THE STATE

Versus

DOUBT MATHE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J with Assessor Mrs C. J Baye
GWERU 4 AND 6 APRIL 2023

Criminal Trial

Ms N. Chikuni, for the state
A. Chihiya, for the accused

MATHONSI J: The accused person was convicted by this court of the crime of murder in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23) on 25 January 2017. This court having found that the murder was committed in aggravating circumstances of robbery and unlawful entry into a dwelling house, it imposed the penalty of death.

The sentence imposed on the accused person triggered an automatic appeal to the Supreme Court against the judgment of this court in terms of the law. The Supreme Court heard the appeal on 27 November 2017 and, without giving reasons for judgment, issued the following order:

> "IT IS ORDERED BY CONSENT THAT:
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> 1. The appeal succeeds.
> 2. The judgment of the court *a quo* is set aside.
> 3. The matter is remitted to the court *a quo* for that court to investigate the allegation that the appellant was acquitted on the same facts on a charge of robbery after which the court is to determine the guilt or otherwise of the appellant and (if) applicable, the appropriate sentence."

This special hearing has been convened in accordance with the above order of the Supreme Court for purposes of carrying out the investigation set out in paragraph 3 thereof.

When the court convened, Mr W. T Matemba who had been one of the assessors at the initial trial, was no longer able to participate as he is now incapacitated by ailment.

In terms of s 8(1) of the High Court Act (Chapter 7:06):

> "(1) If at anytime during a criminal trial in the High Court one of the assessors dies or becomes, in the opinion of the Judge, incapable of continuing to act as assessor, the Judge may, if he thinks fit, with the consent of the accused and the prosecutor, direct that the trial shall proceed without that assessor."

It was with the consent of both the accused and the prosecution that I directed the matter to continue with only Mrs C.J Baye and without Mr Matemba.

BACKGROUND

The facts of this matter appear in detail in this court's earlier judgment in *S* v *Mathe* HB 26-17 delivered at the end of the trial on 25 January 2017. Briefly, the accused, who hails from Zunguzira Village, under Chief Chireya in Gokwe North, was arraigned before this court on a charge of murder. The allegations were that, on the night of 14 June coming onto 15 June 2008 at Mutengate in Makainganwa Village under Chief Sai in Gokwe South, the accused person, in the company of two other accomplices, unlawfully caused the death of Taurai Mache (the deceased).

It was further alleged that they did so by striking the deceased on the head several times with a hoe handle intending to kill him or realising that there was a real risk or possibility that their conduct may cause the deceased's death but continued to engage in that conduct despite the risk or possibility.

Specifically, the facts were that on the night in question the deceased, who was a security guard employed by Grafax Cotton Company at its Mutengate buying point, was performing guard duties having reported for duty at 1800 hours. While at his guarding post, the deceased was approached by the accused and two other persons and they attacked him. Using a hoe handle, they struck the deceased several times on the head inflicting mortal wounds.

Leaving the deceased terminally wounded, the assailants proceeded to break into the house where Winnie Sigwala, a cotton buyer also employed by Grafax Cotton Company, was sleeping along with her very young children and other employees of the company. They broke the door to gain entry before using threats of violence against Winnie Sigwala to rob her of

company property in the form of Z$50 billion, two solar inverters and a generator. They then made good their escape.

It was after the assailants had left that the deceased was found outside the house severely wounded, bleeding from the mouth and ears and unconscious. Shoe prints left by the assailants around the yard and next to the deceased were preserved by covering them with plastic dishes. Following a report to neighbours, including the Village Head, a track team of 12 people was constituted to track the spoor of those that had attacked the deceased inflicting injuries from which he later died.

The spoor led the trackers to a gulley about 10 km away from the scene where they found the accused, Attend Tanyanyiwa and another person in the gulley discussing how they would share their loot. The accused and Tanyanyiwa were apprehended by the track team while the third person escaped. They were found in possession of all the property stolen from the Grafax Cotton Company premises where the deceased was beaten to death.

The accused person and Tanyanyiwa were taken back to the scene where they were interrogated by the villagers who also checked their footwear against the shoe prints left at the scene and satisfied themselves that they matched. Tanyanyiwa, who was known to the villagers as a local, was gang attacked by the angry mob and later died at the local Charamba police base.

Meanwhile, the deceased's body was ferried to Mpilo Hospital in Bulawayo where Dr I Jekenya conducted a post-mortem examination and concluded that the deceased died of severe brain haemorrhage, skull fracture and assault. It is common cause that the accused was jointly charged at Gokwe Regional Magistrates Court with one Tonderayi Muzira of robbery as defined in s 126 of the Criminal Law Code (Chapter 9:23). Alternatively, they were charged with Theft as defined in s 113(1) of the same Code. This was in respect of the property taken from Winnie Sigwala on the night the deceased lost his life.

At the close of the case for the prosecution the state withdrew charges against Tonderayi Muzira after plea as a result of which he was acquitted. It is also common cause that the accused was also later found not guilty and acquitted of those charges.

As already stated, before this court, the accused was charged with murder as defined in s 47(1) of the Criminal Law Code. He pleaded not guilty to the charge. His defence, which

was essentially an *alibi*, was that on the day when the deceased was murdered he was at Chitekere area under Chief Chireya in Gokwe North, about 120 km from the scene of crime in Gokwe South. He was then sent by his mother, who later died and was therefore unable to vouch for him, to travel that long distance to Chief Sai area of Gokwe South, to buy peanuts. He travelled on 14 June 2008 and at the time of his arrest by villagers he had just met Tanyanyiwa by coincidence.

It turned out that Tanyanyiwa was an acquaintance of his whom he already knew from previous association. At the time of the arrest, so the defence went, Tanyanyiwa was in the company of a nephew of his who later absconded but not before both the nephew and Tanyanyiwa had offered to lead the track team to the place where the property was recovered.

Following a full contested trial during which the post-mortem report compiled by Dr Jekenya and the hoe handle used to assault the deceased were produced as exhibits, evidence was led by the state from three witnesses and the accused also testified in his defence, this court made findings on credibility. The court made findings that both Winnie Sigwala and Rennias Chakafa were credible witnesses who had given their evidence very well.

This court also made a finding that the accused's defence of *alibi* was no *alibi* at all because the accused had mixed up his dates in that, if he had arrived in Gokwe South on the morning of 14 June 2008 when the deceased was attacked and fatally assaulted on the evening of that day, there was no *alibi* at all. More importantly, the court found that the accused had not raised the defence of *alibi* at the time of his arrest. He had only done so during his trial on the robbery charge at a time when his mother was said to be deceased.

Significantly, the court also made a finding that the accused person had corroborated the evidence of Winnie Sigwala that he was putting on blue push-ons and that the shoe prints that were identified during investigations matched his shoe prints. The court found overally that the accused person was not a credible witness who prevaricated on key questions and could not sustain his claim that he had been sent to buy peanuts.

Relying on the provisions of s 196 A (2) of the Criminal Law Code on the liability of co-perpetrators, the court found that it was not necessary to establish who, among the accused person and his accomplices, had struck the fatal blow on the deceased. This was so because the accused person had been present when the deceased was struck in circumstances which directly implicated him.

It is also important to note that the court found that the evidence of Rennias Chakafa that the accused person was found, not only discussing the sharing of the property stolen where the deceased was attacked, but also in possession of that property was unchallenged. The accused person was found guilty of murder.

Taking into account that the murder was committed in aggravating circumstances of robbery and unlawful entry into a dwelling house, the court settled for the death penalty. It was following the automatic appeal that the Supreme Court issued the order cited above. Although there are no reasons for the order made, in view of the manner in which it is worded, this court perceives the issues for determination in compliance with the order to be:

1. Whether or not the accused person was acquitted of the charge of robbery on the set of facts placed before this court.

2. If so, whether or not the accused person is guilty of the charge of murder.

3. If the accused person is guilty, the appropriate sentence.

PROCEEDINGS FOLLOWING THE SUPREME COURT ORDER

The record of proceedings in the Regional Magistrates Court wherein the accused person faced a robbery charge and alternatively theft, was produced before this court by consent and marked exhibit 5. In accepting the record the court was mindful that it could be admitted in terms of s262 of Criminal Procedure and Evidence Act (Chapter 9:07). Following that, the parties elected to address the court in an effort to canvas the issues arising from the directions of the Supreme Court.

Ms Chikuni for the prosecution submitted that in her view the order calls upon the court to consider whether the defence of *autrefois acquit* could be available to the accused person in light of his acquittal by the Regional Magistrates Court on the robbery charge. In addition, counsel for the state submitted that the court also has to consider whether there was an impermissible splitting of the charges of robbery and murder as a result of which the accused person was prejudiced.

On *autrefois acquit Ms Chikuni* submitted, relying on the authority of *S* v *Milanzi & Ors* HH 398-17, that it has no application whatsoever because the accused person was never in jeopardy of being convicted of murder of the deceased throughout his trial on the charge of robbery. Counsel submitted that even though some of the witnesses who testified in the murder

trial (Winnie Sigwala and Sgt Samson Chidembo) also testified in the robbery trial, there was no risk to the accused person as the two offences are different.

Mr Chihiya for the accused person conceded that the requirements for the sustenance of the defence of *autrefois acquit* have not been met in the present case. In counsel's view, the charges of robbery and murder are materially different and nothing turns on the acquittal of the accused person on the charge of robbery.

In our view, the concession by counsel for the accused person was properly made and we are indebted to counsel for not wasting the court's time. *Autrefois acquit* is simply a plea by an accused person that he or she has already been tried for and acquitted of the same offence. According to Macmillan Dictionary:

> "Definition of *autrefois acquit* (noun): principle that person cannot be tried twice for the same crime."

Rahul Deo, in an article titled "*Autrefois Acquit and Autrefois Convict*", explains the defence with silky eloquence in the following:

> "The doctrine in a way is the rule against double jeopardy. Rule against double jeopardy means that a person cannot be tried for the same offence once again if he has been either convicted or acquitted <u>in the trial relating to the same offence</u>.
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> *Autrefois acquit* and *autrefois convict* are the French terms literally meaning 'previously acquitted' and 'previously convicted' respectively. These two terms have their origin in the common law where they are accepted as the pleas …. and these pleas have the effect that the trial cannot go ahead due to the special circumstances that these two pleas depict". (The underlining is for emphasis)

The accused person was not charged with murder twice. In the lower court he faced a charge of robbery based on what he did when he broke into Winnie Sigwala's house and forcibly took property. To the extent that he was acquitted, it was in respect of a different offence. The defence is not available to him.

Regarding the possible splitting of charges, *Ms Chikuni* submitted that nothing turns on that either. In her view this is so because different facts confronted the accused person in the robbery charge where the complainant was Winnie Sigwala. In respect of that charge it is the Regional Magistrates Court which had jurisdiction and the facts needed to prove the offence were completely different from those in the murder charge.

Ms Chikuni went on to argue that it was indeed possible to try the accused person on the robbery charge without mentioning the deceased. The deceased in the murder trial was Taurai Mashe and no one else. The state, so it was argued, as *dominus litis,* had the discretion to prefer the charges separately before different courts of competent jurisdiction.

Again, owing to the weight of submissions made on behalf of the state, *Mr Chihiya* for the accused was constrained to concede. He submitted that the accused person did not suffer any prejudice as a result of the splitting of charges. This is so, counsel submitted, because the Regional Magistrates Court did not attempt to relate to the murder case.

During engagement with the court, counsel for the accused person submitted that the evidence presented by Winnie Sigwala before the lower court was of no relevance before this court because this court had the benefit of direct oral testimony from that witness. It is for that reason, so counsel stated, that the defence did not see the wisdom of insisting on the witness being brought in for further cross examination.

As shall become apparent later, the concession by counsel was proper. We will however proceed to examine in great detail the law relating to splitting of charges in resolving the issues for determination in light of the directions of the Supreme Court.

ANALYSIS

Whether or not the accused person was acquitted of the charge of robbery on the same facts

With the benefit of the record of proceedings which was produced by consent, this ceases to be an issue. We take judicial notice of that court record which shows that indeed the accused person stood trial for robbery, alternatively theft, and was acquitted at the conclusion of that trial. We also take judicial notice of the fact that 4 witnesses testified for the state at that trial. They are Winnie Sigwala, Kennedy Machaya, Regis Munodawafa and Samson Chidembo. Of those witnesses only Sigwala and Chidembo testified before this court during the murder trial. The key state witness in the murder trial, Kennias Chakafa, did not testify at the trial before the Regional Magistrate.

That is the furthest one can go in respect of the record of the robbery trial. The question which arises is: what is its evidentiary value for purposes of the case before this court? It is trite that this court cannot place reliance on evidence given before a lower court which evidence

was not given before it. The issue was dealt with in great detail by the Supreme Court in the case of *Nherera* v *Shah* SC 51-19 where at paragraphs 43 and 44 GARWE JA (as he then was) stated:

> "43. A record of a witness's evidence in earlier judicial proceedings is ordinarily hearsay at common law, but there are exceptions in which such evidence can be tendered to prove the truth of the facts which the witness has stated. It is usual for the record of an inquest or criminal trial to be made an exhibit at a subsequent civil trial, but at common law its evidentiary value is only to prove that the witness said what they are recorded to have said. Further, at common law, the testimony of a witness in earlier judicial proceedings is admissible at a subsequent trial provided that (a) the proceedings are between the same parties or their privies (b) the issues are substantially the same (c) the witness cannot be located because he is dead, insane, too ill to attend, kept out of the way by the opposing party, or (in civil cases) beyond the jurisdiction and (d) the opposing party had a full opportunity to cross-examine him – Hoffman & Zeffert, *The South African Law of Evidence, Fourth Edition*, at p 152.
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> 44. The reason for this common law position is simple. This is because, if the court were to act on the basis of evidence given before another court:
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> '… the court is deprived of the opportunity of first-hand experience of the witnesses' demeanor and much of the force of cross-examination is lost if it does not take place before the tribunal which has to accept or reject the evidence …' *Cross on Evidence*, 5th Edition 1979 London, Butterworths at p 568."

For completeness, compare ss 28 and 51 of the Civil Evidence Act (Chapter 8:01) and s262 of the Criminal Procedure & Evidence Act (Chapter 9:07).

It is the view of this court that the accused person was entitled to use the evidence given in the Regional Magistrates Court to cross-examine the witnesses who testified on behalf of the state during the murder trial. The earlier evidence would have been admissible against those witnesses. The opportunity to do so was spurned and, as *Mr Chihiya* submitted, the value of that exercise would be non-existent given that those witnesses had testified in the earlier proceedings about the robbery and nothing was said about the murder.

In addition, even though the accused person was at liberty to apply for the recall of those witnesses for purposes of cross-examination on the record of their evidence, that opportunity was not taken. What remains however is the evidence of the witnesses before this court, which the court found credible and relied on to convict the accused person.

We conclude this part of the discussion by making the point that *Ms Chikuni* is correct in stating that the accused person was not acquitted of the robbery charge on the same facts

presented at the murder trial. During the robbery trial, the state deliberately avoided adverting to the facts relating to the murder of the deceased. The correct position is that the accused person was acquitted on some of the facts presented at the murder trial but not all. This much shall become apparent later in this judgment.

Whether the accused person is guilty of the charge of murder

In the court's view, the critical question arising from the order of the Supreme Court is whether the arraignment of the accused person in the Regional Magistrates Court on the charge of robbery and his acquittal therein precluded his indictment to this court and his conviction on the charge of murder arising from a similar set of facts from which the charge of robbery arose. If the accused person's acquittal did not preclude his indictment on the murder charge, it automatically follows that his guilt on the murder charge could be assessed notwithstanding his acquittal on the robbery charge.

It is important to note from the outset that in terms of s 70(1) (m) of the Constitution of Zimbabwe, 2013;

> "Any person accused of an offence has the following rights –
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> (m) not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits."

The order of the Supreme Court invites this court to determine whether there was a splitting of charges and whether the acquittal of the accused person on what appears to have been a split charge has any effect on his earlier conviction in this case. Of course one cannot consider the effect of the splitting of charges unless there has indeed been a splitting of charges.

It is therefore proposed to consider whether there was a splitting of charges. In examining that aspect, it is usual to invoke the single evidence test and the single intent test in order to determine whether there was a splitting of charges. The most applicable test depends on the circumstances of the case.

Single Evidence Test

In terms of the single evidence test, "if evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purposes of a criminal conviction." See *S* v *Mabwe* 1998 (2) ZLR 178 (H) at p179D. Indeed if the evidence necessary to prove one criminal act necessarily involves

evidence of another criminal act, those two are to be considered as one transaction. However, as stated in the case of *Rex* v *Van der Merwe* 1921 T.P.D I, cited with approval in *S* v *Grobler en 'n Ander* 1966 (1) SA 507 (A) at p 519 A):

> "But if the evidence necessary to establish one criminal act is complete without the other criminal act being brought in at all then the two are separate crimes."

In our view, in the present case, the evidence required to prove the charge of murder can be said to be complete without bringing in the evidence of robbery into the picture. The evidence required to prove the charge of murder included the post-mortem report, the hoe handle used to kill the deceased and the evidence of the track team which followed the spoor and nabbed the accused person. To a certain extent, the evidence of identification of the accused person completed the picture.

Clearly, this evidence alone, does not account for the elements of the charge of robbery which include the immediate taking of property forcibly in order to deprive the person who had lawful control of the property of such control. The necessary evidence for the charge of murder cannot account for the taking of property through threats of violence. Accordingly, it cannot be said that there is single evidence to prove the charge of murder and that of robbery. Applying the single evidence test, there was no splitting of charges in this case.

Single Intent Test

The single intent test was formulated by this court in *S* v *Mabwe, supra,* at p 179C in the following:

> "… a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent."

In *S* v *Mupatsi* 2010 (2) ZLR 529 (H) at p 532, M*AVANGIRA J* (as she then was) observed that where, in the commission of an offence, an accused person commits several other offences, the correct approach is to charge that accused person with the offence which reflects his or her dominant intention. More importantly, there is useful guidance on the application of the single intent test in the case of *Grobler*, *supra,* at pp 523 – 524 where the following passage appears:

> "As to the test to be applied in determining whether there would be an improper duplication of convictions, I have little to add to what has already been said on the

subject in the above-cited cases. The test or combination of tests to be applied are those which are on a common sense view best calculated to achieve the object of the rule. In so far as the 'single intent' and 'continuous transaction' test is concerned, the distinction between motive and intent and the different intents inherent in different offences must not be overlooked. If a person maliciously damages a door of the house of a person whom he dislikes, he commits the crime of malicious injury to property. If he thereafter conceives the idea of stealing an article which he notices after having broken the door, and does so, he commits a theft, and may be properly convicted on two charges. If a person breaks into a room intending to steal from the occupiers and does so at one and the same time it might be said that in substance he committed only one offence. Assuming he enters and steals the goods of the first person while he is asleep and then proceeds to the next person who awakes after his property has been stolen. In order to silence this person the accused renders him unconscious with a blow to the head. The third person is awakened, and the accused then forcibly deprives him of his goods before departing. Common sense suggests that the accused may properly be convicted of housebreaking with intent to steal and theft, assault and robbery.

The essential elements of the three offences differ so widely that it is impossible to bring the whole of the accused's criminal conduct within the ambit of one charge.

In so far as the first appellant is concerned I am satisfied that there was no duplication of convictions. The essential elements of murder and robbery differ in material respects. In murder the court is concerned with the unlawful and intentional killing of a human being. The jurisdiction in regard to sentence depends on the presence or absence of mitigating circumstances. Robbery consists of theft by force, and the court's jurisdiction in regard to sentence depends on the presence or absence of aggravating circumstances. The evidence proved that the first appellant unlawfully and intentionally killed the deceased and that by means of an assault upon the complainants mentioned in the robbery charge he forcibly dispossessed them of R60.

In the circumstances of this case, and notwithstanding the particular concatenation of events, the state was entitled to split up the transaction and indict on both murder and robbery, because the whole extent (i.e all the objectionable elements) of the first appellant's criminal conduct could not have been brought within the ambit of one charge. It follows that a conviction of either murder or robbery could likewise not have covered the whole extent of that conduct." (The underlining is for emphasis)

In our view, the foregoing pronouncement completely resolves the issue in the present case. The accused person had no single intent when he committed the murder and the robbery. This court abides by its earlier finding that in attacking the deceased the way he and his accomplices did, the accused person desired to eliminate the security guard in order to facilitate an uninhibited robbery. The essential elements for the two offences are so much at variance they could not possibly be brought within the ambit of one charge.

Significantly, the accused person's intention went beyond the single intention of committing a robbery. If the accused person was intent on merely robbing Sigwala, he would not have attacked the deceased the way he and his accomplices did. This court stands by its

earlier finding that if indeed they merely wanted to rob, they would have incapacitated the deceased by tying him because they out-numbered him. We conclude that even on the single intent test, there was no impermissible splitting of charges.

The effect of the acquittal on the charge of robbery on the murder charge

We have already found that there was no impermissible splitting of charges in this case. However, even assuming *arguendo*, that the charges of robbery and murder constituted a single transaction that was split, the two charges could not possibly impinge upon the rule against the duplication of convictions even though the accused person was acquitted.

This is because the rule of practice against the duplication of convictions is designed to prevent the multiplicity of convictions of an accused person where the whole criminal conduct imputed to him in substance constitutes only one offence which could be contained in a single but all embracing charge. See *S* v *Moyo* HB 9-11; *S* v *Groblerr en 'n Ander supra* at 517 A-B; *S* v *Zacharia* 2002 (1) ZLR 48 (H) at 50 G-51 A. These authorities show that the mischief targeted by the rule against splitting of charges is duplication of convictions which, in turn, prejudices the accused person during punishment. There was no prejudice to the accused person in this matter.

In light of the foregoing discussion we come to the inevitable conclusion that the accused person was properly tried of the murder charge. Overwhelming evidence, which was assessed in detail in HB 26-17, was presented before this court. It established the guilt of the accused person beyond any reasonable doubt.

We mention, for completeness, that the evidence of Rennias Chakafa, which was not placed before the Regional Magistrates Court, established beyond doubt that the accused person was found in possession of property stolen from Grafax Cotton Company at the time the deceased was killed. The doctrine of recent possession applies to him. In terms of s 123 (1) of the Criminal Law Code:

> "(1) Subject to subsection (2) where a person is found in possession of property that has recently been stolen and the circumstances of the person's possession are such that he or she may reasonably be expected to give an explanation for his or her possession, a court may infer that the person is guilty of either the theft of the property or … if the person –
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> (a) cannot explain his or her possession; or

(b) gives an explanation of his or her possession which is false or unreasonable."

The explanation given by the accused person on why he was found in possession of the stolen property was both false and extremely unreasonable. This was against the credible evidence of Chakafa that he tried to abscond but was arrested and the property found where he and his colleagues were positioned as they discussed the loot.

Unfortunately for the accused person, the property had recently been stolen from the deceased's employment after the deceased was fatally attacked. The court therefore infers that he stole the property and also killed the deceased. Accordingly we confirm that the accused person is guilty of murder. The conviction is sustained.

Sentence

On the question of sentence, *Mr Chihiya* for the accused person submitted that the Supreme Court order does not contain reasons, which then makes it difficult for counsel to appreciate if this court has been empowered to review the sentence it imposed earlier.

Notwithstanding that, counsel submitted that the court should temper justice with mercy and take into account that the accused person has been in custody for 6 years since his earlier conviction and sentence. It was submitted on behalf of the accused person that for that reason the court should come up with a sentence other than that of death. This is because of the anguish the accused person has had to go through all these years.

On the other hand, *Ms Chikuni* for the state initially submitted that the court was at liberty to substitute another sentence. She even suggested life imprisonment. However after engagement with the court which desired to know in terms of what authority, in light of its findings on the guilt of the accused person despite his acquittal by the lower court, the court could substitute the sentence, *Ms Chikuni* changed her stance.

She submitted on behalf of the state that there was no legal basis upon which the court could review its earlier sentence. She submitted that as the conviction has been sustained the sentence should also stand. We agree. It is the view of this court that its current jurisdiction is only being exercised in terms of the directions of the Supreme Court and nothing else.

Having found that the accused person was not acquitted of robbery on the same set of facts and that notwithstanding that acquittal the accused person is guilty of murder, it is our

view that the jurisdiction to re-assess the sentence has not been triggered. There is no legal foundation to alter the sentence assessed earlier. That could only be done if we had arrived at the conclusion different from what we arrived at.

Even if we were wrong in that view, we would still not alter the sentence for yet another reason. It is that this was an unnecessary murder which was committed in aggravating circumstances of robbery and unlawful entry into a dwelling house. In that regard we stand by the findings made in the earlier judgment in HB 26-17 which findings are incorporated herein by reference only.

Accordingly, we still do not have any option but to impose the ultimate penalty of capital punishment.

The sentence of this court imposed earlier is sustained. It is that the accused be returned to custody and that the sentence of death be executed upon him according to law.

National Prosecuting Authority, state's legal practitioners
Makonese, Chambati & Mataka Attorneys, accused's legal practitioners