THE STATE
versus
LEMNICE CHAREWA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 26 March 2024

Assessors: Mr Shenje
Mr Mhandu

Criminal Trial

T. Kamuriwo, for the state
S Ganya, for the offender

MUTEVEDZI J: The offender was initially jointly charged with one Takemore Chipura. At the close of the trial the court reserved its judgment. Takemore Chipura took that opportunity to abscond. He is a fugitive from justice. The offender who stands convicted of the murder of Garikai Chiwaridzo (the deceased) remained to face justice. The brief facts on which he was convicted are that together with his fugitive accomplice, they brutally attacked the deceased on the night of 25 November 2019 at 007 Hideout Nite Club in Glendale. The offender held the deceased with his hands helplessly pinned to his back. It gave his accomplice carte blanche to draw out a knife and plant it deep into the deceased's chest. The injuries stated by the doctor on the post mortem report clearly show that the deceased had no chance of survival. Indeed, he instantly collapsed and died from the wounds.

The law governing the sentencing of people convicted of murder had for long been fairly straight forward. The penalty of death was mandatory unless the court convicting the offender found the existence of what was referred to as extenuating circumstances. Only then could it untie its hands and impose any other punishment it deemed suitable. The law then became somewhat muddied with the advent of the Constitution of Zimbabwe, 2013 which in s 48 (2) provided that an Act of parliament could allow the death penalty to be imposed only on a person who committed murder in aggravating circumstances. Even then it prescribed that such law must necessarily accord the convicting court discretion on whether or not to impose the penalty of death. In addition, it excluded the imposition of capital punishment

from certain categories of offenders such as women, persons under the age of twenty-one years or above the age of seventy years at the time of commission of the offence. The law which was then enacted to regulate the punishment of death in conformity with s 48(2) of the Constitution is s 47(2), (3) and (4) of Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with s 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. As already said, that law changed the sentencing dynamics. It abolished the concept of extenuation and introduced aggravating circumstances such that the sentencing regime in instances where the court found that the murder was committed in aggravating circumstances became straight- jacketed. In compliance with the requirement that the convicting court had to be given discretion to impose or not to impose the penalty of death, that law then gave courts three options in circumstances where aggravating circumstances were found. The court can impose either death, life imprisonment, or a determinate sentence of imprisonment of not less than twenty years.

I retraced the law as illustrated above because in his submissions in mitigation, counsel for the offender stated as follows:

> "That the fatal blow was executed by the first accused who is now on the run. From the evidence it is not clear whether second accused knew that first accused had a knife on his person let alone aware that the 1st Accused intended to kill the deceased and that he would come from behind and strike the fatal blow. To that end, this can only be described as **extenuating circumstances** in favour of the second accused person." (Bolding is for emphasis).

The above submissions make it seem like counsel is still of the old persuasion where the courts were obliged to make a determination on the existence or otherwise of extenuating circumstances. By their nature extenuating circumstances are considerations which lessen an offender's moral blameworthiness. Their existence served to unshackle the court from imposing the penalty of death. Such course is no longer necessary. In fact, its lawfulness is doubtful. They are the direct opposite of aggravating circumstances which serve to increase the offender's moral blameworthiness and draw the court closer to imposing capital punishment unless it elects to exercise its discretion and chooses either of the other two possibilities. The first step in this case is therefore to determine whether or not the murder was committed in aggerating circumstances.

In motivating the court to find the presence of aggravating circumstances, the prosecutor pointed to the brutality of the murder as aggravation. He alluded to the fact that the offender bared the deceased's chest for his colleague to strike the fatal blow as a serious indictment on the offender. He also made reference to the use of a weapon in the

commission of the murder; the occasioning of economic loss on the family of the deceased and lack of contrition by the offender as circumstances which aggravate the murder. We do not agree with the state's submissions. The Criminal Procedure (Sentencing Guidelines), Regulations, 2023 speak to the subjection of the deceased to violence or torture before the killing and not just that there was violence. Murder is an inherently violent crime. If the intention had been to bracket the violence which is intrinsic in the killing as an aggravating circumstance, it would follow that every murder resulting from an assault would inevitably fall into the category of those committed in aggravating circumstances. Our view therefore is that a murder becomes aggravated only if there is violence or torture which precedes the killing or there is gratuitous violence during the commission of the murder. In this case, there was just one blow which killed the deceased. The circumstance does not therefore qualify as aggravation. Further, where there is loss of life especially of a person who was a breadwinner, economic and financial difficulties are bound to afflict the family and or dependents. Such loss is too broad to fit into the realm of aggravating circumstances. The lack of contrition equally appears not to fall into the species of the circumstances which the law outlines as aggravating a murder. The court is allowed to extend the list of aggravating circumstances given in s 47 (2) and (3) of the Criminal Law Code. Even with that stretch there appears to be no aggravating circumstances in this case. The factors raised by the state counsel constitute general aggravation and not the aggravating circumstances as envisaged under s 47. We therefore find that this murder was not committed in aggravating circumstances. As such the court's full discretion to determine the appropriate sentence is restored but before we consider that there is yet another small matter to dispose of.

Counsel for the offender also referred the court to s 196(3) (a), a provision which he said dealt with the liability of co-perpetrators. That reference is not accurate. The section deals with liability of principals, a completely different category of offenders from co-perpetrators. From that erroneous conception, counsel urged the court to examine the provisions of Section 196(3)(a) of the Criminal Law Code which provide as follows: -

> "(3) If any accused person referred to in subsection (2) who is not the actual perpetrator of the crime –
>
> **(a)** Does not discharge the burden mentioned in subparagraph (i) or (ii) of paragraph (d) of subsection (2), his or her liability as the co-perpetrator of the crime shall not differ in any respect from the liability of the actual perpetrator, unless he or she satisfies the court that there are special circumstances peculiar to him or her or to the case …. Why the same

> penalty as that imposed on the actual perpetrator should not be imposed on him or her."

As already stated, the above law does not govern the liability of co-perpetrators. The offender in this case was found guilty as a co-perpetrator and not as a principal. As used in s 196(1), the word principal does not assume its ordinary meaning in criminal law. It is specifically used to refer to situations where someone with authority lawful or otherwise, over an actual perpetrator authorizes that actual perpetrator to commit a crime. For instance, it implies a situation where a general authorizes a soldier of lesser rank to commit a crime. It does not imply that the persons are principal offenders. There cannot be any distinction therefore of the punishments which are imposed on co-perpetrators of a crime such as in this case.

To help the court assess the appropriate sentence, counsel submitted that the offender was forty-six years old at the time of commission of the offence. Needless to state, he is fifty-one now. He is married. That marriage was blessed with four children three of whom are still dependent on the parents. The youngest of them is only four. He implored the court to impose fifteen (15) years imprisonment.

On the other hand, the state's submissions in aggravation were largely confined to the submissions which the prosecutor made in motivating the court to find the existence of aggravation. We have already said that the court's hands became untied when we made the finding that the murder was not committed in aggravating circumstances. The offender at fifty-one can still be rehabilitated and contribute something worthwhile to society if given another opportunity. There is no indication that he is likely to reoffend. It would appear that although it is inexcusable and grave this was a once off indiscretion which he clearly regrets. We cannot however lose sight of the catastrophe that the offender and his accomplice caused to the deceased's family. They killed the deceased in cold blood over a worthless and immoral endeavor. Their situation is made worse by the fact that they killed a member of their church over a dispute about who would hire the services of a prostitute whom they were drinking with. It is the height of hypocrisy. It is also settled that in murder cases, there is no escaping imprisonment.

In the circumstances the offender is sentenced to eighteen (18) years imprisonment.

*National Prosecuting Authority***,** state's legal practitioners
*Ganya Law Practice***,** offender's legal practitioners