HB 274/18
HC (CRB) 95/18

THE STATE

Versus

NDABEZINHLE MPOFU
And
OWNIOUS BHEBHE
And
TOMSON PHUTI
And
MARTIN DLAMINI

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J with Assessors Mrs Moyo & Mr Ngwenya
BULAWAYO 18 TO 21 SEPTEMBER 2018

Criminal Trial

T. Muduma for the state
M. Chimwanda for 1st accused
T. Vhiki for 2nd accused
T. Runganga for 3rd accused
K. Ngwenya for 4th accused

TAKUVA J: The accused persons are facing two counts namely murder and robbery in that on the 17th day of January 2017 and at Pelandaba, Bulawayo, the accused persons assaulted, stabbed and tied up Burton Sikalonga intending to kill Burton Sikalonga or realising that there was a risk or possibility that their conduct may cause the death of Burton Sikalonga continued to engage in that conduct despite the risk or possibility

In count two, it was alleged that on the 17th day of January 2017 and at SDA Pelandaba, the accused persons did each or one of them intentionally and unlawfully used a gun and went on to assault and stab Burton Sikalonga in order to induce him to relinquish property belonging to SDA Pelandaba.

The 1st accused pleaded as follows:

Count 1: Murder - Not guilty but guilty to culpable homicide

Count 2: - Robbery - guilty

The second accused pleaded as follows:

Count 1: Murder – not guilty but guilty to culpable homicide

Count 2: Robbery - guilty

The 3rd accused's plea was as follows:

Count 1: murder – not guilty

Count 2: Robbery – guilty

The 3rd and 4th accused pleaded as follows

Count 1: Murder – not guilty

Count 2: Robbery – not guilty

The state produced its summary as exhibit 1. Briefly the state alleged that on the 126th day of January 2017 and at 17:30 hours the deceased and Vusumuzi Tshuma reported for guard duties at SDA Pelandaba Primary School and church Bulawayo. The two occupied classrooms which they used as a guard room. At approximately 00:30 hours the deceased did some perimeter checking leaving Vusumuzi Tshuma in the guard room. Shortly, thereafter Vusumuzi heard deceased calling out "amasela, amasela" meaning "thieves, thieves". Vusumuzi got up intending to find out what was going on and as he got to the door, he was confronted by accused 4 who pointed a firearm at him ordering him to raise his hands. Accused 4 searched Vusumuzi and took his Huawei Ascend Y200 cellphone.

Meanwhile, accused 1, 2 and 3 assaulted, stabbed and manhandled deceased in front of classroom16. They ordered him to lie down on his stomach. Accused 1 and 2 dragged deceased to where Vusumuzi was. Accused 3 had removed a school flag rope from a flag pole and used

his shoe laces to tie his hands at his back. He then used the flag rope to tie Vusumuzi's legs together. Deceased and Vusumuzi were then tied together using the flag rope and accused 1 remained guarding the two while his co-perpetrators proceeded to the school administration offices where they cut a padlock using a bolt cutter and forced open the main entrance door with an iron bar.

Accused 2, 3 and 4 ground a Chubb strong room door using an angle grinder and stole cash amounting to $70,00 and a race gun. They proceeded to the school accounts clerk's office where they stole a Toshiba laptop and a Lenovo laptop. Further, they forced open the Deputy Headmaster's office and stole five navy blue golf T-shirts inscribed "Adventist Education a Celebration for Excellence". The three proceeded to the church offices where they cut the padlock to the screen door using a bolt cutter and forced open an office door using an iron bar thereby gaining entry. Whilst inside they ground a built in safe and stole cash amounting to $133,00 and an HP laptop. The group left the premises leaving Vusumuzi and the deceased tied up.

On the 17th January 2017 at approximately 05:50 hours one Sisa Masuku scaled the school gate and untied the deceased and Vusumuzi after someone had alerted him that someone was screaming for help inside the school premises. An ambulance was summoned and took deceased and Vusumuzi to Mpilo Hospital for treatment. However, deceased passed on around 0950 hours while being attended to by doctors. The police were notified and arrested all the accused persons after carrying out the investigations. Also, the police were able to recover the following stolen property:

1. Huawei Ascend Y200 cellphone
2. HP laptop
3. Lenovo laptop
4. Toshiba laptop
5. Four navy blue T-shirts
6. Flag rope

The police also recovered the following exhibits from the accused persons:

(a) Tarinta angle grinder
(b) 1 bolt cutter
(c) 1 hunters knife
(d) $40,00 cash

Exhibit 2(a) was the 1st accused's defence outline. The accused pleaded not guilty to murder but guilty to culpable homicide. The state refused to accept his limited plea. In respect to count 2, he pleaded guilty as charged. As regards the murder charge, the accused admitted being at the scene for purposes of stealing. While stealing the property they were confronted by the deceased who was guarding the property. He said a fight ensued between the deceased who was armed with an iron bar and the accused persons. Deceased had disobeyed the accused persons' instructions to move away from the door. Instead deceased ran away shouting "thieves, thives". He stated that the deceased was assaulted because of his resistance and violent behaviour. Further, it was contended that the deceased died as a result of the negligence of the health personnel at Mpilo Hospital. Finally, accused 1 prayed for his acquittal on a charge of murder and that he be found guilty of culpable homicide.

Accused 2's defence outline was marked exhibit 2(b). In it he said he never intended to kill the deceased in that he simply assaulted the deceased with the intention to incapacitate or weaken him as the deceased confronted them violently. The accused prayed that he be found not guilty of murder but guilty of culpable homicide. He pleaded guilty to the charge of robbery.

The 3rd accused's defence outline was marked exhibit 2(c). He pleaded not guilty to murder and guilty to robbery. As regards the murder charge he stated that he was invited by accused 2 at night and informed of a plan to steal property at Pelandaba Primary School. He joined accused 1, 2 and 4 at a shade inside the premises. They broke into an office where they were confronted by the deceased who had come to find out what was happening. Accused 1 and 2 came out first, followed by accused 4. He was the last to leave the office and in the process of looking for his colleagues he came across accused 1 and 2 in the company of the deceased.

When accused 4 left the office, he ran after Vusumuzi who eventually was ordered by accused 4 who was pointing a firearm at him. He tied deceased and Vusumuzi's legs and hands with a flag rope and left accused 1 guarding them. They left the two security guards lying on the ground with their legs and hands tied. Accused 3 denied having any intention to kill the deceased and prayed for his acquittal on a charge of murder.

The 4th accused pleaded not guilty to both charges. His defence outline was marked exhibit 2(d). In his defence outline he denied "unlawfully and intentionally or otherwise ever planning, formulating or harbouring any intention to kill the deceased …" He stated that the sole purpose of his presence at the crime scene was to steal. While admitting that he pointed a firearm at Vusumuzi he vehemently denied being anywhere near the deceased. He denied assaulting, stabbing or tying up the deceased.

Ad robbery

The accused denied this charge on the basis that he did not unlawfully and intentionally use a gun let alone assaulting and stabbing the deceased in order to induce him to relinquish property belonging to SDA Pelandaba. He urged the court to acquit him because he only pointed a gun at one of the guards namely Vusumuzi and not the deceased.

The post mortem report by Dr E. Foto was marked exhibit 3. In it the medical doctor indicated that the cause of death was –

a) Blunt chest trauma
b) Multiple injuries and stabbing
c) Murder (robbery attack)

On marks of violence, the doctor observed the following:

> "swollen upper lip laceration on the left frontal region just above the left eye brow. 4cm long and 0,5cm deep laceration on temporal region middle almost making T shape with another 2 x 0,5cm laceration respectively. 3cm long 0,3cm deep and 1cm wide wound just anterior to the right ear. 1 x 1cm laceration on right upper arm anterolateral with an assaulted fractured right humorous midshaft – distal fragment displaced laterally and proximal 2/3.
>
> 1cm x 1.5cm right lower arm laceration with associated fracture radius born near junction of distalthird. Bruises on both knees, 1 x 1cm laceration of left hand knuckle on middle finger. Bruise on left upper arms nuddle. Right chest wall scratches. Right chest wall haematoma 10 x 6cm noted on the parietal pleural. 8 x 8cm haemotoma on the right side under the skin. Left sided fracture of rib 2 to 7 about 7cm from sternam. Fracture of rib 3 – 7 on the stermal joints. Missing upper incisor cones. Clothes blood stained …" (my emphasis)

On the other remarks the doctor's comments were that "severe forces were used to cause the multiple stabbing and multiple fractures of the ribs, tooth, right humerus right ulna and radius" (my emphasis)

> Exhibit 4 was the Tokarev Pistol which according to a ballistic expert was in working order. Exhibits 5 – 11 related to property that was recovered.

The state led evidence from Vusumuzi a security guard employed by SDA Pelandaba Primary School. Deceased was his colleague and he does not know any of the accused persons. He was on duty on the 17th January 2017 with the deceased in their guard room when at midnight deceased decided to do the usual perimeter check. Shortly thereafter, he heard deceased calling out "thieves, thieves" and he decided to go out and check. As he got to the door he was confronted by a man who pointed a gun at him and ordered him to put his hands in the air. He complied and this man said they wanted to know the location of the school offices as their mission was to steal school property. He showed them the offices. Shortly, thereafter he was ordered to lie down and his hands were tied at his back using shoe laces removed from his shoes. The deceased was brought to where the witness was by three men. Deceased and Vusumuzi were tied together using a flag rope and one accused remained guarding them while 3 entered the school offices. Before the group left for the offices, the witness heard one of them shouting that

the "old man was getting up". He also heard someone saying he did not want the old man's blood on his hands.

Later he realised that deceased was no longer responding to his enquiries. In the morning he noticed that deceased had sustained very serious injuries on the neck and right side of his abdomen with blood oozing from his body. The witness stated that the accused persons covered their faces with pieces of cloths. The next morning they were taken to hospital but deceased died while being attended to by medical staff. Under cross-examination, the witness disputed he assertion that accused 3 and 4 did not intend to kill the deceased but just to steal by saying, "considering the manner in which the deceased was injured, I cannot agree with you".

After the evidence of Vusumuzi, the State applied to have the evidence of the following witnesses formally admitted in terms of section 314 of the Criminal Procedure & Evidence Act Chapter 9:07.

1. Sisa Masuku
2. Bongani Ncube
3. Nyasha Nembaware
4. Sithembiso Moyo
5. Erica Nyoni
6. Ephraim Tshuma
7. Mcedisi Phuti
8. Zanele Sibanda
9. Nomusa Dube
10. Bukhosi Ncube
11. T. Dube and
12. Dr E. Feto

There being no objection, the evidence was duly admitted. The State then closed its case. The 1st accused gave evidence on his own behalf. He admitted that the plan to steal property at No. 1 Shopping Centre was hatched on Marisha Bar where he and accused 2 and 4 were drinking

beer. Accused 2 was said to be the "mastermind' since he wanted to fend for his family. At approximately 2200 hours they left the bar for their intended target. On the way it started raining heavily forcing them to seek shelter in a shed outside the school premises. They scaled the school durawall and sought refuge inside for 1 hour smocking and discussing until accused 2 phoned accused 3 telling him to join them which he did. Upon accused 3's arrival they decided to steal computers from the school offices.

The 2nd and 3rd accused persons then broke into the office where the 2nd accused used his grinder to demolish a Chubb safe. This emboldened the 1st accused who broke into an adjacent office where he stole two laptops in the presence of accused 4. At that point he saw a knife in accused 2's bag and he took it intending to scare off anyone who challenged him. Whilst in that office, they heard some noise and they dashed for the door where they were confronted by the deceased who was armed with an iron bar. The group unsuccessfully tried to scare him off but he stood his ground until he realised that he was out numbered and he fled from the scene towards the school gate. He then gave chase in order to block his way and bring him back to the classrooms. In the process, he fell down resulting in the knife he was wielding breaking. Deceased also fell down. When he got up he saw accused 2 manhandling the deceased and he joined in the assault by punching the deceased on the face with a fist and kicked him on his legs in order to fell him down. They grabbed the deceased by his hands and took him to where his colleague was lying on the ground. At that stage accused 3 brought a flag rope which he used to tie the two together and accused 1 remained guarding the helpless guards while his accomplices broke into further offices. Later the two returned and enquired from Vusumuzi where the other safe was. Vusumuzi indicated the church office and they left. They returned and the rest of them scaled the wall and left.

The accused admitted that his actions throughout were in furtherance of the robbery. He received cash and a T-shirt as his share of the loot. Under cross-examination by the state counsel the accused admitted that he disarmed the deceased of the iron bar and that accused 2 had a crowbar made of iron. Also, he admitted that they were using this crowbar to break doors and remove nails since it has claws on the other end. As regards the presence of guards at the school,

he said they thought there were no guards stationed at the school. In his opinion, he and accused 2 caused all the injuries found on the deceased since accused 3 and 4 did not assault the deceased. Although the robbery was planned in Marisha Bar, when they left with the grinder, bolt cutter, he only saw the firearm for the 1st time at the scene when accused 4 produced and used it. Finally, he said their plan was to flee if they met resistance but they later changed and decided to confront and over power the outnumbered guards.

The 1st accused did not call any other witness and this marked the end of his case.

The second accused then took to the witness stand to defend himself. He is a self-employed cross border trading in kitchen units acquired in Botswana. On the day in question he was returning from erecting a sliding gate and was in possession of his tools namely, a grinder, bolt cutter, crow bar and a knife. He went to Marisha bar where he found accused 1 and accused 4 who are his regular drinking mates. At the time he was in a stressful condition due to financial problems. He had failed to pay school fees for his daughter. As a way of raising money he suggested to accused 1 and 4 that they should team up on a mission to rob. Accused 1 and 4 agreed and enquired on the tools they were going to use. He told them he had tools that could do the job. They agreed to rob No. 1 shopping centre but while on the way, they decided to seek shelter from the incessant rain in a shed inside SDA premises. They scaled a durawall and entered the school premises.

Whilst inside the shed, the 2nd accused then phoned the 3rd accused whom he informed that they were going to steal at No. shops and that accused should join them if he so wished. Accused 3 arrived and the group agreed to rob the school instead. It was accused 1's suggestion. Accused 2 then cut the key to the screen door while accused 3 used crow bar to open the door after which accused 1 took some laptops. He further said he used a grinder to cut open the Chubb safe but was interrupted by accused 1 who announced that they were people around. He immediately switched off the grinder and exited the office with accused 1 in front. He armed himself with crow bar and he saw the deceased outside holding a metal pipe. The deceased fled and they gave chase after realising that he was alone. Accused 1 and the deceased fell down at

the same time and he struck the deceased on the lower part of his arm using a crow bar. Accused 1 arrived and he also assaulted the deceased. They took the deceased to where Vusumuzi was and accused 1 and 3 tied them together. He saw his knife's blade on the ground and he picked it up. Accused 1 admitted to have used it.

After securing deceased and Vusumuzi, he went back to Chubb safe where he used the grinder to open it. They found US$70,00 in the safe. From that office they found 2 laptops and some T-shirts. They returned to where Vusumuzi and deceased were and he asked Vusumuzi whether there was another place where they could get money after which, they were directed to the church offices. They went there and accused 2 proceeded to cut the padlock key with a bolt cutter while accused 3 opened the door forcibly and they searched for money. They took another laptop but decided to search for a built in safe which they found and opened it using a grinder. Inside the safe they found cash in excess of US$100,00. They gave accused 1 all the cash while the 3 of them shared the rest of the property equally. In other words accused 2, 3 and 4 each got a laptop.

Asked under cross examination to comment on injuries sustained by the deceased as shown in the post mortem report, he said he struck deceased once on the arm with a crow bar. He assumed accused 1 stabbed the deceased since he was the only one with a knife. He however saw accused 1 striking deceased with clenched fists and booted feet before taking him to where accused 3 and 4 were. He did not see accused 3 and 4 assaulting the deceased.

Accused 2 denied that he masterminded the whole operation by saying "we discussed the issue amongst ourselves and reached a consensus" He also denied that he intended to kill the deceased. According to him the 3rd and 4th accused persons also chased the deceased but accused 4 went back to the classrooms before deceased had been caught. He did not know accused 4 had a gun as he only saw it when the guards surfaced.

The 3rd accused gave evidence in his defence. He confirmed accused 2's role of inviting him to come to where the rest of the group was hiding. Inside the shed he was informed of the plan to steal computers from the school and he agreed to participate. After accused 2 had cut a

padlock using a bolt cutter, he used a crow bar to open doors to the offices where laptops where stole from. As they were busy ransacking the offices he heard accused 1 threatening the deceased who was outside shouting thieves, thieves. The deceased who was holding an iron bar, quickly retreated upon realising that he was outnumbered. At that stage he decided to escape but accused 1 came out first followed by accused 2 and 4. He was the last to leave the office. Accused 1 and 2 followed the deceased while he followed accused 4 whom he found standing near Vusumuzi who was lying on the ground. He also found deceased and accused 1 and 2 there. He tied Vusumuzi's hands with his shoe laces and later looked for a rope that he used to tie deceased's hands and legs to enable the group to steal. He also confirmed that at the scene he saw accused 4 brandishing a gun, accused 1 had a knife while accused 2 had a crow bar. Finally, he admitted that after apprehending the two guards, he joined accused 2 and 4 to break, enter and steal property from the school and church offices. He denied having an intention to kill the deceased arguing that his intention was to steal and leave the scene undetected. He therefore pleaded guilty to robbery.

The 4th and last accused also gave viva voce evidence in his defence. He denied the murder charge on the basis that he never had any physical contact with the deceased in that he did not stab him or assault him in anyway. As regards the robbery charge, his defence is based on his assertion that he went to the school to steal and he did that without robbing the deceased. As regards the planning, he admitted discussing and agreeing to go to No. 1 shopping centre to steal using accused 2's tools that included a grinder, bolt cutter and a craw bar. He agreed with accused 1 and 2. Later accused 2 phoned accused 3 who also agreed to join them.

After outlining what tools accused 2 was carrying he said accused 1 had no weapon while he was armed with a firearm which he did not intend to use. He gave a long story about the source of the fire arm and why he went into a bar armed with a pistol. The firearm according to him, belonged to his cousin who asked him to take it home for safe keeping. He in turn did not tell accused 1 and 2 that he had a firearm. His version on how they broke into the offices is identical to that given by his accomplices. More importantly, he confirmed that upon realising that he was in the minority, deceased "retreated" as they "advanced". Accused 1 and 2 chased

the deceased and accused 2 was armed with a crow bar. He said as he was fleeing the scene Vusumuzi emerged armed with a catapult and he decided to point the firearm at him ordering him to lie down so as to incapacitate him.

After that he robbed Vusumuzi of his cellphone while a distance away he saw accused 1 and 2 assaulting the deceased. He told them to stop which they did and they brought deceased to where Vusumuzi was. Deceased was made to lie on the ground next to Vusumuzi. At this stage deceased was no longer resisting and he did not hear deceased utter a single word. As regards common purpose, he admitted that accused 1 and 2's deed was his deed. However when asked what he would have done if Vusumuzi had resisted he declined to answer the question on the grounds that it is a difficult question to answer. He admitted that by pointing a firearm at Vusumuzi he prevented him from assisting the deceased.

In so far as the identity of the owner of the gun was, all accused could say is his name is Obvious Panganayi who is a distant cousin on his father's side. He failed to provide further particulars like his residential address or the name of his employer. Also, he argued that he associated with his accomplices to rob the school of the laptops and cash in which they shared. He did not dispute the fact that he kept the pistol concealed in an old refrigerator or shell that was not functional. The accused then closed his case.

Analysis

A. Facts that are common cause

1.1 On 16 January 2017 and at Marisha Bar in Magwegwe, Bulawayo the 1st, 2nd and 4th accused persons hatched a plan to steal property from No. 1 shops but later decided and agreed to steal computers from SDA Pelandaba School.

1.2 The 3rd accused was called by the 2nd accused to join them at the school and he went there. The 4 accused persons then proceeded to break into offices using a grinder and a crow bar. They stole two laptops from the offices.

1.3 On 16 January 2017 at approximately 1730 hours, Vusumuzi and the deceased reported for guard duties at SDA Pelandaba Primary School and church.

1.4 Meanwhile on the 17th of January 2017 at approximately 0300 hours, the deceased went out to do some perimeter checks leaving Vusumuzi in the guard room.

1.5 Shortly thereafter, Vusumuzi heard deceased calling out "thieves, thieves" and he rushed to investigate but was confronted by accused 4 by the door. Accused 4 pointed a firearm at Vusumuzi ordering him to raise his hands. Accused 4 then searched Vusumuzi and took his Huawei Ascend Y200 cellphone. He ordered Vusumuzi to lie down.

1.6 Meanwhile when deceased was shouting "thieves, thieves" he was running away being pursued by accused 1 and 2 who were armed with a knife and a crow bar respectively.

1.7 Accused 2 assaulted deceased with the crow bar on his hand while accused 1 punched and kicked deceased before taking him to where Vusumuzi had been ordered to lie down on his stomach by accused 4.

1.8 Accused 3 who had earlier used Vusumuzi's shoe laces to tie is hands brought a rope and he tied deceased's hands and legs before tying the two together with the same rope.

1.9 The 1st accused was left guarding the deceased and Vusumuzi whilst the 2nd, 3rd and 4th accused persons went back to the school offices where they stole laptops, T-shirts and cash.

1.10 After ransacking the school offices accused 2, 3 and 4 returned to where they had left deceased and Vusumuzi and asked the latter for directions to the location of safes and offices with money. They were directed to the church office. They broke into those further offices where they stole a laptop and cash from a safe.

1.11 They shared the stolen property equally and some of the property was recovered by the police in accused persons' possession.

1.12 The grinder, bolt cutter and knife belonged to accused 2 while the 4th accused was in possession of a pistol.

1.13 The deceased died from injuries inflicted by accused 1 and 2 during the robbery.

B. Facts in dispute (issues)

1. Whether, or not acting in common purpose as co-perpetrators, the accused persons caused the death of the deceased?
2. Whether or not the accused persons acted with the requisite *mens rea* to commit murder?
3. Whether or not the 1st accused used a knife to assault the deceased?
4. Whether or not accused 2 used a crow bar to assault the deceased on his body?
5. Whether or not accused 4 intentionally armed himself with a pistol?

C. The law

The liability of co-perpetrators is laid out in section 196A of the Criminal Law (Codification and Reform) Act Chapter 9:23 which provides:

"196A 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 could be committed then they may be convicted as co-perpetrator in which event the conduct of the actual 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 three 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 near the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that 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.

(3) A person charged with being a co-perpetrator of a crime may be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory if such are the facts proved."

This section codifies the common law doctrine of common purpose.

In *S* v *Ncube & Anor* 2014 (2) ZLR 174 (S) it was held "that the second appellant's defence to the charge must also fail. For his defence of disassociation or withdrawal to succeed, he would have had to have countenanced the original instruction or understanding that existed with the 1st applicant. This he had not done by simply running away from the scene and his conviction for murder was still justified on the basis of common purpose".

The facts in the *Ncube* case *supra* were as follows::-

The two appellants went to a school during the course of the night with the common intention of stealing thereform. They armed themselves with knives and also carried tools and equipment to assist in breaking into the premises. After gaining entry they stole various items which they loaded into a bag. They were seen doing so however, by the deceased, who was a teacher at the school and, arming himself with an axe he went to investigate. The deceased ordered the 1st appellant to surrender but refused to do so, he ran off. The deceased gave chase and was eventually able to apprehend him. Using the blunt end of his axe he instructed the first appellant to lie down. This he did, but he suddenly produced a knife from his pocket and stabbed the deceased in the abdomen, killing him.

In the meantime the second appellant seized his opportunity to escape and ran off in a different direction. Both appellants were later arrested. At their trial they were charged with murder, convicted and sentenced to death. On automatic appeal to the Supreme Court, it was submitted on behalf of the 1st appellant that the state had failed to disprove the defence of the person, in other words that he was acting in self defence.

The second appellant submitted that the state had failed to establish the basis of common purpose to warrant his conviction for the murder of the deceased by the 1st appellant. In this regard it was argued on his behalf that by running off he had disassociated himself from the murder …" As pointed out above, this defence was dismissed.

GARWE J (as he then was) in the case of *S* v *Sumari & Anor* HH-75-200 at pp11-12 summarised the doctrine of common purpose in our law thus:

> "The position is now settled that where accomplices break into premises with a weapon known to all and the weapon is used in the murder of a victim all would have at least a constructive intent to kill – See *S* v *Nyathi & Ors* S-52-95. In *S* v *Careka & Anor* S-40-93 two accused acting in cahorts had a firearm in their possession. The second accused was found guilty of murder with constructive intent. In *S* v *Ngulube & Anor* S-112-93 the Supreme Court held that the 1st appellant should have been found guilty of murder with constructive intent on the basis that being aware that his accomplice was armed with a lethal weapon he must have appreciated and foreseen the possibility of his colleague resorting to the use of the weapon to kill in furtherance of their common objective to effect the robbery.
>
> In this case, it is clear accused 1 must have, at the very least, been aware that accused 2 would resort to the use of the axe in order to successfully effect the robbery".

In dealing with the liability of unarmed accomplices or co-perpetrators McNALLY JA in *S* v *Ndebu & Anor* 1985 (2) ZLR 45 (S) observed that:

> "I will content myself in this case by saying that on the facts I am not at all satisfied that the second appellant dissociated himself from the murder. He had gone along with the common intention to commit house breaking and theft and if necessary armed robbery. He had taken part actively in the breaking and had himself then cut the telephone wires. He knew and appreciated the risk that if someone in the house woke up the firearm might have to be used to subdue the residents or to effect an escape. He was there participating when precisely that situation arose. As it happened he was so placed that he could run away. But by that stage what he did was no longer material. The reason for that is clear. Te risk which he deliberately took was not related to what he himself might do but what his armed companions might do if challenged or cut off. He had linked his fate and his guilt with that of his armed companion's. The mind that needed changing was not his but his companions. His constructive intention to kill depended on a decision by his companion".

The facts in *Ndebu & Anor* were that the appellants were convicted of murder and sentenced to death. During the course of housebreaking at a dwelling known to be occupied at the times the appellants were surprised by the householder. The second appellant not in possession of a firearm, immediately fled and had already run some distance away before he heard the sound of gunshot fired by the 1st appellant which killed the deceased. The 1st appellant

was found guilty of murder with actual intent while the 2nd appellant was found guilty of murder with constructive intent. Both however were sentenced to death.

Before applying the law to the facts, I need to resolve a number of factual disputes that arose during the trial. The 1st dispute relates to what weapon was used by accused 1. Put differently did accused 1 use a knife to stab deceased all over his body? Naturally, in order to resolve this dispute, one looks to the evidence on the point. Accused 1 denied using the knife to stab the deceased. However, the evidence is that, of the four of them, he is the only one who possessed a knife. This he admits but then proceeds to proffer an incredible explanation as to why he could not have used the knife. His explanation being that as he chased the deceased holding the knife he fell down and the knife blade penetrated the ground causing it to break. This is clearly a fabricated story in that firstly the knife that was produced as exhibit 14 is not broken. Secondly, the post mortem indicates that the deceased's body showed multiple stabbings, lacerations and cuts caused by a sharp instrument. Thirdly, the knife is a "Hunters knife" whose blade is very strong and would not break in the manner described by accused 1. We find therefore on these three reasons that the 1st accused used the knife to stab the deceased.

As regards the second factual dispute relating to the use of the crow bar by accused 2, we find that he used it repeatedly on the deceased due to the numerous fractures observed on deceased's body as reflected in the post mortem report. Also, he is the only person who assaulted deceased with a crow bar. Accused 4 in our view was not candid with the court in respect of the origin of the gun. Our finding is that he knew right from the outset that he was carrying a gun. The reasons are simple. Firstly, there was a long discussion in Marisha Bar over what weapons were to be used in the theft and robbery. This should have jogged accused 4's memory about the whereabouts of the gun as the others declared what weapons and tools they were carrying. Secondly, even the 3rd accused who was called later enquired whether it was necessary to bring weapons. Thirdly, accused 4 admitted that they scaled the durawall to the school. If the gun was on his "inside" jacket pocket, he should have felt its weight making him realise that he was in possession of it. Finally, the story he gave about its origin is beyond any doubt false in that he could not supply the identity particulars of the owner whom he referred to

as Obvious Panganayi – a distant cousin. It becomes apparent that this person does not exist at all.

Having disposed of the factual disputes, the next task is to apply the law onto the facts. In the present case, the evidence that is common cause shows that the accused persons committed the crime in association with each other. This is readily admitted both in their defence outlines and evidence in chief. The role played by each accused person has been laid bare by them in detail. They shared the loot equally. They contributed weapons and tools that were used in the robbery and murder of the deceased..

In deciding whether or not the accused persons had the requisite *mens rea* to commit the crime, it is instructive to consider the provisions of subsection (2) of section 196A of the Code. *In casu* it is common cause that all the accused persons were present at the scene of the crime. It is also common cause that they held a preparatory meeting inside Marisha Bar. Further, they committed unlawful entry and theft as a group prior to the deceased's murder.

Accused 1 and 2's argument is that they lacked the requisite intent to kill the deceased because their blows were concentrated on the non-vulnerable parts of his body. This, however is not supported by the post mortem report. It is also inconsistent with the deceased's condition at the time he was tied to Vusumuzi. The evidence shows that the deceased never uttered a word, he never resisted in any form. The deceased had been fatally wounded and totally immobilized. The two used dangerous weapons causing numerous stabbings and fractures on the deceased's body. They used excessive force to inflict those injuries. Where a person uses dangerous weapons to fracture human bones with fatal consequences, that person cannot be heard to argue that he/she lacked the requisite *mens rea* to kill. In casu, we find that accused 1 and 2 intentionally killed the deceased.

As regards accused 3 and 4 their gripe with the State is simply that since they did not physically and personally attack the deceased or got to where he was attacked by accused 1 and 2, they lacked the requisite intent to kill him. However, on legal principles, this argument is misplaced in that once it is found that they are co-perpetrators, then what was done by accused 1

and 2 is deemed to be their deed as well. See section 196A. See also *S* v *Ndebu supra*. The authorities discussed above agree that an accused in accused 3 and 4's circumstances be found guilty of murder with constructive intent. In the present matter the two must have realised and indeed realised that accused 1 and 2 might use the dangerous weapons to kill the deceased. Notwithstanding this realization they did not stop accused 1 and 2 from chasing the deceased with murderous intent. Instead of abandoning their unlawful enterprise, they indeed executed it.

As regards the robbery charge the State rightly in our view, withdrew the charge after plea since it was improper to charge the accused persons with robbery in respect of property in deceased's custody. This amounted to improper splitting of charges.

Accordingly, we return the following verdicts:

Count One

- Accused 1 and 2 are found guilty of murder with actual intent
- Accused 3 and 4 are found guilty of murder with constructive intent.

Count Two

All accused persons are found not guilty and acquitted.

After hearing argument on whether or not the murder was committed in aggravating circumstances we find that the murder was committed in the course of a robbery. Therefore the murder was committed in aggravating circumstances as envisaged in section 47(2) (a) (iii) of the Code.

Sentence

We have weighed the mitigatory factors against aggravating circumstances in order to arrive at an appropriate punishment. However, our options are limited in that in terms of section 47(4) of the Code, a person convicted of murder shall be liable –

(a) Subject to sections 337 and 338 of the Criminal Procedure and Evidence Act, to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
(b) In any other case to imprisonment for any definite period.

In casu, the accused persons' moral blame worthiness is very high in that they acted out of sheer greed and allowed their love for money to transcend human life. The courts have a duty to protect the sanctity of human life in homicide cases. Human life is a precious commodity in that it is a pre-condition to the enjoyment of all other commodities or rights. Consequently, those who kill a human being in order to enjoy ill-gotten property must be visited with the most severe penalties. In such cases, deterrence must be the major object of punishment.

We note also that the deceased had to be immobilized or incapacitated in the most brutal and degrading manner. Further, the multiple lacerations suggest that the deceased must have been tortured before he died. As a result, deceased died a very painful death from multiple fractures and other injuries. The accused persons further humiliated the deceased and Vusumuzi by ordering them to lie on their stomach before tying them together like logs and left them in that state on a rainy night only to be rescued by a good Samaritan on the following morning. All in all, the court has a wide discretion to be exercised judiciously in order to mete out an appropriate sentence. Exercising that discretion, we are of the view that the totality of the circumstances in this case warrants that we impose a sentence of imprisonment for life in respect of all accused persons.

Accordingly, all the accused persons are sentenced to imprisonment for life.

National Prosecuting Authority state's legal practitioners
Nyawo Ruzive Legal Practice, 1st accused's legal practitioners
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Tanaka Law Chambers, 3rd accused's legal practitioners
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