributed to the fact that the deceased was on her menstrual cycle as evidenced by the menstrual pads which the accused observed and are on the picture exhibits.

There is also uncontroverted evidence of detective Sgt Terence Muunze that the accused attributed his desire for sexual gratification to a concoction which he had drunk and which had aroused him sexually. In the courts inferential reasoning, the accused wanted to have sexual intercourse with the deceased but she was not willing. He turned monster and shot her. He would have sexually gratified himself but for the fact that the deceased was menstruating.

The court found the circumstantial evidence against the accused overwhelming. The evidence against the accused was further corroborated by his failure to place the court in his confidence by deliberately omitting to plead self defence in his defence outline. An adverse inference against the accused was drawn by the court in terms of s 67 (2) of the Criminal

Procedure & Evidence Act. Further, the accused did not acquit himself well under cross-examination. His demeanor was not impressive.

The proven facts as outlined herein and upon a consideration of the evidence as a whole left the court in no doubt as to what inference to draw, being that the accused killed the deceased with intent. A verdict that the accused is guilty of murder as defined in s 47 1 (a) is therefore returned.

Sentence:

The accused stands convicted of a capital offence, which involves the unlawful killing of another human being with intent. Section 48 of the Constitution (2013) entrenches the right of every person to life. A person should therefore only lose his or her life by natural causes which obviously include unavoidable mishap or by operation of law:

The prosecutor drew the court's attention to Part XX of the Act No. 3/2016 which amended s 47 of the Criminal Law (Codification and Reform) Act. The amendment came about because of the need to operationalize s 48 (2) of the Constitution which provides that the legislature may pass a law which permits the imposition of a death penalty for the offence of murder committed in aggravating circumstances. Such law should permit the court to exercise a discretion whether or not to impose the said sentence. The said amendment also lists the factors without limit which the court is obliged to regard as aggravating circumstances when exercising its discretion whether or not to impose the death penalty. The amendment Act aforesaid must be read together with ss 42 and 43 of Act No. 2 of 2016 which amended ss 336,337 and 338 of the Criminal Procedure & Evidence Act to provide for the imposition by this court of the sentence of death for a murder committed in aggravating circumstances.

Mr *Masamha* in his lengthy address in aggravation submitted that although aggravating circumstances were present, the State was not pressing for a death sentence. He instead submitted that a sentence of imprisonment for life was appropriate. I drew the attention of Mr *Masamha* to the fact that the amendments Acts Nos 2/2016 and 3/16 had been promulgated on 10 and 24 June, 2016 respectively. To that extent, I sought the prosecutor's view on whether the amendments had retrospective effect since the case before the court was committed in April, 2015 before the amendments changed the law.

Mr *Masamha* submitted that the issue of retrospectivity of legislation had not crossed his mind. It is trite law that there is a presumption against retrospective application of a new law unless such laws provides so. Section 17 (1) of the interpretation Act, [*Chapter 1:01*] provides inter-alia that the repeal of an existing law does not affect any offence, committed under the repealed law or penalty provided for it under the old law. The position therefore is that the court is obliged to apply the old law in sentencing the accused person in this case. Prior to the amendments I have referred to, the Criminal Procedure & Evidence Act provided as follows in the operative provisions dealing with sentence for the offence of murder.

> "**A. Sentence of Death**
>
> **337 Sentence of death for murder**
>
> Subject to section three hundred and thirty-eight, the High Court -
>
> (a) Shall pass sentence of death upon an offender convicted by it of murder:
> Provided that, if the High Court is of the opinion that there are extenuating circumstances or if the offender is a woman convicted of the murder of her newly-born child, the court may impose –
>
> (a) A sentence of imprisonment for life: or
> (b) Any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case.
>
> (b) may pass sentence of death upon an offender convicted of treason.
>
> **338 Person upon whom death sentence may not be passed**
>
> The High Court shall not pass sentence of death upon an offender who –
>
> (a) is a pregnant woman; or
> (b) is over the age of seventy years; or
> (c) at the time of the offence, was under the age of eighteen years."

The court is therefore obliged in this case to pass the death sentence unless it makes a finding of extenuating circumstances in which case it may in its discretion pass a sentence of imprisonment for life or any other sentence which it considers appropriate regard being had to the class of persons excepted in terms of s 338 in so far as the death sentence is concerned. The accused does not fall within the class of person who are excluded from the death penalty.

In considering the question of whether extenuating circumstances exist in this case, the court considered firstly the subjective factors attendant on the commission of the offence which

mitigate or reduce the accused's moral *approbrium.* In *R* v *Mharadzo* 1966 ZLR 240 (AD) at 241 G a decision of BEADLE CJ followed in *S* v *Sikuli* SC 146/04 by CHIDYAUSIKU CJ it was stated that "it is desirable for the trial court to make a positive finding on the precise state of mind of the accused before determining the question of whether or not extenuating circumstances exist, because here this question of the actual state of mind is a factor of considerable importance….." The court is accordingly guided.

The evidence placed before the court convinced the court that the accused's conduct on the day in question, despite him denying it, was unusual clearly implying that he was acting under the influence of other factors which influenced his behaviour. He reported for duty and immediately returned from his duty station to look for cigarettes. He tried to influence the dog handler who was supposed to be on duty with him to take possession of the communication radio and the dog handler refused. The dog handler sensed that the accused wanted to abscond duty hence the accused's desire to divest himself of the radio which it was his duty to keep. The dog handler even warned the accused that if the accused did not report for duty, he would report the accused to the superiors.

In the indications transcript which was produced by the state by consent, the accused person when asked whether he had anything to say attributed his actions or conduct to the fact that he was drunk. The state also led evidence from Detective sergeant Muunze to the effect that the accused attributed his conduct to the effects of a concoction he drank which aroused his sexual appetite, appeal or feelings. Section 221 of the Criminal Law Codification and Reform Act provides that voluntary intoxication which does not incapacitate an accused person to a point that he lacks *mens rea* to commit the crime charged can properly be considered as a factor of mitigation. Intoxication affects a person's reasoning capacity and as such it can properly be taken as a factor of extenuation. The accepted fact that the accused had taken some form of aphrodisiac which aroused his sexual desire to gratify himself is a factor that the court considered as having influenced his mind set. The prosecutor conceded that in as much as he had initially argued that there were aggravating circumstances in the case which outweighed mitigatory circumstances, the court should find that extenuating circumstances existed in the case. The court was satisfied with the state concession and on the evidence that a finding of extenuating circumstances was justified. Accordingly it is the court's finding that extenuating circumstances existed as outlined.

The effect of a finding of the existence of extenuating circumstances is that the court is placed in a position to exercise a discretion whether or not to impose the death penalty. The court has considered the mitigating and aggravating circumstances submitted by counsel and also as arose from the evidence. The murder of the deceased arose from selfish consideration on the part of the accused. He wanted to sexually gratify himself. Had it not been for his state of drunkeness and the effect of the concoction which he said he took, it would not have been possible to find sympathy for his conduct. The court does not and should not condone conduct which leads to unlawfulness. The accused's conduct has to be deprecated and the court will pass a sentence which reflects the court and society's abhorrence for the accused's unacceptable conduct. A deterred sentence is called for.

The accused is 24 years old. He is an adult and is a trained person in self-discipline. He allowed himself to engage in indiscipline by choosing to consume alcohol; and get drunk when he was supposed to and knew that he would be reporting for duty. The indiscipline was compounded by the fact that he chose to consume a sexual arousing concoction at a time that he knew that he would not be available to look for women whom he could propose to and quench his desires. The accused failed to act in an exemplary manner as would otherwise be expected of a trained cadre in his position. In the army, weapons including rifles are not issued to cadres for purposes of committing crime but they are tools of trade. Section 212 of the Constitution provides that:

> "212 Function of Defence Forces
> The function of the Defence Forces is to protect Zimbabwe, its people, its national security and interest and its territorial integrity and to uphold this Constitution."

The Constitution as clearly alluded to provides in s 48 (2) for the right of every person to life. The accused failed in his sworn duties to uphold the Constitution and did so in a very callous manner by killing a colleague for selfish ends.

The court agonized with coming up with an appropriate sentence. Despite the existence of extenuating circumstances, this is a borderline case where the death sentence may well have been merited. The state did not press for the capital punishment and instead suggested a sentence of life imprisonment. The accused's counsel submitted that because the accused was a first offender, a factor which the court took into account, he should be sentenced to a lesser penalty than life imprisonment. He also argued that the accused had been incarcerated since his arrest in

April, 2015. It is correct that pre-trial incarceration is a factor which a court should consider in assessing sentence. Unfortunately, the accused committed a very serious offence. His first brush with the Law was at the deep end. Committing a deep end crime has the unfortunate effect that it clouds the offenders prior blameless life. *In casu*, the crime was committed in a gruesome manner which involved shooting the deceased in the head. There was an attempt to sexually violate the deceased. She was abandoned in the bush in a semi naked state showing the accused's brutal and brazen resolve. Society is in the courts' view better off without the likes of persons like the accused person. The accused did not show or exhibit any remorse for his heinous crime.

Under the circumstances, short of the death sentence, the only appropriate sentence which the court in the judicious exercise of its discretion considered appropriate is the following:

The accused is sentenced to imprisonment for life.

National Prosecuting Authority, for State
Muunganirwa & Company, for the accused (*pro- deo*)