

THE STATE
versus
MNCEDISI NDLOVU
and
NHLANHLA SIBANDA
and
BHEKIMPILO MTHETHWA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 24 JANUARY 2012 AND 12 MAY 2015

Criminal Trial

Mr *Mabhaudhi* for the state
Mr *Muganyi* for the accused 1
Mr *Mazibuko* for the accused 2
Mr *Mashayamombe* for the accused 3

MAKONESE J: During the period extending from 18 November 2010 to 15 December 2010, the community of Stanmore area near Gwanda were left in shock and petrified following the mysterious disappearance of three women and a baby. The remains of the missing women and a 7 months old baby were later discovered in a hill when a villager stumbled upon a shallow grave and remains of one of the victims were found in this grave. Other human remains were to be found in the vicinity of this hill. A manhunt was launched by the police leading to the arrest of the accused persons. Upon their arrest the accused denied any involvement in the murders. Accused one was aged 18 years at the time of the offence and resided at Gumani village, Stanmore area, Gwanda. Accused two was aged 33 years at the time of the alleged offence and resided at Ntalale area, Guyu. Accused three was aged 18 years and resided at Gumani village, Stanmore area, Gwanda. The allegations against the accused persons are briefly as follows:

Count one

On the 18 November 2010 the deceased Meglina Mahlangu aged 62 years left Bulawayo for her homestead in Dema village 3, Stanmore, Gwanda, and whilst on her way to her homestead she was attacked and killed by the three accused persons. The accused allegedly cut off her two breasts and clitoris and thereafter concealed her body. The accused persons then took deceased's property except for her identification documents and photographs. The deceased's family later filed a missing person's report following her disappearance. On 8 December 2010 the deceased's family were alerted of the other murder incidents in the Stanmore area and this prompted them into searching for the deceased's body in a bushy area leading to her homestead. The family found deceased's clothing items, photographs and her son's passport and some kitchen utensils. Human bones were also discovered scattered around some rocks. A black bra and a small plastic bottle with jelly belonging to the deceased were recovered from accused two. All three accused persons pleaded not guilty to the charge of murder in respect of the first count.

Count two

In the second count, the state alleges that during the period between 1 December 2010 and 15 December 2010 the deceased Nothando Siziba left Bulawayo for Stanmore, Gwanda. She was in the company of her 7 months old baby girl. The deceased never reached her destination. Deceased's relatives searched for her to no avail. On 16 December 2010, deceased's mother received information to the effect that human remains had been discovered in a shallow grave. She proceeded to the scene where she identified the deceased's body. She also identified the remains of the 7 months old baby after she recognized the baby's clothes amongst the human remains. After their arrests the accused persons made indications that led to the recovery of a shovel and hoe used to bury the bodies of the deceased. Also recovered from accused persons were two panties belonging to the deceased. All the accused persons pleaded not guilty to the charge of murder on the second count.

Count three

The state alleges that Patience Ndlovu was aged 7 months at the time she met her death. She was murdered by accused persons. The deceased's grandmother identified the baby's clothes. The police recovered deceased's clothes from Siduduzile Mabhena who was accused one's girlfriend. All the accused persons pleaded not guilty to the charge of murder in respect of count three.

Count four

The deceased Ntombana Moyo was aged 81 years old. She was in the twilight of her life when she was brutally murdered. On 8 December 2010 the deceased arrived at Stanmore from Collen Bawn where she had visited her relatives. After failing to reach her homestead, her relatives went on a desperate search for her. Deceased's body was later discovered in a bushy area in the Khumanye area. Accused one and three made indications to the police which led to the recovery of a burnt brownish bag, and a small bottle with some ointment belonging to the deceased. The accused persons denied the allegation of murder in respect of the fourth count.

The accused persons all gave bare denials to the murder charges. They alleged that they were severely assaulted by the police and forced to make indications. All the accused persons claimed that they were subjected to torture by the police. They alleged that they made the indications under threats of assault. They all claimed that they were taken to the scenes of the murders after the discovery of the human remains.

The defence tendered into the record exhibits 2, 3, and 4 being the defence outlines of the respective accused persons. The accused persons all allege that they were wrongly implicated and accused three raised the defence of *alibi*, stating that on the critical date he was nowhere near the murder scene and was in the company of an acquaintance of his, one Lovington Sibanda.

The state tendered Exhibit 5 into the record. This is an affidavit by Constable Nicholas Sibanda. He confirms that he conveyed the remains of the deceased in count one to United Bulawayo Hospitals for a Post Mortem Examination. Exhibit 6 is the Post Mortem Report in respect of Meglina Mahlangu. The Report indicates that that the deceased was aged 62 years at the time she met her death. As a result of the post mortem examination, the pathologist concluded that the cause of death was indeterminate due to the state of decomposition of the

body. The Post Mortem was filed under number 779/775/10, and the examination was conducted on 13 December 2010.

The state then tendered Exhibit 7, being an affidavit sworn to by Constable Banda who confirms that he conveyed the remains of the deceased in count two, Nothando Siziba, to the United Bulawayo Hospitals for Post Mortem examination. Exhibit 8 is the Post Mortem Report of Dr. A. R. Casteiianos in respect of the deceased. The pathologist was unable to establish the cause of death because of the state of decomposition of the body. The Post Mortem Report was filed under number 794/790/10 and the examination was conducted on 17 December 2010.

The next exhibit tendered into the record as Exhibit 9 is an affidavit by Constable Nicholas Sibanda. He conveyed the remains of baby Patience Ndlovu, the deceased in the third count. The Post Mortem Report number 793/789/10 prepared by Dr. A. R. Casteiinos concluded that the cause of death was indeterminate due to the state of decomposition of the body. The deceased is noted to have been 7 months old at the time she met her death.

Exhibit 10 is the affidavit of Constable Nicholas Dube. He conveyed the remains of Nthombana Moyo to the hospital for a Post Mortem examination. The Post Mortem Report in the fourth count is Exhibit 12. Dr A. R. Casteiinos filed the report under number 778/774/10. The report concluded that the cause of death was:

- (a) depressed skull fracture
- (b) Head injury
- (c) Assault

On external examination the pathologist observed that there was a laceration on the left side of the head. In his opinion, the pathologist noted that the cause of death was consistent with a depressed skull fracture. Various other physical exhibits were tendered into the record in respect of each count.

The State Case

The state opened its case by leading evidence from Chelesile Mahlangu. The witness testified that she is the daughter of the deceased in count one, Meglina Mahlangu. She informed the court that upon the discovery of human remains in a bush she was called to identify them. On arrival

at the scene she found several items scattered in the area and amongst them were some documents. There was a NASSA card bearing her mother's name and a Passport belonging to her late brother. She made a positive identification of the remains of her mother's remains through amongst other things, documents found amongst those remains. A vital piece of evidence recovered and identified at the scene were Exhibits 13 and 14, namely one black bra and a small bottle with a pink lid. The witness told the court that she never advised the police that these two exhibits were amongst the property missing from her mother's property at the time of her death. She further indicated that she did not know how these exhibits were recovered but she was merely called by the police to come and identify some of the recovered items at Gwanda Police Station. The witness managed to identify exhibits 13 and 14 as part of her mother's property.

The court concluded that the witness was an unsophisticated young rural woman. She did not know any of the accused persons prior to the death of her mother. She had no motive to fabricate testimony against the accused persons. She gave her version of events in a forthright manner. She was subjected to prolonged and robust cross-examination but remained unshaken. We found her to be a credible witness, worthy to be believed. It is important to note here that none of the accused persons alleged that this witness was lying or biased or that somehow exaggerated her evidence.

Emmaculate Mahlangu was the next state witness in respect of the first count. Once again this witness was a simple rural woman who had an education up to From 3 level. The essence of her evidence was that she is the daughter of the late Meglina Mahlangu. She confirmed that her mother had gone to Bulawayo just before her disappearance. The witness was able to identify exhibits 13 and 14 as property belonging to her late mother. None of the accused persons suggested that the witness fabricated her evidence. It is noted that the evidence of this witness places before the court evidence that links the accused persons to the offences. The small bottle with a pink lid, which had some cream in it was recovered from accused two. These are the pieces of evidence that provide the crucial link between the murders and the accused persons. These exhibits were of a particular nature. This witness's evidence is accepted as credible and

the court makes a specific finding that the witness had no motivation to lie and to implicate any of the accused persons.

McLoud Ngwenya was called by the state to testify in respect of counts two and three. The deceased Nothando Siziba and Patience Ndlovu in counts two and three were mother and daughter respectively. All the three accused persons gave bare denials in their defence outlines. McLoud Ngwenya is an elderly man aged 60 years. He did not know any of the deceased persons during their lifetimes. The witness testified that on a certain day during December 2010 he was looking for his cattle in the hills near the Stanmore area. His dogs started barking around a rocky area. The dogs were digging a certain spot. The witness decided to investigate as he suspected that something was amiss. As the witness drew closer to the spot where the dogs were digging and barking he observed a human leg protruding from the ground. The witness was terrified and disturbed by this discovery. He dashed back to his village to report his findings. The witness was present when the remains of Nothando Siziba were exhumed. He stood at a distance while the exhumation took place. He was made to understand that the left breast of the deceased was missing although he said he did not witness anything himself. The court accepts the evidence of this witness as credible and consistent. He stood his ground under extensive cross-examination. His testimony was not controverted in any material way.

Sibusisiwe Ncube, was the second witness in respect of counts two and three. She is an illiterate woman aged 50 years. She is the mother to the deceased in count two and grandmother to deceased in count three. She testified that on 23 November 2010 Nothando Siziba went to Bulawayo to seek treatment for her sick child. The witness was expecting her back on 5 December 2010. On the expected date of return she proceeded to the bus stop but the deceased failed to turn up. The witness told the court that during the month of December 2010 she had met the three accused persons on her way to Stanmore. They were coming from the direction of the hills. The second accused person was holding a small axe. She did not speak to them. She did not like their demeanour. She was frightened. After some time had elapsed she went about in the village. She then noticed that fellow villagers appeared to be in a state of crisis. No one

wanted to discuss with her what caused the anxiety. Something was not right. As she was walking on a footpath she overheard two men discussing about human remains that had been located in a shallow grave in the hills. She took a decision to proceed to the hill. On arrival at the scene of the activity she found police officers guarding the shallow grave. She was invited to identify the remains, more particularly the leg that was protruding from this grave. The witness managed to identify the remains as those of her daughter, Nothando Siziba. The witness made further observations within the vicinity of the scene. She was able to identify the baby clothes as those of her granddaughter. As a result of what she had witnessed she passed out and lost consciousness. She had been overcome by emotion. She did not observe the rest of the remains of her daughter Nothando Siziba after the police had exhumed the remains. The witness went further to explain that she was later invited by the police at Gwanda to view some of the clothing items that had been recovered. She managed to identify exhibits 20 to 39 as clothing items for her late granddaughter, Patience Ndlovu. The witness said that she is the one who had purchased almost all the property either in Botswana or in Bulawayo. At the time she identified the clothes accused one and two who had been arrested as suspects in the alleged ritual killings were also present at Gwanda police station. The witness confronted the accused persons on why they had committed the gruesome murders. The first accused person told the witness that after committing the crimes he shared the property belonging to deceased persons with accused two. Accused one told the witness that he had taken baby Patience's clothes and accused two had taken property belonging to Nothando Siziba. On being asked why the accused persons had killed the baby in respect of count three accused one stated that he had not instructed that the baby should be killed. Accused one told the witness that his intention was that the child be left by the road-side where she could be taken by passers -by. Accused one expressed his regret at the death of the baby to this witness and apologized. Accused two did not refute the allegations made against him in the presence of this witness but instead he apologized and told the witness that he did not know what had gotten into him. Further accused one had told the witness that they had been sent by one Nhliziyo a businessman based at Stanmore to commit the murders. The witness said accused one pleaded for forgiveness and said that it was accused two who had killed the baby by smashing her to the ground because "she was crying and making noise." The

witness stated that she got very angry to the extent that she had physically attacked accused two by throttling him. Accused two was rescued by the police who told the witness to calm down. The accused person's defence counsels tried to discredit the strong evidence led by the witness but the witness stood by her version. The court concludes that this witness gave her evidence well. She narrated the events in their logical sequence. She showed strength of character as she gave a narration of the painful process of identifying the exhibits in counts two and three. She never sought to exaggerate her evidence and the court notes that her evidence regarding the admissions by accused one and two, at the police station sounds true. None of the accused persons succeeded in controverting her evidence regarding her encounter with the two accused persons at the police station. The first accused volunteered information to the effect that he "had not instructed" that the baby should be killed. He went on to describe how accused two had killed the baby by "smashing her to the ground."

Ntombizodwa Khumalo was called as the third witness in respect of count two and three. She told the court that she is accused two's former girlfriend, with whom she has a four year old son. The witness testified that she had been shown certain ladies pants and asked to explain whether these belonged to her. The witness stated that she had no knowledge of those panties which were tendered into evidence as Exhibit 16. The evidence of this witness was not seriously disputed by accused persons. The accused persons took the stance that none of them had any connection to those ladies panties. Nothing much turns on this witness's testimony.

Constable Rwarinda, was the fourth witness in counts two and three. He is a member of the Zimbabwe Republic Police based at Gwanda. He was posted to guard the shallow grave in respect of Nothando Siziba. He testified that he had also discovered the remains of the child in the vicinity of the grave. He is the one who exhumed the remains of Nothando Siziba and took the remains to United Bulawayo Hospitals for a post mortem examination. The evidence of this witness was credible and was not controverted under cross-examination. The witness was adamant that although the body of the deceased was decomposing he observed that the

deceased's left breast had been severed and was missing. The witness said this was observed by various other persons who were present at the exhumation.

Sidudzile Mabhena is a 26 year old female. She was known to accused one. She was accused one's girlfriend at the relevant time. Their romance seemed to have been at its peak and flourishing during that time. She seemed to be a truthful witness who wanted to co-operate and assist the court in arriving at a just decision. She readily admitted that accused one had given her the property that was later identified as belonging to baby Patience, the deceased in count three. The witness had no reason to mislead the court or to lie. She had no scores to settle with any of the accused persons. She said accused one gave her the clothes to sell. These are the clothes which were recovered from her which provided a useful link between the accused persons and these murders. The witness gave her evidence well and was not shaken under cross-examination in any material respects. We accept her evidence as consistent, reliable and credible. The defence attempted to portray a picture that the witness was assaulted into implicating the accused persons in these murders. That simply, is not the evidence of the witness. The essence of the evidence of the witness is that she was given certain clothes by the first accused person to sell sometime in December 2010. The clothes turned out to belong to the deceased infant. She was found in possession of these clothes by the police. The court cannot ignore this crucial link in the chain of evidence. It was not suggested by defence counsel that the clothes were planted on the witness. The witness confirmed that whilst at the police station the accused persons confessed to the killings.

Shadreck Ndlovu, was the next witness called by the State. The 73 year old witness is accused one's father. The witness informed the court that sometime in December 2010 members of the Criminal Investigation Department arrived at his homestead very early in the morning. Accused one, his son, was in the company of these police officers. He wondered why they had come to his home. Eventually, the witness got to know that the police were searching for the tools that had been used in burying the alleged murder victims. The witness stated that during the search he had confronted accused one to explain the reason for his arrest. Accused one advised the

witness that they had been hired by one Victor Nhliziyo a local businessman who had promised them beasts as payment for the ritual killings. The witness then remonstrated with accused one and asked him whether he was not content with the cattle he had at his homestead. The witness further told accused one that he was never going to allow him to keep the beasts from Nhliziyo in his cattle pen. He asked accused one where he was going to keep those beasts. The witness said accused one did not fully explain to him why he had committed such gruesome murders. Accused one had an opportunity to protest his innocence in the presence of his father, but he seemed instead to have opened his heart out by confessing to the murders. Accused one crucially revealed in the exchange with his father that he had been promised beasts by one Nhliziyo as payment for the ritual killings. At the witness's homestead, the police recovered a hoe and a shovel which were identified by accused one. These were the tools used to dig and cover the shallow graves. This witness was unshaken under cross-examination. He gave his evidence well and he was comfortable on the witness stand. His evidence is credible and he is worthy to be believed. There was no tinge of exaggeration in the manner he narrated what he knew concerning this matter. He was open and candid with the court and seemed genuinely willing to assist the court by placing all material facts known to him before the court. The testimony of this witness was not controverted by the defence at all.

Kayeni Moyo was called to testify in respect of the fourth count. The witness is the daughter in-law to the deceased Ntombana Moyo. The witness identified the deceased's property after it had been found almost completely burnt. The witness made a positive identification of items of property belonging to Ntombana Moyo. She knew the property that was in the deceased's possession at the time she disappeared. The witness said the deceased was carrying a large brown bag that had various items of clothing. There was also a grey skirt, a maroon skirt, a light blue blouse and a yellowish blouse in the bag. The witness was able to identify Exhibit 41, Exhibit 45, and Exhibit 46, these being various clothing items. This witness was not subjected to extensive cross-examination by all defence counsels. Her evidence in my view is credible and should be accepted by the court.

Hlonipani Siziba testified that he was related to Ntombana Moyo. He narrated how he encountered the deceased at the business centre where she purchased some bread, jiggies and sweets. He parted ways with Ntombana Moyo when she highlighted that she was going to rest whilst waiting for a cart at Makaliwa shops to take her home. Nothing much turns of the evidence of this witness. The witness was not subjected to extensive cross-examination.

Luckmore Dube, was called by the state to establish that he sold an okapi to accused three. The knife was tendered into the record as Exhibit 48. Nothing much turns of the evidence of this witness. He was also not subjected to prolonged cross-examination as his evidence was more of an informative nature.

Aaron Gadzai was the investigating officer in this case. He gave evidence on how he recovered the property belonging to the deceased persons. He also narrated how the indications were conducted and how the remains of the deceased persons were recovered. The defence counsels took turns to accuse the witness of subjecting accused persons to assaults and torture. The court must in such instances examine the evidential value of the evidence placed before the court. The courts will not condone the use of force as a means of extraction of evidence from suspects. This case is complex in nature as it involves four deceased persons. It is of importance for the court to consider the various pieces of evidence adduced in court. In my view it is safe to rely on the material aspects of the evidence of Aaron Gadzai as it relates to the undisputed facts which are as follows:

- (a) the accused persons were arrested as suspects in respect of four counts of murder.
- (b) The accused persons all denied involvement in the murders.
- (c) Indications were conducted leading to recovery of the remains of the deceased.
- (d) Various items of property were recovered from accused persons.
- (e) The property recovered linked accused persons to those offences.
- (f) Accused persons made certain admissions of their involvement in the murders whilst at the police station to certain witnesses, notably Sibusisiwe Ncube and also to accused one's father Shadreck Ndlovu at his homestead.

The state closed its case after leading evidence from the Investigating Officer.

The Defence case

The accused persons all gave evidence under oath. It is not necessary to outline what each accused person testified in his defence because essentially they gave bare denials. They denied any involvement in the offences. The pith of their defence was that they were all assaulted into submitting and admitting to the murders. They said they were wrongly implicated in all the offences. They suggested that the indications were made through force and assaults and torture. Accused three, however, raised a defence of *alibi* and suggested that he was with one Lovington Sibanda. In spite of all efforts by the accused and the State to locate the said Lovington Sibanda, to establish his existence nothing materialized. It is conceivable that the defence of *alibi* was but a wild good chase.

Analysis of evidence

I will now proceed to analyse the evidence led in respect of each of the counts.

Count 1

It is the finding of the court that credible and weighty evidence was led from Chelesile Mahlangu and Emmaculate Mahlangu in respect of the first count. Aaron Gadzai confirmed that a small bottle with a pink lid which contained camphor cream and a black bra was recovered from accused two. These important exhibits link accused two to the commission of the offence. The exhibits involved in this count are unique in nature and I shall deal with the issue of circumstantial evidence later in this judgment. Suffice to say that there was sufficient evidence to prove the case against accused one and two on this count beyond reasonable doubt.

Count 2 and 3

The deceased Nothando Siziba in count two and Patience Ndlovu in count three were mother and daughter respectively. All three accused persons pleaded not guilty and gave bare denials to the allegations. McCloud Ngwenya gave a clear and credible account of how the remains of the

deceased persons were discovered. He had no motive to lie. The witness was present when the body of Nothando Siziba was exhumed. The second witness on this count was Sibusisiwe Ncube. She is the mother to the deceased in count two. She is the grandmother to the deceased in count three. She helped in the identification of deceased Nothando Siziba. She also positively identified some of the baby clothes. The baby clothes and those of her mother were linked to accused one and two. The most damning piece of evidence from the testimony of Sibusisiwe Ncube was that accused one admitted to committing the gruesome murders. Accused one even went further to indicate that he had not instructed accused two to murder the baby. He had proposed that the child should be left by the side of the road where she would be picked up by passers-by. Accused one and two had the opportunity to dispute these allegations but instead accused one blamed accused two for the killing of baby without his “instruction.”

The court believed the state witnesses on this count. The accused persons presented a poor demeanour in court and were not impressive witnesses. Their denials sounded hollow right to the end. Accused two did not rebut the assertion by Ntombizodwa Khumalo that the two were lovers prior to the murders. Accused two did not challenge the assertion by the State that Ntombizodwa Khumalo was not the owner of the ladies panties (Exhibit 16). The entire evidence of this witness went unchallenged. The court is satisfied that proof beyond reasonable doubt was adduced to link accused one and two in respect of counts two and three. No credible explanation was proffered by accused persons why the clothing items of the deceased persons were found in their possession. Accused one failed to controvert the evidence of Siduduzile Mabhena to the effect that he had given her property which was later identified as belonging to baby Patience Ndlovu. This witness had no motivation to lie against accused one and her demeanor and candour is consistent with one wishing to open up and assist the court. In spite of the spirited efforts by defence counsel to suggest that she was not a truthful witness, the court finds her evidence consistent and credible. The accused persons offered nothing but bare denials, even in the face of implicating pieces of evidence such as the clothing items clearly linking them to the offences. There was indeed overwhelming evidence of a circumstantial nature adduced by the state. When accused one and two were confronted by Sibusisiwe Ncube over the killing at Gwanda Police Station, they gave an explanation saying they had been hired to

carry out the murders by one Victor Nhliziyo. This was the same explanation that accused one gave to his father when he was asked why he got himself involved in such gruesome murders. Accused one's father even went further to ask accused one why he looked down upon him and yet he owned nine head of cattle. These admissions were unsolicited and unequivocal admissions of guilt. Although the evidence in this case is circumstantial, the court finds that the only inference to be drawn is that the state proved its case against accused one and two beyond reasonable doubt in respect of counts two and three.

Count 4

The deceased in count four, Ntombana Moyo was aged 81 years at the time of her death. Her lifeless body was found in a bushy area in the vicinity of her home area. She was last seen alive at the business centre, waiting for a cart to ferry her home. The pathologist who examined her remains opined that she had died as a result of:

- (a) Depressed skull fracture
- (b) Head injury
- (c) Assault.

The deceased was carrying a large brown bag before she went missing. The following facts are common cause in relation to this count:

- (i) The deceased died as a result of injuries sustained during an attack.
- (ii) The deceased's body was recovered some distance from the hill where the burnt remains of her property were recovered.

Kayeni Moyo who is the daughter in law to the deceased identified the property belonging to the deceased. The identification of the deceased's property was positive because the witness knew the property that was in the possession of the deceased before she was found dead. Some of the property identified was found in the possession of accused persons. Accused one and three were linked to the offences not only through the recovered exhibits but through indications they made at the scenes of the crimes. Accused three narrated how the burnt property was recovered. The police could not have recovered the property if they had not been led by the accused persons. From accused three's narration of the events, he clearly knew that he was

leading the police to the place where the property was burnt. There is no way the police would have had prior knowledge that deceased's property had been burnt. The police could not have located the precise location of the burnt property without the assistance of accused persons. We are satisfied that accused one and three were well aware of the fate of the deceased's property because they had committed the gruesome murder. The only inference that can be drawn from the established facts is that accused one and three murdered Ntombana Moyo and dumped her body in a bushy area. The accused persons are unreliable witnesses who proffered bare denials to the allegations.

Proved facts

In all the four counts it is clear that the gruesome offences were committed after careful planning and with great resolve. Accused one told his father that the murders were committed for ritual purposes and at the instigation of a businessman one Victor Nhliziyo. Accused one told Sibusisiwe Ncube that they killed Nothando Siziba. They initially did not intend to kill the baby Patience Ndlovu but accused two smashed the baby to the ground because the baby was crying and making noise. The clothing items recovered in this matter clearly provide the necessary link between the accused and the offences.

The Law on Circumstantial Evidence

The state has largely relied on circumstantial evidence. There is no direct evidence available in this case. I will, as I must, explore the law on the subject and then apply the law to the proved facts. I must state from the outset, that the state did not seek to rely on the confessions made by the accused persons in their warned and cautioned statements. It will be a worthless exercise to examine the law regarding such confessions because the warned and cautioned statements were never placed before the court. They do not form part of the record. The state in its wisdom did not find it proper to introduce the warned and cautioned statements. It is the duty of the prosecution, which is *dominis litis* to place before the court any written or oral evidence considered relevant and admissible. I shall therefore consider the circumstantial evidence that has been placed before the court and which is relevant.

The state has conceded that its case against all the accused persons in respect of all the four counts is premised on circumstantial evidence. It is important to underline that circumstantial evidence is indeed evidence which any court may rely upon provided the essential requirements for the adoption of such evidence are met. The requirements for the acceptance of circumstantial evidence are well traversed in our jurisdiction. In the case of *R v Blom* 1939 AD 188, WATERMEYER (JA), the learned judge laid down the requirements as follows:

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

See also the case of *S v Marange* 1991 (1) ZLR 244 (SC) at page 249 and *State v Shoniwa* 1987 (1) ZLR 215.

In *State v Isolano* 1985 (1) ZLR 62 (SC), the learned judge, DUMBUTSHENA (CJ) laid down the following position regarding proof beyond a reasonable doubt as follows;

“In my view the degree of proof required in a criminal case has been fulfilled. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB), LORD DENNING described that degree of proof as follows:

---and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused persons is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

It is my view that when all the evidence has been together the inescapable conclusion is reached that the state proved beyond reasonable doubt that indeed the accused persons are linked to the offences and are guilty of the heinous murders. I have already pointed out that circumstantial evidence is evidence that will be accepted by the court provided that the state

proves that such evidence is consistent with all the proved facts. I point out again that the accused persons raised bare denials of the allegations. The accused persons ought to raise plausible defences to the charges. No onus is placed on an accused person to prove his innocence but it can hardly be said a bare denial is a defence at all. If accused one was not involved in the murders why would he open up to his father and go on to indicate that they had been hired by Nhliziyo? If accused one was wrongly implicated why did he apologise to Sibusisiwe Ncube at Gwanda Police Station and go on to implicate accused two in the process? The only inference can only be that accused persons did commit the crimes.

In order to decide whether the state has proved its case beyond reasonable doubt based on circumstantial evidence, the court needs to take into account the cumulative effect of the evidence as a whole. It is impermissible and indeed an incorrect approach to consider the evidence piecemeal. See *State v Snyman* 1968(2) SA 582. I am satisfied that the evidence that has been placed before the court is sufficient and credible to eliminate any reasonable doubt regarding the participation of accused persons in these offences.

Accused three's defence of *alibi* in count 4

In relation to count four accused three submitted that on the day in question he spent the whole day with Lovington Sibanda and at no time did he go to the hills. The first problem with the defence of *alibi* in this instance is that the victims were not killed in the hills where the remains were discovered. The killings occurred at or near the shops at Stanmore. The victims were way-laid as they arrived at the bust stop on their way to their respective villages. Accused three admits that he was at the shops on the day in question. He accepts that he saw the deceased Ntombana Moyo at the shops waiting for a cart to ferry her goods home. The deceased was last seen alive at the shops. Accused three's assertion that he did not go to the hills does not assist him. The efforts by the state to locate Lovington Sibanda were futile. Whether or not the defence of *alibi* will assist accused three must be taken into the context of all the proved facts. Sibusisiwe Ncube testified that sometime in December 2010 she met the three accused persons coming from the direction of the hills. Accused one was holding a small axe. The witness was frightened by the demeanour of the accused persons. This piece of evidence was not challenged

at all by the third accused. It is vital evidence that links accused three to the other accused persons.

I am mindful of the remarks in the case of *R v Difford* 1937 AD 370 at 373, regarding the defence of *alibi*, where the learned GRENBERG J, stated therein that:

“No onus rests on accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but beyond any reasonable doubt that it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.”

In my view where an accused person has given an explanation that is false and unacceptable, then he is not entitled to the defence of *alibi*. The third accused person who was ably represented in the trial merely stated that he was in the company of Lovington Sibanda on the relevant day. No evidence was placed before the court to indicate that the defence was not just a red-herring. While no onus is placed on an accused to prove his defence, in this matter the state took the burden to try and locate the said Lovington Sibanda. He was not located. I am convinced therefore, that the defence of *alibi* was a false defence meant to deflect the attention of the court.

In conclusion therefore, I am satisfied that that state proved its case beyond reasonable doubt in respect of all the counts. Accused one and two are accordingly found guilty of murder with actual intent in respect of counts one to four as charged. Accused three is found not guilty and acquitted with respect to counts one to three. Accused three is however found guilty of murder with actual intent in respect of count four.

Sentence

In assessing an appropriate sentence the court takes into account all that has been said in mitigation by accused's defence counsels. I take note of the youthfulness of accused one and accused three, who were both aged 18 years at the time of the commission of the offences. I do note, however that in spite of their ages the accused chose to embark upon calculated and dangerous missions of murder. The accused persons are all not remorseful. They showed no mercy to their victims. The accused persons are not contrite and have remained so to the bitter

end. Accused one and two are not first offenders. They are currently serving prison sentences for attempted murder which occurred at the relevant time. The accused persons showed a total disregard for human life. They prepared, planned and carried out these ritual killings for financial gain. Life is precious and the courts guard jealously the sanctity of human life. I do not agree with accused's defence counsels that a lower sentence should be imposed in count four due to the advanced age of the victim, who was aged 81 years at the time she met her death. The life of the 7 months old baby Patience is as much valuable as that of the 81 year old. In fact the 81 year old grandmother was a vulnerable person who was as defenceless as the other victims. The moral blameworthiness of the accused persons is very high and this must reflect in the sentence imposed in this matter.

I have not considered the imposition of the death penalty for the following reasons:

- (a) In respect of accused one and three the accused were both 18 years at the time of the commission of the offences and in terms of the Constitution of Zimbabwe the death penalty may not be imposed on persons below the age of 21 years.
- (b) The legality or otherwise of the death penalty is currently under consideration by the Constitutional Court of Zimbabwe.
- (c) In any event, in respect of accused two who was aged 33 years there need is to be a uniformity of sentence to the extent that I do not deem it appropriate to single out accused two for the death penalty.

The sentences I shall impose must take into account the interests of the accused and the societal expectations. These are multiple murders which were committed with deadly violence and great resolve. The only appropriate sentence is as follows:

Count one

Accused one and two are sentenced to life imprisonment

Count two

Accused one and two are sentenced to life imprisonment

Count three

Accused one and two are sentenced to life imprisonment

Count four

Accused one, two and three are sentenced to life imprisonment.

The life sentences are to run concurrently.

National Prosecuting Authority, the state's legal practitioners
Dube-Banda, Nzarayapenga, 1st accused's legal practitioners
Calderwood, Bryce Hendrie and partners, 2nd accused's legal practitioners
Mashayamombe and Company, 3rd accused's legal practitioners