

REPORTABLE (30)

HERBERT LEARNMORE CHIKIWA
v
THE STATE

**SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & CHITAKUNYE JA
HARARE: 30 JANUARY 2024**

The appellant in person

C. Muchemwa, for the respondent

MATHONSI JA: The appellant is a former CID detective in the Zimbabwe Republic Police who was, prior to disengagement, based at Harare Central Police Station. He, along with one of his co-accused, Given Mushore, are serving a term of three years imprisonment for unlawful entry committed in aggravating circumstances and a term of thirty years imprisonment for murder. This followed their conviction and sentence by the High Court of Zimbabwe sitting at Harare (the court *a quo*) on 17 August 2022. The court *a quo* ordered the two sentences to run concurrently.

Aggrieved by both the convictions and the sentences, and self-acting, the appellant noted this appeal to this Court against the whole judgment of the court *a quo* after obtaining its leave to appeal. After hearing arguments and intensively engaging the parties, this Court issued the following order:

“It be and is hereby ordered as follows:

1. By consent, the appeal against both conviction and sentence in respect of count one, unlawful entry in aggravating circumstances, succeeds.
2. The conviction and sentence in count one are set aside and substituted with the following:

“The accused one, Herbert Learnmore Chikiwa, is found not guilty and is acquitted.”
3. The appeal against both conviction and sentence in count two, murder, is dismissed in its entirety.”

The Court indicated that the reasons for the order would follow in due course. What follows are those reasons.

THE FACTS

On the night of 21 September 2013, a determined group of four armed robbers made its way to house number 40 Northampton Road, Eastlea, Harare, the office premises of Imperial Security Company. Upon arrival, they cut the padlock securing the main gate and gained entry into the yard. Once inside the yard they proceeded to the main house used as offices where they cut the screen door before forcing the main door open.

That way they gained entry into the office premises which they proceeded to ransack with reckless abandon as they searched for valuables. They stole various items including a Llama pistol serial number 7260214 with a magazine loaded with 7 x 9mm rounds, a small red box with 4 x 9mm rounds, a blue denim jacket, a jersey, a black leather jacket, a brown jersey, two rubber baton sticks, one pair of handcuffs, a 10 x 10m tent and a black Edgars bag containing some Imperial Security Company documents.

Having stolen the above items, the group of robbers made good their escape unnoticed. They certainly had not had enough because much later during the same night, but in the early hours of 22 September 2013, the group proceeded to house number 5 Wembley Crescent, Eastlea, Harare, the office premises of another company called K and K Properties. Upon arrival, they cut the padlock securing the main gate in order to gain entry into the yard.

Once inside the yard, the robbers forced open one of the windows and cut the burglar bars in order to gain entry into the house. The noise of cutting the burglar bars attracted the attention of Collen Julius, a security guard who was doing his rounds at the premises. He rushed to the cottage located a short distance behind the house to wake up four others sleeping at the cottage including his son, Innocent Julius, who is now deceased.

The five of them armed themselves with empty bottles and stones before advancing towards the office premises while shouting for help from neighbors. Disturbed by the advancing party, two of the robbers bolted out of the office premises towards the gate. Sensing victory the group of five gave chase but not for long. The sound of gunfire stopped them dead in their tracks promptly cutting the chase. Three shots were fired by one of the robbers who had remained inside the office premises forcing the chasing group to beat a hasty retreat to the safety of their cottage as one of the fleeing robbers jumped over the precast wall while the other escaped through the main gate.

It was only when they got back to the cottage that they discovered that the deceased, Innocent Julius, had not been as lucky. One of the bullets ripped through the right side of his chest while a second one hit his hand inflicting mortal wounds. A post mortem examination conducted

by Doctor Salvator Aleks Mapunda, an independent forensic pathologist, on the body of the deceased concluded that he died as a result of “haemorrhages and shock due to gunshot wounds.”

Among other exhibits recovered at the scene of the murder were three spent 9mm cartridges. On 19 December 2013, about three months after the murder of the deceased, the appellant was at Waterwright Irrigation, Pomona, Borrowdale, Harare armed with a 9mm Llama pistol serial number 721889. His suspicious behavior led the employees of that company to suspect he was trying to rob them. As he tried to abscond, Moses Chari and other employees gave chase and managed to apprehend him with the assistance of other members of the public. They disarmed him of his pistol, which was later handed over to the police together with a pair of handcuffs he had in a bag he was carrying.

PROCEEDINGS BEFORE THE COURT *A QUO*

Cited as the first accused, the appellant was arraigned before the court *a quo* along with Johane Kamudyariwa as the second accused, Lawrence Makiwa Makosa as the third accused and Given Mushore as the fourth accused, on two charges. In count one, they were charged with unlawful entry in aggravating circumstances as defined in s 131 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).

The allegations in count one are that on 21 September 2013 they unlawfully, intentionally and without permission gained entry into number 40 Northampton Road, Eastlea, Harare, the premises of Imperial Security Company. Having unlawfully broken into those premises, they had stolen items of property which I have already listed above.

In count two, the allegations were that on 22 September 2013 the quartet had, at number 5 Wembley Crescent, Eastlea, Harare unlawfully and with intent to kill murdered Innocent Julius, by shooting him with a pistol on the right side of the chest and on the right hand, inflicting injuries from which he died.

All the accused persons pleaded not guilty to the charges and submitted defense outlines supporting their pleas. That set the stage for a very protracted trial in which there was a trial-within-a-trial on the admissibility of confessions and the evidence of indications made by the appellant's three co-accused persons. The appellant did not himself make any confession or indications during investigations. All in all, the prosecution called ten witnesses to give *viva voce* evidence while the rest of the evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as set out in the state outline. A ballistic report compiled by the CID Forensic Department following a scientific examination of the 9mm Llama pistol with serial number 721889 and the 3x9mm spent cartridges was also produced as evidence.

The evidence directly impacting on this appeal is that of Moses Chari, a general hand employed by Waterwright Irrigation Company in Borrowdale, Harare and that of Detective Assistant Inspector Steven Gundumure, the ballistics expert who examined the firearm exhibits associated with the shooting of the deceased.

It was the evidence of Moses Chari that at about 1300 hours on 19 December 2013, the appellant came to his workplace. While the witness was at the workshop, the Salaries Officer alerted him and other employees that an intruder had come to take away their salaries. Himself

and others saw the appellant at the gate escaping and they started giving chase as the appellant took to his heels.

They chased him for about 15 to 20 minutes up to Edinburgh Road. At some point near Vainona Primary School the appellant discharged his firearm presumably to scare away the chasing party. Eventually the appellant got exhausted and could not run anymore forcing him to stop still with his pistol at hand. This allowed the witness to close in on the appellant. Hiding behind a tree as he advanced, the witness managed to dive at the unsuspecting tired appellant grabbing the weapon in the process and felling the appellant to the ground.

That is how the appellant was apprehended, handcuffed and eventually handed over to the police but not before the witness and company had searched a black bag the appellant was carrying. They found a pair of handcuffs in the bag which they handed over to the police together with the firearm.

The Llama firearm recovered from the appellant as well as the three spent cartridges uplifted from the murder scene at number 5 Wembley Crescent in Eastlea were subsequently conveyed to the CID Forensic Ballistics Unit for examination. Detective Gundumure, a decorated firearms expert with eighteen years of experience under his belt, subjected the exhibits to thorough scientific examination. Following that examination, the witness, who testified extensively at the trial, concluded that the 9mm spent cartridges found at the scene of the murder were discharged from the Llama pistol serial number 721889 found in possession of the appellant at the time of his arrest.

Against that evidence led by the prosecution, the appellant's defense was that of an *alibi*. He denied having been in Harare on the dates of the commission of the alleged offences initially asserting that he was in Botswana on 22 September 2013 when the deceased was killed. When that *alibi* was investigated and found untrue as, according to his passport, he had only crossed into Botswana on 23 September 2013, he changed his story. This time he insisted that, at all material times, he had been in Bulawayo preparing to go to Botswana.

The appellant also alleged that, on 20, 21, 22 and 23 September 2013, he went to CABS bank branch in Bulawayo very early every morning to withdraw his Zimbabwe Republic Police pension money from an automated teller machine (ATM), which money he was putting together in order to go and buy the engine for his motor vehicle in Botswana. He stated that he then left for Botswana on 23 September 2013. Regarding the whereabouts of his unlicensed firearm allegedly used as the murder weapon, the appellant initially alleged that he had buried it in his garden in Bulawayo in August 2013 where it was still located on the date of the murder.

Upon being confronted with the ballistic report identifying the firearm as the murder weapon, the appellant shifted ground. He alleged that he had, in August 2013, placed his firearm in the custody of a firearms dealer in Bulawayo by the name of Abdul Keen. Abdul was tasked to repair it. Abdul having failed to fix the firearm, so his story continued, he collected it from Abdul on 18 December 2013 the day he travelled to Harare, to have the firearm fixed by the police experts at ZRP Morris Depot, never mind that it was unlicensed. He denied knowing or being known to his three co-accused persons. During cross examination he confirmed the contents of his statement wherein he had told the police that when the offences were committed, he was in Botswana and that his firearm was hidden in his garden.

From the evidence led in the court *a quo*, it was common cause that the items recovered from number 5 Wembley Crescent, Eastlea, Harare, showed that the persons who entered that property and killed the deceased were the same persons who had unlawfully entered and stolen property from number 40 Northampton Road, Eastlea, Harare. The recovered stolen items were confirmed to be a black Edgars bag which contained Imperial Security Company documents, a pair of handcuffs, a small red box with rounds of ammunition and two black rubber button sticks. It became apparent that the firearm linked to the killing of the deceased by the ballistics evidence belonged to the appellant and was recovered from him following his arrest at Waterwright Irrigation in Pomona, Borrowdale, Harare after an attempted robbery.

FINDINGS BY THE COURT A QUO

The issue for determination before the court *a quo* was the identity of the persons who committed the offences at the two addresses. It found as fact that the persons who unlawfully entered house number 5 Wembley Crescent, Eastlea were the same persons who committed the unlawful entry at house number 40 Northampton Road, Eastlea, Harare. In the court *a quo*'s view, the fact that the property stolen at the scene of count one was found at the scene of count two and that the two offences were committed one after the other during the same night, established that fact beyond reasonable doubt.

In finding the appellant guilty of murder, this is how the court *a quo* assessed the evidence:

“Accused one was charged based on the evidence of ballistics results which linked his firearm to the scene of the murder. The expert witness who testified on this piece of evidence, Stephen Gundumure, testified that as far as he is concerned ballistics evidence is one hundred per cent accurate, and there is no instance of evidence linking a bullet to one firearm being linked to any other firearm. In other words, the scientific process that is involved could only show that the bullets and spent cartridges examined in this case came

from the Llama pistol which was found in the possession of the accused to the exclusion of any other firearm. The accused is a former police officer. Although he challenged the accuracy of the findings through cross-examination by counsel, he led no evidence to contradict the findings of the expert. The evidence regarding the reliability, validity and accuracy of the ballistic examination therefore, remains firmly intact.”

The court *a quo* then proceeded to consider the appellant’s own evidence in his attempt to rebut the evidence of the state and found it to be contradictory. It found that the inconsistencies in his explanation about his whereabouts and those of his firearm at the time of the offence rendered his defense “manifestly false.” In arriving at that conclusion, the court *a quo* thoroughly examined the appellant’s conflicting statements given to the police, his defense outline and his testimony in court to show that he kept changing his story about his whereabouts and that of his firearm at the material time.

The court *a quo* also found that the appellant’s explanation that he traveled to Botswana on 21 September 2013 was contradicted by his passport which showed that he left Zimbabwe on 23 September 2013. The court *a quo* made little thrift of the appellant’s evidence of ATM withdrawal slips meant to support his assertion that he was in Bulawayo at the time of the murder. In its view, withdrawal of money from the machine could have been done by anyone. The court *a quo* further found that the contradictions in the appellant’s evidence were “so material that they point to a deliberate lie.”

The court *a quo* drew the following conclusion:

“This is why in this instance his evidence and consequently his defense have to be rejected. This rejection of his evidence would not, of course, necessarily establish the truth of the evidence against him, which has to be assessed on its own, see *R v Weinberg* 1939 AD 71 at 80. In this instance, the court has already found that the evidence tendered by the state on its own is sufficient to prove the guilt of the accused, that once this court found the

accused's defense to be beyond reasonable doubt false, then the guilt of the accused was proved beyond reasonable doubt.”

In the result and in respect of count one, the appellant and the fourth accused person, Given Mushore, were found guilty of unlawful entry in aggravating circumstances and in respect of count two, they were both found guilty of murder. The second and third accused persons were not found guilty of and were accordingly acquitted in respect of both counts for the reason that the evidence of indications they made to the police was uncorroborated. Mushore was linked to the crimes by his fingerprints uplifted at the scene.

As already highlighted at the beginning, they were each sentenced to three years imprisonment in respect of count one and to thirty years imprisonment in respect of count two with the sentences ordered to run concurrently.

PROCEEDINGS BEFORE THIS COURT

Aggrieved, by the decision of the court *a quo*, the appellant appealed to this Court against both conviction and sentence on the following grounds:

“AGAINST CONVICTION

1. The court *a quo* erred in finding that the evidence tendered by the State alone proved the guilt of the appellant.
2. Not having found that the challenge to the evidence at the ballistics expert was intellectual the court *a quo* erred in finding it to be reliable, accurate and valid because no evidence had been produced to contradict it.

3. The court *a quo* erred by failing to consider that the murder weapon could have been a similar firearm to that of the appellant which the police were not able to recover.
4. The court *a quo* erred in admitting evidence of the allegations of an offence with which the appellant was not charged and which was both hearsay and prejudicial to him.
5. The court *a quo* erred in relying on speculation in rejecting evidence supporting the appellant's defence.
6. The court *a quo* erred in rejecting the confessions of two of the appellant's co-accused on the basis that they were not corroborated and which were exculpatory of the appellant.
7. The court *a quo* erred in failing to take into account the fact that the confession of the fourth accused, which it found to be genuine was exculpatory of the appellant.
8. The court *a quo* erred in failing to consider whether any reasonable inference other than the guilt of the appellant could be drawn from the evidence.
9. The court *a quo* erred in finding that the State had proven the requisite mental element for murder.
10. The court *a quo* erred in finding that the appellant and his co-accused were acting with common purpose in committing the murder.

AGAINST SENTENCE

1. The court *a quo* misdirected itself in finding that the person who fired the shot had fired it directly at the deceased and directed it to the upper part of his body.
2. The sentence for murder is manifestly excessive.”

The grounds of appeal pose a very serious challenge. Grounds 1, 2,3,4,5 and 8 are argumentative and unnecessarily repetitive. They relate to the same issue of whether the court *a quo* erred in finding that the evidence of the State was valid, accurate and reliable in light of the criticism directed at it. Grounds 1 to 5 and indeed ground 8 are not directed at the substantive order of the court *a quo* but seek to impugn its reasoning. On the authority of *Chidyausiku v Nyakabambo* 1987(2) ZLR 119 (S), that cannot be done.

Grounds 9 and 10 seek to challenge the court *a quo*'s rejection of the confessions made by the appellant's co-accused which he regards as exculpatory of him. They, however, do not comply with r 44 (1) of this Court's Rules requiring appeal grounds to be clear and concise. Owing to the fact that the grounds adverted to are patently defective, they would have been susceptible to striking out, but for, the fact that the appellant is self-representing. It is trite in this jurisdiction, that there is an unwritten rule of practice to treat unrepresented litigants with a bit of leniency in consideration of their lack of legal training. It is for that reason that this Court elected to relate to the appeal as it is.

Having said that, only one crisp issue arises from the ten grounds of appeal. It is whether the court *a quo* erred in convicting and sentencing the appellant the way it did. The essence of the appellant's case is that the trial court erred in relying on the evidence presented by the prosecution in finding him guilty as charged and that the sentences imposed were uncalled for. On the other hand, the respondent defends the judgment of the trial court.

In both his lengthy heads of argument and in his oral submission at the hearing of the appeal, the appellant motivated the appeal on the basis that the evidence of the State was insufficient to sustain a conviction. While admitting in both his evidence at the trial and at the hearing of the appeal that the firearm found in his possession at the time of his arrest was linked to the murder by the ballistic report and the evidence of the expert, he desperately tried to discredit the scientific evidence only by arguments.

He argued that the spent cartridges examined by the expert had been tampered with, that his firearm was also tampered with by replacing its parts with those from a firearm which had been used to kill the deceased and that even the ballistic report produced as evidence had been tampered with. In his view, the report was prepared long before his firearm was delivered to the expert. To support that assertion, the appellant averred that the evidence of those cartridges had previously been used to prosecute him in another matter without success because he was allegedly acquitted. He did not elaborate.

Per contra, Mr *Muchemwa* for the respondent, submitted that the court *a quo* was correct in accepting and relying on the ballistic evidence and the other evidence presented by the prosecution. Drawing attention to the detailed analysis of the evidence by the court *a quo*, counsel submitted that the court *a quo*'s factual and credibility findings cannot be faulted. He also made the point that the appellant not having contested the credibility of the expert witness at the trial, he could not do so for the first time on appeal.

Regarding the conviction and sentence of the appellant on the charge of unlawful entry in count one and after engagement with the Court, Mr *Muchemwa* conceded that the

conviction was not proper and extremely unsafe. There was absolutely nothing linking the appellant to the offence in count one. There is no evidence whatsoever that the firearm connecting him to the murder in count two was at the scene of count one. More importantly, that the appellant was among the group of persons who committed the offence in count one is not the only reasonable inference to be drawn from the factual matrix of his possession of the murder weapon in count two. It is for that reason that the Court allowed the appeal against both conviction and sentence in count one.

THE LAW

The point of departure is a recognition of the fact that the court *a quo* found the appellant guilty on the basis of circumstantial evidence linking him to the shooting and murder that took place at number 5 Wembley Crescent, Eastlea Harare. From that circumstantial evidence and its rejection of the appellant's defenses, the court *a quo* drew the inference that he was among those that committed the offence. It is this inference which the appellant chose to refer to as "speculations." The law regulating how the courts should deal with circumstantial evidence is as was stated by this Court in *S v Nyamayaro* 1987 (2) ZLR 222 (S) at 225G, where the Court cited with approval the words of WATERMEYER JA in *R v Blom* 1939 AD 188 at 202-203 that:

"In reasoning by inferences there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct"

In considering whether the court *a quo* irregularly applied the principles of the use of inferences, or misdirected itself, or improperly exercised its discretion, this Court must examine how it dealt with the circumstantial evidence in the judgment sought to be impugned. The court *a quo* also made factual and credibility findings. An appeal court will not lightly interfere with those findings. Regarding upsetting findings of credibility, the point is made in *S v Gumbura* 2014 (2) ZLR 539 (S) that:

“As regards credibility of witnesses, the general rule is that an appellate court should ordinarily be loath to disturb findings which depend on credibility. However, as was observed in *Santam BPK v Biddulph* (2004)2 All SA 23 (SCA) a court of appeal will interfere where such findings are plainly wrong.”

Similarly, an appellate court will only interfere with factual findings of a lower court where, as stated in the celebrated case of *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A, there appears that some error has been made in exercising discretion or the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, or if it makes a mistake on the facts, or does not take into account a relevant factor. Only then can an appellate court substitute its own discretion if it has material with which to do so.

Finally, regarding sentence, it is trite that sentencing is pre-eminently within the discretion of the trial court. As to when an appellate court can interfere with that discretion, this Court’s sentiments in *Muhomba v The State* SC 57/13 at p 9 are apposite:

“On the question of sentence, it has been said time and again, that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S v Mkombo* HB-140-10 at p 3 of the cyclostyled judgment it was held that:

‘The position of our law is that in sentencing a convicted person, the sentencing court has discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and in aggravation. For an appellate tribunal to interfere with the trial court’s sentencing discretion there should be a misdirection see *S v Chiweshe* 1996(1) ZLR 425(H) at 429D; *S v Ramushu and Others* S-25-93.’

‘It is not enough for the Appellant to argue that the sentence imposed is too severe because that alone is not misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S v Nhumwa* S-40-88 (unreported) at p 5 of the cyclostyled judgment it was stated that:

‘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 one that the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.’”

To that should be added the remarks made in *S v Sidat* 1997 (1) ZLR 487 (SC) at 491 that:

“Once it is decided that there has been a material misdirection in relation to sentence then there has been a substantial miscarriage of justice. The appellate court is then at large to consider on the right facts, what an appropriate sentence should be. In so considering, it is not fettered by a consideration of the sentence by the lower court.

If, on the other hand, there has not been a misdirection by the lower court, then there can only have been a substantial miscarriage of justice if the sentence is “disturbingly inappropriate” or “so severe as to induce a sense of shock”. Lacking a misdirection, in other words, the court will not be “at large” and will only be able to interfere if the severity of the sentence amounts to a substantial miscarriage of justice.”

EXAMINATION

This appeal resolves itself purely on the factual and credibility findings made by the court *a quo* which can only be interfered with on appeal upon the laying of proper ground work and basis for doing so. The court *a quo* found that the firearm which killed the deceased was the

Llama pistol found in the possession of the appellant at the time of his arrest. It made that finding relying on the expert scientific evidence of the witness who subjected the spent cartridges and the firearm to tests before arriving at the conclusion that the bullets which killed the deceased were fired from that firearm.

The court *a quo* also found that the reliability, accuracy and validity of the ballistic evidence remained intact even after the appellant's attempt to discredit it. It also made the factual finding that the appellant had possession of the murder weapon from the time that he purchased it right up to the time that he was arrested with it on 19 December 2013. It further found the evidence of the appellant that he was elsewhere at the time that the deceased was murdered to be false. An appellate court can only interfere with the factual findings of a trial court where it appears that an error has been made, or that the court did not take into account relevant factors, or made a mistake on the facts. See *Barros & Anor v Chimphonda, supra*. Unfortunately for the appellant, his long winding submissions do not even begin to lay a basis for interference with the factual findings made by the trial court.

The appellant has also failed to lay a basis for interfering with credibility findings made by the trial court that the ballistics evidence was credible and that his own testimony was a deliberate lie. This Court could only disturb those findings if they were shown to be plainly wrong. See *S v Gumbura, supra*. It was always going to be a tall order for the appellant the moment he was run to the ground by Chari and company in Borrowdale, disarmed of a firearm used to kill the deceased and handed over to the police. His prevarications over his whereabouts and the whereabouts of his firearm at the material time are consistent with a guilty mind.

The court *a quo* meticulously examined all the circumstantial evidence and drew the inference that the appellant had been part of the persons that raided house number 5 Wembley Crescent and killed the deceased after their break in was foiled. It was the only reasonable inference to be drawn in the circumstances and as such, the court *a quo* cannot be faulted for the manner in which it dealt with the circumstantial evidence.

With all the escape routes closed, the appellant threw his final dice, that of the exculpatory confessions of his co-accused persons, exculpatory only in the sense that they said nothing about him and that they do not mention him as having been part of the gang on the night in question. He submitted that there were statements by his co-accused, which were made freely and voluntarily, to the effect that they did not know him and that he was not part of the gang which committed the offences. Confessions have limited use in criminal proceedings as their admissibility is governed by s 256 (1) of the *Criminal Procedure and Evidence Act* [Chapter 9:07] which provides:

“Any confession of the commission of an offense and any statement which is proved to have been freely and voluntarily made by and accused person without having been unduly influenced thereto shall be admissible in evidence against such accused if tendered by the prosecutor, whether such confession or statement was made before or after committal and whether reduced to writing or not.” (The underlining is mine).

In the circumstances, the confessions were not admissible against the appellant as co-accused and as such, the court *a quo* was not at liberty to apply them to the appellant’s case. In any event, they were ultimately rejected for lack of corroboration. More importantly, the court *a quo* was seized with damning direct evidence incriminating the appellant. It found such evidence,

the forensic ballistics report, credible, accurate and reliable. The chimes of the appellant about the confessions of co-accused pale to insignificance.

I mention for completeness that all the elements of the offence of murder were established in this case. Three shots were deliberately fired in the direction of human beings with sufficient elevation to hit the upper part of the body. Two of those shots hit the deceased on the chest and hand respectively. For the appellant to even hint at a lack of *mens rea* in the circumstances, is the height of desperation, if not turpitude.

Regarding the appeal against sentence, the appellant did not motivate it in any meaningful manner. The fact remains that sentencing is the discretion of the trial court. It can only be interfered with on appeal on limited grounds as when there is evidence of a patent misdirection on the part of the sentencing court. In terms of the sentencing provision in s 47 (4) of the Criminal Law Code, a person convicted of murder shall be liable to death, imprisonment for life or any definite period. The sentence of thirty years imprisonment imposed by the court *a quo* fell squarely within its sentencing discretion. It has not been shown that the discretion was exercised improperly considering that the murder was committed in circumstances of a break in which the trial court considered serious. There is no merit in the appeal against sentence either.

DISPOSITION

The appeal against both conviction and sentence in count one, unlawful entry in aggravating circumstances, has merit. It ought to succeed and the concession made by Mr *Muchemwa* in that regard was proper.

On the second count, the appeal against both conviction and sentence is without merit. The court *a quo* impressively assessed the evidence and correctly applied the law on the use of circumstantial evidence in convicting the appellant. The assessed sentence of thirty years imprisonment, falls within the sentencing discretion of the court *a quo*. There is no basis for interfering with it.

It is for the forgoing reasons that this Court issued the order quoted above.

BHUNU JA : I agree

CHITAKUNYE JA : I agree

National Prosecuting Authority, respondent's legal practitioners