

THE STATE

Versus

KHOLISANI MYATHI

And

NKOSIKHONA SIBANDA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Dewa & Mr Mashingaidze

BULAWAYO 17, 18 & 20 MAY 2022

Criminal trial

K. Ndlovu, for the State

L. Mbandeni, for accused 1

S. Chingarande, for accused 2

DUBE-BANDA J

Introduction

1. The two accused persons are charged with two counts of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In count 1, it being alleged that on the night between 22nd and 23rd April 2021, between 1800 hours and 0600 hours and at an open space near a sweet potato field opposite house number 5947 Cowdray Park, Bulawayo, the accused persons acting in common purpose one or more of them caused the death of Elvis Dube (deceased 1) by stabbing him with a sharp unknown objects all over the body, intending to kill him or realising that there was a real risk or possibility that their conduct may cause his death continued to engage in that conduct despite the risk or possibility.
2. In count 2 it being alleged that on the 13th May 2021, and at a stream along a foot path leading to Njube, Bulawayo, the accused persons acting in common purpose, one or more or all of them, unlawfully caused the death of Joseph Mawa Moyo (deceased 2)

by striking him on the head with an axe realising that there was a real risk or possibility that their conduct may cause his death continued to engage in that conduct despite the risk or possibility.

3. Kholisani Nyathi (accused 1) pleaded not guilty to count 1 and regarding count 2 he admitted the allegations. However, in respect of both counts the court entered a plea of not guilty. Nkosikhona Sibanda (accused 2) pleaded not guilty to count 1, and in respect of count 2 he admitted that he was present when the crime was committed. The court entered a plea of not guilty in respect of both counts.
4. The two accused persons were legally represented throughout the trial.
5. The State tendered an outline of the State case, which is before court and marked Annexure A. The accused persons tendered into the record written outlines of their respective defences. Accused 1's defence outline is before court and marked Annexure B and Accused 2's defence outline is marked Annexure C.

State case

6. The prosecutor with the consent of both accused tendered the following documentary exhibits: accused 1's confirmed warned and cautioned statement (Ext. 1); accused 2's confirmed warned and cautioned statement (Ext. 2); post-mortem report number 376-334-21(Ext. 3) for deceased 1. Defence counsel objected to the admissibility of the post mortem report number 84/71/2021 for deceased 2. The objection was overruled and it was received and marked Ext. 4.
7. Furthermore, the prosecutor with the consent of the both accused tendered the following real exhibits: an axe, length of handle 70 centimetres and weight 2, 1140 kilograms (Ext. 5); Hisense cell phone colour beige or silver (Ext. 6); and a Techno cell phone black in colour (Ext. 7).
8. The prosecutor sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). These

related to the evidence of certain witnesses as contained in the summary of the state case.

Count 1

9. In respect of count 1, the evidence of the following witnesses was admitted in terms of section 314 of the CP & E Act:
 - i. Decide Mliswa, his evidence is that on the 22nd April 2021, he was with deceased 1 from about 1500 hours to around 1600 hours. On the 23rd April 2021, at around 0500 hours, deceased 1's wife Siwinile Sibanda phoned enquiring about the deceased's whereabouts, saying he was not at home and his mobile phone was not reachable. He gave her contact details for one Chrispen Mupande. This witness and Chrispen Mupande spent the whole day searching for the deceased, but to no avail. The following morning Siwinile Sibanda phoned him and advised him that deceased had died. He accompanied Siwinile Sibanda to United Bulawayo Hospitals and positively identified the body as that of deceased 1.
 - ii. Xolile Ngwenya, her evidence is that on the 23rd April 2021, at about 1015 hours, she went to her sweet potato fields at an open space near house number 5947 Cowdray Park. As she entered the field, she observed a body of a human being in her neighbour's field. She further observed some blood stains near her sweet potato field and some struggle marks. The body was lying facing downwards in a pool of blood. It had several stab wounds. She made a report at Cowdray Park Police Station.
 - iii. Tinashe Bvongodze, is a member of the Zimbabwe Republic Police (ZRP). His evidence is that on the 23rd April 2021, he was on duty when he received a case of murder which occurred at an open space near house number 5947 Cowdray Park. He attended the scene, and conveyed the body to United Bulawayo Hospitals for a post mortem. His evidence is that the body of the deceased did not suffer any further injuries during the time it was under his care.

- iv. Tendai Taderera, his evidence is that sometime in April 2021, he bought a Hisense cell phone from one Ntokozo Moyo. He bought the cell phone for USD25 00. On the 29th June 2021, he handed the cell phone to the police. He identified Ntokozo Moyo to the police as the person who sold him the cell phone.
 - v. Phaniel Nkomo is a member of the ZRP. His evidence is that on the 28 June 2021, he took over investigation of this case. On the 30th June 2021, he received information from Econet Wireless to the effect that deceased 1's cell phone was being used by one Tendai Taderera. He recovered Hisense phone from Tendai Taderera, who said he bought it from Ntokozo Moyo. The witness then interviewed Ntokozo Moyo who indicated that he bought the phone from the two accused persons. The cell phone was shown to Siwinile Sibanda and she positively identified it as the phone deceased had on the 22nd April 2021. The witness recorded the accused persons' warned and cautioned statements after he had properly advised them of their constitutional rights.
 - vi. Doctor Sanganai Pesanai, he is a registered medical practitioner based at United Bulawayo Hospitals. On the 26 April 2021, he examined the remains of the deceased 1 and recorded a post mortem report number 376-34-2021 (Ext. 3).
10. In respect of count 1, the State called two witnesses. We are going to briefly summarise their evidence. The first to testify was Siwinile Sibanda. Deceased 1 was her husband. On the 22nd April 2021, at around 6 pm deceased 1 left home indicating that he was going to meet a workmate. He was in possession of a Hisense cell phone. At around 8 pm, she tried calling his cell phone and it was not reachable. She phoned his friends and relatives who all indicated that deceased 1 was not with them. She later filed a missing person report at Cowdray Park police Station. At the police station she was informed of a body that was picked up at an open space near house number 5947 Cowdray Park. She positively identified the body of the deceased at United Bulawayo Hospitals (UBH) mortuary. She observed that the body had injuries on the head, neck and stab wounds all over the body.
11. She realised that deceased 1's Hisense cell phone was missing. She reported this to the police. Sometime in June 2021, this witness was called by the police and she was shown

a recovered Hisense cell phone. She positively identified it as the one deceased 1 was carrying when he left home on the 22nd April 2021. The Hisense cell phone is Ext. 6.

12. Siwinile Sibanda was not cross examined. She was a very good witness, never stating more than she knew. We accept her evidence without reservation.
13. The second witness to testify was Ntokozo Moyo. He repairs cell phones at Owen Ncube's shop situated at Iminyela Shopping Centre, Bulawayo. He knows the accused persons in that they used to come to the shop to sell cell phones to his employer, Mr Owen Ncube. They came to the shop on several occasions to sell cell phones to Mr Ncube. He testified that sometime in April 2021, he was at work repairing some cell phones when the two accused persons approached him selling a Hisense cell phone. They were asking for USD30 00 and he negotiated and finally bought it for USD20 00. He identified Hisense cell phone, Ext. 6, as the phone he bought from the accused persons. Ntokozo Moyo disputed that the accused sold him an Itel cell phone. This witness later sold the Hisense cell phone to one Tendai Taderera for USD25 00.
14. This witness was later approached by the police who enquired as to where he got the Hisense cell phone he sold to Tendai Taderera, and he told them that he bought it from the two accused persons.
15. Under cross examination by Mr *Mbandeni*, counsel for accused 1, he testified that the owner of the shop, Mr Ncube repairs and also buys cell phones for re-sell. He said when the owner of the shop was not present he also buys cell phones. It was his first time to personally buy a cell phone from the accused persons. He said he did not give accused persons a receipt. He did not record the cell phone he bought from the accused persons. He testified that the accused had a Hisense cell phone, including other cell phones, i.e. Itel, Nokia and an Oppo. The Itel was black in colour. When suggested to him that the accused sold him an Itel, he disagreed. He insisted that he bought a Hisense cell phone from the accused persons.
16. Under cross examination by Mr *Chingarande* for accused 2, the witness insisted that he bought a Hisense from the two accused persons. He said he bought the phone in

April 2021, but did not recall the actual date. He says he could recall the month because he re-sold the Hisense cell in the evening of that same day. He disputed that the accused sold him a black Itel cell phone. He insisted that he bought the Hisense cell phone from the accused. He said on the date he bought the Hisense cell phone from the two accused, they returned to the shop later to sell cell phones to Mr Ncube.

17. This marked the State case in respect of count 1.

Count 2

18. In respect of count 2, the evidence of the evidence of the following witnesses was admitted in terms of section 314 of the CP & E Act:

- i. Justice Mutunami, he is member of the ZRP. On the 16 May 2021, in the company of other police officers he arrested accused 2. Accused 2 was found in possession of dangerous weapons which included an axe and a knobkerrie.
- ii. Blessing Ngwenya, is a member of the ZRP. His evidence is that he was present when warned and cautioned statements were recorded from accused persons. The accused persons gave their statements freely and voluntarily.
- iii. Nokuthula Mavhezha, her evidence is that deceased 2 was her uncle. On the 15 May 2021, she positively identified the body of deceased 2 at Mpilo Hospital.
- iv. Doctor Innocent Jekonya, he is a registered medical practitioner based at Mpilo Hospital. On the 14 May 2021, he examined the remains of the deceased 2 and recorded a post mortem report number 84-71-2021 (Ext. 4).

19. The first witness to testify in respect of count 2, was Owen Ncube. He testified that he is self-employed as a cell phone dealer. On the 14 May 2021, the two accused persons sold him a Techno cell phone. Accused 1 walked into the shop and said he was selling a cell phone, he later went out and returned with accused 2. The phone was produced by accused 1, and the purchase price was handed to him. The witness did not talk to accused 2, he merely walked into the shop in the company of accused 1. This witness identified the Techno cell phone (Ext.7), as the phone he bought from the two accused

persons. The police approached him enquiring about the cell phone, indicating that it was a stolen phone. The phone was still at the shop, and was recovered by the police.

20. Under cross examination by Mr *Mbandeni*, this witness testified that it was the first time that these two accused persons sold him a phone, he used to buy phones from their friend who introduced them to him. He did not record this transaction. In cross examination by Mr *Chingarande* the witness confirmed that he did not buy a cell phone from accused 2, and he handed the purchase price to accused 1. He insisted that accused 2 was present during the transaction.

21. This marked the State case in respect of count 2.

Defence case - accused 1.

22. Accused 1 testified in his defence and did not call a witness. He testified that he met accused 2 for the first time on the 13th May 2021. He says he went to accused 2's place of residence in the company of someone who used to stay at the same house with accused 2. On the same day, i.e. 13 May 2021, the two accused won an Itel cell phone at a gambling school. The cell phone was sold to Ntokozo Moyo.

23. This accused testified that in the company of accused 2, they proceeded to his residence i.e. of accused 1. He was then informed that one Frank who owed him money said he must come collect it. In the company of accused 2 they went to collect money from Frank. They met Frank, he said he had no money and wanted to strike accused 1 with an axe. He then dispossessed Frank of the axe and took it to his residence. He says his thinking was that at the time Frank comes to collect his axe, he would also pay what he owed him i.e. accused 1. Frank followed him to his house, with ten other people and started throwing stones at the house. Accused 1 says he took the axe and ran away, as they were approaching a bridge people blocked their way. He struck with an axe one of the persons who were chasing them. After that someone hit him with a stone on the head. He disputed that they searched the person whom he had struck with an axe. Thereafter they went to accused 2's residence. He was arrested on the third day as he was leaving hospital.

24. Under cross examination by Mr *Ndlovu* counsel for the State, accused 1 confirmed that he sold a cell phone to Ntokozo Moyo. He had won the phone at a gambling school. When he sold the cell phone he was with accused 2. He said he sold Ntokozo Moyo an Itel cell phone. He said it is not true that he sold him a Hisense cell phone.
25. Under cross examination in respect of count 2, accused 1 said he struck deceased 2 with the back of an axe. He did not see where he struck him because it was dark. He agreed that he used the axe, Exh. 5 before court. He said he struck deceased because he was defending himself. He disputed that when he struck deceased 2 with an axe accused 2 was present. He disputed that he took anything from the deceased 2.
26. Accused 1 closed his case.
27. Accused 2 testified in his defence and did not call a witness. He testified that he denied the allegations of causing the death of deceased 1, because at that time he died in April 2021 he was not a friend to accused 1.
28. On the 13th May 2021, he was at home in Lobengula West, Bulawayo. He shares the house with accused 1's friend. Accused 1 came looking for his friend, the friend was not at home at that time. He then discussed with accused 1 a plan of going to a mine, they agreed to go to the mine the following day. On their way to accused 1's residence, they came across a gambling school. They joined the gambling school and won an Itel cell phone. Accused 1 suggested that they go and sell the phone. They sold the phone to Ntokozo Moyo.
29. After selling the phone they went to accused 1's residence. He then accompanied accused 1 to collect his money from someone at the shops. At the shops he saw accused 1 and another person wrestling over an axe. He pulled accused 1, and the other person left. Accused 1 took the axe with him. They went back to accused 1's residence, and some people came throwing stones at the house, accused 1 went outside the house and picked the axe. Accused 2 says he left and returned to his place of residence, and he does not know what happened thereafter.

30. Under cross examination by Mr *Mbandeni*, accused 2 testified that he used to work at a mine in Matopo. He had come to Bulawayo, two days before the 13th May 2021.
31. Under cross examination by Mr *Ndlovu*, accused 2 testified that they sold the cell phone to Ntokozo Moyo on the 13th May 2021. He came to Bulawayo on the 11 May 2021. It was put to him that in his defence outline he did not say in April and part of May he was not in Bulawayo. His answer was he mentioned it but it was not recorded in his defence outline. He met accused 1 for the first time of the 13 May 2021. The day they sold a phone to Ntokozo Moyo. The same day there was wrestling over an axe.
32. He agreed that he sold the phone to Ntokozo for USD 25 00. He said the purchase price was received by accused 1, and he then handed it over to him. He was giving him the money because they co-owned the phone. It is accused 1 who won the phone at a gambling school.
33. He disputed selling a phone to Owen Ncube. He disputed his confirmed warned and cautioned statement saying he was threatened by the police.
34. Accused 2 closed his case.

Analysis of evidence

Count 1

35. There is no direct evidence to show how deceased 1 met his death. The State relied on the doctrine of recent possession. The doctrine was explained in *S v Kawadza* 2005(2) ZLR 321 (H), where the court said the doctrine is based on an inference being drawn that the possessor of recently stolen property stole the property. It may be relied on if he cannot give an innocent explanation of his possession and the inference that he stole the property is the only reasonable inference that can be drawn from such possession. The court held further that there was no reason why the doctrine cannot be used in any case of which theft is a component, like robbery. If the only inference from the totality of the evidence is that he stole the goods, then he can be convicted of robbery of those goods.

36. In *S v Moyo* HB 169/17 the court said the doctrine of recent possession is to the effect that if three requirements are satisfied the court may (not must) infer that the accused stole the goods which were found in his possession. It is simply a common sense observation on the proof of facts by inference. The requirements are: that the goods were stolen; that the goods were recently stolen (time is of the essence); and that the accused has failed to give an innocent explanation for his possession of the stolen goods.
37. From the evidence we find it factually proved that on the 22nd April 2021, at approximately 6 pm deceased left home. He had in his possession a Hisense cell phone. He did not return home, and at around 8 pm his phone was no longer reachable. His body was discovered in the morning of the 23rd April 2021, at around 10 O'clock. The Hisense cell phone was missing.
38. On the totality of the evidence, we find that deceased 1 died a violent death. We say so because Xolile Ngwenya discovered the body of the deceased lying facing downwards in a pool of blood. She observed some struggle marks close to the body. The body had multiple stab wounds. Siwinile Sibanda positively identified the body at UBH mortuary. She observed that the body had injuries on the head, neck and stab wounds all over the body. According to the post mortem report, the cause of death was haemorrhage shock, multiple stab wounds and assault.
39. We find further that the person or persons who caused death of the deceased 1 took his Hisense cell phone. This is so because on the 22nd April 2021, at around 8 pm, Siwinile Sibanda tried to call deceased on his mobile number, but it was no longer reachable. Again, when the body was discovered in the morning of the 23rd April 2021, the Hisense cell phone was missing. It is not in dispute that Hisense cell phone was found being used by Tendai Taderera. According to Taderera he bought the Hisense cell phone sometime in April 2021, from Ntokozo Moyo.
40. On the evidence we find it proven that the Hisense cell phone was stolen, and that it was recently stolen. We say so because it was stolen from the deceased 1 on the 22nd April 2021. Ntokozo Moyo testified that he bought it in April 2021. Ntokozo Moyo's timeline is corroborated by Taderera, whose evidence was that he bought it from

Ntokozo Moyo in the same month of April. Taderera's unchallenged evidence, i.e. it was admitted in terms of section 314 of the CP & E Act can only mean that Ntokozo Moyo got the Hisense cell phone in his possession in April 2021. In essence, we find that the Hisense cell phone was sold to Ntokozo Moyo barely a week after the violent death of deceased 1.

41. The question that we have to answer is whether or not Ntokozo Moyo bought the Hisense cell phone from the accused persons? Ntokozo Moyo testified that he bought the Hisense cell phone for USD 20 00 from accused 1 and 2. Accused persons do not dispute that they sold a phone to Ntokozo Moyo, however they testified that they sold an Itel cell phone, and they say this was on the 13th May 2021.
42. The accused persons say they met approximately midday on the 13 May 2021. They testified that prior to the 13 May 2021, they did not know each other. In fact according to accused 2 their meeting was fortuitous in that accused 1 was visiting a friend who shared a house with accused 2. The said friend was not available. According to accused 2 the two started talking and decided to go a mine in Matopo where accused 2 used to work. Accused 1 suggested that they go to his house to collect money and his clothes. On the way they saw a gambling school, and it is at this school that accused 1 won an Itel cell phone. They then decided to go to Mabutweni to sell the cell phone. The phone was sold to Ntokozo Moyo. The phone was sold for USD 25 00, and they shared or used the purchase price together.
43. Accused 1 testified that he met accused 2 for the first time on the 13 May 2021. He says he went to accused 2's place of residence in the company of someone who used to stay at the same house with accused 2. On the same day, i.e. 13 May 2021, the two accused won an Itel cell phone at a gambling school. The cell phone was sold to Ntokozo Moyo.
44. Ntokozo Moyo testified that sometime in April 2021, he was at work repairing some cell phones when the two accused persons approached him selling a Hisense cell phone. They were asking for USD30 00 and he negotiated and finally bought it for USD20 00.

He identified Hisense cell phone. Ntokozo Moyo disputed that the accused persons sold him an Itel cell phone.

45. On closer scrutiny, the accused persons' versions as to how they met on the 13th May 2021, are not consistent with each other. On one hand accused 1 says he was accompanying a friend who stayed in the same house with accused 2, on the other hand accused 2 says accused 1 came to visit a friend who stayed at the same house with him (accused 2), and that friend was not at home at that time.
46. In his defence outline accused 1 says sometime in May he met accused 2 at a gambling school. He says prior to the meeting at the gambling school he did not know accused 2. He says they met in early May when they were planning to go to Filabusi to engage in gold panning. In their evidence in court they say they met at accused 2's house. In his evidence in court accused 2 testified that they planned to go a mine in Matopo.
47. Cut to the bone, their versions amount to this, that they did not know each other, just fortuitous met on the 13th May 2021, and within a few hours of their meeting, accused 1 wins a cell phone at a gambling school, the phone is sold and the purchase price becomes 'theirs' to share and use together.
48. According to their versions one can conclude that accused 1 shared the purchase price of the cell phone he won at a gambling school with a stranger. We say so because according to them they met for the first time on the 13th May 2021, the day they say accused 1 won the phone. This cannot be the truth. This shows that accused persons were just peddling falsehoods in this court. These falsehoods strike the core of their defences.
49. Ntokozo Moyo knew the accused persons very well, he testified that the two accused persons came to the shop on several occasions to sell cell phones to Mr Owen Ncube. In fact Ntokozo Moyo came across as a witness who had a reasonable recall of events. He withstood cross examination and stuck to his version that he bought a Hisense cell phone from the accused persons. We accept his evidence as the truth.

50. We have no hesitation in finding that the accused persons' version is just a falsehood. Under cross examination, accused 2 was evasive and incoherent. Accused I was merely peddling falsehoods in this court. The reason they are denying that they knew each other prior to the 13th May 2021, is that they do not want to be associated with each other at all as this might link them to the violent death of deceased 1 on the 22nd April 2021. Further, they dispute that they sold a Hisense cell phone for the simple reason that they want to place themselves as far as possible with the circumstances in which they acquired it.
51. Further the lies of the accused persons corroborate the evidence of Ntokozo Moyo. They lied that they met for the first time on the 13th May 2012. They lied that accused 1 won an ITEL cell phone at a gambling school. They lied that they sold an ITEL cell phone to Ntokozo Moyo. These lies were deliberate, and they relate to material issues in this trial. The motive of the lies is a realisation of guilty and the fear of the truth. The totality of the evidence shows that indeed the accused persons were peddling lies in this court.
52. On the totality of the evidence we find it proven that accused 1 and 2 sold a Hisense cell phone i.e. Exh. 6 to Ntokozo Moyo. In the result, we find that they have failed to give an innocent explanation for their possession of the Hisense cell phone.
53. We reject the accused persons' defence as false beyond a reasonable doubt.
54. In the circumstances of this case, we find that the only inference is that on the 22nd April 2021, accused 1 and 2 caused the death of the deceased 1 and robbed him of his cell phone. It is immaterial who delivered the fatal blow because the accused persons are charged with common purpose, the conduct of each one of them in the execution of the common purpose is imputed to the other.
55. The evidence shows that the injuries sustained by the deceased 1 were caused by the persons who robbed him of his cell phone, i.e. the accused persons. The post mortem report shows that the injuries inflicted by the accused persons caused the death of the deceased 1. From the totality of the evidence led herein, we find in respect to count 1 that the State proved its case against the accused beyond reasonable doubt.

Count 2

56. In count 2 the State relied on the confirmed warned and cautioned statements of the two accused persons. The accused persons have in their evidence alleged that some issues in their statements came from the police. These contentions were also repeated by their counsels during closing submissions.
57. The statements were confirmed by a magistrate in terms of section 113 of the CP & Act, and in the of section 266 (2) of the Act, a confirmed statement shall be received in evidence before any court upon its mere production by the prosecutor without further proof, provided that the statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto. This means the statements are admissible in evidence, and it only becomes a question of weight. If shown not to have been made freely and voluntarily, the court would attach no weight to such statements.
58. The *onus* is on the accused persons to show that the statements were not made by them or were not made freely and voluntarily without them having been unduly influenced thereto.
59. The statements were received by consent. There was no indication to the court and the State counsel that the accused persons dispute some of the issues in the statements. It became unnecessary for the State to lead evidence to show that the statements were made freely and voluntarily without the accused having been unduly influenced thereto. In fact by consenting the accused were simply saying the statements were made freely and voluntarily.
60. Further the evidence Blessing Ngwenya was received in terms of section 314 of the CP & E Act. His evidence is that he is a member of the ZRP, and that he was present when the warned and cautioned statements were recorded from accused persons. His evidence is that accused persons gave their statements freely and voluntarily. An accused cannot

be permitted to admit evidence in terms of section 314 of the CP & E Act and then later turn around and purport to challenge such evidence.

61. Further the statement by the accused persons mention facts which could only have been known by them. The statements also present a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such a type will often, therefore, itself prove its genuineness. That kind of information could only have come from the accused persons. The reliability of these statements are proved by their contents. See *Bhebhe v The State* SC 129/02; *R v Sambo* 1964 RLR 565.
62. We are satisfied that the statements were made freely and voluntarily without the accused persons having been unduly influenced thereto.
63. State counsel argued that these statements amount to confessions.
64. The courts have given the term ‘confession’ a very narrow construction so as to restrict the effect of the strict statutory requirements governing its admissibility. In *R v Becker* 1929 AD 171 De Villiers ACJ concluded that a confession could only mean “an unequivocal acknowledgment of guilty, the equivalent of a plea of guilty before a court of law.” It is therefore an extracurial admission of all the elements of the offence charged. As Wessels J put it in *R v Hans Veren 7 others* 1918 TPD at 221, the accused must in effect have said “I am the man who committed the crime.”
65. We are satisfied that the two statements amount to confessions.
66. Accused 1 in his confirmed warned and cautioned statement said:

I admit the charge being levelled against me of killing Joseph Mawa Moyo. On the day in question being the 13th May 2021, I was in the company of Nkosikhona Sibanda and his friend coming from number 2, Mabutweni after assaulting some people running away. As we were approaching to cross a small bridge leading to Lobengula Old we met a man who was alone for no apparent reason we struck the man twice with an axe and he fell down. Nkosikhona searched him and took away from him a phone, we left him lying down groaning and went to the house where

Nkosikhona Sibanda resides. Next morning we were still together we went to sell said cell phone at number one store to a man called Owen. We sold the phone for USD10.00.

67. Accused 2 in his confirmed warned and cautioned statement said:

I Nkosikhona Sibanda admit the charges levelled against me that I killed Joseph Mawa Moyo. On the day in question being the 13th May I was in the company of Kholisani Nyathi and Mbulisi on our way from number 2 shops in Mabutweni after assaulting people. Soon after crossing a bridge we met a man and I searched him after he had been struck twice with an axe on his head by Kholisani. We left him lying down, I took an Itel phone.

68. Accused 2 in the vernacular version of his statement said he took a Techno cell from deceased 2, however in the English version there is reference to an Itel phone. This difference is of no moment, we find that he robbed deceased 2 of Techno cell phone, because that is what he said in his vernacular version of his statement.

69. A court may convict an accused on the basis of his confession, as long as certain requirements have been met.

70. Section 273 of the CP & E Act, provides that any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence: provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed.

71. For this court to convict the accused persons for the crime of murder in court 2 there must be evidence outside their confessions proving that the crime of murder was indeed committed. See: *S v Tsorayi* 1985 (1) ZLR 138 (HC); *Bhebhe v The State* SC 192/02; *R v Taputsa & Ors* 1966 RLR 662; *S v Jokasi* 1986 (2) ZLR 79; *S v Shoniwa* 1987 (1) ZLR 215; *S v Dube* 1992 (1) ZLR 234.

72. The post mortem report (Ext. 4) shows that deceased Joseph Mawa Moyo died on the 13 May 2021. The cause of death is listed as savagely damaged brain; severe head injury; and callous assault. In their statements accused persons say on the 13 May 2021, they killed Joseph Mawa Moyo. He was struck with an axe, and such axe is an exhibit before court. It is a huge axe capable of causing the injuries described in the post mortem report. It is the same axe that accused 1 violently confiscated from one Frank.
73. Accused 2 in his confession says he took a Techno cell phone from deceased 2. This is the same cell phone that they sold to Owen Ncube. Whatever shortcoming of Owen Ncube as a witness in this court, we accept that he bought the Techno cell phone from the accused persons. This is confirmed by the accused persons in their statements.
74. In his defence outline accused 1 says he struck deceased 2 in self-defence. This is just a falsehood. Accused persons were not under any attack at all when accused stuck deceased 2 with an axe on the head and accused 2 stole his cell phone.
75. It is immaterial who delivered the fatal blow because the accused persons are charged with common purpose, the conduct of each one of them in the execution of the common purpose is imputed to the other.
76. We reject the accused defence as false beyond a reasonable doubt.
77. The evidence shows that the injuries sustained by the deceased 2 were caused by the accused persons. The post mortem report shows that the injuries inflicted by the accused persons caused the death of deceased 2. From the totality of the evidence led herein, we find that the State proved its case against the accused beyond reasonable doubt.

Verdict

78. The accused persons are charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It is no longer necessary in our law to

specify that the accused has been convicted under 47(1) (a) or (b). In *Mapfoche & Another v The State SC* the court said:

Thus, under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under 47(1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section.

79. Having carefully weighed the evidence adduced as a whole in this trial we are satisfied that the State has proved its case beyond a reasonable doubt against both accused persons in respect of both counts.

In the result, it is ordered that:

- i. In count 1 both accused persons, i.e. accused 1 and 2 are found guilty of murder as defined in section 47 (1) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].
- ii. In count 2 both accused persons, i.e. accused 1 and 2 are found guilty of murder as defined in section 47 (1) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

80. Despite the horrific events underpinning your convictions, Mr Nyathi and Mr Sibanda the sentences I intend to impose must be a product of sober, unemotional and considered deliberation.

81. You have no previous convictions. That means that you have not committed any known crimes in the past. Put differently, you have a clean record. That counts in your favour. There are other factors that have been placed on record by your legal practitioners: They are these:

Accused 1.

82. You are 28 years old and a Grade 4 drop-out. You grew up in Nkayi. You are a family man, with two minor children attending primary school. You are the sole provider of your family. You were employed at a mine in Filabusi. You migrated to Bulawayo where you lived with a sister, until you moved out to fend for your family. You have been in pre-trial custody for a period approximating one year.

Accused 2

83. You are 24 years old, and Form 3 drop-out. You are married with three minor children, and the youngest is one year old. You grew up under the care of your brother when your parents died. You migrated from Nkayi to Kwekwe in 2017 to work as an artisanal miner. You came to Bulawayo in 2021. You got a job as an artisanal miner in Matopo. You have been in pre-trial custody for a period approximating one year.

Accused 1 and 2

84. The offences which you have been convicted of are grave and serious. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all of the rights vested in that person: the right to dignity, the right to equality and freedom, and the right to life itself. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged.
85. The mitigating factors in your favour pale into insignificance when consideration is given to the nature of these crimes. The evidence shows that in both cases an extraordinary degree of violence was deployed against defenceless human beings, who had done you no wrong, and who were merely working for themselves and their families. The violence that preceded the killing of the deceased persons was such as to place these crimes in the category of the most serious. It is difficult to conceive the degree of violence that you meted out against

the victims and what the victims experienced in their last moments. What a horrible way to end the lives of other human beings. All this was done for you to sell their cell phones and make money.

86. The brutality of the attacks on the victims is graphically portrayed in the post-mortem reports. The attacks involved a high degree of uncontrolled violence.
87. The deceased in count 1 had lacerations on the occipital region (5 x 1 cm); laceration on the left parietal region (3 x 1 cm); laceration on the left occipital region (2 x 1 cm); abrasions on the left neck; stab wounds right inner thigh (2 x 1 cm), leg inner part (3 x 1 cm). These are serious injuries inflicted with severe force.
88. Again deceased in count 2 had a 5 cm oblique superficial wound on the left temporal region; right maxillary swelling; 7 cm long sutured C shaped wound of the lateral right frontal maxillary region. Under the sutured wound there are multiple frontal skull bone fragments with a 5 x 4, 5 cm skull defect. There is a huge haematoma in the brain. The brain is traumatised and damaged. These are serious injuries inflicted with severe force.
89. These murders were committed in aggravating circumstances in the course of robbery. In *S v Madondo* 1989 (1) ZLR 300 (HC) it was held that robbery is inherently a serious offence. It usually involves premeditation, criminal resolve and purpose, brazen execution, an attack on a human victim with the attendant disregard of that person's right to personal security, and forceful dispossession of whatever property the victim has. The perpetrator acts with contempt and callousness. It is therefore proper to regard robbery as a particularly reprehensible form of criminal behaviour and that should be reflected in the sentence.

90. It is seriously aggravating that these murders were committed in the course of robbery. This makes the accused liable to the death penalty. If it were not for the fact that the accused 2 is 24 year old, and was 23 years old at the time of the commission of this offence and therefore a youthful offender we could have been persuaded to pass such a penalty. Although the accused 1 is much older at 28, we did not want to treat the two offenders differently.
91. In count 1 you killed a young man who was merely fending for his family. Now there is a widow and three orphans. In count 2 you killed a 63 year old man, who according to the post mortem report was merely going to buy vegetables for his family. You are wicked.
92. The courts will never tire in discharging their duty of upholding the sanctity of human life. The only way of protecting society from wicked people like you is to remove you from society permanently.
93. The accused persons committed heinous crimes, and have to answer for each count.

In the result you are sentenced as follows:

Count 1: Each accused is sentenced to life imprisonment.

Count 2: Each accused is sentenced to life imprisonment.

The sentence in count 2 to run concurrently with the sentence in count 1.

National Prosecuting Authority State's legal practitioners
Masiye-Moyo & Associates accused 1's legal practitioners
Sansole & Senda accused 2's legal practitioners