THE STATE
versus
LOVEMORE KATAYAMAOKO
and
ELSE BANDA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 4 July 2013, 15 July 2013 - 17th July 2013, 23 July 2013, 13 December 2018, 30 August 2019, 6 September 2019, 10 September 2019 & 2 December 2019.

ASSESSORS:

1. MR. SHENJE.
2. MR. MUTAMBIRA

Criminal Trial

E. Makoto, for the state.
D Mhishi, for the 1st accused.
T. W Nyamakura, for the 2nd accused.

BHUNU J: This has been a protracted trial which has taken a long time to bring to finality. The reasons for delay are many and manifold. Chief among them is that while presiding over the case I was promoted to the Supreme Court leaving me with hardly any time to attend to my partly heard matters in the High Court. The delay was further compounded by my appointment to the COMESA Court of Justice and being hospitalised for quite some time. I however believe that it is a big relief to everyone concerned that the matter is now coming to finality.

The accused stands charged with murder as defined in s 47 of the Criminal (Codification and Reform) Act [*Cap. 9:23*]. He is alleged to have assaulted and killed the deceased on 7 September 2011 at Plot 7 Moulton Estate, Saruwe.

The bulk of the facts surrounding the deceased's death are to a large extent common cause as proven by the admission of the evidence of 7 state witnesses in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap. 9:07*]. The witnesses comprise:

1. John Chibodo
2. Sarah Zvoma
3. John Dewe

4. Hagai Chiwala
5. Edwin Musafare Zvoma
6. Kedias Moyo
7. Doctor Aguero

The undisputed facts are that the deceased was a brother to one Edwin Musafare Zvoma the owner of Plot 7 Moulton Estate, Saruwe. He lived at the farm in the farm house together with the accused and his so called wife Elsie Chibanda. The two were not formally married but had just started cohabiting as husband and wife.

Prior to the fateful night, the deceased had travelled to Harare. Upon his return a dispute arose between the accused and the deceased resulting in the accused assaulting and killing the deceased. The cause of the dispute and killing is hotly contested. I shall revert to this aspect of the case later in my judgment.

After killing the deceased the accused commandeered Elsie to help him hide the deceased's body under the bed. Thereafter the accused stole a large amount of property and US$4.00, belonging to the deceased. He then fled to his rural Home in Zvimba which is in Chinhoyi Province together with Elsie.

On 21 December 2011 the accused and Elsie went to Plot 10 Sigaro Farm in search of employment. Mrs Lona Chikuwa of that farm confirmed that the two came to her farm on that date seeking employment. Her uncontroverted evidence admitted by the defence is that she became suspicious of the accused who was constantly assaulting and abusing his wife who seemed to be in captivity. She then called her sister to help interview the accused as she resided in the same area the accused claimed to be domiciled.

The interview took place the following day on the 22nd of December 2011 in the presence of Mrs Chikuwa, her sister and Michael Zivhu. When questioned the accused had no knowledge of any of the people from the area he said he resided. When asked about his identification particulars, he excused himself to go and retrieve them from his bag. He then took the opportunity to flee from the scene. He was however chased and apprehended with the assistance of some members of the neighbourhood.

Once the accused had been apprehended and confined, Elsie opened up and revealed that the accused was a fugitive from justice who was wanted by the police for the murder of the deceased. Upon being questioned by Zivhu and others, the accused confessed to having killed the deceased. The accused was then taken to Chegutu Police Station where he made a warned and cautioned statement. The statement reads:

> "Yes I do admit that I killed Edward Zvoma and carried his body with the assistance of my wife Elsie Chibanda and we concealed the body underneath the bed after a misunderstanding for which he was alleging that I stole his cash amounting to US$6.00 and his trousers and I was also accusing him of victimising my wife. I was very angry although I knew that I had taken his cash and a pair of trousers and I tied his hands with an electric wire and I started assaulting him on the cheeks with open hands and I untied him and tied him again from behind with a garment robe. I started assaulting the deceased on the ribs with a craw bar. I sent my wife to collect a herbicide which was near the house walls and forced him to drink. The deceased started suffering from serious stomach aches and I send my wife to go and collect salt and make a salt solution and give it to the deceased. For him to vomit but it failed. The deceased lay on his back motionless and that is when I realised that he was gone. I sent my wife to collect the deceased's monarch and we packed the deceased's property which includes 3 trousers, 3 shirts, 1 neck tie, 6 cups, 4 plates, 1 archer, 1 spoon, 1 blanket, 1 Econet light with a solar panel, 1 cell phone, 2 sacks of shelled maize, 1 pair of shoes , suit jacket, 2 pairs of spectacles and US$4.00. We fled from the deceased's residence and went to Chinhoyi and we sold the cell phone, Econet light with a solar panel and a blancket.
>
> Signed
> LOVEMORE KATAYAMAOKO"

At the trial before us the accused challenged the admissibility of the above statement on the grounds that he made it under duress. A trial within a trial then ensued. At the conclusion of the trial within a trial I held that the accused had made the statement freely and voluntarily without duress under judgment number HH 157-2020. I then overruled his objection to the admissibility of the warned and cautioned statement in a detailed written judgment dated 23rd July 2013. There is no need to regurgitate the reasons as they can easily be found in that judgment.

It is common cause that Else was the only eye witness to the alleged murder of the deceased. She was arrested together with the accused as an accomplice to the charge. The prosecution however, withdrew charges against her and she was consequently acquitted and discharged during the course of the trial. Upon her acquittal and discharge she was turned into a state witness. She was then properly warned and admonished to tell the truth nothing else but the truth. At the same time the court was fully conscious of the dangers and pitfalls of reliance on the evidence of an acquitted suspect witness. There was therefore need to treat her evidence with guarded caution and vigilance. She elected to give sworn evidence.

It was her testimony that whatever she did which may be viewed as aiding and abetting the accused's commission of the crime, she did it under duress. Immediately after the commission of the murder she was virtually a prisoner of the accused who abducted her and kept her under guard and threats not to disclose or report the offence. For fear of her

life she complied and only opened up at the first opportunity when the accused was apprehended and confined at Sigaro farm on 22 December 2011. Her evidence was in the main consistent with the accused's warned and cautioned statement which was admitted in evidence in the trial within a trial.

She gave a graphic narration of how the accused attacked and killed the deceased for questioning him about the theft of his property. She gave a vivid description of how the accused stole the deceased's property and abducted her to Zvimba after the murder, culminating in his apprehension and arrest at Sigaro Farm. She confirmed that when he was apprehended by the civilians at Sigaro Farm, he immediately confessed without any duress being perpetrated upon him, that he had murdered the deceased. That confession is admissible against him as it was made to members of the public in front of state witnesses.

The point of departure is mainly the motive for the killing. I now revert to consider and determine the disputed motive for the killing. Elsie's version is that the accused attacked and killed the deceased after he had discovered that his property had been stolen in his absence and he interrogated the accused as a suspect. The accused took offence attacked, killed and robbed the deceased in the manner described in his warned and cautioned statement.

The accused's version is self-contradictory and shrouded in deception. At the commencement of the trial he gave a cryptic brief defence outline that did not address specific allegations levelled against him in the State summary. His defence was basically that of a bald alibi. He denied ever having been at the scene of crime without stating where he was at the material time. He did not reveal this defence of an alibi to the police so that they could check its veracity or otherwise. He only raised this defence for the first time at his trial more than 2 years later on 4 July 2013. His written defence outline proffered by his legal practitioners reads:

> "1. He will deny ever having been at the deceased person's residence on the day in question.
> 2. Will further deny his warned and cautioned statement as it was illegally obtained through the use of force and coercion thus rendering it inadmissible.
> 3. He will lastly state that his co-accused (Else) fabricated the murder allegation as she wanted to get back at the accused for assaulting her. At law accomplice evidence tends to be taken with a pinch of salt as it leans in favour of a party seeking to exonerate themselves".

During his evidence in chief, the accused made an about turn and admitted having killed the deceased in the manner narrated by Elsie but for a deferent motive. It was his

sworn evidence that he attacked and killed the deceased in the manner described by Elsie and in his warned and cautioned statement because when he returned from a beer drink late at night on 7 September 2011, he found the deceased who was a widower seducing his wife. That defence has no ring of truth and has the hallmark of recent fabrication because it is being raised for the first time more than 8 years after his arrest. If it were so, he would undoubtedly have stated it in his warned and cautioned statement or at the very least in his written defence outline prepared by his lawyers. It is inconceivable and not in the least probable that his lawyers would have failed to proffer that defence had he informed them about it.

There can therefore be no gainsaying that the defence of provocation proffered by the accused at the 11th hour is false in fact and misleading. Elsie denied the alleged seduction and we believe her.

Despite being an acquitted suspect witness, Elsie was an honest and credible witness. She gave her evidence well without any signs of hesitation or eversion. Her evidence was amply corroborated by independent State witnesses who had no motive at all for falsely implicating the accused. Above all her evidence was corroborated by the accused's confessions at the time of his apprehension and in his warned and cautioned statement to the police.

On the other hand the accused was an appalling witness who told an incredible fictitious story riddled with self-contradictions as demonstrated elsewhere in this judgment. His evidence was not worth of belief. For that reason the court accepted the evidence of Elsie and the other state witnesses. That evidence collectively establishes that the accused deliberately attacked the deceased with open hands, booted feet and a metal craw bar before administering a poisonous herbicide on him with the intention of killing him. He thereafter stole a large amount of his property and small amount of cash before fleeing to his rural home in Zvimba. The undisputed post mortem report compiled by doctor Aguero shows that the deceased sustained multiple injuries as a result of the assault. He sustained the following injuries:

1. Blood from the mouth and nostrils.
2. Swollen penis and testicles.
3. Bruises on the back and left arm.
4. Haemorrhage on the right parietal area.
5. Subarachnoid haemorrhage left hemisphere.

6. Thorax 500ml blood.
7. Multiple fractures, ribs left side.
8. Perforated left lung.

After noticing the above injuries the doctor concluded that death was due to hem pneumothorax due to fractured ribs due to assault.

His warned and cautioned statement as well as the evidence of Elsie, establish beyond question that while brutally attacking the deceased with a lethal weapon, the accused sent for and forcibly administered a noxious herbicide by mouth on the deceased. That type of dreadful conduct can only be consistent with a deliberate actual intention to kill the deceased.

It is self-evident that the accused perpetrated a vicious brutal attack on an innocent defenceless elderly 66 year old man with the intention of killing and stealing his property which he did before fleeing to his rural home in Zvimba. That mode of stealing using force amounts to robbery at law.

The accused also belatedly raised a feeble half-hearted defence of self-defence which he had never hitherto raised before in his warned and cautioned statement or in his written defence outline which he abandoned in his evidence in chief. There is no evidence whatsoever that the deceased ever resisted, fought back or attacked the accused. He was just attacked and meekly killed like a sacrificial lamb. The court therefore finds that there is absolutely no merit in that concocted fictitious defence.

The accused raised the partial defences of provocation and drunkenness. There is absolutely no merit in both defences because he never raised them until about 8 years later. While he might have taken some beer that day, he knew what he was doing. This is because he was able to give an accurate account of the events of that fateful day in his warned and cautioned statement. He had the presence of mind to realise that he had killed the deceased in the course of a robbery. He then fled taking his loot with him and abducting Elsie the only eye witness to cover his back. That cannot be the conduct of a drunken man who did not know what he was doing. His conduct in fact reveals a conscious brazen resolve to commit the heinous crime of murder to facilitate the robbery.

We therefore have no hesitation whatsoever in finding as we hereby do, that the accused committed the offence, with the actual intention to kill the deceased.

We accordingly find as a matter of fact proved beyond doubt that the motive for the callous brutal murder was robbery and not provocation as alleged by the accused. His conduct throughout the episode of committing the crime is consistent with a deliberate actual intention to kill in the course of a robbery.

For the foregoing findings of fact and law the court is satisfied beyond reasonable doubt that the State has proved its case against the accused beyond any reasonable doubt.

In the result the accused is found guilty of murder with actual intent.

Sentence

The accused has been convicted of murder with actual intent to kill the deceased. This is one of the few offences that still carry the death penalty in terms of s 48 (2) of the Constitution as read with s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. That law permits the imposition of the death penalty on male adults between the ages of 21 and 70 years who commit murder under aggravating circumstances.

The accused was a male adult of 23 years of age at the time he committed the offence. At that age he falls squarely within the range of people liable to death for murder committed under aggravating circumstances.

Section 47 (2) and (3) of the Criminal Law [Codification and Reform] Act [*Cap. 9.23*] provide a list of circumstances that constitute aggravating circumstances. The list is however not closed. It includes:

1. Murder committed in the course of a robbery,
2. Murder preceded by physical torture or
3. premeditated murder.

Whether the Accused Committed the Murder in the Course of a Robbery:

The court made a factual finding in its judgment that the appellant committed the offence in the course of a robbery. Counsel for the accused Mr Mhishi accepted that verdict. In mitigation of sentence he however seemed to contradict his earlier concession by submitting that the murder was not committed in the course of a robbery as it was an afterthought following the commission of the murder. It was his argument that the theft was meant to provide him with food and money for transport to flee to his rural home in Zvimba. This argument was clearly an afterthought as it had never been raised before conviction.

Counsel for the State Mr Makoto however countered that the murder was committed in the course of a robbery because it was meant to facilitate the theft. The accused by his

conduct had demonstrated that he was desirous to steal the deceased's property at all costs. The deceased was however the only person standing between his property and the accused. Killing the deceased was therefore meant to pave way for the theft. It was also meant to cover up the theft by destroying the deceased as a witness. For that reason the murder cannot be divorced from the theft.

The accused admitted to have been in recent possession of property and cash he had stolen from the deceased during the course of the murder. It is trite that theft is a continuing offence. So, as long as the accused continued to be in possession of the stolen property, the theft continued. The initial theft and the subsequent theft after the murder therefore constituted one continuous transaction.

That being the case the conclusion that the murder was committed in the course of a robbery is inescapable. The court accordingly finds as a matter of fact proven beyond reasonable doubt that the accused committed the murder under aggravating circumstances in that it was committed in the course of a robbery.

Whether the Murder was Preceded By Physical Torture.

The accused in his warned and cautioned statement amply corroborated by an eye witness Elsie Chibanda gave a dreadful narration of how he tortured the deceased to death. The accused admitted tying the deceased's hands with a piece of wire and then assaulting and forcing him to drink a dangerous poison. Thereafter he battered him with a metal craw bar causing multiple fractures on the ribs, a perforated lung and bruises on the back, arms and head. The attack on the deceased was vicious, merciless and protracted. At one time he untied the deceased but tied him again and continued with the assault until the deceased died. That type of conduct can only amount to torture.

The submission on the accused's behalf that he perpetrated the brutal assault on the deceased in a bid to resuscitate him by inducing him to vomit the poison he had forced him to ingest is weird and beyond belief. This is an incredible fictitious bizarre submission that was never proffered before conviction. It is false in fact and a product of recent fabrication. Although the accused attempted to revive the deceased using salt after the deceased had passed out and died, it seems the object was to prolong the torture as the accused was intend on torturing the deceased before killing him. The court accordingly finds that the murder of the deceased by the accused was preceded by torture.

Whether the Murder Was Premeditated .

The accused admitted assaulting, tying the deceased's hands, forcing him to drink a poisonous substance and then battering him to death with a dangerous weapon in the course of a robbery. That kind of conduct evinces careful planning to rob and destroy evidence by killing and hiding the deceased's body to facilitate the robbery without detection.

The court accordingly finds beyond question that this was a premeditated well planned and executed murder.

Mitigation

In mitigation of sentence the sentence the accused pleaded the following issues seeking lenience of the court.

1. Provocation
2. youthfulness
3. Delay
4. mercy
5. Repentance and rehabilitation

Provocation

There is no substance in this submission because the court made a factual finding that the deceased did not provoke the accused in any way. All what he did was to ask the accused about the theft of his property and cash. The accused instead of confessing and apologising for the theft turned against the deceased attacked and murdered him. Upon murdering the deceased he continued with his theft spree.

Youthfulness

At 23 years of age the accused was a fully-fledged adult both at common and statutory law. In terms of the Constitution as read with the enabling law he fell squarely within the group of people liable for capital punishment. Our courts have already ruled that death sentence is inevitable where murder is committed In the course of a robbery. Youth falling under the group of persons liable for capital punishment cannot hide behind their youthfulness where they commit murder under aggravating circumstances such as robbery or torture.

In the case of *Emmanuel Ncube* v *The State* SC 219 – 95, MUCHECHETERE JA at p 3 of his judgment had this to say:

> "The law in cases where murder is committed in the course of robbery is to the effect that the death sentence will be imposed unless there are weighty extenuating circumstances. See *S* v *Sibanda* 1992 (2) ZLR *Chareka and Another* v S SC 40/93.

> The issue of youthfulness was raised – he was twenty-one 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 actions 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. He stabbed an elderly woman sixty-three years old, six times with vicious blows and killed her after he had refused her request to leave her home."

Taking the same stance in *Ernest Masuka* v *The State* SC 234/96 at p 5 of his judgment, GUBBAY CJ observed that:

> "In the absence of weighty mitigating features murders committed in the course of robberies invariably attract the death sentence. His youthfulness is an important feature to be considered but the aggravating features are such that I find myself unable to conclude that this was a suitable case for a finding of extenuating circumstances despite the appellant's youth."

Taking the cue from decided cases the principle that emerges quite clearly is that where a murder is committed under aggravating circumstance capital punishment is inevitable in the absence of weighty mitigating factors despite the accused being a youthful first offender. Where a youth commits murder under aggravating circumstances he starts criminal conduct at the deeper end, his youthfulness will not count.

Delay.

Undoubtedly there was delay in finalising this matter. The reasons for delay were reasonable. The defence also contributed to the delay when the accused's erstwhile defence counsel left practice and it took a long time to find a substitute defence counsel. In any case the accused did not assert his rights for an expeditious trial within a reasonable time. See *In re Mlambo* 1991 (2) ZLR 339 (SC). The issue of delay cannot therefore come to the accused's benefit.

Mercy and Repentance

During the trial the accused remained defiant through to the end at no time did he express any remorse or regret for having brutally murdered an elderly man after stealing his property. He continued with the theft after killing the old man to pave way for further thefts. It appears the accused is beyond redemption. He is primarily concerned about serving his own life without any remorse for the heinous murder that he committed. His demeanour and exposition throughout the trial did not exhibit any signs of repentance or sorrow for the despicable murder that he committed. At no time did he apologise to the deceased's family relatives and friends.

This was a barbaric, heinous premeditated murder preceded by torture committed in the course of a robbery. He killed an innocent sixty year old man whom he had wronged by stealing and robbing him of his property and cash. In mitigation of sentence the accused made the incredible submission that he battered the deceased with the craw bar in a bid to make him vomit the poison he had forced him to drink. That kind of a dishonest defence shows the accused's lack of remorse and vindictiveness through to the end.

For the foregoing reasons I find that the aggravating circumstances in this case far outweigh the mitigating circumstance. In the result capital punishment is unavoidable

It is accordingly ordered:

that the sentence of the court is that you be returned to custody and that the sentence of death be executed upon you according to law.

Mhishi Legal Practitioners, the Defence; Legal Practitioners.
National Prosecuting Authority, the State's Legal Practitioners.