

THE STATE  
versus  
NOMORE MAVHURA

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 9 - 11 & 22 November 2021

### **Criminal trial**

*B Murevanhema*, for the State  
*D Matawo*, for the accused

**MUREMBA J:** The accused is charged with murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 6 September 2020 at Mutukudzi Village, Chief Dotito, Mount Darwin, he unlawfully and with the intent to kill, stabbed Clifford Kadowa once in the chest and once in the abdomen thereby causing injuries from which he died. The accused pleaded not guilty to the charge.

It is the State's allegation that on 6 September 2020, the deceased and his wife Mary Kamucheka had a misunderstanding which resulted in the deceased sleeping in the bedroom alone and Mary sleeping in the kitchen hut. At around 2200 hours the wife heard the deceased crying and she went outside. When she went outside, she saw the deceased chasing after two men who were running in different directions. The deceased was bleeding from the chest and the abdomen. He fell down and died. The wife called out for help and her in-laws and other villagers came. Special Kadowa, the elder brother to the deceased tracked some footprints with the assistance of other villagers. The footprints led them to the accused's homestead. This is what resulted in the arrest of the accused.

In his defence outline the accused stated that he spent the day of 6 September 2020 in Mt Darwin cutting firewood in the company of Martin Mutuvha; Gift Musarirambe; Spencer Mututwa and the person who had bought the firewood. They then drove from Mt Darwin to deliver the firewood at the home of the person who had bought the firewood. Gift Musarirambe was driving the truck. On the way, Martin Mutuvha asked the accused to accompany him to see his girlfriend. When they got to Mudzengerere Primary School, the two asked to be dropped

off. When they disembarked, the accused who had been wearing a blue shirt and a red short then wore a pair of blue trousers and some green slippers. Martin who was wearing a jean shirt, a pair of khaki trousers and a pair of brown shoes did not change his attire. The two proceeded to Mutukudzi village, but before they arrived at the girlfriend's place, Martin asked the accused to stay or remain behind and wait for him. The accused agreed and remained behind at a distance of about 100m away from the girlfriend's homestead. However, after about 30 minutes, the accused heard a loud cry coming from the girlfriend's homestead. A short while later, he saw Martin Mutuvha running back. The accused asked Martin about the loud cry that he had heard and why he was running. Martin explained that he had fought with three men whom he had found in his girlfriend's house. The accused said as they were walking, he noticed that Martin's trousers and shoes had blood on them. He asked Martin about the blood and he said that the people whom he had fought with were the ones who were hurt but he himself was not hurt. The two proceeded to the accused's home. From there, they followed the truck to where it had gone to deliver firewood. On the way, Martin Mutuvha hid his blood-stained trousers and shoes in Nyagura River. They proceeded to where the truck was with Martin now wearing a pair of white shorts and a jean shirt. He had no shoes. They got to where the truck was and slept. In the morning when the firewood was being off loaded, the accused received a call from his wife saying that there were people at his homestead who were saying that Clifford Kadowa was dead and that he had been struck with an axe. Whilst the accused was talking to his wife, Martin Mutuvha told the accused that he was going to Mandebvu and that was the last time the accused saw Martin Mutuvha. He only saw him again last month in October 2021 when he (the accused) assisted the police in locating him and having him arrested.

The accused said that after speaking to his wife, he asked Gift Musarirambe the driver to drive to his homestead. On their way there, Spencer Mututwa advised the accused to hide his slippers before they arrived at his (the accused's) homestead. The accused was arrested by the police on that day at his homestead.

#### *The evidence led by the State*

The State led evidence from four witnesses namely Mary Kamucheka; Special Kadowa; Gift Musarirambe and Rhodius Chinzotsi. Their evidence is outlined here-under.

Mary Kamucheka's testimony was as follows. She was the wife of the deceased. She is 25 years old and was married to the deceased for 10 years. They had 2 children together aged 9 years and 6 years. Both are boys. On the fateful day the deceased went to watch or play soccer

in the afternoon. That afternoon around 3pm when the deceased was away, Mary phoned the deceased's girlfriend. The girlfriend insulted Mary who resultantly got angry. Out of anger she decided that she was going to sleep in the kitchen with her children. This was worsened by the fact that the deceased delayed coming home. He came back around 8 p.m. By that time, Mary and the children were already sleeping in the kitchen. He came into the kitchen and had his supper as they spoke. She told him that his girlfriend had insulted her. The deceased said that he had told her (Mary) not to phone his girlfriend and that he was planning to marry the girlfriend. The deceased then went to sleep in the bedroom hut around 9 p.m. Mary said that she was in the habit of sleeping in the kitchen whenever she had an altercation with the deceased over the issue of his girlfriend. It was a normal thing for her to do. At around 10pm she heard a loud cry by the deceased. She rushed out of the kitchen hut and saw the deceased chasing after 2 men who were running in different ways but towards the western direction. Mary ran to the deceased and held him. He had an injury on the chest. He was crying but he was not talking. He fell down and died. His cries had alerted other villagers and her in-laws who came to the scene. The police were alerted and came and ferried the body to the mortuary that evening. Mary told the court that she knew the accused because he resides two villages away from her village. She said that the distance is considerable. The deceased regarded the accused as an uncle in the sense that the accused was a young brother to the deceased's father. She added that the accused's wife is the tobacco representative in the area. It was put to her under cross examination that she was the girlfriend whom Martin Mutuvha had come to visit on the night in question. She vehemently denied it and said that she did not know Martin Mutuvha at all.

Special Kadowa testified as follows. He is the elder brother to the deceased. He went to the deceased's home on the fateful night after one Mike, the deceased's employee came to tell him that the deceased had been stabbed. Special's homestead is in the same village as that of the deceased. He found the deceased's body lying in the yard, naked. He was already dead. He covered the body with a blanket. People who included his parents had already gathered at the deceased's home. Having been told what had happened by the deceased's wife and that she had seen the deceased chasing after 2 men, he suggested that they look for footprints, which they did using torches. They identified 2 sets of prints; one was a foot print and another was a shoe print. They covered these prints and waited for daybreak. At daybreak they followed the two prints. From the deceased's home, the two sets of prints had taken different routes, but they were both headed in the western direction. The two sets of prints later merged. They

noticed that at the place where the prints merged, the person who had been barefooted had then worn some slippers. This was at a distance of about 75-85m from the deceased's home. People followed these two sets of prints right up to the accused's homestead. They arrived there around 11 a.m. The accused was not at home, but his wife was. When they asked her where the accused was, she phoned him. Other people then phoned the police and told them that they had followed the prints which had led them to the accused's home. The accused was later arrested on that day by the police at his home.

Special Kadowa said that they had started tracking the prints right from the deceased's bedroom because there is a lot of soil at the deceased's home. The foot print could be identified because it showed that the person was running and not walking. He was stepping with his toes. Special Kadowa said many people from the village helped him track the prints. Special said that the deceased's homestead is about 30m away from his father's. The deceased's kitchen and bedroom were about 10m apart. Mudzengerere Primary School is about 500-600m away from the deceased's home.

Rhodus Chinzotsi testified as follows. He is the investigating officer in the matter and holds the rank of Detective Sergeant. At the material time he was stationed at Mt Darwin CID. He was assigned this matter on 7 September 2020 in the morning. The offence had been committed on 6 September 2020 at around 10pm. At the time he was allocated the matter, the accused had not yet been arrested. Together with other detectives, he proceeded to the deceased's home that morning. When they got there, the body of the deceased had already been ferried to the mortuary by police officers from ZRP Dotito. He was shown the place where the body had been lying in the yard. There was a pool of blood. Special Kadowa told him that he and other villagers had tracked some prints that had led them to the accused's home. The investigating officer further said that he observed that the deceased had been stabbed inside his bedroom because there were blood stains in the bedroom which was a one roomed four corner hut. The blood was on the floor and on the wall, but there was no blood on the bed. The deceased's clothes were on the floor just by the bed side which showed that the killer(s) had entered whilst the deceased was sleeping. His investigations with the wife showed that the deceased had been sleeping alone while the wife and the children were sleeping in the kitchen after the deceased and the wife had had an altercation. He observed that the bedroom had not been broken into by the killer(s). It appeared to the investigating officer that the deceased had been expecting that his wife would come and join him in the bedroom. As such he had left the door unlocked and the killer(s) just opened the door. He said that the distance between the

kitchen hut and the bedroom is about 5m and these were the only huts that were at the deceased's homestead. The deceased's parents' homestead is about 50m away from the deceased's homestead.

The investigating officer said that Special Kadowa showed him the prints that they had tracked. They were two sets. However, because of the mourners, the prints could no longer be seen in the deceased's yard. They could be seen from where the yard ended and where the field started. They saw a shoe print about 5m behind the deceased's bedroom. They saw a foot print about 10m from the bedroom. The foot print could be identified as that of one of the killers because it was clear that the person with this foot print was running. He was stepping with the toes and the spacing between the right foot and left foot was too big for a person who was walking. The investigating officer said that the shoe print and the foot print later merged at the road side about 500m away from the deceased's home. It is at this point that the foot prints ended and the prints of slippers started thereby showing that the person who had been running bare footed had at that point worn some slippers. This was at the village road which is about 1 metre wide. There is a lot of soil at the place. So, the prints were very visible. They followed the two sets of prints right up to the accused's homestead. When they got there, they found the accused being surrounded by 80 – 100 people. He had been called back home by his wife. They took him to the Police Station together with two other people who had been in his company in the firewood truck.

At the Police Station a warned and cautioned statement was recorded from the accused. It was later confirmed at the Magistrates Court. It was produced during trial as exh 1. In that statement the accused denied killing the deceased and stated that he was murdered by Martin Mutuvha. The accused's narration of what happened is similar in all material respects to what he explained in his defence outline. The only difference is that in his warned and cautioned statement he said that he is the one who gave his slippers to Spencer Mututwa for Spencer to hide them in the bush on the way to his homestead. In his defence outline he said that it was Spencer's idea to hide the slippers.

The investigating officer said that the accused then led them to the river which is about 200m away from his homestead to recover Martin Mutuvha's clothes. He also led them to recover his slippers. The investigating officer said that he referred all the recovered clothing items for forensic examination, but they had not yet been returned at the time the trial commenced. These clothes included the accused's navy-blue trousers which he was wearing. It appeared to have blood stains.

The investigating officer explained that from what he gathered from the deceased's wife, she suspected that the killer(s) wanted to steal money from the deceased. The deceased had sold his tobacco for US\$6000 just before the murder happened. She said that it is the accused's wife who handed over the tobacco voucher to the deceased. So, the accused was aware through his wife that the deceased had cash in his house. The investigating officer said that the deceased's wife explained that on the fateful night there was US\$2000 left in the house, but it was not stolen. The investigating officer suspected that the deceased was stabbed after he had resisted with the money. However, all this remains hearsay because the deceased's wife did not say it when she gave her evidence. The State counsel did not ask her to explain what she thought could have been the reason for the attack on her husband. The investigating officer only said it after the court had asked him what could have possibly motivated the murder.

The investigating officer said that he was later transferred from Mt Darwin and only learnt of Martin Mutuvha's arrest when he was served with a subpoena for this trial. Martin Mutuvha was not arrested earlier because he had absconded to Mozambique.

Gift Musarirambe testified as follows. He was employed as a truck driver and was working with the accused to provide transport to customers in need of transport to ferry firewood. The owner of the truck employed the accused as the manager. The truck would be parked at the accused's homestead as they waited for customers. On 6 September 2020 they were hired by a certain customer. They went to ferry the customer's firewood and the accused being the manager, was responsible for loading and offloading the firewood. When the accused was loading the firewood, he was wearing a pair of brown shorts and a blue shirt. He had taken off a pair of blue trousers he had been wearing. He loaded the firewood with Spencer Mututwa who was employed as a loader. Martin Mutuvha who was in their company, was seated the whole day. They had collected him from Mount Darwin on Friday 4 September 2020 and the accused had introduced him as his uncle from Mukumbura, a place which is quite far away. They went with him to the accused's home. They spent the next day of 5 September 2020 at the accused's home because they had not been hired. On 6 September 2020 that is when they got hired and went together with Martin Mutuvha to ferry the customer's firewood.

When they finished loading the firewood around 5 – 6pm that is when they set off to deliver the firewood at the customer's place in Kadoma village. When they got to Mudzengerere Primary School, the accused and Martin Mutuvha asked to be dropped off saying that they were going to see their girlfriends. The accused wore his pair of blue trousers. The two disembarked. Gift, Spencer Mututwa and the owner of the firewood proceeded to

Kadoma village with the firewood. When they got there, they slept. Gift slept in the truck, a UD. At around 2am, the accused and Martin Mutuvha arrived. They got into the truck and slept. Gift noticed in the morning that Martin was now wearing a pair of shorts and a jacket. He no longer had the trousers he was wearing the previous day. The accused was still wearing the same clothes he left wearing. He was wearing some slippers in his feet. Spencer and the owner of the firewood off loaded the firewood. Gift went to a nearby village to see a certain person who wanted transport services. Upon his return Martin Mutuvha was no longer there. Accused said that he had gone to the next farm to see his friend or relative. Accused said that they could leave without Martin whom he said would follow. On the way, the accused said that they should go *via* his place of residence so that they could eat. He also said that his wife had phoned him. When they were about to reach the accused's home, the accused instructed Spencer to hide his slippers in the bush which Spencer did after Gift had stopped the truck. They then proceeded to the accused's home where they found many people gathered. It was around 10 am. The accused was taken from the truck and was made to sit down as these people were asking him all sorts of questions. The police later arrived and took them to the police station i.e., the accused, Spencer and Gift.

The State then produced the post mortem report. It states that the deceased was 33 years old. He died from the injury that was sustained on the left shoulder. The injury was about 15 cm long and 10 cm deep. The wound was inflicted by a sharp object.

The State also applied to the court for the summary of evidence of Francis Chigora and Spencer Mututwa to be expunged from the record because these witnesses were not located. So, they did not testify.

#### *The evidence led by the defence*

The accused was the sole witness for his case. He simply reiterated what he said in his defence outline, which we shall not repeat. He explained that he considered Martin Mutuvha as a cousin in that Martin is his step mother's brother's son. He denied that Martin had come to his home on 4 September 2020 as Gift Musarirambe said. The problem though is that Gift Musarirambe was not challenged on this issue during cross-examination. The accused said that they picked up Martin Mutuvha in Mount Darwin on 6 September 2020. He said that Martin was coming to visit him. On the way to deliver firewood, Martin Mutuvha then asked the accused to accompany him to see his girlfriend. At Mudzengerere Primary School the two asked Gift Musarirambe to drop them off, which he did. It was around 9-10 p.m. The accused

said that he did not even know where this girlfriend of Martin resided until after the incident when he was taken there by the police. He said that that is when he realised that Martin Mutuvha had left him 100m away from his so-called girlfriend's home. The accused said that he did not ask Martin Mutuvha much about the fight that had happened at his girlfriend's place. He said all that Martin Mutuvha said was that he fought with three men and one of them had hit against the door frame and got injured hence the blood that was on his clothes.

### *Analysis of evidence*

That the deceased was murdered on the night of 6 September 2020 is not in dispute. The issue for determination is whether or not it is the accused who killed the deceased? There having been no eye witness to the murder, the State is relying on circumstantial evidence against the accused. The question is: is the circumstantial evidence sufficient to secure a conviction against the accused? In the case of *Wilson Munyanga v The State* HH 791-13 it was held that:

- “When a case rests on circumstantial evidence, such evidence must satisfy the following tests:
- (1) The circumstance from which an inference of guilt is sought to be drawn must be cogently and firmly established;
  - (2) The circumstances should be of a definite tendency unerringly pointing towards guilty of the accused;
  - (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and
  - (4) The circumstantial evidence in order to secure a conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. See *S v Shonhiwa* 1987 (1) ZLR 215 (S)”

To show that the accused had the means, a motive and the opportunity may go some way towards convincing of his guilt. Where the conviction of an accused depends upon circumstantial evidence and the drawing of inferences from all the established facts, then the inference sought to be drawn must be consistent with all the proved facts and the facts should be such that they exclude every reasonable inference from them, save one to be drawn: *S v Marange and Ors* 1991 (1) ZLR 244 (S).

A person can be convicted of murder even if no body is found, on the basis of circumstantial evidence if that evidence is consistent with no other reasonable inference than that the victim is dead and was murdered by the accused: *S v Shonhiwa* 1987 (1) ZLR 215 (S) and *S v Masawi and Anor* 1996 (2) ZLR 472 (S). However, the court must, as in any other

criminal cases, be satisfied beyond reasonable doubt of the guilt of the accused person. The evidence must be sufficient to provide every reasonable inference of the guilt of the accused.

*In casu* going by the accused's version, it is common cause that Martin Mutuvha was at the scene of the crime on the fateful night and at the material time. Martin Mutuvha's blood-stained clothes were recovered by the police through indications that were made by the accused. There is no doubt that Martin Mutuvha was involved in the murder of the deceased. The question which needs to be resolved is whether or not the accused also participated in the murder of the deceased. The shoe print that was tracked from the deceased's home right up to the accused's home belonged to Martin Mutuvha. Martin Mutuvha later removed his pair of trousers and his shoes and hid them in the river in the presence of the accused. The police recovered them with the assistance of the accused.

With regards to the accused, the State is relying on the following evidence. Mary Kamucheka, the deceased's wife saw two people being chased by the deceased. Both Special Kadowa, the deceased's brother and the investigating officer corroborated Mary's evidence by saying that they also saw and tracked two sets of prints from the deceased's bedroom. Over and above Martin Mutuvha's shoe print, there was a foot print. Special Kadowa saw this footprint right at the deceased's bedroom during night soon after arriving at the deceased's home. Special Kadowa said that there was a lot of soil at the deceased's bedroom and the prints were visible. The investigating officer saw this same footprint when he went to attend the scene the following morning. He said that mourners had contaminated the prints in the yard but he saw the footprints in the field outside the yard, about 10 metres behind the deceased's bedroom. The evidence of both Special Kadowa and the investigating officer was to the effect that the footprints and the shoe prints later merged. When they merged, the person who was barefooted had worn some slippers. That it is the accused who was wearing some slippers, is not disputed. What the accused disputes is that he arrived at the deceased's homestead with Martin Mutuvha whom he said was visiting his girlfriend. This cannot be true because two people were seen fleeing from the deceased's home by the deceased's wife and two sets of prints were tracked from there. This proves beyond reasonable doubt that the accused arrived at the deceased's home. He is the only person who was with Martin Mutuvha that evening. So, he is the one who was bare footed. We believe that when things went wrong, he found it hard to run with the slippers. So, he removed them and ran holding them. When he met up with Martin Mutuvha and they both realised that they were now safe, the accused then wore his slippers and the two then walked all the way to the accused's home.

An examination of the accused's version that Martin Mutuvha had gone to the deceased's home to visit his girlfriend shows that this is a false story. It is meant to cover up for the real reason why he and Martin Mutuvha went to the deceased's home. What discredits the girlfriend story is the following:

- (1) Martin Mutuvha would not have gone to the bedroom instead of the kitchen where the deceased's wife was. Accused said that on the way Martin Mutuvha and his girlfriend were communicating on the phone. Obviously, if this was so, she would have directed him to come to the kitchen where she was sleeping instead of the bedroom where the deceased was sleeping.
- (2) It is illogical that the deceased's wife would have gone to sleep in the kitchen with the children aged 9 years and 6 years if she had made arrangements with her boyfriend to come and visit that night.
- (3) With the distance of only five meters between the kitchen and the bedroom, and the fact that her husband was at home, it is highly unlikely that the deceased's wife would invite a boyfriend over and let alone sleep with the children who were aged 9 years and 6 years old.
- (4) The deceased's parents' homestead is within the same yard and there is only a distance of about 50 meters from the deceased's huts. Besides, the deceased's parents were at home.

Only an insane and foolish woman would invite a boyfriend over when the husband is at home, the husband's parents are at home, she is sleeping with the children aged 9 years and 6 years old and without telling the boyfriend in which hut she is sleeping.

There was talk of Martin Mutuvha having entered the bedroom where three men were. This was clearly false. Evidence adduced by the State shows that there was only one man in the deceased's bedroom, and that man was the deceased. Besides, the deceased was sleeping in his bed. He had taken off all his clothes and he had placed them on the floor by the bed side. If Martin Mutuvha had visited his girlfriend, got lost and entered the bedroom instead of the kitchen where the girlfriend was, the question is why did he not retreat and get out the moment he saw the deceased? Why did he have to fight with the deceased who was naked and had been sleeping? The deceased was stabbed right in his bedroom which means that Martin Mutuvha entered the bedroom, he did not just end at the door. There should be a stage when Martin Mutuvha saw that the person in the bedroom was a man and not a woman. If the person that he wanted was a woman, the question is why did he not simply run out at that moment instead of

fighting the man? All these questions make us infer that Martin had not gone to see a girlfriend at the deceased's home. His actions are not consistent with the actions of a person who had gone to see a girlfriend. For this and the other reasons discussed above, we dismiss the accused's version that Martin Mutuvha had gone to the deceased's homestead to visit his girlfriend. Besides, Martin Mutuvha was not from this area. The accused could not even explain anything else about this alleged adulterous relationship between Martin Mutuvha and the deceased's wife. He did not even know the name of the alleged girlfriend and where she resided. It was just but a made-up story. Clearly, the accused and Martin Mutuvha had gone to the deceased's home for some other reason which they could not disclose to Gift Musarirambe and Spencer Mututwa whom the accused was working with. This is why they had to come up with the false story that they were going to visit their girlfriends.

Having dismissed the girlfriend story, it automatically means that the accused's story that he remained 100 meters away from the deceased's home is false. It cannot be true. If Martin Mutuvha was not visiting a girlfriend, then the accused had no reason not to reach the deceased's home. He reached the deceased's home with Martin Mutuvha. This explains why the deceased's wife saw the deceased chasing after two men. This is why Special Kadowa and the investigating officer saw and tracked two sets of prints right from the deceased's bedroom right up to the accused's homestead. The circumstantial evidence shows that the accused was at the murder scene. He was right there and he left the place running. It is most likely that it is Martin Mutuvha who stabbed the deceased because it was Martin's clothes which were blood stained. But then the accused helped Martin Mutuvha to conceal incriminating evidence. The two followed the truck and pretended as if everything was normal. The accused did not report Martin Mutuvha to anyone and he let Martin Mutuvha escape. An innocent person would not have allowed Martin Mutuvha to escape. He would not have helped Martin Mutuvha to conceal his blood-stained clothes. On his part, the accused hid his slippers when he learnt from his wife that the deceased was murdered and that people had followed or tracked a shoe print and the print of slippers from the deceased's home right up to his home. It is clear that the accused and Martin Mutuvha acted in common purpose in killing the deceased. The law ascribes joint criminal responsibility to people who collude or act with a common intent in furtherance of the commission of a crime regardless of who the actual perpetrator of the crime is. This means that every associate in crime is criminally liable for the criminal compatriot in crime. This is meant to discourage and punish fellowship in crime.

The accused's participation in the murder of the deceased was of a direct and active nature. He went with Martin Mutuvha to the deceased's home at night. The two then ran away together. The State proved that the accused's participation was not innocent because he did not dissociate himself from the actions of Martin Mutuvha. Whilst it is not known what role he played during the stabbing, what is clear is that he helped in concealing evidence.

Since there is no eye witness as to what actually transpired when the deceased was confronted in his bedroom and how he was eventually stabbed, we cannot convict the accused with murder as defined in s 47 (1) (a) which says that any person who causes the death of another person intending to kill the other person shall be guilty of murder. The State did not adduce evidence that shows that the accused intended to kill the deceased. Moreover, there is no evidence which shows why the deceased was stabbed. In the result, we find the accused guilty of murder as defined in s 47 (1) (b) for causing the death of another person realising that there is real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility.

#### *Sentence*

It is mitigatory that the accused is a fairly young man who is 34 years old. He is a family man with five children and a wife to take care of. He is also a first offender. However, this is a murder which was committed in aggravating circumstances in that the accused and his accomplice broke into the deceased's bedroom hut and attacked him. The accused and his accomplice were on a mission because they specifically travelled to the deceased's home that night. They then unlawfully entered the deceased's bedroom when the deceased was sleeping. It is not known why they went to the deceased's home but it is obvious that they went there for a sinister motive. Under the circumstances, it could only have been for a criminal purpose. It could be that they wanted something that was in that bedroom which probably means that they wanted to rob the deceased. It could also be that they wanted to kill the deceased. Whatever, their reason, the intention and the purpose of their visit could not have been good.

The deceased was brutally murdered in cold blood when he least expected it. Although the weapon that was used was not recovered, the medical report states that it was a sharp object. The deceased was stabbed in the bedroom when he had retired to bed and had taken off his clothes. It is highly unlikely that he was armed. It is most likely that the accused and his co-perpetrator are the ones who brought with them the murder weapon. This is a sign that they anticipated resistance from the deceased and they had come prepared. In view of the fact that

this is a murder which was committed in aggravating circumstances we are thus inclined to impose a period of not less than 20 years. We will suspend a portion of the sentence with the objective that the accused will be rehabilitated and deterred in future from committing further offences. Hopefully other would-be offenders will be deterred from committing offences too.

The accused is therefore sentenced as follows:

“30 years’ imprisonment of which 5 years imprisonment is suspended for years on condition the accused does not within that period commit an offence involving violence on the person of another and for which upon conviction the accused is sentenced to imprisonment without the option of a fine.”

### *Correction of Sentence*

In terms of s 358(2)(b) of the Criminal Procedure and Evidence Act when a court convicts a person of any offence other than an offence specified in the Eight Schedule it may pass sentence and suspend the whole or part of the sentence for a period not exceeding 5 years on such conditions as it may specify. *In casu* when the court sentenced the accused yesterday it overlooked that murder is an offence which is specified in para 1 of the Eight Schedule. Suspension of sentence is not permitted. The court therefore delivered a wrong sentence when it suspended 5 years’ imprisonment from the sentence of 30 years’ imprisonment that it imposed on the accused. Once the court passes a sentence on the accused it becomes *functus officio*. It cannot revisit the sentence other than in terms of s 201(2) of the Criminal Procedure and Evidence Act which allows a wrong judgment or sentence to be amended, before or immediately after it is recorded. *In casu* we will resort to this provision to correct the wrong sentence we imposed. The sentence is wrong because it is contrary to the law. The sentence should be amended immediately meaning that the amendment should be done without delay. *In casu* the sentence that we are correcting was delivered yesterday. Therefore it is being amended without delay. This satisfies the requirements of s 201(2) of the Criminal Procedure and Evidence Act.

The accused’s sentence is therefore amended to read:

“30 years’ imprisonment.”

*National Prosecuting Authority, the State’s legal practitioners  
Coghlan, Welsh and Guest, accused’s legal practitioners*