THE STATE
versus
HERBERT LEARNMORE CHIKIWA
and
JOHANE KAMUDYARIWA
and
LAWRENCE MAKIWA MAKOSA
and
GIVEN MUSHORE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 22, 24, 25 & 26 June & 6 August & 3, 4, & 6 September 2015 & 8, 9, 10, 12 April 2019 & 19 & 21 August 2019 & 6, 7, 8, 9, January & 19 November & 2, 3, 4 & 18 December 2020 & 27, 28, 29 April 2021 & 14 July 2022

Criminal Trial

B Murevanhema, for the State
V Makuku, for the Accused One
F Malinga, for the Accused Two
D K Chikumba, for the Accused Three
T Katehwe, (later *B Sadovera*) for the Accused Four

Assessors

1. Mr Chivanda
2. Mr Kunaka

ZHOU J: The four accused persons are facing one count of unlawful entry in aggravating circumstances as defined in s 131 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and one count of murder as defined in s 47 of the same Act. In respect of count one, the allegations against the four accused are that on 21 September 2013 and at Imperial Security Company which is based at Number 40 Northampton Road, Eastlea, Harare, the accused persons unlawfully and intentionally and without permission or lawful authority from Robson Mbudzi the lawful occupier of the said premises, gained entry at the said premises by forcing open

the door and stole a firearm, a pistol with a magazine loaded , a red small box with rounds of ammunition, a blue jean jacket, a jersey, a black leather jacket, brown jersey, two rubber button sticks, one pair of handcuffs, a tent, and a black Edgars bag containing Imperial Security Company documents. The allegations in count two are that on 22 September 2013 and at Number 5 Wembley Crescent, Eastlea, Harare, the accused persons unlawfully and with intent to kill, murdered the now deceased Innocent Julius by shooting him on the right side of the chest and right hand using a pistol, thereby causing the deceased to sustain injuries as a consequence of which he died.

All the accused persons pleaded not guilty to the two counts and tendered outlines of their defences in writing. First accused denied being in Harare on the dates of the alleged offences. He stated that he was in Bulawayo preparing to go to Botswana. He further stated that the other three accused persons are unknown to him. Accused two also denied being in Harare on the relevant dates, and stated that he was at his rural home at Gorejena homestead, Madyavanhu Village, Chief Negomo in Chiweshe, from end of August to 20 December 2013. He stated that prior to his arrest he did not know and had not met any of the co-accused persons. Second accused stated that he is being falsely linked to this matter by one Detective Sergeant Damson Chatukuta who blames him for the loss that he suffered in a gold-buying venture. Third accused also denied being in Harare on 21 and 22 September 2013. His defence was that he was at Petra Farm in Chegutu preparing for the tobacco farming season. He denies knowing any of the other accused persons prior to his arrest and states that he was only told of their names by the police after his arrest in February 2014. He only implicated the other accused persons as a consequence of the torture which was inflicted upon him by the law enforcement agents. The fourth accused person, just like the other three, also denied involvement in the commission of the offence and stated that he did not know the co-accused persons prior to his arrest.

The state led *viva voce* evidence from ten witnesses. These are Godwin Kasanga, Evelyn Taurai Phillip, Jane Mandofa, Collen Julius, Umali Madi, Robson Mbudzi, Moses Chari, Chatukuta Damson, Anele Mkandla, and Stephen Gundumure. The evidence of the following ten witnesses was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]: Dr Mukosera, Beauty Chimhawu, Ntini Clever, Dr Salvator Aleks Mapunda, Nyasha Makanyisa, Gowora Emily, Mupanganyemba Gawaza, Nigel Mude, Michael Tsambatare and Chigondo Josephat. The accused gave evidence for themselves and called no other witnesses.

The facts which are common cause

From the evidence led the following facts are common ground:

1. On the night of 21 September 2013 there was unlawful entry at Number 40 Northampton Road, Eastlea, Harare. The perpetrators accessed the premises by breaking the lock at the gate, and thereafter gained entry into the main house which was being used by Imperial Security Company as offices by cutting the main door. They stole property which is listed herein above.
2. In the early hours of 22 September 2013 at about 0300 hours there was another unlawful entry into the premises at 5 Wembley Crescent, Eastlea, Harare, which is not very far from the premises referred to above. At the second property the main house was being used by a company known as K and K Properties as offices. The perpetrators accessed these premises by cutting the lock at the main gate and gained entry into the main house by forcibly opening the windows and cutting the burglar bars. Collen Julius who was engaged as the security guard sensed the presence of the intruders and alerted the other persons, including the now deceased Innocent Julius who was his son. Together they shouted for help while at the same time trying to pursue the intruders. One of the intruders fired some shots, and two such shots struck and killed the deceased. The deceased died due to haemorrhages and shock caused by the gunshot wounds.
3. Some items recovered from 5 Wembley Drive Eastlea, Harare, show that the persons who entered that property and killed the deceased were the same persons who had unlawfully entered and had stolen property from 40 Northampton Crescent, Eastlea, Harare. These items included the black Edgars bag containing Imperial Security Company documents, a pair of handcuffs, a small red box with rounds of ammunition and two black rubber button sticks. They had been stolen that very night from 40 Northampton.
4. Fingerprints uplifted from the two premises matched those of Given Mushore, the fourth accused herein.
5. The ballistic results following examination of the cartridges recovered from the murder scene show that the firearm which was used in the shooting and killing of the deceased

belongs to accused one and the firearm was recovered from that accused following his arrest at Waterwright Irrigation in Pomona, Borrowdale, Harare. The spent cartridges link the firearm to the murder.

6. The second, third and fourth accused persons made indications which were video recorded. The video recordings of the indications were admitted in evidence. During the indications these three accused persons admitted to being at the two crime scenes on the days in question, and described their involvement at the two scenes.

The issue

The issue for determination, therefore, is the identity of the persons who committed the offences at the two addresses.

The law

In s 131 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the offence of unlawful entry into premises is defined in the following terms:

> "Any person who, intentionally and without permission or authority from the lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises . . . "

The offence is committed in aggravating circumstances if any one or more of the situations listed in s 131(2) is found to be present. These circumstances are that at the time of committing the offence the accused entered a dwelling house; or knew that there were people present in the premises; or carried a weapon; or used violence against any person, or damaged or destroyed any property in effecting the entry; or committed or intended to commit some other crime.

Murder is defined in s 47 (1) of the same Act as follows:

> "Any person who causes the death of another person –
>
> (a) Intending to kill the other person; or
> (b) Realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility;
>
> Shall be guilty of murder."

The standard of proof in criminal proceedings is proof beyond reasonable doubt. The onus to establish such proof is on the state. The accused has no onus to prove his innocence. The applicable principles have been articulated in many case authorities. The following leading statement made in the case of *R* v *Difford* 1937 AD 370 at 372 sets out the applicable principles:

> "….(N)o onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal . . . "

In the case of *S* v *Van Der Meyden* 1999 (1) SACR 447(W) at 448f-g the standard was expressed in the following terms:

> "The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent . . . These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other . . . In whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The principles enunciated above do not enjoin a Court to explore and consider every conceivable possibility when the facts do not point to such possibility, see *S* v *Alex Carriers (Pty) Ltd & Another* 1985 (3) SA 79(T); neither is the court required to entertain fanciful possibilities which do not arise from and/or are not based on the proved facts. As was held by DENNING J (as he then was) in the case of *Miller* v *Minister of Pensions* (1947) 2 AllER 372:

> "The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt but nothing short of that will suffice."

The evidence

Robson Mbudzi, the operations manager of Imperial Security Company, gave evidence on 21 September 2013, he secured the offices of his employer at 40 Northampton, Eastlea Harare by locking the doors and closing the windows before he went home at about 1600 hours. He also locked the screen gate at the main entrance. He was contacted and asked to come to the C.I.D. Homicide Section at Harare Central Police Station where he was informed about the break-in which had taken place at 40 Northampton Eastlea. He disclosed to the police that he had left in his office a firearm and some ammunition and a loaded magazine. He went with the police to the

scene. He gave details of his observation regarding the open drawers, property scattered all over, and evidence that the doors had been forcibly opened. The LIama pistol, a small red bag containing ammunition, the loaded magazine, his jean jacket which he had left on the chair in his office were among the items that were missing. Two button sticks, a pair of handcuffs and four handcuff keys were missing as well. Two of the keys were later found at the premises. When they returned to Harare Central Police Station he was shown items which had been recovered from the murder scene, 5 Wembley Drive. These included a bag which contained Imperial Security Company documents, a pair of handcuffs, two button sticks, a red box which had been taken from his office which had four rounds of ammunition inside, and two rounds which had been picked at the murder scene. The following day he accompanied two details who went to uplift fingerprints from the scene. He was charged for negligently leaving the firearm in an insecure place. Some two or three months later he was informed that accused persons had been arrested in connection with the unlawful entry at his company premises. The value of the property stolen was US$2 500 of which property worth US$76.78 was recovered. The serial number of the stolen LIama pistol was 726024. He identified the documents and other property which had been recovered from 5Wembley Drive but belonging to his company.

Collen Julius, the father of the deceased, was employed as a security guard by K & K Properties, based at 5 Wembley Drive, Eastlea, Harare. The deceased was staying with him at that address. The witness was on duty at night on 22 September 2013. Around 0300 hours he detected sounds suggesting that there were intruders cutting burglar bars at the main house. He woke up the other persons who were sleeping in the cottage, including the deceased. Together they went to the main house shouting, “Thief! Thief!” He saw two of the intruders as they ran out of the main house. Three shots were fired from the direction of the main house which scared them back to the cottage. Upon realising that the deceased was not among them they went back only to find him lying on the ground. He had been shot on the right side of the chest and on the right hand. When police came, they confirmed that he had died. He observed two button sticks and a pair of handcuffs which had been left by the intruders. He was unable to concentrate on the other things because he was now mourning his son.

Umali Madi was employed by the owner the immovable property at 5 Wembley Drive. He was in charge of that property. He was one of the persons who were residing at 5 Wembley Drive.

He corroborated the evidence of Collen Julius on how attention was drawn to the presence of intruders, the observation of two male intruders who ran out of the main house, that one of the intruders went out through the gate while the other one scaled the precast wall, the firing of the three shots and how he and his colleagues turned back and ran towards the cottage. He and Kennedy Davison jumped the wall into a neighbour's property and later jumped the wall to get onto the road. Outside the gate they found a bag which was about a metre from their gate. They took the bag inside their property. He telephoned the police. The gun shots were fired from the direction of the house. He realized that the deceased had been killed when he got to the gate and heard members of his family and the other persons at the premises crying. When the police came, they went around the house and found two button sticks, a pair of handcuffs, two rounds of ammunition, and three spent cartridges. Shortly thereafter another team of police officers came to uplift fingerprints. The body of the deceased was conveyed to the hospital by another team of officers. Some rounds of ammunition were found in the bag that he and Davison had found near the gate. The bag was written "Edgars". Inside the bag there was also a small red box which contained more rounds of ammunition. There were some documents in the bag such as bank deposit slips, ZIMRA documents, and receipts. He identified these documents and the other items recovered. The deposit slips showed that the deposits were being made by Imperial Security. Some of the other documents also had the name of Imperial Security.

Moses Chari, an employee at Waterwright Irrigation, testified on how the first accused was apprehended by him and his co-workers following allegations that he had attempted to commit a robbery at the witness' workplace on 19 December 2013. A firearm was recovered from the first accused who was holding it and using it to threaten the mob that eventually apprehended him. Accused had fired shots from the firearm as he was being pursued. This accused was also found with a pair of handcuffs at the time that he was arrested. The firearm, handcuffs and the accused were surrendered to the police. The witness identified the firearm that was recovered from the first accused by its serial number 721889, Exh. 9.

Mupanganyemba Gawaza's evidence was that the firearm, a LIama pistol referred to above, a pair of handcuffs, and a fleece mask, all recovered from the first accused, were handed over to him at Borrowdale Police Station when the first accused was brought by employees of

Waterwright Irrigation. He handed these exhibits to Nigel Mude who in turn gave them to Mike Tsambarare.

Stephen Gundumure, a Detective Assistant Inspector in the Zimbabwe Republic Police and a firearms expert, examined the LIama pistol recovered from accused one and it matched the fired cartridges which had been recovered from 5 Wembley Crescent after the murder of the deceased on 22 September 2013. He gave a detailed account of the scientific examination of the weapon and the spent cartridges and/or ammunition recovered in order to determine whether there is connection between the weapon and any reported and outstanding crime scenes. A machine is used in the examination of the results. In this instance, following the examination the witness produced a Forensic Ballistics Report with Reference Number 06-2014, Exh. 11, in respect of the LIama Pistol referred to hereinbefore. The examination, as revealed in the Report, showed that the LIama pistol bearing the Serial Number 721889 is the one from which the cartridges (Exh. 13) which were recovered from 5 Wembley Drive Eastlea were fired. In his evidence, the marks relied upon are unique to that one particular weapon and no other. The computerised machine produced photographs, which were produced in evidence, Exh. 12A and !2B. According to the witness the margin of error of the computerized machine is almost zero.

Godwin Kasanga, a Detective Inspector in the Zimbabwe Republic Police attended at 5 Wembley Drive to uplift the fingerprints. He gave his evidence in the capacity of attending detail. He managed to uplift fingerprints from some places such as the office door, reception door frame, point of entry inside the house which was being used as offices, and from some window frames. He managed to uplift eight fingerprints, took them back to his office, and completed the relevant forms. His evidence was that the fingerprint impressions are one hundred percent accurate.

Evelyn Taurai Phillip, a Superintendent in the Zimbabwe Republic Police gave evidence as well. She is a fingerprint expert, certified by the National Criminal Bureau in India in addition to the in-house training that she received locally. She studied Advanced Fingerprints Science and Computers. She is also a holder of a Bachelor of Science degree in Counselling, Bachelor of Science in Police Studies, and a Certificate in Gender Mainstreaming. Her examination of fingerprints uplifted from 5 Wembley Drive Eastlea linked the fourth accused person to the scene. According to her, fingerprints evidence is one hundred percent accurate, because scientifically no

two persons, not even identical twins, have identical fingerprints. She detailed the method and machines used in analyzing the fingerprints.

Accused two, three and four made indications which were admitted in evidence. The indications were video-recorded and are contained in a DVD, Exh. 15. All three of them were warned and cautioned, confirmed that they understood the caution and elected to make the indications.

The first one to go on the indications was accused three, Lawrence Makina, who is also referred to in some papers as Lawrence Makiwa or Lawrence Makiwa Makosa. When he was at the police station, he indicated that he knew of the exact location of the scenes only when he was within the area itself, that is to say, in Eastlea. When the police motor vehicle got to the area, he gave instructions for the car to be stopped, and informed that they should move to a place where there was a hedge. Upon getting to a gate he instructed that that was the gate at which he and his colleagues broke the lock. He indicated where the lock was. He informed that second and fourth accused went to check for a security guard. He informed that the house was locked. He advised that he and his co-accused were looking for cash. The fourth accused is the one who got the pistol when they were inside the house while he, the third accused, took a button stick. After sometime he was asked if he could lead the officers to the murder scene and he confirmed that he could do so. He gave an instruction to "turn and go back". After driving for a while, he instructed the driver to turn right, and then to go straight. As they were driving, he instructed the driver to stop, indicating that they had just gone past the gate which was on the left. Number 5 Wembley Crescent, Eastlea, had a "K & K Properties" signpost. He informed the police that when he and his co-accused arrived, they intended to break the gate but discovered that it was not locked, so they pushed it open. They went round the house to check if there was any person guarding the premises but saw no person. They then broke a window and forced it open using an iron bar. They were three. He and second accused went inside the house. They had information that there was money at these premises. While they were inside, he heard some noise coming from outside, then he heard two shots. He opened the door and ran away. He knew that the fourth accused had a firearm. He then signed to acknowledge that he had made the indications freely and voluntarily.

The second accused was the next one to go for the indications. He also informed the officers that he would only be able to locate the place when he got to Eastlea. When they got to

40 Northampton, he explained that he and accused three and four then forced open the gate. They went around the place to check if there was any security person. Accused three opened the door using an iron bar. They searched inside the house for cash. Fourth accused came holding a pistol. Third accused took a button stick and something that looked like an axe. After that they went to 5 Wembley, Eastlea. He advised that he did not know how to get there. The police drove to that location. When they got there, he informed that he and his co-accused had forcibly opened the gate. He advised that the fourth accused person went inside. He demonstrated the corner where he was standing just in case there were people who might come to the house. When he heard some noise, he ran out of the premises. According to him the deceased was shot by the fourth accused. He stated that fourth accused never told him and the other accused that he had shot a person. He also informed that fourth accused had taken a file from the house. After his indications the accused signed to acknowledge that he had made his indications freely and voluntarily.

The last to make his indications was fourth accused, Given Mushore. Unlike the other two accused persons, this accused said that he was able to lead the police to Eastlea from the police station. When the motor vehicle got to the intersection of First Street and Robert Mugabe, he advised that he did not know how to get to the scene since when he went there it was at night. The police drove to Eastlea. When they were in the vicinity, he stated that he remembered the open space. He then advised that they had gone past 40 Northampton. He evidence was that on the night in question they were four in number – namely – Lawrence (Third accused), second accused (whom he kept referring to as "Joe"), himself, and Lawrence's young brother. They went over the precast wall. He pointed out where he stood while his accomplices went inside the house. He remained outside. He saw Lawrence coming holding something. When second accused and third accused's young brother came out of the house the four of them agreed to search each other (presumably to ensure that any loot that may have been found by anyone of them would be accounted for). Before they searched one another third accused produced a gun and some rounds of ammunition. The rounds of ammunition were kept by second accused while third accused kept the firearm. He did not know where the gun had come from but stated that when they got to the place, they did not have any firearm. At 5 Wembley Crescent second accused was the one who opened the gate. He did not get inside the premises, but remained at a corner looking for any motor vehicles that might come by. Second and third accused went inside. After sometime second

accused and third accused's young brother came running. Then he heard some gun shots. This marked the end of his indications, after which he signed to acknowledge that he had made the indications freely and voluntarily.

First accused is a retired police officer. He gave evidence to the effect that he was in Bulawayo on 21 and 22 September 2013 when the offences were committed. He was preparing to go to Botswana to do some shopping. He stated that on 20 September 2013 he received his pension money, and started making withdrawals to enable him to travel to Botswana. He made withdrawals on 20, 21, 22, 23 and 24 September 2013, before leaving for Botswana. He produced bank statements to show the withdrawals which were made at banks in Bulawayo. Later on, he stated that his last withdrawal was on 23 September, and that he left for Botswana in the afternoon of that day through the Plumtree Border Post. He crossed the border mid-afternoon on that day. He confirmed that he was arrested at Waterwright Irrigation Company where he had passed by to see his brother Tanaka Gwenhere who was employed by that company as an Agricultural Engineer. He said that he was apprehended by workers at Waterwright Irrigation after one of them had misunderstood his firearm and tried to take it away from him. When the workers attacked him, he decided to run away. At some point he fired a shot to scare them away. His firearm later jammed. He stated that on the dates that the offences were committed his firearm was in the custody of a firearms dealer by the name Abdul King Gatsi in Bulawayo from the end of August to 18 December 2013. On the day that he was arrested on 19 December 2013 he had come to Harare to get his firearm fixed by police details at the Zimbabwe Republic Police's Morris Depot, to go to Central Firearms Registry, and to see his brother Tanaka Gwenhere at Waterwright. His evidence was that he had never met any of the other accused persons prior to his arrest. He suggested that the working parts of the pistol were swapped with those from his firearm and the weapon was fired in order to produce the evidence that was tendered in court. He suggested that the firearm that was stolen from 40 Northampton is the one that was used to commit the murder. During crossexamination he stated that during investigations he had told the police that on the dates of the offences he was on Botswana. He confirmed the contents of his statement wherein he had told the police that when the offences were committed, he was in Gaborone Botswana and that his firearm was hidden in the garden where he had hidden it. He had returned from Botswana on 27 September 2013.

Second accused, Johane Kamudyariwa, stated that he was arrested at Mount Pleasant Heights, his wife's aunt's residence. He intended to sell gold in town, because he was into gold panning and was also a farmer in Chiweshe communal lands. After his arrest he was taken to the police station where he was tortured and assaulted. He ended up admitting to committing all the fifteen offences which were being alleged against him. He produced a pair of blue jeans, Exh. 18, with what appeared to be blood stains. He produced Exh. 19, a letter by the doctor showing that he received treatment for injuries. He only met the other accused persons after his arrest. He referred to an illegal gold deal which had failed involving one of the police officers, Chatukuta, and alleged that he was being made to suffer for that because Chatukuta was blaming him for the one thousand United States dollars that he had lost in that deal.

Third accused, Lawrence Makina, was arrested at Mabelreign shopping centre in Harare on 6 February 2014 by police officers who included Damson Chatukuta, Joseph Nemaisa, Kurauone Madzivanyika and Mkandla. He stated that he was forced to admit to the charges. During the indications he was not assaulted. He was assaulted before and after making the indications. He produced Exh. 20, a letter from the doctor showing that he was treated for injuries. Prior to his arrest he was a farmer at Chegutu where he stayed. He stated that during the indications the police would from time to time pause the camera and give him instructions on what to do while at the same time intimidating him. For instance, the video recording was paused from Harare Central Police Station up to Enterprise Road.

The fourth accused stated that he was arrested in the evening on 8 February 2014 while he was at his residence in Glenview 3, Harare. At the time that he was arrested the allegations against him were that a motor vehicle similar to his had been used in the commission of robberies. He was detained at Mabelreign Police Station. The following day he was taken to CID Homicide where he was alleged to have committed twenty counts of armed robbery. Before being taken on indications he was assaulted by police officers and instructed on what to say during the indications. He was assaulted during the indications. He stated that the indications had been tempered with. He knew Martin Masenda, one of the police officers, because they grew up in the same area. He stated that the fingerprints were uplifted after the indications had been done. He had many fingerprints taken from him. He conceded that in his defence outline he had never mentioned bad blood between him and Martin Masenda.

Analysis of the evidence

As noted earlier on, this court finds as a fact that the persons who unlawfully entered 5 Wembley Drive, Eastlea, Harare, are the same persons who committed the unlawful entry at 40 Northampton Crescent, Eastlea, Harare. The fact that property stolen at the latter address was found at the former address, and that these two offences were committed during the same night establishes this fact beyond reasonable doubt. Property belonging to Imperial Security Company was no doubt brought to 5 Wembley Crescent by those who stole it from 40 Northampton, and these are also the same persons who unlawfully entered 5 Wembley Crescent and committed the murder thereat. This is the only reasonable inference that can be drawn from the circumstantial evidence in this case, see *S v Tambo* 2007 (2) ZLR 33(H).

Evidence relating to first accused (Herbert Learnmore Chikiwa)

Accused one was charged based on the evidence of ballistic results which linked his firearm to the scene of the murder. The expert witness who testified on this piece of evidence, Stephen Gundumure, testified that as far as he is concerned ballistics evidence is one hundred percent accurate, and there is no instance of evidence linking a bullet to one firearm being linked to any other firearm. In other words, the scientific process that is involved could only show that the bullets and spent cartridges examined in this case came from the LIama pistol which was found in the possession of the first accused to the exclusion of any other firearm. The accused is a former police officer. Although he challenged the accuracy of the findings through cross-examination by counsel, he led no evidence to contradict the findings of the expert. The evidence regarding the reliability, validity and accuracy of the ballistic examination therefore remains firmly intact.

The inconsistencies in the first accused's explanation about his whereabouts and the whereabouts of his firearm at the time of the murder render his defence manifestly false. Upon his arrest this accused told the police that when the offences were committed on 21 and 22 September 2013 he was in Gaborone, Botswana. He further stated that his firearm was in the garden where he had dug and hidden it sometime in August 2013. In his warned and cautioned statement, exh.10, he stated: "On 21/09/13, I was preparing to leave for Botswana and eventually left at around 1400 hrs. My firearm pistol was in the garden where I had dug and hidden it sometime back in August 2013." He repeats this assertion in para. 2 of his defence outline that on the day in question he was not in Harare but was in Bulawayo preparing to go to Botswana. While in the defence outline

he does not state when he went to Botswana, it is clear that he is repeating the assertions in his warned and cautioned statement. However, in his evidence before this court accused one stated that he only left for Botswana on 23 September 2013, in the afternoon. Understandably, he found himself constrained to make that admission because his passport, exh. 17, shows that that is the date on which he left the country and not on 21 September as he had stated earlier on. Regarding the whereabouts of his weapon, he makes another complete abandonment of his earlier statement. He states in his defence outline that the firearm was in the custody of one Abdul Keen, a firearms dealer who operates from Bulawayo. This is inconsistent with his warned and cautioned statement wherein he stated that the firearm was in the garden where he had hidden it underground. Quite apart from the startling denial that the firearm was not in Harare even in circumstances where he himself does not claim to have been in possession of the weapon, the contradictions are so material that they point to a deliberate lie. The first accused states in his defence outline that he only collected the weapon from Abdul Keen on 18 December 2013. This was a day before he was arrested. This is no doubt meant to explain his possession of the firearm on the date that he was arrested on 19 December 2013. Significantly, the said Abdul Keen was not called to testify to confirm the assertions by the first accused which were already contradicted by his earlier statement regarding where the firearm was on the dates of the offence.

The relevance of a lie in the rejection or acceptance of a person's evidence depends on the circumstances of a case. The maxims *semel mentitus, semper mentitur* (once untruthful, always untruthful) and *falsum in uno, falsum in omnibus* (false in one thing, false in all), are not part of our law of evidence, see *R* v *Gumede* 1949 (3) SA 749(A); P. J. Schwikkard & S. E. Van der Merwe, *Principles of Evidence* (4th ed), Juta, 1997, at 576. And it is not desirable to make them part of our law. A trial court must be able to assess the relevance, place and significance of any lie or lies in the context of all the circumstances of the case. In the case of *S* v *Oosthuizen* 1982 (3) SA 571(T) the court said:

> "All that can be said is that where a witness has been shown to be deliberately lying on one point, the trier of fact *may* (not *must*) conclude that his evidence on another point cannot be safely relied upon . . . The circumstances may be such that there is no room for honest mistake in regard to a particular piece of evidence: either it is true or it has been deliberately fabricated. In such a case the fact that a witness has been guilty of deliberate falsehood in other parts of his evidence is relevant to show that he may have fabricated the piece of evidence in question. But in this context the fact that he has been honestly mistaken in other parts of his evidence is irrelevant, because the

> fact that his evidence in regard to one is honestly mistaken cannot support an inference that his evidence on another point is a deliberate fabrication."

In this case the first accused was clearly not honestly mistaken in all the falsehoods that he presented. These related to the very bases of his defence. Being outside Zimbabwe in Botswana's capital city would have been a perfect *alibi*, while the fact that his firearm was underground in his garden would have placed it away from the scene of the crime. His person and the firearm are two features of the offence which had to be explained, and there is no way he could have been mistaken about their whereabouts. In fact, if, as he later stated, he had only collected the firearm a day before his arrest, then there was no way that he would have mistakenly thought that he had placed the same firearm underground in his garden. This is why in this instance his evidence and consequently his defence have to be rejected. This rejection of his evidence would not, of course, necessarily establish the truth of the evidence against him, which has to be assessed on its own, see *R* v *Weinberg* 1939 AD 71 at 80. In this instance, this court has already found that the evidence tendered by the state on its own was sufficient to prove the guilt of the accused; that once this court found the accused's defence to be beyond reasonable doubt false, then the guilt of the accused was proved beyond reasonable doubt.

The withdrawals from this accused's account which were shown in his bank statement, exh.16, to have been made at an Automated Telling Machines (ATM) in Bulawayo do not show that he was in Bulawayo as such withdrawals can be made by another person. In any case, the withdrawal statement does not state the times of the withdrawal made on 22 September 2013, such as would exclude the accused from being in Harare in the early hours of that date. The evidence shows that the offence in the second count was committed around 0300 hours, which would be five hours before banks open for normal business. Accused does not claim to have made the withdrawals at night. His evidence was that he made them during the mornings. In fact, it maybe that those withdrawals were calculated to contrive the defence that the accused was not in Harare when the offences were committed. This court finds the defence to be beyond reasonable doubt false.

Thus, when all the evidence is considered in its totality, the guilt of the first accused is established beyond reasonable doubt.

The evidence relating to second accused (Johane Kamudyariwa)

Accused two is linked to the offence by his confessions made during indications as mentioned earlier on. It is true that the other two accused persons, three and four, also mentioned him in their confessions. However, s 259 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows: "No confession made by any person shall be admissible as evidence against any other person." In other words, the confessions by the other two accused implicating the second accused are inadmissible as evidence against him. This court must therefore examine the evidence of his own indications in order to assess whether his guilt has been established beyond reasonable doubt in light of the authorities cited above. As already found, the mere fact that some portions of the video recordings were missing or cut does not affect the admissibility of the video recordings, much the same way that a video or audio tape would not be inadmissible merely because part of it is inaudible, especially if the accused accepts the accuracy of the audible parts thereof, see *S* v *Tsvangirayi* 2004 (2) ZLR 210(H).

However, the deficiencies such as paused or inaudible portions would have a bearing on the weight of the evidence, especially in light of the unconvincing explanation as to why the police decided to proceed with the indications when they doubted the efficacy of the battery of the camera. They could have postponed the indications until they got a new battery. The pausing of the video recordings during the indications diminishes the reliability of the evidence in this case.

There was no independent evidence which placed the second accused at the scenes of crime in respect of both counts. This is not one of those cases where the genuineness of the confession is beyond reasonable doubt by reason of the accused mentioning facts which only he would have knowledge if he was connected to the crime (see *S* v *Ndlovu & Anor* 2005 (1) ZLR 349(S)), because, while there was evidence of voluntariness in talking to the police to make the indications, there are aspects of the indications that impact on the uncorroborated evidence's reliability to sustain a conviction. Apart from the pausing of the video recording, this accused told the police when they left the police station that he did not know how to get to the place, that is, Eastlea. The police officers took it upon themselves to be led by one of them, Detective Sergeant Munda. The video does not show how far they drove with Sergeant Munda leading the way. It is not clear from the video recording how far they were from the scene of crime when they then left it to the accused to lead the way**.**

A letter by Dr M. Kajawo was produced in court by accused two, exh. 19, showing the following injuries: (1) Open wounds on both legs and wrist joints; and (2) soft tissue injuries. The accused attributed these to assault by the police but the letter by the doctor is unhelpful as it lacks detail. No weight is therefore placed upon this letter. The video shows that accused two was having difficulties when he was walking, but again it is difficult to attribute that to any assault upon him in light of the inadequacies noted in the letter from the doctor.

At 40 Northampton Crescent accused two stated that they forced open the gate by tempering with the lock. They were three, that is, accused three, accused four and him. They went around the property looking for the security guard. He described how they accessed the house by forcibly opening the door using an iron bar, the movements inside the house when he and his accomplices were searching for cash, how he saw one of his colleagues holding a pistol when they met in the passage, and that the other accomplice took a button stick and something that looked like an axe. The details of what happened inside the house are sketchy and lack the kind of detail that only a person who was at the scene of crime could give.

When it came to 5 Wembley Crescent this accused stated that he did not know how to get there. Again, Sergeant Munda led the way until they got to the property. Only when they were there was the accused then asked by a police officer if he still remembered "this place'. This is clearly a leading question which casts doubt on the genuineness of the indication and the reliability of the evidence. The second accused answered in the affirmative, after which he then described how they got into the premises by forcibly immobilizing the key at the gate. He described the corner where he was positioned when he heard some noise which made him to run away. He then heard the sound of a firearm. He did not know that a person had been killed because fourth accused never told him that he had shot a person.

Thus, the case against the second accused rests solely on the confessions. There is no independent evidence to corroborate the confessions. As shown, there are many aspects of the evidence which diminish the weight of the evidence against this accused. This court must guard against convicting on the basis of a false confession. As was held in *S* v *Khumalo* 1983 (2) SA 379(A) at 383G-H, "Experience in the administration of justice has shown that people occasionally do make false confessions for a variety of reasons." A consideration of all the evidence pertaining to the second accused shows that the evidence of the confession is insufficient to support a

conviction. It does not prove his guilt beyond reasonable doubt. He is therefore entitled to acquittal.

The evidence in respect of accused three

The findings relating to the lack of reliability of the evidence in respect of accused two apply to the third accused. The only evidence relied upon to support the case against him was that of the confessions made during the indications. This evidence is afflicted by the same deficiencies noted above. This accused also stated that he did not know how to get to the area where the scenes of crime were, hence the police again led the way. The video recording was paused, and does not reveal what was happening up to the time that the accused gave an instruction for the car to be stopped for the place to be located. He instructed that they move to a place where there was a hedge. At the gate at 40 Northampton he demonstrated how they broke the lock at the gate. The house was said to be locked so he did not make any indications inside the house but merely narrated from outside what he said had taken place inside the house on the day in question. This makes the indications incomplete and of a general nature. He was asked if he could lead the officers to the scene of the murder to which he answered affirmatively. He directed that the car turns back. After driving for a while, he instructed the driver to turn right, then to go straight, up to a point where he instructed the driver to stop. He even drew attention to the fact that they had just passed the gate on the left. The video shows 5 Wembley Crescent Eastlea, where there is a sign post written "K & K Properties" and was clearly visible. Owing to the clear marking of the address, this piece of evidence is not given much weight. The rest of what he stated is of a general nature, and lacks the detail of a natural narration by a participant in such an enterprise. He stated that when they got to the gate, they saw that it was shaking and realized that it was not locked, hence they pushed it open, went inside, and checked around for a security guard who might be guarding the property. He indicated the window that they broke to force it to open using an iron bar. They went inside. While they were inside, they heard some noise outside. Then he had two-gun shots being fired.
As in the case of accused two, there was no independent evidence to corroborate the evidence obtained through the confessions. In view of the deficiencies noted with respect to the indications, the evidence is not clear, satisfactory and reliable enough to sustain a conviction. For these reasons, this accused person is entitled to an acquittal as well.

The evidence in respect of accused four (Given Mushore)

Accused four is linked to the offence by two pieces of evidence, (1) the confessions made during the indications, and (2) the fingerprints. The fingerprints were uplifted at the scene of crime in the morning after the crime. These matched the fingerprints taken from fourth accused following his arrest. The suggestion by this accused's counsel that the fingerprints were uplifted from the murder scene after he had made his indications is false. The witnesses who uplifted the fingerprints at the scene of the crime had no reason to mislead the court and were not challenged as to the dates on which they uplifted the fingerprints from the scene of crime. The witnesses who are not police officers who were at the scene also confirmed the day on which the fingerprints were uplifted as noted earlier on. Further, as observed earlier on, Evelyn Taurai Phillip, the fingerprints expert was a very credible witness whose evidence was compact and firmly linked the accused to the scene.

In the English case of *R* v *Buckley* (1999) 13 JP 561, ROSE L.J. held that fingerprint evidence, like any other evidence, is admissible as a matter of law if it tends to prove the guilt of the accused. The law presumes the accuracy of fingerprint evidence in the absence of any evidence to rebut that presumption. There was no such rebuttal. The expert witness took the court through the process of analyzing the fingerprints, which process involves the use of a computerized machine. This court having found the witness who testified on the fingerprints to be an expert, and having accepted her evidence to be weighty and reliable, the finding is made that the fingerprints found are those of the fourth accused, see *S* v *Mutsinziri* 1997 (1) ZLR 6(H) at 28A-D.

The fingerprints evidence in respect of the fourth accused is corroborated by his confessions during the indications. Unlike in the case of the second and third accused persons, the confessions in respect of the fourth accused corroborate the evidence of the fingerprints. In the case of the fourth accused, after being warned and cautioned about the indications, he stated that he wanted to show the officers "the place where we stole the firearm". He confidently said that he was able to show the way. Outside Harare Central Police Station, this accused directed that the motor vehicle must turn left at the intersection. When he got to the intersection of Robert Mugabe Road and First Street, he stated that he did not know how to get to the place because when the offence was committed it was at night. The detail that he gave regarding the activities at the scenes

of crime establish his presence at the scenes on the date of the offences. While he is the only one who ascribed the gun to accused three, he is also the only one who mentioned that when they got out of 40 Northampton, he and his accomplice searched each other, no doubt to make sure that all the loot would be accounted for. The idea of searching each other is such an unusual detail that it cannot be ascribed to someone who was not involved in the enterprise. He uses "Joe" instead of the full names in referring to one of the accomplices, which is evidence of familiarity. He is also the only one who talks of the presence of a fourth person. The fourth accused's allegation that he was being deliberately implicated in the offence by Martin Masenda, a police officer who had had a dispute with the accused's brother who had gone to South Africa is not a convincing explanation about how he got arrested. The alleged misunderstanding was not with him, and he does not explain why he would be made to suffer for a misunderstanding involving his brother. Also, the evidence of the fingerprints was not given by Masenda. Furthermore, and in any event, the allegation of bad blood between Martin Masenda and his brother (or him) is not mentioned in the defence outline. It was an afterthought raised to build a defence. Significantly, this accused also never made allegations of torture or assault in his defence outline. He only raised these allegations during the trial. Even during his challenge to the indications, the fourth accused never mentioned Martin Masenda as the author of his misfortunes. Despite his claim that police forced him to admit to the commission of the offences, his story is not a direct admission. He merely admitted to being present at both scenes. At the scene of the murder he states that he remained outside, and that he is not the one who had the firearm and therefore that he is not the one who fired the shot that killed the deceased. This is not the evidence of a person who was being coerced to incriminate himself but one who was at large to explain the version that he wanted to advance. Unfortunately, his confessions and the fingerprints place him at the crime scenes as a participant in the criminal enterprises.

A consideration of all the evidence tendered points to the guilt of the fourth accused person. His guilt has been proved by evidence beyond reasonable doubt.

Conclusion

When two or more persons agree to commit a crime or actively associate in a joint unlawful enterprise, each one of them is held responsible for specific criminal conduct committed by the other or one of the members of the group which conduct falls within their common scheme.

Section 196A of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] provides the following about the liability of co-perpetrators:

> "(1) If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
>
> (2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they –
>
> (a) were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of the crime; or
>
> (b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
>
> (c) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged."

The above provision reflects what was always known as the common purpose doctrine under the now repealed common law, the essence of which is explicated by Jonathan Burchell in *Principles of Criminal Law* (5th ed) p. 478 as follows:

> "So, for instance, an accused who agreed, as a member of a criminal syndicate, to commit (or participate in the commission of) housebreaking with intent to commit a crime or robbery would be liable for murder if the resultant death was foreseen as a possibility of engaging in the agreed crime. As was said in *Madlala*:
>
> "An accused may be convicted of murder if the killing was unlawful and there is proof . . . that he was party to a common purpose to commit some other crime, and foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted reckless of such fatal consequence, and it occurred."

In the case of *S* v *Chauke & Anor* 2000 (2) ZLR 494(S) at 497A-B, the court, endorsing the principle in *S* v *Nhlapo & Anor* 1981 (2) SA 744(A), held that where security guards were attacked by robbers and one of the guards was killed during a shoot-out by a bullet fired by one of his colleagues the robbers present would be convicted of murder. In *Nhlapo* (*supra*) at 750H-751B VAN HEERDEN AJA said:

> ". . . the robbers knew that they would have to attack and overpower guards who were armed for the specific purpose of using their firearms to thwart any attempted robbery. It may be conceded

> that they hoped to overpower the guards without a shot being fired by the latter, but they must have known that the guards would endeavour to use their firearms when attacked. It follows that they must have known that their attack on the guards could lead to a gun battle during which anybody, be it a guard, one of the robbers or an innocent bystander, might be killed in the envisaged cross-fire. Consequently, they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a person such as a staff member of Makro witnessing the attack. In sum, the only possible inference, in the absence of any negativing explanations by the appellants, is that they planned and executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility that anybody involved in the robbers' attack, or the immediate vicinity of the scene, could be killed by cross-fire."

See also *S* v *Mubaiwa & Anor* 1992 (2) ZLR 362(S) at 370F-H.

In this case, the first accused was present at 40 Northampton Crescent during the case of unlawful entry in aggravating circumstances. The unlawful entry was in aggravating circumstances because the accused persons not only damaged locks/keys and the doors in accessing the premises but intended and went on to commit another offence, theft. The use of accused one's weapon at 5 Wembley Crescent links him to the murder at that address. As found earlier, the two offences were committed by the same persons. Likewise, the fourth accused was present at both scenes, and participated in the commission of both offences. The debate on who fired the shot that killed the deceased at 5 Wembley Crescent does not arise in view of the finding that all those involved were co-perpetrators. The accused persons knew that they might face resistance from persons at the premises to which they went. Indeed, the evidence during the indications was that the first thing that they did when they got to the scenes was to look around to check if there was a security guard guarding the premises, which meant that they were ready to deal with any form of resistance, hence the killing of the deceased in count two.

Accused two and three have only the evidence of the indications against them. In the absence of corroboration thereof, and in view of the weight that this court has given to the indications, these two accused must be given the benefit of the doubt.

Verdict

In the result, the following is the verdict of this court:

1. In respect of count 1, first accused is found guilty of unlawful entry in aggravating circumstances as defined in s 131 (1) and (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

2. In respect of count 2, the first accused is found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
3. In respect of both counts 1 and 2, the second accused is found not guilty and is accordingly acquitted.
4. In respect of both counts 1 and 2, the third accused is found not guilty and is accordingly acquitted.
5. In respect of count 1, the fourth accused is found guilty of unlawful entry in aggravating circumstances as defined in s 131 (1) and (2) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*].
6. In respect of count 2, the fourth accused is found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
7. The first accused and fourth accused are to be remanded in custody pending the passing of sentence.

National Prosecuting Authority, applicant's legal practitioners
Makuku Law Firm, first accused's legal practitioners
Muronda Malinga Legal Practice, Second Accused's legal practitioners
Chizengeya & Partners, Third Accused's legal practitioners
Tadiwa & Associates, Fourth Accused's legal practitioners