THE STATE
versus
TINOTENDA MANGENJANI

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 12 June, 21 November 2023 & 16 January 2024

Assessors: Mr Shenje
Mrs Gwatiringa

M Furidze, for the state
T Mazonde, for the accused

Criminal Trial - Sentence

MUTEVEDZI J: Contrary to the representations made by counsel on his behalf, that he is a first offender with no history of violent behaviour, the offender, Tinotenda Mangenjani is a murderer who can rightly be described as the bully of Shamva. From the evidence submitted during his trial, he terrorised the entire community in which he lived. He terrified even members of his own family to the extent that his brother watched helplessly as he butchered the deceased and attacked another person who had gathered the courage to restrain him. What is surprising though is his youthfulness. He is only twenty-four. When he committed this crime, he was barely twenty-two. He stands convicted of murder after brutally stabbing the deceased with a knife. The attack was motivated by a missing pint of beer which the offender alleged had been taken by the deceased. He pleaded guilty but we threw out his defence that he was defending himself against the deceased's aggression

Counsel then alleged that the mitigating factors in this case far outweighed the aggravating ones. As will be demonstrated, he was wrong in drawing that conclusion. He then also went to town regarding the factors which the court must take into account when sentencing the offender. He said in the two years that the offender has been in prison he has reformed because he did nothing in conflict with prison regulations. He may have been right but the truth is that the reformation of an aggressive person cannot accurately be measured at the time he is in a state of captivity. A lot of reliance was placed on the new Criminal Procedure (Sentencing Guidelines), 2023 (the guidelines). It is heartening that all players in the administration of

criminal justice appear to have realised the centrality and indispensability of those guidelines. Whilst that realisation is important it is equally critical that prosecutors and defence counsels come to grips with the fact that the sentencing guidelines were not enacted to supplant existing legislation but to compliment it. In that regard the sentencing regime for the crime of murder set out in s 47(4) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. (The Code) remains the principal basis upon which the punishment of offenders convicted of murder is premised. That section provides as follows:

> "(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."

As can be observed, sentencing guidelines or no sentencing guidelines, the first consideration by a court which has convicted an offender of the crime of murder is to determine whether or not the offence was committed in aggravating circumstances. I stated in *S* v *Emelda Marazani* HH 212/23 that the above determination is critical because:

> "The sentence which a court may impose is entirely circumscribed by the presence or absence of aggravating circumstances. Where a court determines that aggravating circumstances exist, its sentencing discretion is severely curtailed. It has to choose one of three options namely to sentence the accused to death or to life imprisonment or to a definite period of not less than twenty years imprisonment. The starting point for a prosecutor and a legal practitioner attempting to assist the court sentence a murder convict must therefore be the question of establishing the presence or absence of aggravating circumstances."

The advent of the sentencing guidelines has not altered the applicability of the principle stated above. Urging the court to start from weighing what is heavier between mitigation and aggravation is in my considered view, not only erroneous but carries the potential to mislead it. That however is not to say the sentencing guidelines are not important. They are and their applicability only kicks in after the court has made the determination of the existence or otherwise of aggravating circumstances. That is so because even where the court determines that the crime was committed in aggravating circumstances, it still must be guided in the exercise of its discretion to impose either death, life imprisonment or a determinate term of imprisonment of not less than twenty years. In that choice the court must resort to the sentencing guidelines to arrive at an appropriate penalty. Where it determines that the crime was not committed in aggravating circumstances, the court can impose any definite term of

imprisonment and the process of arriving at such punishment will, needless to say, be guided by the considerations outlined in the sentencing guidelines. I will later on endeavour to demonstrate how these principles are applied.

In s 47, the Code equally provides guidance as to what constitutes aggravating circumstances. It states that:

> **"47 Murder**
> (1) …
> (2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—
> (*a*) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an
> essential element of any such crime (whether or not the accused was also charged with or convicted
> of such crime)—
> (i) an act of insurgency, banditry, sabotage or terrorism; or
> (ii) the rape or other sexual assault of the victim; or
> (iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or
> (iv) 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; or
> (*b*) the murder was one of two or more murders committed by the accused during the same episode,
> or was one of a series of two or more murders committed by the accused over any period of time; or
> (*c*) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused
> on the victim; or
> (*d*) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the
> indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.
> [Subsection substituted by Part XX of Act 3 of 2016]
> (3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other
> circumstances of an aggravating nature, regard as an aggravating circumstance the fact that—
> (*a*) the murder was premeditated; or
> (*b*) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or
> over the age of seventy years, or was physically disabled."

The prosecutor argued in this case that the victim was murdered in a public place and the court must therefore find that in terms of s 47(2) (d) the murder was committed in aggravating circumstances. That section provides that it shall be aggravating that the victim was murdered:

> "in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders."

From her submissions, the prosecutor appeared to believe that the fact of the murder having occurred in a public place is conclusive of the matter of aggravation. I do not read it that way. There are two important considerations which both must be satisfied. First the murder must have occurred in a public place like the prosecutor rightly pointed out. Second the means used to commit the murder must have caused or must have involved a substantial risk of serious injury to bystanders. The Code alludes to the use of fire, explosives or the indiscriminate firing of weapon. From the examples given and through the application of the *ejusdem generis* rule of statutory construction for the means used in the commission of the murder to fall into the realm of aggravating circumstances, the weapon must be capable of exploding or producing fire of one kind or another. *Ejusdem generis* simply means of the same kind. Put simply that rule connotes that where words or phrases of a general nature come after specific ones, the interpretation of what the imprecise words/phrases mean must be restricted to persons or things of the same kind, genre or class as the ones specifically mentioned. The weapons which are specifically mentioned in this case are fire, explosives and a gun *which is fired indiscriminately*. The phrase "means used" to commit the murder must in my opinion, therefore be limited to those that are volatile, combustible or inflammable. The common thread in all those weapons is that they are not easily controllable. It is the reason why a gun properly handled and targeted at a particular individual would not qualify as an aggravating circumstance. A gun only fits the bill if it is then fired indiscriminately. In other words it is fired non-selectively or at random. Fire and explosives can easily run amok. Invariably murder is a crime that is committed with the use of one weapon or another. If the term weapon were taken to mean any weapon it would put the majority of murders in the group of those committed in aggravating circumstances. The reference to a weapon made in schedule three to the guidelines under the offence of murder must therefore be interpreted in the context of s 47(2) (d) as discussed above. In addition, the weapon must also have had the potential to cause serious injury to innocent members of the public. The word used in the statute is bystander. In its general sense a bystander is an on-looker, a spectator or a non-participant in the events which led to the commission of the crime. Where participants in the events are injured or where serious risk of harm is posed to those who are actively engaged in the events it does not amount to aggravation of the crime of murder.

In this case, the offender used a knife to attack his victim and another person. The knife does not qualify as a kindred weapon to those specifically mentioned in the statute. It is something that was firmly in the grasp of the offender and could not possibly injure bystanders unless he had specifically targeted any of them. It is neither combustible, volatile nor inflammable. The third party who was injured had ceased to be a bystander at the time that he became actively involved in the fight albeit with good intentions of restraining the offender from harming the deceased. It is on that basis that I find that the prosecutor's argument that the murder was committed in aggravating circumstances because it occurred in a public place not convincing.

Further I do not think that the fact that the offender had a knife on his person at the time the violence broke out meant that he had premeditated the murder. The evidence before us is that the offender and the deceased had been drinking beer at the same drinking place since the morning of the evening when the deceased was murdered. There was no acrimony between them before then. It is far fetched to then assume that all that time the offender was thinking and planning to kill the deceased.

Apart from the above, the prosecutor made no further arguments in relation to the aggravated nature of the murder. The offence does not fall into any of the other categories of aggravation mentioned in the statute nor can I find anything else outside the specifically mentioned instances that can be considered as such. Against that background my finding is that the murder was not committed in any aggravating circumstance.

The above conclusion releases me from the shackles of the mandatory sentences of death, imprisonment for life or a determinate jail term not below twenty years. The presumptive penalty stated in the guidelines where the murder was not committed in aggravating circumstances is fifteen years imprisonment. That penalty must be the court's starting point. I am obliged to impose it if the mitigating factors listed therein are present. Those factors include instances where the deceased was the aggressor or was a participant in criminal conduct or where the offender acted out of passion or where there was a high degree of provocation or the offender tried to render assistance to the deceased after the commission of the assault. The submissions in aggravation and mitigation by the prosecutor and counsel for the offender respectively must necessarily kick in. They are aimed at motivating the court to either stick to the stated presumptive penalty or go below or above it. None of the mitigating factors listed appear to be present in this case. The murder was a brazen attack on an innocent man who was peacefully enjoying his drink on the night in question. Counsel for the offender concentrated on other mitigating factors outside those stipulated in the guidelines. It is

permissible to do so but the probative value of such mitigation is insignificant to say the say the least. Admittedly, the authorities which deal with principles of sentencing remain applicable but they cannot be divorced from the guidelines. This court has previously stated that the rationale for the guidelines is to attempt to achieve substantial uniformity in sentences imposed on similarly placed offenders. Legal practitioners must therefore remain alive to the need to try as much as possible to fit their clients within the circumference of the aspects stated in the table of presumptive penalties under the offence for which the offender stands convicted. As already stated, the offender in this case is someone from whom society must be protected. He is an acknowledged ruffian, a roughneck who instilled fear in those who knew his behaviour. Much as he does not have any known previous convictions s 6(1)(d) of the guidelines lists as one of the objectives of sentencing the need to protect the public by separating dangerous offenders from society. An offender does not only become dangerous by virtue of previous convictions. A court can ascertain such danger based on the evidence given by the community. In this case the violent disposition attributed to the offender by witnesses was not refuted by the defence. It stands as the truth and the allegations are supported by the fact that the offender stabbed an innocent third party who dared to restrain him. His own brother could not intervene because he knew how dangerous it was to attempt to do so. The prosecutor recounted the terror under which the entire community from which the offender hailed lived in. His conduct brutalised that society. The police were, at the time this crime was committed, looking for the offender in connection with yet another crime he had allegedly committed.

From the above I find nothing significantly mitigatory about the commission of this crime or about the offender himself apart from his youthfulness. That factor becomes heavily diluted by the gravity of the crime committed and the general behaviour of the offender. Absent the mitigating factors outlined in the guidelines coupled with the presence of the serious aggravation stated above I find no basis to impose a sentence below the presumptive penalty. Instead I am compelled to go a little higher than that to illustrate how much the courts frown at violent crime.

In the circumstances, the offender is sentenced to **nineteen (19)** years imprisonment.

National Prosecuting Authority, the State's legal practitioners
Jiti Law Chambers, the accused legal practitioners