

THE STATE
versus
BENJAMIN GONZO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5 October 2020, 21 October 2020,
3 & 21 December 2022 & 4 January 2023

ASSESSORS: 1. Mr Musengezi
2. Mr Mhandu

Criminal Trial

V Mtake, for the State
S Gutsa for the accused – *pro deo*

CHITAPI J: The late conclusion of the trial in this matter resulted from the indisposition of one of the members of the court being assessor Mr Musengezi. The accused has after being notified of the continued indisposition of the assessor agreed that the trial proceeds with one assessor, Mr Mhandu. This procedure is provided for in s 8 of the High Court Act [*Chapter 7:06*]. It is recorded that at the time that the assessor Mr Musengezi became indisposed, the case was at judgment stage. This is the judgment of the two-member court.

The accused then a 21 year old male adult was arraigned before this court on a charge of MURDER. He was legally represented by *pro-deo* counsel Miss *Gutsa*. The details of the charge alleged against him were that on 12 November 2019 at Chiweshe Village, Chief Svoswe, Wedza, he unlawfully and intentionally caused the death of an 85 year old male adult, Misheck Musarurwa Chiweshe. The *modus operandi* of causing the deceased's death was alleged to be that the accused struck the deceased on the head with an iron rod, bricks and stones thereby causing the deceased's death with intention to cause that outcome or realizing the risk or possibility that death could result from his conduct but nevertheless continuing to engage in that conduct despite the realization of the risk or possibility.

To the charge as stated above, the accused pleaded not guilty. He elected to give evidence in his defence and duly filed a defence outline. The gist of the defence outline was

that there was a misunderstanding between him and the deceased over food in that the deceased ordered the accused not to eat the food left for the accused by the deceased's wife until the accused had completed all chores assigned to him. The accused averred that he then demanded to be paid for his services as he could not continue working for the deceased. The accused averred that the deceased attacked him first with a stone during the misunderstanding. The accused averred that in the heat of the moment, he picked up an iron bar which he then used to strike the deceased once on his back. He averred that this took place on the verandah of the deceased's house. The accused further alleged that in a fit of rage he then got into the deceased's house where there was his bag of clothes. The accused then took his bag together with a solar panel, a pair of shoes and cellphone. He averred that he took those items to offset the amount he was owed for his services by the deceased. He outlined that he left the deceased seated on the verandah. He was arrested in possession of the stolen property at a different location from the scene. The accused expunged para(s) 13 and 14 of his defence outline. In para. 13, he had sought to challenge the confirmed warned and cautioned statement. In para. 14 he had stated that he was illiterate, unsophisticated and could not read and could barely write.

The State counsel in opening the adduction of evidence in support of the charge produced a number of exhibits by consent. Exhibit 1 was the post mortem report which was compiled by Doctor Matshalaga following his examination of the remains of the deceased on 15 November 2019 at Parirenyatwa Hospital, Harare. The doctor recorded multiple injuries which were concentrated on the deceased's head. The deceased had lacerations on the head area. The scalp had multiple haematoma, contusions on the right forehead, contusions on left cheek extending across the nasal bridge, contusion on left forehead, multiple subdural haematoma extending to palatal submucosa and extensive bilateral fresh subdural haematoma. In respect to the conclusion on the cause of death, the doctor attributed the cause of death to four factors namely:

- (a) Bilateral subdural haematoma
- (b) Base of skull fracture
- (c) Blunt force head trauma
- (d) Assault

It can safely be concluded from the nature of the injuries noted and the cause of death that the deceased was subjected to severe indiscriminate assault where force severe enough to cause a skull fracture, blunt force trauma and subdural haematoma was used.

Exhibit 2 was the accused warned and cautioned statement. It was confirmed by the magistrate on 4 December 2019. The accused made it on 20 November 2019. He stated as follows:

“I admit the charge that is being levelled against me that I murdered Misheck Musarurwa Chiweshe. At first, I struck him with a stone on the head close to the ear. Afterwards I struck him with a metal bar many time on his back and I lastly struck him with two bricks twice o his head. I first petted him with a stone while he was sitting. He later stood up when I was using the metal bar and he later fell down when I struck him with the bricks on the head. I dragged him from the veranda of the house where he was and left him at the door of the house. I murdered Misheck Musarurwa Chiweshe because he had refused to give the sadza and meat which had been cooked at his homestead since I lived with him while working for him. I later took a solar panel from Misheck Musarurwa Chiweshe’s house together with the shoes and a small machine that is used to measure the sugar levels in a person’s blood system then I fled from his homestead.”

Exhibit 3(a) and 3(b) were respectively indications allegedly made by the accused, by a state witness Magret Chiweshe, state witness Angeline Chiweshe and by the investigating officer showing his own observations. The accused’s counsel indicated to the court that he did not consent to the production of indications because the accused did not sign them. The accused’s counsel in evidence did not put questions to state witnesses to deny that the accused made indications. The denial based on the allegation that the accused did not sign the indications goes to the authenticity of the indications and not the fact of their being made. The accused did not, however, contradict the authenticity thereof in evidence-in-chief or cross-examination. It is also noted that the indications allegedly made by the accused were, contrary to the assertions by defence counsel, actually signed by the accused as per exhibit 3(a) which was the indications form. The form was not challenged. The accused signed the indications form on 9 January 2020 after making them on the same date. There was thus no valid challenge to the indications for the court to determine.

In relation to the contents of the accused’s indications, they largely dovetail with those of State witnesses on what was on the ground on common areas or points of indications as per Exhibit 3(a). Notably the accused indicated point B being the spot where the deceased was seated. It was at this point that the accused attacked the deceased with a clenched fist, pelted the deceased with stones and struck the deceased with an iron rod and the deceased fell down. The accused also indicated points C, F and G being C, the spot where the deceased first sat before he moved to point B where he was then attacked. F, the spot where the deceased sat eating sadza before he attacked the deceased and G, the point which the deceased used to leave the scene.

The indication made by the State witness Margret and Angeline Chiweshe were similar. Significantly both indicated points D and E. Point D was the point where the deceased was found dead lying on his back by the door way to his house with his head facing upwards. The attending police officer and the investigating officer found the deceased still lying in that position upon attending the scene. At point E the witnesses observed one face brick, one piece of farm brick, two stones and an iron rod. The weapons were next to the body of the deceased.

It is common cause that the deceased and the accused were left at the deceased's homestead being the two of them early in the morning of the fateful day by the deceased's wife Margret Chiweshe and the deceased's sister-in-law (wife to the deceased's younger brother) Angeline Chiweshe. The two women left for a funeral within the village. Upon their return, they found the deceased dead and lying on his back with his face up. The accused was nowhere to be seen within the homestead and the vicinity. The issue that then arose and arises in this case is to answer the question "who killed the deceased?" since the accused denied that he committed the murder.

The evidence of Margret Chiweshe, the 84 year old wife of the deceased was that the accused had been employed as a general hand by her and the deceased on the previous day before the demise of the deceased. The accused behaved in a rather bizarre manner. There had been an agreed plan on the eve of the accused's employment to plant maize in the garden in the morning. The accused had woken up around 3.00am and woke up the witness so that they proceed to plant the maize. The deceased refused to allow the accused and Margret to go to the garden at that time as they risked being attacked by hyenas. The witness and the accused then proceeded to the garden with the accused going first around 5.00am and the witness following shortly thereafter after washing the dishes. The witness subsequently followed to the garden and teamed up with the accused and planted the maize. The two returned to the homestead around 9.00am where the deceased had remained behind. The accused cooked food and the accused, deceased and the witness partook aof the meal. Thereafter, the deceased and the accused remained at the homestead whilst Margret and her sister-in-law left to attend a funeral after instructing the deceased to fill up a pit with broken bricks. On their return, they found the deceased dead.

Angeline Chiweshe stayed within the same yard as the deceased albeit she and her husband had their separate homestead. Her evidence on what she observed of the deceased upon returning from the funeral with Margret was the same as the evidence of Margret. No

useful purpose is served by repeating the evidence save to say that it corroborated that of Margret.

Further material evidence led from Margret Chiweshe which was not disputed or challenged by the accused was that the accused stole a solar panel which led to his arrest when some teachers to whom he was trying to sell it reported him to the police. The accused further stole a bag which contained a sim card, dried fish, chicken meat and eight (8) bars of soap. The witness and Angeline Chiweshe both denied that there was anyone named Brian who was or had been employed by the witness and/or the deceased. The only other person known to the witnesses was one Sanford who had been employed at Angeline Chiweshe's homestead. He, however, had left employment ceremoniously on the same day and been seen off around 6.00am and bid his farewell to the deceased as witnessed by Angeline. This evidence was not denied.

The last State witness Godknows Chimhete is a police officer. He was the attending detail who received a report of the death of the deceased from one Cassian Chiweshe on 12 November, 2019 around 1400 hours. The witness attended the scene and guarded the body which he did not disturb or allow anyone to disturb it until police Criminal Investigations Department (CID) attended the scene to take over the investigations as it was a homicide case. On arrival at the deceased's homestead, the witness observed the body of the deceased to be partly on the veranda from the waistline and the other part inside the house. The deceased's body lay on its back facing upwards. There were blood stains and drag marks from outside the house which suggested to the witness that the body had been dragged. It was possible of course that the deceased could have dragged himself intending to get into the house. Nothing of great moment turned on this evidence.

The attending detail further noted a wound or cut below the deceased's right eye and blood which flowed from the wound. He also observed three blood-stained stones, face bricks and an iron bar which were all blood stained suggesting that they had been used as weapons to attack the deceased. The witness asked the witnesses Margret Chiweshe and Angeline Chiweshe to check the house and confirm if everything was in order. The witnesses made reports of missing items which included bars of soap, a solar panel, cellphones, pair of shoes and a sugar testing machine.

The witness was also the arresting detail. He teamed up with Cassian Chiweshe on 19 November 2019 in search of the accused after receiving an anonymous phone call that the accused was sighted within Machiridza Village in Rusape. He proceeded to the village and

with the aid of a member of the neighbour-hood watch committee who gave directions, the accused was arrested at the homestead of one Romana Madziwa who had housed the accused. Upon his arrest the accused was found in possession of the property stolen from the deceased's homestead namely the solar panel, diabetes testing machine, pair of shoes, soap bars, a cellphone and a handbag. In this regard, it is noted that the evidence of the lady who housed the accused Romana Madziwa was admitted by the accused. The evidence was to the effect that she had met the accused on 13 November, 2019 around 6.00pm and he was looking for employment. The accused who had a handbag had reported that he had been given the solar panel and other items as payment for his services by his ex-employer.

The accused also admitted the evidence of the investigating officer Sergeant Raki Matibvira. He attended the scene and took over the case from the attending detail on 13 November 2019. He recorded witness's statement, their indications and drew a sketch plan. He observed upon examining the body of the deceased that he had a deep cut below the right eye and another deep cut on the back of the head. He also took the accused for indications at the scene on 9 January 2020.

The last piece of admitted evidence was that of Cassian Chiweshe who after receiving a message of the deceased's death attended at the deceased's homestead on 12 November 2019. He made the same observations at the scene as made by Margret Chiweshe, Angeline Chiweshe and Constable Nkete the attending detail. The observations need not be repeated. He reported the homicide at Goto Police base. He received information on 19 November 2019 that the accused was offering a solar panel for sale within Devedzo area around Rusape. He teamed up with Constable Nhete and proceeded to Machiridza Village in Rusape where the accused was arrested. Upon arrest, property stolen from the deceased's homestead namely, a black leather handbag, 15 watts solar panel, a diabetes testing machine, Motorola cellphone and a pair of black shoes were recovered from the accused.

Upon the closure of the State case after the State counsel adduced the summarized evidence as detailed above, the accused gave evidence. He testified that he was aware of the allegations against him. His narration of the events of 12 November 2019 was that he had been offered a job as a helping hand by the deceased and his wife in November 2019 and they started staying together. On the day in question, he was left with the deceased when the deceased's wife went to attend a funeral. He had been tasked to fill up a pit with bricks. He then hid his food after which he decided to go and fetch water. Upon his return he again looked for the food and began to eat it. The deceased queried why the accused was eating for the second time.

He testified that there were verbal exchanges between him and the deceased. The accused did not give details of the exchanges. He, however, stated that the deceased picked up a stone intending to strike the accused whereupon the accused ordered the deceased to put the stone down. The deceased did not take heed of the warning. The accused stated that he then picked up an iron bar and struck the deceased with it on his back. He then left the deceased seated on the veranda. He then packed his clothes, took a solar panel, shoes and a bag and went away. The accused stated that he was by the veranda of the deceased's house when the deceased tried to strike the accused and the accused in turn struck the deceased with an iron bar. He testified that on leaving the homestead he told the deceased that he was going to collect his money from his previous employer. The deceased had asked him where he, the accused, was going to. The accused stated that he left the deceased seated on the veranda.

The accused further testified that he was arrested five days after the incident. He stated that he gave a statement to the police in which he implicated Brian who used to work at the next homestead as the culprit. He stated that the police said that they would place him in custody whilst they looked for Brian. He did not testify on how Brian was the culprit.

In cross-examination, the accused testified that the problem started when the deceased asked him why he was eating food for the second time. When he answered that he had planned to do so, the deceased picked up a stone and tried to strike the accused with it. He did not know why the deceased wanted to strike him with the stone. He stated that he suspected that the deceased would strike him with the stone. The accused then picked up an iron bar and struck the deceased with it on the back and from the deceased's back. He testified that he only used the iron bar once and had no idea how the deceased suffered other multiple injuries. There was of course no suggestion that the injuries observed by the doctor were not *ante mortem*. He disowned the confirmed warned and cautioned statement alleging that he was assaulted before making the statement. He stated that his statement to the police had been that he knew nothing about the case. This of course would still be false because he knew about the case. When asked why he assaulted the deceased with the iron bar the accused stated that it was because the deceased was holding a stone intending to strike him. When asked why he did not run away, the accused answered that it was not possible. He did not give details of why it was not possible to escape without striking the deceased. He agreed that after assaulting the deceased, he then took the items recovered from him from the house. He also collected his clothes. When asked to give details about Brian, the accused stated that Brian worked at the next homestead and came to ask for his money from the deceased. He stated it was then that Brian killed the

deceased using his bare hands and bricks to attack the deceased. The accused stated that Brian left the accused and the deceased behind. The story of Brian was unintelligible and no doubt contrived.

The court after considering the testimonies of the state witnesses who gave evidence noted that their evidence easily flowed and was easy to follow. It was given lucidly and the witnesses corroborated each other. In fact, the evidence of the Chiweshes, Margaret and Augeline on material points on the position of the body of the deceased when they first discovered the deceased's body as well as the presence of weaponry was corroborated by the police. The witnesses were credible and the court believed and accepted their evidence as truthful. If the state witnesses were credible, the opposite was the position with the accused. His evidence was inconsistent and contradictory. In the warned and cautioned statement the accused gave details of how he attacked the deceased. The account given therein has traits found in the accused's oral evidence that he struck the deceased with an iron bar on the back, that there was an altercation over food and that the accused stole property after the attack on the deceased. The accused then threw in a red herring and brought in another version that it was one Brian who attacked the deceased in the accused's presence and killed the deceased. The accused could not advance the contrived story because as with any contrived stories the story will not flow or stick. The accused then gave a version wherein he alleged self-defence. He averred that he struck the deceased with an iron bar on the back because the deceased was holding a brick intending to strike the accused. Whilst it is correct that the accused bears no onus to prove his innocence and that the lies told by an accused are not necessarily proof of his guilt, where however, the accused deliberately lies or gives glaringly inconsistent testimony to explain his conduct such that the court is left unable to say what exactly is the accused's position, then the lies and inconsistencies may properly be taken into account as corroborative of other evidence which incriminates the accused. The accused did not make any attempt to explain the contradictory positions which he gave to the court.

The State counsel submitted that the case fell to be determined on circumstantial evidence. The approach of the court to circumstantial evidence is well documented. In the case of *Mutsare v State* SC 73/18 the Supreme Court quoted the judgment of *R v Sibanda & Ors* 1965(4) SA 241 (RA) where BEADLE CJ dealing with circumstantial evidence stated:

"The degree of certainty with which the individual facts must be proved in criminal cases must always depend on the probative value of the individual facts themselves generally speaking when a large number of facts taken together point to the guilt of the accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt.

It is sufficient if there are reasonable grounds for taking these facts into consideration and all facts, taken together prove the guilt of an accused beyond a reasonable doubt.”

See also *R v Blom* 1939 AD 188; *Abraham Mhovora v State* SC 75/14.

In casu, the accused was left in the company of the deceased on the fateful day. The accused admitted that there was an altercation involving food between him and the deceased. He admitted that he struck the deceased with an iron bar. He contrived out of the blue a story that the deceased was killed in the accused’s presence by one Brian. The accused was found in possession of property stolen by him from the deceased’s homestead. He lied that the property had been given to him as payment for his services. His account of events was contradictory and mirrored a desperate attempt to deny the obvious and did not help him in the assessment of his credibility. The circumstances of the case clearly pointed to his guilty.

The accused averred in the defence outline that acted in self-defence. The defence could not be sustained. It is a difficult defence for the accused because there was no evidence led to show that the attack on the deceased in the manner that the accused by this admission admitted to have perpetrated was necessary to avert the nature of the attack posed on him by the deceased. Counsel for the accused did not motivate the defence quite understandably so because the defence was untenable.

Counsel also feebly attempted to argue that the accused acted under provocation. Again, the defence was not a whole heartedly taken one. The accused on the evidence was not provoked. He did not establish the grounds of provocation for the state to disprove. To ask a person why he is having a second meal cannot be a ground for provocation. Provocation even if established must satisfy the provisions of s 239 of the Criminal Law Codification and Reform Act [*Chapter 9.23*]. The section provides *inter alia* that the provocation must have been sufficient to make a reasonable person in the accused’s circumstances to lose self-control. See *S v Sahumani* HH 454/20; *S v Ndhlovu* HB 242/20. The defence of provocation was not established and the issue of whether the provocation could have resulted in a reasonable person placed on the accused’s shoes to lose self-control does not arise for determination.

The totality of the evidence shows that the deceased suffered grievous injuries from which he died. The accused did not suffer any injury or allege any thus clearly discounting suggestions of any attack upon him. The accused after the attack did not take time to steal property from the homestead and make good his escape until arrested five days later. He used a dangerous weapon directed on the head of the deceased in an act which had makings of being calculated and deliberate. The accused in the courts’ view acted with intent to kill the deceased

and made sure that the deceased was unable to stop him from proceeding to steal property from the homestead. No other reasonable inference can be reached on the proved facts.

Under the circumstances, the court after considering the evidence and the surrounding circumstances of the case as well as the accused's evidence in his defence has reached the conclusion that the accused intentionally caused the death of the deceased and is guilty of murder as charged with intent.

SENTENCE

Following the conviction of the accused on 13 December 2022, counsel for the accused and the State addressed the court in mitigation and aggravation of sentence respectively. The sentence hearing was postponed to 3 January 2023 and further postponed to 4 January 2023. The accused was after the court gave brief *ex tempore* reasons for sentence, sentenced to 30 years imprisonment with the court finding that the accused committed the murder in aggravating circumstances. The court advised that it would give fuller reasons for sentence and these are they. The accused was convicted of the capital offence of murder committed in circumstances of constructive intent with aggravating circumstances being established. The accused attacked on 84 years old octogenarian who would pass off for the accused's grandfather or even great grandfather given the age disparity between the accused and the deceased which was 63 years since the accused was 21 years old when he committed the murder. Society frowns upon youths who have no respect for their parents, grandparents and indeed their elders. The court has to take a mean view of the conduct of the accused. He lacks moral turpitude and his conduct was morally reprehensible.

The accused committed the murder in aggravating circumstances. Sections 47(2) and (3) of the Criminal Law Codification and Reform Act provides without limit factors or circumstances which the court must take into account in determining whether or not the murder in any case where the accused has been convicted of murder was committed in aggravating circumstances. It is not necessary to recite the provisions aforesaid. It is a circumstance of aggravation in terms of the provision of subsection (3) where the murder was premeditated or the victim is over 70 years of age. *In casu*, the court made a finding that the accused foresaw the risk or possibility that his conduct might result in the death of the deceased but proceeded to grievously assault the deceased despite such realization. The deceased was 84 years old and therefore the age factor by operation of law was an aggravating factor.

Further circumstances which individually or taken together with the fact of the accused age resulted in holding that the murder was committed in aggravating circumstances were the

fact that after attacking and disabling the deceased, the accused then unlawfully entered the deceased's house and stole the deceased and his wife's property. The accused proceeded to the homestead of the deceased's young brother and unlawfully entered the property and again stole property therefrom. The accused went on to offer some of the property for sale. The attempt to sell the property resulted in information filtering to the relatives of the deceased who alerted the police leading to the police following up and arresting the accused whom the police were looking for as a suspect. The fact that the murder was gruesome and committed upon an octogenarian does not escape the attention of the court. The attack on the deceased was inflicted for selfish reasons to enable the accused to steal.

The mitigation submitted by counsel for the accused was firstly that the accused was a youthful offender then aged 21 years and that he was remorseful and had been in custody for three years at the time of mitigation after conviction. It was submitted that the accused was an unsophisticated and uneducated youth who lacked parental guidance. This submission was accepted. However, the nature of the offence of murder is that every human being whether sophisticated, uneducated or educated is aware of what death is inasmuch as no person wants to die. If one was to threaten the accused with death or injury, the accused would obviously fight back or escape. The accused must have and did appreciate that it was wrong to cause death. It does not require education or sophisticated to appreciate the sanctity of human life.

The submission that the accused was remorseful was not supported by the accused's counsel. The accused did not own up to his misdeed and gave contradictory accounts of how the deceased met his death. Remorseful is ordinarily demonstrated by owning up to one's misdeed and apologizing for it. It was not suggested that the accused apologized to the deceased's family for his actions.

The court invited a member of the deceased's family to give the court evidence of the impact which the death of the deceased has had on the deceased's immediate family. The invitation was informed by the need to take into account the impact which the offence has had on the family. There is a trend in the field of sentencing to only dwell on the accused's personal circumstances pitted against the circumstances of the commission of the offence and interests of society and balancing these to come up with an appropriate sentence. In considering interests of society the affected persons or victim's views are not considered. More often than that, not it is the accused who may be referred for mental examination depending on the facts if he accused's behaviour shows trends of mental instability and in the process the accused gets the benefit of treatment, psychological re-orientation and related attention. The victim and those

affected by the deceased's death do not get prominence and sometimes they are not even advised of the outcome of the trial and have to follow up themselves. It is salutary for the court to hear view of victims. Victim impact statements do not usurp the courts' discretion on sentence. They assist the court in understanding the effect of the crime on the lives of the victims and their families. In this way the issue of the interests of society being taken into account will have a practical basis to start from since the victims are members of society too.

In casu, the deceased's son Kingston Chiweshe gave evidence. He stated that the death of the deceased was devastating on the deceased's family because the family then remained with one father figure, the deceased young brother who had been of poor health and died as he was traumatized by the deceased's death. When asked what the family's attitude was towards the concept of mercy and forgiveness, the witness stated that it was not for another human being to forgive such a heinous act but for God. The court discerned some bitterness on the part of the witness. It was clear that were it possible, the deceased's family needed some counselling so that the family comes to terms with the death of the deceased. The court does not have power to order that there be such counselling. It is, however, a noble idea which the legislature and powers that may be pleased to consider in their discretion as meriting interrogation. For purposes of sentence in this matter the court will take into account that the deceased's death traumatized the deceased's family. The death of another person will invariably result in trauma to loved ones. Nonetheless, victim impact statements also ensure that the victim consider themselves as part of the criminal justice process in that they are players too. I again emphasize that their views are considered for their relevance as with any other factors which may appropriately be taken with account as relevant to the determination of the level of blameworthiness of the accused.

In fairness to the accused, the court was of the view that if it could be stated that the accused showed remorse, he did not show it during trial but perhaps to the police upon being charged because he confessed to being the perpetrator. At least at that time the accused owned up to his misdeed. His subsequent challenge to the confession would under the circumstances have just been a desperate attempt to manufacture a defence which was doomed to failure as the circumstantial evidence even without the confession being admitted was overwhelming. The fact that upon his arrest, the accused co-operated with the police was considered by the court as a circumstance of mitigation.

Further the youthfulness of the accused and his status as a first offender constituted weighty mitigation circumstances. The court will invariably exercise a measure of leniency

when sentencing a first offender, moreso, a youthful one. The fact that the first offender has been convicted of a serious offence such as in this case, murder, does not bar the court from giving appropriate weight to the combined first offender and youthful states of the accused person. A measure of leniency is therefore on account of the two factors deserved.

The prospects of the imposition of the death penalty looked high in this case because the accused committed the murder after which he then stole property at the accused's homestead. The motivation for the murder was therefore arguably to steal. Whilst this consideration weighs heavily on the extent of the accused's moral blameworthiness, it still must be considered together with other aggravatory factors and counter balanced with mitigating circumstances. The court after considering all factors of aggravation and mitigation in the case considered that the death penalty was not deserved. Whilst the killing of the deceased was brutal or gruesome, the accused could not be described as the type of offender who could not be visited with a measure of mercy as a youthful first offender.

Having considered by the court in the exercise of its judicious discretion that the death penalty was not deserved, the court considered the imposition of the sentence of imprisonment for life. In this respect, s 344 A of the Criminal Procedure and Evidence Act, [*Chapter 9.07*] provides as follows:

“344A Imprisonment for life

Subject to any other law, the effect of a sentence of imprisonment for life imposed on or after the date of commencement of the Criminal Procedure and Evidence. Amendment Act, 1997 shall be that the person so sentenced shall remain in custody for the rest of his life.”

It follows from the above provision that where a court considers that the sentence of the death penalty is not deserved in a particular case but that nonetheless society will be better protected if the convict were to be permanently removed from society other than killing him in turn, then imprisonment for life will be the appropriate sentence to impose. If, however, the court considers that the accused may be rehabilitated and be given a chance to reintegrate into society and the murder is found to have been committed in aggravating circumstances, the accused must be sentenced to imprisonment for a period of not less than 20 years imprisonment. In this respect s 47(4) of the Criminal Law Codification and Reform which provides as follows;

“47 (4) A person convicted of murder shall be liable to-

(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;

(b) In any other case to imprisonment for a definite period.”

The court did not consider the accused as incorrigible and incapable of rehabilitation and reintegration into society. He deserved a second chance.

Sections 337 and 338 referred to respectively permit the High Court in its discretion to pass the penalties provided for in s 47(4)(a) and (b) of the Criminal Law Codification and Reform Act and in respect of s 338 to exclude from liability for the death penalty women convicts aged 70 years and above and convicts below 21 years old reckoned from the date of commission of the offence.

A submission was made by the accused's counsel that the accused has been in custody since his arrest in 2019. From the time of arrest to the date of conviction the accused was in custody for three years. It was not his fault that he remained in custody for the said period. There were challenges with the COVID 19 pandemic which resulted in suspension of court operations. The accused's position in relation to delay was not helped by the absence of one assessor who became and is still indisposed. The accused mitigated his continued incarceration by electing that the trial proceeds with one assessor. The accused did not attempt to apply for bail although it was open to him to do so. The period of incarceration prior to conviction will be taken into account in assessing sentence. After agonizing on the appropriate sentence to impose, the court considered that the appropriate sentence would be one exceeding the twenty years benchmark as discussed. A sentence of 30 years was considered appropriate and hence the accused was sentenced as follows:

“30 years imprisonment.”

National Prosecuting Authority, State's legal practitioners
Gutsa and Chimhoga Attorney, accused's legal practitioner