

**THE STATE**

**Versus**

**BARON DUBE**

HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mrs Moyo and Mr Sobantu

BULAWAYO 27-28 FEBRUARY, 6 MARCH, 30 MARCH, 7 JULY, 31 JULY AND 7  
OCTOBER 2020

**Criminal Trial**

*S Ndlovu*, for the state

*L Mudisi*, for the accused

**TAKUVA J:** The accused is charged with the crime of murder in contravention of section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) (The Code). It is alleged that on the 26<sup>th</sup> day of September 2018 at Atlas Mine Esigodini, the accused shot and killed Antony Prince Bvundura using a gun on the left bicep intending to kill Antony Prince Bvundura or realising that there is a risk or possibility that his conduct may cause the death of Antony Prince Bvundura continued to engage in that conduct despite the risk or possibility.

The State alleges that on 26 September 2018 at approximately 2300 hours, the accused armed himself with two guns namely, a Voere Rifle serial number P – 93912/249829 and a Taurus Revolver serial No. QD 579746 and in the company of his gang of illegal gold panners armed with machetes, axes, shovels and picks drove in accused's Toyota Landcruiser to Atlas Mine where there was a gold rush. Upon arrival the accused disembarked carrying the two guns and chased away all the panners from the site claiming that the mine belonged to him. The panners complied out of fear and moved out of the pits. The deceased who was one of those panners moved away but was shot by the accused using one of his guns.

The accused pleaded not guilty to the charge and stated in his defence outline that he was employed by Khalanyoni Ranch to safeguard against vandalism of infrastructure especially roads by gold panners. On the night in question he received information that gold panners were digging a farm road in search of gold. He drove to the scene where upon

arrival, he came across a multitude of panners digging on the farm road. He decided to park his car facing away from where the panning was taking place. Accused admitted that he was armed with the two guns. He ordered the panners to vacate but they resisted and threw stones and other objects at him. Sensing danger accused backtracked towards his motor vehicle. In that process he stepped on a stone, slipped and the revolver which is a self cocking gun fell to the ground. Accused abruptly picked up the revolver resulting in its accidental discharge. The panners ran away and accused was later told that a person had been shot and killed at the scene.

Accused claimed that he lacked both the intention to discharge the fire arm and to kill the deceased. He also denied being negligent in anyway. Finally he prayed for his acquittal. According to the post mortem report prepared by Doctor Roberto Lara there were gun shot wounds on the left arm, left side of the chest, tears of the heart with loss of all its anatomy, torn arm vessels and multiple tears of the trachea. The doctor further concluded that the cause of death was:

1. Hypovolemic shock
2. Heart Destruction
3. Gun shot wound

The State also produced two firearms as exhibits. The 48” Voere Rifle Serial No. P 93912/249829 was marked exhibit 5 while the 357” Taurus Revolver Serial No. QD 579746 was marked exhibit 6. It is common cause that these two firearms were in accused’s possession at the scene. Also produced by consent were the respective cartridges, some live and others spent.

### **Issue**

From the above, it is apparent that the sole issue for determination is whether or not the accused shot the deceased intentionally. Put differently, did the accused pull the trigger deliberately or the gun accidentally went off?

In order to prove its case, the State called Tendai Musanangurwa who is the registered owner of Atlas Mine where the murder occurred. His evidence is to the effect that he knows the accused as a miner in the area. He stated that there has been an ongoing boundary dispute

between him and the accused. He received a report of a “gold rush” at his mine. The witness also stated that he spotted the accused on his mine on the previous day. Accused was in the company of his “gang” plundering his claim and the witness could not stop accused as the Police had also failed to remove accused’s “people” from the mine. Helplessly, he just stood by and watched. The road leading to his mine had been reclaimed by him and the fact that the portion that the panners were digging is within his claim means that the accused in his capacity as a miner or an employee of Khalanyoni Farm had no official business there. The road to his mine branches off from the main road leading to Khalanyoni homestead. He was certain because he is the one who constructed that portion of the road. Of the 5 claims at Atlas Mine, 3 sit in Khalanyoni Farm and the claim in dispute is within Khalanyoni Farm. The witness had his own workers working on his claim. However when he visited the farm he found that his claim had been invaded by several groups with one group “belonging” to the accused and another involving the deceased. The panners were digging and damaging roads. According to this witness the deceased was not his employee.

When it was put to him that the accused was employed by the Mtetwa family to safeguard infrastructure including roads, the witness could neither confirm nor deny that. However the witness categorically stated that after the gold rush on one of his claims he visited the claim where he saw the two rival groups working on this claim. There were two rival groups, one belonging to the accused while the other belonged to the deceased. This was two days before the shooting of the deceased. He saw accused’s vehicle at the scene. As regards the suggestion that the accused had gone there to chase away illegal panners who were digging the road, the witness said; “Accused is a leader of a gang that was marauding my area. I saw the gang during the day. I saw accused at the scene. I was helpless.” On the location of the roads the witness said the road that passes through his mine goes to Charles Makoni’s mill. He denied that the Mtetwas use this road saying they use a different road. In order to make the mine accessible he hired a bulldozer to construct the road in 2006 and the accused had no right to protect or control that road.

The portion of the mine that was invaded was not fenced and he had not sunk a shaft there. According to him the area is 200 m x 30 m cutting across the access road which had been damaged by the panners. The illegal gold panners were armed with machetes and knobkerries.

The State's next witness was Mkhulisi Sibanda a gold panner working with the deceased at Atlas Mine on the fateful night. As he was standing by the roadside with a metal detector he saw accused arrive aboard a white Landcruiser. He knew accused from 2010 as a gold panner and resident of Habane in Esigodini. In the car were a number of people armed with machetes and axes. The motor vehicle stopped at a distance of 3.8 m from where he was with its lights focusing in the direction of the panners. Accused alighted from the car holding a pilsener beer bottle in his left hand while in his right hand was holding a "big gun." The witness also noticed that the accused had a "pistol" on his waist and walked past him at a distance of 4.8 metres.

The witness greeted the accused saying "How are you Dube" to which the accused retorted "why are you greeting me when you are stealing my mine." Accused then ordered all the panners to take their tools and leave his mine after which the panners came out of the pits and left. The witness then saw the accused move a little bit further. At all material times, the scene was illuminated by the motor vehicle lights which were pointing at where the panning was taking place. The accused ordered one Mcebisi Mguni to leave the scene without his tools. At this time Mcebisi was in the company of one Antony. The deceased then came out of the pit in the company of Mzingaye Sibanda as the two were digging together. Accused insulted Mcebisi by his mother's private parts ordering him to leave the mine immediately. Mcebisi had insisted on removing all his tools from the pit before leaving.

As deceased, Mzingaye, Antony and Mcebisi were walking away, the witness saw accused holding the "big gun" with both hands and fired a shot in the direction of the deceased. Before the shot had been fired no-one had resisted the accused's order to leave. The only person accused had a confrontation with was Mcebisi who did not want to leave without his tools. The witness categorically denied that at some point accused "fell down." The witness explained how his group ended up prospecting for gold ore at Tendai's mine. His explanation was that the manager at that mine also known as Tendai authorized them to work there on condition he will receive 30% of the gold harvested. The witness was operating a metal detector. He had no knowledge of the accused's status as a "security guard" at Khalanyoni Farm to safeguard the roads.

When asked how many shots were fired the witness said accused shot Antony (deceased) and they ran away. Shortly thereafter he heard a sound of a gunshot. He saw

accused shooting at 3 people deceased, Mcebisi and Mzingaye from a distance of 20 m. Before the shooting, the witness had seen accused's gang members jumping out of the vehicle chasing away his group and started digging in the same pits. This was around midnight. After the deceased was shot, they continued running until they reached Magutshwa's residence where they made a report. The police were subsequently notified.

Under cross-examination, the witness denied being deceased's relative but explained that the two hailed from the same rural area. On the fateful night he had arrived at the mine in the morning accompanied by the deceased after they had received news of a gold rush. He found many people at the mine. He said he was supervising Magutshwa's group that had been authorized to work at that mine by Musanangurwa's manager one Tendai. Upon arrival the accused's vehicle stopped facing the direction of the panners and his "boys" at the back of the car jumped out and ran to the pits. According to him, they were not only drinking beer but also very rowdy. He estimated their number at 15. When asked whether his group resisted he said no-one resisted, as they came out of the pits with their tools with accused shouting "Get out of my mine, you have worked for a long time on my mine." Some of the accused's "boys" took Mcebisi's tools which made him confront the accused who insulted him ordering Mcebisi to leave without his tools. Mcebisi left and accused moved towards the people who were leaving the pits. They had their backs to the motor vehicle and they were clearly visible from the motor vehicle lights.

As regards the shooting, the witness said he saw accused throwing the beer bottle away before shooting deceased who had his back to the accused. He was adamant that accused used the "bigger" gun. The witness said there was no bad blood between him and the accused and when he was repeatedly asked about accused's motive the witness said he did not know of any but suspected that accused wanted to shoot Mcebisi or fire into the air. He believed Mcebisi was accused's intended victim because accused had shortly before the shooting insulted Mcebisi by spewing the following vitriol; "Mcebisi, you are too full of yourself, your mother's clitoris – get away."

Finally, the witness denied that members of his group attacked the accused by throwing stones at him adding that people were afraid of the big gun accused was carrying. He said after having ran for some distance after the deceased had been shot, he heard a sound

similar to that of a gunshot. At the time the witness left the scene accused's men were digging the road at Atlas mine.

The State's next witness was Innocent Dube a Detective Assistant Inspector, a Forensic Firearms Identification Officer at C.I.D Forensic Ballistics Harare. He has 12 years experience in that capacity. On 5 October 2018, he received the following exhibits from Detective Constable Makasu of C.I.D Gwanda;

- (a) 458 Voere Rifle,
- (b) 357" Taurus Revolver
- (c) 1 x 357" spent cartridge case
- (d) 1 x 38" sperial spent cartridge case
- (e) 15 x 357 live cartridges
- (f) 5 x 458 live cartridges

After examining the exhibits he compiled a report that was admitted as exhibit 4. In that report he concluded *inter alia* that;

- “(1) weapons (a) and (b) were both manufactured after 1900 and were both functional
- (2) Examination of the chamber cylinder and barrels of exhibits (a) and (b) showed some deposits of gunshot residue an indication that weapons (a) and (b) were both fired but cannot ascertain when they were fired.” (my emphasis)

He added that there were two (2) spent cartridges which had remained in the revolver. Test cases fired from the revolver matched the characteristics of the two fired cartridges that remained in the gun. When asked about the effect of the bullet, he said this depends on the type of the bullet. If it is a full metal with round nose and sharp pointed bullet, the hole will be clear. It causes a larger exit wound. From the hole, one can tell the general diameter of the bullet. On the other hand if it has a soft nose or hollow point, it has a tendency of mushrooming meaning that the hole will take the shape of a mushroom. It opens a bigger hole and usually does not go through depending on the distance.

The witness concluded that the revolver uses both types of bullets. The revolver produces a faint cocking sound which can be heard from a distance of 17-20 metres if the

environment is very quite while exhibit 5 (the rifle) produces a very loud cocking sound which can be heard clearly from a distance of 20 metres. Both exhibits 5 and 6 use both types of bullets described above with the consequences so described. The live cartridges that he received consisted of both types of bullets although he could not tell whether or not spent cartridge cases for the revolver (i.e paragraph c and d) of his report were sharp or hollow.

He opined that the deceased's wound as described in the post mortem report was most probably caused by a bullet from the revolver because the rifle would have caused a bigger entrance hole than the one observed by the pathologist.

When it was put to him that the revolver is a "self-cocking" gun, the witness said technically, it does not mean it cocks itself without anything happening but it has what is called a double action system that when the trigger is pulled deliberately or accidentally it will automatically bring the hammer to the back, rotate the drum, release the hammer to the front and discharge without having been previously cocked. If one holds on to the gun without squizzing the trigger, it will not release a second bullet. He explained that this does not normally happen unless the revolver falls on its hammer. Further he said cocking is by pulling the hammer.

After the testimony of this witness, the State counsel applied to have the evidence of Onwell Hangaiwa and Doctor Roberto Lara Diaz admitted in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07. There was no objection and the evidence was admitted by consent. The State also indicated that the bulk of its witnesses were gold panners who could not be located at the time of the trial. She therefore applied for their evidence to be expunged from the record. For the avoidance of doubt these witnesses are;

- (1) Mzingaye Sibanda
- (2) Vusumuzi Sibanda
- (3) Albert Ndlovu
- (4) Mcebisi Mguni
- (5) Brighton Sibanda

(6) Gilbert Mpunzi

The evidence of these witnesses as summarised, together with that of Searchmore Ndlovu and Jabulani Zengwa was expunged from the record. The State closed its case and the accused opened his case by testifying in person.

Accused said on the 26<sup>th</sup> September 2018, he travelled to his farm in Shangani in the company of Saiti Mhlanga. He left in the morning and returned around 9 pm. He was armed with the 2 guns. The rifle was for hunting while the revolver was for safe keeping of cash meant for his workers wages. When they arrived at Esigodini, a friend gave him a pilsener bottle of beer. Someone told him that Thomas a member of the security team at the farm informed him that there were people who were digging the road. Since it was his duty to protect the road, he immediately went there in Mhlanga's company.

Accused produced a Contract or Agreement between the owner of Khalanyoni Farm and himself which confirmed that it was part of his duties to ensure that mining pits are well kept and to prevent destruction of infrastructure. The "Contract of employment" signed on 10 January 2017 was marked as exhibit 9. On the way, he gave three men a lift. They came across a portion of the road that had been dug. The driver stopped the vehicle and the three men disembarked. Accused said he saw many people digging the road and he got off while Saiti remained in the motor vehicle. Before he could get to where there were "many people" he confronted two men who were cooking and asked them why they were digging the road. He ordered them to leave while holding the rifle (exhibit 5) in his right hand. These two did not exhibit any signs of violence. As regards the revolver he said "On my waist I had the revolver loaded with eight (8) rounds." When asked how it was secured he said, "I inserted it into my shorts and the drum was holding it. It does not have a holster." According to him that is how he always carried it.

As he did not anticipate any violence he moved to relieve himself and he suddenly heard some noise and he saw lit torches. At the same time stones were thrown at him. He retreated dodging stones while torch lights blinded him. As he moved backwards, he "stumbled and fell into a pit." The revolver fell onto a rubble which was stoney. When he tried to immediately pick it up, it fired one shot. He did not see the direction it fell but after the shot, people started dispersing. Since no one told him he had shot and killed someone he

simply went home and returned the following morning to fill up the pits. He was arrested at the scene by the Police who informed him that he had shot and killed the deceased.

When asked under cross-examination as to how he fell, the accused said he fell on his back into the pit. His legs “went in and he remained seated.” He claimed that the long rifle fell on the left side of the pit and he placed his hand on the ground and picked up the revolver without looking for it. He said he then walked away only to return for the rifle later. As to why he carried guns with the revolver loaded with 8 bullets, the accused initially said he had no opportunity to leave them at home on his way from Shangani. However he later changed and said although there was no gold or cash in the motor vehicle at that time he carried them for self protection in the event that violence erupted. Accused said he had possessed the gun (revolver) since 2012 and he knew it neither had a safety pin nor a holster. Despite this knowledge and the fact that the gun had a “double action” (i.e. could self cock, the accused consciously walked around with it pushed into his pants literally.

The next defence witness was one Saidi Mhlanga who is accused’s acquitance. On the 26<sup>th</sup> of September 2018 he drove accused to his farm in Shangani where accused wanted to pay his workers their monthly wages. The witness wanted to learn how to hunt in accused’s farm. They were armed with two firearms namely exhibit 5 and 6. They could not proceed to hunt because their torches had flat batteries. They decided to return to Esigodini where they stopped at accused’s bar and accused entered. When he emerged he was holding a beer bottle. Two young men talked to him and he instructed the witness to drive to Mtetwa’s farm as a matter of urgency.

On the way they gave 3 young men a lift. They were carrying a sack and proceeded until he came to a portion of the road that was damaged. He realised that he could not proceed further. The accused told him that that was “their destination” and the purpose was to remonstrate the people who were digging the road. He stopped the car and turned it westwards away from the site. The three boys jumped out and the accused disembarked carrying a rifle and a beer bottle. The revolver was on his waist and he went to the people on the road. Accused talked to those people but the witness did not hear or see anything as he was busy texting messages on his phone. He then heard people whistling followed by a gunshot. He removed the vehicle and the accused came back with an injury on his hand. However accused went back to look for the rifle. The witness gave the accused his cellphone

to illuminate the area. Accused picked a gun from a pit of knee-high after which he went to the place where people were digging on the road and spoke to them. They then left the scene. When asked whether or not the accused was under attack, he said he only heard a gun shot, whistling and a stone hit the car on his side causing him to remove the car from the scene.

Under cross examination, the witness said the accused told him that there were people digging the road while they were on their way to Mtetwa's farm. He further said at the bottle, accused left the big gun in the car. Finally, he said he did not see how the shooting occurred.

The last defence witness was Mr Nkondlokazulu Mtetwa the farm manager at Khalanyoni Farm. He knows the accused as a miner and his employee at the farm. The accused's mine is on his property. He referred to exhibit 9 and confirmed the accused's duties as outlined therein. The witness said he knows Tendai as someone who ceased mining in that area in 2007. According to him the accused pegged his mine in 2004 before Tendai pegged his mine in 2006. He said the two mines are approximately four (4) kilometers apart. After the shooting he visited the scene and saw the damaged road which access the farm. He agreed that Tendai's road branches off from the main road and the damage was before the turn-off placing that portion within the accused's responsibility.

Under cross examination he said the shooting did not occur at Atlas mine but on the access road. He concluded that the accused had a right to go there in order to protect the road. Although he did not directly instruct the accused to go to the scene, he talked to one Thomas Mpofo in the security department about the damage to the road. The witness said it is the accused who pointed out to him the place where deceased was shot and that this happened the next day.

## **THE LAW**

### **INTENTION**

A subjective test for a state of mind is a test whereby a court decides whether or not the person concerned actually possessed that state of mind at the relevant time, taking into account all relevant factors that may have influenced that person's state of mind – section 12, Criminal Law (Codification and Reform) Act (Chapter 9:23) (The Code). Section 13 of the Code states;

**“Intention**

13(1) Where intention is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequences he or she did.

(2) .....

The realization of a real risk or possibility concept is defined in section 15 as follows;

“15(1) Where realization of a real risk or possibility is an element of any crime the test is subjective and consists of the following two components –

(a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there is a real risk or possibility, that-

(i) his or her conduct might give rise to the relevant consequence; or

(ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and

(b) a component of recklessness, that is whether despite realising the risk or possibility referred to in paragraph (a), the person whose conduct is in issue continued to engage in that conduct.

(2) .....

(3) .....

(4) For the avoidance of doubt it is declared that the test for realization of a real risk or possibility supercedes the common law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable.” See also *State v Mhako* 2012 (2) ZLR 73 (H).

The essential elements of murder are codified in section 47 of the Code as –

“47(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 continue shall be guilty of murder

(2) .....

(3) .....

(4) .....

(5) .....

It is trite that no person shall be held to be guilty of a crime unless each essential element of the crime is proved beyond a reasonable doubt. The onus rests upon the prosecution to prove the commission of the crime beyond a reasonable doubt. Also, the prosecution bears the burden to prove beyond a reasonable doubt that a defence does not apply – see section 18(1)(4) of the Code.

## **ANALYSIS OF EVIDENCE**

### **Tendai Tasanangurwa's Evidence**

This witness gave his evidence well. It was common cause that accused and this witness had a long mining boundary dispute. It was also common cause that the road to Atlas mine branches off from the main road to Mtetwa's homestead. The accused and this witness agreed that panners were digging the road. The dispute between this witness and the accused is whether or not the digging occurred at a point on the main road leading to Mtetwa's home or on the road leading to Atlas Mine. We believe this witness's testimony and reject the accused's version for the following reasons;

- (a) it is common cause that the shooting occurred at Atlas Mine.
- (b) the road that leads to Atlas Mine branches from the main road to Mtetwa's home.
- (c) Musanangurwa constructed the road.

As regards the gold rush at Atlas Mine we believe Musanangurwa's evidence that accused was fully aware of this development. We so conclude because the probabilities favour this version in that it is highly improbable that accused who mines gold a few kilometers from Atlas Mine would have remained ignorant of an event of such publicity and magnitude. For at least two days before the shooting many gold panners descended on Atlas Mine. There is another reason why we believe accused had knowledge of the gold rush at Atlas Mine. The reason arises from the nature of accused's duties as a "Security Manager" at Kalanyoni Farm. News of a gold rush not only travel fast but far and wide and those in security are the first to receive such news. This is because once there is a gold rush at a mine or claim, hordes of gold panners invade it and in the process cause extensive and permanent

environmental and infrastructural damage. In any event accused knew that those digging the road were not doing so for fun but were prospecting for gold.

For these reasons, we find Musanangurwa to be a credible witness. We therefore believe his evidence whenever it conflicts with that of the accused.

### **DETECTIVE ASSISTANT INSPECTOR DUBE'S EVIDENCE**

This is an expert witness whose report Exhibit 4 is silent on accidental discharge. It appears at the time the exhibits were forwarded to this witness the question of whether or not the revolver accidentally discharged was not an issue. A proper reading of this witness's evidence does not lead to a conclusion that an accidental discharge occurred but that it can occur under certain circumstances. However, this witness was not told during cross-examination of the precise and detailed circumstances accused alleged to have found himself in. This would have enabled him to make an informed decision. The absence of any mention of accidental discharge in the forensic ballistic report suggests that this issue was raised for the first time in the defence outline.

Quite clearly, the fact that a revolver like the one in accused's possession (Exhibit 6) can accidentally discharge does not mean it indeed discharged accidentally on the day in question. The court is enjoined to examine the totality of the evidence. The question becomes; is the accused's explanation reasonably possibly true? Here it is necessary to closely examine the accused's explanation which we will do later in this judgment.

As regards which gun was used, Detective Assistant Inspector Dube said from the size of the wounds as described in the post mortem report it was his opinion that it was most likely that the revolver was used. It should be noted that this opinion is based on someone else's report. Further the witness categorically stated that the size of the wound would depend on the type of bullets used. Some would produce a smaller entrance wound while others would produce large entrance wounds. *In casu*, it was his evidence that both guns use both types of bullets.

In our view the issue crystallises to this. If we believe the eye witness who says it was the "big gun" (rifle) that was used, then the issue of an accidental discharge falls away. If however the witness is not believed on that aspect then accidental discharge remain an issue to be determined in light of the totality of the evidence. Put differently, a resolution of

whether or not on the evidence there was an accidental discharge necessarily resolves the question of intention and renders the question of which gun was used irrelevant. This point will be re-visited and then developed when an analysis of the eye witness's evidence is made later in this judgment.

**Mkulisi Sibanda (Mkulisi)**

**Common cause facts -**

1. Accused arrived at the scene armed with 2 guns, a rifle and a revolver after midnight.
2. He held the rifle in his hand while the revolver was on his waist.
3. He was also carrying a beer bottle in one of his hands.
4. Accused ordered everyone to leave the area immediately.
5. The panners came out of the pits with their tools and started to leave.
6. Shortly thereafter gun fire was heard and it was discovered that deceased had been shot and killed.
7. The matter was reported to the police that night and they immediately attended the scene. The deceased's body was removed the following morning.
8. The deceased died from the gunshot wound

Mkulisi is a single witness whose evidence in terms of our law is sufficient to sustain a conviction. See S269 of the Criminal Procedure and Evidence Act, Chapter 9:07. The section states;

“269            “It shall be lawful for the court by which any person prosecuted for any offence is tried, to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness,.....”

The issue becomes whether or not Mkulisi is a competent and credible witness? ... Evidently, he is a competent witness. We therefore cautiously proceed to assess his evidence.

## **Facts in dispute**

1. Whether or not accused arrived in the company of approximately 15 men who were armed

Mkulisi said this is what happened. The accused on the other hand totally denied this. The question is who is telling the truth between these two. Obviously, they cannot both be telling the truth. The accused just made a bare denial of this fact.

However, his driver one Mhlanga confirmed that accused talked to “men who were digging the road” – These men were now working on the same pits deceased and company were working on. The question is who were these men? The answer is simple. These are the men accused brought to the scene. Otherwise why would accused turn a blind eye on this group of panners if his objective was to protect the road? Again, the answer is that these men were working for the accused. Interestingly, Mhlanga stated that these men he gave a lift alighted at the scene. The question is where were these young men going to at that time of the night? It appears there were more than 3 passengers in accused’s motor vehicle. Simply put, Mhlanga just reduced the number from approximately 15 to 3. For these reasons, we find Mkulisi Sibanda to be a credible witness whose testimony was corroborated by accused’s defence witness. Therefore on the issue of whether or not accused arrived in the company of many people who were armed and immediately entered the pits at Atlas Mine, we believe Mkulisi Sibanda. We reject the accused’s evidence *in toto* on this point.

2. Whether or not the accused was assaulted by a group of men who were throwing stones at him?

It was the accused’s evidence that panners suddenly attacked him. However, accused does not proffer any explanation why according to him these panners who had not resisted his order to leave, suddenly became belligerent towards him. The probabilities do not favour this course of events in the circumstances. The accused had brandished two guns. At the very least there was no doubt that he was armed with a rifle for he was holding it in his hand for all to see. It would have been suicidal for anyone to throw stones at the accused. The weapons were clearly disproportionate. Further, the deceased’s group was fully aware that

the accused was not alone but had this violent group of armed men which he could summon for help at their peril.

Also Mkulisi's evidence is corroborated by the post mortem report in that the entry wound in that report shows the deceased was shot on the upper part of his left arm and the bullet entered the chest, damaged the heart and exited on the right side of the chest. This injury is inconsistent with accused's version that deceased could have been one of those panners facing him throwing stones. Accused contradicted himself by initially saying the panners were not violent and then said he was under attack adding "he was besieged". He said this is why he did not cock the gun as they "were not fighting". In evidence in chief, accused said; "when I arrived, we talked and were in agreement." Also the fact that the accused could move freely enjoying his beer supports Mkulisi's evidence that he was never assaulted by anyone. For these reasons we find the accused to have been an untruthful witness. We find Mkulisi to be a credible witness. He was telling the truth when he said no one assaulted the accused before the shooting.

3. Whether or not the scene was illuminated when the shooting occurred?

Accused claims the place was dark as the car had been turned to face away from where the digging was taking place. Accused said this was done because the motor vehicle could not proceed further. However, Mhlanga the driver said he did not want to "provoke" the multitude of panners. What is baffling about the decision to turn the motor vehicle lights away from the pits is that it defies all logic. According to the accused it was of utmost urgency that he visited the scene to "inspect" the damage and chase away the panners from the road. Surprisingly, when he got there he decided to inspect the road in the dark. Equally surprising is Mhlanga's version that at the scene he was "busy" with his phone and did not see or hear what the accused said. Mhlanga had realised there were many gold panners whom he did not want to provoke. In view of this, his alleged non interest is unbelievable. We find it to be false. Further, why would accused be keen on talking to illegal gold panners in the dark. This was a very dangerous thing to do indeed. How was he going to assess the damage or ensure that all the panners had indeed left if he moved around in the dark?

On the other hand, Mkulisi's version is simple and accords with common sense. It is that accused arrived in his vehicle whose lights were focused on where the deceased and others were panning. The whole area became illuminated and he was able to clearly see that

accused was holding a beer bottle in his hand. This is also why the witness was able to see that the accused had a revolver on his waist. Both the revolver and the beer bottle are small items which the witness could not have seen in the dark. Both accused and his witness admitted that the accused was carrying these items in the manner described by the witness. That one could not see clearly without illumination is confirmed by Mhlanga who said at one point accused requested for his cell phone to use as a torch in order to locate one of the guns. The lights enabled the witness to see accused talking to Mcebisi. He also was able to see the deceased and those in his company.

An intelligent over-view of the accused's evidence reveals that the accused was not being honest and truthful with the court on circumstances surrounding how the motor vehicle was parked. The aim was to mislead the court into believing that visibility was very poor at the scene. We find accused's evidence unimpressive at all. All in all, the accused gave false evidence on this issue. We therefore dismiss accused's version and accept Mkulisi's evidence that the car's lights were focused on the scene making visibility very good.

4. Whether or not the accused fell into a pit before the pistol was discharged?

Mkulisi's evidence is to the effect that accused did not fall into a pit at all. Accused said he did, but contradicted himself further as to how this happened. In the defence outline he said he "backtracked towards his vehicle and stepped on a stone, slipped and the revolver fell on the ground," yet in evidence in chief he said he "fell into a pit that was knee high and the gun fell onto a rubble." It is difficult to understand how accused would give such divergent views on this issue. It is either he stepped on a stone and fell down or he fell into a pit. The two are mutually exclusive in that what the accused was emphasizing is what caused him to fall down. It is either the stone or the pit and not both. Also incredible about accused's version is that he fell into the pit with both guns but was able to locate the smaller gun with relative ease in the darkness while at the same time he struggled to locate the rifle which is more than 1 metre long. This is strange in our view. We are satisfied therefore that the fall is a concocted story. Accused did not at any stage fall into a pit. It follows that the revolver never fell onto a rubble.

5. Which gun was used

Mkulisi was adamant that accused used the rifle (the big gun) while the accused admitted using the revolver (the small gun). In our view, the discrepancy as to which gun

was used is a result of perception. There was pandemonium at the scene with panners fleeing, others jumping into the pits and insults flying. Under those circumstances Mkulisi's perception was bound to be distorted. We agree with the State Counsel that at the end of the day, whether a big gun or small gun was used is neither here nor there since the accused was identified as the shooter and he is the only one who possessed guns at the scene. In our view Mkulisi assumed that since the accused was holding the rifle in shooting position and pointing it towards the direction deceased, Mcebisi and others were moving, it is the gun that was fired. On the evidence, from a pathologist (post mortem report) and ballistic expert, there is a possibility that it is the revolver that was used. However, the matter does not end there as the court has to determine under what circumstances the revolver was fired. This brings us to the next question namely;

6. Whether or not the revolver discharged accidentally?

It is only possible for a revolver to discharge accidentally without squeezing the trigger if it falls on hard surface on its hammer after it had been loaded. *In casu* revolver was loaded and on accused's waist inside his trousers without a holster.

The meaning of the term "self-cocking" gun was explained by the expert in the following way; "Technically it does not mean it cocks itself without anything happening. – It has what is called a double action system. If the trigger is pulled accidentally or intentionally, it will bring the hammer to the back, rotate the drum, release the hammer to the front and it will fire. Technically it can occur if revolver fell on its hammer. Cocking is by pulling the hammer." Therefore certain conditions have to exist before a revolver can discharge accidentally.

Since we have dismissed the evidence that the accused fell into a pit, there is no other credible evidence suggesting that the revolver discharged accidentally. In any event the fact that the Ballistic Expert was never asked about either an accidental discharge test or a negligent i.e operator error test being conducted shows that these issues were never raised when the exhibits were referred to his office. It is also noteworthy that the accused who was legally represented declined to make indications. As a result, no one saw the alleged pit – no one tested the texture of the ground. In our view even if it were accepted that the accused fell into a pit, there is no reasonable basis to conclude that there was an accidental discharge since there was on the evidence no hard fall in that the gun did not fall from a considerable height.

The deceased was shot on the upper part of his body. This suggests shooting from a standing position or that the shooter aimed the gun on the upper part of the body. The question is, is there any reasonable possibility of accused's explanation being true. See *S v Makanyanga* 1990 (2) ZLR 231 (H) and *S v Katsiru* 2007 (1) ZLR 364 (H). The test here is objective.

Further, accused's failure to mention certain facts relevant to the accidental discharge to the police discredits his explanation. Section 257 of The Criminal Procedure and Evidence Act deals with an accused's failure to mention certain facts. The section states;

“257            Failure of accused to mention certain facts to police may be treated as evidence

Where in any proceedings against a person evidence is given that the accused, on being –

- (a) questioned as a suspect by a police officer investigating an offence; or
- (b) charged by a police with an offence; or
- (c) informed by a police officer that he might be presented for an offence; failed to mention any fact relevant to his or her defence in those proceedings being a fact which in the circumstances existing at the time he or she would reasonably have been expected to have mentioned when so questioned or charged or informed, as the case may be, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be considered on that charge may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences be treated as evidence corroborating any other evidence given against the accused”.  
(my emphasis)

*In casu*, there is evidence that is common cause that after his arrest, the accused was advised of his rights before a warned and cautioned statement was recorded in the presence of his lawyer. On the same day, the Investigating Officer one Jabulani Tengwa of ZRP CID Gwanda invited the accused to make indications at the scene but he declined to do so.

By declining to make indications, the accused failed to mention facts relevant to his defence which facts he was reasonably expected to have mentioned or pointed out. Accused failed to point out the pit he alleged to have fallen into to the police officer. He should in our view have pointed out where the revolver landed and how it discharged a bullet accidentally.

In our view the only reasonable and proper inference that must be drawn is that the fall never occurred. We therefore treat that failure as evidence corroborating Mkulisi's evidence that accused never fell into a pit.

For this further reason, we find Mkhulisi to be a credible witness. We accept his evidence wherever it differs from that of the accused.

As regards the accused's explanation, the question is whether or not there exists a reasonable possibility of the explanation being true? In our view for the above reasons, the answer is in the negative. In *State v Makanyanga* 1996 (2) ZLR 231 (H) it was held that;

Applying the law to the facts, we make the following findings;

### **Findings of Fact**

1. There was a gold rush at Atlas Mine owned by Tendai Musanangurwa during the period the deceased was shot.
2. The deceased was shot at Atlas Mine by the accused.
3. It was not accused's responsibility to protect the road that leads to Musanangurwa's mine. Therefore, the accused had no right to be at that portion of the road. The purpose of accused's visit at Atlas Mine was to plunder it of gold ore.
4. The accused who was armed with 2 guns brought approximately 15 armed men to the scene. These men immediately started digging the pits with accused's approval. Accused left them there still panning for gold.
5. The accused and his group chased the deceased and his group from the pits. The deceased's group complied and left the pits.
6. The accused was not subjected to any stone throwing by the panners he found at Atlas mine. Instead, he picked up a fight with one Mcebisi who did not want to leave without his tools. The accused angrily insulted Mcebisi by referring to his mother's clitoris.

7. At the scene, the accused's vehicle did not turn to face the direction it came from. Therefore the motor vehicle's head lamps illuminated the area where the digging was taking place making visibility very good.
8. The accused did not fall into a pit before firing the fatal shot.
9. The accused used exhibit 6 (revolver) to shoot the deceased.
10. The accused recklessly fired the revolver in the direction in which the deceased and his colleagues were fleeing.
11. Accused was aware that his conduct might result in the deceased's death. He was also aware of the other panners' presence in the immediate vicinity.
12. The deceased died from injuries caused by the gun shot fired from accused's gun.
13. The revolver did not accidentally discharge. Instead, the accused fired it realising that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility.
14. The purpose of visiting the scene was to unlawfully prospect for gold and to plunder Atlas mine of this finite resource.

## **DISPOSITION**

We find the accused guilty of murder in contravention of section 47(1)(b) of the Criminal Law Codification Reform Act Chapter 9:07.

## **REASONS FOR SENTENCE**

In assessing an appropriate sentence, we have taken into account the factors that have been advanced by Counsel in mitigation of sentence. The accused is a married man with a big family of 3 wives and 14 children. He is a 45 year old businessman who owns a supermarket, bar and a butchery. It was further submitted that accused contributed a sum of US\$3 900-00 towards deceased's funeral. Accused is a first offender. As regards circumstances surrounding the commission of the offence, Counsel submitted that a clash

between two groups of illegal gold panners as a result of the gold rush caused the unfortunate shooting of the deceased.

Against all that is the fact that accused behaved like a bully on the night in question. On the evidence on record, the accused had no right to be at the scene of the crime. In a clear sign of pre-planning the accused went to the scene armed with two firearms, despite having the knowledge that the Revolver was loaded with 8 bullets. Accused recklessly fired at the group of fleeing gold panners.

Further accused did not show any concern for human life in that after the shooting, he did not bother to find out if anybody had been injured or killed. Also, after the shooting, the accused failed to report the incident (shooting) to the authorities as is required by the law. The evidence showed that deceased's group had been authorized by Musanangurwa (the owner of Atlas Mine) to prospect for gold while the accused acted out of sheer greed. That kind of behavior is inexcusable. The violence he perpetrated was not only totally unwarranted but betrays a senseless and unfortunate trait that is fast becoming a badge of our artisanal miners throughout the country.

The court has a duty to protect the sanctity of life by imposing a fitting sentence that also discourages other like minded offenders. While the court must consider the interests of society in assessing an appropriate sentence, it must not lose sight of the other two components namely the accused's personal circumstances and the circumstances surrounding the commission of the offence in order to avoid a capricious penalty – see *State v Zinn* 1969 (2) SALP.

In the result taking into account all relevant factors, the accused is sentenced to 10 years imprisonment.

*National Prosecuting Authority*, state's legal practitioners  
*Mutendi, Mudisi and Shumba c/o Dube-Tachiona and Tsvangirai*, accused's legal practitioners