

THE STATE  
versus  
EMELDA MARAZANI

HIGH COURT OF ZIMBABWE  
MUTEVEDZI J  
HARARE, 24 March 2023

**Assessors:** Mr *Kunaka*  
Mr *Mhandu*

### **Criminal Trial – Sentence**

*T Kamuriwo*, for the State  
*G K Muchapireyi*, for the accused

**MUTEVEDZI J:** After the accused’s conviction, we adjourned the trial in order to afford the prosecutor and counsel for the accused time to prepare their submissions in aggravation and mitigation respectively. They both did. The Court is indebted to both of them for their assistance. The submissions however illustrate that there still exists a worrying lack of appreciation of the sentencing regime and the attendant sentencing principles which must inform the punishment of an accused convicted of murder. The court finds itself constrained to once again restate the elementary principles which have been emphasised in a long line of authorities in the hope that the addition of its voice to the discourse may add a few decibels to make the courts’ pronouncements more audible.<sup>1</sup> To begin with both the prosecutor and counsel for the accused generalised their views on what they deemed as the appropriate sentence for the court to impose in complete disregard of the provisions of s47(4) of the Criminal Law Code which provide as follows:

- (4) A person convicted of murder shall be liable—
- (a) subject to ss 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], 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.

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<sup>1</sup> See for instance the cases of *S v Tafadzwa Mapfoche* SC 84/2021 and *S v Jindu* SC 114/2021

What the above provision entails is that the court must, before sentencing an accused convicted of murder make a finding on whether the murder was committed in aggravating circumstances or not. That determination is important because the sentence which a court may impose is entirely circumscribed by the presence or absence of aggravating circumstances. Where a court determines that aggravating circumstances exist, its sentencing discretion is severely curtailed. It has to choose one of three options namely to sentence the accused to death or to life imprisonment or to a definite period of not less than twenty years imprisonment. The starting point for a prosecutor and a legal practitioner attempting to assist the court sentence a murder convict must therefore be the question of establishing the presence or absence of aggravating circumstances. Both counsel in this case did not see the need to make submissions in that regard. Subsection (4) of s 47 is made subject to ss 337 and 338 of the Criminal Procedure and Evidence Act [*chapter 9:07*] (the CP&E Act). Sections 337 and 338 deal with the sentences which are permissible for the crime of murder and persons on whom the death penalty cannot be imposed respectively. They are in the terms indicated below:

**337 Sentence for murder**

(1) Subject to s338, the High Court may pass sentence of death upon an offender convicted of murder if it finds that the murder was committed in aggravating circumstances.

(2) In cases where a person is convicted of murder without the presence of aggravating circumstances, or the person is one referred to in s 338(a), (b) or (c), the court may impose a sentence of imprisonment for life, or any sentence other than the death sentence or imprisonment for life provided for by law if the court considers such a sentence appropriate in all the circumstances of the case.

[Section substituted by s 43 of Act 2 of 2016]

**338 Persons upon whom death sentence may not be passed**

The High Court shall not pass sentence of death upon an offender who—

- (a) was less than twenty-one years old when the offence was committed; or
- (b) is more than seventy years old; or
- (c) is a woman.

In this case, the accused is a woman. The sentence of death cannot be applicable because its imposition on her is specifically proscribed by law. If the court therefore finds that she committed this crime in aggravating circumstances the options available to it are reduced to only two. It can impose either a sentence of life imprisonment or any definite period of not less than twenty years imprisonment. If the court however determines that the offence was not committed in aggravating circumstances, its sentencing discretion is fully restored. It is only in those instances that indeed the prosecutor and the legal practitioner representing an accused

convicted of murder can urge a court to be at large in terms of sentencing and direct it at particular aggravating or mitigating circumstances to inform the sentence.

Importantly, the question of what constitutes aggravating circumstances is also legislated in s 47 of the Criminal Law Code. Although the list is not exhaustive, the law maker provided guidance on the factors which a court may take into account in determining the question of the presence or absence of aggravating circumstances.

#### **47 Murder**

(1) ...

(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—

(a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an

essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—

(i) an act of insurgency, banditry, sabotage or terrorism; or

(ii) the rape or other sexual assault of the victim; or

(iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or

(iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives; or

(b) the murder was one of two or more murders committed by the accused during the same episode,

or was one of a series of two or more murders committed by the accused over any period of time; or

(c) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim; or

(d) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.

[Subsection substituted by Part XX of Act 3 of 2016]

(3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other

circumstances of an aggravating nature, regard as an aggravating circumstance the fact that—

(a) the murder was premeditated; or

(b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or

over the age of seventy years, or was physically disabled.

The factors which are listed as constituting aggravating circumstances in s 47(2) are connected by the word ‘or’ which appears at the end of each factor. Or is a disjunctive used to connect alternatives. It follows that the court need not establish the existence of more than one factor to hold that a murder was committed in aggravating circumstances. The presence of a single factor suffices. In this case the accused appears to fall foul of s 47 (2) (b) which provides that it is aggravating where *the murder was of one of two or more murders committed by the accused during the same episode*. Generally speaking multi murders are classified into three broad categories namely mass murders, serial murders and spree murders. The *Wikipedia* defines a mass murder as the act of murdering a number of people, typically simultaneously or over a relatively short period of time and in close geographic proximity. In some jurisdictions it has been defined as the killing of three or more people in one episode with no cooling off period between the homicides.<sup>2</sup> Here, the accused stands convicted of the gruesome and barely explainable murder of her four very young children aged between one and 9 years. Her actions fall squarely into the definition of what constitutes a mass murder. It equally fits into the description given in s47(2)(b) and therefore qualifies as a factor which aggravates these murders.

During the trial the accused admitted to lacing four cups of drinks with poison which she then instructed her children to drink. She subsequently slit each of the children’s throats. Although falling short of the torture alluded to in s47 (2) (c) it is the court’s view that it must be considered as an aggravating factor that an accused such as in this case used multiple fatal methods to kill his/her victim(s). What seems scary about the accused is that she chose two methods which are on the extreme ends of the *modi* employed by different killers. On one hand the poison is considered a more humane way of murdering a victim if at all there is anything like that. The cut throat method on the other hand is viewed as savage and brutal. The means used by a killer to murder his victim matters. The use of multiple means may not only demonstrate an accused’s heightened desire to kill but may also point to some measure of sadism. Subsection (5) of s47 is clear that the list of aggravating factors itemised in the provision does not cover all possibilities. It allows a court to expand that list. I therefore find that the use of multiple fatal methods to kill the same victim is an aggravating circumstance in

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[https://en.wikipedia.org/wiki/Mass\\_murder#:~:text=Mass%20murder%20is%20the%20act,off%20period%22%20between%20the%20homicides.](https://en.wikipedia.org/wiki/Mass_murder#:~:text=Mass%20murder%20is%20the%20act,off%20period%22%20between%20the%20homicides.)

which a murder is committed for the purposes of subsection (4) (a) of s47 the Criminal Law Code.

Having said the above, it leaves the court with no choice but to find that the murders in this case were committed in aggravating circumstances. The sentencing options stipulated under subsection 4 (a) except the penalty of death must therefore apply. What is left is for us to determine whether to impose a definite period of imprisonment not less than twenty years or life imprisonment. Ms *Muchapireyi* for the accused urged us to consider the accused's pitiful background and that she suffered from the battered woman syndrome. Both herself and the prosecutor referred the court to the case of *S v Locardia Ranganai*<sup>3</sup> in which this court held that the accused had been in an abusive relationship and was routinely physically assaulted and emotionally abused by her husband and that although the murder itself was premeditated there was emotional and psychological trauma brought to bear upon the accused. She had killed her 8 year old daughter as a result. The court proceeded to sentence the accused to:

“10 years imprisonment of which 3 years is suspended for 3 years on condition accused is not within that period convicted of an offence of which violence is an element and for which she is convicted and sentenced without the option of a fine. **Effective 7 years imprisonment.**”

I wish to state that besides the fact that the battered woman syndrome applies to instances where the abused woman retaliates and kills the abuser and not innocent third parties like the children of the marriage, my view is that the case is distinguishable from the one before us. The court in *Locardia Ranganai* did not investigate the question whether or not the murder had been committed in aggravating circumstances. It inevitably did not make a finding on it. That with respect could not have been correct. In addition the sentence imposed itself brings me to the next issue in this case. Both Mr *Kamuriwo* for the state and Ms *Muchapireyi* for the accused urged the court to impose considerable years of imprisonment on the accused but suspend significant portions on condition of good behaviour. That approach although supported by this court's decision in *Lorcadia Ranganai* is erroneous. In fact it is illegal. Ms *Muchapireyi* suggested 35 years imprisonment with 15 years suspended. Mr *Kamuriwo* on his part proposed 40 years imprisonment with 15 years suspended on condition of good behaviour. Once again both of them appeared oblivious of the provisions of s 358 (2) of the CP&E Act which this

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<sup>3</sup> HB 270/2018

court specifically dealt with in the case of *S v World Kera and Another*.<sup>4</sup> The section provides that:

(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may—

(a) ...

(b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; (emphasis is mine)

The power of a court to pass a sentence and suspend a portion thereof is undoubted. That power is however inapplicable where the court has convicted an accused of an offence listed under the eighth schedule to the CP&E Act. That schedule provides as follows:

**“EIGHTH SCHEDULE (SECTION 358)**

OFFENCES IN RELATION TO WHICH POSTPONEMENT OR SUSPENSION OF SENTENCE, OR DISCHARGE WITH CAUTION OR REPRIMAND, IS NOT PERMITTED

1. Murder, other than the murder by a woman of her newly born child.
2. Any conspiracy or incitement to commit murder.
3. Any offence in respect of which any enactment imposes a minimum sentence and any conspiracy, incitement or attempt to commit any such offence.” (Underlining is my emphasis)

Clearly therefore murder, except murder by a woman of her newly born baby which in any case has now been given the nomenclature of infanticide in our law, is one of the offences where a court is expressly prohibited from suspending any portion of a sentence it would have imposed. See also the case of *S v Pritchard Zimondi*<sup>5</sup> for the same proposition. It is for that reason that we are unable to follow the course taken in *Locardia Ranganai* and recommended by both the prosecutor and defence counsel.

Ms *Muchapireyi* further urged the court to take all the four counts of murder as one for purposes of sentence in order to mitigate the severity of the ultimate penalty which it will impose on the accused. I find myself once more unable to accede to that approach. In the case of *S v Jindu*<sup>6</sup> the Supreme Court held as follows:

“A point of concern is that upon finding the appellant guilty of murder with actual intent on both counts of murder the court *a quo* passed one sentence of death. This is an improper method of sentencing an offender with two or more counts of murder. A complication would arise if for instance the appellant’s appeal was to succeed on one count and fail on the other count.

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<sup>4</sup> HH.../2021

<sup>5</sup> HH 179/2015

<sup>6</sup> SC 114 /2021

Where it is intended to impose a death sentence the proper approach is to impose the death sentence on each count separately.”

Although the Supreme Court was dealing with the sentence of death, by parity of reasoning, the same course must also apply to instances where a court will sentence an accused convicted of two or more counts of murder to life imprisonment or even to a definite period of imprisonment. The same difficulties would arise in case where if an accused appeals the decision and the appeal succeeds in relation to one of the counts but fails on the other(s). Just like it is difficult and often impermissible to charge an accused with one count of murder for killing several people it is equally difficult to bunch convictions for those separate counts as one for purposes of sentence.<sup>7</sup>

Having disposed of the procedural challenges cited above, what remains mitigatory of the accused’s actions is very little. We indicated in our judgment that during trial the accused remained stone cold. We admitted however that it is not only an emotional breakdown which signifies the regret which may be going through an accused’s mind. We therefore give the accused the benefit of doubt that she may have been genuinely remorseful when she asked for forgiveness from her family, her husband, the court and society generally. If the accused indeed loved her children in the way she professes to have done, then she is serving many years’ imprisonment in her mind. The conscience of guilt will no doubt be debilitating on her. She is likely to be haunted by the consequences of her irrational behaviour throughout her life. That is punishment on its own.

We do not intend these reasons for sentence to be a sermon on the fidelity of men towards their wives but the accused’s husband Lameck Brande cannot escape responsibility for the death of his children. A married man who shamelessly hops from one woman to another and engages in multiple intimate relationships in the manner that Lameck did does not only hurt his spouse but also hurts his children and many other innocent third parties who become collateral damage in those promiscuity escapades. His claim that he loved his children is no different from his wife’s. Both of them only thought about themselves at the expense of their children. Lameck’s actions significantly contributed to the accused’s rage and bitterness leading to the massacre of the children.

What is even clearer however is that the accused’s love for her children if she had any was completely misguided. In fact our view is that it was not love but selfishness. That self-obsession and egocentrism is demonstrated by her own fear of death. Whilst she claimed that

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<sup>7</sup> See *S v Dube* 1992(1) ZLR 234(S).

she wanted to die with her children she did very little if anything to show her commitment to that cause. That she survived the poison, conveniently failed to get a wire to hang herself with and ran away from the inferno inside the house are events which vindicate our apprehension that she did not intend to die but merely used the children to seek the attention of a husband who appeared long loveless. Jealousy which rages and drives a spouse to kill the children of his/her marriage is senseless. The accused deflected her bitterness towards those that she claimed to have been protecting. That was self-destructive conduct. The accused took the law into her own hands. She sentenced the little four souls to death. The right to live is guaranteed by s 48 (1) of the Constitution of Zimbabwe. It is inviolable. That the right to life is sacrosanct is similarly expressed in s 86 (3) (a) which decrees that no law may limit the right to life, except to the extent specified in s 48 which in essence allows a court to impose the punishment of death on a person convicted of murder in aggravating circumstances. As stated earlier even that law which permits capital punishment does not apply to women. It follows therefore that the constitution places the lives of women in a special category where they remain untouchable even in the face of having savagely taken away lives themselves. Unfortunately and contrary to the values which informed the lawmakers' decision to so protect female members of Zimbabwean society, the accused murdered little girls who ironically looked up to her for protection. It was her basic, legal and natural responsibility as a mother to protect the children. She utterly failed in her duty. She betrayed the trust which the girls had in her. They were so trusting and did not sniff anything to the extent that even when she asked them to drink poison they gulped it happily.

We have not lost sight of the fact that the accused has a two year old daughter. She gave birth to that baby whilst she was in remand prison. The child needs protection. I scoured through the Children's Act and kindred statutes with the hope of summarily dealing with the protection of that child during this sentencing process but could not find anything helpful. My hands are tied and simply hope that the appropriate government institutions will take responsibility and ensure that the child is given full protection.

It is against all the above circumstances, that we have no apprehension to conclude that the accused is a highly dangerous individual. The courts will accord very little if any mercy to a mother who butchers her own children in cold blood. We would be completely irresponsible if we were to consider giving the accused a second chance. She does not deserve it. She does not deserve to return to society.

Accordingly on each of the four counts: The accused IS SENTENCED TO LIFE IMPRISONMENT

*National Prosecuting Authority, State's legal practitioners*  
*Muvirimi Law Chamber, Accused's legal practitioners*