THE STATE
versus
DIVINE CHIRISA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 31 January 2023, 01 February 2024

Assessors :Mr Barwa
:Mr Gwatiringa

Criminal Trial – Sentence

A Mupini, for the state
G F Dzitiro, for the accused

MUTEVEDZI J: To him the name Divine is an antiaptronym because it means exactly the opposite of what he did in this case. Divine means Godly or seraphic yet the offender epitomised the devil himself. The deceased, Smart kamupira was sleeping peacefully with his wife and children when the grim reaper visited him. Only that on this occasion it was not the berobed skeleton holding a scythe but real human beings whom he regarded as colleagues in the industry they survived on. After a misunderstanding, the offender Divine Chirisa and his fugitive friend killed Smart in cold blood. His wife and possibly his children watched in horror as this happened. The attack occurred on 22 March 2021 in some village in Mudzi. The offender and his friend had ambushed the deceased at his homestead ostensibly to follow up on payment for two grams of gold which they had given to the deceased. He had no money to give them. They demanded, in lieu of the money, a bucketful of marijuana. When the deceased couldn't provide that either it became his waterloo. His assailants struck him repeatedly on the head with a wooden axe handle. The deceased's wife escaped to seek help from his brother. When the brother returned in the company of neighbours, it was too late because the offender and his colleague had already fled and the deceased lay mortally wounded in his bedroom. His young children were with him possibly completely traumatised by the events to the extent of being oblivious that their father was struggling through his final moments.

At his trial, the offender denied the crime. His protestations centred on apportioning the blame for killing the deceased on Persuade Svovera his fugitive friend. We rejected his defence and found him totally liable for the deceased's death. The evidence which we accepted was that he had been accompanied by that friend to the deceased's homestead. It was the offender who knew the deceased and had frequented the deceased's homestead more than the fugitive friend. It was him who had taken the leading role in the negotiations for the money and who had suggested the bartering of the gold with marijuana.

In her submissions regarding sentence, counsel for the offender correctly observed that the starting point in the sentencing of a murder convict is the determination by the court of the presence or absence of aggravating circumstances as envisaged by s 47(4) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]* (the Code). She went further to indicate that those factors constituting aggravation are listed in subsections (2) and (3) of s 47. She was once again correct serve to say that the list suggested therein is not exhaustive. The court is allowed to find and determine as aggravation, other factors outside the listed ones. Counsel then suggested that from the facts of the case, no aggravating circumstances existed in this case. But as will be illustrated she could not have been correct.

In contra distinction, the prosecutor appeared not to start from the same premises as counsel for the offender. In her submissions, she made no mention of the requirement that the court must determine the existence or otherwise of aggravating circumstances in the commission of the offence. This court has made pronouncements in a number of authorities that it is impossible to ignore the examination of whether or not a murder was committed in aggravating circumstances when sentencing an offender for that crime. It was important therefore for the prosecutor to have commenced her submissions from s 47(4) of the Code. She however stumbled upon some of the pertinent issues because in some paragraphs of her submissions she makes mention of factors which she argued constituted aggravating circumstances in this case. She mentioned that the offender and his colleague had premeditated the commission of the offence and that the murder was committed with the use of a weapon. She also made extensive reference to the Criminal Procedure (Sentencing Guidelines) Regulations, 2013 (the sentencing guidelines).

As already stated, the court ought to determine whether or not this murder was committed in aggravating circumstances. Needless to state, that is so because the sentencing matrices become different depending on the presence or otherwise of aggravating factors. Where they are present, the court can only impose one of three specified sentences. It may

sentence an offender to death or to imprisonment for the remainder of his/her life or to a sentence of not less than twenty (20) years imprisonment. Where the crime was not committed in aggravating circumstances, the court is not bound to the mandatory sentences indicated above. Its full sentencing discretion is restored. It is only then that the suggestions by defence counsels and the prosecution as to the quantum of imprisonment would make sense. It is only then therefore that mitigation and aggravation in their general sense would become useful.

The factors which aggravate a murder are specified under s 47 (2) of the Code. It provides that:

> **"47 Murder**
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> (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 by-standers.
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> (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."

I indicated earlier that counsel for the offender could not have been correct in arguing that there were no factors which aggravated the commission of this murder given the above list and the additional latitude which permits the court, at its discretion to find other

circumstances which it may deem aggravating outside the ones listed. For instance it is important that s 47 (2) (c) provides that it shall be aggravation that the murder was preceded or accompanied by the physical torture or mutilation inflicted by the accused on the victim and that subparagraph (b) of subsection (3) of the same section states that premeditation of the crime aggravates it. In equal measure much as I appreciate that this crime occurred in 2021, that is before the advent of the sentencing guidelines and that ordinarily, their application would be confined to crimes which were committed after the 8th of August 2023, I find it important to mention that s 47 empowers a court to extend the list of aggravating circumstances listed therein. The factors which the law says aggravate a murder in the third schedule to the sentencing guidelines cannot be ignored. It does not matter that those factors in the sentencing guidelines were enacted after the commission of this offence because they simply point a court to those other circumstances which it can regard as aggravation when sentencing an offender which it, in any case, could have still done without the enactment. It would be absurd to disregard such factors solely on the basis that they are in a statute which was predated by the commission of the offence when the court could have still resorted to the same even if the legislation did not exist. Legal practitioners and prosecutors who deal with cases which predate the sentencing guidelines must be able to draw that distinction in the application of the guidelines.

In this case, the offender and his accomplice went to the deceased's homestead in the middle of the night. It could not have been an impromptu visit. It was planned as shown by the discussions between the offender and his erstwhile colleague. They went to the deceased's place armed with not only the wooden axe handle but also with a knife. It shows that the two were prepared for violence. That fact puts the offender within the criterion specified under s 47 (3) (b). In addition, the evidence which the court received and admitted was that at the time they were assaulting the deceased, the assailants did not start by hitting him on the head to occasion his death but that they held him and pinned him down. In the process they demanded their payment. At another point and once again in a bid to force payment, the offender was said to have put a knife between the deceased's teeth threatening him with it. In my view those actions by the assailants amount to physical and mental torture of the deceased before he was killed. Once again that satisfies the aggravation requirement under s 47 (2) (c) of the Code.

It is also noteworthy that the deceased was bludgeoned with an axe handle. The deceased's wife and other witnesses alleged that when they returned they followed a spoor of

blood from outside into the deceased's bedroom. Inside, they found him lying and drenched in a pool of blood. That depicted the amount of violence which had been perpetrated on the deceased by the offender and his accomplice. It fits into what is described in s 8 of the sentencing guidelines as an offence committed with repeated and gratuitous violence and or cruelty. It is yet another aggravating factor.

In conclusion the court also notes that it accepted the evidence that the offender was the one who played a leading and principal role in the commission of the murder. We rejected his attempt to shift the bigger blame to the absent accomplice.

Given the above, it has to be said that this crime was committed in circumstances where there was a multiplicity of aggravating circumstances. Though a single factor can be sufficient for purposes of s 47(4) the presence of a number of these factors can only make the offender's situation worse.

Counsel advised us about the offender's tribulations in her submissions in mitigation. He is a school dropout, who was the breadwinner for his mother and younger siblings before his arrest but so was the deceased. Counsel said none of those family members had stood by him throughout his ordeal. Much as the court would pity the offender it wouldn't make any sense for it to attach any significant weight to those issues and ignore the deceased's widow and his orphaned children. The widow submitted a victim impact statement in which she narrated that her life basically went upside down as a result of this murder. It not only took away the family's breadwinner but traumatised it. The deceased was murdered in her presence and that of the children. The family had to abandon its homestead soon after the deceased was killed in fear that more attacks could be perpetrated on them. That fear can only be realistic. The offender's accomplice is still out there. The possibility of him coming to attack the deceased's family cannot be discounted with certainty. At the moment the deceased's widow and his children have had to endure the ignominy of being dependent on the deceased's relatives for their livelihoods.

All said and done, the court's conclusion is that this was a gruesome murder, a bad murder if ever there is a good one. The offender though remains a young man and one in which the court cannot entirely lose hope. He may serve some useful purpose in society if given another opportunity. It is for that reason that the court would not see any benefit derivable from the death sentence or from life imprisonment. Instead a determinate jail term which illustrates the court and society's displeasure at the heinous crime which he committed will meet the justice of the case. For those reasons the offender is sentenced as follows:

30 years imprisonment.

National Prosecuting Authority, for the State
G Dzitiro Attorneys, for the accused