

THE STATE
versus
OWEN KATSANDE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 26 JUNE 2024

Assessors: *Mr Kunaka*
Mr Jemwa

Criminal Trial - sentencing judgment

M. Furidze, for the state
D. Zondesa, for the offender

MUTEVEDZI J: They say that a genuinely remorseful offender is usually artless. The one we are faced with here or at least his counsel was not. Often in criminal proceedings, a sleek and winding plea betrays a weak cause.

[1] After losing some obscure musical instrument(s) described in the papers only as a speaker at his home in Chitungwiza, the offender Owen Katsande teamed up with his friends who were named during the proceedings but were not before the court. They rounded up a number of people on suspicion of having stolen the instrument(s) in question. All of their suspects were taken to Owen's house which they had turned into a torture chamber. The offender and his goons finally cornered the deceased Robert Nyatsine who was the offender's nephew. They pinned the theft on him and fatally assaulted him. In fact, we were told that the assault took the greater part of the night preceding the morning when the deceased died. It was merciless.

[2] At his trial, on a charge of murder in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code), the offender was jointly charged with his brother Farai. There was no evidence that Farai had participated in the barbaric assault. We acquitted him in the end. The offender's defence was that the deceased came to his place of residence after he had already been fatally assaulted by unknown persons at a beerhall. He provided him with a place to sleep but he

unfortunately he died the following morning. The defence was preposterous. We threw it out and convicted him.

- [3] At the pre-sentencing enquiry we asked both counsel for the offender and the prosecutor to make submissions regarding the various issues prescribed in the Sentencing Guidelines. They did. We were intrigued by the colourful and often extravagant descriptions of the offender's circumstances made by his counsel. For instance, counsel submitted that:

“The Offender is not a very sophisticated person. He only made it up to grade seven in school. He eked his trade in piece work, characterised as menial, hard slogging manual work. In the bellows of social disadvantage he would lay his head, there too he would assimilate to the various coping mechanisms, legit or otherwise of his environment. He would recalibrate and fight his demons, despite his difficult life he stuck to it, no previous history of notoriety a model citizen by all accounts. The simple hard-working man eking a living swimming against the tide. He acquired a prized possession from the burdens of his hard labour, he proceeded to acquire a prized boom box, and the speaker was stolen.

I pause to reflect on what was stolen on that day, it was not a mere speaker, it was hours, days and months of hard slog. The sacrifices made for the accused to save enough to acquire the speaker. The failure of the accused to deal with the theft of his speaker and his social environment may explain why he could not act to the standard that ought to have acted in the circumstance surrounding the commission of the matter. His belief in vigilantee justice is a summation of his social circumstance and his environment.”

- [4] Like we said, the above hyperbole is barely necessary in legal proceedings. It may distort the meaning of critical issues that one may be trying to put across. We agree that it may have been important for counsel to put his client in good stead before the court. That unfortunately was not achievable by attempting to portray him as an angel who was trapped in the devil's grim web on his way back to heaven from earth, after a day's shift trying to save lost human souls when in reality the facts of this case are clear that the offender's list of transgressions may be longer than the paragraph used to glorify him.
- [5] The important considerations that we get from counsel's submissions above and which could have been said in one line, are that Owen is a first offender, has limited education and may be of limited financial means.
- [6] In addition, counsel also urged the court to consider that the offender is the one who alerted the police to the plight of the deceased. He further urged us to turn a blind eye to the offender's motive in informing the police. Once again, he was bombastic. In counsel's own words the issue was that: -

“The act by the accused shows respect for the sanctity of life and contrition in the realisation that one had crossed the line in the haze of anger, served with adrenalin and bad judgement.”

[7] But we do not agree. The offender went to the police not out of respect of the scaredness of human life or because he was contrite. When he got there, he deliberately withheld the truth from the police. A remorseful person is one who owns up to his wrong doing and takes responsibility for what would have happened. The offender did not. Instead, he chose to deflect responsibility from himself and led the police on a wild goose chase by telling them that the deceased had been assaulted by unknown assailants at a beerhall at Chikwanha shops. After diverting the police’s attention from himself, he vanished from the area. He only resurfaced a year later. His arrest was as fortuitous as they can be. The police identified him as a suspect for this murder after he had been detained for public drinking. It would be irresponsible of us to credit the offender with anything in such circumstances.

Aggravation

[8] In aggravation the prosecutor argued that this was a premeditated and senseless murder which could have been avoided if the offender and his co-conspirators had not decided to take the law into their own hands.

[9] In addition, the state made the point that there were multiple victims and multiple incidents involved in this murder. The prosecutor also said the offender and his team contravened s 93(1) of the Code when they kidnapped three victims in two separate incidents. Undeterred by their already reprehensible conduct they had the temerity to kill the deceased. She rounded her submissions by alleging that there is evidence of prior planning as indicated by the fact that just before the murder the offender had kidnapped two other people. They then pursued the deceased, apprehended and tortured him before he died.

The law

[10] In the sentencing of offenders convicted of murder, the practice is fairly straight-jacketed. This court has repeatedly stated, in fact so repeatedly that there is no longer any need to refer to any authority for it, that the law restricts a court to three options in instances where it determines that the murder was committed in aggravating circumstances. The inquiry as to whether or not a murder was committed

in aggravating circumstances is therefore an indispensable one and must be the precursor to every attempt at sentencing a murder convict.

[11] Where the court determines that the murder was in aggravating circumstances, it can only impose either a determinate prison term of not less than twenty years, life imprisonment or capital punishment. Where it however does not find aggravating circumstances, it can resort to its full sentencing discretion as guided by the law.

[12] *In casu*, the prosecutor raised a number of issues which she argued amounted to aggravation. The first related to premeditation. It is an aspect often mentioned by prosecutors when they scrounge around to find something that may aggravate a murder which they find particularly reprehensible and wish to see the offender send to the gallows. Much as the factor appears to be a case of shooting fish in a barrel, it actually represents a very long shot at aggravation. I conclude so because of the way it is couched in s 47 (4) of the Code. That section provides that: -

“(3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that: -

(a) the murder was premeditated”

[13] What the above means is that premeditation, standing on its own, cannot aggravate a murder. For it to, it must be shown that either there is nothing that lessens an offender’s moral blameworthiness or that there are other aggravating circumstances to which it may be cojoined. Here, the prosecutor did not motivate us to take either of the options. More critically, we did not find any evidence of such premeditation. The evidence we have is that the offender and his gang apprehended the deceased with the objective of recovering the stolen musical instrument. They did not in our view, specifically set out to murder the deceased. The conviction of the offender was based on his realisation of the real risk or possibility that death could ensue from their conduct in continuously assaulting the deceased. It is therefore off target to allege premeditation in this case.

[14] The allegation of there being multiple victims appears equally misplaced. The multiple victims referred to in s 47(2)(b) of the Code must be of murder and not any other crime which the offender may have committed in the course of the killing. In this case, there was a single homicide.

[15] The third aspect which the prosecutor raised is that the murder was committed in the course of a kidnapping. S 47(2) of the Code states that a court shall regard it as aggravating that: -

“(2) ...
(a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)-
(i)...
(ii)...
(iii) kidnapping or illegal detention”

[16] What is poignant from the provision is that it is not necessary for prosecution to show that the accused was charged with or convicted of any of the crimes mentioned therein. It suffices that the evidence shows that such crime was committed. Not only that. The provision is so permissive that it allows a court to hold that the murder was committed in the course of, or in connection with, or as a result of the commission of a kidnapping (or any of the stated offences) in circumstances where not all the essential elements of the offence are present. It is enough that an act which makes up only one of the essential elements of the offence is established by the facts of the case.

[17] In regards to the torture alleged by the prosecutor our view is that such allegations are unverifiable. What can be ascertained is the torture which the witnesses Ali Yosni and Christopher Mlauzi were subjected to. No one witnessed the assault on the deceased to prove that he was tortured before he died. It therefore cannot constitute aggravation in this case.

[18] It was however shown in this case that the offender and his gang detained the deceased at their house for hours on end. It is obvious that they did so against the deceased's will. That detention constitutes an essential element of the offence of kidnapping as defined in the Code. In that regard, we agree that the act constituted an aggravating circumstance as envisaged by the law. It is our finding therefore that because of that this murder was committed in aggravating circumstances.

[19] Having found the existence of aggravating circumstances, it follows as indicated earlier, that the court is restricted to the three options of a sentence of imprisonment of at least twenty years, life imprisonment or the death penalty. In choosing which amongst those three to take, the court is persuaded by the

circumstances of the offender. He is youthful. His actions may have been driven by the zeal and the boundless adrenalin which comes with that age group. He had lost something which he considered valuable. In his mistaken belief and like his counsel put it, he believed that he could resort to vigilante justice to recover his prized possession. He killed his own nephew in that the deceased's mother was a sister to the offender's father. It must be something that haunts him intensely.

[20] What the offender however did after the murder beats us. He disappeared from the scene completely. He did not even attend the deceased's funeral although the police had not yet profiled him as one of the suspects in the murder. He was only apprehended a year later. It does not speak to the contrition card which his counsel attempted to play at the start of his submissions in mitigation.

[21] Given the above, it is however unlikely that the offender will reoffend if given a sentence that seeks to both punish and rehabilitate him at the same time. It is against that background that we are convinced that the minimum possible term of imprisonment will meet the justice of this case. That minimum possible is twenty years imprisonment as already explained. For those reasons **the offender is sentenced to 20 years imprisonment.**

MUTEVEDZI J:.....

National Prosecuting Authority, state's legal practitioners
Manase & Manase, offender's legal practitioners