TINASHE NYARUSANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 31 October 2016, 2 November 2016, 3 & 6 November 2016

Assessors: 1. Mr Shenje
2. Mr Gweme

Criminal Trial

M. Munhamo, for the State
I Goto, for the respondent

CHITAPI J: The accused is charged of murder as described or defined in s 47 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. The allegations against him are that on 4 December, 2015 at Chikwira Business Centre, Mount Darwin, the accused acting with intent to kill or realising a real risk or possibility that his conduct might cause death, unlawfully killed Edmore Mwedziwendira, a male adult thereat, by striking him on the head with an iron bar and stone and further used a knife to cut off the deceased's left ear and left eye as well as cutting off the skin covering the deceased's head.

The accused pleaded not guilty. The court enquired on his age and he said that he was 18 years old. The State summary of witness evidence was produced as Annexure A and read into the record. The accused's defence outline was similarly read into the record and produced as Annexure B. The evidence of the following state witnesses as set out in the summary of the state case was admitted by the accused through his defence counsel in terms of s 314 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]; Lisa Manuwere, Taurayi Mahachi and Shepherd Moffat. The court excused the witnesses. The gist of their evidence was to the following fact:

Lisa Manuwere:

Was an employee of the deceased. She worked in the deceased's shop as a shopkeeper. On 4 December, 2015, she closed the shop and retired to sleep in the shop whilst the deceased put up in the nearby kitchen hut. This was at Chikwira business centre. On the following day in the morning she proceeded to her rural home as she had a day off. Around 1:00pm she was telephoned by the deceased's wife Gladys Chabvunduka to return to the shop. Upon her return the witness opened the shop and the kitchen door. She observed blood stains on the kitchen floor and on the pillow on the bed used by the deceased. She then made a report to one Tatenda Mwedziwendira and also showed the deceased's wife the blood stains when the latter arrived at the shop later. They then decided to make a police report about their observations and of the fact of the deceased missing.

Taurayi Mahachi

Is a police and on 4 December, 2015 at 0400 hours he received a report concerning the deceased who was reportedly missing. He attended the scene at the deceased's shops and was part of the search team which discovered the deceased's body in the graveyard some 40 metres away from the deceased's kitchen hut in which he had retired to bed. On inspecting the deceased's body the witness observed that the skin covering the deceased's head had been removed as well as the left ear and left eye.

Shepherd Moffat

Is a police officer attached to the Criminal Investigations Department, Mount Darwin. He witnessed the recording of the accused's warned and cautioned statement and his recorded testimony was that the accused gave his statement freely and voluntarily without any undue influence and also signed the statement.

Gladys Chabvundura

Is the deceased's wife and knows the accused as a neighbour. She has known the accused since 2002. She resided at the material time with the deceased at Chikwira Business Centre with

their family. She left the homestead on 4 December, 2015. On 5 December 2015, she received a call from her 16 year old son Tatenda reporting that the deceased was missing from home. She phoned around to no avail. She advised the family relatives after which she returned to the business centre arriving there around 2200hours. On arrival a search of the homestead was carried out. The search party was shown blood stains in the bedroom and on the pillow. The bedside drawers were open and contents strewn on the bed. She proceeded to Dotito Police Station and arrived there at dawn. She made a report thereat of the missing deceased and also of what she had observed at the scene. When she returned to the business centre, a search was carried out and the deceased's body was found some 45 metres away from the homestead. She was not allowed to examine the body but when the body was placed in the coffin she observed a fracture on the deceased's head. The body was taken to Mount Darwin hospital.

Funeral arrangements were initiated. On the way from collecting the body from Mount Darwin for burial she received information that the perpetrator of the murder had been arrested. She then met up with the accused who was in a vehicle driven by another local person, Atikenzi Mugoneka. The accused was under arrest. She was shown a nokia 1200 cellphone which she identified as that of the deceased. The deceased had had the phone for 2 years.

Under cross examination nothing eventful came out. She however knew of no bad blood between the accused and the deceased. The accused was someone whom the witness and the deceased assisted together with his young brother. The father of the deceased was an oldman and the deceased used to assist that family with food and clothing. The witness showed impartiality and commendable maturity and self-restraint when giving evidence despite the fact that it was her husband who had died. The court believed her evidence.

Kasirayi Gakanje

Stays in Chikwira village. His homestead is 100 metres away from the accused family's homestead. He knew both the accused and the deceased as a local resident and local businessman respectively. He stayed about 50 metres away from the deceased's homestead.

On 4 December 2015, he did his laundry at his homestead. He left his trousers and T-Shirt on the washing line to dry up overnight as he had done his laundry around 7:00pm. The following morning, he discovered that the trouser was not on the washing line. He reported the

theft of his trousers to his mother and to Atkenzi Mugoneka who was his uncle. On 6 December, 2015 he got information that the accused had been arrested whilst putting on the witness trousers. He identified his trousers to the police. He denied that he was friends with the accused nor that they used to exchange clothes. In particular he denied that he gave or authorized the accused to use of his trousers.

The witness was also shown by the police an iron bar which was 1.9 m – 2m long. The iron bar had been removed from one of the huts under construction at the witness' homestead. He said that the accused led the police to the recovery of the iron bar.

Under cross examination, the witness said that the accused and him grew up as friends. However, the friendship ended in 2014 because the witness did not approve of the accused's errant behaviour. The defence counsel asked the witness to indicate or give examples of the errant behaviour of the accused. The witness indicated that the accused had stolen fertilizer from a house. It is noted that the defence counsel solicited character evidence and he got the answers to his question. The court will not however be guided or influenced by evidence of the character of the accused in determining this matter. The witness said that he believed that the accused had used the iron bar to assault the deceased because the iron bar was blood stained. This witness gave simple straight forward evidence. He said that he went to school up to grade 5. He did not exhibit any ill feelings or animosity towards the accused save to say that he did not approve of the accused's behaviour.

Atkenzi Mugoneki

He resides in Chikwari village and owns a shop at the local business centre where the deceased owned a shop and was also murdered. He knows the accused since he was a young boy growing up in the neighborhood. His wife and the deceased's wife are aunt and niece. On 5 December, 2015, in the morning he received a report from the last witness that his trousers had been stolen from the washing line. The trousers was described to him. Later that morning the witness drove to Mount Darwin for orders for his shop. On the way back he saw the accused by the roadside wearing a black trousers. It is common cause that the trousers turned out to be the one belonging to Kasirayi Gakanje which had been taken from the washing line.

The witness asked the accused where he was coming rom and where he was headed for. The accused answered that he was waiting for a car coming from Bindura. He asked the accused to get into the car. The witness wanted to drive the accused to the business centre and lure him to where Kasirayi Gakanje was so that Kasirayi would examine the trousers to see if it was his. The witness also telephone Mount Darwin Police to report that the accused was putting on a trousers fitting the description of Kasirayi's trousers.

On the way to the business centre the witness met up with the funeral cortege and police from Mount Darwin Police Station. The police then apprehended the accused. They recovered from him the deceased's cellphone which the deceased's wife identified.

Under cross examination the witness said that when he first saw the accused, the accused was standing at a bus stop near a bridge which is just by the shops. The witness first drove past the accused then reversed his car to where he had passed the accused. The witness said that the accused confessed to having taken Kasirayi's trousers from the washing line. The accused offered to undress and give the trousers to the witness. The witness's evidence was not contentious nor put in issue. The court accepted it.

George Mautsahuku

He is a detective constable based at C.I.D Homicide Mount Darwin. He attended the crime scene on 6 December, 2015 with other police officers. They were shown the body of the deceased by the police officers who had arrived earlier. The body of the deceased was lying in a graveyard some 40 metres from the deceased's house. The body lay face down. The left ear and left eye had been removed. The left jaw had been damaged and was depressed. The deceased wore a red T/Shirt and blue jeans and he was bare foot. He saw the drag marks from the deceased's house to the graveyard. There were blood stains on the dragline. Him and his colleagues took the body to Mount Darwin hospital for post mortem. The police team also took the deceased's blood stained pillow from the bedroom.

The witness and other officers arrested the accused. The accused was in possession of a Nokia phone which was identified as belonging to the deceased by his wife. When the witness scrolled through the phone, the contacts which were stored in the phone included the deceased's

wife's contact number. The deceased's Telecel sim card was still in the phone. Upon being interviewed, the accused made a confession to the murder of the deceased.

On 8 December, 2015, the accused was taken for indications. He led the police on indications and the recovery of an iron bar and 4 stones which were blood stained. The accused also led police to the recovery of two bricks which were also blood stained. The witness with the consent of the accused's defence counsel produced the following exhibits

(i) the deceased's Nokia phone – exh 1 serial No. 352407/05/05/6923/6

(ii) an iron bar 1 – 9 metres long – exh 2

(iii) 5 stones – exhs 3 (a) – (e) weighing between 0,085kg and 9.3 kg as detailed in a certificate of weight exh 5.

(iv) 3 bricks – exhs 4 (a) – (c) weighing between 2.25kg and 4.95 kg as detailed in exh 5.

Separate dockets were compiled against the accused for murder and for theft of the trousers and deceased's cellphone. The accused implicated two accomplices in the murder of the deceased but the police did not find any other evidence connecting them to the offence save the confession by the accused. The witness denied that the police stage managed indications which led to the recovery of the exhibits. He also denied that police showed the accused phones and foistered one on him.

Under cross examination the witness was asked whether but for the indications allegedly made by the accused, the police would have connected the accused to the offence to which he responded that the accused was in possession of the deceased's phone which the deceased's wife identified. The witness said that the accused had said that he took the phone from the deceased's headboard. He denied that the accused had said that he received the phone from Clifford Mutimumwe as security for a debt. As a result the police did not verify with Clifford. The witness first told the police that he acted alone but later sought to include accomplices. The witness denied that the accused was intimidated by the police or their number and said that although they were seven policemen present during questioning of the accused only one police officer was putting questions whilst the rest took notes. The accused is said to have implicated one Takesure Chionza as the person who was the main actor who knew and had been sent or hired by the person who wanted the deceased's body parts. There was really nothing contentious

which came out of the cross examination. The witness gave his evidence fairly and the evidence was not impugned.

Tafireyi Nakusiya

Is a detective Sergeant with Homicide Police mount Darwin and was the investigating officer. He testified to how the deceased's body was recovered, the injuries observed on it and how the accused was arrested. The witness evidence was similar to that of the last witness and it is not necessary to repeat it. The witness testified that the accused freely elected to make indications and also to give a warned and cautioned statement which was subsequently confirmed by the magistrate at court on 18 December 2015. The confirmed warned and cautioned statement was produced by consent as exh 6 through the witness. The witness also testified that the accused led police to the recovery of an iron bar. He also led police to a co-accused's residence within the village but the co-accused denied any involvement in the commission of the offence. Nothing of note came out of the brief cross-examination of the witness.

The warned and cautioned statement exh 6 was a detailed two paged document. It was given by the accused in Shona and translated into English. It gave a detailed account of how the accused committed the murder with his accomplices. The statement provides as follows in its detail:

"ACCUSED'S REPLY TRANSLATED INTO ENGLISH LANGUAGE

Yes l have understood the nature of the offence and I admit. I killed the deceased Edmore Mwedziwendira together with Clifford Mutimumwe, Takesure Chionza and another man whom I did not know his name. What transpired is this on the 4th day of December 2015 at 12:00 hrs I was at home when I saw Clifford Mutimumwe passing by the road. Clifford Mutimumwe told me that he wanted to see me since he had something to discuss with me. On that day I spent the whole day sleeping which surprised my father since he thought I was not feeling well. At 22:00 Clifford Mutimumwe returned to my home and stood by the door. I recognized him since I was not asleep. I then got outside and went to a church near our home. At the church Clifford Mutimumwe told me that we were supposed to go to deceased's Edmore Mwedziwendira's home. The mission was to steal some money since he had a lot of money which he intended to purchase a big Commuter Omnibus. I asked Clifford Mutimumwe how we were going to do it. He told me that we were going to kill him. Clifford Mutimumwe told me that the deceased was alone since his wife had gone to Mashumba at their field. I was promised US$2 000-00 after completing this job. Clifford Mutimumwe told me to go and collect an iron bar from Mrs Gezai's house and I did so. I returned to where Clifford Mutimumwe was. He went with me under a tree where there was a black car. At the car I recognized Takesure Chionza but I did not recognize the other tall

man. Clifford Mutimumwe introduced me to that man who promised to pay me after the job. I and Clifford Mutimumwe stealthily walked towards Edmore Mwewedziwendira's house holding my iron bar. Takesure Chionza and the man whom I did not know remained at the car. I was told by Clifford Mutimumwe to enter the house and hit Edmore Mwedziwendira on the head. I slowly opened the door until I entered. I hit the deceased once on the head with an iron bar while he was sleeping on the bed. During that time Clifford Mutimumwe then entered the house with his torch on. When I wanted to hit the deceased for the second time, Clifford Mutimumwe snatched the iron bar and hit the deceased thrice on the head. We dragged the deceased to the door. Takesure Chionza and the other man whom I did not know then arrived. The four of us carried the deceased. At a distance of about fifteen metres I struck the deceased with the stone on the chest since he was still breathing. Clifford Mutimumwe struck the deceased with a stone on the head. Clifford Mutimumwe returned to the car and came back with a blue cloth and a knife. Clifford Mutimumwe told me to remove parts of the body of the deceased. At this stage Takesure Chionza was with us. The man whom I did not know was just walking on the road. I removed the left ear, left eye and parts of brains as I was instructed by Clifford Mutimumwe. I wrapped the parts on the cloth and was handed to a man whom I did not know by Clifford Mutimumwe. I returned and took the iron bar we used to kill the deceased in his house. Inside the house I opened the drawer of a bed and stole $20-00. I then stole a cell phone which was on the bed a Nokia 1200. Clifford Mutimumwe promised me that the deals were not over I will get my money at a later stage. I tried to start the car of the deceased but I failed. I then left the keys in the ignition. I was told by Clifford Mutimumwe to return the iron bar which we had used to kill the deceased and I did so. Whilst I was returning the iron bar the three drove away in the car and I then stole a trousers at Mrs Gezai's washing line. I went home and proceeded to St Alberts in the middle of the night. I boarded a car to Mt Darwin. I was arrested with the cellphone of the deceased in the car that I boarded back home. That is all.

Signed ……. TINASHE NYARUSANGA."

The state counsel next produced the post-mortem report as exh 7 by consent. The report was compiled by Dr Walter Nyazondo following an examination of the deceased's remains on 7 December, 2015. The deceased was described as an African male measuring 1.65m and weighing 70kg. His age was given as 43 years. The external examination, revealed that the accused's clothes were blood stained, the scalp was missing skin on the left front and he had a fractured jaw. The left eye was missing and there was a deep wound on the left side of the face. The right eye was swollen, there was semen oozing from the penis. Some teeth were missing and there were numerous bruises on the abdomen and groin areas. The body had a neck wound 4cm deep. The doctor concluded that the deceased died from head injury, strangulation and a deep cut on the neck. After production of the post mortem report which described the gruesome injuries on the body of the deceased, the state closed its case.

The accused adopted his defence outline in giving evidence on oath. The defence outline in summary consisted in a denial of the charge. The accused's defence outline stated that he took

Kasikayi Gakanje's trousers from the washing line because they usually exchanged clothes as they were friends. He denied volunteering indications at the crime scene. The outline stated that police showed him photographs of iron bars, stones and bricks used to attack the deceased. After he was shown the photographs he was driven to the crime scene to incriminate himself. The outline denies the theft of the deceased's cellphone and explains the accused's possession of the same as having been handed to him by one Clifford Mutimumwe as security for an US$8-00 debt.

Testifying in his defence the accused said that he was a grade 7 drop out aged 18 years old whose mother is deceased. His father is alive and he has two other siblings. On 4 December, 2015 he was at his brother's place in Chibaya Village assisting him to water his garden which had a tomato crop. Around 4:00pm he went to St Alberts business centre arriving there around 5:00pm. He was given the deceased's phone around 8:00pm the same night by Clifford Mutimumwe on his way from St Alberts business centre. He was owed US$8-00 for reaping tobacco. He did not enquire from Clifford as to where Clifford got the phone from. He however knew Clifford to own a similar phone.

He testified that he took Kasikai Gakanje's trousers from the washing line at 7:00am on 5 December leaving the T/shirt because he only needed the trousers since his own was dirty. He said that he was friends with Kasikayi and they often exchanged or shared clothes. He was seen by Kasikayi's brother Gezai when he took the trouser. He proceeded to St Alberts and boarded a car to Mount Darwin to visit his friends Tafadzwa and Askme with whom he wanted to discuss as to when the trio could go gold panning. He spent the day in Mount Darwin and proceeded back home on 6 December, 2015. He then boarded Atkenzi's Mugoneka's vehicle at a bus stop. He was asked about Kasikayi's trousers and he told Atkenzi about how he obtained the trousers. The accused's phone also rang and when Atkenzi asked if it was not the deceased's phone, the accused responded that he did not know because he had been given the phone by Clifford. He was asked whether he knew that the deceased had been murdered and he responded that he did not know. Atkenzi and his son then assaulted him together with other persons who were in Atkenzi's vehicle. They phoned Mt Darwin police and made a report following which the police came and arrested him.

When the police came he said that he was already tied with a rope. The rope was removed and he was handcuffed and taken to Mt Darwin Police Station where he was detained. He was interrogated on 8 December 2015 and he denied the charges of murdering the deceased. He was shown photographs of phones and asked to show the police how he murdered the deceased. He was shown the deceased's body on the phone. He was shown an iron bar from mai Gezai's homestead after which he was assaulted. He was then driven to the crime scene. The police collected the iron bar and proceeded with him to where the deceased's body had been found. There were blood stained bricks and stones there. He admitted to knowing about the stones because he was afraid of being shot. The police went to his homestead to collect his trousers as they wanted to see if it had any blood stains but it was clean. He denied exh 6 and said it was not his statement. He said that he was assaulted and forced to sign the statement.

Under cross-examination the accused first denied knowing the deceased before turning around to say he knew him. He said that on 4 December, 2015 he went to St Alberts to look for work because he had just been released from prison. He said that he was taken to court for confirmation of his warned and cautioned statement and agreed before the magistrate that it was his statement because he was afraid that he would be assaulted. He said that he told the police about the assault upon him. He agreed that he lied to the magistrate because he feared being assaulted. Asked how police knew about the existence of the iron bar at Mai Gezai's place, he responded that the police knew because that is what happened. He then changed and said that the police must have found the iron bar when they were looking for the deceased. Asked why he did not challenge the contents of the warned and cautioned statement or its production he responded that he assumed that when in court he should wait his turn to speak. He said that police fabricated the warned and cautioned statement. He accused the police of leaving out what he had said and recording what they wanted. When asked by the assessor whether he was suggesting that the police and the magistrate could not be trusted and wanted to nail him he responded that he trusted the magistrate. Asked why the magistrate would endorse false information during confirmation proceedings, he responded that the magistrate told the police to take note of his injuries. He agreed that the purpose of confirmation proceedings was explained to him. When asked where he was on the night of the murder of the deceased, he said that he was at home with his brother Clever Nyarusanga. The court asked the accused to give the court details of his date

of birth. He said that he was born on 1 January, 1999. He said that his father was aged 89 years old. The defence counsel closed the defence case without calling further evidence or any witness. Counsel were given time to file written submissions and further directed by the court to get information from the accused's last school on details of his date of birth. This directive was made in the light of the accused having given his date of birth as 1 January 1999 which would mean that he would have been just about 16-17 years old when the offence was committed. A letter from the Acting Headmaster of Chikwira School dated 7 November, 2016 was then obtained showing that the accused was entered in the school admission book as a grade one student on 22 February, 2011 and his date of birth was entered as 7 April, 1997.

The court considered the closing submissions by both the State and defence counsels. The evidence led against the accused is overwhelming. The accused's defence that he did not participate in the felony charged, was at home on the night of the murder and that police just implicated him is so unconvincing if not shown to have been decidedly false. The accused could not have spent the night at home because he stole Kasirayi Gakanje's trousers which the latter had left to dry overnight. The accused then put on the trousers and was caught whilst wearing it. He had in his possession the deceased's phone. His explanation for possession of the phone recovered from him a day or two after the deceased's murder was false. The recent possession of the phone clearly implicated him. The accused's explanation that he was given the phone by Clifford Mutimumwe was disproved by the police who checked with Clifford and he denied giving the accused the phone. The accused did not lead evidence from any witness from his home where he says he spent the night to testify to this effect.

The accused gave a detailed account of how the murder was committed by him and his colleagues. He detailed the sequence of events in his confirmed warned and cautioned statement. The warned and cautioned statement was produced by consent when the prosecutor tendered it in terms of s 256 of the Criminal Procedure and Evidence Act. The accused in evidence sought to deny that exh 6 was his statement. Where a statement is confirmed, the court will not use it in evidence against the accused if he proves that he is not the one who made the statement or that he did not voluntarily and freely give the statement without being unduly influenced. The accused came nowhere to proving on a balance of probabilities that the statement was not his nor that he gave the statement under duress. Defence counsel did not raise issue with the statement's

authenticity nor did he suggest that another named person was the author of the statement. He did not allege or give the details of any undue influence brought to bear upon him, by who, where and when exactly. He alleged assaults by Atkenzi, his son and persons in Atkenzi's vehicle at the time that he was apprehended.

The warned and cautioned statement contains so much detail that a third party without knowledge of the facts would not have made it in graphic detail. The police would not have been able to manufacture so much detail as was given in the statement including the involvement of alleged accomplices. The court considered the accused allegations challenging the statement as just an afterthought which in any event were not really persisted in nor taken up with any noticeable conviction. The defence counsel submitted in his closing submissions that the accused was an unsophisticated young man who did not appreciate the nature and purpose of confirmation proceedings as he was not legally represented. The submission is not supported on the evidence. The accused testified that he trusted the confirming magistrate and that the purpose of confirmation proceedings was explained to him. To argue otherwise would amount to a distortion of the clear evidence given by the accused. The purported challenge to the confirmed warned and cautioned statement was accordingly dismissed as a feeble attempt by the accused to deny the charge and manufacture a defence. The defence counsel referred to the *Miranda Principles* derived from the American case of *Miranda* v *Arizona* June 13, 1966. The court is not able to appreciate how the same are relevant to the determination of this case. *In casu*, the accused was found in possession of the deceased's phone. He confessed to the murder of the deceased. No undue influence was proven to have been exerted on him during the making of the confession. Section 50 (4) (c) of the Constitution which outlaws compelling an arrested person to make an admission or statement was not shown to have been infringed. In his defence outline, the accused stated that police showed him photographs of iron bars, stones and bricks and then took him to the scene of the murder to incriminate himself. How the showing of photographs would have led the accused to then give a detailed account of how the murder was perpetrated was not explained either in the defence outline or in evidence. The court does not simply uphold a challenge to a warned and cautioned statement which is confirmed because the accused has simply sought to disown it. A confirmed statement would have gone through a judicial process where an accused's rights are explained to him as well as the purpose of the procedure. Where

therefore a challenge is made to the use of the statement as evidence, there must be laid before the court sufficient facts from which the court can infer or conclude that the statement was not made by the accused or that he made it under duress. The accused failed to lay before the court such facts.

After analyzing all the evidence in this case, the court found that the accused either alone or with his accomplices intentionally murdered the deceased in the course of both a robbery and to remove from him body parts off the deceased. The facts of the case speak to a case of hired assassins by someone who wanted to use the body parts removed from the deceased. In the circumstances the accused is guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

SENTENCE

The accused has been convicted of a very serious offence. Every person has a right to life and so does the accused. Section 48 of the Constitution entrenches the right of every person to life. Life should only be lost through natural occurrences or by law. The right to life is the most important fundamental of all human rights and indeed all other rights derive from or are subordinate to it. The courts are therefore required and expected to safeguard this right jealously and indeed to show society's abhorrence for conduct which infringes or breaches this right by adequately punishing the wrong doer and imposing deterrent penalties.

The accused's conduct must be frowned upon by the court and the societal interest should in the view of the court eclipse or override other considerations in the triad of the basic factors which guide the court in assessing sentence being, the offender, the circumstances of the offence and the interests of society.

Both defence and State counsel are agreed that the offence of murder is serious. They are equally agreed that the murder was committed in circumstances of aggravation. State counsel submitted that the court should be guided by the provisions of Part XX of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and in particular to the extent that s 47 thereof has been amended by the General Laws Amendment Act No. 3 of 2016. The amendment has listed facts or circumstances without limitation which a court which has convicted a person of murder

should regard as aggravating circumstances to be taken into account with other factors which the court may properly consider in determining an appropriate sentence.

Without quoting the amending provisions aforesaid *ex tenso* and in so far as the listed factors may be relevant to or be present in the instant case, it is aggravatory where the murder is committed consequent upon an unlawful entry into a dwelling house, where the murder is accompanied by or preceded by physical torture or mutilation of the body of the victim and where there was premeditation of the murder. The factors are not considered cumulatively but individually which means that a murder is considered to have been committed in aggravating circumstances where one or more of the factors are present. *In casu*, the factors listed above were all present. Their cumulative effect was to make the case a gruesome and sickening one. The murder was committed mercilessly, ruthlessly, ghastly, grisly in horrifying fashion. The deceased was struck with an iron bar on the head whilst sleeping, struck with bricks and stones to ensure that he had died and thereafter the skin of his scalp was removed with a knife, his left ear cut off and left eye disgorged. The sight of the deceased must have been frightful; and shocking to an onlooker and even to the court in its imagination of the deceased's image.

In terms of the amendment aforesaid sections 47 of the Criminal Law Codification & Reform Act and ss 337 and 338 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] have been amended to provide for the imposition of the death penalty, imprisonment for life or imprisonment for a definite period of not less than 20 years for a conviction of murder committed in aggravating circumstances. Before the amendment to ss 337 and 338 aforesaid as well as the passage or enactment of the new Constitution of Zimbabwe Amendment (No20) 2013, the court was obliged to pass the death penalty upon an offender convicted of murder in the absence of extenuating circumstances. Where extenuating circumstances existed the court had a discretion not to impose the death penalty and to impose a sentence of imprisonment for life or any lesser penalty. The death sentence could not be imposed upon a woman who killed her newly born child nor upon a pregnant woman, a person overt 70 years of age or under 18 years of age at the time of the commission of the offence. The new Constitution in s 48 spares from the sentence of death, all women, offenders below 21 years old or older than 70years at the time of the commission of the offence. Section 47 of the Criminal Law Codification Act spared below 18 year olds at the time of the commission of the murder from the death penalty.

In view of the General Laws Amendment Act, having come into effect on 24 June, 2016, I asked counsel whether the amendments to ss 337 and 338 aforesaid had retrospective effect to offences committed before the amendment came into force. Section 17 (1) of the Interpretation Act [*Chapter 1:01*] provides that the repeal of an enactment does not affect offences committed before its repeal and any penalties or punishments provided for in terms of the enactment before its repeal. It would appear therefore that the correct approach for the court to adopt would be to be guided by the provisions of ss 337 and 338 before their repeal and substitution. Fortunately even if the court's interpretation as to which law to apply is wrong, there should really be no prejudice to the accused person because whichever provisions are applied be it the new ones or the old ones, the accused will be spared the death penalty because of his being below 21 years and therefore constitutionally protected from the death penalty.

The accused's age was given in the court papers as 18years when he was charged as will appear on exh 6. Counsel for the accused submitted that the accused was 18years old. The accused did not have a national identity card. With his recorded date of birth having been given by the school headmaster in the school records as 4 April, 1997, it means that when he committed the offence, the accused was just a few months past 18years but below 21years.

The court has already determined that the aggravating features of the offences outweigh the mitigatory circumstances and societal interests must override other considerations. This notwithstanding, the court should still strike a balance of the competing factors. It should not be emotional; and should remain focused bearing in mind that no one factor should sway it to come up with a fitting sentence but the totality of all factors subjective and objective weighed together.

The court put questions to the accused to get more information on the accused's personal circumstances. He said that he was the eldest in a family of three siblings, his mother having died in 2010. After the death of his mother, he looked for a job and became a herdman. This means that he was just about 13 years old then when let loose to fend for himself. He did not attend schooling and when he tried to do so in 2011, his father could not afford the costs. This led him to look for a job at the instigation of his father. Despite the prosecutor having asked the court to treat the accused as a first offender, it was noted that when he gave evidence in chief he stated that he was looking for employment because he had just come from prison. The court asked him to give details of the imprisonment. He said that he had been convicted of unlawful entry of a

teacher's dwelling where he stole US$320-00. He served time of 5 months 10 days. Asked whether he felt pained by the deceased's death, he said that he was very pained because the deceased used to help his family. When asked what he really wanted to realize in life, he said that he wanted to take care of himself.

In the view of the court when sentencing youthful offenders following convictions especially on serious charges, it is important for the court to gather as much information as possible relevant to assessing sentence. The court should be placed in a position where it appreciates the type of person or youth it is dealing with. The new Constitution in s 20 enjoins the State and all institutions and agencies of government at every level to safeguard the youth and give them the correct direction. The court considered whether the accused could be classified as being inherently wicked. The answer which the court came to taking into account the surrounding circumstances was that the accused was a victim of his poor upbringing and lack of direction. His family appears to have lived on hand-outs including from the deceased. He grew up a challenging life having to seek for employment at 13years of age and lacking basic education. He turned to the only life which could sustain him being dishonestly and theft. With respect to the previous conviction for unlawful entry and theft of the US$320-00 for which he was jailed, the accused said that the victim or teacher used to give him piece jobs.

It was during the performance of the piece jobs that he saw where the teacher kept his money. The accused then stole the money in the teacher's absence.

Looking at the present case, the accused committed the crime for money. Going by his confession, he was promised US$2000-00. He even tried to drive away the deceased's motor vehicle following the deceased's death. The accused stole a trousers from the washing line and also the deceased's phone. Evidence was led from Kasirayi Gakanje that the accused had become a social misfit or outcast. It is therefore true that the accused had developed a wickedness within him. Even jail time had not dissuaded him from crime because he appears to have been lured by the prospects of earning easy of money to commit the offence. He graduated from a less serious offence of unlawful entry and theft to murder committed in a daring fashion.

Sentencing is the province of the Judge, that is myself. It is an onerous task. It is also a lonely task. This case has been one of the most difficult ones for me to tackle with respect to assessing the appropriate sentence yet I cannot task anyone else to discharge the duty but myself.

I have already indicated that in assessing sentence, the triad of the nature of the offence, the personal circumstances of the offender and the interests of society are the key relevant considerations to consider, see *S* v *Zinn* 1969 (2) SA 537 (A). I hasten to add however that the triad is not open and shut nor an immutable rule. A motley of other factors relevant to sentence such as were set out in *Moyo & Ors* v *S* HB 114/06 are relevant. Statute has also set out other considerations as already adverted to.

In *State* v *Banda & Ors* 1991 (2) SA 352 (B) at 355A-B FRIEDMAN J stated when expanding on the triad referred to in *Zinn*'s case;

> "The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counter balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider; and try to balance evenly the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and its concern."

I have already stated that in the balancing of the triad, the scales tilt in favour of societal interests. I however also bear in mind the main objects of punishment. These can be said to be deterrence both of the offender and like-minded persons, preventive, retributive and reformative. Judicial mercy and not sympathy should also find its way in the considerations. The transformative nature of the Constitution has also to be borne in mind. In saying so, note is made of the fact that the accused was a victim of the failure by the responsible organs of the State as mandated by s 20 of the constitution to safeguard the interests of the youthful accused who found nothing better to do or to choose from hence settling for crime. For as long as the youths are not nurtured and their interests safeguarded so that they graduate into responsible citizens, errant behaviour and crime amongst the youth will continue unabated. In this case, the point must be made that society created the monster in the accused by not nurturing him and providing for him to mold into a useful and responsible citizen. Conditions which create conducive and positive upbringing as well as opportunities for schooling and work thereby leading to a happy life is the little that society and the States should strive to do and achieve for the youths.

In casu, the accused did not appear to show any signs of remorse. By looking at him when testifying, the court did not get the impression that he really appreciated the enormity of

his despicable conduct. He presented a picture of someone who was resigned to whatever comes not giving a thought to what society think of him. The accused could safely be described as incorrigible or hardened. Hope should however not be lost. By sparing the youthful offender like the accused from the death sentence, the legislature and indeed society which passed the Constitution outlawing the death penalty for offenders below 21years old must in their wisdom have reasoned that such person s deserved a chance to reform and reintegrate into society.

Having considered the factors I have adverted to including those which came out in evidence and questions put by the court to elicit information relevant to sentence as well as the helpful submissions from both counsel, I am of the view that a fitting sentence in the circumstances of this case is one which despite the enormity of the accused's conduct is one which is both deterrent and reformative. It is hoped that a long prison term will meet the justice of the case. A long sentence should hopefully reform and deter the accused and other like-minded would be offenders. Such a sentence will also mirror society's abhorrence for the heinous crime committed by the accused.

The accused is sentenced to 25years imprisonment.

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