THE STATE
versus
SINSAMALA CHINSI

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 7 September 2013, 8 October 2010, 16 October 2010, 23 June 2014 and 2 December 2014

Assessors: 1. Mr. Mhandu. Mr. Musengezi.

*D.H Chesa*, for the State.
Ms *O.T Sanyika*, for the defence.

BHUNU J: The accused is charged with murder as defined in s 47 of the (Criminal Law Codification and Reform) Act [*Cap* 9:23]. The facts giving rise to the charge are by and large not in dispute. It is common cause that the accused is a 23 year old young man who was in the business of selling firewood and roasting green mealies. He however lived the life of a pest as he was entirely dependent on others for his subsistence while he squandered his money on drugs and pleasure.

As at 3 January 2013 he was staying with his uncle at number 3957 Matye Close Budiriro 2. Fed up with the accused's exploitative habits the uncle chased him away from his home that fateful day.

Finding himself homeless, the accused armed himself with a lethal kitchen knife he found on a kitchen rack outside a certain house and went out to rob people of their money and property. He then proceeded to Glenview 2 where he way-laid people along Patranda road. He did not have a specific victim in mind but looked for soft targets at random. After some reconnaissance along the road he pounced on the deceased. He stabbed her in the chest and both hands thereby inflicting on her mortal injury. Thereafter he robbed her of her cell phone serial number 357904/04/550262/4 and two dollars. In his own words this is what he had to say in his sworn evidence in open Court:

"I was in control of my faculties during that time. As I was walking along the way I came to a place where there was a knife on a kitchen rack. I took the knife. When I took the knife, I intended to use it for stealing. I intended to scare people before I stole. I wanted to steal some money.

I did not have a specific victim to target. I was just searching randomly. The reason was that I was desperate.

When I had taken the knife I proceeded to Glenview 2. I then got into Patranda Way. I saw two women who were walking ahead of me. I then walked past them. I observed that the other woman had a pouch hanging around her neck. I was tempted to snatch that pouch. I then walked for a short distance. I then turned and went back to them. When I approached them I then snatched the pouch from the left side. I was not able to snatch the pouch because she resisted and we fell down on the road. I did not drag her considering that I was walking on the tarred road. The first witness was walking along the road and my hand actually passed in front of her as I was reaching for the deceased's pouch.

When I tried to snatch the pouch from the deceased the string of the pouch got torn and the deceased grabbed my T-shirt as we were struggling against each other.

I then pulled out the knife and stabbed her on the wrist but she did not let go. That is when I stabbed her on the shoulder and she let go. I stabbed her on the arm first and then on the shoulder. When I stabbed her on the shoulder that is when she let go of me. I then dropped the knife and ran away with the pouch.

My intention when I stabbed the deceased was for her to let me off so that I could escape. It never came to my mind that she could die. When I had escaped I then searched the pouch. I found that there was a cell phone, a juice card and two dollars. I then proceeded to Budiriro 1 where there were my friends. There were no blood stains on my clothes. I did not tell anyone what had transpired.

Some police officers just came to Tichagarika as I was selling some maize cobs. I was actually surprised to see them coming. During that time I did not know why they were arresting me. When they produced the cell phone and enquired from me if I knew it, I then reflected and recollected what had transpired.

I recalled how I had snatched the cell phone. I remembered the stabbing. When they informed me that the deceased had died I actually convicted myself and I was very much afraid. I did not intend to kill the deceased.

My Lord I would want to sincerely apologize to the Court and her relatives about the incident that took her life."

The lethal knife that the accused used to stab the deceased was produced in evidence by consent as an exhibit. It was photographed and scanned against a ruler. The image gives a graphic chilling illustration of a murderous weapon as appears in the picture below.

Zodwa Mandiringa confirmed that she was in the company of the now deceased Jean Chinounda at around 9 pm along Patranda Way in Glenview 2 on their way to church when the deceased was attacked and robbed of her cell phone in the manner described by the accused in Court. They cried out for help. One Madzibaba Teddy Mandizvidza and others responded to her distress calls. Madzibaba Teddy Mandizvidza corroborated her evidence in every material respect. There is no need to repeat his evidence.

The post mortem report is consistent with the attack perpetrated on the deceased by the accused. It shows that the deceased was stabbed several times. As a result she sustained two deep wounds on both arms measuring 2 cm and 1.2 cm long respectively. She also sustained a deep penetrating chest wound. Death was diagnosed to be due to haemorrhagic shock due stab wound.

After robbing the deceased of her cell phone serial number 357904/04/550262/4 the accused pledged it to Godfrey Mafunga as security for a debt. Mafunga in turn exchanged the phone with Sarudzai Munemo. Police investigations linked the cell phone to the accused who admitted pledging it to Godfrey Mafunga shortly after the commission of the murder. Godfrey Mafunga confirmed the pledge in every material respect.

Although the accused raised the defence of intoxication and abuse of drugs he openly confessed that he was in full control of all his faculties when he committed the horrific crime. He deliberately set out to commit this despicable offence to avert self imposed hardship in pursuit of cheap pleasure.

The above evidence clearly establishes that the accused intentionally stabbed the deceased to death in the course of a robbery in the most brutish and barbaric manner. He raised no material issues in his defence as he convicted himself through his own mouth. That being the case, the conclusion that he is guilty of murder with actual intent is inescapable. The accused is accordingly found guilty of murder with actual intent.

**SENTENCE**

BHUNU J: The accused stands convicted of murder with actual intent in the course of a robbery. Section 48 of the new constitution retains the death penalty for males between the ages of 21 and 70 years at the time of commission of murder under aggravated circumstances. The section provides as follows:

> **"48. Right to life**
>
> (1) Every person has the right to life.
>
> (2) A law may permit the death penalty to be imposed only on a person convicted of murder in aggravating circumstances, and –

(a) the law must permit the court a discretion whether or not to impose the penalty.

(b) the penalty may be carried out only in accordance with the final judgment of a competent court.

(c) the penalty must not be imposed on a person –

(i) who was less than twenty-one years old when the offence was committed.

(ii) who is more than seventy years old.

(d) the penalty must not be imposed or carried out on a woman: and

(e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President.

(3) An Act of Parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law."

Having laid down the relevant law pertaining to the death penalty I come to the conclusion that the accused being 23 years of age at the time of commission, passed the red line when he attained the age of 21 years. He therefore falls squarely within the group of persons liable to the death penalty according to the prevailing laws of the land.

On that score, I now turn to consider whether the offence was committed under aggravating circumstances. The facts found proved and admitted by the accused are that he lived with his uncle. Although he was self-employed as a vendor he squandered his money on beer, drugs and cheap pleasures of this world leaving the uncle to fend for him as regards the vital necessities of food, shelter and other necessities of life.

Fed up with the accused's perpetual life of a pest the uncle evicted him from his home on this fateful day. Finding himself homeless the accused decided to go out hunting for people to rob armed with a lethal knife with a 15 cm blade. To obtain Dutch courage and moral armament he bought and smoked dagga. He then went and waylaid people at night along a secluded street looking out for soft targets.

He pounced on the deceased and her friend who were on their way to church. He stabbed her not once but several times to overcome her feeble resistance inflicting mortal injury in the process. He then relieved her of her purse containing US$2-00 and a cell phone. He sold the cell phone and again squandered the money on cheap pleasure. In his testimony the accused made it clear that he was in full control of his faculties when he committed this terrible grievous crime for the love of money and pleasures of this world.

On those facts we had no hesitation in coming to the unanimous conclusion that the offence may have been committed under aggravating circumstances. Having come to that conclusion it is necessary to consider whether or not the offence was committed under any mitigatory circumstances that may reduce the accused's moral blameworthiness.

The accused is not new to these courts. On 10 February 2011 he was convicted of robbery and was sentenced to 24 months imprisonment with 2 months suspended on condition of restitution. A previously relevant suspended sentence was brought into effect at that trial. The accused is therefore an incorrigible repeat persistent offender with an insatiable appetite for robbery. He has now graduated from plain robbery to murderous armed robbery calumniating in the death of the deceased.

The murder was committed with brazen, cold hearted and unrelenting determination leaving his victim with no chance of survival. The execution was vicious, merciless and brutal in the extreme such that there are no extenuating circumstances at all. He must be stopped in his tracks. Courts have said time without number that young offenders who commit such ghastly offences in the course of a robbery cannot hide behind their youth when they are called upon to atone for their murderous conduct with their own life. In *S* v *Chiramba* S – 146 – 82 FIELDSCEND CJ had occasion to remark that:

> "The only factor which can be advanced in favour of the appellant is his age. He was said to have been, and it was accepted in the court bellow that he was between twenty and twenty-four. This factor was carefully considered by the trial judge. Weighing this, which was really the only factor in mitigation, against the circumstances of the case he found it impossible to hold that there existed extenuating circumstances within the terms of the Act.
>
> We can see no grounds whatsoever for interfering with the conclusion of the trial Court. This was a premeditated and a brutal double murder for gain. It was ruthlessly executed and the appellant's objective callously pursued. Unfortunately brutal crimes of this nature are so often committed by young men, and age cannot be treated in such circumstances as an extenuating feature."

The learned Chief Justice's remarks apply with equal force to the accused's horrific criminal conduct. I am in respectful concurrence with his Lordship's remarks that apply to the current accused before me with equal force.

In *Emmanuel Ncube* v *The State* SC 219/95 CHATIKOBOJA had this to say:

> "The issue of youthfulness was also raised- he was 21 years when he committed the crime. The learned judge's finding on the issue cannot be faulted. This was to the effect that although the appellant was relatively young his action and the whole circumstances of the offence are those of a mature person. He showed a brazen

> criminal resolve and he could not be deterred. His was a sheer determination to attain his objective of robbery and he succeeded."

In the recent case of *Norman Sibanda* v *The State* SC 39 / 2014 MALABA DCJ was at pains to restate the principle that youths who commit brutal murders in the course of robbery cannot take refuge behind their tender age.

In the absence of extenuating circumstances had the accused been convicted under the old constitution he would have been a proper candidate for a date with the hangman. He was however fortunate to have been convicted after the advent of the new constitution

While under the old constitution a murder committed in the course of a robbery invariably attracted the death sentence in the absence of extenuating circumstances the position has drastically changed with the advent of the new constitution. The new Constitution as already stated retains the death sentence for males aged between 21 and 70 years of age for murders committed under aggravating circumstances.

Looked at from another angle, although the current Constitution allows the passing of the death sentence, s 48 (2) prohibits the court from sentencing anyone convicted of murder to death unless the murder was committed under aggravating circumstances.

The section does not however define what constitutes a murder committed under aggravating circumstances preferring that the definition be done by a law that is yet to be promulgated. This omission undoubtedly introduces an element of a vacuum and uncertainty in the law. It is however an established rule of interpreting statutes that where a statute confers a right to interfere with fundamental rights of a person such as the right to life and liberty the law must be certain and strictly interpreted leaving no room for doubt or guess work. The courts are disabled in this case from properly applying the law in that they cannot interpret a non-existent law that is yet to be passed defining what constitutes a murder committed under aggravating circumstances.

Bennion *Statutory Interpretation* 1984 at p 160 quoting the Committee on Legal Education makes the valid point that:

> "The law cannot be properly applied until [the facts] are ascertained. If the facts are wrong, the advice of the most learned lawyer will be, at best worthless."

Having said that the learned author goes on to remark at p 165 that:

> "A coercive legal formula may be based on one legislative statement or on the combined effect of several legislative statements. Indeed there is a sense in which the full legal meaning of an enactment cannot be gained without penetrating to the extremities of the legal system as a whole."

The law in this case cannot therefore be properly interpreted and applied unless the facts constituting aggravating circumstances are legally spelt out and ascertained when the relevant law defining aggravating circumstances is eventually passed and known.

It is a settled principle of legal policy that a person must not be penalized let alone be deprived of his life under a doubtful law. Thus a person shall not be put in peril of his life upon an ambiguity. That being the case I would hesitate to sentence the accused to death under a doubtful law.

I take comfort that for the same considerations my brother HUNGWE J recently came to the same conclusion under similar circumstances in the case of *S* v *Jonathan Mutsinze* HH 645-14. The accused is an incorrigible serial robber and murderer. The accused should be locked away for good in prison for the rest of his life without parole.

**It is accordingly ordered that the accused be and is hereby sentenced to life imprisonment.**

*The Prosecutor General's Office*, the State's legal practitioners.
*Matipano and Matimba*, defendant's legal practitioners.