

THE STATE
versus
LEEROY MHUNZA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE 30 May 2023

Assessors: Mr Mpofu
Mrs Chitsiga

Criminal Trial - sentence

T M Havazvidi, for the State
R J T Kadini, for the accused

MUTEVEDZI J: The accused stands convicted of the offence of murder. In *S v Emelda Marazani* HH 212/23, this court remarked that the regime which regulates the sentencing of offenders convicted of murder is somewhat rigid. It is so because the court's hands become tied and has little discretion where it finds that the murder was committed in aggravating circumstances. Needless to say, a court must therefore, before doing anything else in sentencing an accused, make a determination of whether or not the murder was committed in aggravating circumstances.

Sections 47(2) and (3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] give guidance as to what constitutes aggravating circumstances. The factors listed therein include among others where the murder was committed by the accused in the course of, or in connection with, or as a result of, the commission of the following offences or of any act constituting an essential element of such offence:

- a. An act of insurgency, banditry, sabotage or terrorism; or
- b. The rape or other assault of the victim; or
- c. Kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or

- d. 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
- e. The murder victim was of or over the age of 70 years or was physically disabled.

In this case, the court's finding during judgment was that the accused proceeded to the deceased's homestead. He unlawfully entered into her dwelling house for purposes of stealing. That on its own constitutes an aggravating circumstance. In addition the evidence before the court is that the deceased was well over 70 years. The deceased's son testified in court that she was over 70 years. The doctor who conducted the post mortem indicated in the autopsy report that the deceased was 73 years old. Once more that brings the crime into the realm of murder in aggravating circumstances and makes the accused person liable to be sentenced to death, life imprisonment or a definite period of not less than 20 years.

It is however important to note that there are particular individuals on whom the death penalty cannot be imposed. Section 47(4) of the Code is made subject to ss 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:10*]. Section 338 provides that the death penalty shall not be imposed on an offender who was less than twenty-one years at the time when the offence was committed or is more than 70 years or is a woman.

In this case, the accused person is twenty-one years old. He was twenty at the time when the crime was committed. The court is prohibited from imposing on him the sentence of death regardless of finding the existence of aggravating circumstances in the commission of the murder. It follows that the court is left with only two options. It can either sentence the accused to life imprisonment or a determinate prison term of not less than twenty years.

As already pointed out what heightens the accused's moral blameworthiness is that there isn't a single but several circumstances which aggravate the murder. We have already said the murder was committed in the course of or as a result of an unlawful entry into a dwelling house. We say so because the accused was startled by the deceased old woman when he had entered her kitchen hut intending to steal. The accused disappeared for a while and returned to attack the deceased. On his return, he severely assaulted the defenceless old woman with bricks, a log and stones. He knew the old woman as they stayed in the same village. He killed her in cold blood. There is no denying that he made up his mind to murder the deceased after the unlawful entry episode. He therefore premeditated the commission of the murder. The third aggravating factor is that the deceased was a septuagenarian.

In mitigation the only submission which counsel made is in regard to the accused's youthful status at twenty-one. Clearly therefore the factors which aggravate the crime far outweigh those that mitigate it.

We accept that given his youthful age, the accused is an offender whom we are prepared to offer a second chance despite the callousness and the total disregard for the old woman's life which he exhibited. To afford him that opportunity we exercise our discretion not to sentence him to life imprisonment.

In the circumstances, the accused is sentenced to 35 years imprisonment.