

THE STATE

VS

JAMES NGORIMA

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 1, 2, 9 & 26 OCTOBER 2018.

ASSESSORS:

1. Mr Gweru
2. Mr Chikukwa

Criminal Trial

M. Tembo for the State

F. Chirairo for the Accused

MAWADZE J: The accused was arraigned before us to answer to a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

The charge is that on 1 April, 2018 at Nduna Village, Headman Madzivire, Chivi, Masvingo the accused unlawfully and with intent kill shot his wife Lucia Sumaili with a pistol in the head thereby causing her death.

The now deceased apparently aged 28 years and the accused were husband and wife. They had an unregistered customary law union. They were residing together as lodgers at Ngundu Growth Point in Chivi, Masvingo. They had no children. This was the now deceased's second marriage. The now deceased had a daughter Chantel aged about 6 years from her first marriage and was staying with her together with her brother's son, Wayne, much younger than Chantel (together with the accused). The accused was employed by Zimbabwe Amalgamated

Housing Association (ZAHA) and at the material time he was based at Buffalo Range in Chiredzi, some 100 km from Ngundu. The state case is that on the night of 31 March 2018 the accused and the now deceased fought over the accused's alleged infidelity. In anger the now deceased is said to have smashed the windows of the accused's motor vehicle after which she fled to her parent's home some 5 km from Ngundu Growth Point. The accused is said to have looked for her.

The state alleges that in the morning of 1 April 2018 accused proceeded to his work place at Buffalo Range, Chiredzi where he stole a pistol which was being used by a security guard Eneas Mungiria. Thereafter it is alleged the accused proceeded to the home of the now deceased's parents where he indicated his intention to divorce the now deceased.

It is alleged that when the now deceased's parents left the yard searching for network coverage in order to call the accused's relatives the accused proceeded to his motor vehicle where he had hidden the pistol he had stolen. He entered the house where the deceased, her daughter, Wayne and another younger child were watching television. The accused is said to have shot the now deceased with a pistol on the forehead killing her instantly. The accused then left the home of the now deceased's parents in his motor vehicle and proceeded to one Killer Zivhu's residence in Gomana Village where he was subsequently arrested.

The accused denied shooting the now deceased with a pistol. In his defence outline the accused disputed that he stole the said pistol and instead explained how he ended up with the pistol. The accused said on 29 March 2018 during the Easter holidays he knocked off duty at about 1700 hrs at Buffalo Range, Chiredzi and proceeded for his residence at Ngundu Growth Point. The accused said he forgot to surrender the pistol to a security guard on duty one Eneas Mungiria and instead put it under the passenger seat of his motor vehicle on 29 March 2018. The accused said he had the pistol from 29 March 2018 until 1 April, 2018 when the now deceased died as he had again forgot to leave the pistol on 31 March 2018 when he passed through his work place and met Eneas Muringia.

The accused confirmed that he had an altercation with the now deceased on the night of 31 March, 2018 which spilled over to the morning of 1 April, 2018. He said the now deceased without his knowledge took accused's cellphone and the pistol from accused's motor vehicle after which she smashed the windows of the accused's motor vehicle. The accused said the now deceased proceeded to her maiden home some 2 km away from Ngundu at 0830 hrs. The accused said he discovered what the now deceased had done and followed her at her parents' home where he located her inside the house. He said upon seeing the accused the now

deceased who had the accused's cellphone by her side pointed the pistol to her head. Accused said he knelt pleading with the now deceased not to play with the loaded pistol. Instead the accused said the now deceased shot herself on the forehead. The accused said upon his arrest he requested to have his warned and cautioned statement recorded in the presence of his legal practitioner of choice but that the police failed to afford him that opportunity until the commencement of this trial.

In support of its case the state led *viva voce* evidence from Eneas Mungiria a security guard, Daniel Sumaili and Evans Sumaili both brothers to the now deceased, Manuel Sumaili the now deceased's father, Assistant Inspector Onias Chitsungo of ZRP Ngundu, Dr Godfrey Zimbwa and the Investigating Officer Detective Sergeant Farirayi Chimuka of CID Mwenezi Police Station. The accused gave evidence and did not call any witnesses.

In the course of the trial a total of 4 Exhibits were produced by consent being;

- Exhibit 1 the post mortem report,
- Exhibit 2 (a) to (d) being deceased's photographs;
- Exhibit 3 a Forensic Ballistic report and
- Exhibit 4 the said FN Browning pistol serial number 76C38503

As per Exhibit 1 the now deceased had a single gunshot wound whose entry point was the right supra orbital margin and the exit was on the mid cervical area or midline. The other injury on the now deceased was a laceration on the infra orbital margin of the left eye which was about 2 cm with rough edges. The doctor concluded that the cause of death was severe head injury arising from the gunshot wound.

As per Exhibit 2(a) the photographs show that the point of the bullet entry was just above the right eye and as per Exhibit 2(b) the point of the bullet exit was in the back of the neck. Exhibit 2(c) shows the now deceased's lifeless body slumped in a seating position on a sofa.

According to Exhibit 3 the Forensic Ballistic Report compiled by Detective Assistant Inspector Dube the pistol in issue was functional and had been fired. The spent cartridge found at the scene and a spent bullet were both fired from the said pistol which is Exhibit 4 the FN Browning pistol. This evidence is not in issue.

A police officer Prosper Chandigere of CID Mwenezi is the one who took the pistol, the bullet head, spent cartridge and a live bullet found on the accused to the Forensic Laboratory for examination by Detective Assistant Inspector Dube who compiled Exhibit 3. His evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

From the evidence placed before us there was no eye witness to how the now deceased met her death. The state relied on circumstantial evidence despite that the now deceased met her death in the company of her 6-year-old daughter one Chantel and other 2 younger children as alleged. The accused attributes the now deceased's death to suicide. The narrow issue we have to resolve therefore is whether indeed this was a case of suicide as per accused's version or that the accused shot the now deceased as per the state's version. To resolve this dispute, we need to analyse the evidence before us.

Eneas Mungiria (Eneas)

Eneas is employed by Span Gold Security Company a company which offered security services at ZAHA premises at Buffalo Range, Chiredzi where the accused was employed. He was employed as a security guard at the premises together with one Solomon Tigere. His testimony relates to how the accused ended up in possession of Exhibit 4 the pistol.

Eneas testified that only himself and Solomon Tigere were the security guards employed at the said site at Buffalo Range, Chiredzi. He said they performed their duties at night guarding the equipment. During the day no security guard would be on duty.

Eneas said he had known the accused for 6 years as they had worked together in Norton for 4 years and for 2 years at Buffalo Range, Chiredzi. He said the accused was not employed by the security company Span Gold hence he was not allowed to handle any firearms. Instead the accused was a brick moulder. At the material time ZAHA had retrenched all its workers except the site Manager one Emmanuel Zivhu and the accused who both remained at the site.

Eneas testified that he performed his duties at night using the pistol Exhibit 4. At dawn after duty he would secure the pistol underneath a bed in the site Manager's cabin which was locked and his colleague would do the same while on duty.

In relation to this case he said his colleague finished his stint at the commencement of the Easter holidays and he resumed duty on the night of 29 March 2018. He found the pistol Exhibit 4 at its usual place and used it until the night of 31 March 2018 after which he secured it at its usual place in the morning of 1 April 2018. Eneas said in the morning of 1 April 2018 around 0900 hrs the accused arrived at the site driving his motor vehicle which had shattered windows and accused told him upon inquiry that accused's wife had broken the car windows. He said the accused asked for food and he directed him to the site Manager's cabin where there was some left overs. Eneas said accused entered this cabin but Eneas did not pay much attention. This is the same cabin where the firearm was secured. The accused then left his tool

box and drove away. Eneas said he later locked the Manager's cabin and proceeded to church and returned in the afternoon.

It is Eneas's evidence that around 16.00 hrs an ex-employee of ZAHA Robson Tawedzerwa telephoned Eneas inquiring if Eneas was in possession of the pistol as word was it that accused had shot and killed his wife in Ngundu. Eneas said he checked in the cabin and realised the firearm was missing. He immediately telephoned the site Manager and his employers who in turn alerted the police at ZRP Triangle.

Eneas testified that only the pistol Exhibit 4 was functional at the site as the other firearm, a shotgun, was non-functional. Under cross examination Eneas dismissed as false accused's story that accused had been given the said pistol Exhibit 4 by Eneas's colleague Solomon Tigere on 29 March 2018 and challenged accused to call Solomon Tigere, an offer the accused did not take up. Eneas insisted he had the pistol from 29 March 2018 until 1 April 2018 when it went missing. In fact, Eneas said Span Gold Security Company was charged for improperly securing firearms which were not being kept in a gun cabinet but underneath the site Manager's bed in a lockable cabin to which other persons like accused had access.

In our assessment Eneas's evidence is simple and straight forward. He was clear that the accused was not allowed to possess the pistol Exhibit 4 as he was neither a security guard nor an employee of Span Gold Security Company. The accused, according to Eneas, was not the custodian of the pistol at all. Further he was clear that he was in possession of the firearm until on 1 April 2018 when it went missing and a police report was made. He explained the accused's presence at the site on 1 April 2018 and how accused entered the cabin where the firearm was kept. Apparently accused never took up his threat to call Eneas's colleague Solomon Tigere. In fact in his defence outline accused does not mention this Solomon Tigere at all. The evidence of Eneas was not discredited at all and he had no motive to lie. We found no basis to doubt his credibility.

The evidence of the now deceased's brothers Daniel Sumaili and Evans Sumaili and their father Manuel Sumaili relate to the events of 1 April 2018 and other ancillary issues.

Daniel Sumaili (Daniel)

Daniel said on 1 April 2018 he was unwell when the now deceased arrived in the morning from her matrimonial home. The now deceased had an injury below the left eye and explained that the accused had assaulted her the previous night over the food she had served him, namely milk, after accused came late from a beer drink. She said he had not left any money

for relish. The now deceased also told Daniel that the accused had smashed the family television set.

Daniel said the now deceased reported that in the morning of 1 April 2018 the accused had woken up saying he wanted to go and see his girlfriend in Chiredzi which then angered the now deceased who in turn smashed the car windows of accused's motor vehicle after which she fled to her parents' home where Daniel stayed. He said the now deceased arrived with her daughter Chantel and implored Daniel not to tell accused at all that she was at the home if he happened to pass by.

Daniel said moments later accused arrived looking for the now deceased saying she had damaged his motor vehicle. Daniel lied that he had not seen the now deceased after which the accused drove off.

After some time that morning Daniel said accused returned in the company of Daniel's elder brother Evans Sumaili. Their parents were now present and they engaged accused over his dispute with the now deceased. He said accused said he wanted to divorce the now deceased. Daniel's parents then indicated they were telephoning accused's relatives to discuss the matter and they went out of the yard searching for network coverage. The now deceased was inside the house with 3 young children watching television.

Daniel said the accused who had hitherto been seated in the yard went to his motor vehicle nearby and took out something. Daniel could not see what it was. The accused went straight into the house where the now deceased and the 3 children were. Daniel was seated outside and he heard accused demanding his cellphone from the now deceased. The now deceased refused to hand it over saying she would only do so in the presence of accused's relatives. Daniel said immediately he heard a gunshot. The accused immediately came out wielding a pistol Exhibit 4. In fear Daniel fled. The accused walked to his car and when Daniel's father rushed back accused pointed the firearm at him saying no one should come close to him. Daniel said his father also fled as accused held the pistol to his head, got into his motor vehicle and sped off at high speed. Daniel rushed into the house and found the now deceased slumped in the sofa and dead.

Under cross examination Daniel dismissed as false that the accused ever begged the now deceased not to play with the pistol. He also discounted the possibility that the now deceased shot herself saying she had fled from the accused's violent conduct and virtually hiding at her maiden home.

In our assessment Daniel gave his evidence well. The two visits made to his residence by the accused are not refuted. Daniel did not seek to exaggerate his evidence but restricted himself to what he saw. To his credit he did not seek to say he actually saw accused shooting the now deceased. We find no reason to disbelieve him.

Evans Sumaili (Evans)

Evans said in the morning of 1 April, 2018 he passed through accused's residence where the accused showed him his damaged motor vehicle saying the now deceased had caused this damage and fled. The accused also reported that he had earlier on failed to locate the now deceased at her maiden home. He said accused revealed he had quarrelled with the now deceased the previous night and that in the morning of 1 April 2018 accused had had a telephone conversation with his girlfriend which had then angered the now deceased after which she smashed the windows of the accused's motor vehicle and fled.

Evans said they proceeded to the now deceased's maiden residence in accused's motor vehicle looking for the now deceased. They found the now deceased at home and Evans observed she had an injury below the left eye. Evans said the now deceased seemed unsettled when she learnt of the accused's arrival as she was visibly trembling not knowing where to go. The now deceased only went to bath at the time her parents were engaging the accused as accused said he wanted to end the marriage. Evans said his parents then left the yard in search of network coverage to telephone accused's relatives. He said accused proceeded to his motor vehicle as Evans followed his parents outside the yard.

At that stage Evans said he heard a gunshot and ran back to the house. He met the accused holding a firearm walking very fast. Evans's father came running but Evans had to restrain him telling him accused was armed. He said accused pointed the firearm at Evan's father who in turn fled. Accused pointed the firearm to his head saying "bye bye" and got into his motor vehicle after which he sped off.

In our view the evidence of Evans was not meaningfully challenged except that he had left some details in his statement to the police like accused pointing the firearm to Evans's father and to his head. Just like Daniel, Evans said it was inconceivable that the now deceased would shoot herself after fleeing from accused and was visibly scared. Again Evans did not purport to be an eye witness to how the now deceased got shot. We find no basis to disbelieve him.

Emmanuel Sumaili (Emmanuel)

Emmanuel gave the court an insight into the marriage between the accused and the now deceased which marriage was a turbulent one. He was called to intervene as the now deceased's father on some of the occasions.

Emmanuel said in one of the incidents accused and the now deceased quarrelled over a telephone call accused had received presumably from a girlfriend and accused became violent. He said accused damaged some premises at a doctor's surgery where the now deceased was employed. As a result, he said the accused was arrested and he paid an admission of guilt fine. This however resulted in the now deceased being discharged by her employer.

Emmanuel said the now deceased and accused also quarrelled over the family motor vehicle as the now deceased claimed to have contributed US\$2 500 in its purchase and accused only US\$300. The now deceased alleged the accused was now flirting with girlfriends using that same motor vehicle. In another incident during the turbulent one-year marriage Emmanuel said after a quarrel the now deceased sent him a distress call after accused had assaulted her and broke a door at their lodgings. Upon attending to the distress call he said accused was very violent and threw at him and the now deceased what appeared to be a like a petrol bomb. They advised the police who guarded the premises overnight. He said police later called accused and counselled him and did not effect any arrest.

Emmanuel said as result of these developments he called accused's relatives who came and promised to counsel both accused and the now deceased and to also stay with the couple. He said accused and the now deceased briefly stayed with the accused's relatives who then informed Emmanuel that problems between the accused and the now deceased had been resolved. He said the now deceased however advised him that she was still unhappy in the marriage as accused still abused her hence she was traumatised and wanted a divorce. This was about 3 months before this incident.

The issue of the long outstanding marital problems between the accused and the now deceased was not challenged by the accused. Our conclusion therefore is that this was not a blissful marriage as it was characterised by bouts of violence.

Turning to the events of the fateful day, 1 April, 2018. Emmanuel said he was at a neighbour's memorial service in the morning when he was called back home after the now deceased's arrival. Upon arrival he observed that the now deceased was dirty and visibly tired. She had an injury below the left eye and reported that the accused had assaulted her again over

his alleged infidelity. The now deceased told him she was now fed up and wanted to divorce. He advised the now deceased to take a bath.

Emmanuel said moments later accused arrived in his motor vehicle inquiring about the now deceased's whereabouts. He told accused that she was inside the family house. The accused indicated that the now deceased had smashed the windows of his motor vehicle and that he wanted a divorce. Emmanuel said he advised accused that he could not resolve this issue with accused alone but had to involve the go-between and accused's relatives as per custom. Thereafter Emmanuel proceeded with his wife out of the yard searching for network coverage to telephone accused's relatives. He saw accused's damaged motor vehicle.

Emmanuel said as he was making the telephone calls he heard a gunshot and rushed back home. He noticed that accused who had moved to his motor vehicle was no longer there. As he got to his house his son Evans held his hand telling him the accused was armed with a gun. Simultaneously the accused emerged wielding the gun pointing at him and he asked accused why accused would want to shoot him. Accused just turned the gun to his own head waiving saying "bye bye" as he paced to his motor vehicle after which he drove away.

Emmanuel said he ran into the house and saw the now deceased's lifeless body slumped in the sofa, with lots of blood on the floor. A spent cartridge was close by. He immediately rushed to ZRP Ngundu to file a report.

Emmanuel said he was present when police arrested accused at one Killer Zivhu's residence. He said upon being confronted by the police the accused moved towards some fish ponds pointing the gun to his head but the armed police ordered him to surrender. He said the accused eventually complied and was arrested. This was after one to two hours after the now deceased's death.

Emmanuel said police asked accused where he got the gun and accused simply said the gun was his.

Under cross examination Emmanuel was visibly shocked by suggestions put to him that his daughter the now deceased shot herself in a suicide. In response he retorted as to why the now deceased who was visibly troubled and had fled from accused to seek refuge at her parent's home would decide to inexplicably kill herself. He also wondered where and how the now deceased would have obtained the firearm. Emmanuel was clearly irritated by the suicide version pleaded by the accused pointing out that he was hearing it for the first time in court. Infact he said in his presence after the arrest the accused had made indications to the police showing how he had shot the now deceased.

In our assessment despite the visible emotional stress Emmanuel gave his evidence quite well. We got the impression that he was a mature self-respecting father. Indeed, he was pained by the death of his daughter but he nonetheless stuck to what he witnessed. He did not try to paint his daughter as an angel but pointed out that she had smashed the windows of accused's motor vehicle. He never sought to lie that he saw the accused pulling the trigger. We therefore assess him as a credible witness. If deceased's relatives were malicious they would simply have connived to say they saw accused shooting the now deceased.

Assistant Inspector Onias Chitsungo (Ass/Insp. Chitsungo)

Ass/Insp. Chitsungo explained how the accused was arrested. He led a team of 5 police details from ZRP Ngundu, 3 who were armed who looked for the accused after the report of murder. They later learnt accused was hiding at one Killer Zivhu's residence and proceeded there. Upon arrival accused moved away to some fish ponds pointing a gun to his head. He ordered accused to drop the gun and surrender as police closed in armed. The accused complied and they arrested him. Upon searching the accused, he recovered a live bullet in accused's jean trousers pocket. He inquired from the accused where accused had got the gun and accused simply said the gun was his.

Ass/Insp. Chitsungo then warned accused of the murder charge as he arrested him and the accused did not respond. Ass/Insp. Chitsungo said he was indeed aware of the marital problems between the accused and the now deceased as at one point they were counselled at ZRP Ngundu.

Ass/Insp. Chitsungo said the accused never told the police that the now deceased had shot herself. His evidence was not challenged.

Detective Sergeant Farirayi Chimuka (D/Sgt. Chimuka)

D/Sgt. Chimuka is a fairly experienced CID detail with 18 years in the police force 13 years of which he has been attached to the CID. He is based at ZRP Mwenezi and is the Investigating Officer.

D/Sgt. Chimuka attended to the scene on 2 April, 2018. He found the now deceased's body slumped in a sofa with a gunshot wound on the forehead just above the right eye. There was lots of blood on the floor. Upon examining the body, he noticed that the bullet had exited through the neck and had pierced the sofa the now deceased was seated on also hitting the wall. He recovered both the bullet head and the spent cartridge and interviewed witnesses. He said he was unable to interview the now deceased's daughter Chantel who was said to be an eye witness to the shooting as she was not only too young but was visibly shaken and traumatised.

Later on he never sought to interview Chantel as accused did explain to him what had transpired as accused made indications.

D/Sgt. Chimuka said he interviewed the accused at ZRP Ngundu and all accused could say was he was aware of the charge of murder he was facing. The accused said he would only give his warned and cautioned statement in the presence of his lawyer.

D/Sgt. Chimuka said accused however agreed to make indications at the scene after he assured him of his safety as accused said he was afraid of the now deceased's relatives. He said at the scene the accused freely and voluntarily made indications but refused to sign them saying he would only do so in the presence of his lawyer.

Thereafter they took accused to ZRP Mwenezi where a legal practitioner *Mr Maboke* arrived saying he was representing the accused. He invited accused to give a warned and cautioned statement but they hit a brick wall as *Mr Maboke* suddenly renounced agency and accused insisted he would only give a statement in the presence of a lawyer.

D/Sgt. Chimuka said they had no choice but to take accused to court within 48 hours after which he was remanded at Masvingo Remand Prison. He later followed accused at prison to record a warned and cautioned statement but accused declined saying his legal practitioner *Mr Mugiya* was to be present. The accused gave him a telephone number allegedly for *Mr Mugiya* but the number was not in use. He advised accused but still accused declined to give a statement. He was instructed by his superiors to proceed and take the docket to the Prosecutor General for prosecution without accused's statement.

Under cross examination D/Sgt. Chimuka said all accused was willing to say verbally was he was aware of the murder charge against him and would only say more in the presence of his legal practitioner. He was taken to task as to why no statement was recorded from an alleged eye witness Chantel and he said he saw no point to bother a traumatised child when accused had indicated to him how he had shot the now deceased and had promised to sign such indications in the presence of his legal practitioner. He denied the accused ever raised the issue of suicide and said that he was hearing it for the first time in court. As a result, he said he did not see the need for checking for the now deceased's finger prints on the pistol, Exhibit 4, or for any gun residue on the now deceased's attire as accused had indicated how he had shot the now deceased without alleging any suicide. Consequently, it was pointless for him to take any swabs on the now deceased.

D/Sgt. Chimuka said the accused was co-operative to the extent that he gave indications freely and voluntarily but was unwilling to sign for these indications in the absence of his legal

practitioner or to give any warned and cautioned statement without the legal practitioner. He nonetheless warned accused of such failure. He dismissed as untrue that the police failed to avail accused's lawyer for him to give a warned and cautioned statement but that it is accused who sent him from pillar to post until the matter was set for trial.

D/Sgt. Chimuka's evidence is clear and straightforward. He articulated quite well his role as the investigating officer. He was quite conscious of the accused's rights and respected them. The only blemish aspect we noted was his folly not to record a statement from an eye witness irrespective of what accused purportedly said or accused's antics. Further as an experienced police officer he should have gathered all evidence to exclude any possibilities despite the alleged co-operation of the accused. In fact, a red light should have flashed at him when the accused refused to sign indications or to give a warned and cautioned statement. It was therefore foolhardy for him to believe accused would not have anything under his sleeve. Thus without an eye witness to the shooting he should indeed have gathered all evidence to exclude alleged suicide. This would have made his task easier and obtain direct evidence rather than for the state to rely on circumstantial evidence. A murder is a serious case which enjoins the police to carry out comprehensive investigations regardless of any purported co-operation by a suspect or accused person.

Dr Godfrey Zimbwa (Dr Zimbwa)

Doctor Zimbwa a medical doctor with 23 years' experience carried out the post mortem on the now deceased and compiled the report, Exhibit 1.

The sum total of his evidence was as follows:-

1. the gun shot's entry was above the right eye and exited in the mid cervical area
2. the now deceased had another injury below the eye tearing the skin which was about 2 cm caused by blunt trauma
3. he established the cause of death as severe head injury because of the brain damage caused by the gun shot

Doctor Zimbwa gave two reasons as to why it was highly improbable that the now deceased could have shot herself and thus totally discounted that she committed suicide. He stated as follows;

- (a) that in suicide cases where one shoots himself/herself the muzzle or barrel of the gun would be very close to the target, that is the skin, and as a result around the entry point of the bullet there should be extensive charring of the skin or burning because of the flame from the gun powder. He said this happens when the muzzle

of the gun is about 30 cm or less from the target or the skin. Now in this particular case there was no charring or burning of the now deceased's skin at the entry point of the bullet. This means the gun which fatally shot the now deceased was fired from at least one metre which rules out suicide.

- (b) the angle of trajectory of the bullet fired ruled out a self-inflicted gunshot. Doctor Zimbwa said the entry point was above the right eye and the bullet came out through the neck on the midline. This means that the trajectory is inclined downwards. The scientific explanation therefore is that the muzzle of the gun was fired whilst above the level of the now deceased's right eye. In the normal circumstances if one shoots himself/herself the trajectory is normally horizontal or upwards. In this case the physics of the movement of the bullet shows that the now deceased was most likely shot by someone standing as she was seated.

We accept Doctor Zimbwa's evidence as he did basic forensic medicine and basic ballistics in relation to post mortems. He gives a scientific explanation which rules out that the now deceased shot herself.

The accused evidence

A close look at the accused's evidence is that it is fraught not only with improbabilities but in certain circumstances outright lies. Indeed, the accused made voluminous notes which he constantly showed to his counsel throughout the trial and was extensively consulted by *Mr Chirairo* his counsel. The accused is a person who is very conscious of his rights indeed!!

We however noted the following: -

- (i) the accused did not satisfactorily explain how he ended up in possession of the pistol Exhibit 4. His defence outline does not at all say he was given the firearm by Solomon Tigere. To the police upon arrest he simply said the firearm was his. In court he threatened to call Solomon Tigere but never called him. Eneas was clear that accused was not allowed to possess the firearm. The accused did not call his employer to rebut this. If the accused had this firearm from 29 March, 2018 to 1 April, 2018 surely he would have led evidence to show that the security guard on duty was using another functional firearm. The site Manager, Emmanuel Zivhu, could have been called to rebut Eneas's evidence, or better still such other firearm could have been availed to the police to show it was functional. Our conclusion is that the accused told a material lie on how he acquired Exhibit 4, the pistol. It is inconceivable that Eneas would fail to ask

accused about the firearm which Eneas used when accused came to the workplace enroute to Chiredzi

- (ii) the accused's conduct on 1 April 2018 is inconsistent with his story that the now deceased had stolen the firearm, Exhibit 4. The accused did not tell anyone that his supposedly violent wife was in possession of a gun. He did not alert the now deceased's relatives nor the police. Did he know the now deceased's motive, more so after their fight and breaking of the windows of his motor vehicle? All the accused wanted was his cellphone and kept the issue of the firearm a secret. The inference is that accused never raised the issue of the firearm because the now deceased was never in possession of it
- (iii) it is inconceivable in our view that the now deceased who had fled from the accused and sought refuge at her parents' residence would suddenly decide to take away the very life she was keen to preserve. Why would the now deceased take her own life? The coincidence is inconceivable that she would chose to do only so in the presence of the accused and in the absence of her parents and brothers
- (iv) the accused's conduct after the deceased was shot is not consistent with his purported innocence. If indeed, accused had witnessed a suicide one would have expected him to raise alarm as he was the only adult person inside that house. He would have been in shock. Instead he decided to take the smoking gun, putting his finger prints on the same gun and flee from the scene without explaining anything to anyone. Worse still he did not rush to report this supposedly shocking incident to the police but hid at Killer Zivhu's residence. Upon being confronted by the police he feigned attempted suicide with a pistol not loaded. Why if the now deceased had shot herself?
- (v) the accused's failure to explain to the police what had happened is not consistent with his innocence. Indeed, in terms of s 50(4)(a) of the Constitution the accused has a right to remain silent. However, the same right is qualified in s 50(4)(b)(ii) of the Constitution that there are indeed consequences of remaining silent. This right as the accused himself admitted was explained to him. The consequences referred to are outlined in s 257 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. This provision makes it clear that where an accused person chooses not to explain anything to the police upon being arrested or charged or fails to

disclose any facts within his/her knowledge, such omission may be adversely considered and taken as evidence corroborating any other evidence given against such an accused person. In this case the accused was aware how the now deceased had died. He was an eye witness. He chooses not to explain anything to the arresting details or upon being charged. We are entitled to draw an adverse inference in that regard.

Further in purportedly exercising the right to silence accused decided to play the Russian roulette with the police or in Shona “madhamburosi” sending them from pillar to post as he avoided giving a warned and cautioned statement. A serious case had happened to which he was a prime suspect and accused believed silence was golden in the circumstances or that it was prudent to keep his peace. Well it is within accused’s right but what is improper is for him to lie in his defence outline that he was not afforded the opportunity to give his warned and cautioned statement. That opportunity was availed and he spurned it to his detriment. Maybe the accused was still trying to figure out what false story to tell. Guerrilla tactics do not succeed in all cases.

The accused’s version of events is improbable and he should be disbelieved.

The state case is premised on circumstantial evidence. In the case of *R v Bloom* 1939 AD 188 at 202 – 203 there are two cardinal principles to circumstantial evidence, that is;

- (a) the inference sought to be drawn must be consistent with all proved facts. If not, the inference cannot be drawn
- (b) that 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 a doubt whether the inference sought to be drawn is correct. See also *S v Tambo* 2007 (2) ZLR 33 (H); *S v Marange & Ors.* 1991 (1) ZLR 244 (S).

In our law an accused can be found guilty solely on circumstantial evidence see *S v Shoniwa* 1987 (1) ZLR 215 (S); *S v Vhera* 2003 (1) ZLR 668 (H) at 680 C.

We have already dealt with the demeanour and credibility of the witnesses and the accused. The facts we found proved are as follows;

- (a) the marriage between the accused and the now deceased was plagued with bouts of violence
- (b) the accused, prior to the now deceased’s death, exhibited violent conduct

- (c) the accused stole a firearm, Exhibit 4, at his work place and lied as to how he had acquired it
- (d) the accused and the now deceased fought on the night of 31 March, 2018 and on 1 April, 2018 culminating in the now deceased fleeing from the matrimonial home after smashing the windows of accused's motor vehicle
- (e) the now deceased sought refuge at her parents' home
- (f) the accused frantically looked for the now deceased and located her at her parents' home
- (g) the now deceased met her death in a house in which only the accused was present. She died of gunshot wound
- (h) the now deceased was shot and the fatal injury was definitely not self inflicted
- (i) the accused failed to give plausible explanations on a number of issues and lied in his evidence

The only inference we can draw from these proved facts is that it can be reasonably inferred that the accused shot the now deceased. He had an opportunity to shoot the now deceased and his conduct is consistent with that finding. We therefore dismissed as false that the now deceased committed suicide by shooting herself. The scientific evidence proves otherwise.

In the circumstances the accused's guilt is beyond any reasonable doubt. Consequently, we find the accused guilty of murder with actual intent.

VERDICT:

Guilty of contravening s 47(1)(a) of the Criminal Law (Codification and Reform) Act [Cap 9:23]. Murder with actual intent.

SENTENCE

The accused stands convicted of the offence of murder with actual intent.

It is very difficult to find any meaningful mitigatory factors in the case save for the accused's personal circumstances.

The accused is 29 years old and was married to the now deceased. They did not have any children. The accused had two children born out of wedlock. He indicated that he had family responsibilities in respect of the extended family.

The accused was employed and he has now lost employment. We note that it is the accused's first conviction and therefore we should exercise some measure of leniency. We also noted that accused suffered from pre-trial incarceration for about 6 months since 1 April 2018.

The offence of murder is both a very serious and prevalent offence. The sacred nature of human blood and the sanctity of life cannot be over emphasised. The prevalence of murder cases in Masvingo is very worrying to the courts. This is a reputation this province can do without.

Cases of domestic violence leading to loss of life are equally prevalent. A lot of spouses are losing their lives at the hands of those who are expected to love and protect them. We are utterly shocked by lack of contrition on your part. Indeed, you are very hard hearted person. The manner in which the accused committed this shows clear premeditation. We say so because the accused first stole a fire arm and proceeded to hunt for the now deceased like a wild animal.

After locating the now deceased at her parents' home the accused pretended that he wanted to engage in dialogue. When the opportunity presented itself the accused then proceeded into the house where the now deceased was and callously shot her at point blank. Your conscience was not pricked at all as you simply drove off as if nothing had happened. It is shocking that you deemed it fit to commit such a heinous crime at the residence of your in laws. This shows total disrespect. To make matter worse you have the temerity to allege suicide.

In our view this defenceless woman had fled from you and sought shelter at her parents' home. She did not deserve to die such a cruel death. We wonder what really had incensed you to such an extent. We should send a clear message to you and society at large that such domestic violence which results to loss of life would never be tolerated. Violence in any form should be met with the full wrath of the law.

It is disheartening that the company which owned this firearm and your employer did not realise the need to properly secure firearms. In this day and age lethal and dangerous weapons like firearms cannot be kept under a bed like a pair of shoes. They would fall into wrong hands resulting in ghastly consequences.

It is only fair and just that you should be incarcerated very a very long period of time. Clearly the aggravating factors far outweigh the mitigatory factors. No reasonable court can sympathise with you.

In the result you are sentenced as follows;

“30 years imprisonment”

National Prosecuting Authority, counsel for the state

Saratoga Makausi Law Chambers, counsel for the accused