

THE STATE

Versus

BHEKINKOSI MASILELA

IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr J. Sobantu and Mrs A. Dhlula
BULAWAYO 28 MARCH 2017

Criminal Trial

W. Mabhaudi for the state
S. Chamunorwa for the accused

BERE J: After the accused had been convicted of the crime of murder with actual intent by the late MUTEWA J, the accused was sentenced to death thereby entitling him to automatic appeal.

Upon hearing the appeal, the Supreme Court ordered that the accused's sentence be revisited guided by the principles of sentencing in murder cases regard being had to the provisions of sentence 48 (2) of the Constitution of the Republic of Zimbabwe.

Aggravating circumstances

We are grateful to both legal practitioners for having come to an agreement that this murder was not committed in aggravating circumstances. We believe the unanimous position was well informed.

We accept as argued by Mr *Mabhaudi* for the state that in all the probabilities of this case there is nothing on record of the court *a quo* to support the proposition that this particular murder was committed in aggravating circumstances to warrant the consideration of the imposition of death penalty.

What stands out above everything is that there was no motive for this murder. This was one of those unexplained cases of murder. The accused maintained throughout his trial that he

did not know why he murdered the deceased. At the conclusion of the hearing of the trial the trial court remained clueless as to the motive of the deceased's murder.

Secondly, the averment by the accused that he had smoked dagga prior to the commission of this offence could not be controverted and stands as a factual finding of the trial Judge.

Thirdly, the cumulative effect of the evidence led and accepted by the trial court did not in any way suggest that this offence was premeditated.

Finally, accepted the murder victim in this case was way above 70 years but that factor cannot be looked at in isolation. It must be looked at in conjunction with the other factual findings of the trial court as already highlighted.

Our unanimous view is that the imposition of death penalty would be inappropriate in this case. The court is therefore at large to impose any other alternative sentence to death penalty.

Sentence

In considering sentence we will take into account the following factors in both mitigation and aggravation.

The accused is aged 32 years and clearly in the prime of his life. He was 29 years at the time he committed this offence.

There is no doubt in our minds that given the fact that the accused authored the death of his 83 year old grandmother this fact will haunt him forever and has earned himself a permanent tag in the family. This is highly mitigatory.

Having been convicted in 2014 and sentenced to death, the accused has been on the death row awaiting the execution of the penalty of death for 1 year and 8 months. The trauma that the accused must have gone through can only be better imagined than stated. It must have been the

most harrowing experience and we consider that as punishment on its own and of course highly mitigatory.

The accused, through his counsel has expressed genuine remorse for this heinous murder of his paternal grandmother who did so much for him after the death of his biological mother in 1995 right up to the time he committed this crime in 2013.

It must be highly mitigatory that there was no motive for this murder. The accused has repeatedly said he has no clue as to why he killed the deceased and this court and the trial court could not even find the reason for this murder.

In aggravation, it is clear that the deceased died a very painful death. Having narrowly escaped death from the burning hut she must have been completely taken aback by the decisive blow delivered on her by the accused person.

It is aggravating that the accused consciously partook of dagga before he committed this offence.

The abuse of drugs is frighteningly on the increase in this country and the accused has become part of the statistics of those who have committed very serious offences after the abuse of dagga.

It is saddening that instead of rendering protection to the deceased, who had a legitimate expectation to be protected or rescued by the accused the accused turned out to be her murderer.

Society looks up to the young ones to protect their elderly relatives and not to be responsible for the termination of their lives.

The sanctity of life must always be emphasised when life is needlessly lost like what happened in this case.

We are conscious as a court that there is no penalty that we can impose which adequately recompenses the loss of life because of the permanent nature of such a loss.

Everything said we feel that in this case the following sentence meets the justice of this case.

The accused is sentenced to 18 years imprisonment.

*The National Prosecuting Authority, state's legal practitioners
Calderwood Bryce-Hendrie & Partners, accused's legal practitioners*