THE STATE
versus
JEREMIAH SAUNGWEME

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 29 November 2023 & 16 January 2024

Assessors: Mrs Chitsiga
Mr Chimonyo

A Chogumaira, for the state
P Chikangaise, for the accused

Criminal Trial - sentence

MUTEVEDZI J: In an act of unbridled zeal to wade off the invasion of Shamva Gold Mine (the gold mine) by illegal artisanal miners, the offender, Jeremiah Saungweme shot and killed the deceased in cold blood. He was employed by VS Security, a private security company contracted by the gold mine to assist with security. He was charged with murder to which he pleaded not guilty. We however convicted him after a contested trial. The proved facts of the matter were that on the day in question he was called to react to an invasion which had just been reported. He proceeded to the affected site with three other security guards. They chased the deceased and other panners. The deceased was unfortunately singled out by the offender who tracked him into a bushy area and shot him on the back of the head at point blank range. The deceased collapsed and died instantly. From the findings of the post mortem examination he had stood no chance of survival. The evidence that we admitted also showed that the deceased had been shot by a revolver. The offender was the only one amongst the security guards who carried a pistol because two of the other guards were armed with 303 rifles whilst the fourth one was completely unarmed.

The offender is forty eight years old. His marriage failed despite having been blessed with seven children, five of whom are still minors. He claimed that all the children are entirely dependent on him. More tellingly, the offender said he was a member of the Zimbabwe National Army from 1999-2009 when he retired. He is a veteran of the civil war in the Democratic Republic of Congo which saw Zimbabwe deploying troops to that country under

the auspices the Southern African bloc SADC. In that war, he served as a troop medic ostensibly because when he joined the army he had basic medical training obtained from the Red Cross Society. Sadly his family appears to have abandoned him after his incineration because only his younger brother has bothered to visit him in prison.

In other submissions in mitigation after his personal circumstances, counsel for the offender appeared to emphasize the point that the offender committed the murder with constructive intention as opposed to actual intention. She acknowledged the Supreme Court's holding in *S* v *Tafadzwa Mapfoche* SC 84/21. In that case the Supreme Court held that the common law distinction between murder with actual intent on one hand and with constructive intent on the other had become superfluous because s 4(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code) did not distinguish between convictions based on the two forms of intention. That separation used to be important under the common law regime where a finding of murder with constructive intent was regarded as an extenuating circumstance and saved the offender from being sentenced to the mandatory capital punishment. The introduction of the statutory sentencing regime blurred that distinction. It abolished the concept of extenuation and introduced a new one where an offender is liable to be sentenced to death, imprisonment for life or to a determinate term of time in a penitentiary of not less than twenty years in instances where a court found that the murder was committed in aggravating circumstances. Yet in an unexpected turn counsel went on a tangent and argued about the offender's intention. She submitted that, the finding that the offender had constructive intention was a heavy mitigating factor. But there are two very concerning issues which arise from those submissions. The first is that the High Court decisions such as *S* v *Dube* HH 26/18 and *S* v *Mtisi* HMT 28/21 which counsel relied on were not only decided before the Supreme Court's decision in *Tafadzwa Mapfoche* but that they cannot be followed anymore. The second is that counsel for the offender appears to make her own conclusions divorced from the court's in this case. In our main judgment, we found the offender guilty of murder and no more. We did not specify whether it was murder with actual intent or with constructive intent because that is unnecessary under s 47(1) of the Code. The argument that the murder was with constructive intent is therefore a creation of the offender and his counsel. Even if those principles were still applicable, which they are not, a person who shoots someone with a gun on the head at point blank range cannot claim that he did not have actual intention to kill. The submission on intention can only therefore be a red herring if not a subterfuge.

What is important and which counsel must have concentrated on is the question posed in s 47 (4) of the code. That section 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."

Undoubtedly therefore a court which has convicted an offender of murder must necessarily determine before any other considerations whether or not the murder was in aggravating circumstances. I may add that that assessment must be undertaken notwithstanding whether or not the offender killed with actual or constructive intent. It is the reason why the dissimilarity between the two forms of intention no longer serves any purpose. The punishment meted on an offender who committed murder with actual intention will be the same as that of one who committed it with constructive or legal intention if the court makes the finding that it was perpetrated in aggravating circumstances. As such where a court distinguishes between the two forms of *dollus* it does so for other purposes and not for the objectives of sentencing the offender as used to be the case under the common law.

This court has in several authorities repeatedly stated that the circumstances which aggravate murder are stated in s 47(2) of the Code. They include instances where the murder was perpetrated in the course of committing specified offences such as banditry, unlawful entry into premises, kidnapping and sexual assaults; where the victim was murdered in a public place; the murder was preceded by the torture or mutilation of the victim; the murder was part of serial killings among a number of others. The statute clearly stipulates that the listed factors are not meant to be exhaustive. That affords the court opportunity to find and add on to the list other factors which it may consider as having aggravated a murder. In other words those extra considerations will be on a case by case basis. Counsel for the offender relied not on the s 47(2) aggravating factors but went to the general provisions on aggravating circumstances stated in s 8 of the guidelines. Those factors are generic to every offence. In other words they are common and not offence specific. They are intended to apply to all offences. I accept that they are important considerations but in addition to those which may apply to murder or to an offender convicted of murder resort must be had to the circumstances listed in s 47(2) and in the third schedule to the guidelines under the crime of murder.

In this case, *Ms Chogumaira* for prosecution argued that the offence was indeed committed in aggravating circumstances because as provided for in the guidelines, the offender played a leading role in the commission of the murder. Additionally he used a firearm to kill the deceased. Those factors do not appear in s 47(2). But as already highlighted the s 47(2) circumstances were never meant to be exhaustive. That list was left open ended. Additions can always be made to it. The guidelines therefore could, without infringing the Code or the principal Act perfectly extend the list of aggravating factors. It follows therefore that the use of a weapon and the playing of a prime contribution to the murder by an offender must be considered as aggravating that crime. There is no debate in this case that the deceased was shot with a gun. There is equally no contention that the offender was the leader of the guards who went on the mission to disperse the illegal gold panners from the gold mine's fields. He therefore fits both criteria. In fact counsel for the offender admitted in her submissions that at least one aggravating factor i.e. the use of a firearm existed in the case. The law does not require the court to find the existence of many aggravating factors. The existence of one factor is sufficient to trigger the imposition of any one of the mandatory sentences provided under s 47 (4) of the Code. A finding of the presence of a multiple of the factors only serves to make the offender's situation worse. The court's conclusion is that for the reasons stated above, this murder was indeed committed in aggravating circumstances. I find it unnecessary therefore to determine the additional argument that it is aggravating that the offender is a trained military person and should have known better when he shot the deceased on the head from that close distance. I choose to leave that open and let it be an argument for another day.

As stated above, once the court finds that the crime was committed in aggravating circumstances, its discretion is limited to a choice of one of the three options in s 47(4) that is death, imprisonment for life or a definite period of time in gaol not below twenty years. For the court to appropriately determine which option to take, the general mitigating and aggravating factors must then become relevant. The defence has the right to motivate the court like counsel in this case rightly did, to impose the minimum mandatory twenty years and no more whilst prosecution may urge the court to pass the death penalty. It is at this juncture that the question of weighing which is heavier between mitigation and aggravation comes into play. In line with that the prosecutor argued that it was necessary for the court to consider imposing death given the brazen nature in which the offender killed the deceased. She submitted a victim impact statement from the deceased's widow Addinine Njanji who stated that apart from the trauma of losing a husband, the family faces financial ruin because the deceased was the sole

breadwinner for it. The deceased left behind children aged twelve and eight years who now have nothing to live on. She added that in 2022 she had completely failed to plant anything in their small field because she did not have money to buy inputs. Further she stated that the children had not worn any new clothes since the passing on of their father. The eldest will be in grade seven in 2024 but his position is precarious because she cannot afford to pay his fees. Her wish was to see the courts ordering the payment compensation in cases like this rather than sending the offenders to prison which essentially wouldn't help the deceased's family. Her sentiments evoke the debate surrounding restorative justice. Once again, it's an issue that cannot be dealt with and determined in this judgment. The long and short of her statement is that the family is in financial dire straits after the breadwinner was killed. She witnesses her children going to school barefooted on a daily basis and has had to contend with donations from her church mates. It is a sad scenario and one which unfortunately cannot be undone.

On his part the offender said he committed the offence whilst on duty. He said he did not brazenly kill the deceased but thought that he had the right to protect the mine fields from being plundered by the illegal miners. I however find the submissions unconvincing. From my understanding Shamva Gold Mine is a conglomerate. There was no reason why he had to be as zealous as he exhibited in this case. The large corporation that the gold mine is, surely had at its disposal other lawful means of protecting its assets than the indiscriminate killing of locals who wanted to eke a living from the mineral resources around them. The killing of the deceased was therefore inexcusable. The offender being a military trained person must have exercised restraint. The deceased and his colleague panners scattered in all directions at the sight of the offender and his colleagues. There was no need to pursue them because they were leaving the site on their own volition. The excesses shown by offender heighten his moral blameworthiness. Further he admitted on his own that he had medical training and had practised it during his stint with the Zimbabwe National Army in the Congo. He unfortunately showed a complete disregard for human life by failing to assist the deceased at the time that he shot him. Even grave as the injuries were, the least the offender could have done was to attempt to help. He did not.

We accept however for purposes of mitigation that misguided as he was, the offender genuinely thought that he had a duty to protect the assets of the mine to the extent that he could kill if it became necessary. We equally accept that the deceased died in the course of carrying out illegal mining activities in the gold mine's fields. They were out of bounds for anyone who did not work for the mine.

Against the above background, we are of the firm view that the penalty of death or imprisonment for life would not serve any of the objectives of sentencing stated in the guidelines. A determinate term of imprisonment would achieve a multiple of the objectives at the same time. We do not consider it possible that the offender would reoffend. A sentence which would rehabilitate him, deter other would be offenders and one that would show the courts' displeasure at the commission of violent crimes would be more appropriate.

It is for that reason that we considered that the offender be and is hereby sentenced to **twenty five (25) years imprisonment.**

National Prosecuting Authority, the State's legal practitioners
Maphosa Ndomene, the accused's legal practitioners