

**REPORTABLE** (29)

(1) CHRISTOPHER KUFAKWEMBA (2) GODFREY MASENHU  
(3) BENSON JOEL (4) LANGTON NYAKUDIRWA  
v  
THE STATE

**SUPREME COURT OF ZIMBABWE  
UCHENA JA, CHITAKUNYE JA & MUSAKWA JA  
HARARE: 12, 13 OCTOBER 2023 & 18 MARCH 2024**

*B.M Maunze*, for the first appellant.

*L. Nyamudeza*, for the second appellant.

*K.T Mukangani*, for the third appellant.

*L. Mutendes*, for the fourth appellant.

*F.I Nyahunzvi*, for the respondent.

**CHITAKUNYE JA:** This is an appeal against the whole judgment of the High Court (the court *a quo*) in which all the appellants were convicted of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and each was sentenced to death.

**BACKGROUND FACTS**

The appellants were convicted of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Act) and each was sentenced to death after a

protracted trial. The allegations were that on 19 November 2011 at around 1930 hrs, the appellants broke into Aldo Carli's (the deceased) house with the intention of robbing him. The second appellant, who was dressed in police uniform, approached one Leas Pfungwadzapera who was employed as a guard and was on night duty at the deceased's premises. He proceeded to handcuff Leas Pfungwadzapera on the allegations that he was cultivating cannabis. The first to third appellants then force marched Pfungwadzapera to the deceased's house where they knocked at the door whilst the fourth appellant remained outside the deceased's premises as a sentry.

The appellants posed to the deceased as police officers who had arrested Pfungwadzapera for cultivating cannabis in the deceased's yard. The deceased invited the appellants into the house and on entry the second appellant tripped the deceased in such a way that the deceased's head hit hard against the floor. The appellants proceeded to disarm the deceased of his firearm, a Webley revolver 22 serial number A15603. They assaulted the deceased and Pfungwadzapera with a log, booted feet and clenched fists demanding money and valuables. They searched the deceased's pockets and took US\$2 500-00 therefrom.

The appellants also stole an undisclosed amount of money and two other firearms from the deceased's safe after having obtained the keys from his pockets. They proceeded to ransack the house and stole various clothing items, and a Nokia 5230 cellphone, serial number 353424046879412 which they loaded into the deceased's Isuzu KB 280 motor vehicle, registration numbers ABY 6251, and drove away leaving the deceased unconscious. The deceased was admitted in the Intensive Care Unit at the Avenues Clinic as he had sustained severe injuries from the assault. Pfungwadzapera sustained injuries on his head and leg and he was admitted at

Parirenyatwa Hospital after a head scan revealed that he had some clots and he had to undergo an operation.

On the same night of the robbery, the appellants were involved in a road accident with the deceased's vehicle. They abandoned the vehicle which was recovered by the Police on the same night in Epworth, Harare, still loaded with some of the stolen property including a Webley Revolver firearm belonging to the deceased.

On 2 January 2012 the first appellant was arrested at house number 2505 Glen Norah A, Harare and he led to the recovery of a Nokia 5230 cellphone serial number 353424046879412 in his possession and a Colt Pistol 45 serial number 20420 G70 hidden under his bed. His arrest led to the arrest of the second appellant who led to the recovery of police fawn trousers at Block 12 door 11, Geneva, Highfields, Harare. The two appellants led to the arrest of the third appellant who in turn led to the recovery of a Smith & Wesson revolver 357 serial number 35940 which he had hidden in a disused hut at his homestead in Goromonzi. The third appellant then led to the arrest of the fourth appellant in Goromonzi.

The deceased, who was 80 years old, passed away on 6 January 2012 at the Avenues Clinic. On 10 January 2012 a full postmortem examination was conducted at Parirenyatwa Hospital by Forensic Pathologist Doctor Gabriel Agüero. The post mortem report concluded that the cause of death was brain damage due to severe head injury secondary to assault.

**BEFORE THE COURT A QUO**

The first appellant denied committing the offence and averred that he was not present at the deceased's residence on the night in question. He further denied having known of the deceased's residential address and that he only got to know of it when he was arrested on 2 January 2012. He further alleged that he was given the firearm found at his residence by the second appellant for safe keeping and that he agreed to take the firearm because the second appellant was his long-time friend. He denied knowing the third and fourth appellants. He admitted to have been found in possession of the Nokia 5230 Cellphone.

The second appellant pleaded not guilty and in his defence averred that he did not participate in the assault and the robbery as he was not at the scene. In relation to the firearms stolen from the scene and found to have been in his possession at some point, the second appellant averred that these had been given to him by James Jimmy Maisiri for safekeeping.

The third appellant also pleaded not guilty to the charge. He averred that he did not participate in the assault and robbery as he was not at the scene of crime. He averred that he was given the firearm found in his possession by the second appellant for safekeeping. He further averred that he met the first appellant for the first time on the day he was arrested.

The fourth appellant also pleaded not guilty to the charge levelled against him. He claimed that he was never in the company of the other appellants and denied ever meeting the first and second appellants. Further, the fourth appellant contended that he confessed to being involved in the offence as he had been coerced through force, torture and threats of further torture to his person. He averred that he had a contract with the deceased and that the contract at the time of the

deceased's demise was not yet completed. He stated that on the day in question, he was at home with his wife, his sister, Cephas Nyakakudarika and Milk Mutandwa.

At the trial, a number of witnesses, including Pfungwadzapera, gave evidence for the State. Out of those witnesses only Pfungwadzapera was able to testify on the identity of the assailants as he had direct contact with them on the night in question. He gave evidence to the effect that on the night of the robbery he was on night guard duty when he met the second and third appellants who called him out by his name. He testified that they handcuffed him and force marched him to the deceased's house. They knocked at the door and the deceased opened the door whilst holding a gun. The appellants told the deceased that they had arrested him for cultivating cannabis/dagga. The deceased invited them into the house. Upon entering the house, the second appellant grabbed the deceased and a struggle ensued. The first and second appellants disarmed the deceased and in the process the firearm went off. The deceased was tripped and he fell with his head hitting the floor with a lot of force. The deceased and Pfungwadzapera were then handcuffed together and were severely assaulted on their heads and legs in that state using hands and sticks/logs. The third appellant then joined in assaulting them. He further testified that the deceased was assaulted mainly on the head. The witness identified the first, second and third appellants as the assailants and that he did not see the fourth appellant. He was able to see the assailants as there was electrical light in the house from a generator. The inside of the house was thus well lit. The court found him to have been a credible witness.

The first appellant testified that he bought the Nokia cellphone but did not proffer any explanation as to how he came to buy the cellphone. He also testified that he was given the firearm found hidden under his bed by the second appellant for safe keeping.

The second appellant testified that he was the one who gave the bag with firearms to the first and third appellants at different intervals. He had received the bag from one James Jimmy Maisiri for safekeeping as Maisiri owed him some money. He stressed that at the time he received the bag he did not know its contents. He later discovered that the contents included two firearms, one of which he gave to the first appellant and the other to the third appellant at different times for safekeeping.

The third appellant testified that he knew the second appellant because he married his niece. He confirmed having been in possession of a firearm that was recovered by the police hidden in a disused hut at his homestead.

The fourth appellant maintained his position that he was nowhere near the scene and that he did not know the first and second appellants but he knew the third appellant.

### **FINDINGS BY THE COURT A QUO**

The court *a quo*, after a careful analysis of the evidence adduced, held that the first to the third appellants were not credible witnesses. It further held that the only conclusion that could be derived from the inadequacies and inconsistencies in their explanations was that the first and third appellants at all material times had the firearms which were found in their possession after

having robbed the deceased. It found that the first, second and third appellants were directly linked to the murder. The court *a quo* accepted the evidence of Pfungwadzapera and the possession of the recovered firearms and cellphone by the appellants as evidence linking them to the commission of the crime.

Pertaining to the fourth appellant, the court *a quo* was of the view that he was the one who had prior knowledge of the premises having worked for the deceased before. The court *a quo* held that he was the one who had supplied information regarding the premises to the other appellants through his link with the third appellant. The appellants were thus all found guilty of contravening s 47 (1) (b) of the Act.

In assessing sentence, the court *a quo* considered the aggravating and mitigatory factors. The extenuating circumstances that were placed before the court *a quo* were that the appellants' intention was to rob the deceased; they were not armed at the time they arrived at the deceased's premises; they acted in self defence; the trial had taken long to conclude and, with regards to the fourth appellant- his role was merely limited to furnishing information to the other appellants. The aggravating factors included, *inter alia*, that the brutal assault that led to the deceased's death was committed in the course of a robbery and was perpetrated on an elderly person. The court *a quo* held that the aggravating circumstances far outweighed the extenuating circumstances. Consequently, the appellants were all sentenced to death.

Aggrieved by the court *a quo*'s determination, the appellants appealed to this Court against both conviction and sentence on the following grounds:

### **FIRST APPELLANT'S GROUNDS OF APPEAL**

1. The court *a quo* erred in rejecting the first appellant's defence of *alibi* when the State had not disproved it.
2. The court *a quo* erred in finding that the first appellant's possession of the Colt pistol and the cell phone led to the only inference that the first appellant was at the scene of the crime when there was another reasonable inference where he got them from which had not been disproved. (*sic*)

### **SECOND APPELLANT'S GROUNDS OF APPEAL**

#### **Ad-conviction**

It is submitted that the court *a quo* erred in failing to consider the torture and assault that the appellants had been subjected to and how the same was used in order to corroborate and buttress the State's case.

#### **Ad-sentence**

The court *a quo* erred in failing to consider the mitigating circumstances of the Appellant which includes the following: -

- i. He did not benefit from the fruits of the crime.
- ii. He was brutally assaulted to admit to what he did not do.
- iii. The second appellant did not possess an intent to commit murder.

### **THIRD APPELLANT'S GROUNDS OF APPEAL**

#### **Ad - conviction.**

1. The court erred in ignoring the inherent weaknesses of (*sic*) wherein the first state witness identified the third appellant for the first time in the dock in the absence of a proper identification Parade.
2. The court erred in ignoring the torture and assault the third appellant was subjected to despite such evidence being corroborated by other co-accused persons'
3. The court misdirected itself in arriving at a conclusion that third appellant was acting in common purpose with other co-accused persons in the absence of clearly defined roles by each co-accused Person.

#### **Ad-sentence**

1. The court *a quo* erred in treating the mitigatory factors in piece meal as it placed more weight on the aggravating circumstances.

#### **FOURTH APPELLANT'S GROUNDS OF APPEAL**

##### **Ad-conviction**

1. The court *a quo* erred in failing to appreciate that the fourth appellant was not implicated in this matter as an actual informant or accomplice to the crime but rather as a person that he had gone to work with at the time third appellant was being sought by the police. (*sic*)
2. The court *a quo* erred in convicting the fourth appellant based on uncorroborated testimony without assessing the credibility and reliability of the witness.
3. The court *a quo* erred in failing to consider the torture and assault that the accused persons were subjected to and the implication of same on the evidence proffered for the state's case.

4. The court *a quo* erred in concluding that the fourth appellant acted in common purpose with the co-accused persons.
5. The court *a quo* erred by failing to take note of inconsistencies that were exhibited in the state's evidence.

#### **Ad-sentence**

6. The court *a quo* erred in failing to consider the mitigating circumstances of the appellant.
7. The court *a quo* erred in failing to consider that the fourth appellant did not benefit from the proceeds of the crime.

#### **SUBMISSIONS BEFORE THIS COURT**

Mr *Maunze*, for the first appellant, submitted that the court *a quo* erred in rejecting the first appellant's defence of *alibi* when the State had not disproved it. He argued that the court *a quo* erred in finding that the first appellant's possession of the Colt pistol and the cell phone led to the only inference that the first appellant was at the scene of the crime when there was another reasonable inference on where he got them from which had not been disproved. He submitted that the State produced no firearm certificate linking the said pistol to the deceased. In addition, counsel argued that no proof was proffered to prove that the cellphone found in the possession of the first appellant belonged to the deceased. On this basis, he moved that the appeal succeeds, that the first appellant be found not guilty and be acquitted.

Ms *Nyamudeza*, for the second appellant, abandoned the only ground of appeal against conviction relating to assault and torture, it having come to her attention that the court *a quo* did

not take the evidence obtained through the alleged torture into consideration in convicting and sentencing the appellants. She submitted that the conviction of the second appellant was proper but maintained that the sentence imposed was too harsh. Counsel did not, however, articulate in what way the sentence was improper given the finding of aggravating circumstances.

Mr. *Mukangani*, for the third appellant, also abandoned ground of appeal number two on torture and assault. He submitted that the court *a quo* erred in ignoring the inherent weaknesses of the first state witness who identified the third appellant for the first time in the dock in the absence of a proper identification parade. Counsel further submitted that the court *a quo* misdirected itself in arriving at a conclusion that the third appellant was acting in common purpose with other appellants in the absence of clearly defined roles by each co-accused person.

In respect of the sentence imposed, counsel submitted that the court *a quo* erred in treating the mitigatory factors piecemeal as it placed more weight on aggravating circumstances.

Ms *Mutendesi*, for the fourth appellant, submitted that the court *a quo* erred in failing to appreciate that the fourth appellant was not implicated in this matter as an actual informant or accomplice to the crime but rather as a person who had gone to work with the third appellant at a time the third appellant was being sought by the police. It was submitted that the court *a quo* erred in convicting the fourth appellant based on uncorroborated testimony without assessing the credibility and reliability of the witness. Counsel averred that no evidence implicating the fourth appellant was placed before the court *a quo* except mere speculation and suppositions. She argued that the court *a quo* erred in concluding that the fourth appellant acted in common purpose with the co-accused persons. Counsel therefore argued that the requisite standard of proof was not met

and that the court *a quo* relied on the single evidence of the third appellant who implicated the fourth appellant despite its finding that the third appellant was not a credible witness.

On sentence, counsel submitted that the court *a quo* did not consider the mitigating circumstances of the fourth appellant. She moved for the acquittal of the fourth appellant given that he had been incarcerated for more than a decade.

*Per contra*, Mr. Nyahunzvi, for the respondent, submitted that the issues raised by the appellants had no merit considering the evidence led in the court *a quo*. He, however, conceded that there was insufficient evidence warranting the fourth appellant's conviction and sentence.

He submitted that the first appellant was linked to the crime by the evidence of Pfungwadzapera, the other appellants and his own admission of possessing a firearm and a cellphone stolen from the scene of crime. Counsel further submitted that the second and third appellants, besides being identified by Pfungwadzapera, were also found in possession of firearms stolen from the scene of crime. The second appellant also led to the recovery of a police fawn trousers. In fact, the sequence of their arrest showed that they were all linked to each other in the commission of the offence. That linkage was not denied by the appellants.

### **ISSUES FOR DETERMINATION**

It appears that from the grounds of appeal and submissions made by counsel before this Court, the following are the issues for determination

1. Whether or not the court *a quo* erred and misdirected itself in convicting each of the appellants for the crime of murder given their defenses.
2. Whether or not the court *a quo* erred and misdirected itself in sentencing each appellant to death.

## **THE LAW**

The offence of murder is defined in s 47 of the Act as follows: -

“(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; shall be guilty of murder.”

In essence, s 47 (1) (a) relates to murder with actual intent and s 47 (1) (b) murder with what used to be termed constructive intent.

Section 48 of the Constitution of Zimbabwe, 2013 permits the imposition of the sentence of death for murder committed in aggravating circumstances by providing that: -

“A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and –

(a) the law must permit the court a discretion whether or not to impose the penalty;

(b) the penalty may be carried out only in accordance with a final judgment of a competent court;”

The Act provides in s 47 (2) the circumstances which must be considered by a court when imposing a sentence after a conviction of murder. The section provides:

“In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if –

- (a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime) –
  - (i) an act of insurgency, banditry, sabotage or terrorism; or
  - (ii) the rape or other sexual assault of the victim; or
  - (iii) kidnapping or illegal detention, **robbery**, hijacking, piracy or escaping from lawful custody; or
  - (iv) **unlawful entry into a dwelling house**, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives.” (My emphasis)

Section 47 (3) of the Act also provides:

“(2) A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that –

- (a) the murder was premeditated; or
- (b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or **was of or over the age of seventy years**, or was physically disabled.” (My emphasis)

Section 47 (4) of the Act provides that a person convicted of murder shall be liable, subject to ss 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to death, life imprisonment or to imprisonment for not less than 20 years if the murder was committed in aggravating circumstances, which in terms of subsections (2) (a) and (3) thereof includes murder committed in the course of a robbery or unlawful entry into a dwelling house or in which the victim is seventy or above seventy years old. It is therefore within the court’s discretion when dealing

with an accused who committed murder in aggravating circumstances to sentence the person to death, life imprisonment or to imprisonment for not less than 20 years.

It is clear that the sentence of death is not automatically imposed by virtue of the existence of aggravating circumstances but the sentencing court still retains discretion to impose such sentence or not.

### **APPLICATION OF THE LAW TO THE FACTS**

1. **Whether or not the court *a quo* erred and misdirected itself in convicting the appellants for the crime of murder.**

Counsel for the first appellant, Mr *Maunze*, submitted that there was no compelling and sufficient evidence produced in the court *a quo* to convict the first appellant. Counsel further submitted that the court *a quo* erred in rejecting the first appellant's defence of *alibi* when the respondent had not disproved it. Counsel argued that the court *a quo* ought to have acquitted the appellant on the basis that he was not present at the scene of the crime as he was at home with his uncle, one Vongai Kufakwemba.

An *alibi* is a statement of defence to the effect that a person accused of a crime was at a specific place different from the scene of crime at the time the crime was committed. In the case of *Hlabangana & Others v S HB 101/22* the court aptly stated that:

“While there is no onus upon the applicants to prove their *alibi*, an accused who raises the defence of *alibi* must of necessity fully disclose its details to enable the State to fully investigate it.”

In the court *a quo*, in his defence outline, the first appellant averred that on the day the crime was committed he was at home with his uncle, Vongai Kufakwemba. He indicated that he would call that uncle as his witness. However, when the time came for him to call the witness, he declined alleging fear of victimization by the police. He did not explain what fear had suddenly engulfed him when all along he had indicated that he would call the witness. Thus, his defence on this aspect remained a bare statement that ‘I was at home with my uncle, Vongai Kufakwemba’ and nothing else in substance. The first appellant’s circumstances are similar to those in *Madya v S* SC 88/23 wherein at p 13 this Court held that:

“It can also be said that the appellant’s failure, in the particular circumstances of this case, to call his brother to testify as a witness in support of his alibi, tends to negate his defence in the face of the cogent evidence adduced by the State against him. The appellant dismally failed in his evidence before the court *a quo*, to give a clear account of where he was on that particular day. In addition, he did not call his brother to testify or lead any further evidence to substantiate his defence that he was with his brother on that fateful day. The court *a quo* was thus left with no other option but to consider the evidence placed before it and finally coming to the conclusion that culminated in the conviction of the appellant. In the court’s view, the court *a quo* did not misdirect itself in any way.”

The first appellant upon raising the defence of *alibi* was expected to fully disclose the details thereof in order to enable the respondent to fully disprove the defence, such as the time of the day he was with his uncle *vis- a -vis* the time of the offence. The first appellant’s assertion that he failed to bring his uncle to testify in the court *a quo* for fear of victimization by the police remained hollow, thus as per the *Madya* case *supra*, he failed to sustain that defence in the light of the State’s evidence on his whereabouts on the night of that day. The respondent could therefore not disprove evidence that had not been placed before the court. The submission by counsel that the court *a quo* erred in rejecting the first appellant’s defence of *alibi* when the respondent had not disproved it cannot be sustained.

Counsel's further submission that the court *a quo* erred in finding that the first appellant's possession of the firearm and the cell phone led to the only inference that the first appellant was at the scene of crime when there was another reasonable inference on where he got the stolen items from which had not been disproved, is without merit.

The respondent adduced evidence to the effect that upon the arrest of the first appellant he was found in possession of a Colt Pistol, which was found under his bed, and a Nokia 5230 cellphone which was stolen at the scene of the robbery. The first appellant during his cross examination admitted to have been in possession of the property in question. He, however, averred that he was safekeeping the firearm for the second appellant and, in relation to the Nokia cellphone, he did not disclose where he had bought the cellphone from nor any details on the sale transaction. He also could not explain why the firearm was hidden under his bed if he had innocently been given it for safekeeping. When the first appellant's inadequate explanation of the circumstances of his possession of the items stolen on the night of the robbery is considered together with Pfungwadzapera's identification of him as having been part of the robbers who assaulted the deceased on the night in question, his presence at the scene of crime cannot be doubted.

The law on circumstantial evidence was correctly encapsulated by WATERMEYER JA in *R v Blom* 1939 AD 188 at 202 and 203 when the learned judge referred to "two cardinal rules of logic" which govern the use of circumstantial evidence in a criminal trial:

- “(1) the inference sought to be drawn must be consistent with all the proven facts.
- (2) the proved facts should be such that they exclude every possible inference from them save the one to be drawn ....”

Circumstantial evidence is indirect evidence from which an inference of guilt may be drawn. This is done when the State fails to place real and direct evidence before a court of law in criminal matters. However, there are safeguards that are in place to avoid wrong and misguided convictions in the guise of circumstantial evidence. In our jurisdiction, a person can be convicted purely on circumstantial evidence alone.

Professor *G. Feltoe*, in his book, *Magistrates' Handbook*, on pp 322-323 outlines some crucial/important/critical guide lines from which an inference of guilty can be drawn as:

- “(a) The inference of guilt is consistent with all the proved facts and the proved facts are such that they exclude every reasonable inference from them except that accused is guilty.
- (b) The circumstances taken cumulatively form a chain so complete that the conclusion is inescapable that within all human probability the crime was committed by accused and no-one else.
- (c) Where circumstantial evidence leads inexorably to a definite conclusion no direct evidence is necessary for their probative value, save that things do not happen that way without reason or explanation.
- (d) The circumstantial evidence is 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 accused but also inconsistent with his innocence.”

The first appellant does not deny being in possession of the Colt pistol and the Nokia cellphone which were stolen from the scene of crime. The bare averment by the first appellant that he was given the firearm for safekeeping by the second appellant and that he bought the cellphone cannot be sustained. The court *a quo* aptly disbelieved the first appellant's version that he had innocently received the gun from the second appellant for safekeeping as, from his own evidence, the second appellant did not deal in firearms but in electrical and plumbing ware. Further, he admitted not to have inquired on the source of the firearm. His version was virtually

that he gullibly accepted to safe-keep the firearm without any inquiry on its source. According to him, the second appellant was proceeding to Mufakose suburb and would return to collect it on that same day. No explanation was given for the second appellant not proceeding with the firearm to Mufakose or for the fact that he ended up keeping the firearm for a week before the police recovered it from him. Equally with the cellphone, the first appellant did not proffer any explanation of the circumstances surrounding the sale transaction, his was simply a bare statement 'I bought it'. When such bare averments are juxtaposed with the State's evidence and the manner in which the items were recovered, it is inescapable that the first appellant knew more about the items than he was willing to disclose right from his arrest. Counsel's belated submission that the respondent did not produce a firearm certificate linking the said Colt pistol to the deceased does not hold any merit. The pistol and its identification number were produced and accepted in the court *a quo*. There was in fact no issue on the ownership of both the pistol and the cellphone. This submission was clearly without merit. The circumstantial evidence linking the first appellant to the crime is so overwhelming that one cannot turn a blind eye to it.

It is pertinent to note that the court *a quo* did not entirely rely on circumstantial evidence to convict. It also considered direct evidence from witnesses. In addition, the key State witness Pfungwadzapera positively identified the first appellant as the person who handcuffed him.

The evidence shows that Pfungwadzapera positively identified the first to third appellants and the roles that each played from the inception of the robbery, to the assault that led to the death of the deceased and the ransacking of the deceased's house. This Court is therefore persuaded by the submission by counsel for the respondent that the first appellant is linked to the

crime by the evidence of Pfungwadzapera, the recovery of stolen items from him and the other accused persons.

Ms *Nyamudeza*, for the second appellant, abandoned the only ground of appeal against conviction. She conceded that after a careful perusal of the record of proceedings the conviction by the court *a quo* was correct. The ground of appeal raised had been on the allegation that the second appellant had been tortured and assaulted yet the court *a quo* had accepted this as corroboration of the State's case. This was clearly wrong as the court *a quo* had not admitted into evidence the alleged confessions and indications said to have been obtained under torture or assault. The appellant's conviction was supported by the evidence adduced such as the identification by Pfungwadzapera as the one who was clad in police uniform and the firearms which he admitted to have been in possession of. Though he belatedly averred that he had been given the bag containing the firearms by James Jimmy Maisiri to hold onto in lieu of a debt owed him by the said James, it was not disputed that during the arrest of all the appellants and subsequent investigations such a name, as the source of the firearms, had not been mentioned, till the submission of his defence outline. The appellant could not explain why he had not mentioned this person earlier or state why this person had never returned to collect his bag with the firearms up to the date of trial. He could also not explain why he ended up distributing the two firearms in the bag to first and third appellants when the owner had said he would come for the bag. The court *a quo* cannot be faulted for disbelieving such a story as a recent fabrication. The appellant's defence was thus not worth the paper it was written on.

Counsel's submissions on sentence will be considered in due course.

Mr *Mukangani*, for the third appellant, submitted that the court *a quo* erred in ignoring the inherent weaknesses of the first State witness who identified the third appellant for the first time in the dock in the absence of a proper identification parade.

It is trite that in order to produce reliable evidence an identification parade must ordinarily be conducted fairly. A courtroom identification commonly referred to as “dock identification” may at times be accepted. The court *a quo* allowed dock identification whereby Pfungwadzapera was asked if he knew the accused persons and he identified the appellants including the third appellant in the courtroom as being the perpetrators. However, there are disadvantages that are associated with a dock identification which must always be guarded against.

In *Maradu* 1994 (2) SACR 410 (W) the court held that the danger of a dock identification is the same as that created by a leading question in examination-in-chief: it suggests the answer desired. As the latter type of question is inadmissible, there is no reason why a dock identification should also not be inadmissible, save in special circumstances.

Further, in *S v Mutsinziri* 1997 (1) ZLR 6 (H) at p 8 the court noted that:

“A “dock identification”, where a witness is asked whether the person in the dock is the offender, suffers from considerable disadvantages. Everything about the atmosphere of the court proceedings points to the accused, and to him alone, as the person who is to be identified by the witness. These circumstances are inevitable unless one insists that any dock identification take the form of an identity parade. The manner in which a dock identification is elicited from witnesses by the prosecutor can be done the right way or the wrong way. The wrong way is one which makes it virtually impossible for the witness to say anything other than that the accused is the culprit. This way constitutes an irregularity. The better way is to get the witness to recount all the events without reference to the accused in the dock, and only when the witness has said all he has to say about the events should he be asked whether any person in the court is recognised. This form of identification still carries the defective feature of a dock identification, that the accused is obviously the person who is suspected of

committing the offence, but it avoids leading questions and putting the identification into the witness' mouth.”

From the evidence in the court *a quo*, Pfungwadzapera was asked if he recognized any of the 4 persons in the dock, to which he indicated that he recognized the first to the third appellants as the persons who perpetrated the offence in question. He also identified the fourth appellant as someone he had worked with but he did not see him on the day of the crime. The witness was able to ascribe the roles played by each of the 3 appellants during the commission of the offence. The evidence shows that he had ample opportunity to observe the intruders. The identification procedure that was adopted by the court *a quo* was acceptable despite some disadvantages as noted in *Mutsinziri* above. Further, in *S v Nkomo* 1989 (3) ZLR 117 (S), this Court held that good identification does not need corroboration or support but poor identification does. Examples of good identification include cases where the witness observed an accused over a long period or many times or where the accused was well known to the witness. In *casu*, Pfungwadzapera was able to observe and identify the appellants over a long period of time and he was even able to hit the second appellant with a stick. In essence the identification that was accepted by the court *a quo* was correct considering that Pfungwadzapera clearly explained how he was able to see the three assailants and excluded one. This was not just a case of Pfungwadzapera being honest in asserting that he was able to identify them but the long time the assailants took while ransacking the house gave him time to observe them.

Whilst the identification was by one witness, it is trite that such may still be accepted. In *S v Nyathi* 1977 (2) RLR 315 (A) LEWIS JP had this to say on the evidence of a single witness:

“...there is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution and the merits thereof weighed against any factor which militate against its credibility. In essence a common sense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict.”

In *casu*, the court *a quo* did not just rely on the evidence of the single witness, though it found him to be credible, but it also considered the recent possession of the stolen firearms and cellphone by the appellants as confirmation of their participation in the crime. In fact, the second appellant did not deny leading police to the recovery of a police uniform which Pfungwadzapera had said this appellant was clad in on the night of the crime.

In this regard this Court in *S v Nathoo Supermarket* 1987 (2) ZLR 136 (S) at 138D-F held that:

“where the evidence of a single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.”

The possession of the firearms and the cellphone in circumstances explained above pointed to the appellants’ involvement in the offence in question. The court *a quo* made findings of fact on the credibility of Pfungwadzapera’s evidence and on the unreliability of the appellants’ evidence. Such findings of fact cannot be lightly interfered with. In *Chimbwanda v Chimbwanda* SC 28/02 this Court remarked that:

“It is trite in our law that an appellate court will not interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them.”

The court *a quo* having seen and heard witnesses for the state and for the appellants; and having observed their demeanour, believed the respondent's evidence and threw out the appellants' versions on the identification of the perpetrators of the offence in question.

We are of the view that the court *a quo* cannot be faulted in that respect as regards the first, second and third appellants.

Ms *Mutendes*, for the fourth appellant, submitted that not enough evidence was placed before the court *a quo* to warrant the conviction of the fourth appellant. Mr *Nyahunzvi*, for the respondent, conceded that the evidence against the fourth appellant was speculative and abandoned opposing the fourth appellant's appeal.

In the court *a quo* Pflugwadzapera recognized the fourth appellant as his co-worker and in his evidence, he stated that;

“Q: On that particular day where did you see accused number 4?

A: I never saw the fourth accused person on the day in question, he only came on the following day which was a Sunday and I explained to him what had transpired and was consecrating (*sic*) with me.”

The evidence shows clearly that Pflugwadzapera did not identify the fourth appellant as one of the assailants on the night in question. Equally, the fourth appellant was not found in possession of any of the stolen items. The alleged implication by the third appellant was not in his evidence in court. In short, there was no evidence implicating or identifying the fourth appellant as part of the assailants placed before the court *a quo*.

The concession by counsel for the respondent that the evidence pertaining to the fourth appellant's conviction and sentence was merely speculative was proper. This Court finds that the fourth appellant ought not to have been convicted at all. The court *a quo* erred in convicting the fourth appellant on the premise that he must have been the one who gave the other appellants details of the deceased's premises because of his association with the third appellant. The fourth appellant ought to have been acquitted of the charge.

**2. Whether the court *a quo* erred and misdirected itself in sentencing each appellant to death.**

The question of sentence is within the discretion of a trial court. This Court will not lightly interfere with a lower court's sentence unless it is shown that, *inter alia*, the sentence imposed is disturbingly inappropriate or where the discretion has been exercised capriciously or upon a wrong principle. See *S v Sidat* 1997 (1) ZLR 497 (SC).

In *S v Nhumwa* SC 40/88 at p 5, this Court clarified the limits upon which it will interfere with the sentencing discretion of a primary sentencing court as follows:

**“It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severe than the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.”** (my emphasis)

The court *a quo* in imposing the death sentence alluded to the mitigatory features submitted by the appellants and the aggravating features submitted by the respondent. It held that the aggravating features far outweighed the mitigatory features. The court *a quo* also concluded that there were no extenuating circumstances warranting a lesser sentence than the ultimate price for such an offence. The question is therefore whether in arriving at such a decision the court

*a quo* failed to properly exercise its discretion in determining the appropriate sentence. The reasons for sentence show that the court *a quo* considered all the relevant factors placed before it. The appellants' submissions included that their intention was to rob and not to kill the deceased; they went there unarmed; they acted in self defence; the trial took long to finalize (albeit the court noted that the appellants were responsible for much of the delay); they were convicted of contravening s 47(1) (b) and not (a) of the code, hence there was no actual intent.

The respondent, on the other hand, submitted that no extenuating circumstances had been established and that the circumstances of the case showed that there were in fact aggravating circumstances as not only was the offence committed in the course of a robbery, but the victim was an elderly person aged 80 years who was battered and left seriously injured and sprawling on the floor together with his security guard Pfungwadzapera. The court *a quo* made reference to a number of authorities where such features have been held to be aggravating and deserving of the death sentence.

In *S v Matyityi* 2011 (1) SACR 40 (SCA) the court held that:

“In determining whether there are substantial and compelling circumstances present, a court must be aware that the legislature has set a benchmark of the sentence that should ordinarily be imposed for a specified crime, and that there should be truly persuasive reasons for a different response. In deciding whether substantial and compelling circumstances exist, the court is required to look at all the mitigating and aggravating factors, and consider the cumulative effect thereof.”

In *S v Matongo & Others* SC 61/05 the court held that:

“The law in this regard is clear. A murder committed in the course of a robbery attracts the death penalty unless there are weighty extenuating circumstances.”

Previously in *S v Sibanda* 1992 (2) ZLR 438 (S) at p 443F-H GUBBAY CJ had remarked that:

“Warnings have frequently been given that in the absence of weighty extenuating circumstances a murder committed in the course of a robbery will attract the death penalty.”

These sentiments were reiterated in *Simango v The State* SC 42/14. A death penalty is not a sentence which is lightly imposed on convicted persons, and the law clearly stipulates that it is given under circumstances whereby the person convicted of murder committed that crime in aggravating circumstances. It is common cause that at the end of a trial before a sentence is imposed upon a convicted person a court has to assess and take into account the mitigating and aggravating circumstances in the case. The mitigatory factors alluded to by the appellants are not the sort of compelling circumstances that would warrant a departure from the penalty imposed in the face of the established aggravating circumstances. We find that the court *a quo* properly exercised its discretion in this regard and no justification has been established for this Court to interfere with the sentence imposed in respect of the first, second and third appellants.

### **DISPOSITION**

In a criminal trial the State is required to prove the guilt of the accused person beyond a reasonable doubt. Proof beyond a reasonable doubt requires more than proof on a balance of probabilities. It is not, however, proof to an absolute degree of certainty or beyond a shadow of a doubt. Where there is proof beyond reasonable doubt no reasonable doubt will remain as to the guilt of the accused. If a reasonable person would still entertain a reasonable doubt as to whether the accused is guilty, the accused is entitled to be acquitted.

In *casu*, in respect of the first to the third appellants the court *a quo* cannot be faulted for convicting them for the crime of murder. In relation to the fourth appellant the court *a quo* erred and misdirected itself in convicting him when there was insufficient evidence of his involvement in the offence.

It is accordingly ordered as follows:

1. The appeals against both conviction and sentence by the first, second and third appellants be and are hereby dismissed in their entirety.
2. The appeal against both conviction and sentence by the fourth appellant be and is hereby upheld in its entirety.
3. The conviction and sentence of the fourth appellant is hereby set aside and is substituted as follows:

“The fourth accused person, Langton Nyakudirwa, is hereby found not guilty and is acquitted.”

**UCHENA JA** : I agree

**MUSAKWA JA** : I agree

*Mawere Sibanda*, 1<sup>st</sup> appellant's legal practitioners

*Messrs Rujuwa Attorneys*, 2<sup>nd</sup> appellant's legal practitioners

*Mugiya Law Chambers*, 3<sup>rd</sup> appellant's legal practitioners

*Messrs Madzima Chidyausiku Museta*, 4<sup>th</sup> appellant's legal practitioners

*The National Prosecuting Authority*, respondent's legal practitioners