THE STATE
versus
TINASHE CHIKOSHA
and
WALTER NENYERE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29 & 30 November 2016

Assessors: 1. Mr Mhandu
2. Mr Barwa

Criminal Trial – Sentence

H. Muringani, for the State
Miss *S. Vas,* for first accused
T. J. Mafongoyo, for second accused

ZHOU J: The two accused persons were convicted by this court of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], in that they caused the death of the deceased person intending to kill him. The murder was committed with actual intent.

The Court heard submissions on whether the murder was committed in aggravating circumstances. The State counsel and the accused persons' legal practitioners addressed on the question of aggravating circumstances. The need to address that issue was informed by the requirements of the legislative provisions which were enacted pursuant to the provisions of s 48 (2) of the Constitution of Zimbabwe, which are as follows:

> "A law may permit the death penalty to be imposed only on a person convicted of murder in aggravating circumstances, and –

(a) the law must permit the court a discretion whether or not to impose the penalty . . ."

Prior to the amendments introduced in accordance with the above provisions of the Constitution of Zimbabwe, s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provided the following:

> "Subject to section *three hundred and thirty-eight*, the High Court –
> (a) shall pass sentence of death upon an offender convicted by it of murder:
> Provided that if the High Court is of the opinion that there are extenuating circumstances or if the offender is a woman convicted of the murder of her newly born child, the court may impose –
> (a) a sentence of imprisonment for life; or
> (b) any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case."

Put in other words, under the old provision once the court found that there were no extenuating circumstances or that the offender was not a woman convicted of the murder of her newly born child then it was enjoined to impose the death penalty unless the offenders fell within the category of the persons listed in s 338. This court had no discretion to impose a lesser sentence under that old provision.

The new sections 337 and 338 of the Criminal Procedure and Evidence Act introduced by s 43 of Act 2 of 2016 provide as follows:

> "**337 Sentence for murder**
> (1) Subject to section 338, The High Court may pass sentence of death upon an offender convicted by it of murder if it finds that the murder was committed in aggravating circumstances.
> (2) In cases where a person is convicted of murder without the presence of aggravating circumstances, or the person is one referred to in section 338(a), (b) or (c), the court may impose a sentence of imprisonment for life, or any sentence other than the death sentence or imprisonment for life provided for by law if the court considers such a sentence appropriate in all the circumstances of the case.
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> **338 Persons upon whom death sentence may not be passed**
> The High Court shall not pass sentence of death upon an offender who –
> (a) was less than twenty-one years old when the offence was committed; or
> (b) is more than seventy years old;
> (c) is a woman."

The new s 337 introduces certain fundamental changes to the question of sentence for murder. Firstly, it introduces the concept of aggravating circumstances as a requirement for the imposition of sentence of death. See also s 47(4) of the Criminal Law (Codification and Reform)

Act. In other words, if the murder was not committed in aggravating circumstances the sentence of death is not even considered. A lesser sentence as provided for in that section would have to be considered. The second feature is the discretion which is reposed in the court to impose a lesser sentence than sentence of death even where the court finds that the murder was committed in aggravating circumstances. That discretion must, of course, be exercised judicially upon a consideration of all the relevant facts and circumstances of the case.

The new s 338 introduces two changes which accord with the provisions of the new Constitution in respect of persons upon whom the court is precluded from passing sentence of death. The old provision excused the passing of sentence of death upon a pregnant woman or a person over the age of seventy years or an offender who at the time of the offence was under the age of eighteen years. As illustrated above, the new provision excludes the passing of sentence of death upon a person who was less than twenty-one years old when the offence was committed. The age has thus been increased, no doubt in recognition of the fact that a person who is below the age of twenty-one years is a youthful offender whose judgment or full appreciation of the gravity of his conduct may be impaired by immaturity. Also, while the old section excused only a pregnant woman from the imposition of sentence of death, the new provision applies to all women whether or not they are pregnant. The provision relating to the offender being more than seventy years has been retained as it was in the old provision.

None of the exemptions listed in s 338 applies to the two accused persons convicted in this case. It was submitted by their legal practitioners that the first and second accused persons were twenty-eight and twenty-three years old, respectively, at the time of the commission of the offence.

What must be considered is whether the murder *in casu* was committed in aggravating circumstances.

Section 47 (2) and (3) list some of the factors which the court may regard as constituting aggravating circumstances for the purpose of section 337 of the Criminal Procedure and Evidence Act. The list of factors given is explicitly stated not to be exhaustive, and the court is at large to take into account any other factors not enumerated as constituting aggravating circumstances. Section 47 (2) (a) (iii) explicitly provides that the court shall regard as an aggravating circumstance if, *inter alia*, the murder was committed by the accused in the course

of, or in connection with, or as a result of, the commission of robbery, or of any act constituting an essential element of that offence irrespective of whether or not the accused was also charged with or convicted of that offence. The murder in the instant case was committed in the course of a robbery, and in connection with the robbery in the sense that the accused persons stabbed the deceased person in order to be able to rob him of his belongings. They took his cellphones after stabbing him. This court therefore finds that the murder was committed in aggravating circumstances.

The accused persons' counsel made submissions on the mitigating circumstances, including the personal circumstances of each of the accused persons. A point made was that the new provisions did not preclude a consideration of extenuating circumstances if any were established, in considering an appropriate penalty to impose. However, the accused persons did not allege, let alone prove, any such extenuating circumstances which would be relevant to the commission of the offence. No such circumstances exist. In relation to the first accused person, Miss *Vas* urged the court to consider that he is a first offender, and that he was twenty-eight years old at the time that the offence was committed and that, as a consequence of that age, he lacked the maturity, thoughtfulness and experience of life to enable him to appreciate the implications of his conduct. The court was urged to consider that the first accused person is a family man with four children who look up to him for guidance and support. It was submitted, too, that the crime was not committed in a brutal manner since only one blow was inflicted. The court was also urged to consider that the offence was not premeditated, as there was absence of detailed planning to commit the offence.

Mr *Mafongoyo* pointed to the age of the second accused person, and the fact that he was a first offender with a family comprising a three years old child and a wife. The submission was also made, with the concurrence of Mr *Muringani* for the State, that the second accused person must be treated differently from and leniently compared to the first accused because his moral blameworthiness was not as reprehensible as that of the first accused person who inflicted the fatal blow.

Mr *Muringani* urged that different but lengthy custodial sentences be imposed because a life was needlessly lost. He also pointed out that the offence was committed in a public place as there were persons nearby at the market, which aggravates the murder. See s 47(2) (d) of the

Criminal Law (Codification and Reform) Act. He, however, did not press for the imposition of sentence of death on the grounds of the ages of the accused persons as well as the part of the body where the deceased was stabbed.

It is the policy of the law to be lenient when sentencing first offenders in order to give them an opportunity to reform. However, in the present case there was a loss of life in the course of a robbery. The accused persons planned to rob the deceased person and his companion. The second accused person confirmed that in his evidence. Clearly the robbery was planned and agreed upon by the accused persons who pretended to be police officers. The accused persons are not so young that they lacked maturity. The first accused person was twenty-eight years old. Both are family man who would appreciate the value of life.

Courts have always taken a very serious view of murders committed in the course of or in connection with a robbery, as happened in the present case. In the case of *S* v *Sibanda* 1992 (2) ZLR 438(S), at 443F-H, GUBBAY CJ said:

> "Warnings have frequently been given that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty. This is because, as observed in *S* v *Ndlovu* S-34-85 (unreported):
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> > '. . . it is the duty of the courts to protect members of the public against this type of offence which has become disturbingly prevalent. People must feel that it is possible for them to enjoy the sanctity of their homes, to attend at their business premises, or to go abroad, without being subjected to unlawful interference and attack.' "

In that case the court upheld the death penalty where the deceased person had been found lying on a dirty footpath in a bushy area, and had been stabbed in the stomach with a sharp object. The court found that the appellant had murdered the deceased in the course of a robbery.

In *S* v *Mubaiwa & Anor* 1992 (2) ZLR 362(S) the court upheld the death penalty imposed upon the first appellant for a murder committed in the course of a theft by false pretence even though the weapon used to murder the deceased had not been brought by the appellants but had been taken from one of their victims. In the present case the weapon, the okapi knife, was being carried by the first accused person. That aggravates the offence.

Although the accused persons in the two cases cited above were found guilty of murder with actual intent where no extenuating circumstances existed, the reasoning there applies equally to the present case not just because there were also no extenuating circumstances but, more pertinently, because the murder was committed in the course of a robbery and, therefore, in

aggravating circumstances. The authorities referred to by the accused persons do not assist their cause, because they did not involve murder with actual intent committed in the course of a robbery. In *S* v *Siluli* 2005 (2) ZLR 141(S) the conviction was of murder with constructive intent.

The final question is whether the second accused person must be treated differently because he is not the one who stabbed the deceased person. Such an approach would negate the legal consequences of the doctrine of common purpose. The *mens rea* and *actus reus* of the first accused person are imputable to the second accused person by application of that doctrine. His culpability is therefore not less than that of the first accused person. His moral culpability is by no means diminished by the fact that he is not the one who wielded the knife and inflicted the fatal blow upon the deceased. He was part of the offence by association.

After weighing all the mitigating factors against the aggravating circumstances in which the murder was committed, the Court holds that it would be an improper exercise of its discretion not to consider imposing sentence of death in this case. In accordance with the provisions of r 49 of the Criminal Procedure (High Court) Rules, 1964 SRGN 452/1964 the accused persons must be afforded the opportunity to show cause if any, why the sentence of death should not be passed.

National Prosecuting Authority, legal practitioners for the State
Scanlen & Holderness, legal practitioners for 1st accused
Matsikidze & Mucheche, 2nd accused's legal practitioners