

THE STATE

Versus

THOKOZANI NCUBE

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Mashingaidze & Mr Sobantu

BULAWAYO 28, 30 November 2022; 1 December 2023 & 16 January 2024

Criminal trial

T.M. Nyathi, for the State

M. Mpofu, for the accused

DUBE-BANDA J

[1] The accused, Mr Thokozani Ncube, is appearing before this court charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (hereinafter referred to as the “Criminal Law Code”). It being alleged that on 2 December 2021 at approximately 0000 hours at Lyn 24 Mine Filabusi, the accused unlawfully caused the death of Martin Sibanda (hereinafter referred to as the “deceased” or “Martin” as the context will permit) by shooting him with a shotgun on the right thigh intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of the Martin and continued to engage in that conduct despite the risk or possibility.

[2] The accused, who was legally represented throughout the trial pleaded not guilty to the charge. He tendered a plea of guilty to assault. The State rejected the plea of guilty to assault and the matter proceeded to trial on the murder charge. The State tendered an outline of the summary of the State case (Annexure A), which was read and is part of the record, and the accused tendered a defence outline (Annexure B) which was also read and is part of the record. In his defence outline the accused stated that he shot Martin in self-defence and in defence of property, and in the alternative that there was a *novus actus interveniens* in that Martin bled for a long time at the hospital resulting in his death.

[3] The accused made admissions in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case.

[3:1] The evidence of Pardon Sola is that he is employed as a mine worker at Lyn 24 Mine. He knows the accused as a security guard at the mine. He did not know the deceased during his life time. On 2 December 2021 at around 0000 hours, he heard three gunshots. The shooting occurred at the main shaft which was 150m from his tent. He proceeded to the main shaft and on arrival he saw a person, whom he now known as Lameson Bhanditi (Banditi) lying on the ground facing downwards. The accused told him that he had apprehended two unknown males who had unlawfully entered the mine shaft and he shot one of them who fell back into the shaft. He was assisted by other mine workers including one Cloud Mapondera to rescue the one who was shot, whom he now know as Martin. He noticed that Martin was shot on the thigh and was bleeding profusely. He put Martin in a wheel barrow and pushed him to the Mine office which is about 300m from the shaft. In the company of the accused and the mine manager he drove Bhanditi and Martin to Filabusi Police Station. He left Banditi at the police station and took Martin to hospital were died on admission.

[3:2] The evidence of Cloud Mapondera is that he is employed at Lyn 24 Mine as a supervisor. On 2 December at around 0000 hours, he was awakened by Pardon Sola, a co-worker at the mine who informed him that two thieves had been apprehended at the mine's main shaft. He went down the shaft with Pardon Sola to rescue Martin. Upon bringing him to the surface, he noticed that he had been shot on the right thigh and had sustained a deep wound and was bleeding profusely.

[3:3] The evidence of Munyaradzi Danda is that he is a member of the Zimbabwe Republic Police (ZRP) stationed at Filabusi Police Station. On 2 December at around 0430 hours, he was on night shift manning the Charge Office. He received a report of sudden death from Pardon Sola. He was informed that Martin died after sustaining a gunshot wound.

[3:4] The evidence of Losen Mufarachisi is that he is a member of the ZRP stationed at Filabusi Police Station. On 2 December he accompanied Sergeant Chinembiri to Lyn 24 Mine to attend the scene of crime. He was present when Sergeant Chinembiri arrested the accused and he witnessed the recording of the warned and cautioned

statement. His evidence is that the accused was informed of his rights and he gave his statement freely and voluntarily.

[3:5] The evidence of Innocent Chinembiri is that he is a member of the ZRP and the investigating officer in this matter. On 2 December at around 0700 hours, he was allocated a case of murder which had occurred at Lyn 24 Mine. He went to the crime scene in the company of other police officers, and they searched for cartridges but did not find any. He observed that the shaft was about two meters wide and seven meters deep. There was a ladder descending to the depth of the shaft. He noticed that from about two meters in depth going back into the shaft, the walls of the shaft were severely blood stained. He recovered a shotgun, a Franchi Calibre 12 bore, with serial number 614015 and one round from the accused. He recorded a warned and cautioned statement from the accused, and the accused gave his statement freely and voluntarily. The statement was confirmed by a magistrate at the Filabusi Magistrate's Court.

[4] The State tendered with the consent of the accused the following documentary and real exhibits: a Post Mortem Report No. 1302-978-21 (exhibit 1) compiled by Dr. S. Pesanai. The doctor opined that the cause of death was haemorrhagic shock and gunshot wound on the right thigh. A confirmed warned and cautioned statement of the accused (exhibit 2), and a shotgun, a Franchi Calibre 12 bore, with serial number 614015 (exhibit 3).

[5] The State called one oral witness and the accused testified in his own defence. The evidence of the witnesses will be summarised briefly.

[6] Lameson Bhanditi (Bhanditi) testified that Martin was his cousin. He testified that Martin was employed at Lyn 24 Mine, and was staying at the Mine. He was staying in a tent. On 1 December Martin invited him to Lyn 24 Mine. He had gotten a job at Lyn 24 Mine and he was going there to start work. On 2 December one Brighton gave Martin a fuse or an explosive and said "go to the shaft and use it where you were working." He went down the shaft with Martin, and he was not carrying anything, Martin was carrying a fuse. When the witness and Martin were down in the shaft, they saw a light at the entrance of the shaft. The two thought it was Brighton who was holding that which was beaming the light. When they came out of the shaft, they were not carrying anything. He denied that he was carrying a catapult and that Martin was

carrying an axe. Bhanditi climbed the ladder to exit the shaft, when he was about to exit, he saw a security guard carrying a gun, and he was ordered to come out of the shaft and he did. He was ordered to lie down and his hands were tied from his back. Martin was still in the shaft. He heard a gunshot. Martin was shot and he heard the accused saying “today I got you, you thought this was a pellet gun.” Martin fell down into the shaft. Thereafter some people came to remove Martin from the shaft.

[7] Under cross examination Bhanditi testified that he knew the owner of Lyn 24 Mine as a Mlilo. He said he and Martin had authority to enter the shaft because Martin was employed at the mine. He said Martin phoned the manager who authorised them to go inside the shaft and said he would see them in the morning. The witness confirmed that they got into the shaft after 12 midnight. Put to him that they were not given express authority to enter the shaft, his answer was that he had not seen the manager but he was phoned. Asked whether he was employed at the mine, he said he had come from Zvishavane to start work at the mine. Put to him that as he had not started work, and had no authority to enter the shaft, his answer was he was being shown where he would be working. Asked the reason he was carrying explosives, his answer was that he was not carrying any explosives, but it was an employee of the mine Martin who was carrying explosives. Asked whether there were people working at that time, he said they were workers working at the hammer mills. He conceded that it was only the two of them inside the shaft. Put to him that mine workers start work at 0600 hours and finish at 1600 hours, his answer was that Martin told him that they work at night removing the gold ore. Asked whether Martin showed him where he stayed, he said he showed him a tent. Put to him that Martin was not employed at the mine, he insisted that he was employed at the mine. Further under cross examination, this witness testified that he heard one gunshot. He disputed that he was in possession of an axe when he was arrested. He said they were taken to the police around 0400 hours and that it was only after that time that Martin was taken to hospital. Answering questions put to him by the court, he testified that Martin phoned him and said there was a shortage of manpower at the mine and that he must come and he would be employed. He said after being shot, Martin was made to lie on the ground for two hours, and when he requested to be bandaged, no one showed any interest.

[8] This court takes the view that Mr Banditi was bent on self-preservation and such clouded his mind such that he lied in some respects. It is for this reason that his evidence must be

approached with extreme caution. He lied that Martin was employed at Lyn 24 Mine. The evidence of Pardon Sola a s 314 witness is that he was employed as a mine worker at Lyn 24 Mine. He knew the accused as a security guard at the mine. He did not know Martin during his life time. If Martin was employed at the mine Pardon Sola would have simply said he knew him as an employee of the mine. Further, Cloud Mapondera another s 314 witness and a supervisor at the mine did not say Martin was employed at the mine. He merely said two thieves were caught at the mine. If Martin was employed at the mine he would have said so without any hesitation. Banditi lied that he had secured employment at the mine and that they had authority to enter the mine shaft. He pre-occupied himself with trying to hide the fact that they had entered the shaft to steal gold ore. His version is at variance with the State case which is simply that him and Martin entered the mine shaft at midnight to steal gold ore. This court will not attach any weight to his evidence unless it is corroborated by some other independent evidence.

[9] At the conclusion of the testimony of Banditi the prosecution closed the State case.

[10] The accused opened his defence case and testified that he is employed at Lyn 24 Mine as a security guard. On 2 December 2021 at around midnight, while doing patrols he saw a person, whom he now knows as Banditi emerging from the mine shaft. Before he got out of the shaft Banditi called someone who was still far down in the shaft and that person was responding. He apprehended Banditi, ordered him to come out of the shaft and lie down, and he complied. The accused testified further that while he was still investigating, he saw another person emerging from the shaft. He ordered this other person, who turned out to be Martin not to come out of the shaft. The person continued climbing the ladder to exit the shaft, the accused then fired two warning shots, and the person continued coming out and he then shot him behind the knee. The person he had shot lost energy and fell back into the bottom of the shaft. He did not want Martin to come out of the shaft because he wanted first to attend to Banditi who was already out of the shaft. He testified that in shotting Martin, he was protecting himself and the property of the mine.

[11] The accused testified further that Pardon Sola and other mine workers came to the scene and rescued Martin from the shaft. Banditi and Martin were searched and the former was found with a small axe and the latter with a catapult. The mine director said Banditi and Martin must

be taken to the police station. On arrival at the police station, Banditi was taken into custody and Martin was ferried to hospital. He said Martin was taken to hospital at around 0100 hours. The accused testified that he accompanied Martin to hospital, and at the hospital he observed that the hospital staff did not show any interest in attending to Martin.

[12] Under cross examination the accused testified that he shot Martin in self-defence. He conceded that at the time he shot him, he was still in the shaft, and that at that moment he could not have attacked him. He conceded that the wrong Martin had committed was to continue climbing the ladder when he had been ordered not to do so. The accused further conceded that Martin did not attack him. He testified that he did not know what made Martin adamant to exit the shaft when he had been ordered not to do so and he did not know what he was carrying that made him adamant to continue exiting the shaft. He conceded that at the moment he shot Martin he had not searched Banditi and had not seen the axe that he says he was carrying. Put to him that he was not truthful in his defence outline where he stated that he shot Martin because he thought he was armed with an axe like Banditi, his answer was that if someone is adamant, he would be basing it on something. Asked which property he was protecting when he shot at Martin, he said gold and the gun he was carrying. He conceded that at the moment Martin was shot at he was not carrying anything. Asked why he did not shoot at Banditi, he said he was not arrogant and was complying with all the orders he was given. The accused testified further that Martin was not attended to at the hospital, and if he had been attended to timeously, he would not have died because he was not seriously injured. Put to him that Pardon Sola said Martin died on admission at the hospital, his answer was when he died, he (accused) was no longer at the hospital but at the police station. Answering a question by the court he said he aimed the gun at the leg of Martin. And the moment he shot him, Martin was facing the opposite direction.

[13] The view of this court is that there are instances where the accused lied in his evidence. He lied that Martin was taken to hospital at around 0100 hours. It is so because the evidence shows that he was taken to hospital at around 0430 hours. He lied in his defence outline when he stated that Martin was taken to hospital at 0000 hours. It is a lie because that was the time he shot Martin. He lied that Martin was not attended to at the hospital. This is a lie because according to Pardon Sola a s 314 witness, Martin died on admission at the hospital.

[14] Further it is doubtful that he fired two warning shots before shooting at Martin. It is so because the police searched the scene for spent cartridges and found none. Again, answering a question by the court, he said the two warning shots were fired at a rubble, however in his confirmed statement he stated that he fired in the air. Again, Banditi testified that he heard one gun shot. However, the State case is that the accused fired two warning shots, and this comes out from the evidence of Pardon Sola a s 314 witness who said he heard three-gun shots. In the circumstances the accused will get a benefit of doubt that he fired two warning shots before firing at Martin. The accused lied that he shot at Martin from at the back of the knee. It is a lie because the post mortem report shows that the bullet moved from front to back. He shot at him when the two were facing each other. In the circumstances, where the evidence of the accused is at variance with the established case, it will be rejected as false.

[15] After the testimony of the accused, the defence closed its case.

[16] The following facts are found established. On December 2021 Banditi and Martin went to Lyn 24 mine. None of the two was employed at the mine and they had no authority to enter the mine shaft. They got into the shaft to steal gold ore. The shaft they entered is two metres wide and seven metres deep. There is a ladder to enter and exit the shaft. At around midnight the two decided to climb the ladder to exit the shaft. Banditi was the first to climb and when he was about to reach the exit, he was seen by the security guard, i.e. the accused. The accused ordered him to exit the shaft and lie down, he complied. Martin followed and he climbed the ladder, and when he was about to exit, he was ordered by the accused to stop his attempt to exit. He disobeyed the order and the accused fired two warning shots and Martin continued climbing up the ladder intending to exit. When he was two metres from the exit point the accused shoot him on the right lower thigh. At the moment of shooting the two were facing each other. The bullet moved from front to back. Martin then fell into the bottom of the shaft suffering the following injuries in the process: bruises on the right frontal region; on the shoulder, upper arm, abdomen and back. Martin bled profusely as he fell down the shaft. He was rescued from the shaft; and together with Banditi they were taken to Filabusi Police Station. The evidence of Banditi that the two were taken to the police station at around 0400 hours is corroborated by the evidence of Munyaradzi Dande a s 314 witness who was manning the charge office. His evidence is that he received a report of a sudden death at 0430 hours. It is also corroborated by the evidence of Pardon Sole another s 314 witness who said that Martin died on admission at

the hospital. Therefore, it is factually proven that Martin was taken to hospital at around 0430 hours and he died on admission. The post mortem report shows that Martin died of haemorrhagic shock and gun shoot wound on the right thigh. Therefore, the injuries sustained by Martin were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the Martin.

[17] In his defence outline the accused stated that he shot Martin in self-defence and in defence of property. The common law defences of defence of self-defence and the defence of property have been codified in Part XIII and XIV of the Criminal Law Code. To rely on the defence of self-defence and the defence of property, several requirements regarding the attack and defence action must be met. In relation to an attack there must be evidence of an attack; the attack must be unlawful; the attack must have commenced or imminent. In relation to a defence the defensive action must be directed against the attacker; the defensive action must have been necessary to avert the attack; and the means used to avert the attack must be reasonable.

[18] The evidence shows that visibility was good inside the shaft. The accused was carrying something that illuminated the shaft. He was even able to aim the gun shot on the knee and he must have seen that Martin was not carrying a weapon. It is the accused who was armed with a firearm. There is no evidence that Martin attacked the accused or that an attack on the accused had commenced or was imminent. Regarding the defence of property, Martin was not carrying anything, i.e. he was not carrying any gold ore from the shaft. These were just young boys intending to steal gold ore. Martin was twenty-two years and Banditi twenty-five years. The accused's contention that he feared Martin might have disarmed him of the firearm is far-fetched. Therefore, the defences of self-defence and defence of property are not available to the accused in whatever form.

[19] Further, in the defence outline the accused stated that in the event the defence of self-defence and defence of property fail, this court should find that there was a *novus actus interveniens* between the time he shot Martin and the time he met his death. *Novus actus interveniens* means "a new intervening event." If a *novus actus interveniens* has taken place, it means that between the accused's initial act and the ultimate death of the deceased, an event which has broken the chain of causation has taken place, preventing the court from regarding the accused's act as the cause of the death of the deceased. If an accused performs an act which

is a *conditio sine qua non* of the deceased's death and a third party subsequently performs another act which hastens the deceased's death, it does not necessarily mean that the latter act is regarded as a *novus actus*. See Snyman CR in *Criminal Law* (5th ed. LexisNexis) 87. In *Grotjohn* 1970 (2) SA 642 (T) 645 the court said that the latter event can be deemed to have broken the causal link only if it is completely independent act, having nothing to do with the and bearing no relationship with the accused's act.

[20] In support of the defence of *novus actus* the accused contended that Martin was shot at around 0000 hours. He was taken to hospital for treatment. He did not receive any treatment. collapsed alone inside the toilet. He bled for a long time and died at around 0500 / 0600 hours. The evidence on record does not support the accused factual averments in this regard, it is so because it is accepted that Martin was shot at around 0000 hours. Pardon Sola a s 314 witness says he summoned manpower to rescue Martin from the shaft, after he was rescued, he was taken in a wheelbarrow to the mine office which is about 300m from the shaft. Thereafter, he and Banditi were taken to the police station and from the station Martin was then taken to hospital. He says Martin died on admission at the hospital. The evidence of Sola corroborates Munyaradzi Danda another s 314 witness who said he received a report of a sudden death at around 0430 hours. It is clear that there was a delay in taking Martin to hospital, and this delay resulted in severe bleeding which caused his death. In fact, the accused cannot be heard to say Martin was not attended to at the hospital and that he collapsed inside the toilet, because his evidence is that at the time Martin died, he (accused) was at the police station. He had left the hospital. Therefore, the contention that Martin died because of neglect at the hospital has no evidential and factual basis.

[21] In any event even if there was a delay in attending to Martin at the hospital, such delay did not break the causal link. It is the accused who shot Martin and caused him to bleed profusely. Martin fell approximately five metres into the shaft. The evidence of Innocent Chinembiri a s 314 witness is that the shaft was seven metres deep and from about two metres in depth going back into the shaft, the walls of the shaft were severely blood stained. Martin bled profusely before he was even taken to hospital. Therefore, the defence of *novus actus* is not available to the accused. It is rejected.

[22] The evidence shows that the accused shot at Martin because he was not taking his orders not to exit the shaft. In his view Martin was desirous to escape so he needed to be immobilised. In Zimbabwe the use of force in effecting arrest is statutorily regulated by s 42 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). Section 42 is applicable not only to police officers but also covers private persons authorised to effect an arrest to use force in circumstances permitted the section. The accused as a security guard is covered by s 42 of the CP & E Act. Therefore, the conduct of the accused must be viewed within the context of s 42, which provides thus:

Resisting arrest

(1) If any person who is authorised or required under this Act or any other enactment to arrest or assist in arresting another person, attempts to make the arrest and the person whose arrest is attempted resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the person concerned cannot be arrested without the use of force, the person attempting the arrest may, in order to effect the arrest, use such force as may be reasonably justifiable and proportionate in the circumstances to overcome the resistance or prevent the person concerned from fleeing:

Provided that the person attempting the arrest is justified in terms of this section in using force against the person concerned only if the person sought to be arrested was committing or had committed, or was suspected of having committed an offence referred to in the First Schedule, and the person attempting the arrest believes on reasonable grounds that—

- (a) the force is immediately necessary for the purposes of protecting the person attempting the arrest, any person lawfully assisting the person attempting the arrest or any other person from imminent or future death or grievous bodily harm; or
- (b) there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.

(2) For the avoidance of doubt it is declared that no use of lethal force for the purposes of subsection (1) shall be lawful unless there is strict compliance with the conditions specified therein.

[23] The section regulates the use of force, including deadly force in effecting an arrest. The requirements to be met are that the suspect must offer a serious threat of danger to the arrestor or others, or must have committed a crime involving the infliction or threatened infliction of serious bodily harm and there was no other way (without using force) to arrest the suspect. To

make a decision in this regard the arrestor must take a number of factors into consideration e.g. the type of force to be used; the extent of the force to be used; whether such force is proportional to the seriousness of the crime the suspect allegedly committed; and whether such force is also proportional to the extent of the suspect's resistance against the arrest. The arrestor must then also consider whether the suspect offers a threat of serious violence to the arrestor or another person or whether the arrestor suspects on reasonable grounds that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm; and whether there are no other reasonable means of carrying out the arrest at that time or at a later stage.

[24] It is accepted that Martin had disobeyed the order to remain in the shaft and had not taken heed of the two warning shots. The evidence shows that he intended to flee. However, he did not pose a serious threat of danger to the accused or any other person. He was not suspected of having committed a crime involving the infliction or threatened infliction of serious bodily harm. Martin could have been arrested at a later stage. This is so because his accomplice Banditi had already been accounted for and would have provided information that would have led to the arrest of Martin. Shooting Martin while he was in that vulnerable position, i.e., two metres from the shaft exit and five metres from the bottom of the shaft was not proportional to the crime he was suspected of having committed. He was suspected of stealing gold ore, but at the time of the shooting he was not carrying any gold ore. In the circumstances the accused's conduct fell outside the provisions of s 42. Section 42 of the CP & E Act is not available to him.

[25] Mr *Nyathi* Counsel for the State sought a verdict of guilty to Murder. For this court to return a conviction of murder in terms of s 47(1) of the Criminal Law Code, the State must prove beyond a reasonable doubt that when the accused shot Martin, he desired death. Death was his aim and object, or death was not his aim and object but in shooting he foresaw death as a substantially certain result of that the shooting and proceeded regardless as to whether that consequence ensues. Or he did not mean to bring about death but foresaw it as possibility and proceeded regardless as to whether death ensues. See (*S v Mugwanda* 2002 (1) ZLR 547 (S); *S v Tailo & Anor* HB 126/22).

[26] The accused ordered Martin to stop exiting the shaft. He disobeyed his order. The accused fired two warning shots, and Martin was not deterred. Instead, he continued climbing the ladder

intending to exit the shaft. The accused shot him on the upper thigh. At the moment the accused fired the shot, Martin was two metres from the exit point and five metres from the bottom of the shaft. After he was shot, he fell five metres down the shaft. On one hand it can be argued that the accused foresaw the possibility that by shooting at Martin while he was in that precarious position, would cause him to fall back into the shaft and bleed profusely and die. On the other hand, it can be argued that by shooting him on the thigh he neither foresaw the death of the deceased as a substantially certain consequence, nor foresaw the possibility of the death of the deceased as a consequence and persisted with the shooting regardless. In such a case the accused is entitled to the benefit of doubt. It cannot be said that the State has proved a case of murder beyond a reasonable doubt as required by the law. In the circumstances, it cannot be said that the State has proved a reasonable that the accused committed the crime of murder as defined in s 47 of the Criminal Codification Act.

[27] The fact that the accused cannot be convicted for the crime of murder is not the end of the inquiry. The accused in shooting the now deceased (Martin) in the manner he did, a reasonable man placed in the same circumstances would have foreseen the possibility of death and would have guarded against it. He shot at Martin when he was two metres to exit the shaft and five metres from the bottom of the shaft. The gun shot caused Martin to fall back five metres into the bottom shaft and to bleed profusely. A reasonable person in the position of the accused would have foreseen all this happening and would have guarded against it. In the circumstances of this case, the conduct of the accused shows that he fell below the reasonable person standard. The accused ought, as a reasonable man, to have foreseen the death of Martin and guarded against it. In shooting Martin, the accused was negligent and it was his negligence that led to the death of Martin. In the circumstances, the accused is liable to be found guilty of the crime of culpable homicide as codified in s 49 of the Criminal Law Code.

In the result: the accused is found not guilty of murder and found guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[28] Mr. Ncube, this Court found you guilty of the crime of culpable homicide arising from the death of the deceased. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, this court will have regard to the triad of factors that have to be considered as set out in case law, e.g., in the case of *S v Zinn* 1969 (2) SA 537 (A). This court must also factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[29] This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. Whilst it is so that a court must always endeavour to exercise a measure of mercy, however, sight must not be lost on the purpose and objectives of punishment. See: *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H. A court should also be cautious in weighing the elements under consideration and not unnecessarily elevate one element of above others, rather, a balance must be struck amongst these factors and between the interests of the accused and that of society.

[30] We will now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State.

[31] In mitigation of sentence, your counsel addressed the court and placed factors which he urged this court to take into account in order to impose a lesser sentence in respect of the crime of which you had been convicted. Your personal circumstances are as follows: you are 51 years old; married with two adult children; you are the sole provider of both your immediate and extended family. You are employed at Lyn 24 Mine as a security guard earning a salary of USD\$500.00 per month. You have been in pre-trial incarceration for one month. You are a first offender.

[31] In determining an appropriate sentence this court factors into the equation that the deceased was suspected of theft of gold ore, the very property that you were guarding. He and his colleague without authority entered a shaft to steal gold ore. You ordered him (Martin) not to exit the shaft, but he disobeyed the order and that is what prompted you to shot at him. You shot him on the knee. You did not aim at a delicate part of the body. It was at night. These factors no doubt reduce your moral blameworthiness.

[32] On the other hand you have been convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. You shot the deceased when he was in a vulnerable position. He was two metres to exit the shaft. The shot caused him to fall down to the bottom of the shaft. The fall was vicious and he must have suffered excruciating pain. This is so because the walls of the shaft were blood stained showing that he was bleeding as he fell.

[33] Even if the deceased had escaped, he was going to be accounted for as his accomplice, Banditi had been arrested. The arrest of Banditi could have no doubt led to his arrest too. This was a clear case where the now deceased could have been arrested without any use of force, let alone deadly force. The use of deadly force was unnecessary and uncalled for in the circumstances. See *S v Mlambo* HMT 19-18. A young man of twenty-two years was robbed of his life. The accused an old man of experience as a security guard ought to have done better and not use a lethal weapon on a human being who was in a vulnerable position. Human life was unnecessarily lost.

[34] A sentence of community service will trivialize an otherwise serious case. Society looks up to the courts to do justice not condone crime in a manner which would intrigue society into losing confidence in the criminal justice system. The courts should not make the community lose confidence in the justice delivery system by letting those who caused loss of human life go unpunished. The right signal has to be sent to those in authority and power that they should refrain from using force and unnecessarily shooting to kill under the realm of protecting property. There must be consequences for such conduct.

[35] A non-custodial sentence is inappropriate in this case. In fact, it will trivialise an otherwise serious matter. On a balanced consideration of the totality of the evidence and the facts of this case, this court considers that the following sentence will meet the justice of this case:

You are sentenced to 4 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Samp Mlaudzi & Partners, accused's legal practitioners