

THE STATE
versus
EALLAH CHINODYA
and
BRIAN TONGOWASHA
and
TONGAI CHINODYA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 20 December 2023

Criminal trial – Sentencing judgment

Assessors: Mr *Shenje*
Mr *Barwa*

Mrs K Chigwedere, for the State
T Kabuya, for the first accused
K Tichawangana, for the second accused
E Chibondo, for the third accused

MUREMBA J:

Introduction

The accused persons are male adults aged 30 years, 24 years and 34 years respectively. They were arraigned before this court facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was the State's averment that on 7 October 2022 and at the guard room near Block 1 Nenyere Flats in Mbare, Harare all the accused persons or one or more of them unlawfully and with intent to kill or realising that there was a real risk or possibility that their conduct may cause death and continuing to engage in that conduct despite the risk or possibility, assaulted Onisimo Mavhungire all over his body with stones; booted feet, open hands and a wooden log thereby causing injuries from which Onisimo Mavhungire died.

The Pleas

All the accused persons pleaded not guilty to the charge. However, following a full trial, they were all convicted of the offence charged.

The relevant facts

The full judgment of this case is in HH 37/24. In denying the charge all the three accused persons gave *alibi* defences and said that they were nowhere near the scene of crime in Mbare on the day in question. Accused one said he was in Glen View, Harare where he was looking for a bar to rent. Accused two said he was playing football at Mushawasha grounds in Mbare, about 500m away from the scene of crime. Accused three said he was in Mazowe where he had gone to sell second hand clothes in mines. To prove its case, the State led evidence from a total of six witnesses. Of the six witnesses, four were eyewitnesses to the assault of the deceased at the scene of crime. The other two witnesses were police officers who received the assault report and investigated the murder case.

The four eyewitnesses gave evidence to the effect that on the fateful day the deceased was drinking beer with his two colleagues whilst seated at a disputed piece of land. However, the dispute did not involve them. The dispute involved CCC members who included the accused persons' mothers and some ZANU PF members who had successfully obtained an eviction order from court against the CCC members. The enforcement of the eviction order by the sheriff left CCC members disgruntled. They became violent and started throwing stones at people who were working on the said piece of land on 7 October 2022. The deceased and his colleagues who were busy enjoying their beer at the guard room were not aware of what was going on until they were confronted by CCC members who had gathered into a group. The accused persons were part of the group. When the group confronted the deceased and his colleagues, accused three slapped the deceased on the face with an open hand. Unaware of what was happening the deceased decided to fight back. This infuriated the rest of the group which was made up of more than ten people. The group turned on the deceased and assaulted him with open hands, booted feet and stones all over his body. One of the assailants struck the deceased on the head with a log that was 2m long and 7.5cm thick. The deceased was assaulted by at least 10 people. The group stopped the assault of its own volition and left the deceased after noticing that he was now looking lifeless. He was now bleeding from the head, nose and mouth. He was no longer able to talk.

Soon after the group had left, onlookers who included the State witnesses who were eyewitnesses tried to render first aid to the deceased. They then took him to the police station where he was referred to hospital. He died as he was being attended to at hospital. The deceased's cause of death as per the postmortem report was brain damage, severe head trauma secondary to assault and epidural haematoma on the right hemisphere.

The accused persons were identified by the four eyewitnesses at the scene of crime participating in the assault of the deceased. The court was satisfied with their identification because the assault happened during the day and the witnesses were at close range. Moreover, the accused persons were known to the eyewitnesses for a period of not less than 5 years. One of the witnesses who identified all the three accused persons participating in the assault had known each one of the accused persons for about 20 years. The accused persons' *alibi* defences that were raised belatedly during trial could not prevail over positive and categorical testimonies of the eyewitnesses who saw the accused persons participating in the assault. On this basis the accused persons were all found guilty.

The Law

The penalty for the crime of murder is provided for in s 47(4) of the Criminal Law (Codification and Reform) Act. If the crime was committed in aggravating circumstances, it attracts a death penalty, imprisonment for life or any definite period of imprisonment of not less than 20 years. If the crime was not committed in aggravating circumstances, the penalty is imprisonment for any definite period.

Out of the need to achieve uniformity in sentencing, the sentencing guidelines in S.I. 146 of 2023 provide a presumptive penalty for each offence together with the aggravating and mitigating circumstances that may justify a sentencing court in departing from the presumptive penalty¹. A presumptive penalty is defined in s 3 of the Sentencing Guidelines S.I 146 of 2023 as,

“A penalty expressed as a specific amount of a fine or a specific period of imprisonment or both that is midway between an augmented penalty which may be imposed in aggravating circumstances and a diminished penalty which may be imposed in mitigating circumstances.”

¹ S10 of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 SI 146 of 2023

See also s 334A (1) of the CPEA.

In *The State v Blessed Sixpence and Others* HH 567/23 at page 6 MUTEVEDZI J said,

“My understanding of the definition is that the presumptive sentence is a punishment that is found midway between a crime committed in what I may describe on one hand as a run of the mill circumstances and the particularly horrendous ones on the other. It is a median. It is a starting point. It is not a mandatory minimum penalty. Put differently, what the law has done is to streamline particular mitigating and aggravating circumstances and declared that where such are present, the ideal penalty is the presumptive sentence stated in the guidelines.”

In other words, a presumptive penalty is a penalty that is neither the maximum nor the minimum penalty. It is a penalty that is considered to be appropriate in most cases and is used as the starting point for determining the final penalty for a particular offence.

In terms of the sentencing guidelines, the presumptive penalty for a murder which was committed in aggravating circumstances is 20 years’ imprisonment. A murder which was committed in other circumstances has a presumptive penalty of 15 years’ imprisonment. What are aggravating factors for the offence are outlined in the table of presumptive penalties in the sentencing guidelines. The same factors are also listed in s 47(2) and (3) of the Criminal Law (Codification and Reform) Act. However, s 47(5) of the same Act provides that these aggravating factors are not exhaustive. This means that the court may find other circumstances or factors that are not listed therein to be aggravating factors. In other words, the court is not limited to the listed factors. What are mitigating factors are also listed in the sentencing guidelines. Again, these are not exhaustive. However, there are no mitigating factors listed in the Criminal Law (Codification and Reform) Act. The established sentencing trends for the offence of murder is the imposition of imprisonment or the death penalty even in cases where the convict is a first offender.

In the circumstances of the present case the murder was committed in aggravating circumstances in that the murder was committed by a group of persons who were acting in common purpose in defiance of a court order. There was complete disregard and disrespect for the rule of law. Respect for the rule of law is essential for the proper functioning of a democratic society. Disregard and disrespect for the rule of law can lead to a breakdown of the legal system, which can have serious consequences for the stability of the country. Therefore, the applicable presumptive penalty in the circumstances of this case is 20 years’ imprisonment.

In terms of s 5 of the Sentencing Guidelines, where a presumptive penalty is provided for, the court is mandated to pay due regard to it when sentencing the accused. In the *Sixpence*

case *supra* MUTEVEDZI J said that this means that where streamlined mitigating and aggravatory factors are present in a case, the ideal penalty is the presumptive penalty. The court is only permitted to depart from the presumptive penalty, provided it gives reasons for the departure. So, the court can go higher or lower than the presumptive penalty provided it gives clearly expressed and persuasive reasons. Obviously, s 5 is meant to ensure rationality and consistency in sentencing in our courts and at the same time it safeguards the sentencing discretion of the court.

The mitigatory factors

The court is mandated to inquire into the aspects covered in s 12 (1) of the sentencing guidelines. For unrepresented accused persons, the court has to do the inquiry with the accused. For accused persons that are legally represented, their legal representatives are the ones who do so. In *casu* since the accused persons are legally represented, the court allowed counsels to prepare and file written submissions that cover aspects listed in s 12 of the sentencing guidelines. The court was able to gather the following mitigatory factors from the accused persons through their legal representatives. Accused one is 30 years old. He was 29 years old at the time of the commission of the offence. He grew up in Mbare and relocated to Budiriro in 2015. He is a married man with two minor children aged 7 years and 2 years. The first child is in primary school. His wife is a housewife and he is the sole breadwinner. He sells wares at Mbare Musika and runs a small bar in Glen View. In addition, the first accused takes care of his aunt's two children because the aunt relocated to South Africa. The accused is a youthful first offender who deserves some leniency and a second chance.

The second accused is 24 years old. When he committed the offence, he was 23 years old. He grew up in Mbare and lives with his widowed mother and an 11-year-old sister. He passed his "O" level examinations but sells wares and works as a caretaker, loader and plays football to fend for himself and help his widowed mother with the upkeep of the family. The mother is a vendor and is not able to meet the family's living expenses alone. The accused also helps with his 67-year-old paternal grandfather's medical bills. The accused has a long life ahead of him and would want a chance to rewrite his life story. The accused is a youthful first offender who deserves some leniency and mercy.

The third accused is a youthful 34-year-old first offender. He is married and has two children aged 10 years and 10 months. His wife is unemployed and is dependent on him as the

sole breadwinner. He is not likely to offend in future because he has no history of committing crimes.

The aggravatory factors

The aggravatory factors are that when the accused persons assaulted the deceased, they were part of a mob of more than 10 people. As for accused one and three who are blood brothers, they were said to be the ring leaders. They were the first to throw stones at the people who were at the disputed piece of land. Accused three even made death threats to those who were refusing to leave and true to his word, the deceased who did not leave the land, not because he refused to do so, but because he was busy drinking beer unaware of what was happening around him, ended up dying on that day. Although accused two was not said to be a ring leader, he was seen at the forefront together with his co-accused throwing stones. It is aggravatory that the accused persons attacked an innocent and defenceless man who was drinking his beer in peace. The deceased was mercilessly killed in a ruthless and brutal manner without any sense of pity for him. He was killed in cold blood. Evidence that was led before this court showed that what led to the murder of the deceased was a land dispute between CCC and ZANU PF supporters yet the deceased was not into politics. He did not belong to either CCC or ZANU PF. He was just caught in the crossfire. During the assault he was struggling to rise in order to ward off blows and defend himself from the violent mob, but the mob was relentless. Between accused one and two who are blood brothers, one of them took a very big log which was 2m long and 7.5cm thick and struck the deceased on the head. The deceased fell down and urinated. Instead of discontinuing the assault, the group went on to kick the deceased with booted feet on the head and all over his body until he was almost lifeless. He was now bleeding from the head, the mouth and the nose. Onlookers were standing at a distance afraid to restrain the assailants. The assault was violent and disturbing. The deceased was not treated with respect and dignity. His crime was being at the wrong place at the wrong time. The deceased had not even provoked the mob that attacked him.

The victim impact statement that was furnished by the State shows that the deceased was a married man. The affidavit from his wife is heartbreaking. She narrated how the death of her husband has severely impacted on her and her two children who were aged 3 years and 4 months at the time their father died. When their father died, the couple had been married for 8 years. At the time of the deceased's death, the family was living in rented accommodation in

Southlea Park. The deceased was the sole breadwinner while his wife was a housewife who had ample time to look after their children. They were paying USD85 for rentals for the two rooms they were using. They had electricity, running water and a flush toilet. The wife is now surviving on illegal vending and can hardly make ends meet. She has relocated to Epworth, where she is now renting a one room which is not electrified and does not have running water. The family now uses a Blair toilet and can only afford one meal a day. Before the death of her husband, they had bought building material in order to build a rural home in Murewa. The wife said she has since failed to build the rural home. Some of the material has been stolen and some of it is breaking. When she goes for vending in town, she leaves her now 4-year-old child with her neighbour and carries the younger one on her back throughout the day. She spends the whole day running away from the police. Unfortunately for her, on 21 June 2023, when she was returning from her vending job in town, she was hit by a car as she was disembarking from a lorry that she had boarded. She suffered a broken leg and is now unable to walk. She said she uses lorries for transport because they charge 50 cents instead of USD 1.50 which is charged by commuter omnibuses. She said she cannot afford the high fare and at the same time as a woman she struggles to board and disembark from lorries.

The deceased's wife stated in her affidavit that the death of her husband has traumatised her immensely. She cries most of the mornings. She believes that if her husband had not died, her life would not have been such a mess and pathetic. Her eldest child is continuously asking her about his father's whereabouts. He asks her why she does not leave him food anymore. The child does not understand why his father was killed and she is failing to make him understand. She also said that she does not understand why the accused persons decided to terminate her husband's life. She said that she is deeply saddened by the fact that her children will have to live without their father for the rest of their lives. She said that persons who murdered her husband do not deserve to live. She said that the accused should be imprisoned for life.

The sentence

Clearly from the foregoing, the aggravatory factors far outweigh the mitigatory factors and they do justify a departure from the presumptive penalty going up. The accused persons have expressed no remorse whatsoever for the brutal murder of the deceased. Although no form of punishment will bring back the deceased to life, at least some form of compensation to his

family would have eased the burden the wife is carrying. Counsels for accused one and two made no proposals for the sentence to be imposed on the accused persons whereas counsel for accused three proposed a sentence of 10 years' imprisonment. On the other hand, the State counsel proposed imprisonment for life. Whilst we agree that a stiffer penalty is called for in this case, we however believe that justice should be tempered with mercy. Imprisonment for life will not give the accused persons who are still youthful a second chance in life. It is our considered view that a sentence of 25 years' imprisonment will meet the justice of the case.

Accordingly, each accused is sentenced to 25 years' imprisonment.

National Prosecuting Authority, State's legal practitioners
Matsikidze Attorneys-At-Law, first accused's legal practitioners
Maunga Maanda & Associates, second accused's legal practitioners
Gumbo & Associates, third accused's legal practitioners