

THE STATE
versus
FARAI KATSANDE
and
OWEN KATSANDE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 22 March 2024

Assessors: Mr Kunaka
Mr Jemwa

Criminal Trial

M Furidze, for the State
S Muyemeki, for the 1st accused
D Zondesa, for the 2nd accused

MUTEVEDZI J: The two accused in this case Farai Katsande and Owen Katsande are brothers. They lost some property at their residence and allegedly went on a rampage assaulting people they suspected of having stolen it. When they thought they were sure it was their nephew Robert Nyatsine (the deceased) who had deprived them of their valuables, they cornered him, severely assaulted him and inflicted mortal injuries which took his life. Formally the charge against them was that in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code), the accused persons each or both of them, with intent to kill or realising that there was a real risk or possibility that their conduct could lead to death but persisting with that conduct despite the realisation of the risk or possibility assaulted Robert Nyatsine with electrical cables and wires all over his body. They inflicted injuries from which Robert Nyatsine died.

If it is accurate, the summary of allegations by the prosecution is the definition of one taking the law into one's hands. The State alleged that on 27 October 2018, the accused persons, together with William Chiturumani and Rudo Chavaruka kidnaped Christopher Mlauzi and Ali Yosini after accusing them having stolen their musical instruments called a subwoofer and a speaker. They kept the two incommunicado for hours on end and only released them on 28 October after they realised that their victims knew nothing about the theft. Undeterred, on 31

October 2018, the two accused persons then apprehended the deceased on the same allegations of having stolen their musical instruments. They took him to their house. There the deceased was subjected to the same fate as Christopher and Ali. He was assaulted with electrical cables and wires. He was badly injured and when reason dawned on them the second accused went to file a police report. When police attended the scene, they discovered that the deceased was lifeless. A post mortem was conducted on the remains of the deceased on 7 November 2018. The pathologist's findings were that death had occurred as a result of head contusion, left parietal, subarachnoid haemorrhage (which means the deceased was bleeding in the space which surrounds the brain) and multiple injuries.

Both accused tendered pleas of not guilty. Farai Katsande (the first accused) alleged that the deceased was their nephew. On the day in question around midnight, the deceased came to their residence. He was slightly swollen and bruised. His explanation for the injuries was that he had fought with some people at Chikwana Shops. He wanted a place to sleep. The first accused said they offered him one of the bedrooms which were not in use at their house. The first accused said the following morning he woke up early to attend to his wares at Zengeza 2 Flea Market. He did not bother to check on the condition of the deceased. He was surprised to return later to find police officers at their residence.

Owen Katsande (the second accused) equally denied the allegations. His story was similar to that of the first accused except that he was specific in terms of the time that the deceased approached their house seeking a place to sleep. He said it was around 0400 hours. The deceased confessed to him that he had he had been beaten by a mob at Chikwanha shops after a misunderstanding over one of the patrons' phone. The next morning, he said he woke up around 0630 hours to tend to his business of the day. He checked on the deceased. He observed the deceased had difficulties in breathing and clearly required medical attention. The first accused then left some money for the second accused to take the deceased to St Mary's clinic. Before he could take the deceased to hospital, the second accused said he went to the police to get authorisation for that because clinics refuse to attend to people who may have been injured through assaults or in the commission of crimes without police clearance. At the police, the second accused said he got the necessary documentation and was accompanied back to his residence by two police officers. On arrival, they found the deceased lying on the veranda of the house. One of the police details examined the deceased and noted that he had died. The second accused said he then travelled to a place called Bora to inform their relatives. He was only arrested over a year later accused of the murder of the deceased.

The State Case

The prosecutor commenced her case by applying to produce the post mortem report compiled by Doctor Yeghlin Iglesias. His conclusions after the examination were as already stated. Thereafter she led oral evidence from various witnesses. We summarise the relevant aspects of the witnesses' evidence below.

Ali Yosini

He is a twenty-nine-year-old barber, who was unfamiliar with both accused before his ordeal at their hands. He said on 27 October 2018, the night he was kidnapped, the second accused came to his room and knocked on the door. He was in the company of three other people who were not charged with this murder. One of those people was clad in army uniform. The witness said they group advised him that they wanted to take him to the police for questioning. He agreed but told them that he wanted to first inform his parents. He knocked on his mother's door and accordingly advised her. He was surprised along the way when his kidnappers' story changed. The surprises were not over because on arrival at the accused persons' house, he was advised that they also had his friend in their custody. He was accused of stealing their speakers. He said he told them he knew nothing about what they were saying. He flatly denied having stolen their speakers. They immediately began assaulting him. They assaulted him the whole night demanding their speakers. During the assaults, one of them reasoned that the door had not been broken when the items were stolen which meant that the person who had stolen the instruments had gained entry using keys and then put them back where they stayed. It was then that the deceased's name was mentioned and it was alleged the witness and his friend had teamed up with Robert to steal the gadgets. The beating only stopped the next day. The witness said accused one did not assault him but he was present all the time. His main assailants were accused two and the other three people whose names he does not know. His friend, Christopher Mlaudzi was also severely assaulted. The witness said he was injured and taken to hospital. He denied knowing Robert Nyatsine with whom they alleged he had connived to steal. During the assaults, the witness said they cried for help until the accused persons' neighbours got worried and started peeping over to see what was taking place. It was only then that they were released. Their assailants used electric cables, car jumpers and broom sticks to beat them. When they released them the accused were muttering that it was Robert who had stolen their speakers. They were sure that with the thorough assaults meted on both him and his friend, they would have divulged where the speakers were if they knew anything about them. Ali said he got home and went straight into his bedroom. He had been so severely

assaulted that although the accused's place is only thirty minutes' walk away from his it had taken him and his friend very long to get home. At times they couldn't walk and had to crawl. The following morning his mother came to his bedroom. He explained to her what had happened. She took him to hospital where they asked for a police report. They later went and lodged a formal police report. The accused later came to the witness's residence. They saw his mother and asked for forgiveness for assaulting him and his friend when they knew nothing about the theft. They said they had finally gotten the culprit called Robert Masamusa whom they had in their car. They asked his mother to see him. He was however honest that he did not personally see the alleged culprit. From his recollection, the deceased used to be in the business of selling samosas hence his moniker Robert Masamusa. The following day, the witness said the police took him for indications at the house where they had been beaten. There were people who were gathered there and he found out that someone had been killed at the house.

The witness was then subjected to intense cross examination particularly by counsel for accused one. He however stuck to his testimony.

Ostedah Yosini

She is the first witness's mother. In court she said she could only identify the second accused whom she had seen in 2018 after he visited her residence. She essentially corroborated the evidence of Ali. They were four of them when they visited. They came at night intending to take her son alleging that he had stolen their speakers. One of them was in military uniform. The one who was giving introductions said three of them were soldiers and one was a constable in the police. The one who gave introductions was short and light. They took her son the whole night and stayed with him until the following day. When he returned, she found him lying in his room badly injured and bloodied. She had actually first gone to his friend's place to ask if he had seen him not aware that they had both been kidnapped. It was him who then advised her that they had returned together. She confirmed going to the police and later to hospital to seek medical attention. She went to the police with Ali where they got a letter to seek medical treatment. She also confirmed the visit by the second accused and his colleagues to apologise about beating her son when he did not know anything about the theft. They offered to pay the medical bills. They said they had assaulted her son for stealing when in actual fact they had apprehended the real culprit. Ostedah saw the person whom they had in their car but could not identify his face. She equally confirmed later going to the house where Ali had been assaulted and discovered that someone had subsequently died at that house.

Mufudze Muyeye

He is a police officer. He was the attending detail in this case. He said at the scene, he found the deceased's body on the veranda. It was covered with a police blanket. He removed the blanket and observed that the body had bruises. The informant accused two who had come to the police station was no longer there. He also attended the post mortem examination. Notably, during the examination, a piece of wire was retrieved from the deceased's back.

Munyaradzi Munhuumwe

He investigated the murder but left the investigations mid-stream. Then he was still based at St Mary's Police Station. His testimony was that on 1 November 2018, constable Muyeye had advised him that there was a case of a suspected murder reported at a house in Manyame Park. Other police officers had already attended the scene. When they got to the house the deceased's body was lying on the veranda. The entire body was bruised. CID scenes of crime later attended to take photographs and make other investigations. Accused two who had earlier reported the matter was no longer in attendance. When the docket was later allocated to him for investigations, he revisited the scene. Accused two was nowhere to be found. He had fled. Initially the second accused had reported that the deceased was sick and he wanted to take him to the hospital. The police noticed that the deceased had died and accused two immediately fled. Accused one was later arrested. The officer said he interviewed the neighbours and got witnesses who testified in court. He took accused one for indications but he didn't indicate that he had assaulted anyone. The witness played down the accused's story that the deceased had been assaulted at the shops. His point was that it could not be true because the accused said they had not opened the gate for the deceased but that he had jumped in over the precast wall yet he was so badly injured that such a feat was completely impossible for someone in his state.

With the above evidence the State closed its case.

DEFENCE CASE

Farai Katsande

He incorporated his defence outline into his evidence in chief. He denied ever assaulting the witness Ali and his friend or the deceased. He alleged that no audio equipment had been stolen from his residence as alleged by the witnesses because the audio equipment they used to have had been distributed to relatives when their parents had died. He stayed at house number 5399 Manyame Park where the deceased died. He lived with the second accused

and hardly used some of the rooms at the house. He added that their house is very close to those of their neighbours such that any noise would be heard by the neighbours. Although the premises is surrounded by a precast wall, it is only about two and a half metres high and cannot prevent noise from reaching the neighbouring premises. The deceased had arrived at their house the night preceding the morning he died. He came through the gate because it was not locked. He alleged that he had been beaten by some people at Chikwanha shops. They offered him a place to sleep. The first accused said it was the last time he spoke to the deceased. In the morning he left early to Zengeza 2 where he operates his business from. He returned from the business early and found police officers at their house. He was asked a few questions, was arrested and taken to the cells. He further told the court that the deceased was their nephew. His mother was their father's sister. He had stayed with them between 2003 and 2005 and had only left after operation Murambatsvina an infamous exercise in which government destroyed houses and other settlements which had been erected without the necessary approvals by the authorities. He once more denied ever assaulting the deceased. He equally denied knowing the persons called William and Rudo and said he had never met them in his life.

Under cross examination he admitted that the deceased had arrived at their place towards midnight, he was badly injured but that they did not do anything to assist him. They didn't even think about calling an ambulance despite the deceased being a very close relative. He denied that Ali and Christopher were brought to 5339 Manyame Park. He said he knew Ali as someone who made beads for export to South Africa but had never seen him at their house.

Owen Katsande

He too incorporated his defence outline into his evidence in chief. His evidence was that the deceased came from the beer hall. He knocked at their door and he opened the door for him. The deceased advised him that he had been assaulted at the beer hall. In the morning the second accused said he noticed that the deceased had difficulties in breathing. He therefore proceeded to the police to get a letter to facilitate him taking the deceased to the clinic. He got it and returned home. Unfortunately, the deceased had died. He went back to inform the police. Two officers accompanied him back to the house. The officers checked the deceased and also thought he had died. The police officers started asking him questions. He said he told the officers that he wanted to go and notify their elders who stayed in Bora. He then proceeded to their sister-in-law to ask for bus fare. He got it and caught transport to Bora. He was adamant that he didn't flee but left walking in the presence of the police officers. Asked to clarify when he was arrested, the second accused said he was later arrested for public drinking. It was only

after that arrest that the police noted that he was also wanted for this murder. It was some time in November 2023 more than a year after the commission of this murder. He also denied assaulting Ali and Christopher or the deceased. He said he was not aware why they were falsely implicating him.

Under cross examination, the second accused was at pains to explain a lot of issues. We will explain these later.

The common cause issues

1. The deceased had extensive injuries which the pathologist noted as:
 - a. Multiple abrasions located at the level of all back side
 - b. Lineal abrasions located on the left lumbar area with remain of wire taken from the skin
 - c. Multiple abrasion on the back side of the right arm
 - d. Plaque abrasion on the external side of the right arm
 - e. Contuse wound of 03 cm of large at the level of right parietal area
 - f. Multiple lineal abrasions on both shoulders
 - g. Severe brain oedema
 - h. Left parietal subarachnoid haemorrhage
 - i. Right cerebelouse focal haemorrhage

In addition, the doctor observed that the deceased's liver was injured, the spleen was enlarged and both kidneys and both lungs had also been affected. Given the above injuries it was apparent even to a non-medical expert that the deceased stood little to no chance of surviving the brutal assault.

2. The ultimate cause of his death is as already detailed. He had been assaulted. The only question being by who?
3. The deceased died at House Number 5339 Manyame Park which was owned by the two accused.

The Issue

As has been held common cause above, the deceased died from wounds sustained from a brutal attack. The only question in this case is therefore who killed the deceased. In other words, it is who inflicted the mortal wounds that took the deceased's life. Needless to say, none of the witnesses who testified in court saw witnessed the attack on the deceased. The evidence of Ali Yosini and Ostedah Yosini falls into the category of similar fact evidence whilst the rest of the State's evidence is circumstantial.

Similar Fact Evidence

It is evidence of similar acts previously done by an accused person. Unfortunately, the previous acts are usually notorious ones yet the general rule is that the notoriety of an accused is information which a court trying him must be insulated from. Put bluntly similar fact evidence is nothing but evidence which shows that the accused is a person of bad character. For that reason, similar fact evidence is generally inadmissible. There are therefore rules which govern its admissibility. The history of the admissibility of similar fact evidence in this jurisdiction is somewhat checkered. Earlier cases such as *S v Mutsinziri* 1997 (1) ZLR 6 (H) and *Ngara v S* 1987 (1) ZLR 91 (S) embraced the principle that for it to be admissible, the similar fact evidence which the prosecutor wishes to present to the court had to bear such a striking resemblance to the case under trial that it would be an affront to common sense to assume that the similarity was explainable on the basis of happenstance. The phrase striking resemblance means an uncanny likeness. In legal terminology it implies that for a court to admit it, the similar fact evidence ought to carry a high degree of probative value and not merely intended to show that the accused is a person of bad character. This approach still obtains in South Africa. In Zimbabwe that position changed. The law as it currently obtains is what the Supreme Court held in the case of *Banana v The State* 2000 (1) ZLR 607 (S) that the law had shifted from the requirement of striking resemblance. What has to be focussed on is the probative value of the similar fact evidence. The problem which I see in the new test is that there is no straight-jacketed way in which the probative value of the evidence can be measured. It leaves the door open for the subjective decisions of judicial officers. The probative value of evidence is an assessment that each judicial officer makes at his/her discretion. It is unpredictable and therefore leaves the admission of such evidence at the whim and caprice of the judge or magistrate. Despite the above weaknesses, it is clear that for it to have weight, the similar fact evidence must not only be alike to the issues(s) at hand but there must also be a likeness of common features between the previous and current acts which show that the accused had a general plan to do those acts. In other words, the notorious previous acts must share with the current acts characteristics which add credence to the argument that there is a pattern that links the accused to both sets of acts. Another crucial issue is that the accused person need not have been convicted of an offence relating to the previous conduct for it to be accepted as similar fact evidence.

Application of the law to the facts

In this case, the accused persons particularly the second accused, are alleged to have kidnapped Ali Yosini and his friend Christopher Mlauzi. They abducted each of them from their residences separately and took them to House Number 5339 Manyame Park. There the two were kept incommunicado. They were each assaulted heavily with electric cables and wires. They were literally tortured in order for them to confess to taking the musical equipment allegedly stolen from the accused persons. After their ordeal they were released when their abductors were convinced that they knew nothing about the alleged theft. It is also poignant that the people who abducted Ali and Christopher were four. They claimed that their group was made up of soldiers and a policeman. When juxtaposed against the little which we know to have befallen the deceased, a clear chain appears to be established. To begin with whoever assaulted the deceased must have used electric cables and or wires. We conclude so judging from the injuries which were noted from the body of the deceased. If the injuries were simply a deduction that such weapons were used the fact that a piece of wire was removed from the deceased's back makes conclusive that one of the instruments which were used to assault the deceased was a wire. The deceased died at House Number 5339 Manyame Park. That Ali and Christopher were assaulted with the same instruments at the house where the deceased died becomes a common occurrence in the accused's previous acts and the current murder. It makes it unrealistic that within a space of about three days after Ali and Christopher had been assaulted, the deceased was also assaulted in the same manner elsewhere but then died at the house of horror in Manyame Park. Further, there is evidence that the deceased was abducted in the same manner that Ali and Christopher had been kidnapped. The evidence of Ostedah Yosini in that regard went largely unchallenged. She said a few days after her son Ali had returned home, the same people who had abducted and tortured him reappeared at her residence. They not only apologised for beating up her son when he knew nothing about the missing instruments but also told her that they had apprehended the actual culprit named Robert Masamusa whom they had in their car. Robert Masamusa was the moniker by which the deceased was known in the area because he used to sell samosas. That fact also went unchallenged. The gang even invited Ostedah to go to their car and see Robert Masamusa. Although Ostedah admitted that she did not go to the car and did not personally see Robert in the car, her evidence brings a further dimension to the similarities between the kidnapping, assaults and torture of Ali and Christopher on one hand and that of the deceased on the other.

They were all abducted by the same gang comprising of people who called themselves soldiers and policemen and in the same car. It is our view that the similarities in those previous acts to the current case are not explainable on the basis of coincidence. They appear to have been deliberate and planned on the part of the second accused and his gang. The *modus* was to pretend to be a team of soldiers and members of the police force, approach the victims and advise them that they were being investigated for the theft of the music speaker and subwoofer, bundle them into their vehicle in the guise of taking them to the police station but along the way divert to House Number 5339 Manyame Park. There the systematic assaults using electric cables and wires would then take place.

What we also hasten to state is that the first accused is not particularly incriminated. Ali's testimony was that the first accused did not assault him or Christopher although he was present throughout the assaults. Ostedah also mentioned that on both occasions that the gang came to her residence, the first accused was not amongst them. He therefore cannot be incriminated in the commission of this murder through the element of similar fact evidence we have just explained above.

If the evidence as narrated above is not enough to ground the second accused's conviction (which we think it is), there is a further principle of evidence which if added to the similar fact evidence crucifies him more. It is the principle of circumstantial evidence.

Circumstantial Evidence

Circumstantial evidence is testimony that implies someone's guilt but certainly doesn't prove that guilt. It does not prove a fact in issue. In murder cases, it does not prove that it is the accused who killed the deceased. It is important though because it points to a logical inference of the existence of the fact. The fact that it is not direct evidence does not however make it lesser evidence in the eyes of the court than other forms of evidence. How circumstantial evidence must be treated in the resolution of crimes in this jurisdiction is a well-trodden path. The case of *Muyanga v The State* HH 79/13 is generally regarded as one of the leading authorities in that regard. It explained the concept of circumstantial evidence in the following way:

“The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and
- (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

The cases of *S v Shoniwa* 1987 (1) ZLR 215 (SC) and *S v Masawi & Anor* 1996 (2) ZLR 472 (S) equally support the above views. The explanation in both cases was that the law prescribes that when the resolution of a criminal case is predicated on evidence which is circumstantial, it means the court's decision is based upon inferential deductions of guilt. The evidence must therefore be clear, entrenched and must point towards the guilt of the accused. The circumstances taken as a whole should result in a series so whole that the conclusion that the accused and no one else was the preparator of the crime is inescapable.

In the case of *Arthur Kazangarare v The State* HB 9 /16 MATHONSI J (as he then was) at p 5 of the cyclostyled judgment citing with approval the authors Hoffman and Zeffert summed it up in the following terms:

“Again, the rules governing the use of circumstantial evidence are fairly simple. As stated by the learned authors Hoffman and Zeffert, *The South African Law of Evidence*, third edition, Butterworths, at pp 589-90:

In *R v Blom*, WATERMEYER JA referred to two cardinal rules of logic which governed the use of circumstantial evidence in a criminal trial:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

The law is therefore that where the proved facts leave the court with the possibility of drawing more than one reasonable inference, it is not safe for it to convict an accused on the basis of such circumstantial evidence.

Application of the law to the facts

The first accused has not been shown to have been part of the marauders who terrorised Ali and Christopher. We are not sure whether his presence at House Number 5339 Manyame Park would make him part of it. It is difficult to conclude so in the absence of cogent evidence.

Ali's testimony was a coherent story. If it needed corroboration, then that was provided by the testimony of his mother. With that their account of events became complete. They both were very credible witnesses. This trial had nothing to do with the crimes committed on or against them. It was about the murder of the deceased. Their testimonies illustrate that they did not attempt to falsely incriminate the accused persons. For instance, Ali was forthright that the first accused did not assault both him and Christopher. If he was a vindictive witness, he could have simply said both assaulted him. He further said when the second accused and his group of outlaws came to his residence for the second time, he did not see them but only heard them talking to his mother. He could once again have easily said he had not only seen them but also saw Robert in their car. Equally Ostedah gave her evidence with the restraint of an honesty and impartial witness. She said she had not seen the deceased in the accused and his gang's car. We could not find any reason not to believe such measured testimonies from the witnesses. Because we believed the witnesses and their testimonies as credible, we find it as a fact that the second accused in the company of his colleagues who are not part of this trial abducted and tortured Ali and Christopher. The method of abduction and torture was the same that was used by whoever killed the deceased.

The accused persons allege that when the deceased arrived at their residence, he was already badly injured and that he advised them that he had been assaulted at the beerhall. They want the court to believe that they simply let him into their house. He was a close relative. They did not do anything to assist their nephew who was dying. They did not see it fit to go to the police or at least to seek medical help for him. What is even more incredible is that the investigating officer said when he asked the accused persons how the deceased had come into their premises, they had advised him that he had scaled over the perimeter wall that surrounded the house and then knocked at the door which they opened for him. The officer however said given the injuries which the deceased had, that feat was an impossibility. To compound their woes the testimonies of the accused themselves contradicted each other. To begin with the times when they said the deceased arrived at their residence are different. The second accused initially said the deceased had arrived around 0400 hours before tailoring that to around midnight. The first accused maintained from start that the deceased had arrived between 2300 hours and midnight. The contradictions carried over to the activities of the following morning. The first accused said he woke up early and went to his business at Zengeza without checking the condition of the deceased but the second accused gave a different narrative about the issue. He alleged that the first accused checked the deceased and noted that he was badly injured and

needed medical attention. He then left money for the second accused to take the deceased to the clinic.

In relation to the second accused he then went to the police to acquire a clearance letter to take the deceased to hospital. When he came back, the deceased had passed on. He reported that to the police but when questions started to be asked, he disappeared. There are a lot of issues which simply do not add up in his story and questions which he could not properly answer under cross examination. For instance, he could not properly account why he had not attended the funeral wake or burial of the deceased, a close relative who had died in his and accused one's house. His explanation that soon after the police started asking questions about the death he went to Bora and did not come back is disingenuous. He could not say anything about why he did not report to the police after he heard that his brother had been arrested for the deceased's murder yet he claims that no such thing had happened because the deceased had come to their place mortally wounded from the beerhall at Chikwanha Shops. He could not properly explain why both him and his brother did not find it necessary to call for help after noticing that the deceased was seriously injured. He sought to make the court believe that the injuries were not serious but his brother accused one testified that indeed the injuries were concerning. He was also aware that the police were looking for him but did not bother to go and hand himself in. He was only arrested more than a year after this incident when the police fortuitously apprehended him for another crime.

The courts do not consider evidence, in whatever form, piecemeal. In the same vein circumstantial evidence must be looked at holistically. The circumstances as stated above are many in this case. They add up from the similar fact evidence earlier discussed to all the accused's indiscretions described above. Added together they form a chain which is so complete that they point to nothing else but that it was the second accused at the very least who killed the deceased. They point to a plan where the second accused and his colleagues who are not under trial decided to abduct and torture whoever they suspected to have stolen their instruments. Ali and Christopher were lucky to escape with their lives. The deceased was not as lucky. After the murder the second accused must have panicked and disappeared. The first accused who appeared not to have anything to fear remained and was arrested. Like we pointed earlier it is difficult to draw the inference that the first accused participated in the murder. There are other inferences that can be drawn from the circumstances of the case in relation to him.

Disposition

We have already concluded that the similar fact evidence points to similarities between the abduction and torture of Ali and Christopher on one hand and the death of the deceased at second accused's hands. We have equally shown that the circumstantial evidence available leaves the court with the sole inference that the evidence points to the second accused's guilt. In both instances, the first accused's situation is different. The assaults in both occasions may have happened with his blessings but given the evidence available it remains doubtful that he participated in the deceased's murder. An accused's guilt must be proved beyond reasonable doubt and where there is doubt it is resolved in favour of the accused.

It is for those reasons that we are persuaded that the prosecutor was not able to prove her case against the first accused person beyond reasonable doubt but managed to do so against the second accused.

In the circumstances, **it is ordered as follows:**

- a. The first accused is found not guilty and is acquitted of the charge of murder.
- b. The second accused is found guilty of murder as charged.

National Prosecuting Authority, State's legal practitioners
Manase & Manase, first accused's legal practitioners
Mapaya & Partners, second accused's legal practitioners