

THE STATE
versus
TRISH MACHADO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 20 – 22 March & 15 May 2023

Criminal trial

Assessors: Mr *Shenje*
Mr *Gweme*

A Masamha, for the State
A Majachani, for the accused

MUREMBA J: The accused person is facing a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). She pleaded not guilty to the charge.

The State alleges that on 19 May 2022, the accused unlawfully and with intent to kill or realizing that there was a real risk or possibility that her conduct may cause death continued to engage in that conduct despite the risk or possibility and caused the death of Walter Chiponda by throwing him into Mazowe River thereby causing him severe head trauma and drowning resulting in his death. The deceased was her 4-year-old son.

In her defence outline the accused did not dispute that she threw the deceased into the river as alleged by the State. She however stated that when she did so, she never wanted to kill her child. She was suffering from some form of psychological trauma or mental disturbance. She grew up as an orphan, her parents having died when she was an infant. She was taken care of by a sister to her paternal grandmother whose husband never wanted to stay with her. He always said that she was a stranger and was constantly verbally abusing her. The situation got worse when she fell pregnant and was rejected by her lover. She was chased away from home. It is the cumulative effect of all these things that triggered a psychological disorder that caused her to

slide into a perpetual state of depression. It was the accused's prayer that she be acquitted of murder and be found guilty of culpable homicide. It was stated that at most the accused negligently caused the death of the deceased.

The State led the following evidence. It produced the accused's confirmed warned and cautioned statement wherein the accused stated the following. On 19 May 2022, she left her grandparents' home after they had chased her away. She left with the intention of killing her son and herself. She left home at around 0900hours going to Shamva where she spent the day with the deceased. At around 4pm she proceeded to Mazowe River where she intended to throw the deceased into the river so that he would die. When she got to the river, she sat with a certain lady who was selling her wares at her market stall while the deceased was playing with that lady's child. The lady later left as the accused was waiting for the sun to set. The accused waited until 1900 hours and then lifted the deceased. She removed his clothes leaving him with the underwear only. She then threw him into the water and fled from the scene. She left his clothes on the river bank. The accused said that the deceased died in the river because of her actions.

The State also produced the post mortem report by consent. It states the cause of death as brain edema and severe head trauma.

The State led evidence from Emily Chigunde. She is the lady who was selling her wares by Mazowe River bridge when the accused arrived at the river. Emily Chigunde's evidence is similar in all material respects to what the accused said in her confirmed warned and cautioned statement about their encounter and how they parted ways. For this reason, we shall not repeat her evidence. Emily Chigunde went on to say that on the next day when she went back to her vending site, she saw people gathered by the bridge. People were looking at the body of the deceased which was floating in the river between two rocks. She got closer and managed to identify the body and the bag of clothes. She then remarked that the lady that she had spent the previous day with was the owner of the bag and the mother of the little boy whose body was in the river. One Luke who is the person who had discovered the body then called the police. He also went on to retrieve the body from the river. The witness said that she gave him a wrapping cloth so that he would wrap the body.

Edward Mutimodyo, a constable in the Zimbabwe Republic Police testified as follows. At the time material to this case, he was stationed at Shamva Police Station. On 24 May 2022, as he

was driving from work going home, he received an anonymous call. The caller said that he was calling in connection with the body of the child that had been retrieved from Mazowe River. The caller said that he suspected that a certain lady who used to stay in Chishapa area of Shamva who had since relocated to Masauso area is the one who abandoned her child whose body was then retrieved from Mazowe River. He said that the lady was now being seen without the child. Coincidentally Edward Mutimodyo was carrying a passenger who comes from Chishapa area. Edward Mutimodyo diverted his route and proceeded to Masauso to look for the accused. There is a mine and a lot of tuckshops at Masauso. The mine is called Wep mine. The witness said that he proceeded to the tuck shops when he arrived at Masauso. As soon as they arrived there, the passenger that Edward Mutimodyo was carrying saw the accused who was at a certain canteen and identified her as the lady the anonymous caller had referred to. The accused was busy serving food to some customers.

Edward Mutimodyo said that he then approached the accused and identified himself as a police officer. He went on to ask her where she had left her child. She said that she had left him at Mazowe River bridge by himself. As they were talking, a certain man who identified himself as an uncle of the accused arrived. When the uncle heard what was going on he asked the accused to go and change her clothes so that they could go to the police station. When the accused was done, they proceeded to the police station. On their way they stopped at Mazowe River bridge where they saw the first witness Emily Chigunde who had earlier on told the police that she had seen the lady who had abandoned the deceased. Upon seeing the accused, Emily Chigunde positively identified her as the mother of the deceased. Edward Mutimodyo said he then proceeded to Shamva Police Station where he handed over the accused to the investigating officer. The witness said that Masauso is about 12 – 13 km away from Mazowe River bridge. He said that at Masauso he learnt that the accused was working for a certain lady cooking sadza. During cross examination it was put to this witness that it is the accused person who had handed herself over to the police after committing the offence. It was being denied that the accused had been arrested at Masauso. The witness maintained that that was not true as he is the one who went and apprehended her at Masauso after receiving an anonymous call.

Winnet Muchemwa, a sergeant in the Zimbabwe Republic Police testified as follows. She was the investigating officer in the matter. She was allocated the matter after the accused had

been arrested. According to the copy of the report received book that was produced as an exhibit through her, the person who made the report to the police about having discovered the body of the deceased in Mazowe River was one Luke Chadereka. She denied that it was the accused who reported the matter and handed herself over to the police. She said that the accused led them to Mazowe River where she freely and voluntarily made indications about how she had committed the offence. The investigating officer further said that she learnt from the accused that at the time that she committed the offence she was actually married and was staying with her husband who was the step father of the deceased. The accused furnished her with the contact details of her husband. The husband was called and he came to the police station. He confirmed that he was the accused's husband and step father to the deceased. He said that he started staying with the accused and the deceased when the deceased was two months old. He even asked the accused why she had killed the deceased considering how much he loved her and that he had been looking after the deceased like his own child. The step father was deeply hurt. Some of his relatives had even come to attend the deceased's funeral thinking that the deceased was his child. The step father had never told them that the deceased was not his child. That is how much the stepfather loved the accused and the deceased. The investigating officer said that she learnt from the accused's husband that the accused had left home saying that she was going to visit her grandparents as she wanted them to see the deceased. The investigating officer said that she gathered that the accused and her husband have one child together. At the time this trial was conducted, that child was now 1 year 9 months old. The accused had left that child with the father when she went to visit her grandparents with the deceased.

The investigating officer said that she also visited the accused person's grandparents because on the day that the accused committed the offence she had come from their home. She learnt from the accused's grandmother that the accused had come to their home on a visit from where she was staying with her husband, the step father of the deceased. She had then left saying that she was now going back to her husband. The investigating officer said that investigations had revealed that the accused used to stay with her grandparents before she was married. She said that the accused explained that she had stayed with the deceased's father for a short while and had to leave because he was a married man.

When the investigating officer was asked who buried the deceased, she said that the accused had told the police where the deceased's father was. The father was contacted and advised about the death of the deceased. His family took the responsibility of burying the deceased. The investigating officer denied that the accused was in a desperate situation which warranted her to kill the deceased. She had a loving husband who took her in together with the deceased when the deceased was only two months old and even introduced the deceased as his son to his relatives. She also said that the deceased's clothes that were in the bag that was recovered by the river side were good quality clothes that showed that the deceased was a child who was being well looked after.

The investigating officer said that the accused person never looked like a person who was disturbed by the fact that she had killed her child. She was very calm throughout the investigations. Even when they went to Mazowe River for indications, she was very calm and composed. Police officers were afraid that she would throw herself into the river but she assured them that she would not. She said that she was okay. She was acting normal and clearly showed that she lacked motherly love.

The State also produced the deceased's bag of clothes that was left by the river side by the accused after she had thrown the deceased into the river. The court observed that the clothes were of good quality and they were many.

During the defence case the accused said that she is 22 years old. She knows nothing about her family. She was raised by her paternal grandmother's young sister who took her into her custody when her grandmother passed on. She dropped out of school because there was no one to pay school fees for her. It was difficult staying with her grandmother's sister because the husband was always saying that she was a stranger and that in the event that she died they would have problems burying her. Out of her desperate situation she fell in love with the father of the deceased. It later turned out that he was a married man. She said that she only learnt of this when she was already pregnant. He could not stay with her at his home. He made her stay with his grandfather and later moved her to stay with an aunt of his. When she was 8 months pregnant, he told her that he no longer loved her. That is when she then left and went to stay with a neighbour of her grandmother because she was not welcome at her grandmother's place. After she had given birth, her grandmother came and collected her out of embarrassment. She stayed with

grandmother for 3 months and had to leave to go and stay with the neighbour again because of grandfather. When the deceased was now 8 months old that is when she met one Phillip Kasiku, the man who later became her husband and step father to the deceased. They stayed together for 2 years and had one child together, Prudence Kasiku. The accused said that in February 2022, she suffered from malaria and was admitted to hospital for 3-4 weeks. Phillip Kasiku's mother came to hospital and took the child who was still breast feeding from her. The accused said that when she was eventually discharged from hospital and went home, she found her husband now staying with another woman. He told her that he no longer loved her and made her stay very difficult. She ended up going back to her grandmother's place as she had nowhere else to go. She went with the deceased leaving the other child because the other child had been taken away from her by his grandmother when she was in hospital. She stayed at her grandmother's home with the deceased from February 2022 until May 2022. What made her leave on the day that she eventually killed the deceased was that grandfather was continuously complaining against her stay at their home.

The accused said that before she left, she had learnt from her grandmother's neighbours that grandmother had a granddaughter who resided at Kiff's farm who could be able to help her. The accused said that she was able to get her contact details and phoned her. She told the accused that she had travelled to Harare and was now on her way back. She asked the accused to wait for her at Mazowe River Bridge where she would collect her and proceed with her to Kiff farm since the accused had never been to the farm in question. The accused said that this is how she ended up proceeding to Mazowe River on the day that she killed the deceased. When she got to the river that is when she met with Emily Chigunde the State witness who was selling her wares whom she spent the afternoon with. The accused said that she spent that afternoon in constant communication with her grandmother's granddaughter who continued to falsely assure her that she was about to arrive from Harare.

The accused said that when Emily Chigunde then left for her home, she remained waiting for her cousin until around 7pm. This time around, she was now failing to get through to the granddaughter on the phone. The accused said that it was at that moment that she thought to herself that no one loved her. She then thought of killing her child first and then herself to end both their misery. It was at that juncture that she took the deceased, undressed him and threw

him into the river. She said that she then immediately turned and walked away without looking back. She ended up at the road that leads to Masauso. She proceeded to Masauso where her friend lived. The accused said that she had decided that she wanted to go and greet her friend first before committing suicide. However, when she got to her friend's place, she did not tell her friend what she had done. The friend started telling her stories such that she ended up falling asleep. The accused said that when she woke up the next morning she started to think about her child. She said that it is at that point that she decided to go to Shamva Police Station to report herself for having killed her child. The accused said that she asked for 50cents for transport from her friend and proceeded to the police station where she reported herself around 10am. She said that it appeared to her that the police had already heard about the child's body that had been discovered in Mazowe River. She said that she was placed under arrest and later taken for indications. The accused vehemently denied that she was arrested by a police officer at Masauso whilst working at a canteen. She said that the evidence that was given by police officer Edward Mutimodyo in this court was all a lie.

During cross examination the accused said that she went to school up to form two. She had the deceased when she was 17 years old. The accused admitted that the clothes of the deceased that had been produced as exhibits were good quality clothes. She said that they were bought by her husband Phillip Kasiku. The accused said that Phillip had loved her and the deceased very much before she fell ill and got admitted to hospital. He however changed when he started staying with another wife at the time that she was in hospital. The accused said that when she killed the deceased, her intention had been to kill herself too. Asked why she did not then go ahead to kill herself too, the accused said that she had then thought of going to Masauso to bid farewell to her friend first before killing herself. When it was suggested to her that she could have looked for a job in order to fend for herself and the deceased, she said that she had earlier on tried to look for a job but all the potential employers said that that they would not allow her to bring the deceased to work.

The accused said that the thought of killing the deceased and herself crossed her mind for the very first time when she was at Mazowe River after Emily Chigunde had left and when her cousin who had said was coming from Harare was no longer reachable. Asked why she did not simply abandon the deceased, the accused said that it was because she did not want her child to

suffer. The court asked the accused to supply the name of her friend that she thought of visiting after she had thrown the deceased into the river and the accused said that she only knew her as Chihera and did not know her real name.

This is all the evidence which was placed before the court.

Analysis

Mr. *Masamha* in his closing submissions submitted that the deceased's death did not come as an accident and that as such the accused must be convicted of murder in terms of s 47(1) (a) of the Criminal Law Code for intentionally killing the deceased. He said that this is because the accused took the child to the river where she intentionally threw the child into the water. On the other hand, Mr *Majachani* submitted that the evidence led by the accused showed that she had lived a destitute life full of struggles as an orphan. Her foster parents had no love for her. She had been involved in two failed love relationships that ended with heartbreaks. Mr *Majachani* submitted that the accused had demonstrated that the cumulative effect of her life's woes, heartbreaks and family rejection saw her being so depressed and suffering from acute psychological trauma which saw her throwing the deceased into the river. He submitted that the accused threw the child into the river out of sheer desperation and a bleak future. She felt that nobody loved her. Mr *Majachani* submitted that the accused caused the death of the deceased through negligence by throwing him into the river. He further submitted that when the accused threw the deceased into the river she was not in her right state of mind. He said that this is a case of diminished responsibility because the accused in the face of rejection was going through intense psychological trauma and could not appreciate the wrongfulness of her actions and the consequences thereof. She was suicidal. The accused ended up handing herself over to the police. Mr. *Majachani* submitted that under the circumstances the accused therefore ought to be convicted of culpable homicide.

In terms of our law diminished responsibility does not constitute a defence to a criminal charge, but is only taken into account in mitigation of sentence. See s 218 of the Criminal Law Code. The provision reads;

“218 Diminished responsibility to operate in mitigation not as defence

(1) If at the time when a crime is committed the capacity of the person committing it –
(a) to appreciate the nature of his or her conduct or that his or her conduct was unlawful; or (b) to act in accordance with an appreciation of the kind referred to in paragraph (a);

is diminished on account of acute mental or emotional stress, or a partial mental disorder or defect, such diminished responsibility shall not be a defence to the crime, but a court convicting such person shall take it into account when imposing sentence upon him or her for the crime.”

Prof G Feltoe, Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23] Legal Resources Foundation 2nd Ed, 2012 @ p 212 states that the plea of diminished responsibility by an accused person is a plea to the effect that his or her capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation was reduced by reason of some disorder or stress affecting his or her mind. In *S v Chikanda* 2006 (2) ZLR 224 (S) @ 229D-E it was held that diminished responsibility only reduces the level of responsibility, but does not completely absolve a party from his or her actions. The court further held that where the court finds that at the time the accused committed the offence, he or she was criminally responsible for the act, but that his or her capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect and then acts in accordance with an appreciation of its wrongfulness, the court may take the fact of such diminished responsibility into account when sentencing him. The foregoing therefore shows that Mr. *Majachani's* submissions were misplaced. He was raising diminished responsibility as a defence. The above legal authorities show that diminished responsibility does not have the effect of reducing any criminal charge to a lesser charge nor does it have the effect of absolving the accused *intoto* and entitle him or her to an acquittal. It does not reduce the charge of murder to culpable homicide nor does it entitle the accused to an acquittal. If diminished responsibility is proven, all it can do is to act as a mitigatory factor relating to mental state at sentencing stage, well after the accused has been convicted. The onus of proving diminished responsibility is on the accused and the onus is discharged on a balance of probabilities. See the proviso to s 18 of the Criminal Law Code. Since diminished responsibility can only be considered as a mitigatory factor, there is therefore no need at this juncture to determine whether or not the defence managed to prove on a balance of probabilities that the accused was suffering from diminished responsibility at the time that she committed the offence. Even if a finding is made that the accused was suffering from diminished responsibility, that finding will not have any effect on the verdict the court will pass. It does not determine whether or not the accused had the intention to kill the deceased.

That the accused killed the deceased by throwing him into the river is not disputed. It is common cause. In her own words the accused said that when she threw the deceased into the river, her intention was to kill him first and then kill herself later. Clearly, she did not want the deceased to survive. The accused's physical actions of lifting the deceased, throwing him into the water and turning and walking away without looking back until she got to the road which leads to Masauso also confirm the accused's intention to kill the deceased. The accused's explanation for what she did was that she did not want the deceased to suffer. With this, there cannot be any doubt as to the intention of the accused. This is a murder which was committed with actual intent. The accused deliberately caused the death of the deceased. Whatever her motive was, she desired the death of the deceased. If we go by what she said in her confirmed warned and cautioned statement, when she set out for Mazowe River after leaving her grandmother's home, her aim and object was to kill the deceased. When she got to the river, she waited until it was dark and when there was no one at the river she threw the deceased into the water.

Mr *Majachani* submitted that the accused was suicidal. Whether or not the accused was suicidal, that is neither here nor there. Being suicidal alone does not take away the fact that she intentionally killed the deceased. No evidence was placed before the court by the defence to show that the accused was mentally disordered so as to negate her capacity to appreciate the nature or lawfulness of her conduct or to act in accordance with such an appreciation. In terms of our law, it is a person who is mentally disordered at the time of commission of crime who is entitled to a complete defence of insanity. See s 227 of the Criminal Law Code. Being suicidal is not synonymous with being mentally disordered. The defence needed to place evidence before the court to show that the accused was mentally disordered when she committed the offence. In any case nothing shows that the accused was suicidal.

The fact that the accused intended to end the suffering of the deceased does not exonerate her. She might have killed the deceased for a good motive in her own view. However, motive is distinguishable from intention. Motive is simply the reason why the accused committed the offence. If an accused intentionally brought about a criminal consequence, the fact that he or she may have had a good motive for doing so will not excuse him or her from criminal liability. In the circumstances of the present case the accused's motive for killing the deceased was not even good. In her own words the accused said that she was failing to secure employment because

potential employers were saying that they would not allow her to bring her child to work. Clearly the accused found the deceased to be an inconvenience in her life. She then found it necessary to eliminate him by killing him. Clearly, her motive for killing the deceased was bad. This motive even assists in establishing the guilt of the accused. It helps in showing that the accused deliberately and intentionally killed the deceased.

In *The State v D.M (A Juvenile)* HMA 12 -22 which is a case which falls on all fours with the case in casu, the accused was found guilty of murder with actual intent as defined in s 47 (1) (a) of the Criminal Law Code. The accused who was 16 years old when she committed the offence of murder, threw her two-year-old child in Tugwi River and left her to drown. The accused had been allegedly raped by an uncle resulting in the birth of the deceased. On the day the accused then threw the deceased into the river, she had been assaulted by her brother. The accused said she felt hurt physically and emotionally. She decided to commit suicide and left for the nearby Tugwi River. However, as she went away, the deceased cried for her. The accused took the deceased with her. Upon arrival at the river, the accused threw the deceased into a deep pool. The accused said she then failed to master the courage to drown herself. She went back home and reported herself. During trial the accused's defence was that she lacked criminal capacity to comprehend the unlawfulness of her conduct due to emotional stress arising from the alleged rape, the constant hostile home environment arising from the conduct of her bother and her grandmother with whom she was staying who were always using punitive language against her and the trigger caused by the assault on the fateful day. The accused said as a victim of rape she constantly suffered from emotional stress and trauma. This was compounded by her relatives who were labelling her a prostitute. The accused said she threw the deceased into the river in a fit of rage. She said that it was only after throwing the deceased into the river and after she had been arrested that she realized the wrongfulness of her conduct. She said that when she threw the deceased into the river, she believed that she was simply getting rid of the source of her shame. The accused was seeking to be acquitted of the murder charge. In convicting the accused of murder, MAWADZE J at p 9 of the judgment said that,

“On the day in question the accused appreciated the nature of her conduct. She explained what she did in proper chronological order until she threw the now deceased into Tugwi River. The accused indicated that she wanted to get rid of the object of her ridicule (the child). She decided to throw the child into a deep pool. The 2 year old child could not swim. She appreciated the child would drown and die. The accused knew that her conduct was unlawful hence soon after

throwing the child into the river she met her brother D and naively told him that it is D who would be arrested by the police. Indeed the accused was suffering from acute mental and emotional stress. The accused's state of mind as proved would not absolve her of legal liability but simply reduces her moral liability.

There is no doubt that the accused, by throwing the 2year old deceased into a deep pool of water she wanted to take away the life of the child. She desired that result and it is what happened. The accused acted with actual intent as defined in s 47(1) Criminal Law (Codification and Reform) Act [Cap 9:23]. Be that as it may, her conduct still amounts to diminished responsibility as per s 218 of the Criminal Law (Codification and Reform) Act [Cap 9:23]" (my underlining for emphasis)

At p 9 MAWADZE J said that the state of mind envisaged in s 218 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] does not vitiate the requisite *mens rea* but is merely mitigatory.

In view of the foregoing, we find the accused *in casu* guilty of murder with actual intent as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

SENTENCE

We considered the following factors. The accused is a young first offender. When she committed the offence on 19 May 2022, she was 21 years old. She is now 22 years old. She was born on 1 January 2001. She grew up under the care of her paternal grandmother's sister and her husband. The accused said that her stay with them was difficult because the husband to her grandfather's sister never wanted her to stay at his homestead. He was always saying that she was a stranger and in the event of death they were going to have problems burying her. The facts of this case show that the accused fell pregnant with the deceased at an early age. She was 17 years old. The accused said her difficult home environment made her to fall in love and fall pregnant at that early age. It is also evident from the evidence led during trial that the accused had been involved in 2 failed love relationships. It is obvious that she has been unlucky in love.

The defence counsel submitted that because of her woes, the accused was suffering from diminished responsibility when she committed this offence. He submitted that as a result, when the accused committed this offence, she did not appreciate the consequences of her actions. The defence counsel submitted that the accused was suffering from psychological trauma as she was going through emotional stress. In response Mr *Masamha* for the State, disputed that the accused was suffering from diminished responsibility as nothing was placed before by the court by the defence to prove the same. He submitted that nothing shows that when the accused

committed the offence she was suffering from intense psychological trauma. She may have grown up as an orphan but that does not mean that she was subjected to ill treatment. She may have been involved in 2 failed love relationships, but that does not mean that when she killed the deceased, she did not know what she was doing.

Let me hasten to point out that the plea of diminished responsibility is a plea by the accused that his or her capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation was reduced by reason of some disorder or stress affecting his or her mind. See Prof G Feltue Commentary on the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] LRF 2nd Edition, 2012 at p 212.

The accused bears the onus of proving diminished responsibility on a balance of probabilities - see the proviso to s 18 of the Criminal Law Code. *In casu* the problem that there is that the defence placed no medical evidence to show that the accused was suffering from diminished responsibility when she committed the offence. Obviously the accused does not know anything about diminished responsibility. So, she could not have told her lawyer that she was suffering from diminished responsibility. This therefore means that it was the defence counsel's own conclusion that the accused was suffering from diminished responsibility. He simply concluded this from the situations that the accused said she has gone through in life. We must point out that the defence counsel is not an expert in psychiatry. He has no expertise in assessing and diagnosing the mental status of any person. He is therefore not qualified to tell the court that the accused was suffering from acute psychological trauma and depression when she committed the offence. There was need for the defence to lay the foundation for diminished responsibility by adducing medical evidence to that effect. In the case of *The State v D. M (juvenile) supra*, the defence produced a psychometric Assessment Report and a General Anxiety Disorder Assessment which were compiled by a psychiatric nurse. Over and above that, the psychiatric nurse in question gave *viva voce* evidence on behalf of the accused at trial. The nurse explained how he had arrived at the conclusion that the accused suffered from post – traumatic stress disorder and clinical depression when she threw her child into the river. Presented with this medical evidence the court did its own analysis in light of the circumstances of the case and made a finding that the accused was suffering from diminished responsibility at the time she threw her 2 year old child into the river.

The above case demonstrates that for the court to make a determination on whether or not the accused was suffering from diminished responsibility, there is need for medical evidence to be placed before it. The case of *S v Chikanda* 2006(2) ZLR 224 (S) further buttresses this point at p 225 (the Headnote) by saying that;

“Medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence need to be supported by some other evidence. On their own, such reports may not be conclusive. The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts.”

This case further clearly demonstrates the need for presentation of medical evidence by the defence to prove diminished responsibility on the part of the accused. In view of the foregoing, we are constrained to make a finding that the accused was suffering from diminished responsibility when she threw the deceased into Mazowe River.

We also agree with the State that the circumstances of the accused do not show that when she committed this offence she was in a desperate situation. Whilst the accused disputed the investigating officer's evidence that she was still married to the deceased's step father when she committed the offence, it is common cause that the deceased had a father and the accused knew where the father was staying. The accused also knew the father's grandfather and aunt with whom she once stayed when she eloped. The accused could have taken the deceased to his father or to the other relatives. No evidence was placed before the court that she once made such an attempt. The worst case is that the accused could have abandoned the child at her grandmother's place instead of killing him. We do not believe that the accused was suicidal at all. It is just her word with nothing to support it. The accused testified that when she threw the child into the river she turned and never looked back. She gave no good explanation for not killing herself. She said that she has decided to go and bid farewell to her friend first before killing herself. A person who is serious about killing herself would not give such a flimsy excuse. Evidence shows that the accused had made no plans at all about how she was going to kill herself after she had thrown the deceased into the river. A question was asked as to why she had not thrown herself into the river as well and she said that the water was shallow and she knew she could swim out of the river. If she was serious about killing herself why would she swim out?

This is a clear case of a person who decided to kill her child so that she could get the freedom of living without the burden of living with a child. The child was simply an inconvenience to her. As such the accused decided to get rid of him. This explains why from the river the accused proceeded to Masauso to look for a job. In 4 days of having committed the offence, the accused was already employed at a canteen.

It is also clear that this was a murder which was committed in aggravating circumstances so as it was premeditated – see s 47 (3)(a) of the Criminal Law Code. The accused stands convicted of a very serious offence of murder with actual intent. The victim of the murder was a 4 year old innocent little boy who died a very painful death of being thrown into the river and suffering severe head trauma. The accused showed no remorse at all for what she did. She lied about being suicidal herself and that she reported and handed herself over to the police after committing the offence. Evidence led by the State clearly showed that after committing the offence, the accused proceeded to look for a job at Masauso. That is where she was arrested. According to the investigating officer, the accused was very clam and composed during investigations and even when she went for indications. Even during trial the accused was calm and composed. This is a case where if the accused was not young, we would have imposed the minimum of 20 years' imprisonment provided for in s 47(4)(a) of the Criminal Law Code since the offence was committed in aggravating circumstances. However, in view of the highly mitigatory factor that the accused was impregnated at the age of 17 years and committed this offence at the age of 21 years we have to temper justice with mercy. The accused who is now 22 years old needs another chance in life. Immaturity obviously influenced her simplistic reasoning that she could simply throw the child into the river and move on with her life. The reduced sentence that we will impose is also in light of the fact that the accused is a person who has had a difficult life growing up. Life has generally been cruel to her. We will impose a sentence that should enable the accused to get rehabilitated. The sentence should also act as a deterrent factor to other would be offenders in our society seeing that this offence is generally on the increase.

Accused is sentenced to 12 years' imprisonment.

