THE STATE
versus
TAFADZWA SHAMBA
and
TAPIWA MAKORE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 12 July 2023

Assessors: Mr Chakuvinga
Mrs Chitsiga

Criminal Trial – Sentence

A Masamha with *D H Chesa,* for the State
M T Mavhaire, for the 1st accused
M E Midzi, for the 2nd accused

MUTEVEDZI J: Both accused persons stand convicted of the gruesome and repulsive murder of a seven year old boy named Tapiwa Makore.

We wish to begin by acknowledging that Mr *Mavhaire* with Ms *Chivandire* and Mr *Midzi* counsel for accused 1 and 2 respectively and Mr *Masamha* with Mr *Chesa* for the prosecution all handled this protracted and at times very trying trial admirably. On 29 June 2023 when the court handed down judgment all the parties requested time to prepare their submissions in mitigation and aggravation. We allowed the requests. Our decision to do so was partly informed by the criticism often levelled at all the role players in criminal trials including judges and magistrates that so much energy is expended in dealing with the guilt or innocence of accused persons but once the accused is convicted the process leading to his/her sentencing is so rushed that it becomes nothing but an arbitrary and unreasoned process. In *S* v *Dlamini* 1992 (1) SA 18 (A), NICHOLAS AJA expressed the same concerns when he remarked that:

> "It has been observed that, whereas criminal trials in both England and South Africa are conducted up to the stage of conviction with scrupulous, time-consuming care, the procedure at the sentencing stage is almost perfunctory."

In England itself, author R.M. Jackson in his book *'The Machinery of Justice in England'* (3rd ed) comments that:

> "An English criminal trial, properly conducted, is one of the best products of our law, provided you walk out of court before the sentence is given: if you stay to the end, you may find that it takes far less time and inquiry to settle a man's prospects in life than it has taken to find out whether he took a suitcase out of a parked motorcar."

These concerns are also widespread in Zimbabwe. We take full heed that sentencing is an equally if not more important stage of the criminal trial as the determination of guilt itself. Once more we are indebted to all counsel for the effort they put in their attempt to guide the court in its determination of a just and appropriate sentence in this case. Unfortunately, we were at the same time taken aback by some of the submissions which were made particularly by counsels for the accused persons. As will be illustrated later some of the aspects which they implored the court to base its sentence on are no longer part of our law. We do not doubt any of the counsels' commitment and diligence. It is possible that they got fatigued along the way. In psychology there is a concept known as vicarious trauma. It is generally defined as the emotional residue of exposure to traumatic stories and experiences of others through one's work. It may result from witnessing fear, pain, and terror which other people have experienced. We have no doubt that some of the gory detail of this murder which bordered on the surreal may have left or will leave psychological scars on some of the participants in the trial. Because they do not fall under the law, the court has no expertise on these issues but it is said that after listening to and literally living with the horrific stories that usually accompany murderous violence, everyone involved may require counselling to deal with the secondary traumatisation.[1] Judicial officers are however often trained to remain dispassionate and to ensure that the harrowing experiences do not rub on to the decisions they make in court and in their social lives.

Accused 1, Tafadzwa Shamba is aged forty years. He has a family comprising of his spouse and two children. The elder child is already a major whilst the younger one is only ten. It was claimed that he is contrite and remorseful for the incomprehensible loss he caused to the deceased's family. Accused 2 Tapiwa Makore (snr), is aged sixty years. He is also a family man with a wife and three children who are all majors. These personal circumstances of both accused, as will be illustrated, really count for very little if anything.

[1] https://www.cdcr.ca.gov/bph/wp-content/uploads/sites/161/2021/10/Trauma-Fact-Sheets-October-2021.pdf

Perhaps the real starting point is that counsel for the first accused urged the court to have regard to what she referred to as s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Code). She reproduced it verbatim and alleged that it said:

> "Subject to s 338, the High Court-
>
> (a) Shall pass sentence of death upon an offender convicted by it of murder:
> Provided that, if the High Court is of the opinion that there are extenuating circumstances or if the offender is a woman convicted of the murder of her newly born child, the court may impose
> (i) A sentence of imprisonment for life; or
> (ii) Any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case."

At the hearing we quizzed counsel as to the source of that provision. She sought to retract it. We allowed her to do so. In our consideration of the submissions however we realised that it was impossible to sever that part without rendering the greater part of her submissions useless. Counsel for accused 2 equally dedicated a sizeable portion of his submissions to what he termed applicable laws. Among the laws he dealt with is some s 47(2) of the Criminal Law (Codification and Reform) Act. We copied it from his submissions and reproduce it here in full. It states that:

> "Subject to s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a person convicted of murder shall be sentenced to death unless –
>
> (a) The convicted person is under the age of 18 years at the time of commission of the crime; or
> (b) The court is of the opinion that there are extenuating circumstances; in which event the convicted person shall be liable to imprisonment for life or any shorter period."

Once more that reference was not severable from the rest of the submissions because throughout, there was reference to extenuating circumstances. Legal practitioners must, without a choice, keep abreast of developments in the law. It may be unforgivable for a legal practitioner to appear in court and premise his/her arguments on legislation which has long been repealed. Judges and magistrates depend, for the production of well-reasoned judgments, sentences and other decisions, on the input of legal practitioners. Where that input is erroneous the danger of miscarriages of justice is heightened. In this case, the contents of both s 337 of the Criminal Procedure and Evidence Act cited by counsel for accused 1 and s 47 (2) of the Criminal Law (Codification and Reform) Act referenced by counsel for accused 2 do not exist. I did not bother to check but my suspicion is that they were part of the law before the advent of the Constitution of Zimbabwe, 2013 which necessitated various amendments to our criminal law. Such amendments included the substitution of the then s

47(2) of the Criminal Law Code and ss 337 and 338 of the Criminal Procedure and Evidence Act by Part XX of Act 3 of 2016 and by s 43 of Act 2 of 2016 respectively. As a result of that amendment, the principle of extenuating circumstances which hitherto had been the bedrock of sentencing in offences which attracted capital punishment became obsolete. It is no longer part of our law. Legal practitioners and prosecutors who deal with murder trials may do themselves, their clients and the courts a lot of good if they quickly forgot about it.

Counsel for the first accused right from the onset was convinced that this a case where her client deserved imprisonment in the region of 18 years. She did not pluck it from nowhere. Rather she referred the court to numerous decisions which included among others the South African case of *Machaba & Anor* v *S* [2015] 2 All SA 552 in which the South African Supreme Court of Appeal granted an accused's appeal against the sentence of life imprisonment and substituted it with 20 years imprisonment; *S* v *Collen Makura* HH 100/2012 where an accused who had stabbed a fellow imbiber in a bar in the chest was sentenced to 18 years imprisonment; *S* v *Vasco Da Gama Ngole* HB 148/11 in which the accused was sentenced to 15 years imprisonment for murdering his mother-in-law and *S* v *Julius Dabeti* HMA 53/18 where the accused had stabbed the deceased twice above the ankle and on the collar bone. What counsel must have missed was that the majority of those cases were decided before the coming into effect of the Constitution of Zimbabwe 2013 which ushered in the concept of murder committed in aggravating circumstances. That marked a paradigm shift in the sentencing of offenders convicted of murder. Whereas previously an accused had to show the existence of extenuating circumstances described by author G. Feltoe in his work *A Guide to the Criminal Law of Zimbabwe*; 3rd Edition, 2004 citing with approval the explanation of HOLMES JA in *S* v *Letsolo* as facts pertaining to the commission of the crime which diminish the moral culpability of the accused as opposed to his legal culpability. On the other hand the new regime requires an accused to show the absence of factors which tend to increase his moral blameworthiness. Further, the role of prosecution was equally reversed. In the past prosecutors seeking the imposition of capital punishment were required to show the absence of extenuation but now they are expected to show the existence and presence of aggravating circumstances.

In *S* v *Emelda Marazani* HH 192/23, I remarked that counsel's views on what he/she considered to be an appropriate sentence cannot be generalised because the new sentencing practice in murder cases appears to be rigidly regulated by statute. The sentences for murder

are entirely dependent on whether or not the crime was committed in aggravating circumstances.

S 47 (4) of the Criminal Law Code states that:

> "(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."

As is clear, where a court finds that a murder was committed in aggravating circumstances, its sentencing discretion is heavily fettered. The legislature on one hand left room for the court to exercise only a modicum of discretion for fear of giving the courts a free run on the issue and on another in an attempt to comply with s 48(2) of the Constitution which provides that a law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and that law must permit the court a discretion whether or not to impose the penalty. Where aggravating circumstances are shown to exist, the court exercises its discretion within a rigid framework set by the law. It can only impose either the death penalty or life imprisonment or a definite period of imprisonment which is not less than twenty years. The court's more flexible discretion is restored in instances where the murder was not committed in any aggravating circumstances. In such cases the court cannot impose the death penalty or life imprisonment. It must impose any definite term of imprisonment. There is therefore no gainsaying that it is neater, wiser and even necessary that any motivation concerning the sentencing of an accused convicted of murder must begin with a discussion on whether or not the murder was committed in aggravating circumstances. It is self-defeating for example to argue that although the murder was committed in aggravating circumstances the factors which lessen an accused's moral blameworthiness outweigh the aggravating circumstances. Such considerations are applicable in the sentencing of offenders convicted of crimes other than murder.

The next logical step is to ask what constitutes aggravating circumstances. The Criminal Law is now largely codified. The courts only turn to the common law in very few instances where there exist gaps in statute. I am vindicated in my view by the provisions of s 3 of the Criminal Law Code which prescribes that:

> "**Roman-Dutch criminal law no longer to apply**
> (1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply

within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.
(2) Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of
(*a*) the criminal law referred to in subsection (1); or
(*b*) the criminal law that is or was in force in any country other than Zimbabwe."

In *S* v *Tungamirai Madzokere* SC 74/12 the Supreme Court was of the view that the language used in s 3 was deliberately wide to oust as much of the common law as is possible and was intended to make the Code and other statutes the predominant sources of the criminal law in Zimbabwe with the common law providing a fall-back position to cover any possible gaps in the law.

In the same vein, the considerations which a court must take into account when determining the existence or otherwise of aggravating circumstances in any murder are specifically stated in subparagraphs (2) and (3) of s 47 of the Criminal Law Code. They state as follows:

"**47 Murder**
(1) …
(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—
(*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 of 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) an act of insurgency, banditry, sabotage or terrorism; or
(ii) the rape or other sexual assault of the victim; or
(iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or
(iv) 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
(*b*) the murder was one of two or more murders committed by the accused during the same episode; or was one of a series of two or more murders committed by the accused over any period of time; or
(*c*) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim; or
(*d*) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.
(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; or
(*b*) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled.

(4)…
(5) For the avoidance of doubt, it is declared that the circumstances enumerated in subsections (2) and (3) as being aggravating are not exhaustive, and that a court may find other circumstances in which a murder is committed to be aggravating for the purposes of subsection (4)(*a*)."

Apart from the listed factors the court by virtue of subparagraph (5) of the same section is given the latitude to extend the list of aggravating circumstances to include any other factors it may deem so. Equally important to note is that the listed factors are independent of each other. It is therefore not a requirement for the court to find a combination or a series of factors for it to determine that the murder was committed in aggravating circumstances. The existence of a single factor suffices and overrides any mitigation, no matter how weighty it may look, which an accused may present.

When it still mattered in our law, the question of extenuating circumstances was literally a matter of life or death. It was held then in *S* v *Jaure* 2001 (2) ZLR 393 (H) that a murder trial concluded with the finding on whether or not there were extenuating circumstances. It meant that both the judge and the assessors had to participate in that regard. The question was thus decided by the majority of the court even if it meant that the judge was in the minority. In my view, the question of whether or not there are aggravating circumstances in a murder are just the flip side of extenuation. Aggravating circumstances are inverted extenuation. I am convinced therefore that in the present set up, a murder trial ends with a finding of whether or not the murder was committed in aggravating circumstances. Just like then the question of aggravating circumstances must be a decision of the majority of the court. The assessors must participate in that enquiry and can actually outvote the judge. Traditionally, the onus to prove any factor in aggravation has always been the responsibility of prosecution. Extenuation placed the onus on the accused to prove on a balance of probabilities that there were those factors which lessened his moral culpability. Conversely the presence of aggravating circumstances in a murder must be proved by prosecution. The above interpretation accords well with subs (s) (2) and (3) of s 10 of the High Court Act [*Chapter 7:06*].

Lastly, the operation of s 47(4) is made conditional to ss 337 and 338 of the Criminal Procedure and Evidence Act. The two sections speak to the penalties imposable for the offence of murder and the categories of people on whom capital punishment cannot be meted respectively. They state that:

"**337 Sentence for murder**

(1) Subject to section 338, the High Court may pass sentence of death upon an offender convicted by it of murder if it finds that the murder was committed in aggravating circumstances.
(2) In cases where a person is convicted of murder without the presence of aggravating circumstances, or the person is one referred to in section 338(*a*), (*b*) or (*c*), the court may impose a sentence of imprisonment for life, or any sentence other than the death sentence or imprisonment for life provided for by law if the court considers such a sentence appropriate in all the circumstances of the case.
[Section substituted by section 43 of Act 2 of 2016]
338 Persons upon whom death sentence may not be passed
The High Court shall not pass sentence of death upon an offender who—
(*a*) was less than twenty-one years old when the offence was committed; or
(b) is more than seventy years old; or
(c) is a woman."

In Zimbabwe, the death penalty cannot be passed on anyone who was less than twenty-one years at the time the murder was committed or is more than seventy years old. The reckoning of the ages is critical. In the former instance what matters is the age of the offender at the time of commission of the offence. For illustration purposes, what that means is that if an accused commits murder whilst he is aged twenty years but is thirty years at the time he is convicted and sentenced, the death penalty cannot be imposed on him. The latter scenario has no relationship to the time that the offence was committed but has everything to do with an accused's age as at the date of sentence. If he is more than seventy years at that time the death penalty is inapplicable. The rationale for that law is not difficult to see. It seems to be that commission of murder by someone who is below twenty-one years is driven by immaturity whilst sentencing someone above the age of seventy years to death may be deemed illogical in that the person is already in the afternoon of his life. The Constitution of Zimbabwe, 2013 in its preamble mentions God the Almighty on two separate instances depicting Zimbabwe as a country whose values are anchored on the Christian religion. That in a way betrays the magic of the number seventy. Christians believe that the Bible allots seventy years as a man's life and that anything beyond that is the Lord's benevolence. Lastly, the death penalty is not applicable where the offender is a woman. Presumably the rationale is that the rate of recidivism is less in women than in men. We are fortunate as a jurisdiction that in Zimbabwe, people are defined by the genders which are ascribed to them at birth. In other countries which have liberalised gender definitions, those who wish to are allowed to change genders midstream. The definitions are so fluid that some people claim to be gender neutral. In those communities gender is not neatly categorised on the basis of the binary lines

of man and woman.[2] If ever those gender variations reach our shores I envisage a raging Armageddon between medicine and the law. As it stands however, the issue is clear cut and causes no difficulty.

Before applying all the principles discussed above to the case at hand, I wish to also state that counsel for accused 2 urged the court to consider that his client played a minor role in the commission of the offence. That in the court's view is yet another erroneous interpretation of the law. The error may have stemmed from the court's pronouncement in its judgment that the 2nd accused had been found guilty of murder as an accomplice. That pronouncement, was a distinction without a difference especially if regard is had to two critical provisions of the Criminal Law Code. First s 197 states that:

> "**197 Liability of accomplices**
> (1) Subject to this Part, an accomplice shall be guilty of the same crime as that committed by the actual perpetrator whom the accomplice incited, conspired with or authorised or to whom the accomplice rendered assistance."

The provision is unequivocal that an accomplice and an actual perpetrator commit the same offence and are convicted of the same crime. The court's declaration that the 2nd acused stood convicted of murder as an accomplice was only for purposes of illustrating the satisfactory discharge of the evidentiary burden borne by prosecution. It did not and does not mean a distinction between the liabilities of the two offenders. Second, s 202 provides that:

> "**202 Punishment of accomplices**
> Subject to this Code and any other enactment, a person who is convicted of a crime as an accomplice shall be liable to the same punishment to which he or she would be liable had he or she been an actual perpetrator of the crime concerned."

If there was any misconception as to how an accomplice must be punished, then the above provisions exorcise that.

On their part the prosecutors urged the court to find that the crime was committed in aggravating circumstances. They argued that the accused had committed the offence for ritual purposes, had preplanned it, sought to cover their tracks once they had committed it and that the boy died a painful death. They also implored the court to note that the first accused had been convicted of murder with actual intention with the second accused being convicted as an accomplice. Whilst I have already dealt with the misconception relating to accomplices and actual perpetrators I note that prosecution wrongly ascribes to the court the pronouncement that the first accused was convicted of murder with actual intent when in fact he was simply

[2] https://www.medicalnewstoday.com/articles/types-of-gender-identity#history

convicted of murder. The court deliberately formulated its verdict in the form in which it appears in conformity with the Supreme Court's finding in the case of *Tafadzwa Mapfoche* v *The State* SC 84/21 where, commenting of the construction of s 47(1)(a) and (b) it said:

> "Thus, under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under 47(1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section. It further appears to me that the distinction between a conviction of murder with actual intent and murder with constructive intent, which under the common law greatly influenced the court in assessing sentence is no longer as significant or material as it was. The sentence to be imposed for murder, committed with the intent specified in s 47(1) (a) or (b), has also been codified ..."

A conviction of murder with whatever species of intention on its own does not deal with the question of the presence or absence of aggravating circumstances. Those have to be dealt with in the manner already discussed above.

Whether this murder was committed in aggravating circumstances

The manner in which this murder was committed shows that the accused persons must be inherently wicked people. They showed no morality, no sentiment and no conscience. They approached their task to kill the boy with the animated fixation of a predator. Anyone acquainted with how the events leading to the death of the deceased were reconstructed during this trial would be forgiven to make the conclusion that the two accused are men who were born in violence, raised in it and were hardened by it.

1. We held as a matter of fact in our judgment, that this murder was an unconscionable act of mortal violence which betrayed that the objective of the killers was to perform a ritual ceremony with some parts of the deceased's body. We equally held that the evidence as depicted by accused 1's confession on how the crime was perpetrated illustrated many days if not weeks of careful planning. The discussion between the two accused on their plans was not an overnight one. They first held it in the 2nd accused's garden. They abandoned it after they were interrupted by some people who had turned up uninvited. They picked it up again days later and abandoned it once more. We heard that on yet another occasion, they finally agreed to kill the boy. In all those discussions they concretised their plans in incremental phases. They identified exactly who they wanted to kill and how they would execute their plan. Once the angels of death had marked seven year old Tapiwa Makore there was no going back. Against that background we entertain no apprehension that this is a murder which was premeditated as contemplated by s 47(3) (a) of the Criminal Law Code.

2. The deceased was taken from his parents' garden around 1500 hours on the day he disappeared. He was locked up in accused 2's house until about midnight of the same day. Roughly calculated the period during which he was locked in the house against his will amounts to about eight hours. In its basic sense, kidnapping involves abducting and holding someone captive against his or her will or confining that person to a controlled space for an illegal purpose. Section 47(2)(a)(iii) specifies that it shall be an aggravating circumstance if the murder was committed in the course of, or in connection with, or as the result of, the commission of kidnapping or of any act constituting an essential element of kidnapping regardless of whether the accused was charged with or convicted of the kidnapping. Although it is not a requirement for an accused's actions to satisfy all the essential elements of kidnapping, in this case they did. The abduction and detention of the child for many hours clearly brings both accused within the confines of the relevant provision under s 47(2). They detained the child against his will. Their motive was to kill him thereafter.

3. Section 47(2)(c) adds to the list of aggravating circumstances, a murder which is preceded or accompanied by physical torture inflicted by the accused on his victim. In this case, the accused persons forced the deceased to drink an illicit brew hours before they murdered him. Although it appears distinguishable from physical torture, to us, the distinction is blurred. Our understanding of the purpose of torture is that it is used to suppress the victim's resolve, destroy any resistance and make them submit to the torturer's demands. Ultimately every form of successful torture results in the victim breaking down mentally. Torture's ultimate effect is psychological damage to the victim. The *Wikipedia* defines the use of psychotropic or other drugs to punish or extract information from a person as pharmacological torture.[3] It says the forced use of drugs and other stimulants is intended to force compliance by causing distress, which comes through various forms such pain, anxiety, psychological disturbance, immobilization, or disorientation. To us therefore, it should not matter whether the torture is physical or otherwise. As long as the aim of the perpetrator is to achieve the subjugation of his victim, the act must be regarded as a circumstance which aggravates a murder. In any case, even if we are wrong in our conclusion of equating pharmacological torture to physical torture, the law allows a court to find other circumstances in which a murder is committed as aggravating. Our view is

[3]https://en.wikipedia.org/wiki/Pharmacological_torture#:~:text=Pharmacological%20torture%20is%20the%20use,disturbance%2C%20immobilization%2C%20or%20disorientation.

that where an accused forces someone to take or drink an intoxicating or other mood altering substance for purposes of subduing that other person to allow the perpetrator to easily carry out the murder or to avoid detection, it must be regarded as an additional circumstance which aggravates the murder. In this case, the accused persons heavily drugged the deceased with home brewed illicit beer. He became completely sedated. Both accused must have been aware of the brew's toxicity and potency particularly on a seven year old. In reality they poisoned him into a comatose state of drunkenness. The number of hours which he either slept or passed out shows that the brew may have had the potential even to kill the child.

4. When the boy was dead, the accused defiled his body. They severed it by neatly hewing off the head, both hands and both legs. In short they mutilated the corpse. They hid most of the body parts some of which were later recovered in different locations. As is common cause, the deceased's head has not been found up to now. Those acts could not have been done out of the accused's sadism. We are convinced that it was part of the ritual to be fulfilled. We therefore further hold that the deliberate mutilation of a corpse after a murder for ritual purposes is itself as much a factor which aggravates the murder as killing for ritual purposes in the first place is. The hiding of evidence is similarly reprehensible. At a murder scene, the most important piece of evidence is the corpse. From our experience, it can and often does reveal a lot. The prosecution were right to allege that the accused were determined to cover their tracks. The cause of the deceased's death could not be determined because of the state of mutilation of the body and that the head could not be found. Had it not been for the monumental mistakes that the accused made along the way, it could easily have been impossible for the state to prove the accused's participation in the murder. It only shows the centrality of the corpse and the dangers wrought by a perpetrator who seeks to destroy evidence.
5. That the accused killed a minor need no explanation. I said earlier that it takes proof of the existence of only a single factor for a murder to be considered as having been committed in aggravating circumstances. But as if to show that the accused were the sickest of a very sick lot, there isn't one aggravating factor in this case but a multiplicity of them as discussed above. We find therefore that this is a murder which was committed in aggravating circumstances some of which were so vile that they nauseate any right thinking person.

As required by law, where that happens, there are three penalties from which the court can choose the sentence to impose namely death, life imprisonment or a definite prison term not less than twenty years.

Counsel for both accused 1 and 2 urged the court to shun imposing the death penalty whilst the State advocated for it. In addition to the submissions already discussed, counsel for accused 1 requested the court to consider that the 1st accused person is an ardent follower of the *shona* tradition. As such he believes in the theory of avenging spirits commonly called *ngozi.* As a result he is firmly of the conviction that he and his family will for a good measure be haunted by the boy's avenging spirit. The only way to deal with the avenging spirit, so it was argued, is to appease it. The 2nd accused therefore asked for a lighter sentence which would allow him to carry out his traditional obligations in that regard.

The court notes that the *avenging spirit* is a traditional belief system which affects the psyche of many Zimbabweans in one way or another. Whilst a significant portion of the population believes it works, many others believe it's a subterranean discourse which has no place in their lives. A third category comprises of those who are ambivalent about the avenging spirit's place in the contemporary set up. The court's position is that we do not need to debate what motivates such beliefs because in the court's view whatever one believes in, the important consideration is that the avenging spirit is an occult belief which has no place in the criminal law particularly where an accused implores the court to note that apart from judicial punishment he/she will additionally be punished by the avenging spirit. At best we can only regard it as urban legend narrated by a learned legal practitioner. We refuse to be persuaded by it.

Moratorium on executions of persons on the death row

Counsels for both accused were collectively of the view that the court must take judicial notice that there is a *defacto* moratorium in the execution of prisoners on death row. They said from their research the last executions were carried out in 2005 ostensibly because there is a vacancy, which seems to have no takers, for the job of hangman. We asked them at the hearing to back those claims with official confirmations of the issues. They both couldn't and ultimately conceded that these were stories they mainly gathered from the grapevine. Our courts are courts of law. They do not make decisions on the basis of media reports. What is official is that capital punishment is still very much part of our penal code. In fact it is permitted by the Constitution itself. Critically though, it must be appreciated that the courts

do not involve themselves in the execution of judicial punishments. The doctrine of separation of powers which is so central in our constitutional democracy ascribes that function to the Executive. The courts' role ends immediately after punishment is pronounced. Just like judicial officers do not concern themselves with how prisoners serve their stipulated periods of imprisonment there is equally no reason for any judge to pry into whether a prisoner sentenced to death has been executed or not. The court once again refuses to be swayed by that. It is a futile argument.

It remains unclear to us why the accused decided to carry out this heinous act. If the two's drinking habits were anything with which to assess their business, then it was doomed to fail from the onset. A business person who abandons his work as early as 0900 hours and goes to partake illegally brewed highly intoxicating substances, drinks himself to a standstill in the vain hope that he will miraculously see his vegetables thriving without more is an inveterate failure. Their plan smacked of businessmen who were at the end of their wits.

It is true that the two accused are going to suffer a resentment which will rankle across generations even amongst their family members. No one can be blamed for resenting them. Human beings are creatures of emotions which bristle with prejudices, which are motivated by pride and vanity.

We considered the three options available to us. Any determinate period of imprisonment no matter how lengthy appeared not to make sense not because of the seriousness of the crime but because of the level of cruelty exhibited during its commission. If the accused had only murdered the boy and left it at that stage, we were ready to blend our sentence with a measure of mercy. They did not as already indicated. They were merciless and unapologetic. They were brazen because they actually went about drinking their favorite illicit brew soon after the murder like nothing had happened. Up to now, they have not seen it fit to offer a hand of apology to the deceased boy's parents. The accused have not even considered it important to disclose what happened to the boy's head to allow the parents to find closure. The community in which this murder occurred is tormented. It equally needs closure. In modern day criminal justice victims of crime are more than witnesses who are simply obliged to testify in court and are forgotten. They have the right to be assisted by state actors to recover from their traumatic experiences. The rights of offenders are important and must be respected. We cannot however develop criminal law jurisprudence which is perceived to subordinate the rights of victims to those of the wrong doers. In this case, the starting point for the deceased's parents was their boldness to give evidence in court against

their son's killers. The court will play its role in that regard by frowning at the accused's conduct through the sentence it will pass. The issue is compounded by the fact which we have already stated that the parents are not the only victims in this case because there was mass or structural victimization of an entire community. Both the deceased boy's parents on one hand and their entire community on the other have been crucified to this recurring nightmare. We therefore hope that everyone works together to make that community a better place going forward. The deceased's parents particularly, must endeavor to accept the sage advice that when a boy realizes that he is going to have a physical disability for life he is choked at first but after he gets over the shock, he usually resigns himself to his fate and then becomes as happy as any other boy.

It was with all the above considerations in mind that we reached the difficult conclusion that the accused's wickedness cannot be exceeded by anything else. In the mush of their decayed brains they saw themselves becoming very rich businessmen through shedding the blood of an innocent child. The demon which drove Tafadzwa Shamba and Tapiwa Makore to commit this murder is relentless and could not be stopped. It can only be neutralized by death. Our hands are therefore bound. Accordingly it is directed that:

Both accused shall be returned to custody and that the sentence of death be executed upon each of them according to law.

National Prosecuting Authority, State's legal counsels
Chivandire Mavhaire & Zinto Law Chambers, first accused's legal practitioners
Mlotshwa Solicitors, second accused's legal practitioners