

STATE
versus
HERBERT LEARNMORE CHIKIWA
and
JOHANE KAMUDYARIWA
and
LAWRENCE MAKIWA
and
GIVEN MUSHORE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17 August 2022

Reasons for Sentence

B Murevanhema, for the state
V Makuku, for the accused one
D Marange, with him *Ms T S Maonera*, for the fourth accused

ZHOU J: The two accused persons, accused one and accused four, have been convicted of unlawful entry into premises in aggravating circumstances as defined in s 131(1) and (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and one count of murder as defined in s 47(1)(a) of the same Act.

In respect of count one, the Act provides for a penalty of imprisonment for a period not exceeding fifteen years. In the case of count two the Act in s 47(4)(a) provides for sentence of 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 subsection (3) or in any other case to imprisonment for any definite period.

The court is enjoined to consider the mitigating and aggravating circumstances and, indeed, any other relevant factors, in assessing the appropriate sentence. The circumstances of the accused person must be weighed in relation to the interests of society in order to come up with a just penalty, one that meets the justice of the case.

In this case both accused persons, are first offenders. It is the policy of the law to weigh this factor in favour of the convicted person. In the case of the first accused, the court heard that he is 45 years old. During that period he has not been convicted, which makes his life a blameless one in so far as crime is concerned. The offence was committed in September 2013,

which means that he would have been 36 years old at the time that offences were committed. A crime free life of that duration must be rewarded. Likewise, accused four is 38 years old, which means that he was 29 years old at the time that the offences were committed. Both accused are family men, with wives and children who would look up to them for support. The court heard that the two accused persons were the breadwinners of their families prior to their incarceration. The court also considers that it is nearly 9 years since the offences were committed. The delay is quite considerable. Pre-conviction incarceration is a factor that weighs heavily in favour of the accused persons.

In respect of court one, the offence of unlawful entry into premises in aggravating circumstances is a very serious offence. In this case the premises entered were business premises, from which business property was stolen. Among the property stolen was a firearm, which makes the offence even more serious given the widespread abuse of ill-gotten firearms in the commission of other offences. The court finds no special factors which distinguish the accused persons in relation to this offence.

There was no evidence to prove the exact value of the property stolen other than an estimate which put it at USD2 500. That is not a considerable amount. The court must therefore not consider a sentence that is close to the maximum penalty allowed. A sentence in the region of four years as proposed by the state would have been appropriate. However, from this must be discounted one year to reward the accused persons for being first offenders who lived a crime free life for more than three and half decades in the case of the first accused person and for nearly 3 decades in the case of the fourth accused. But for the fact that there is count two which both accused persons have been convicted of, the court would have considered suspending a portion of the remaining period on condition of good behaviour.

In respect of count two, the new law gives the court a discretion to impose a sentence less than death even where the murder was committed in aggravating circumstances and a definite period of imprisonment in any other case.

Mr *Murevanhema* for the state submitted that the murder was committed in aggravating circumstances because it was committed in the course of or in connection with or as a result of the commission of the offence of unlawful entry into premises. Defence counsels made no meaningful submissions in this regard. However, a reading of s 47(2)(a)(iv) shows that it is not unlawful entry into premises *per se* which is considered as an aggravating circumstance. Rather, it is “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.” In other words, if the house was not a dwelling house then the mere act of unlawful entry into it does not fall within the ambit of that provision. A dwelling house is one that is used for residential purposes or for dwelling by the occupants thereof. In this instance, there was unlawful entry into premises where the main house was being used for commercial purposes as offices. Although there was an outbuilding at the premises referred to as the cottage, the accused persons did not enter that cottage which, from the evidence led, was the structure that was being used as dwelling house. The house that the accused persons unlawfully entered was therefore not a dwelling house. None of the other factors which would constitute aggravating circumstances has been established. There was no evidence of premeditation in the commission of the murder. It is clear that although the accused persons were armed their primary purpose was to unlawfully enter the premises and steal property therefrom. The absence of aggravating circumstances therefore places the case outside the ambit of s 47(4)(a) and places it squarely within the parameters of s 47(4)(b) for the purposes of determining the appropriate penalty.

Notwithstanding the mitigating factors considered earlier on, the court considers that the offence was a very serious one. A life was lost unnecessarily. There was no need to fire directly at the deceased, and moreover, directing the shot to the upper part of the body. Though not premeditated, this was a callous murder of an innocent person. The sanctity of life which s 48 of the Constitution of Zimbabwe holds dear must be upheld. The courts must play their part by reflecting this respect for human life in the sentences imposed for offences involving loss of life. In this case the court cannot think of any sentence that is less than 40 years for the murder involved. However, given the time that the matter has taken to finalise, this could be discounted to 30 years imprisonment.

Considering the proximity in terms of the time when and the distance where the two offences were committed it is appropriate that the two sentences be ordered to concurrently.

In the result, the following is the sentence for each accused.

1. Count One: Three (3) years imprisonment
2. Count Two: Thirty (30) years imprisonment
3. The sentences in counts One and Two are to run concurrently.

National Prosecuting Authority, legal practitioners for the state

Makuku Law Firm, legal practitioners for accused one

Zimbabwe Human Rights NGO Forum, accused four's legal practitioners