

THE STATE
versus
CLEVER MUDZENGERE
and
TRYMORE MUDZENGERE
and
FREDDY GIREYA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 5 March 2024

Assessors: Mr Mhandu
Mr Shenje

Criminal Trial – Sentencing Judgment

V Ngoma, for the State
E Chimombe, for the 1st accused
Z Majena, for the 2nd accused
R Makumbe, for the 3rd accused

MUTEVEDZI J: These three young offenders, Clever Mudzengerere (Clever), Trymore Mudzengerere (Trymore) and Freddy Gireya (Freddy), all of them barely twenty-five years old were convicted of the murder of the deceased person. The murder was a result of a near senseless drunken brawl. The brief facts proven at trial were that the offenders chased down, cornered and fatally assaulted deceased after they accused him of having stolen Clever's phone. From the narration of the events, the court accepted that Clever was the principal instigator of the murder. He chased the deceased first and played the biggest role during the assault. Trymore later joined in possibly in a blood is thicker than water scenario. He fought on the side of Clever who is his sibling. Freddy arrived at the scene when the assault had already started. He fully participated by stomping on the deceased as he lay helplessly. Although they all denied the charges, we rejected their defences. Beyond reasonable doubt, we were convinced of their guilt.

This court has categorically explained that the sentencing of offenders convicted of murder is in more than one way, straight-jacketed. It is so because of the requirement in s 47(4) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (The Code) that

once a court finds that a murder was convicted in aggravating circumstances, it has no option but to sentence the offender to one of three prescribed punishments. Although the court retains some modicum of discretion on which one to impose, the truth is that very little room is left for the exercise of that choice. I am obliged therefore to start the sentencing inquiry from finding whether or not the murder was committed in aggravating circumstances.

In her submissions, the prosecutor alleges that indeed what aggravates this murder is that the offenders attacked the deceased with repeated and gratuitous violence as they hit him with beer bottles and stamped on his body many times. On the other hand, counsel for all the three offenders argued that this was a drunken brawl because all the offenders were drunk. They had been imbibing alcohol for hours on end by the time that the commotion broke out. The court's view is that surely, the offenders were in one way or another inebriated. The evidence before the court supports that view. Not one of the witnesses refuted the drunken behaviour of the offenders. They could not even be restrained and their violence was attributed to drunkenness. I find it baffling that many legal practitioners do not stop to think about the sentence likely to be imposed on their clients during trial. The possibility of an accused being convicted at the end of a criminal trial must always be real to any legal practitioner. As such even in circumstances where the accused's defence is an outright denial of the offence an astute counsel must nonetheless prepare for the eventuality of a conviction. It becomes even more important where the defence such as in this case was that the deceased was attacked by a mob to which the offenders were a part. It becomes a contradiction where during trial the offenders denied being intoxicated and asserted that they were in full control of their faculties to turn around and request the court's leniency on the basis that intoxication played a part in their wrong doing. It would not have been damning in any way if the offenders had admitted drunkenness but at the same time maintaining their defences. They did not. Yet the evidence suggests that they were drunk. Whether they retained control of their faculties or not is something else. I have already said that the assault was a drunken brawl where the offenders went on an unrestrained attack on the deceased. It was not premeditated. As a result, I find it difficult to agree with the prosecutor that the murder was committed with gratuitous violence and therefore in aggravating circumstances.

Other than the above, I also considered the factors stated as aggravating circumstances in s 47(2) and (3) of the Code. I found none to be applicable in this case. The closest was that it is aggravating where the deceased was murdered in a public place but that factor has a qualification that the murder must have been with the use of means such as fire,

explosives or the indiscriminate firing of a weapon. No such means were used in this instance. The court is constrained to find as it hereby does that this murder was not committed in aggravating circumstances.

With the above finding, the court is liberated to impose a sentence outside those that are prescribed in instances where there is aggravation. It calls for a weighing of the mitigation submitted by the offenders against the aggravation by the state. What makes the offenders' moral blameworthiness high is that it appears that they attacked their victim for no proper reason. It is even difficult to believe that the deceased had stolen a phone as alleged. They were all not known to the deceased. He was a stranger enjoying his Boxing Day holiday. His life was ended abruptly. The prosecutor submitted that the father and brother of the deceased are struggling to come to terms with his death. Any normal person would feel for them. To lose a relative through natural causes may be more acceptable than through violence. In addition, the offenders chose to leave the crime scene and go home, reckless as to what happened to their victim. They never attempted to assist him. In short, they simply did not care.

In mitigation though the first offender Clever submitted that he is a young man whose rage was driven by intoxication on the day in question. He has no family of his own because he is not yet married. He together with his younger brother Freddy were responsible for taking care of their elderly parents who are not employed. They survived through gold panning. He is of very little education having dropped out of school in grade seven. He asked the court to be lenient with him because he has not had any previous brush with the law. He requested the court for opportunity to compensate the family of Tungamirai Muyangwa, the victim in this case.

The second offender Trymore is also a first offender. He neither has prior criminal convictions nor any record of violent behaviour. Counsel submitted that he is remorseful and is willing to pay reparation for his transgression. The court was further advised that when he was in detention, Trymore introspected, couldn't find any justification for the wrong he committed, he realised his wayward ways and came to peace with his Lord. He is a born again who now believes in the power of prayer and righteousness. He views his conviction by this court as the Damascene moment that saved him from sin. He accepts that he has no visible injuries but argues that his heart bleeds every day. He is an emotional wreck and has developed ulcers for which he constantly requires medication.

Counsel further submitted that Trymore is youthful. That cannot be doubted because he is only twenty-three. He was twenty-one at the time he committed the offence. That youthfulness coupled with intoxication may have deprived him of the maturity and wisdom to realise the catastrophic consequences of his actions. He clearly has much to learn and the court must afford him opportunity to do so. Like his brother, he only went as far as grade seven and then dropped out of school. Counsel further urged the court to consider that the offender together with his co-offenders were never granted bail from the time they were arrested. As such they have been in pre-trial incarceration for a long period.

The third offender Freddy is also a first offender. This is his first criminal conviction. His counsel said he has no propensity to committing offences and is therefore unlikely to reoffend. Counsel further argued that it was evident from his testimony during trial that he was genuinely remorseful for the death of the deceased. He is very youthful and was only twenty-two years old at the time of the commission of this offence. He is a family man as he is married. The marriage was blessed with a son who is one and a half years old now. If sentenced to a lengthy prison term the boy is likely to grow up without fatherly guidance necessary for his personal social and economic upbringing. The third offender said he too had imbibed alcohol at the time the offence was committed. It diminished his judgment and decision making. He referred the court to the case of *S v Gunde & Anor* HH 481/2023.

It is clear that the submissions in mitigation given above all make sense. In the court's view they outweigh the aggravation by the State. The youthfulness of the offenders and the attendant danger of making the wrong decisions spurred by irresponsible alcohol intake all contributed to the unnecessary and avoidable death of the offenders' victim. A life was needlessly lost. All the offenders are simple village young men with little education if they have any at all. Those factors sway the court to accept that any sentence which it passes must be rehabilitative whilst at the same time punishing the offenders for their heinous transgressions. We have already indicated that the finding that the crime was not committed in aggravating circumstances liberates the court from the minimum mandatory penalties otherwise imposable. **In the circumstances, it is ordered that the offenders are EACH sentenced to 15 years imprisonment.**

National Prosecuting Authority, State's legal practitioners
Magwaliba & Kwirira, first accused's legal practitioners
Majena, Chugumba Danha Attorneys, second accused's legal practitioners
Maguchu & Muchada Business Attorneys, third accused's legal practitioners