REPORTABLE (36)

(1) TAFADZWA SHAMBA (2) TAPIWA MAKORE
v
THE STATE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MATHONSI JA & MUSAKWA JA
HARARE: 20 FEBRUARY 2025 & 12 MAY 2025

A. Masango, for the first appellant

K. E. Kadzere, for the second respondent

F. I. Nyahunzvi, for the respondent

MATHONSI JA: This is an automatic appeal in terms of s 44 (2) (c) of the High Court Act [*Chapter 7:06*], against the conviction of the first and the second appellants by the High Court (the court *a quo*) of the crime of murder on 29 June 2023 and their subsequent sentence to death on 2 July 2023. If the appeal had not been automatic, one would have been left wondering what possessed those involved in the appeal to embark on it owing, not only to the overwhelming evidence staked against the appellants, but also to the brutal and senseless manner in which the murder was committed.

THE FACTS

The facts of the matter make for chilling reading indeed. The late Tapiwa Makore (the deceased), who met his bizarre and gruesome death at the very tender age of seven years, was not only the second appellant's name-sake, but also his nephew, being the son of the second appellant's cousin. The first appellant was an employee of the second appellant and some kind of business associate of his, if one were to generously regard the exercise of growing cabbages at a rural garden as a business.

The 17th of September 2020 was a normal day for the community of Makore village under Chief Mangwende in Murewa, on which villagers left their homes to work at the communal gardens. These included the deceased who was also assigned by his mother to tend the vegetables at the gardens. That was so until the appellants decided to put in motion their outlandish plan of growing their vegetable business by killing the deceased, singled out as an ideal candidate by virtue of sharing a name with the second appellant, for ritual purposes.

While minding his business at the gardens, the deceased was lured to the second appellant's homestead on the pretext he would be given food or some other freebies. Once there, he was intoxicated with a very potent illicit brew known in local lingo as "*skokiyana*," as a result of which he passed out. Meanwhile, the deceased's mother alerted other villagers having noticed that the child was missing and a search party was commissioned to look for him. Curiously, the second appellant also participated in the search before retiring home.

After nightfall, like a sheep to the slaughter, the deceased was carried to the foot of a nearby mountain where he was butchered. It is Francis Bacon, the iconic English philosopher and statesman, who once said:

"There is in human nature more of the fool than the wise."

He should have added that there is also the animal in humans because those humans responsible for ending the deceased boy's life laid him on some mats while one of them sat on the boy's stomach and set about cutting him to pieces. First his head was cut off, followed by his hands and then his legs until his whole body parts were dismembered and packed into plastic bags and taken to the second appellant's homestead.

On the way there, the torso was dumped at a location near a graveyard. It was later dragged by dogs to the homestead of one of the witnesses thereby laying the gruesome crime bare. Later another dog was spotted helping itself to the palm of the deceased.

Following investigations, the appellants were arrested and charged with the crime of murder as defined in s 47 (1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations were that on 17 September 2020 at Makore Village, Chief Mangwende in Murewa, they, or one or more of them, unlawfully and with intent to kill, caused the death of the deceased by drugging him with alcohol and chopping off his head, neck, lower and upper limbs with an unknown weapon thereby causing injuries from which the deceased died.

THE TRIAL

Kicking, screaming and loudly protesting their innocence, the appellants were arraigned before the court *a quo* along with two other persons who were later found not guilty and acquitted following the withdrawal of charges against them at the close of the case for the prosecution. They both pleaded not guilty to the charge thereby setting the stage for a lengthy but very thorough criminal trial.

In his defence outline the first appellant stated that, on the fateful day he never saw the deceased even though he had spent the day watering vegetables at the garden with the second appellant and other workers. He added that after work the second appellant provided him and other hangers on with alcoholic beverages at Katsande's homestead before they received information that the deceased was missing.

The first appellant stated that the following morning he was at the second appellant's homestead when he received information that a human body part had been discovered and he was part of the group of people that went to view it to their surprise. He explained that even though he was the owner of a pair of blood stained trousers recovered at the second appellant's homestead, the blood stains were those of a chicken he had recently slaughtered and that even though he owned the blood stained white vest also recovered in his room, the blood was menstruation from a friend's girlfriend. His friend and his girlfriend had soiled it during sexual intercourse.

On the confession he made in his warned and cautioned statement as well as the indications he made to the police which led to the recovery of more body parts of the deceased, the first appellant alleged that they were products of severe assault perpetrated on him by the police after his arrest. He denied killing the deceased as alleged.

For his part, the second appellant stated in his defence outline that he was related to the deceased as an uncle and cousin to the deceased's father. He participated in the search for the deceased in good faith as he never participated in or arranged for the deceased's murder.

While stating that he was not aware of why the first appellant was implicating him in the commission of the offence, the second appellant pitched camp with the former insisting that the blood stains on the first appellant's pair of trousers were from a chicken slaughtered by the first appellant "only a few days earlier" on his instructions. He continued in that vein asserting that the first appellant was "either coerced or convinced to implicate him."

The state lined up a total of eight witnesses to prove its case during both the main trial and the trial within-a-trial which became necessary following the first appellant's

challenge to the admissibility of the evidence of indications he made. The trial court found the indications admissible and admitted them as evidence. Only the first and the second appellants gave evidence for the defence.

DECISION OF THE COURT *A QUO*

In respect of the trial proper, the court *a quo* noted that the evidence against the appellants was mainly circumstantial. After meticulously assessing all the evidence that was led, the court *a quo* concluded that, owing to the inept manner in which investigations were conducted, especially the signal failure to follow up on the DNA tests of the blood-stained apparel of the first appellant, it could not possibly conclude that the blood stains were from the blood of the deceased. It could not completely dismiss the first and the second appellants' explanation that the blood stains were from a slaughtered chicken "no matter how absurd" the explanation was.

The court *a quo* found that the first appellant freely and voluntarily made indications to the police which led to the recovery of the deceased's body parts, even those disposed of in a disused pit latrine. It found that the first appellant confessed to the murder to the police in a lengthy warned and cautioned statement which was later confirmed by a magistrate in accordance with the law.

The court *a quo* also found that the two appellants had a cordial relationship as employer and employee and that the first appellant's blood stained pair of trousers, a five litre plastic container inscribed "Topoto" (the second appellant's moniker), a small animal tail and black plastic bags similar to those used to carry the deceased's body parts, were recovered from the second appellant's house while a blood-stained vest was recovered from the first appellant's

house. It underscored that after Joseph Nyambuwa's dog was spotted dragging the deceased's palm, the second appellant had exhorted Nyambuwa to conceal the evidence by burying it.

Finding that it was permissible in terms of s 273 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to convict a person accused of a crime on the basis of his or her confession, the court *a quo* made the point that in terms of that section, the court does not require any evidence to support the facts stated in a confession even though there is need, apart from the confession, for other evidence to establish that the confessed crime was actually committed. The court *a quo* then found that the first appellant's confirmed warned and cautioned statement qualified as a genuine confession that he had killed the deceased.

The said confession described "in graphic and sordid detail" how the first appellant kidnapped the deceased, took him to the second appellant's house where he fed him with illicit beer before locking him in a room until midnight and then taking him to a secluded place. Once there, he systematically dismembered his body parts and disposed of some of them.

The court *a quo* found that almost every fact in the confession turned out to be true when followed up by investigators. It found that the indications which the first appellant made corroborated his confession and that certain items, including the denim shorts hung on a tree were recovered through the first appellant's confession and voluntary indications.

After correctly observing that, according to s 259 of the Criminal Procedure and Evidence Act, the confession of the first appellant, even though it incriminated the second appellant, could not be used against the latter, the court *a quo* set about carefully assessing the evidence against him. It noted that the independent evidence relating to his direct participation in the murder was "tenuous."

On its way to finding the second appellant guilty as an accomplice, the court *a quo* reasoned as follows at pp 41-43 of the cyclostyled judgment:

> "In this case, although we have discounted his direct participation in the murder for want of evidence, the second accused person is embroiled in its commissions in more than one way. The court found as a fact that after the first accused kidnapped the deceased from the community gardens, he took the boy to the second accused's house. The deceased was abducted on 17 September 2020 around 1500 hours and remained in accused 2's house until about midnight of the same day. At the time of the abduction, the evidence before the court is that the second accused was at a beer drink in the village. The first accused locked the boy in accused 2's house, proceeded to the beer party where accused 2 was. In paragraph 4 of his defence outline accused 1 expressly alleges, which allegation was never refuted by the second accused, that it was accused 2 who supplied the alcohol that they were drinking at Katsande(s) homestead. It is the same alcohol part of which he later took in the container which accused 2 admitted was his to drug the victim. It was inscribed with his nickname. The question which arises is whether the second accused supplied the means for the first accused to commit the crime and or made his premises available for the commission of the murder to bring him within the confines of s 198 (1) (a) and (d) of the Criminal Law Code. The child was locked in his house for many hours. In fact he must have been there for close to eight hours. The second accused person left the beer party and went home that evening. He went home after the futile search for the deceased earlier that night. He did not allege that he slept anywhere else other than at his residence on the fateful evening. It is unimaginable that he would have failed to notice the presence of the child in his house. The first accused said the boy was detained in the sitting-cum dining room of accused 2's house. After the murder, accused 1 said that same night he returned to accused 2's house with bags full of the murdered boy's limbs. He pulled some of them out of the bags and put them in a bucket. The second accused was in the house at the time. It is once more incredible that he did not notice the first accused doing all that he alleges to have done. The police recovered from accused 2's house black plastic bags similar to those which accused 1 alleged to have used to carry the deceased's limbs after killing him. They also recovered a small animal tail which accused 1 said had been used in the ritual to dissuade the deceased's spirit from avenging his death. They further recovered the container inscribed *Topoto* also from the second accused's house. Accused 2 supplied the alcohol which was used to drug the boy to facilitate his murder by accused 1. The apparatus in which the alcohol was stored was his. All the paraphernalia mentioned above were linked in one way or another to the commission of the murder by the first accused person. They were discovered as a consequence of police investigations following the confession by accused 1. The law provides for their admissibility…..
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> The court accepts that the evidence pointing to accused 2 providing implements and his premises for the commission of the murder is circumstantial. The requirements governing circumstantial evidence must therefore come into play."

Having said that the court *a quo* proceeded to examine the law on circumstantial evidence. In doing so, the court *a quo* was alive to the fact that it was examining whether the

circumstances proved that the second appellant supplied the first appellant with implements and made his premises available for the commission of the offence. It concluded that the only reasonable inference to be drawn from the circumstances of the case was that indeed the second appellant did so.

That way both appellants were found guilty of the crime of murder. On 12 July 2023, the court *a quo* handed down a detailed judgment on sentence. It took the view that the manner in which the two appellants committed the murder showed that they were inherently wicked as they "showed no morality, no sentiment and no conscience" as they went about their task "with the fixation of a predator."

The court *a quo* drew the conclusion that the murder was committed in aggravating circumstances. Finding its hands tied, the court *a quo* sentenced the first and the second appellants to death.

THE APPEALS

The death sentence triggered the appellants' automatic right of appeal to this Court in terms of s 44 (2) (c) of the High Court Act. The appellants filed separate grounds of appeal. The first appellant appealed against sentence only on the following grounds:

"1. The sentence imposed by the court *a quo* was inconsistent with the provisions of s 48 (2) of the Constitution of Zimbabwe which provides for the right to life.
2. The sentence imposed induce (sic) a sense of shock in light of the judgments relied upon.

RELIEF SOUGHT

1. That the appeal succeeds.
2. The sentence of death imposed by the court *a quo* be and is hereby set aside and in its place the following sentence is imposed:

'The accused person is sentenced to life imprisonment.'"

On his part, the second appellant appealed against both conviction and sentence on the following grounds of appeal:

"1. The court *a quo* erred and misdirected itself in finding the appellant guilty of murder as an accomplice on the basis of circumstantial evidence when the evidence on record did not exclude every reasonable inference including the possibility that the first accused planted evidence at the appellant's homestead and acted on a frolic of his own without the appellant's participation.

2. The court *a quo* erred and misdirected itself in failing to place due weight on the fact that at the time that the deceased was kidnapped and detained at his homestead, the appellant was not there and consequently could not have vailed (sic) his homestead for such purposes.

3. The court *a quo* misdirected itself in failing to give the appellant the benefit of doubt as his defence was reasonably true.

4. The court *a quo* erred in sentencing the appellant to death in circumstances where such a sentence induces a sense of shock in light of its finding that the appellant was not a direct participant in the murder.

RELIEF SOUGHT

Wherefore, the appellant prays that the appeal be allowed and the decision of the court *a quo* be set aside and subsequently substituted with the following:

1. The accused be and is hereby found not guilty and is acquitted.

   Alternatively:-

2. The accused person be and is hereby sentenced to fifteen years imprisonment."

Mr *Masango*, who appeared for the first appellant, while acknowledging that in an automatic appeal of this nature, the Court is enjoined to review the conviction of the appellant even where no appeal has been noted against conviction, submitted that he had no meaningful submissions to make on the conviction of the first appellant. He left it to the Court to look into the conviction as it deems fit.

I mention, as I pass, that it is trite that this Court will always consider the appropriateness or otherwise of the conviction in automatic appeals of this nature, even where the grounds of appeal do not impugn the conviction. See *S* v *Mutero* SC 28/17. This is so because the Court has to be satisfied that the conviction itself was proper before delving into the appropriateness of the sentence.

On sentence, Mr *Masango* was still not inclined to take much of the Court's time. He readily conceded that, taking into account the totality of the circumstances of the offence, this is a case in which the most severe penalty provided for by law should be imposed. With that in mind, counsel restricted his submissions to new developments in the law post the sentencing of the appellants.

Drawing the attention of the Court to the Death Penalty Abolition Act [*Chapter 9:26*], whose s 2 (b) precludes this Court from confirming the sentence of death imposed on an appellant, Mr *Masango* urged the Court to exercise its discretion in favour of the imposition of the sentence of life imprisonment on the first appellant. Significantly, counsel conceded that there is nothing whatsoever that would inform the imposition of a sentence lighter than the one urged of the Court.

Mr *Kadzere* for the second appellant, submitted that there was no direct evidence linking the second appellant to the offence and that the circumstantial evidence led

was not enough to ground a conviction. In counsel's view, the inference that the second appellant committed the offence was not the only one to be drawn from the proved facts. It was suggested on his behalf that anyone else, other than him, could have assisted the first appellant commit the offence.

On the items recovered at the second appellant's home, Mr *Kadzere* submitted that they do not point to him having participated in the commission of the offence. The first appellant could have just mentioned the "Topoto" container as having been used to carry the illicit beer fed to the deceased, so it was argued, because he already knew it was at the homestead. A different container could have been used.

On the use of his home as a venue, counsel suggested that there is nothing to show that the second appellant allowed it because he had been elsewhere when it happened. Counsel went to the extent of suggesting that the blood-stained apparel found at his home may have been deliberately planted by the first appellant in order to incriminate him. As to why the first appellant would do that, counsel did not say even though he still maintained that the stains were chicken and not human blood.

Mr *Kadzere* also sought to down play the recovery from the second appellant's house of the black plastic bags similar to those used to carry the deceased's body parts. In his view the presence of the black plastic bags did not prove anything as they are found in households. A lot of reliance was also placed on the first appellant's alleged apology to the second appellant while being questioned by the police.

Regarding sentence, Mr *Kadzere* conceded that, bearing in mind that this was a gruesome murder of a minor, it calls for the most severe penalty allowed by law. He readily abandoned the suggestion of a sentence of 15 years imprisonment in his heads of argument.

Mr *Nyahunzvi*, who appeared for the State, gladly accepted the concessions made on behalf of the first appellant regarding both conviction and sentence. In the case of the second appellant, Mr *Nyahunzvi* defended the conviction on the premise that the exhibits recovered from his home led to only one inference, which is that he participated in the commission of the offence. This was more so, in his view, considering that the first appellant was a mere employee of the second appellant and would ordinarily lack the authority and the wherewithal to commit an offence of the magnitude under consideration in this case.

In wrapping up submissions on behalf of the State, Mr *Nyahunzvi* made reference to s 5 of the Death Penalty Abolition Act urging the Court to exercise its discretion in favor of substituting an appropriate sentence. He reiterated that the court *a quo* found serious aggravating circumstances in the manner in which the offence was committed and urged this Court to uphold those findings. In counsel's view, the befitting sentence is one of life imprisonment.

THE LAW

The basis of the first appellant's case is that, with the introduction of the Death Penalty Abolition Act [*Chapter 9: 26*], the sentence of death imposed on him has been wiped out. This Court must substitute, in its discretion, the next most severe penalty, namely that of life imprisonment.

Indeed s 2(b) of the Death Penalty Abolition Act obliges this Court not to confirm a sentence of death where it has been imposed. It accords the Court the discretion to substitute another sentence in the place of the death sentence. It reads:

> "**2. Abolition of death penalty**
> Notwithstanding any other law -

(a) No court shall impose sentence of death upon a person for any offence, whenever committed, but instead shall impose whatever other competent sentence is appropriate in the circumstance of the case.

(b) The Supreme court shall not confirm a sentence of death imposed upon an appellant, whenever that sentence may have been imposed, but instead shall substitute whatever other competent sentence is appropriate in the circumstances of the case."

I shall return to the issue of the sentence later, but let it suffice to say that Mr *Nyahunzvi* for the State welcomed the suggestion by counsel for the first appellant that the Court should substitute the sentence of life imprisonment in respect of the first appellant.

Regarding the second appellant's appeal against conviction, his case is that the court *a quo* erred in convicting him of murder as an accomplice on the basis of circumstantial evidence there having been no direct evidence linking him to the commission of the offence. In the second appellant's view, the evidence led on behalf of the State did not meet the requirements of the law on the use of circumstantial evidence.

The position taken by the second appellant was strongly contested by counsel for the State who took the firm view that there was sufficient evidence led before the court *a quo* for it to draw the necessary inference that the second appellant was guilty.

The *locus classicus* on circumstantial evidence, which has been hallowed by repetition in this jurisdiction, is *R* v *Blom* 1939 AD 188 at 202 – 203, where WATERMEYER JA, referring to two cardinal rules of logic governing the use of circumstantial evidence in a criminal trial, stated:

"1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude every reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

In *S* v *Tambo* 2007(2) ZLR 32 (H) at 34C UCHENA J, as he then was, expressed the test thus:

> "Circumstantial evidence can only be used to draw an inference if the inference sought to be drawn is the only reasonable one which can be drawn from those facts. It must be supported by rational reasoning and an analysis of the proved facts."

In an earlier pronouncement in *S* v *Maranga & Ors* 1991 (1) ZLR 244(S) at 249 B-C this Court sounded a caution to the reliance on circumstantial evidence. KORSAH JA stated:

> "Lord Normand observed in *Teper* v *R* [1952] AC 480 at 489 that:
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> > 'Circumstantial evidence may sometimes be conclusive, but it may always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another …. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'"

The approach of the court when relying on circumstantial evidence was recently restated by MUSAKWA JA in *S v Chidemo* SC 68/24 at pp 7-8 as follows:

> "It is trite law that circumstantial evidence is narrowly construed. With circumstantial evidence the inference sought to be drawn must not permit other reasonable inferences. Before the court can draw an inference of guilt, however, the inference must be the only one that can be drawn from the facts. The inference must be consistent with the proven facts and it must flow naturally, reasonably, and logically from the facts. The evidence must also exclude, beyond a reasonable doubt, every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the accused's innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused is guilty of the crime charged and that inference is established beyond reasonable doubt, then the court must find the accused guilty of the crime. In drawing inferences, the court must take into account the totality of the evidence, and must not consider the evidence on a piecemeal basis."

I have said that the second appellant was convicted as an accomplice as envinced by s 198 (1) (a) and (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It provides:

"**198 Types of assistance to which accomplice lability applies**

(1) Without limiting the expression, any of the following forms of assistance, when given to an actual perpetrator of a crime, shall render the assister an accomplice-

(a) Supplying the means to commit the crime; or
(b) …
(c) …
(d) Making premises of which the assister is the owner or occupier available for the commissioning of the crime; or …"

Regarding the penalty to be imposed on an accomplice, s 202 provides:

"202 Punishment of accomplices

Subject to this code or 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."

The foregoing is the law that regulates the determination of these appeals which I now proceed to examine.

EXAMINATION

The first appellant confessed to the commission of the heinous crime. He placed himself at the center of the crime and went on to volunteer to make indications to the investigators. The indications, which the court *a quo* correctly found admissible, yielded the body parts of the deceased which up to then were still outstanding. These were recovered at a disused pit latrine. The court *a quo* patiently and thoroughly examined all the evidence and concluded that he was guilty of the crime of murder.

Counsel for the first appellant conceded, correctly in our view, that the conviction could not be impugned. The court is satisfied that the first appellant was properly convicted. The conviction is accordingly confirmed. Having said that, it would be remiss not to mention that the police investigators would have made the task of the trial court relatively easier had they done the elementary thing of following up on all the evidence. There were visible blood stains on the suspect's clothing which, with the benefit of modern technology, would have yielded conclusive evidence of involvement in the killing of the deceased.

For some unknown reason, the police investigators, having taken the clothing for DNA examination, did not bother to follow up on that evidence content to submit an incomplete docket for trial. For how long must the courts continue bemoaning this ineptitude on the part of investigators with no sign of improvement? The risk of guilty people getting away with murder as a result of this is very high and as courts of law, we can only entreat the authorities to address this lack of diligence with a dash of speed before it is too late.

As for the second appellant, he strongly contested his conviction on the basis of circumstantial evidence. To the extent that circumstantial evidence is indirect evidence as it does not directly prove a fact in dispute, it has been seen as a boon to many an accused person who regard it as a gateway to freedom. How wrong. Although that type of evidence relies on an inference, meaning that it does not directly establish a fact but points towards it based on other facts, once such evidence has so pointed to that fact, its value is the same as any other evidence. This is because our law of evidence treats both circumstantial and direct evidence equally in terms of weight.

As against the second appellant, the court *a quo* did not use circumstantial evidence to establish his guilt in satisfying the requirements of murder but, correctly in my

view, in satisfying the requirements of the guilt of the assister, an accomplice. His home and in particular his house, was used as a detention venue for the deceased as he was locked in it for several hours. While detained in the second appellant's house, the 7-year old deceased was made to ingest a toxic illicit substance called "*skokiyana*" which promptly knocked him out rendering him susceptible to mutilation.

The illicit substance used to incapacitate the deceased was provided by the second appellant in a container inscribed with his nick name "Topoto." In a state of complete inebriation, the deceased was removed from the second appellant's house at about midnight, at a time when the second appellant was already at home from his beer drink and after having pretended to be aiding the search for the missing child. The child was carried to the foot of a mountain where his body was dismembered, with body parts ferried back to the second appellant's house where they were further packaged in plastic bags. This happened at a time when the second appellant, by his own account, was at the same house. More importantly, the proved facts are that all this was done by the second appellant's employee who, ordinarily, would not be doing that at an employer's house or home except with the consent or approval of the employer.

The remainder of the black plastic bags not used in packaging the body parts, were recovered at the second appellant's house. The small animal tail used to perform a defensive ritual to ward off the avenging spirit of the deceased, which belonged to him, was also recovered at his house. Even more paraphernalia linked to the crime, like the blood – stained clothing of the actual perpetrator (the first appellant), was found at the second appellant's house.

Confronted with all this evidence, the court *a quo* could not possibly be faulted for drawing the inference that it did, namely that the evidence pointed to the second appellant having provided "implements and his premises for the commission of the murder." Indeed, the court *a quo* cannot be faulted for coming to the conclusion that the only inference to be drawn was that the second appellant was an accomplice. There is therefore no basis for interference with the conviction of the second appellant. The appeal against conviction has no merit. It ought to fail.

On sentence, there is no doubt that this was one of the most heinous, heartless, brutal and indeed despicable killings ever recorded in the history of this country. That grown up people, and in the second appellant's case, a parent with children of his own, saw it fit to decapitate a child for whatever senseless reason the way the 7-year-old boy met his demise, shakes the very foundations of humanity. It is a crime that would have, before changes in the law, warranted the ultimate penalty as it was committed in extremely aggravating circumstances.

LAW REFORM

Following the conviction and sentence of the first and second appellants the legislature intervened. It introduced the Death Penalty Abolition Act [*Chapter 9:26*], enacted for the purpose of abolishing the death penalty in Zimbabwe. It did so in s 2 (c) which provides:

> "Notwithstanding any other law-
> (a) …
> (b) …
> (c) No sentence of death, whenever imposed, shall be carried out."

I have already stated above that s 2(b) precludes this Court, on an appeal of this nature where the sentence of death has been imposed, from confirming a sentence of death imposed upon an appellant. Instead it enjoins the Court to substitute whatever other competent

sentence is appropriate in the circumstances of the case. I interpret it to mean that, on an appeal against the sentence of death as in this case, the court is required to substitute it with any other competent sentence. This is what this Court should proceed to do.

However, before doing so I have to point out that the law–giver has set out a new procedure for the handling of cases of all the prisoners previously on death row. The procedure is contained in the transitional provisions of s 8 of the Act which I deliberately reproduce here under *verbatim*:

"**8. Transitional Provisions**

(1) In this section –
"fixed date" means the date of commencement of this Act;
"prisoner under sentence of death" means a person who, before the fixed date, was sentenced to death for an offence, which sentence has been confirmed by the Supreme court on appeal.

(2) The Minister of Justice, Legal and Parliamentary Affairs, the Prosecutor- General and the Commissioner–General of Prisons and Correctional Services shall do everything within their respective competences to ensure that, as soon as possible, every prisoner under sentence of death is brought before the High Court to be sentenced afresh for the offence for which the death sentence was imposed upon him or her.

(3) In proceedings for the sentencing of a prisoner brought before the High Court in terms of sub section (2) –
a. the prisoner shall be entitled to legal representation, whether at his or her own expense or provided by the State, in all respects as if he or she had been indicted for trial before the High Court on a charge of murder; and
b. the State shall be entitled to be represented by the Prosecutor – General or any other person entitled to appear for the State in criminal proceedings in the High Court; and
c. the parties shall be heard, and the proceedings shall be conducted, as nearly as possible as if the presiding judge were sentencing the prisoner at the conclusion of the criminal trial.

(4) The High Court shall impose upon a prisoner brought before it in terms of subsection (2) whatever sentence, the court considers appropriate, taking into account all relevant circumstances including :-
a. the nature and circumstances of the offence; and
b. the personal circumstances of the prisoner; and
c. the interest of the society; and
d. the length of time the prisoner has been under sentence of death, and the treatment accorded to him or her during that time; and

e. the likelihood of the prisoner committing further offences.

(5) Notwithstanding any other law, the High Court may direct that a sentence of imprisonment it imposes on a prisoner brought before it in terms of subsection (2) shall run from a date before that sentence was imposed.

(6) A sentence imposed upon a prisoner in terms of subsection (5) shall be subject to appeal in all respects as if the sentence had been imposed by the judge following a criminal trial.

(7) This section shall not be construed as limiting the power of the President to exercise the power of mercy under section 112 of the Constitution in respect of any person who is or was a prisoner under sentence of death." (Emphasis added)

A prisoner under sentence of death is one whose automatic right of appeal would have been exercised and the Supreme Court rejected the appeal and confirmed the death sentence imposed by the trial court. He or she is a prisoner who, prior to the promulgation of the Death Penalty Abolition Act, was on death row having exhausted all appeal remedies then available to him or her.

Such a prisoner has, by dint of the new law, been accorded a fresh hearing on sentence before the High Court, which court is required to re-sentence the prisoner as if such prisoner was not sentenced at all previously. Following the imposition of a new sentence on the former death row prisoner, the same prisoner enjoys a further right to appeal to the Supreme Court, what is clearly a second bite at the cherry, notwithstanding that such right of appeal would have been enjoyed previously.

Unfortunately that second bite is not accorded to a prisoner whose appeal was pending before this Court immediately before the coming into effect of the new Act. The situation of such a prisoner, just like the first and the second appellants herein, is that this Court has to substitute a sentence other than the death sentence and send the prisoner back to serve it. Such a prisoner does not have the benefit enjoyed by other prisoners under sentence of death

to a new sentencing process complete with a fresh right of appeal, even though, for all intents and purposes, the prisoner was also under such sentence.

It occurs to me that this is an unnecessary, if not undesirable, discrimination against this type of prisoner who really is in the same predicament as the prisoner under sentence of death or on death row. The Court calls upon the legislature to revisit s 2 of the Death Penalty Abolition Act in order to insert a provision that allows even prisoners whose automatic appeals are yet to be heard, to also benefit from the new sentencing regime. Doing so will ensure that there is no discrimination. It is desirable that those prisoners be sent back to the High Court, to be re – sentenced the same way as the prisoners whose appeals to the Supreme Court had already been determined when the new law came into effect.

But then I digress. Coming back to the task at hand and having regard to all the circumstances of the present case, I am satisfied that the concession by both counsel for the appellants that the offence calls for the imposition of the most severe available sentence, was proper. The sentence of death imposed by the court *a quo* having been abolished by the law, the most appropriate sentence in the circumstances is that of life imprisonment.

DISPOSITION

The appeal by the first appellant against sentence only ought to succeed. The appeal by the second appellant against conviction and sentence ought to succeed in part.

In the result, it be and is hereby ordered as follows:

1. The appeal by the first appellant against sentence only is allowed.
2. The appeal by the second appellant against conviction and sentence is allowed in part.
3. The convictions of the first and second appellants of the crime of murder are confirmed.

4. The sentences of the first and second appellants to death are set aside and substituted with the following:

> "The first and second accused persons are each sentenced to life imprisonment."

GUVAVA JA : I agree

MUSAKWA JA : I agree

Messrs Malinga Masango Legal Practice, 1st appellant's legal practitioners

Kadzere, Hungwe & Mandevere, 2nd appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners.