

THE STATE
versus
CLAYTON MABASA HUNDA

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 28 November 2023

Criminal Trial - Sentencing judgment

Assessors: *Mr Mhandu*
Mrs Chitsiga

P Gumbo, for the State
O Marwa, for the accused

MUNGWARI J: The offender appeared before this court charged with the crime of murdering his wife. After a contested trial, we dismissed his protestations and convicted him of the murder. Briefly, the facts proven at trial were that on the fateful night the offender who had earlier in the day been merry-making with the deceased had together with her consumed an entire 750 ml bottle of gin. That drink had an alcohol volume of up to 43%. The couple later had a misunderstanding over the deceased's refusal to prepare supper which was expected to have taken place soon after the restoration of electricity. There had been an electricity outage the whole of the day. When the offender requested the deceased to prepare their supper she was slow in attending to the request probably because of the effects of the alcohol she had taken. She also made some remarks which the offender must have found unpalatable. In anger he assaulted and sat on her. He pulled out her braids and continued assaulting her as she screamed, cried and groaned in distress. She passed out from the assaults and subsequently died.

Both counsels for the state and the offender were in agreement that the murder was not committed in aggravating circumstances because none of the factors envisaged in s 47(2) and (3) of the Code and in The Criminal Procedure (Sentencing Guidelines) Regulations, SI 146/23 (the Sentencing guidelines) are present. The court agrees with their observations. A perusal of the cited pieces of legislation leaves us in no doubt that based on the proven facts outlined

above none of the listed aggravating factors are present. We could also not find any other factors outside those prescribed that could extend the list of aggravating circumstances as envisaged by the Code. I wish to also point out that in any case, the murder *in casu* was committed in November 2021 well before the sentencing guidelines became law in August 2023. Those regulations cannot be applied retrospectively to an offence which was committed before their enactment. We therefore make the finding that this murder was not committed in aggravating circumstance.

Section 47 (4) of the code provides that:

“(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.”

Mr *Marwa* who appeared for the offender advised that his client was waiving his right to give *viva voce* evidence in mitigation. In his submissions, counsel then urged the court to pass a sentence below twenty years. To support his view, he submitted that his client who is aged thirty-seven (37) years is a first offender. He added that the offender is remorseful and is perpetually haunted by the death of his wife who also happened to be the mother of his only child. For that reason, so argued counsel, the offender is not likely to reoffend if given a second chance. He emphasized that the offender lost self-control in a moment of madness. He implored the court to consider that the provocation he experienced although not sufficient to exonerate him when measured against the reasonable person, was amplified by his intoxicated state. Acting out of passion he was enraged by the victim’s retort to his request to prepare their supper. The deceased is said to have mentioned that she was talking to her boyfriends. Mr *Marwa* emphasized that because the evidence was not controverted the offender’s version should be taken as is.

Further, counsel urged the court not to lose sight of the fact that when the deceased passed out, the offender attempted to assist her by administering first aid and pouring water on her body in an effort to revive her. He also mentioned that the offender’s family met all the funeral expenses and attended the funeral despite being chased away by the deceased’s

relatives. Lastly he pointed out that the offender is unemployed and has no savings or money on his person but owns a house in Redcliff Kwekwe valued at USD \$15000. In light of the mitigating factors he requested the court to consider a rehabilitative sentence. The court, so he said, must temper justice with mercy as the offender has suffered enough mental anguish. He prayed that the offender be given a sentence of twelve (12) years imprisonment in the circumstances.

For prosecution, Mr *Gumbo* who appeared clearly out of his depth in his address demonstrated that he had no inkling whatsoever on what the law relating to the sentencing of murder convicts is. He seemed clueless as to what the sentencing guidelines are all about and the expectations thereto. All that drama was against the court's inquiry on whether he needed more time to go and acquaint himself with that law. All he could do was to stand up and mumble that the court should in fact have convicted the offender of voluntary intoxication all the while pointing at the Criminal Law Code which he held in his hands. His opening remarks in what was supposed to have been submissions in aggravation became a clear departure from his closing submissions in which he had urged the court to find the offender guilty of murder because of the circumstances of the case. Mr *Gumbo* was clearly off rails. He went on a tangent to address the court about the conviction. It is sad when at this level a prosecutor appears not to be able to tell the stage at which a criminal trial is and to recognize what is required at that stage. It is only with that appreciation that it is possible for him/her to properly assist the court arrive at appropriate decisions. His actions left the court puzzled as to whether he was in good health. To everyone's relief he said he was but the court still directed an adjournment for him to put his house in order.

At resumption, Mr *Gumbo* returned in a pliable state. He in essence agreed with all of the offender's submissions. He additionally lamented the loss of life at the hands of the very person expected to be its keeper, who is the husband. He also bemoaned the prevalence of murder matters arising from within a domestic setting. Mr *Gumbo* attached a victim impact statement authored by the deceased's brother one Dickson Sibanda who in it expressed shock at the murder of his sister and outlined the grief and pain caused by it. Dickson Sibanda confirmed that funeral expenses had been rendered to the deceased's family by the offender's family as well as their attendance thereto. He however stated that the accused was not taking care of the minor child, Kendra Hunda. He expressed disappointment over the fact that the accused has, to this day, not paid any compensation in line with cultural values and made it

known that his wish is to see the court ordering compensation. In the circumstances, Mr *Gumbo* suggested a sentence below 20 years imprisonment as befitting.

Much as I have indicated that the sentencing guidelines were enacted after this offence was committed and that their application could not be retrospective, s 47 (2) which lists the factors which constitute aggravating circumstances in murder cases provides that those factors are not intended to be exhaustive. It follows that the courts are allowed to find other circumstances outside the list which may constitute aggravation. The sentencing guidelines therefore constitute a legitimate source from which such other considerations may be obtained. In equal measure the sentencing guidelines direct a court to consider as mitigation, factors such as provocation, or that one acted out of passion, or that the offender assisted the victim when imposing a sentence in cases where the minimum mandatory sentences do not apply. An examination of the circumstances in which this murder occurred reveals that indeed it cannot be denied that the offender may have been provoked although that provocation was insufficient to reach the threshold necessary to accord the offender the partial defence of provocation which would have reduced the crime to culpable homicide. The court is still obliged to consider it as lessening his moral blameworthiness. The provocation related to the possibility of infidelity on the part of the deceased when she boasted that she was talking to her boyfriends. It therefore also amounts to the fact of the offender having acted out of passion. It was a finding of this court that the offender took offence of his wife's response to his request to cook their supper. Those issues incensed him. He had then acted out of character and assaulted her. Arising out of that we hold that the crime might be classified as one having undertones of provocation and passion.

That the offender attempted to assist the deceased in one way or the other is not in doubt although it seems that the assistance was offered when it was too late as the victim had already died. The offender tried to call the gardener twice he refused to assist him. He then later called his brother who through his wife gave him advice on how to render first aid as the couple made their way over to the offender's house to assist him. All this is evidence of the fact that he indeed sought to render assistance to the deceased. Those efforts may however be drowned in his failure to seek help from those people such as his landlord or qualified paramedics who could easily have offered substantial help and saved the life of the deceased. That notwithstanding he tried to resuscitate her by pouring water over her body and administering

first aid. The witnesses all saw the inside of the house drenched with water and that illustrated his attempts to resuscitate her. It is mitigatory.

In addition, it is also not in dispute that the offender catered for expenses at the deceased's burial and funeral wake. Further his family made attempts to involve themselves in the arrangement of the funeral of the deceased. Case law is abounded on the mitigating effect of such a show of remorse by an offender. See the case of *S v Hahlekiye* HH260-17. In that case this court found it mitigatory that the accused met the demands of the family of the deceased by paying funeral expenses and part of the compensation sought by the family. It held that this showed contrition on the part of the accused. In the same vein, we hold in this case that that the assistance extended to the victim's family is mitigatory and reduces the offender's moral blameworthiness.

In a case where the court's hands are untied and its discretion to assess sentence the court is enjoined to weigh the mitigating factors against the aggravating ones. In this case and as discussed above, it is apparent that there appear to be more mitigation than there is aggravation. In addition to all the circumstances in mitigation indicated above, the offender and the deceased appear to have been both somehow intoxicated. This therefore is a case which cries out for the court to mix the objectives of sentencing. Whilst it must show its complete disapproval to those who disregard the sanctity of human life it is also apparent that the offender is someone who must be given a second chance. A sentence which may rehabilitate him would therefore be appropriate. He is only thirty-seven. He can still do time in prison but come out and live a useful life thereafter. A wholesome consideration of these issues lead us to the inescapable conclusion that it is in the interests of justice that the offender be sentenced as follows:

14 years imprisonment.

Tabawa & Marwa, accused's legal practitioners
National Prosecuting Authority, State's legal practitioners