

THE STATE
versus
GARIKAI KAMUPIRO

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 15 February 2024

Sentencing Judgment

Assessors: Mr Gweme

Mr Gwatiringa

A Mupini, for the State
M Hamandishe, for the accused

MUNGWARI J:

[1] In the early hours of 10 February 2023 at a farming compound known as Chidziva in Mvurwi the familiar sound of a quarrelling couple echoed through the quiet morning. The offender and her husband awoke from their drunken slumbers. They must have both been in foul moods. Upon hearing the commotion, Abigirl Ndege (Abigirl) the daughter of the deceased took it upon herself to intervene and sought the assistance of Jane Sixpense (Jane). Together, the two women approached the compound and endeavoured to pacify the feuding parties. Despite their efforts, the offender who had the upper hand in the scuffle and had the deceased cornered, remained unyielding. She proceeded to assault the deceased with a log.

[2] After disarming the offender Abigirl and Jane left believing they had diffused the situation but this was not the case as two other men Lazarus Chesango (Lazarus) and Receive Aliyoni (Receive) later passed and found the offender still belligerent and armed with logs. While they also disarmed the offender she persisted in her aggression. Tragically she went on to fatally assault the deceased multiple times all over the body with logs.

[3] The offender was subsequently arraigned before this court 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. While she did not dispute assaulting the deceased, she claimed to have done so in self-defence, alleging that she was under attack from the deceased. We however threw out that defence and convicted her after a contested trial. The proved facts of the matter were as alleged by the state as outlined above.

The law

[4] The initial stage in evaluating sentences in murder cases involves the court determining if the murder was committed in aggravating circumstances. Section 47(4) of the Criminal Law Code provides as follows:

“(4) A person convicted of murder shall be liable—
(a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
(b) in any other case to imprisonment for any definite period.”

[5] Based on the aforementioned provision, the court’s discretion is notably constrained when determining the sentence, it must impose following a murder conviction where it finds that the killing was committed in aggravating circumstances. The choice of sentence is predominantly swayed by the weight of the mitigating and aggravating factors submitted by the defence and the prosecution.

[6] In aggravation the prosecution’s counsel Ms *Mupini* implored the court to make a finding that the offender committed the murder in aggravating circumstances. In particular she urged the court to find that the murder was preceded and accompanied by physical torture. The court was referred to s 47(2)(c) the Criminal Law Code which provides that in arriving at an appropriate sentence for murder, it shall be taken as an aggravating circumstance if:

“the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim”

[7] Within the Zimbabwean criminal justice framework, torture is not considered a distinct offence. Instead, torture is intricately linked to various violent crimes such as assault and murder which have been codified. Many international human rights instruments offer definitions of

torture and provide criteria for identifying it. For instance, Article 1 of the UN Declaration Against Torture which Zimbabwe ratified, defines torture as:

“For the purpose of this declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons”¹

[8] Going by the definition provided, for an allegation of torture to be sustained, the pain and suffering must have been perpetrated by a public official. There must be evidence of intense pain and suffering from the prohibited act. Lastly the purpose of the torture must be to obtain information, confession or mere punishment of the victim. *In casu*, the offender is none of the above. Without satisfying that requirement, the provisions of s 47(2)(c) of the Criminal Law Code cannot come into play. Any suggestion therefore of physical torture by the State is misplaced. The offence was therefore not committed in aggravating circumstances as envisaged in that section.

[9] The state also suggested that the murder was premeditated as the offender had vowed to take vengeance against the deceased who was unarmed. This stance presents a contradiction by the state as during trial they urged the court to find the accused guilty of murder with constructive intent implying that the accused may not have deliberately set out to kill the deceased. Despite the state’s conflicting positions, it is crucial to acknowledge that this was a couple whose relationship was defined by constant quarrelling and haggling often degenerating into fights that would escalate and then reconcile, only for the cycle to be repeated.

[10] To many observers Lazarus and Receive included, it appeared to be just another one of their regular disputes and that is why after disarming the offender they left the scene. Tragically on this particular day it resulted in a fatality. Considering their tumultuous relationship, it could have been either the offender or the deceased who lost their life. The offender testified during trial that she has loose front teeth from their frequent fights. She would sometimes sleep outside

¹ Declaration on the protection of all persons from being subjected to torture and other cruel inhuman or degrading Treatment or punishment, GA res 3452(xxx) Annex,9 Dec 1975 against torture

in the cold fearing for her life. Given these circumstances it is difficult to conclude premeditation by the offender.

[11] What is not in dispute however is that arising from their tumultuous relationship she harboured intense resentment towards him which she expressed to anyone who cared to listen on the fateful day. From those feelings she failed to restrain herself and killed him. The court is convinced that her actions were primarily driven by her emotions rather than any calculated intent.

[12] Additionally, the use of a log in this instance cannot be considered aggravating as it was in their nature to chase after each other with whatever they could lay their hands on. If anything, it is consistent with an assault and suggests that the assault went awry.

[13] Section 47(5) of the Criminal Law Code provides that the list of aggravating circumstances enumerated in s 47 (2) and (3) is not exhaustive. The provision provides that a court may find other circumstances in which a murder is committed to be aggravating. In the circumstances of the present case, even though the state encouraged us to do so, we could not find any other aggravating factors besides those already mentioned. We accepted therefore that this murder was not committed in aggravating circumstances as envisaged by s (47)(2) and (3) of the Criminal Law Code.

[14] We also highlight at this point that the defence prayed for a custodial sentence of less than twenty years while on the other hand, the state prayed for a sentence of not less than twenty years. For this purpose, in mitigation, Mr *Hamandishe* for the accused submitted the following:

Personal circumstances

[15] We were informed that the offender is a sixty-four-year-old first timer. She was sixty-three years old when she committed the offence marking her as an elderly offender in the later stages of her life. Additionally, her health is compromised as she was diagnosed with HIV in 2017. The fact that she is a first-time offender and her age both suggest that she is less likely to reoffend. The probability of an offender reoffending is assessed based on various factors including past convictions and age, which can indicate an offender's predisposition to reoffend. Given that this is her first offence and considering the limited years she has left in life, we conclude that she is less likely to reoffend. This will be considered as a mitigating factor.

[16] On the other hand, we find it aggravating that the offender was violent towards the deceased from the early hours of the day until the afternoon when he eventually died. Whatever disputes the two had could not have been resolved through such prolonged violent acts. As fate would have it a life was lost on this day. A life lost can never be restored. It is the duty of the courts to uphold the sanctity of human life and the Constitution of Zimbabwe, 2013 in s 25 is clear that:

“The state and all institutions and agencies of government at every level must protect and foster the institution of the family and in particular must endeavour within the limits of the resources available to them, to adopt measures for-

(a) the prevention of domestic violence”

[17] This court laments the increasing number of women who perpetrate violence against their partners. What further aggravates this crime is that this was a senseless murder of a defenceless fifty-nine-year-old man. There was no reason for the offender to have assaulted the deceased in the manner she did. While she belatedly tried to suggest provocation by the deceased the evidence on record tells a different story. She was the aggressor. She was the provoker as she was intent on settling the previous day’s scores. She had the upper hand. This is supported by the way the deceased cowered from the presence of the offender and hid in the bedroom from her sight.

[18] From the circumstances under which the offence was committed, there is little doubt if any that the deceased died a painful death at the hands of the accused. The autopsy indicated that he had abrasions on the right lateral part of the occipital as well as on the left and right shoulder and thorax. He also had abrasions on the right cheek and on both legs. He also had extensive head injuries which made the doctor conclude that the cause of death was an assault which caused brain damage, severe brain oedema and severe head trauma.

[19] In aggravation Ms *Mupini* for the State furnished the court with a victim impact statement authored by Abigail, the deceased’s daughter. Abigail explained that she has been affected psychologically and socially by the loss of her father. She prayed that the court impose a just sentence on the offender. But even in the face of Abigail’s modesty, throughout the trial the offender showed no remorse for her actions. Her demeanor suggested a good measure of impunity on her part. It would have assisted the offender in mitigation if she had reached out and apologized to Abigail and other members of the deceased’s family. She clearly did not think it

worthwhile. As such the sentence which the court will pass must strive to pacify the victim's family that justice finally caught up with the perpetrator. The court has no doubt that a lengthy custodial sentence is called for in the instance. Accordingly, the offender is sentenced to **fourteen (14) years imprisonment.**

*National Prosecuting Authority, the State's legal practitioners
Sibanda and partners, accused's legal practitioners*