

THE STATE
versus
BLESSING NYAKWIMA
and
NKAZIMULO NKOMO
and
DAMASCUS TAFU
and
VITALIS NYAKWIMA

HIGH COURT OF ZIMBABWE
MUREMBA J

HARARE, 3 February, 5 February, 10-11 February, 13-14 February, 17-19 February, 24-26 February, 3-4 March, 7 March, 10-14 March and 19 May 2014

Assessors : 1. Mr Gonzo 2. Mr Shenje,

Criminal Trial

A. Masamha, for the State
N. Mugiya, for all the accused

MUREMBA J: The four accused are charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], it being alleged that on 17 April, 2012 and at Glen Norah suburb, Harare, they assaulted one Brown Mwale, which conduct resulted in his death.

The following is common cause. On the evening of 17 April 2012, the deceased was in the company of Amos Mukwena, Mavhuto Bhasikoro and Thulani Mwale. They went to Farai Nightclub in Glen Norah B for a beer drink. At around 11pm, they decided to go home. They looked for transport and in doing so they came across the four accused persons who had also been drinking beer at the same shopping centre but in Hwenje's nightclub. The four accused persons were driving a Toyota Noah. The accused persons charged the deceased and his colleagues \$5-00 as transport fare to Irvin's. The deceased and his colleagues got into the vehicle. Before the fourth accused started the vehicle, he demanded payment of the fare. The deceased who was stone drunk was already sleeping in the vehicle. The deceased's colleagues told the fourth accused that it was the deceased who had the money for the fare. However, they told him not to worry saying that the deceased would wake up and pay the fare upon reaching their destination. This did not go down well with the accused persons and an altercation ensued. While the deceased's colleagues allege that the accused persons then

assaulted them and dragged them out of the vehicle, the accused persons allege that there was a scuffle between the deceased's colleagues and accused four. As this was happening, some police officers who were on patrol approached the scene. The accused persons got into their motor vehicle and drove off. At that juncture no one was injured.

It is not disputed by the accused persons that after they had driven off, the deceased and his colleagues looked for alternative transport at the shopping centre to no avail. They decided to walk to Masimbi bus stop which is along High Glen road to look for transport. The distance from Glen Norah B shopping centre to Masimbi bus stop was estimated to be 150-200metres. On the way and at Glen Norah community hall, they met up with a Toyota Noah vehicle. The occupants thereof disembarked, went after the deceased and his colleagues and started assaulting them. Since the deceased and his colleagues were drunk they could not fight back. They all ran away except for the deceased who was stone drunk. The deceased remained at the mercy of these assailants.

The accused persons do not dispute that the deceased's colleagues went home and informed the deceased's young brother one Fungai Mwale about what had happened. That same night, the deceased's colleagues and Fungai Mwale went back to Glen Norah community hall to look for the deceased to no avail. From there, they went to Glen Norah B shopping centre where they saw the accused's motor vehicle parked at Mutomba night club. They reported to the police who were on patrol about what had happened and that they were still looking for the deceased. The police and the deceased's colleagues went into Mutomba Nightclub where the deceased's colleagues identified accused one, two and three as the people who had assaulted them and remained with the deceased at Glen Norah community hall. The police arrested the three accused persons. The fourth accused was not there. Upon being questioned, the three accused stated that the fourth accused had remained at his house in Glen Norah C. It is common cause that upon being arrested, the first accused's T- shirt had blood stains and he was wearing it inside out. That night, the three accused were detained at Glen Norah police station on assault charges. The deceased's colleagues and brother went to their homes and retired for the night. The next morning at around 7 am as the deceased's colleagues and brother were on their way to Glen Norah community hall to look for the deceased, they saw some people who were gathered around a dead body along High Glen road. It was the deceased's body. The deceased's pair of shoes and money estimated to be around \$80-00 was missing.

The post mortem report which was produced by consent states that the deceased's body had the following surface wounds and injuries: a 4,5cm cut on the left side of the head, multiple bruises on the left side of the body, bruises on the left leg, a 12cm irregular cut on the right leg and bruises on the left shoulder.

The body had fractures on the skull; second, fourth, fifth, sixth and seventh ribs.

The cause of death was subdural haemorrhage, skull fracture and severe head injury due to assault.

It is common cause that after the body of the deceased had been discovered the accused persons who were still detained at Glen Norah police station on assault charges were then charged with murder. The police went looking for accused four at his place of residence but he was not at home. When he later learnt that the police had been looking for him, he handed himself over at Machipisa police station. The first three accused were then transferred from Glen Norah police station to CID Homicide for the investigation of the murder. On the way to CID Homicide, the police and the first three accused persons passed through Machipisa police station collecting accused four.

The first accused's T- shirt which was blood stained was not taken as an exhibit for forensic examination.

In denying the charge, the accused persons stated that after the altercation at Hwenje's Nightclub they went to the fourth accused's house in Glen Norah C, just about 5minutes' drive from Hwenje's Nightclub. Accused two then realised that he had forgotten his jacket at the night club. That prompted accused one, two and three to return to Glen Nora B shopping centre. Accused four remained at home. It was now around 1am.

Although the three accused admitted that they drove back to the shopping centre in the same Toyota Noah they had been driving when they met the deceased and his colleagues at Hwenje's Nightclub, they vehemently denied meeting the deceased and his colleagues at Glen Norah community hall on their way back to the nightclub. They said when they got to Hwenje's Nightclub the second accused collected his jacket. They then proceeded to Mutomba Nightclub to drink beer. As they were in Mutomba Nightclub, they were approached by three police officers who were in the company of the deceased's two colleagues who alleged that they were the people who had assaulted them at Hwenje's Nightclub. That is how they were arrested. The three accused said that their arrest had nothing to do with the assault that had happened at Glen Norah community hall. They said that upon their arrest nothing whatsoever was said about the incident at the community hall.

Accused one said that he was asked to explain the blood stains which were on his T-shirt. He said that he explained that he had been assaulted by one Knox who owns a bar at the same shopping centre and nose bled. Accused one's evidence which was adopted by accused two and three was also to the effect that from Mutomba Nightclub they were driven to a certain place which is not Hwenje's Nightclub where the deceased's colleagues said was the place where the misunderstanding had occurred. The three accused persons disputed that they are the ones who led the police to that place. They said that they did not spend two minutes at that place and proceeded to Glen Norah police station where they were detained overnight for assault charges.

The accused persons challenged the admissibility of their warned and cautioned statements.

In their defence outline the accused persons said that no warned and cautioned statements were recorded from any one of them. However, during trial accused one, two and three said that warned and cautioned statements had been recorded from them for the murder charge at Glen Norah police station. Accused four said that his warned and cautioned statement was recorded at Machipisa police station where he had handed himself over. All the accused said that no warned and cautioned statements were recorded from them at CID Homicide.

From the defence given by the accused persons it is clear that the following issues are in dispute.

- (a) Whether or not the accused persons and the deceased and his colleagues met at Glen Norah community hall for the second time.
- (b) Whether or not the accused persons gave warned and cautioned statements at CID Homicide, Harare
- (c) Whether or not the 4th accused person was present during the second encounter at the community hall.
- (d) Whether or not the deceased died as a result of the injuries sustained following the assault by accused persons.

I will deal with the issues in relation to the evidence that was led.

(a) Whether or not the accused persons and the deceased and his colleagues met at Glen Norah community hall for the second time.

On this issue the State led evidence from Mavhuto Bhasikoro and Thulani Gumbo who were in the company of the deceased on the night in question. These two said that they were positive that the people whom they met at the community hall were the same people they had had an altercation with earlier on at Hwenje's Nightclub because of the motor vehicle they were driving. It was the same Toyota Noah. It was white or cream in colour. They said that the vehicle came from the opposite direction and stopped right at their feet.

The two witnesses said that as soon as the accused alighted from their vehicle they (witnesses) identified them (accused persons) as the persons with whom they had had an altercation with earlier on at Hwenje's Nightclub. Thulani Gumbo said that they recognised them by their attire which they had seen earlier at Hwenje's Nightclub. He said that although he could no longer recall what each of the accused was wearing due to lapse of time, he still recalled that one had a black jacket, another had a white T-shirt and another had a red T-shirt. They said that what strengthened their identification of the accused were the utterances which the accused made as they started assaulting them. They made utterances to the effect that they (deceased and his colleagues) had messed with the wrong people, soldiers in that they wanted to board their vehicle without paying any money. The two witnesses contradicted each other on whether or not visibility was good at this place. Thulani Gumbo said that visibility was good because there was a tower light which was at the community hall which enabled him to identify their assailants. Mavhuto Bhasikoro said that there were no lights and as such visibility was not good. He said that despite the poor visibility, he was able to identify the accused persons because they came in close proximity to each other as the accused persons assaulted them.

We are convinced that the two State witnesses correctly identified the accused persons. Accused one never disputed during the State case that he was wearing a white T-shirt. It was only during the defence case that he said that he was wearing a blue T-shirt. This puts his credibility in doubt because the defence counsel did not challenge the State witnesses on that aspect when he still had the opportunity to do so and this should have been done during the State case. Accused two admitted that he had a black jacket on the night in question while accused three admitted that he had a red T-shirt. What buttresses the State case is that the same witnesses are the very people who identified the first, second and third accused to the police later that same night in Mutomba Nightclub thereby causing their arrest. If they had not identified them at the community hall they would not have been able to

identify them to the police in Mutomba Nightclub. They were even able to identify the accused persons in the absence of their motor vehicle.

Elliot Muzvimwe is one of the three police constabularies who arrested the first three accused persons. He said that the report that had been made by the deceased's colleagues was that they had been assaulted by some people at Hwenje's Nightclub and that the same people had assaulted them again at the community hall and remained with the now deceased. Elliot stated that upon arresting the first three accused they asked them if they knew the deceased's colleagues. The three admitted and stated that they had been involved in a fight with them at the community hall. The accused even led the police to the place of scene at the community hall stating that that was where they had left the deceased after the fight. Fungai Mwale the deceased's brother who was also present corroborated Elliot Muzvimwe's testimony. These two witnesses stated that they spent about 20 minutes at the scene searching for the deceased before proceeding to the police station. Even Mavhuto Bhasikoro and Thulani Gumbo confirmed that upon being arrested the three accused stated that they had left the deceased at the place where they had assaulted him and led the police to the community hall where a search was conducted before the accused were taken to Glen Norah police station.

The first and second accused stated that after their arrest they were taken in Fungai Mwale's pick-up vehicle to some place which is not Hwenje's Nightclub where it was alleged that that was where they had assaulted the deceased and his colleagues. They said that it is Mavhuto Basikoro and Thulani Gumbo who led the police to that place. They said that at the scene they never alighted. They said that they were at this place for less than two minutes. From there, they were taken to the police station. They said that the third accused who was taken in a different car was never brought to the scene. The third accused stated that from the shopping centre he was taken by one of the police officers in the Toyota Noah to Glen View and then to the police station. He said that he was never taken to the community hall.

Despite the denial by the accused persons, we are convinced that the first three accused persons led the police to the scene at Glen Norah community hall. We make this finding because we found the State witnesses to be credible as they corroborated each other. We failed to see why the State witnesses would collude to lie against the accused persons that they led the police to the community hall when they did not. The State witnesses impressed us as truthful witnesses.

We conclude that the accused persons met the deceased and his colleagues at Glen Norah community hall.

(b) Whether or not the accused persons gave warned and cautioned statements at CID Homicide, Harare

In court all the accused denied ever making warned and cautioned statements at CID homicide and challenged their admissibility. In order to show that the accused had indeed made the statements, the State called the investigating officer Detective Assistant Inspector Alick Dube who was also the recording detail. He stated that the accused persons were brought to CID Homicide on 19 April 2012. When they were brought the fourth accused was there. He had been collected from Machipisa police station where he had surrendered himself. He explained in detail how he recorded the warned and cautioned statements from the accused persons. He said he properly warned and cautioned each accused for the charge of murder before the accused elected to make their own statements in writing. The explanation was made to each accused in the absence of the others who were in a separate office. All the four wrote their statements in vernacular. Accused one, three and four wrote in Shona while accused two wrote his in Ndebele. All the four accused signed their statements. The recording of the statements was witnessed by Detective Sergeant Jetro Tapererwa. The investigating officer said after that he took the statements to Harare Magistrates' Court for translation by an Interpreter.

The State also called Detective Sergeant Jetro Tapererwa who confirmed witnessing the recording of the statements at CID Homicide. Diston Michael a principal court interpreter at Harare Magistrates court confirmed that his office translated the statements to English.

We are satisfied that these three State witnesses told the truth of what transpired. We do not believe the accused's version that no statements were ever recorded from them at CID Homicide. Our reasons are that in their defence outline the accused said, "None of the accused persons were recorded a warned and cautioned statement by the police". The meaning of this statement is that no statement was recorded from the accused whatsoever whether at Glen Norah police station, Machipisa police station or at CID Homicide. If statements had been recorded at Glen Norah and Machipisa police stations the accused persons would have simply said so in their defence outline. They would not have made a complete denial of any statements ever having been recorded from them.

It came as a surprise during trial when the accused made an about turn and said that warned and cautioned statements were recorded from them at Glen Norah and Machipisa police stations. They even said that at Glen Norah and Machipisa police stations they had

been made to write their statements on their own and had signed them. They said that they do not know what happened to these statements. This must have come as an afterthought by the accused persons. It cannot be a coincidence that the accused are saying that they wrote their own statements and signed them at Glen Norah and Machipisa and the investigating officer is saying that is what also happened at CID homicide when he recorded the accused persons' statements.

The investigating officer said that the docket he received from Glen Norah had no warned and cautioned statements. As a result he had to record statements from the accused persons. We failed to see why the investigating officer would lie that he recorded statements from the accused when he did not. The accused persons said that all the statements which were produced in court were fabricated and were originated by the investigating officer. We find it highly improbable because the statements are in four different handwritings. Why would the investigating officer labour himself by looking for four people to write the statements for him? Would it not have been easier for him to simply write the statements himself and say that the accused had elected to give their statements while he was recording them?

The accused said that the investigating officer was bent on nailing them for the murder charge; hence he originated these statements himself. An analysis of the contents of the statements does not reflect this at all. None of the accused persons' statements admits to killing the deceased. Accused one, two and three's statements admit that the three accused met the deceased and his colleagues for the second time on their way back to the Nightclub. They further say that it is only accused one and two who alighted from the vehicle and slightly assaulted only two members of the deceased's group. It is said no objects were used and the deceased walked away after a few claps. Accused three who is said to have been driving the car is said to have remained in the car all the while. Accused four is said to have remained at home when the rest of the accused returned to the Nightclub. Honestly, if the investigating officer had decided to nail the accused for murder would he have come up with such weak statements? Apart from admissions to assault which were made by accused one and two, the statements hardly link the four accused persons to murder. Accused four is completely exonerated as he is said to have remained at home.

The contents of these statements are clear testimony on their own that they never originated from the investigating officer but from the accused persons themselves. If they had originated from the investigating officer would he not have made sure that they tallied with

the evidence of the State witnesses? We believe that that is what would have happened. It only makes sense that way. The State witnesses said on the second encounter with the accused persons at the community hall, the accused were still four in number and that accused four was the one who was still driving the Toyota Noah. The State witnesses further said that the accused alighted from the vehicle and were all involved in the assault. Would it not have been logical for the investigating officer to say all this in the warned and cautioned statements he fabricated? This would have guaranteed the State of a conviction.

In cross examining the investigating officer the accused's counsel asked,

“Are you aware that the court (remand court) ordered the State to investigate the circumstances relating to the recording of the warned and cautioned statements and allegations of torture by CID homicide?”

This question simply means that CID Homicide had recorded the warned and cautioned statements from the accused persons and that in doing so had tortured them.

In response the investigating officer said,

“I am aware that allegations of assault were made by you and the court ordered an investigation.”

If no statements had been recorded from the accused at CID Homicide, the remand court would not have been given such a complaint by the accused persons' counsel on the accused persons' first appearance in court.

In view of the foregoing we are satisfied that the State managed to prove that the accused persons gave warned and cautioned statements at CID Homicide. The statements are therefore admissible as evidence. We are satisfied that no statements were ever recorded from the accused persons at Glen Norah and Machipisa police stations. In any case there is no way a warned and cautioned statement could have been recorded from accused four at Machipisa because Machipisa police never handled the matter at all. They did not even have the docket. It is accused four who just handed himself over there. From there he was transferred to CID Homicide.

The admissibility of the accused persons' warned and cautioned statements further strengthens our finding in point (a) above that the accused persons did meet the deceased and his colleagues for the second time at Glen Norah community hall. In their warned and cautioned statements accused one, two and three admitted meeting the deceased and his colleagues for the second time at the community hall. Accused two and three further admitted in their statements that after they had been arrested in Mutomba Nightclub they went with the

police to the scene (Glen Norah community hall) to look for the deceased but did not find him.

(C) Whether or not the fourth accused was present during the second encounter

Other than Mavhuto Bhasikoro and Thulani Gumbo's word that during the second encounter four accused persons disembarked from the vehicle and started assaulting them, the State has no other evidence which clearly shows that accused four was present at this scene. Whereas these State witnesses managed to describe the attire of the first three accused persons, they could not describe accused four's attire. Mavhuto Bhasikoro said that accused four is the one who was still driving the vehicle. Thulani Gumbo said that he did not see who was driving the vehicle because when it stopped the accused persons quickly opened the doors and came out.

On the other hand, the evidence by the accused shows that accused four was not at this scene. All the accused in their statements say accused four had remained at home when the others returned to the nightclub. What supports their version is that when accused one, two and three were arrested at Mutumba Night Club accused four was not there. Upon being questioned about the whereabouts of accused four by the police, accused one, two and three stated that they had left him at home.

There being no other evidence supporting the State's version, we are inclined to believe the accused persons' version. The State was unable to rebut accused four's alibi. We thus make a finding that accused four was not present during the second encounter.

(d) Whether or not the deceased died as a result of the injuries sustained following the assault by the accused persons.

The first encounter at Hwenje's nightclub

Mavhuto Bhasikoro in his evidence in chief said that all of them were assaulted using hands and booted feet. He said that they did not retaliate as they were drunk. He said that they were assaulted for ten minutes before the arrival of the police.

During cross examination, he said that the assault during the first encounter was not so severe as to cause harm or death. He said personally he was slapped by the second accused. He said that he did not see who amongst the other three accused assaulted the deceased and his other colleagues. He said that he did not see as he was drunk. At the same time he said that none of them was assaulted using booted feet or clenched fists. He further

said that all of them were slapped with open hands on the faces. He said that the assault lasted 5-6 minutes.

About this incident Thulani Gumbo said that everybody else in their group was assaulted except the deceased. He said that the assault took 12-15 minutes. He said that they alighted from the vehicle after they had been told to do so by the accused persons after having failed to pay the money. He said even the deceased disembarked from the vehicle on his own. He said that the deceased went and stood a distance away from the Toyota Noah as his colleagues were being assaulted.

Under cross examination this witness said that during this incident the deceased was never assaulted at all.

All the four accused persons stated that in this encounter it is only accused four who had a scuffle with the deceased's colleagues. They said that although accused four slapped some of the deceased's colleagues with open hands, the deceased was never assaulted as he was stone-drunk and was never involved in the quarrel.

Analysis

The accused persons denied that the deceased was ever assaulted. Thulani Bhasikoro denied it. Mavhuto Bhasikoro's evidence is confusing. Initially he said everyone from his side was assaulted using booted feet and open hands. He then turned around and said that no one was assaulted with booted feet. He then went on to say that he did not see how his colleagues were assaulted. So if he did not see how his colleagues were assaulted he cannot say with absolute certainty that the deceased was assaulted during this encounter.

It is our conclusion that during this encounter the deceased was not assaulted by any of the accused persons.

The second encounter at the community hall

Mavhuto Bhasikoro told the court that during the second encounter at the community hall, the accused persons assaulted them with more intensity and the assault lasted about 15 minutes before he managed to run away. Mavhuto Bhasikoro said that the four of them were assaulted using booted feet and hands. He said that the blows to the deceased were directed to his face and ribs. He said that as the deceased was being assaulted he was being held by two of the accused persons but he was in a standing position.

Under cross examination, he said that personally he was assaulted with clenched fists several times on the face. He could not remember if it was accused one or two who assaulted him. He said that as he was being held, he also saw the deceased being held by accused two and three. He said at the time he ran away he saw the deceased being assaulted by accused one and two. As he continued to be questioned he changed his story and said that the person who assaulted him was accused three. He said that he remembered him because of what he was wearing. He said that he saw the deceased being assaulted with open hands and booted feet. He said that the deceased was being kicked all over his body including the chest and head.

Asked if all the four accused at one time assaulted the deceased, Mavhuto Bhasikoro said that he did not see that. However, in his statement to the police he said that the deceased fell down as he was being assaulted. He further said that at the time he ran away he left the deceased being assaulted by all the four accused persons.

Mavhuto Bhasikoro continued to contradict himself. The defence counsel asked him if during the assault the deceased ever fell down and he denied it. However, he admitted that in his statement to the police he said that the deceased fell down as was being assaulted. When asked to explain the contradictions he said that he was forgetting some of the things because of time lapse.

Mavhuto Bhasikoro said that he would not know whether or not the deceased had sustained any injuries by the time he ran away.

Thulani Gumbo in his evidence in chief said that when the accused alighted from their vehicle they assaulted everyone with open hands. He said that personally he was assaulted with open hands and clenched fists on the face and ribs. He said that he was not assaulted with booted feet. He said that he would not know if any of his colleagues were assaulted with booted feet. He said that personally he did not sustain any visible injuries.

He said that during the duration of his assault he was unable to see how his colleagues were being assaulted. Asked if any weapon was used by the accused persons, Thulani Gumbo said that he would not know but as he was being assaulted by accused two, he felt some object inside the sleeve of his jacket.

Thulani Gumbo further said that at the time he escaped, the deceased was being held by the collar and being slapped with open hands. He said that during the scuffle the deceased did not fall down. He (Thulani) said that he was assaulted for about 10minutes before he managed to flee. He said that after he had run for about 100m he looked back and heard the

deceased being ordered to get into the vehicle. However, he did not see the deceased getting into the vehicle as he was running away.

During cross examination he said that when he escaped and looked back he saw all the four accused now assaulting the deceased with open hands. He then changed and said the person who had assaulted him was accused one and he is the one whose jacket's sleeve had an object inside. Asked how many accused persons had a black jacket, he said only one. When it was put to him that in his statement to the police he said that at the time he escaped the deceased was on the ground as he was being assaulted by the accused persons with booted feet, he said that if that is what he said to the police it was correct. It was also put to him that in his statement to the police he had said that he had seen the deceased being forced into the car. He denied having seen the deceased being forced into the vehicle.

Thulani Gumbo said that when he escaped from the scene he ran towards Masimbi bus stop. He estimated the distance from the community hall to Masimbi bus stop to be 170metres. He said just as he arrived at the bus stop running, the accused person's vehicle arrived too. It was following him. He said that he ran away from it and as such he could not see its occupants. He could not tell whether or not the deceased was inside the vehicle or had been left at the scene.

Analysis of the assault

It is clear that the evidence of the two State witnesses is full of contradictions. Each witness was contradicting himself. This is an assault which happened at night and at a place where visibility was not very good, both witnesses were drunk and both of them were assaulted simultaneously. One cannot expect them to have made the same observations during the assault. There is no way they could have managed to witness exactly the same things under the circumstances. Obviously each one was trying to defend himself and to find ways of escaping from the assault.

What is disappointing though is the fact that each witness contradicted himself as has been demonstrated above. However, what we managed to decipher from their evidence is that the deceased was also assaulted.

While the State alleges, in its summary of evidence, that the accused was assaulted with open hands, clenched fists and booted feet, the evidence that emerged from the two State witnesses makes it very difficult for us to arrive at the conclusion that the deceased was assaulted with booted feet with certainty. This is because initially Mavhuto Bhasikoro said all the four of them were assaulted with open hands and booted feet. Under cross examination he

changed and said that personally he was only assaulted with clenched fists. This means that personally he was not assaulted with booted feet. Although he maintained that the deceased was being kicked with booted feet, what makes this difficult to believe is that he said that the deceased was being kicked all over his body, chest and head as he was standing. He said that the deceased never fell down. Honestly, is it possible to kick someone as tall as 170cm in the chest and head while he is standing? It is highly improbable.

What worsens the doubt in Mavhuto Bhasikoro's evidence is the further contradiction that he made. He did not dispute telling the police that the deceased fell down during the assault. When asked to explain the contradiction he said that because of the time lapse he was now forgetting some of the things. This kind of explanation left us wondering as to whether or not the deceased fell during the assault.

On the other hand Thulani Gumbo said personally he was assaulted with open hands and clenched fists. He said that he was not assaulted with booted feet. This means that the two of them, that is, Mavhuto Bhasikoro and Thulani Gumbo were not assaulted with booted feet. So Mavhuto Bhasikoro did not tell the truth when he said that all the four of them were assaulted with booted feet.

Thulani Gumbo said that he would not know if any of his colleagues were assaulted with booted feet because he did not see how they were assaulted. He said that he only saw the deceased being assaulted with open hands at the time he escaped. He said that all the while the deceased never fell down. However, in his statement to the police, just like Mavhuto Bhasikoro, he also said that the deceased fell down during the assault. In explaining the contradiction he said that if that is what he said to the police, then it was true.

The self-contradictions which were made by the two State witnesses make it difficult for us to say with certainty that the deceased was assaulted with booted feet and that he fell down during the assault.

Both witnesses said that they did not sustain any visible injuries. They never sought medical treatment. This suggests that they were not severely assaulted.

The two State witnesses said that they would not know whether or not the deceased had sustained any injuries at the time they ran away. What is therefore clear is that there is no evidence by the State to show the severity of the assault that was perpetrated upon the deceased by the accused persons by the time the deceased's friends escaped.

Although Thulani Gumbo said that he felt an object inside one of the accused's jacket's sleeve, it is common cause that that object, whatever it was, was never used to

assault anyone from the deceased's side, during the presence of the two State witnesses. In fact, there is no evidence of any weapon being used on the deceased during the presence of the two State witnesses.

The State suggests in its summary of evidence that the accused bundled the deceased in their vehicle, took him to some place where they assaulted him with an unknown object on the head and all over his body thereby killing him and dumping his body along High Glen road. While there is this suggestion by the State, there is no direct evidence to this effect. Thulani Gumbo and Mavhuto Bhasikoro said that they did not witness the deceased being forced into the vehicle. It is only Thulani Gumbo who said that he heard the deceased being ordered to get into the vehicle. Whether or not the deceased then got into the vehicle, Thulani Gumbo did not see as he had run away.

What is clear from Thulani Gumbo's evidence is that the accused persons did not remain at the scene for too long. We say this because Thulani Gumbo said that from the scene he ran to Masimbi bus stop which he estimated to be 170m away. As he reached the bus stop the accused's vehicle caught up with him. Thulani Gumbo could not see whether or not the deceased was in it.

The next thing that happened is that the deceased's body was found the following morning along High Glen road. The deceased's shoes and money amounting to around \$80 was missing.

As already stated above, the post mortem report states that the deceased had a fractured skull. The second, fourth, fifth, sixth and seventh ribs were fractured too.

The cause of death was subdural haemorrhage, skull fracture and severe head injury due to assault.

The cause of death and the injuries which were later found on the deceased's body show that an object was later used to assault the deceased after his colleagues had left him. Clenched fists and open hands could not have caused a fractured skull, a cut on the leg and fractured ribs.

What is in issue now is whether or not it is the three accused persons who inflicted the fatal injuries on the deceased. There being no direct evidence to this effect, we will consider whether the accused persons can be convicted on circumstantial evidence.

The law on circumstantial evidence and its application in this case

When a case leans on circumstantial evidence it means that there is no direct evidence linking the accused to the offence. The court is supposed to infer from the established facts of the case whether the accused committed the offence or not. The inference sought must however lead to one inescapable conclusion since the accused's guilt must be proven beyond reasonable doubt.

WATERMEYER JA in *R v Blom* 1939 AD 208, referred to two cardinal rules of logic:

- “(1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (2) the proved facts should be such that they exclude every reasonable inference from them save the one 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.”

The State counsel made submissions to the effect that the following circumstances prove the accused's guilt. One of the accused was seen with an object in his sleeve. The deceased was found dead within the vicinity of the scene of the assault. The body had injuries consistent with assault and the use of a weapon. Accused one was seen putting on a blood stained T-shirt which he could not satisfactorily account for and that that could not have been by coincidence.

The argument by the State makes a lot of sense and leads to a reasonable inference that the accused did cause the death of the deceased. It is an established fact that when the deceased's colleagues ran away the accused persons remained with the deceased assaulting him at the community hall. The deceased was so drunk that he could not defend himself or escape. During the assault Thulani Gumbo had felt an object in one of the accused persons' jacket's sleeve. At the time Thulani Gumbo ran away, he said that he heard the deceased being ordered to get into the vehicle. At day break his body was found within the vicinity of the scene of assault. Fungai Mwale the brother of the deceased estimated the distance from the community hall to where the body was found at 700-800 metres. Mavhuto Bhasikoro estimated it at 70metres but then he said that he is not good at estimating distances. No other person gave an estimation of that distance. The cause of death was consistent with assault. The fractures on the body show that a weapon had been used to inflict them. On the other hand accused one's T-shirt was seen to have blood stains at the front at the time he was arrested in Mutomba night club, just a few hours after the assault.

Under the circumstances it is reasonable to infer that when the accused remained with the deceased at the community hall they took him in their vehicle and then assaulted him with

an object. The accused persons then dumped either the deceased or his body at the place where it was later found at day break. It is not known whether or not at the time of being dumped the deceased had died or not.

Stephen Sodzano, the police officer who attended the scene where the body was found did not testify in court. By consent he was not called to testify. His evidence was formally admitted. His undisputed evidence was that the observations he made at the scene were that the deceased had been attacked elsewhere before he died at this place. He arrived at this conclusion because there were no signs of a struggle at this place except a few drops of blood which were on the grass below the head. He checked around to see if he could find anywhere where the attack could have taken place, but found none. The body was lying face down. The head had 6 deep cuts and another deep cut on the right leg.

The injuries on the deceased's body were severe. It had cuts and fractures. Fungai Mwale said that he saw the deep cuts in the head and on the leg. He said that both wounds were bleeding. The absence of signs of a struggle at or near the place where the body was found simply means that the deceased was assaulted at a different place far away. Five of his ribs were broken. He had a severe head injury and a fractured skull. He had a 12cm long cut on the right leg. With these kinds of injuries that the deceased had sustained, we do not believe that after he had been attacked he was able to walk at all, let alone walk for a long distance. This is more so given the fact that the deceased was extremely drunk. Now, if he could not walk the only reasonable inference to make is that the deceased or his body was dumped at the place where it was later found.

Upon being arrested the accused persons said that they had left the deceased at the community hall where the fight had taken place. Even in their warned and cautioned statements, they said the same thing. The State does not have any evidence to rebut this averment by the accused persons. Assuming that they told the truth, the possibility of the deceased having been murdered by some other people like robbers, as suggested by the accused persons cannot be ruled out. This is more so given the fact that the deceased's shoes and money were found missing when his body was found at day break.

Looking at this possibility in conjunction with the undisputed evidence of Stephen Sodzano, what it means is that the robbers attacked the deceased at a different place and then carried his body and dumped it where it was later found. Now the question is would some robbers have gone that extra mile? If so, for what reason would they go that extra mile? It is our considered view that robbers would have left him where they attacked and robbed him.

They would not have laboured themselves with carrying the deceased from where they had robbed and attacked him and dumping him elsewhere. They had no reason for wanting to remove the deceased's body from the place where they had attacked the deceased.

Suppose the robbers attacked the deceased and left him at the place where they attacked him, the fact that his body was then found at a different place means that the deceased walked to the place where he later died even though we doubt that he could have walked. If the deceased walked to that place, surely a trail of blood from the place of attack leading to the place where the body was found should have been seen. The 12cm long cut on the right leg and the head injury must have bled as was observed by Fungai Mwale. It is our considered view that it is not possible that the deceased walked and left no sign of blood whatsoever on the path that he used when he was bleeding from the severe injuries.

In our view, although there is another possible inference that the deceased was murdered by robbers, that inference has been ruled out by the explanation and analysis of the observations which were made by Stephen Sodzano who attended the scene where the deceased's body was found. This leaves us with one inescapable conclusion that it is the accused persons who murdered the deceased. They remained with him when his colleagues ran away. They were assaulting him. One of the accused had an object inside his jacket's sleeve. They were heard ordering him to get into the vehicle. They had the means to ferry him from wherever they assaulted him to the place where his body was later found. To us the missing shoes and money were just a cover up by the accused persons. They took them away in order to make it appear as if the deceased had been robbed and murdered. The shoes and money were never recovered.

What strengthens our finding is the blood that was seen on accused one's T-shirt. This is the T-shirt which he was wearing on the night in question. It is not in dispute that the T-shirt had blood on its front. The only dispute was on the amount of the blood. State witnesses varied on this issue. Some said the blood was much while others said that it was not that much. The first, second and third accused said that it was very little. The problem is that this T-shirt was not taken by Glen Norah Police as an exhibit. So the T-shirt was not seen by the court. Again it was not taken to forensic for an examination to establish whose blood was on it. The investigating officer said that he only learnt of the said T-shirt two weeks after he had commenced investigations. By that time the deceased had already been buried. No blood sample had been taken from him in order to compare it with the blood that was on accused

one's T-shirt. If this had been done, maybe it would have helped resolve this case. The scientific test would have shown whose blood it was between the deceased and the accused.

As it is, we only have accused one's word that it was his blood. Be that as it may, it is common cause that he had no visible injury on his person. His explanation was that he bled from the nose. However, what is worrying is that he gave three different explanations about how he bled from the nose.

In his defence outline, he said that when he was drinking beer in Hwenje's Nightclub at around 8pm with accused two they had a misunderstanding with the owner of the bar. A fight ensued resulting in him bleeding from the nose.

During the defence case he gave a different explanation that he had been assaulted by one Knox in Knox's bar which is next to Hwenje's Nightclub. He said that when this happened accused two and he had temporarily left Hwenje's Nightclub for Knox's bar. There was a misunderstanding at the entrance. He said that as a result Knox slapped him with an open hand in the face and he started bleeding from the nose.

In his warned and cautioned statement which was produced as exhibit one, he said that during the scuffle which happened at Hwenje's Nightclub one of the deceased's colleagues hit him with an elbow and he bled from the nose.

We are well aware that the accused has no duty to prove his innocence. Again he has no onus to convince the court of the truth of any explanation that he gives. In *R v Difford* 1937 (AD) 370 at 383 it was held that,

“.....if he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal.....”

In *casu* the three different explanations for the nose bleeding which were given by accused one make us believe beyond reasonable doubt that they are false. It is not improbable that accused one bled from the nose after he had been assaulted. However, what is improbable is that he did not stick to that single explanation for the nose bleeding. There is no explanation for the three varying explanations that he gave. It would have made sense if he had stuck to one explanation even if it was an improbable one.

In our view accused one had all those explanations because they are not the truth of what happened. Naturally it is difficult to remember a lie and stick to it. He was hiding the truth of what really happened. Under the circumstances it can be reasonably inferred that

either he bled from the nose at the time they were assaulting the deceased. Anything could have happened which caused him to bleed. The other possibility is that it was the deceased's blood which came out as he was being assaulted or as they were holding him at the time they were dumping him along High Glen road.

In view of the foregoing we find the first three accused guilty of murder as defined in s 47(1) (b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. We cannot conclude that the accused had an actual intent to cause the death because there is no evidence to show that they set out to commit the offence. Under the circumstances the accused must have foreseen the real possibility of death arising in the manner they assaulted the deceased and persisted with such conduct despite the risk. They assaulted him with an object on the head and all over his body.

As for accused four, evidence does not show that he was present during the second encounter at the community hall. This means that he did not participate in the assault that happened at the community hall. There is also no evidence, direct or circumstantial, that shows that he later participated in the fatal assault which resulted in the death of the deceased. He is therefore found not guilty and acquitted of murder. Evidence has shown that he did not assault the deceased during the first encounter at Hwenje's Nightclub. So he cannot even be convicted of assault.

Attorney General's Office, for the state
Mugiya and Macharaga Legal Practitioners, for the accused