

THE STATE  
versus  
KUDAKWASHE NDUMA

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 16, 17, 20, 21, 23 February 3, 6 March & 1 June 2017

Assessors: Mr Gweme  
Mr Mhandu

### **Criminal Trial**

*B Murevanhema*, for the state  
*Edson Mutsanura* with *Ms C Danha*, for the accused person

TSANGA J: The accused faces a charge of murder in terms of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as well as a charge of robbery in terms of s 126 of the same Code. The allegation is that on 20 June 2016 near the 3km peg along Poverty Valley Road, Chinhoyi, he unlawfully and with intent to kill, strangled and struck one Bertram Gardner on the head with a stone, causing injuries from which the said Bertram Gardner died. In terms of the robbery charge, it is alleged that he intentionally used violence against him to rob him of his vehicle with the intention of permanently depriving him of the custody of his motor vehicle.

In relation to these charges, it is more fully alleged that on 20 June 2016, the accused was by the road side awaiting transport to travel to Chinhoyi town from Gypslander farm, in Chinhoyi. The deceased offered him a lift in his Ford Ranger, ADX 5611. The accused was arrested on 25 June whilst in possession of the said vehicle. He was also putting on the deceased's short pair of trousers, and a long sleeved jersey, which clothes the deceased was last seen wearing on 20 June 2016. The deceased's vehicle was recovered on 25 June leading to accused's arrest whilst resultant investigations led to the discovery of the deceased's

remains in a bushy area at Citrus farm. The deceased's remains were referred to Chinhoyi for an autopsy, where it was concluded that the cause of death was "intracranial haemorrhage" leading to cardiac arrest. The deceased was aged 90.

The accused pleaded not guilty. In his defence outline he stated that he knew nothing at all about how the deceased was robbed or met his death. He stated that he does not drive a car and that on the fateful day he was at his girlfriend's house wearing different clothes to those alleged. He said his mother would testify to that effect. He denied having any relatives in Zvimba, a key aspect of the state's evidence and said his friend would come and testify. He said the police officers and one Ganda Gweshe, were known to him prior to this matter and that they were the ones who would frequently ask him about the deceased. He also said he was severely beaten to admit to the charges and that he was in fact led to the indications by the police. He denied participating in any indications and said he had merely been handed a copy for his signature. He said he had been threatened with being shot if he did not admit to the charges. He distanced himself from his warned and cautioned statement.

As regards the accused's defence, suffice it to point out that subsequent to the state leading evidence from two police detectives, the accused sought to change the thrust of this defence by admitting being present at the scene on that fatal day as well as adding that he had been with Ganda Gweshe at the time and that it was the latter who had committed the murder. He also admitted to taking \$400.00 from the car belonging to the deceased. Accused's counsel had sought to halt the leading of further evidence on the basis that Ganda Gweshe was to blame. The state insisted that all evidence continue to be led and the court agreed. The reasons for so ordering will be canvassed more fully in the factual analysis of the evidence led in this matter.

### **The admitted evidence**

It is expedient to deal with the admitted evidence at this point. The evidence of the doctor who conducted the post mortem report was admitted as exh 1. The evidence of three of the state's ten witnesses was admitted in terms s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The admitted evidence was that of Rumbidzai Jaramba, Farai Kaingwa and Ngonidzashe Chimhunu.

The following was gleaned from the admitted evidence:

- The post mortem report showed that the deceased had a laceration on the right scalp, a fragmented right skull as well as intracranial blood clots. He had died from intracranial haemorrhage and cardiac arrest.
- The accused was wearing the clothes that belonged to the deceased when his girlfriend met him.
- The critical items belonging to the deceased were found at the accused's girlfriend's house.
- The accused had used a flower blower belonging to the deceased as security for repairs to the car which belonged to the deceased when he had taken his car to one Farai Kaingwa.

The accused's warned and cautioned statement was also admitted in evidence as exhibit No 2 and stated as follows:

"I admit to the allegations of murdering Bertram Gardner. I knew the deceased as a horticulturalist at East Range Farm, Chinhoyi where I reside. I had heard at beer halls that he was always in possession of a lot of money during his visit to the farm and back to Chinhoyi where he stayed. Because it was towards month end when I saw him, I suspected him to be in possession of money and waited for him close to his way back to Chinhoyi. He used to ferry people so I was convinced that he would pick me. When I stopped him I told him I was going to Chinhoyi and he offered me a lift which gave an opportunity along the way to lie that vehicle had a puncture. When he stopped I throttled him and dragged him to the bush whereupon I used a boulder to hit him on the head twice until he died. I stripped him naked and wore his clothes since mine were blood stained. I then dragged the deceased's body far away from the road. I took his Ford Ranger vehicle registration number ADX 5611 which I intended to sell to get money. I also took all his belongings including US \$225.00 and drove to Chinhoyi."

The exhibits which were admitted as evidence included a pair of short trousers, a long sleeved black jersey and a brown pair of shoes all which the deceased had been wearing on that fateful day. Exhibits further included the deceased's nokia cell phone 1203; a blue bag belonging to the deceased with his personal particulars, the Ford Ranger car ADX 5611, and a flower blower, all which belonged to the deceased. Also included in the exhibits was a pair of jean trousers said to belong to the accused and a black and red woollen hat. The boulder said to have been used in the murder was also admitted as an exhibit.

### **The state's oral evidence**

The first witness was Design Tsikayi of the Criminal Investigation Department (CID) Chinhoyi who recorded indications from the accused on 25 June 2016. He explained that the accused was then in police custody having been arrested on 24 June 2016. The accused was advised that he was not compelled to make indication but voluntarily elected to do so. He was also cautioned before signing a warned and cautioned statement. The accused had led a team of about seven police officers to where he had stopped the deceased for a lift and to where he had struck the deceased to death. The police had also been shown by the accused where he had dumped the deceased's body which was lying face upward in a grassy area. He had also shown them where he had hidden his own trousers and a hat as well as a brown pair of shoes which belonged to the deceased. The accused was wearing the clothes he had taken from the deceased at the time of the indications. The police had also been shown the boulder that had been used to murder the deceased. They had observed that the deceased's head was blood stained. The proceedings had been photographed.

A sketch plan had been drawn from the indications. The photographs and sketch plan were admitted as exhibits in court. The accused had also signed that he had made indications. Detective Masendu had also signed as well as an independent witness who had been called to witness the indications. The witness denied the accused's assertion that he had been forced to make indications. We found this evidence of the indications to be credible and straight forward in highlighting the processes that had been followed and at whose instigation the body had been discovered and the recovery of core items of clothing that had been left at the scene.

In cross examination accused's counsel had sought to discredit this witness's evidence as lacking credibility because he had omitted to mention that in the indications, the accused had mentioned that he had been with one "Nhema" when deceased was killed. This was of no significance to his credibility as accused's "Nhema" story had been thoroughly investigated by the relevant authorities at the time and been found to be false as the said Nhema was not even residing in the area at that time. He had been in Gokwe. Therefore accused's indications in reality had nothing to do with the said Nhema. In any event, the accused's defence was not fashioned at all around Nhema.

The next witness was Detective Sergeant Kasongo. He knew the deceased as a resident of Chinhoyi and had also assisted him at one time to change the ownership of the vehicle which was now the subject matter of this case. He had been called by security personnel from SAS Security Services who were responsible for security at the home where

the deceased stayed and was advised that the deceased was missing. Having personal knowledge of the deceased's vehicle he had gone around Chinhoyi looking for it. He had discovered it at the bus terminus and had noticed that there was a black male adult in the vehicle yet missing person was an elderly white male. Back up personnel had been requested. The lone male, one Ganda Gweshe had been apprehended and interviewed regarding his possession of the vehicle and the whereabouts of the missing person.

He had indicated that the vehicle belonged to the accused and that he was in the process of purchasing it from him but had not given him any money yet at that point as he had not produced a registration book. He had been waiting for the accused at that time who had purportedly gone to fetch the registration book for the vehicle. The accused had been phoned by Ganda Gweshe under the pretext that he could collect payment. Accused had arranged to meet him and the police had driven with Ganda Gweshe to the place accused had agreed to meet with him. He had fled upon realising that Ganda Gweshe was in the presence of the police. The police had obtained information that accused had a girlfriend and had gone to her house to conduct a search. It was there that they had discovered several items that belonged to the deceased which included a bag, a brown wallet which contained the deceased's identity card and driver's licence, business cards and bank cards for different banks. The deceased's cell phone number was saved on the girlfriend's phone under the name of the accused. Also in the bag was an affidavit pertaining to the proposed sale of the vehicle to Ganda Gweshe by the accused. It was dated 24<sup>th</sup> June 2016. (Exhibit 17).

The girlfriend had phoned the accused who had indicated that he was coming home. At around 1:00 am he had arrived whilst the police kept vigil. They had pounced on him after he had entered the house. He was wearing a black jersey and a cream short. On being searched he also had a black Nokia cell phone which the witness recognised as belonging to the deceased as he had had occasion to see him with it during his life time when he reported at their offices.

It also emerged from his evidence that a photograph of the deceased had been taken by his colleague sometime in May 2016 at the deceased's home for purposes of change of ownership of the vehicle which they were assisting him with. The photograph was of the deceased wearing the very clothes which the accused person was putting on at the time of his arrest. The photograph had been taken by the officer who had accompanied him to the deceased's home. He had used his cell phone. He had also recognised the brown shoes recovered at the scene of the indications as those belonging to the deceased. Ganda Gweshe

had also indicated upon interrogation at the time they were looking for the accused that the accused was wearing a black jersey. When he was arrested the witness had recognised the clothes.

Detective Kasongo further narrated his primary role as a photographer during the indications by the accused. These photographs which were admitted as exhibits included among others, those of the accused person wearing clothes taken from the deceased before going for indications (exh18); Citrus farm where they had gone for indications (exh 24); the boulder used to kill the deceased (exh 20); the trek followed (exh 19); the accused pointing to the deceased's body (exh 21) and, photographs of accused indicating the way to where the jeans and deceased's shoes were recovered.

He had been taken to CID Chinhoyi and had been advised of his rights. Key procedures had been followed in recording a warned and cautioned statement from him. (Exh 2). He told the court that his conviction that the accused had committed the crime arose from the indications which he had freely made and from this warned and cautioned statement which has been confirmed by the court, in accordance with the proper procedures He dismissed as unfounded the contention by the accused that he had been threatened. The cross examination of this witness was largely factual and a repetition of information that he had already narrated in his evidence in chief. Again, we found his evidence to be a credible narration of what had taken place during indications with the accused at that time.

Detective Sergeant Bothwell Masendu also gave evidence which corroborated that of detective Sergeant Kasongo on the events leading to the arrest of the accused and the indications that had been carried out subsequent to his arrest. He further corroborated the evidence on what accused was wearing at the time of his arrest and also on what had transpired during indications.

He was part of the escort team when the accused was taken to court for the statement to be confirmed. The only injuries the accused sustained were those to his legs from scaling the wall when he was fleeing the police. He also confirmed that during the indications the accused had said he was with Nhema and that this had been proven to be false. Investigations had confirmed that he had perpetrated the offence alone. Furthermore, it was accused who accounted for all that was recovered from the deceased. He was also of the view that the accused must have smashed the accused's head on the boulder as opposed to lifting it and that he had then dumped the body. He also asserted that Ganda Gweshe had stated that he was buying the vehicle from the accused and that he needed the registration book from him. He

further confirmed that through a call to the accused they had made him believe that the payment was ready for collection. He was also the one who had taken the photograph of Bertram Gardener at the time that he was assisting him to clear this vehicle.

Shepherd Chakasvika a duly attested member of the Police at Makombe also gave evidence. He had helped the accused to drive to Zvimba to see his brother on the 20<sup>th</sup> of June 2016. He had met the accused at TM South Supermarket in Chinhoyi whilst he was in the company of Peter Mtetwa who is also a member of the police. It was Peter Mtetwa, his workmate who had asked him that if he was not busy to accompany accused and himself to Murombedzi for accused to see his brother. Peter Mtetwa had driven the vehicle which the accused said belonged to him. Accused had bought them meat and beer on the way. They had met the accused's brother at Masiyarwa shopping centre and had then proceeded with him to his homestead. Accused had informed his brother and sister in law that he had bought a vehicle. On their way back the vehicle had veered off the road and they had been assisted by villagers to get back on the road. As it was now cold the accused had given Peter and him jerseys to wear which were in the vehicle. He had been given a black jersey whilst Peter had been given a sleeveless jersey. When they got back to Chinhoyi they had gone to leave Peter Mtetwa at his place of residence. The accused had sat at the wheel but said he was too drunk to drive. The witness had then driven the car to Chinhoyi Rank which is where they had met Rumbidzai who was known to the witness. The accused had shown interest in her. He had subsequently dropped off the accused at Rumbidzai's residence where he parked the car and gave accused the keys. He had met him again on the 24<sup>th</sup> and accused had stated that Ganda Gweshe was buying his vehicle. His evidence was important in so far as it showed that accused was with the deceased's vehicle on the day he went missing.

After this witness's evidence the state had alerted the court to the difficulties it was then experiencing in bringing Ganda Gweshe to court as he was refusing to cooperate on the basis that the officers were wasting his time. It was at this point in the state's case that the accused's counsel Mr Matsanaura indicated that the accused had made certain concessions regarding his involvement in the matter but that he committed the offence with Ganda Gweshe. His counsel also told the court that the accused's role had been to simply watch whilst Ganda Gweshe committed the murder. His counsel had sought to stop the state from leading of any further evidence on account that the accused had acknowledged being present but that the actual killing had been done by Ganda Gweshe. Whilst state counsel Mr Murevanhema acknowledged the right of an accused to change his plea before sentence, his

position was that evidence should be led as it was the accused who was on trial and it was the state's intention to prove the link between the robbery and the murder. We will return to this issue of the change of plea and more particularly the change of accused's defence in our analysis of all the evidence. Suffice to point out that a warrant for Ganda Gweshe's arrest for failure to attend court had been issued and was subsequently discharged when he attended court and explained his default. His evidence will be dealt with following the chronology of the witnesses.

Peter Munyaradzi Mtetwa who had driven the vehicle to Murombedzi gave his evidence. He is a constable in the police force. He told the court he had met the accused through a tout named Kervias who had told him accused had problems driving the motor vehicle. The accused had told him that he could not drive himself as he was tired and had come from Harare. The accused had shown him where he had parked the vehicle and had given him the keys to the vehicle and they had proceeded to TM South where they had then met Sherperd Chakasvika. He said the accused and Sherperd knew each other slightly. Accused asked them if they were free to accompany him to Murombedzi where he wanted to go and see his brother. This was around 10-11 am in the morning. He had driven the car to Murombedzi having been granted permission by the accused to drive the car. They had stopped on the way to have the car washed and the accused had also phoned his relatives whilst at Masiyarwa. He corroborated Peter Mtetwa's evidence on meeting the accused's brother and proceeding to his house. At around five they had driven back to Chinhoyi and he had been dropped at his house. He had been given a sweater by the accused which he forgot to return. After being informed by detectives on the 25<sup>th</sup> that the sweater belonged to the deceased he had taken it to them. He confirmed that on way back the car had veered off the road resulting in the radiator leaking. He had subsequently seen the accused in Chinhoyi having the radiator fixed. He had identified the sweater in court.

Dennis Moffat who was employed by the deceased at Gysplander farm gave evidence that he had last seen the deceased on 20 June at the farm at round 6.30am when he had gone to East Range where they had a flower project. He said he had been wearing a black jersey, cream shorts, and brown shoes. Having been granted time to go to a funeral, the witness said on his way he had seen the deceased's car and noticed that whoever was driving was high up in his seat yet the deceased would normally be sunken. He had also observed that the person driving was a black person and not the deceased who was a white male. He had thought the car would stop but it never did. He had next seen the deceased on the 25<sup>th</sup> when he had been

called by a police detective to come and identify the body. He identified the clothes, shoes, phone and the flower blower as belonging to the deceased.

Kelvin Ganda Gweshe then gave evidence. He is self-employed and sells groceries and has a poultry project. On 22 June he had come back from where he sells wares and had taken his car to the garage to have it fixed. There he had found his mechanic attending to the accused's car which was said to have been involved in an accident. The accused was in the company of Peter Mtetwa and Sheperd Chakasvika, the two police officers. When the mechanic had completed the job on that car he had advised him that the car was for sale as he knew that he had been looking for a car. The accused had been called and had told the witness that he was a soldier based at Inkomo Barracks. He had also told him that he had farmed soya beans and was selling the car due to a misunderstanding with his wife. They had discussed a possible sale and a swop with his old car. It was in this context that he had gotten to meet the accused. The accused had informed him that the registration book was with his wife in Budiriro. The following day the accused had phoned him to advise him that his wife was coming with the registration book. They had met on 24<sup>th</sup> with accused in the company of three other men whom he said were his nephews. He had also said he would wait for his companions the two police officers to knock off. Sheperd Chakasvika had later turned up.

In the course of that afternoon the accused had said he was going to pick up the book on the grounds that his wife who had brought it from Harare had taken it directly to Cold Stream Farm where they stayed. It was whilst he was waiting for the registration book to be brought that the police had found him with the car and had taken him to the police station for questioning. At this time, the others had gone into a bottle store to buy some liquor and had subsequently disappeared, possibly when they had spotted the police. At the behest of the police he had contacted the accused on the grounds that he wanted to pay him the deposit. He explained that a statement regarding payment for the vehicle had been written by accused after he had indicated that his wife bring the registration book. The witness had refused to part with any money until he had seen the registration book. He had tried to get him to pay upfront without the book on the pretext that he was a soldier. He had given the accused \$200.00 to go and get the registration book which amount was to have been deducted from the final purchase amount for the car. He had taken it at face value that the accused was a soldier and had not doubted him since he was in the company of police officers. He explained in cross examination that he had been comfortable in sitting in a car he had not bought because the accused was a soldier and also his friends were police officers

He emphasised that he only know the accused in connection with him wanting to sell the ford ranger in question. In cross examination, he explained that upon being arrested the police had been jittery about the fact that two members of the force had interacted with the accused particularly in relation to the sale of the vehicle. This explanation was in response to the discrepancy between his evidence in court and his statement in which he had said that the vehicle had a “for sale” sign on it when he saw the accused with it. He said that this particular detail which was not true had been crafted to hide away the involvement of the police at the scene where he had met the accused. Again this witness’s evidence was corroborated by the evidence already given by the detectives as to how they had found him with the car and the explanation he had given. There was nothing new in what he told the court. Furthermore, the evidence of Shepherd Chakasvika was clear that they had had an accident with the car and that it needed repairs on their way back from Murombedzi. Ganda Gweshe evidence that he had met the accused whilst having the car repaired therefore had corroboration in this respect.

#### **The accused’s defence case**

The accused took to the stand. In his evidence he admitted taking money from the deceased but said that it was Ganda Gweshe who killed the deceased. His version was that they had researched and found that the deceased had money and that they had hatched a plan to rob the deceased. Ganda Gweshe had come in the morning in question and they had sat by the roadside and on the deceased’s way back from the farm they had stopped him for a lift. The accused had sat at the back and as planned had knocked on the window after the car was in motion to indicate a fault with the car. He said it was Ganda Gweshe who had then grabbed the deceased by the neck and rushed with him into the bush. It was at that time that he has taken US\$400.00 from the car. He said he had heard cries from the bush and when Ganda Gweshe returned he had told him that he had killed the deceased. He said he had enquired why he had killed the deceased since the intention had been to only take his money. Thereafter they had proceeded to D & R Service station with Ganda Gweshe driving. He admitted asking for assistance to drive as he said at that point Ganda Gweshe had said he was going to see his wife and would be coming back shortly. It was when he was late in returning that he had sought assistance from Peter Mtetwa with driving the car.

He confirmed driving to Murombedzi and said that they had gone to drink beer. He said that he had been forced by the police to confess to the crime and denied being the one who led police in the initial instance to where the deceased’s body was found. He said that

since they had arrested Ganda Gweshe before him, he must have been the one who had shown them where the deceased was. He said that the police namely Detectives Masendu and Kasongo had made him wear the deceased's clothes when going for indications. In cross examination he said he had been able to lead the police to the place of the indications because he knew the general area. He denied meeting Ganda Gweshe for the first time at the garage and said he had known him since 2014. This however had not been put to Ganda Gweshe when he took the stand. He also said that he had agreed to the warned and cautioned statement being confirmed because the police officers were sitting in the gallery and had indicated that if he denied they would burn his homestead.

### **The legal position and analysis of the evidence**

It is important to start by addressing the significant departure by the accused from his defence outline. Materially a defence outline is given before the prosecution evidence to prevent it being tailored to fit that evidence. There was a remarkable difference in the new defence raised by the accused. Nowhere in accused's defence outline did he assert that he was in the company of Ganda Gweshe when the crime was committed. This was a new defence with the risk of adverse comment. It was a radical departure from his defence outline. There is a distinction between the state's outline and that of the defence. As Reid Rowland explains:

“The outline of the defence and the defence cases perform similar functions to pleadings in civil case.....However there is one major distinction between the outline of the state case and that of the defence case. If the accused in his defence departs significantly and without good explanation from the outline of the defence which he makes, this may be a matter for comment or even adverse conclusion. The same does not apply to a departure by a State witness from the outline given. This is because the state outline is a précis of the witnesses' statements, often compiled by a policeman with no legal training..... The defence outline is a categorical assertion by the accused person of facts on which he relied for his defence.”<sup>1</sup>

The law which embodies the above principles is equally clear in this respect. Section 66 (6) (a) and (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides for the disclosure of outlines prior to the trial by the state and the defence respectively and states as follows:

“66 (6) Where an accused has been committed for trial in terms of subsection (2) there shall be served upon him or her in addition to the indictment and notice of trial—  
(a) a document containing a list of witnesses it is proposed to call at the trial and a summary of the evidence which each witness will give, sufficient to inform the accused of all the material facts upon which the State relies; and

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<sup>1</sup> John Reid Rowland *Criminal Procedure in Zimbabwe* (Harare: legal Resources Foundation, 1997) *Chapter 16 p 28*

(b) a notice requesting the accused—

(i) to give an outline of his or her defence, if any, to the charge; and

(ii) to supply the names of any witnesses he or she proposes to call in his or her defence together with a summary of the evidence which each witness will give, sufficient to inform the Prosecutor-General of all the material facts on which he or she relies in his or her defence; and informing the accused of the provisions of section 67(2) in the event that that accused declines to give the information referred to in paragraph (b) whether on the grounds that he or she wishes to exercise his or her right to silence or otherwise.”

Section 67 (2) is important in that it deals with the consequences of failure by an accused to mention relevant facts to his or her defence. It provides as follows:

“If an accused has failed to mention any fact relevant to his or her defence as requested in the notice in terms of section 66(6)(b), being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused”.

An accused is therefore clearly given an opportunity in no uncertain terms to put forward his own position in view of the state’s outline. He is also clearly warned of adverse inferences that may arise for failure to disclose information that he could have disclosed. There are important factors to be considered by the court where a new defence has been raised at trial. What a court must take have regard to before making an adverse inference, commenting on its justification or granting leave for the new defence, is the extent of the difference between that which is raised and the new defence. The court might very well condone non-compliance without inference or comment in situations such as those arising from genuine error, change of counsel or where there has been a shift in the prosecution case.<sup>2</sup>

In this instance, the failure to mention his new defence cannot be attributed to any error as there is nothing that points to an error. Furthermore, the accused in this instance was represented by legal counsel whose role was to ensure from the onset that the accused faced trial on the basis of the correct factual information from the accused’s point of view. In addition, there was no shift in the prosecution case at any point which can be said to justify an altered defence. The adverse inference in the accused’s shift in his defence in so far as he

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<sup>2</sup> See for example Kevin Dawkins’ discussion on *Defence Disclosure in Criminal Cases* 2001 New Zealand Law Review 35 2001 pp35-65 at p46 where he discusses the **Criminal Procedure and Investigations Act 1996 (UK)** and its sanctions for non-disclosure.

sought to now pin the murder on Ganda Gweshe, is that the altered defence was simply a recent fabrication. It was not lost upon the court that the accused conveniently departed from his defence outline at the point when he thought that Ganda Gweshe would not be coming to give his evidence due to the state's professed difficulty at the time in securing his attendance. It was at that point that the accused manufactured his story to lump it all on Ganda Gweshe. It was motivated by the realisation that the circumstantial evidence against him was very strong. There was no reason whatsoever why the accused did not tell the truth of what happened at the very onset if indeed he had been with Ganda Gweshe. There is also no reason why the police would want to shield Ganda Gweshe from the crime if he indeed committed it. In fact he had been taken in at the time that he had been found sitting in the car and full investigations had been done. Materially, as already discussed, the accused had mentioned being in the company of one Nhema when he was initially arrested. He had now changed to Ganda Gweshe. This points to a tendency on his part to seek to escape responsibility by blaming whoever he considers fair game at any given point.

His own explanation as to why he had come up with the defence he had in the initial instance is itself telling. He blamed his initial version in his defence outline on discussions he had had with other prison inmates. In the same manner that he claims to have fashioned a defence with the help and advice of his inmates in the same manner he drew on their assistance for an altered version when the difficulties that were being encountered with bringing Ganda Gweshe to court were revealed.

What is therefore not in dispute from his partial plea of guilty is that the accused was definitely involved in the crime on the day in question. His claim was that he had only heard cries from the bush but had not seen the actual murder. Yet his story is far from convincing. There is no explanation as to how he was able to lead the police on the indications who then made recoveries with precision following his leads on items that had been clearly hidden. The accused can only have known about the hidden clothing and shoes because he had put the items there himself. His evidence that he was able to do because he knew the area was far from convincing.

Furthermore, it is the accused who was found with the deceased's property and not Ganda Gweshe. He had no explanation whatsoever about how the deceased's personal items had all but been virtually found in his possession and yet his alleged chief architect did not have a single item on him.

The clothes that the deceased was wearing on that day were confirmed by his employee Dennis Moffat. It was the accused who wore these clothes. The admitted evidence of his girlfriend also confirmed the clothes which the accused was wearing on the day he came to her house which were the deceased's clothes. The two police officers who had assisted him also confirmed that they had been given jerseys to wear by the accused which turned out to belong to the deceased. His point about having been forced by the two investigation detectives to wear the clothes belonging to the deceased was clearly false as it was not put to the two detectives when they gave their evidence. There can be no merit in the assertion by the accused that the accused was forced to wear the clothes by the police. The admitted evidence of the girl friend as well as that of the police officers corroborated each other that the accused had on him the clothes belonging to the deceased.

We accept the explanation that Ganda Gweshe gave as to why he was found at the vehicle on that day. We are satisfied that Ganda Gweshe only came into the picture in relation to the sale of the vehicle. When Ganda Gweshe was approached by the police he indicated at the outset that he was waiting for the owner of the car. The police had investigated his story and had found his story to be true. The sale is corroborated by the document which was crafted by the accused regarding the payment terms. The accused had certainly been at the garage on the day in question when he met Ganda Gweshe even though he denied meeting him there. There was evidence that the deceased's car which the accused had taken had been involved in an accident and needed some repairs. He had reason to be at the garage when Ganda Gweshe arrived with his own problem to his car. He claimed to have known Ganda Gweshe since 2014 and yet this was not put to Ganda Gweshe at the time that he was in the witness stand.

It was also the accused who had used the deceased's flower blower as security when he could not pay for the repairs according to the admitted evidence of Farai Jaingwa.

His warned and cautioned statement which was confirmed is evidence upon mere production in terms of s 256 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. There is absolutely no evidence to confirm his assertion that it was not voluntarily given. Furthermore that evidence of his confession was indeed supported and confirmed by pictorial evidence that was placed before this court.

The accused simply lacks the ability to tell the truth. He lied to the investigators that he was with Nhema. He lied about being a soldier. He lied about his acquisition of the vehicle being a result of his proceeds from farming. Then in his initial defence he tried to suggest that

he had been implicated by the police. Whilst in his initial defence he denied ever going to Murombedzi in his evidence he did acknowledge going to Murombedzi and said he had gone there to drink beer. The evidence in its totality speaks to one person and one person only who killed the deceased and who stole his vehicle. It is the accused person who committed these offences.

We turn now to the issue of whether the evidence points to murder with actual intent. As stated in the case of *S v Mungwanda* 2002 (1) ZLR 574 (S) for a trial court to return a verdict of murder with actual intent it needs to be satisfied beyond reasonable doubt that either the accused desired to bring about the death of his victim and succeeded in completing that purpose, or that while pursuing another objective the accused foresaw the death of his victim as a substantial certain result of that activity and proceeded regardless.

The wording of our Criminal Code puts emphasis on the conscious effort to have brought death of the deceased as its formulation of actual intent. It reads as follows:

**“47 Murder**

(1) Any person who causes the death of another person

(a) intending to kill the other person; or

(b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility.”

The provision sets out two distinct scenarios of murder essentially leaving it up to the courts and its assessors on the basis of the evidence led, to objectively come to an informed conclusion as to whether the murder was intentional or constructive in the sense of realising a real risk or possibility that conduct may result in death and continuing to engage with the conduct nonetheless. In the first instance, consciously willing the result is at the centre of murder with actual intent. An intentional murder is one in which the killer wilfully intended to kill. Thus it is wilfulness that is at the core of murder with actual intent and which distinguishes it from murder with constructive intent which requires the foreseen result to be possible as opposed to being certain. Where intent is not admitted then it is the accused's actions and circumstantial evidence taken *in toto* that speak to an accused's intention.

In the second instance knowledge and realisation of the dangers likely to result from one's conduct, with indifference, negligence and recklessness as to the result informs the second type of murder.

The evidence in this instance that points to a deliberate intent to kill is that the accused waited for the now deceased, and when he succeeded in getting a lift from him, lied

to him that there was a problem with the car to get him to stop, dragged him into the bush and had battered his head on a stone or with a stone until he was dead. What cannot be denied is that using a stone weighing 20 kg, whether the accused bashed the deceased head on the stone or hit his head with the stone, was calculated to result in death.

The murder was also committed in perpetration of robbery. Particularly damning in this regard is that the deceased's items were found on the accused inclusive of the clothes that he was wearing on that day. The possession of the deceased's car was also linked to the accused on the day of his murder and thereafter including his attempt to sell the vehicle to Ganda Gweshe. It can be convincingly be concluded in light of all the evidence led that it is the accused who murdered the deceased.

The verdict of the court is that the accused is guilty of robbery and of murder with actual intent.

#### **Reasons for sentence**

In mitigation it was argued that the accused is 24 years old and was 23 when he committed the crime. He is also a sole breadwinner, is married and has a child aged two years old. He was also said to be looking after three siblings. In addition, his counsel said he had pleaded guilty in the course of the trial. He was also said to have already spent a year in custody and that even though a custodial sentence was inevitable under the circumstances it should be tempered with mercy and should not be lengthy.

The state pressed for the death penalty as the crime was committed in the course of robbery and therefore aggravated. It relied on cases such as *S v Chauke* HH 654/14; *S v Chidumo* SC 139/2000 and *S v Sibanda* SC 05/87 and *S v Sibanda* 1992 (2) ZLR (2) 438 for its argument that where murder is committed in the course of a robbery the death penalty should prevail. This case was said to be within that ambit those cases.

From the evidence led during the trial it was quite clear that the accused even whilst admitting to robbing the deceased and being present at the scene, still tried to lump the murder on an innocent person. The risks of recidivism on his part are very high given the very real difficulty he exhibited in taking full accountability for his actions. He thinks he can get away with murder. It is the duty of the court to protect the safety of the public in the sentence that it gives. Given his age and that he was 23 when he committed the offence, I do not however think that the death penalty would be appropriate in this instance or serve any purpose towards rehabilitating his mind-set. The appropriate prison sanction in this instance

would be life imprisonment given the very real risk of recidivism from his firm belief that he can get away with murder.

Accordingly, the accused is sentenced to life imprisonment.

*National Prosecuting Authority, for the State*  
*Mugwadi & Associates, accused's legal practitioners*