THE STATE
versus
PRISCA MUDYANADZO
and
MAXWELL MOYO
and
TAFADZWA HOVE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 1 JULY 2014 & 12 MARCH 2015

Criminal Trial

Miss A. Munyeriwa for the state
N. Nyathi & Miss M. P. Mundopa for accused 1
J. L. Mhlanga for accused 2
M.R. Petkar for accused 3

TAKUVA J: The accused persons are facing one count of murder in that on the 3rd of July 2013 and at Getrude Park Makokoba, Bulawayo in the Province of Matabeleland, the accused persons did each or more of them, wrongfully, unlawfully and intentionally kill and murder an unknown male adult in his lifetime there being.

They all pleaded not guilty with accused 1 exercising her right to silence in terms of section 70 (1) of the Constitution of Zimbabwe. In his defence outline which is exhibit 2A, the second accused denied being at Gijima Night Club or near Getrude Park on the night in question. He claimed to have been at Waverly Night Club until 2400 hours when he left for his residence at Vundu Flats in Makokoba. Further he said accused 1 and Sharon Nyathi were assaulted by the police so that they implicate him. He said in fact these two know nothing about this crime, because it never happened. Accused 3 in his defence outline also raised the defence of an alibi by claiming that he was "at the rural areas when the deceased died." The state then produced accused 1's warned and cautioned statement as exhibit 3 by consent. Also introduced by consent are the following exhibits; Exhibit 4 – 1 black T-shirt; 1 red T-shirt; Exhibit 5 – a pair of North Star shoes with red and blue stripes.

The state opened its case by calling Sharon Nyathi (Sharon) who at the time was accused 2's girlfriend. The state counsel indicated that Sharon was in his view an accomplice witness who should be warned before testifying. The court warned her in terms of section 267 of the Criminal Procedure and Evidence Act [Chapter 9:07]. She testified that on 3 July 2013 at approximately 2100 hours she was at Gijima Night Club in the company of accused 1 whom she referred to as Cinderella, accused 2 and accused 3. She said accused 2 chose Gijima Night Club on that night. While at the night club she was seated next to accused 2 and 3 when accused 1 stood up and started dancing. Later she saw accused 1 talking to the deceased for approximately two minutes. Accused 1 then approached accused 2 and 3 and said the "boy has a lot of money". Further she said, she was taking the man to Getrude Park and they were to follow in order to assault him and take his money.

Accused 2 and 3 agreed and accused 1 then left with the deceased. Shortly thereafter, accused 2 ordered the witness to accompany them in pursuit of the deceased. They followed and found accused 1 and the deceased at Getrude Park "seated and talking". Before they saw deceased and accused 1, accused 2 had armed himself with a brick. When they arrived at where accused 1 and deceased were, accused 3 uttered the following words; "you what are you doing with my wife?" Accused 2 then struck the deceased with a brick on the head. Deceased fell down and accused 3 stabbed deceased in the abdomen and behind the ear. After that, accused 3 searched deceased and took his money, tennis shoes and a cellphone. They left him lying down injured. The following morning accused 2 gave her $10,00 before going away to sell deceased's cellphone. Later he returned and went to Madlodlo Beer Hall in accused 3's company.

After some days, accused 1 was arrested followed by accused 2 and the witness. According to her, she got arrested after accused 2 told the police that she witnessed the murder. At the police station, she freely and voluntarily told the police everything that she knew about this case. However, it turned out that the police were simultaneously investigating another murder involving one Silas who was accused 2's friend. The police asked her about this murder and when she said she did not know anything about it, she was assaulted with a whip and a baton stick. The following exchange occurred under cross-examination;

"Q - For how many days were you being assaulted by the police?

A - One day

Q - Is that when you gave them the other half of the information?

A - No

Q - Why did they stop assaulting you?

A - They just left me alone

Q - What information did they want from you because usually they do so for information?

A - They wanted me to reveal other things that accused 2 and 3 do.

Q - What did you tell them?

A - I said I only knew that which I had already told them and the court."

Asked why she followed the deceased, failed to report the murder to the police or anyone and stayed in the bush with accused 2, the witness said she was terrified of accused 2 who habitually physically abused her. At one time she said accused 2 threatened to kill her. She denied that she was a commercial sex worker. The witness said 3 days after the murder, accused 2 took her shoes and clothes in a bid to prevent her from "selling" him to the police. She then took the tennis shoes belonging to the deceased and wore them when she went to Manningdale where she left them. When shown exhibit 6, the pair of shoes, the witness identified them as those taken from the deceased. She said she did not notice that the deceased had a satchel.

On the group's state of sobriety on the night of the murder, the witness said she was sober, that accused 1 was drunk and although accused 2 and 3 were drinking Black Label beer they were not very drunk. The second state witness was Kenias Nyevedzanayi a constable in the Zimbabwe Republic Police based at Hillside. On 4 July 2013 at approximately 5:00am he was

on his way to work when he observed the deceased lying facing downwards. He observed deceased had injuries on his head and stomach, where he said the intestines were protruding. The deceased was still alive and he called an ambulance at the same time notifying Mzilikazi Police Station. He searched the deceased's person but did not find his identification document. Also, he noticed that deceased had a pair of shoes on his feet and a satchel tucked at the back. The witness left the scene after deceased's body had been conveyed to Mpilo Hospital where he later died.

The next state witness was Owen Nyathi a detective Assistant Inspector in the Zimbabwe Republic Police and the investigating officer. He told the court that he was allocated a docket of murder without any suspects. He failed to establish the identity of the deceased. At the same time, his colleague was also investigating a murder case and he had picked up suspects namely accused 1, 2 and 3. From the *modus operandi*, he became interested and decided to question them about this case. He recorded a warned and cautioned statement from accused 1 who made it freely and voluntarily. Later, he questioned Sharon who opened up and divulged the details of how the group had robbed and murdered the deceased. He recovered a pair of white North Star shoes from Sharon, who told her the shoes had been removed from the deceased. The shoes were recovered at Manningdale where Sharon had worked before while the rest of deceased's property was recovered by his colleagues.

Under cross-examination he denied assaulting Sharon or any of the three accused persons. In his own words Sharon was his star witness and he had no reason to assault her although he admitted that when accused 2 and 3 were taken to court on initial remand they lodged a complaint of assault against him resulting in an investigation whose outcome he is unaware of. He admitted removing Sharon from Bulawayo to her grandparents' home in Esigodini because firstly she was a destitute of no fixed abode, secondly he was worried about her security and thirdly he wanted to establish her exact residential place. He eventually left her at home after locating her mother and assured that she would be available for trial.

According to him accused 2 and 3 never raised a defence of an alibi and that if it had been raised he would have investigated it.

After the evidence of this witness, the state applied to have the evidence of Detective M. Ndlovu expunged from the record. The defence did not object and the court ordered by consent that the evidence be expunged. The state counsel then applied to have the evidence of the following witnesses admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (the Code).

(i) Maxwell Malakaza
(ii) Lee Mupombwa
(iii) Constable Chimbadzwa and
(iv) Dr I. Jekenya

Again, there was no objection and the evidence was admitted by the court as requested. The state then closed its case and accused 1 and 3 applied for discharge at the close of the state case in terms of section 198 (3) of the Code. They filed written submissions and I dismissed the application on 5 September 2014. I indicated that reasons would follow. These are they:

The section states –

> "If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

The 1st accused based her application on two broad grounds namely:

(a) the evidence of Sharon is inadmissible by virtue of section 70(3) of the Constitution of Zimbabwe; and
(b) the confirmed warned and cautioned statement is not a confession.

The law relating to the meaning of section 198 (3) *supra* is a well beaten path and therefore settled. Counsel relied on a variety of cases. I need to refer to just one of them namely *S* v *Tsvangirai and Ors* 2003 (2) ZLR 88 (H) at p 89 (A-B) where it was held that the section means that the court must discharge the accused person at the close of the case for the prosecution where:

"a) there is no evidence to prove an essential element of the offence;
b) there is no evidence on which a reasonable court acting carefully, might properly convict;
c) the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely rely on it. Instances of the last such cases will be rare, it would be in the most exceptional cases where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be relied on."

In casu, 1st accused counsel sought to rely on paragraphs (b) and (c) *supra.* In my view, a close reading of section 70 (3) of the Constitution and the evidence in its totality, leads one to the conclusion that Sharon's evidence is admissible. Her evidence cannot be described as "so manifestly unreliable that no reasonable court could safely rely on it." The fact that counsel for accused 1 refers to Sharon as an accomplice is telling in that the question becomes, who is the principal offender that she is alleged to have assisted?

This takes me to the next ground namely the 1st accused's statement. In it she admitted being at the scene where deceased was robbed and murdered. She implicates accused 2 and 3 as the actual perpetrators. She admitted being given $5,00 from the cash taken from the deceased. The question is does this evidence not make her a *socius criminis*? The answer is *prima facie* she is an accomplice. This evidence, coupled with that of Sharon which shows accused 1 as a co-principal offender proves a *prima facie* case against accused 1. Accused 3 submitted that he should not be put on his defence because Sharon's evidence is manifestly unreliable. Surprisingly accused 3's defence is that of an alibi. Sharon was not at all unsure about his identity. She narrated what happened and how it happened. Surely this constitutes a *prima facie* case against accused 3. Moreso where the defence is that of an alibi.

For these reasons I dismissed the application and ordered that the accused persons be put to their defences. Unfortunately accused 3 had passed on in prison. He died on 8 August 2014. The cause of death is Inguinal Hernia or intestinal obstruction as shown on the post mortem report produced as exhibit 7. As a result only accused 1 and 2 gave evidence in their defence as indicated earlier.

It appears to us that the questions to be answered in this trial are the following;

(1) whether or not Sharon's evidence is admissible in light of the constitutional provision?
(2) whether or not Sharon's evidence is credible?
(3) whether or not accused 1's confession in her warned and cautioned statement binds accused 2.
(4) whether or not accused 1 acted in common purpose with accused 2?

The first issue is a legal one. Mr *Nyathi* for the 1st accused contends quite eloquently that the evidence of an accomplice extracted through torture is inadmissible. He at the first instance relied on sections 53 and 70 of the Constitution. Section 53 states "No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment." Section 70 (3) provides that:

> "In any criminal trial, evidence that has been obtained in a manner that violates any provision of this chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest." Reliance was also placed on the following cases;
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> (a) *Mtembo* v *The State* 2008 SCA51
> (b) *Mukoko* v *Attorney-General* SC-11-12

It was held in *Mukoko's* case that, "the law imposes the duty on public prosecutors not to admit or use information or evidence obtained from an accused person suspected of having committed a criminal offence or any third party by torture, inhuman or degrading treatment when making prosecutorial decisions. If the duty fails at this stage the law imposes the duty on judicial officers … Information or evidence obtained from an accused person or any third party by torture or inhuman or degrading treatment if admitted or used in legal proceedings would reduce s 15(1) of the Constitution to a mere form of words."

In casu, the contention by Mr *Nyathi* is that since Sharon stated that she was assaulted by police officers in order to reveal "some information regarding the accused persons," she was therefore forced to confess or provide information through torture. Therefore such conduct by

the investigating officer and his colleagues violates the constitution and such information should be excluded from the trial.

In our view, section 70 (3) of the Constitution has two main characteristics, namely,

(i) That evidence must have been obtained in a manner that violates the provisions of the Constitution and

(ii) That the use or admission of such evidence must be prohibited if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest. The question then becomes, have these essentials been met *in casu*? The answer in our view is in the negative for the following reasons;

(a) It is common cause that the police were investigating two murder cases where members of this gang (Sharon) included were suspects.

(b) According to Sharon, she made her statement in respect of this case freely and voluntarily. She categorically denied that the police assaulted her in order to obtain information pertaining to this offence. She repeated more than three times that she was assaulted in order to reveal "other things that accused 2 and 3 were doing." Specifically she referred to the information pertaining to the murder of one Silas as an example of one of the things that the police thought she had information about.

(c) That they were not assaulted in order to extract information relating to this case is confirmed by accused 1's warned and cautioned statement that was confirmed by a magistrate.

(d) Whatever information the police wanted in connection with Silas' murder it is totally irrelevant to this trial and this is why when Sharon gave details of the circumstances, counsel for accused 2 and 3 applied for it to be expunged from the record of proceedings and indeed it was excluded as highly prejudicial and irrelevant.

Quite clearly, no relevant evidence was obtained from Sharon in contravention of the constitution. Therefore the 1st requirement has not been established.

As regards the second *essentialia,* it is difficult to see how irrelevant evidence would render a trial unfair or detrimental to public interest. The spirit of section 70(3) is to prevent the use of evidence obtained from an accused person or any third party by torture. Irrelevant evidence is inadmissible. For these reasons, the second requirement has not been met. Consequently, Sharon's evidence was not obtained through the use of torture and is therefore admissible.

The second issue is a factual one which requires an analysis of Sharon's evidence. Sharon has been described as an accomplice. An accomplice or *socius criminius* is a person who with the necessary mental state aids, abets, counsels or assists in a crime either before or during its commission. If she indeed is an accomplice, who is or are the principal offenders? How did she assist or abet these actual perpetrators? Be that as it may, this court proceeds on the basis that Sharon is an accomplice witness.

The starting point is section 267 of the Code. It provides:

"(1) When the prosecutor at any trial informs the court that any person produced by him or her as a witness on behalf of the prosecution has, in his or her opinion, been an accomplice, either as principal or accessory, in the commission of the offence alleged in the charge, such person shall, notwithstanding anything to the contrary in this Act, be compelled to be sworn or to make affirmation as a witness and to answer any question the reply to which would tend to incriminate him or her in respect of such offence.

(2) If a person referred to in subsection (1) fully answers to the satisfaction of the covert all such lawful questions as maybe put to him, shall, subject to subsection (3) be discharged from all liability to prosecution for the offence concerned and the court or magistrate, a the case maybe, shall cause such discharge to be entered on the record of the proceedings.

(3) A discharge in terms of subsection (2) shall be of no effect and the entry thereof on the record of the proceedings shall be deleted if, when called as a witness at the trial of any person upon a charge of having committed the offence concerned, the person concerned refuses to be sworn or to make affirmation as a witness or refuses or fails to answer fully to the satisfaction of the court all such lawful questions as may be put to him."

Quite clearly therefore an accomplice is a competent and compellable witness in a criminal trial. As regards the sufficiency of single evidence of an accomplice, section 270 of the Code provides for this in the following terms;

> "270 Conviction on single evidence of accomplice, provided the offence is proved *aliunde*
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> Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any accomplice:
>
> Provided that the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed."

When evaluating evidence of an accomplice witness, the courts adopt the cautionary rule whose function and scope is to serve as a reminder to the courts that the facile acceptance of the credibility of certain witnesses may prove dangerous. The cautionary rule requires, first, that the court should consciously remind itself to be careful in considering evidence which practice has taught should be viewed with suspicion and secondly, that the court should seek some or other safeguard reducing the risk of a wrong finding based on the suspect evidence. It has often been stressed, however that the exercise of caution should not be allowed to displace the exercise of common sense. Usually corroboration satisfies the cautionary rule but it is not the only factor, any other factor which can in the ordinary cause of human experience reduce the risk of a wrong finding will suffice.

In *S* v *Masuku* 1969 (2) SA 375 (N) 375-7 the following elaborate exposition of the basic principles relating to the evidence of an accomplice was given:

> "(1) Caution in dealing with the evidence of an accomplice is imperative …
> (2) An accomplice is a witness with a possible motive to tell lies about an innocent accused for example, to shield some other person, or to obtain immunity for himself.

(3) Corroboration, not implicating the accused but merely in regard to the details or the crime, not implicating the accused, is not conclusive of the truthfulness of the accomplice. The very fact of his being an accomplice enables him to furnish the court with details of the crime which is apt to give the court the impression that he is in all respects a satisfactory witness, or as has been described to convince the unwary that his lies are the truth.

(4) Accordingly, to satisfy the cautionary rule, if corroboration is sought it must be corroboration directly implicating the accused in the commission of the offence.

(5) Such corroboration may, however, be found in the evidence of another accomplice provided that the latter is a reliable witness.

(6) Where there is no such corroboration, there must be some other assurance that the evidence of the accomplice is reliable.

(7) That assurance may be found where the accused is a lying witness, or where he does not give evidence.

(8) The risk of false incrimination will also, I think, be reduced in a proper case where the accomplice is a friend of the accused.

(9) In the absence o any of the aforementioned features, it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits of the accomplice as a witness, and the demerits of the accused as a witness, are beyond question.

(10) Where the corroboration of an accomplice is offered by the evidence of another accomplice, the latter remains an accomplice and the court is not relieved of its duty to examine his evidence also with caution. He like the other accomplice, still has a possible motive to tell lies. He, like the other accomplice, because he is an accomplice, is in a position to furnish the court with details of the crime which is apt to give the court, if unwary, the impression that he is a satisfactory witness in all respects."

In *S* v *Banana* 2000 (1) ZLR 607 (S) a case which did away with the need to rely on the cautionary rule in sexual cases it was however held that the evidence of a single witness must be approached with caution and its merits weighed against any factors that militate against its credibility. A common sense approach must be adopted. Where the evidence of a single witness is corroborated in any way that tends to indicate that the whole story was not concocted, the caution may be overcome, as it may be by any other feature that increases the confidence of the court in the reliability of the single witness. Corroboration is not however essential.

Returning to the instant matter:

Counsel for accused 1 placed considerable emphasis on the following features in Sharon's evidence:

(1) the witness struggled to remember what transpired, in particular the deceased's age.
(2) that there is a major anomaly in evidence in that while she said accused 2 removed deceased's shoes "from his feet", Constable Nyebedzanai told the court that deceased was found with his shoes.
(3) that she contradicted the medical report on where the deceased was stabbed in that while the medical report shows that deceased was stabbed in the abdomen, Sharon claimed he was stabbed "behind the ear".
(4) that she contradicted herself on where she went to after deceased had been robbed and whether she was given any money.
(5) that the time she alleges deceased and accused 1 spoke to each other is insufficient to ascertain whether the deceased had a lot of money for the purposes of robbery.
(6) she had a motive to lie against accused 2 whom she described as a bully who was threatening to assault her.
(7) that her evidence is also tainted by the fact that the investigating officer violated her freedom of movement by "confining her to her rural home in Esigodini.
(8) that her evidence lacks corroboration

Mr *Mhlanga* for accused 2 relied on more or less the same criticism. He, however, referred to what he termed a further contradiction in that Sharon, in her evidence told the court that 2nd accused "did the assaulting" while accused 3 stabbed the deceased. To the contrary, 1st accused's version is that the 2nd accused assaulted and stabbed the deceased.

The issue, therefore, is whether the discrepancies in Sharon's testimony are fatal. This is so because it is common to find discrepancies in evidence, but such discrepancies are not necessarily an indication of falsehood on the part of the deponent. In *S* v *Lawrence & Ors* 1989 (1) ZLR 29 (S) it was held that discrepancies in a case must be of such magnitude and value that

they go to the root of that matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. In my view discrepancies whose presence do not usher in that change should be regarded as immaterial and as such of no value in the determination of the truth or otherwise of the matter at hand.

In *S* v *Makandigona* 1981 ZLR 408 (A) where the witness had made an inconsistent statement, BARON JA at 411D – E stating the proper approach to evidence where there were inconsistencies said:

> "Even without a previous inconsistent statement, and ignoring also that she was an obvious accomplice with an obvious interest to support the appellant the proper approach of the court was to consider the evidence of all the witnesses, whether called by the prosecution or the defence, and to decide where the truth lay." (my emphasis)

In casu, it must be borne in mind that the only material discrepancy between Sharon's evidence and accused 1's testimony is that accused 1 denies that she told accused 2 and 3 that deceased had a lot of money, that she was taking him to the park and that accused 2 and 3 should follow them in order to rob deceased With this in mind and the fact that Sharon is an accomplice, I proceed to cautiously consider the alleged inconsistencies *seriatum*.

As regards the first criticism relating to Sharon's ability to remember dates, times and the specific sequence in which events occurred, we are of the view that indeed Sharon was not impressive in this regard. However, we are also of the view that this inability and her alleged failure to estimate the deceased's age is clearly immaterial.

The second contradiction is really not a contradiction in that Sharon simply said accused 2 removed deceased's shoes – she never said the shoes were removed from "deceased's feet" as suggested by counsel. Accused 1 said the shoes were removed from the deceased's satchel while Constable Nyebedzanai said the deceased had his shoes on when he first saw him. What this simply means is that all three witnesses were telling the truth – this truth being that deceased had two pairs of shoes, one in the satchel and the other on his feet. There is no other logical explanation.

There is no contradiction between Sharon's evidence and the medical report in that the medical report refers to "head injuries" and the area behind the ear is in medical terms part of the head. In any case accused 1 corroborated Sharon's evidence when she also said deceased was stabbed "on the stomach and neck".

We agree with the state counsel's submission that:

> "While the pathologist observed only one stab wound, it is clear that there were two stabbing motions that were observed by both women "in the darkness". In any case her description of the assault on deceased's head is accurate".

It was further contended that Sharon contradicted herself on "when she left and where." Emphasis is placed on the allegation that while in court she said she went home i.e. to Makokoba, this was materially different from what she said in the "statement she had given the police". The same criticism was extended to her testimony relating to whether or not she was given any money. There are two problems with the submission. Firstly, the so-called statement was not produced as an exhibit. Secondly, there is a limit beyond which a court can find a witness incredible on the basis of a discrepancy between a witness's *viva voce* evidence and the contents of a statement made to the police – see *S* v ……

As regards the alleged short time she spent with the deceased, we find this to be immaterial in that the heart of this matter lies at the fact that accused spoke to the deceased and this is common cause, went out with the deceased who was robbed of approximately US$60,00, a cellphone, two T-shirts and a pair of shoes. It is neither here nor there that they i.e. accused 1 and the deceased conversed for a short period.

Further, the alleged motive to lie against accused 1 is not supported by the evidence. Under examination in chief the following exchange took place:

Q - How were your relations with accused 1

A - We were not friends, she was a girlfriend of my boyfriend's friend that is accused 3

Q - Any bad blood?

A - Yes in that on a certain day she threatened to assault me with her friend. It was before this incident.

Q - Cause of bad blood?

A - I do not know she just threatened to assault me.

In our view no weight should be attached to this so called motive for two reasons;

Firstly, while we were told that the threat was made before the deceased's death, we were not told precisely how long before. Secondly, it is common cause that after the threat Sharon and accused 1 together with their boyfriends continued to move together, sleep in the bush together until the day the deceased was murdered. Surely, it is fanciful in our view that Sharon could have harboured a grudge against accused 1 until the fateful day. This view is bolstered by the fact that it is not Sharon who reported this matter to the police.

In our view the fact that the investigating officer took Sharon to her rural home is commendable in that it enabled the state to keep track of its witness. The officer simply weighed the interests of Sharon as an individual against the interests of justice. In any case this development has no bearing on the quality of Sharon's evidence.

The contention that Sharon's evidence lacks corroboration is legally incorrect and untenable. To the contrary her evidence is sufficiently and materially corroborated by that of accused 1 – a co-perpetrator who testified against accused 2. The nature of the corroboration is material and relevant in that it goes to the role played by accused 2.

Finally, the alleged contradiction by accused 2's counsel relating to who did what between accused 2 and 3 is immaterial in that in cases of common purpose, the *actus reus* consists in the agreement rather than the precise acts carried out by different members. In that respect, it is neither here nor there that accused 2 is said to have only assaulted the deceased with a brick.

All in all, despite these inconsistencies the complexion of Sharon's evidence did not change where it matters most, namely the respective roles played by accused persons in the deceased's murder. Her evidence is also supported by probabilities in that if accused 1 had not informed accused 2 and 3 that she had been hired for sex by the deceased, that she was taking the deceased to Getrude Park, how would these two have known where to find accused 1 and the deceased?

Also, the fact that accused 2 and 3 upon sight of deceased pounced on him suggests that they had prior knowledge of his valued possessions. They promptly took out a wallet and cellphone. From the evidence, it is only accused 1 amongst the group who had shortly associated with the deceased before his death. Accused 1, therefore is the source of what property deceased had.

As regards accused 2's role, Sharon's evidence is corroborated by the fact that accused 1's evidence dovetails with her evidence. Further, the failure or more appropriately the refusal by accused 2 to call any witnesses to prove his alibi and his false testimony relating to the ownership of the deceased's shoes are pieces of corroborative evidence that exclude the danger of false incrimination in this case.

For these reasons, we find Sharon to be a credible witness.

The third issue is purely a legal one. It is trite that a confession binds the maker. In casu, nothing will be gained by engaging in an academic exercise in the status of accused 1's confirmed statement to the police. The proper approach is whether it contains relevant and credible evidence. In that statement she explained in detail what transpired. She also mentioned the perpetrators. Quite clearly, she was present at the scene of crime. The only issue is what her

role was in this whole sad saga. This gap in her evidence is filled by Sharon's testimony as shown above. The totality of the evidence shows that accused 1's denial of complicity in the murder is akin to someone who is desperately trying to hide behind the proverbial finger.

The second sub-issue is whether accused 1's warned and cautioned statement binds accused 2. The short answer is no. However, this is not the end of the matter, for once a co-accused takes the witness stand, what he says *viva voce* is admissible evidence against his or her co-perpetrators. This is exactly what happened *in casu* and accused 1's evidence as a witness is admissible against accused 2. That evidence does not only place accused 2 at the scene, it also shows his role in the murder.

The last issue is whether or not accused 1 acted in common purpose with accused 2. G Feltoe in *A Guide to the Criminal law in Zimbabwe* 3rd edition at p 47 – 48 state the legal position as follows:

> "If X is an accomplice to Y in a criminal enterprise, X will be liable for crimes committed by Y which fall within their common design. X is liable because he participated in Y's crime with the necessary mental state, that is he participated knowing or foreseeing that Y would commit the crime in question. If X and Y actually agree upon what crime will be committed, X will be guilty when Y commits the crime because he will have actual intention; if X and Y have not actually agreed in advance that the crime in question will be committed during the criminal enterprise but X foresees the real possibility that the crime will be committed X will be guilty of the crime committed by Y on the basis of legal intention". Cases – *S* v *Mugwanda* 2002 (1) ZLR 574 (S)
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> This is what is referred to in legal parlance as the Doctrine of Common Purpose.

In casu the evidence of Sharon shows that accused 1 made common purpose with accused 2. The evidence however shows that what accused 1 agreed to was that deceased be robbed and not that he be killed. The question then becomes whether in the process of robbing the deceased death was not a real possibility. In our view it was, and accused should on that basis be found guilty of murder with constructive intent as it cannot be said that accused 1 foresaw deceased's death as a substantially certain result – see *Mugwanda supra*.

As regards accused 2 the evidence shows that he used lethal weapons on vulnerable and delicate parts of deceased's body i.e. the head and abdomen. He used a brick to the head and a knife to the abdomen. Here we believe accused 1's version as she was closer and therefore had a better opportunity to observe events than Sharon. In our view, while accused 2 was pursuing the robbery, he foresaw the death of the deceased as a substantially certain result of that activity and proceeded regardless.

On the basis of the foregoing, we make the following findings:

(1) Sharon's evidence is admissible against both accused persons
(2) Sharon is a credible witness
(3) Accused 1's confirmed warned and cautioned statement binds her only
(4) Accused 1 is a competent witness against accused 2
(5) Accused 1 acted in common purpose with accused 2
(6) Accused 1's evidence conflicting with that of Sharon, especially on whether or not she was used as a bait to lure deceased from the safety of Gijima Night Club is rejected
(7) Accused 2's evidence relating to his alibi and his claim to ownership of deceased's shoes is rejected
(8) In those respects, accused 1 and 2 are found to be incredible witnesses
(9) Deceased was lured by accused 1 outside the night club
(10) Accused 1 told accused 2 and 3 to follow her to Getrude Park
(11) Deceased was robbed and murdered by accused persons
(12) Deceased died as a result of the assault by accused 2
(13) Accused 1 foresaw deceased's death as a real possibility but proceeded nevertheless
(14) Accused 2 foresaw deceased's death as a substantial certainty but proceeded notwithstanding.

For those reasons the court returns the following verdicts:

Accused 1 guilty of murder with constructive intent

Accused 2 guilty of murder with actual intent.

As regards the provisions of s 48 (2) of the Constitution of Zimbabwe Amendment (no. 20) Act 2013, the court finds that although the murder was committed in aggravating circumstances, the death penalty is inapplicable by operation of the law. The first accused is a female who was 21 years of age at the time of the commission of the offence. Accused 2 was a couple of months below 21 years at the time of commission of the offence.

Sentence

In deciding the appropriate sentence, the court takes into account what was submitted in mitigation by both legal practitioners. In particular the court takes into account that accused 1 is a youthful first offender who is of no fixed abode. She ran away from home at the tender age of eleven years and became a commercial sexual worker patronizing bars and night clubs.

Accused 2 is also a youthful offender who comes from a broken family. His mother died when he was 16 years and thereafter chose crime as his source of income.

In aggravation, it is noted that murder is a very serious crime. What makes this case a very bad one is that the murder was committed in the course of a robbery. Where like *in casu*, murder is committed in the course of a robbery the courts treat it as a particularly serious crime deserving the severest of punishment.

The accused persons' moral blameworthiness is very high in that they murdered the deceased in a callous and wicked manner. He was lured, robbed, assaulted and murdered in cold blood. There is need however to differentiate the sentences in view of the fact that accused 1 was almost a juvenile at the time of the commission of the offence and was found guilty of murder with a constructive intent.

Accused 2 on the other hand is a wicked man who does not respect human life. If he is allowed to come out of prison and live with the rest of society, the chances that he will repeat his murderous ways are very high indeed.

For these reasons, the accused are sentenced as follows:

Accused 1 – twenty years imprisonment

Accused 2 – life imprisonment.

Prosecutor General's Office, state's legal practitioners
Legal Resources Foundation, 1st accused's legal practitioners
Hwalima, Moyo & Associates, 2nd accused's legal practitioners