STATE
versus
EDDINGTON CLEOPAS RUGARA
and
CHIKEREMA MANYERERE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 10, 11, 12, 13, 14 July, 29 & 31 August 2017

ASSESSORS: 1. Mr Chidyausiku
2. Mr Gweme

Criminal Trial

A Muzivi, for the State
T Mupangwa, for the 1st accused
B Mupwanyiwa, for the 2nd accused

TSANGA J: The two accused were charged with one count of unlawful entry into premises under aggravating circumstances in terms of s 131 (1) (a) as read with s 131 (2) of the Criminal Code, and one count of murder in terms of s 47 (1) (a) of the same Code. A 3rd accused Lovemore Mumba who was facing the same charges was discharged at the close of the state case and the reasons were given for his discharge. This judgment therefore deals with the remaining two accused.

On 4 January 2016 extending to 5 January 2016, the two accused are said to have unlawfully entered number 83 Lavenham Drive, Bluffhill where they stole various property after ransacking the house. It is also alleged that they assaulted the deceased Daniel Wayne Hoffman with an unknown object on the head, tied both his hands and legs and strangled him. The deceased had been found tied with electric cables. He died as a result of strangulation and suffocation according to the post-mortem report.

Both accused persons denied the charges and pleaded not guilty. The 1st accused's defence was that he was nowhere near the premises on that day having been in Chivhu from 22 December 2015 up to March 2016. His defence was also that he had been coerced by the police to admit to the murder and that his admission had not been made freely and voluntarily.

The 2nd accused also said that he had made his statement under duress and undue influence of persistent torture and assault. None of the statements had been confirmed and were therefore not part of the trial.

The State's case against the two accused rested largely on the recovery of direct evidence from the two accused persons, being property which had been stolen during a break in from the house where the deceased was staying at the time of his murder. It also rested on the admitted evidence from certain witnesses which was not in dispute and was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:23*].

The undisputed evidence

The evidence which was admitted without dispute from the state's witnesses was that of Shelly Chinhiwu and Weston Nyamadenga, the two domestic workers who worked at the premises and had discovered the body of the deceased on the morning of 5 January 2016, when Shelly Chinhiwu had gone to the house to assume her daily duties. Their evidence confirmed that the house had been broken into, had been ransacked and was in disarray on the morning in question.

The stolen property was more specifically detailed in the admitted evidence of Melany Louise Lipczyk who was the deceased's sister. She and her husband had left him in the house on 27 December when whey had gone to Durban on holiday. Her evidence listed the property stolen on that day which among other things included items such as a phone, computer, an iPad, power tools, clothes belonging to the deceased as well as various other men's clothes and shoes, among other items.

Of significance from the admitted evidence of Melany Louise Lipczyk is that on 27 May 2016, a day after the accused's arrest she had positively identified property that had been found in their possession and that had been stolen from her then residence on the night in question. This included a silver and white iPad serial number F7WLPXK3F196, a dark and light blue short sleeved shirt, a sleeveless Snickers jacket, two long sleeved van Heusen shirts, a shot sleeved shirt with a *Domino* company logo, and a light blue shirt with the same

logo as well as a dark blue short sleeved shirt also with the same logo and a white and red Casa Msika Lodge fishing shirt, all of which had been stolen from 83 Langham Drive Bluffhill sometime on the night of 4 January into 5 January 2016.

Essentially, it was not in dispute that the house had been unlawfully entered into, the deceased murdered and the house ransacked. It was not in dispute that the property which had been recovered from the accused had been properly identified by Melanie Lipczyk and that it was the property that had stolen on the night of the murder. It was also not in dispute that the deceased had died as a result of the murderous assault perpetrated on him by whoever had entered the house that night.

What was at issue in the trial was the two accused person's denial of being the perpetrators of both charges on the basis that the evidence against them in particular was circumstantial and improperly obtained.

The state's evidence

The state led evidence from three police details who had been involved in the investigation of the matter. These were Detective Inspector Makanyisa, Detective Constable Hove and Detective Constable Lin Gutsa. Detective Inspector Makanyisa told the court the recovered items had been properly identified not just by the deceased's sister but also by her husband and Shelly Chinhuwu who worked for them. He also told the court that both accused persons' statements on indications had not been confirmed because it was not a hard and fast rule that all statements should be confirmed.

Detectives Hove and Gutsa in particular had been involved in recovery of property at Stapleford Farm compound in connection with a series of robberies. What had emerged during those investigations was that a stolen cell phone was in the possession of one Lestara Lapsen. He had led them to the first accused, Eddington Rugara, who stayed at Lumanda Farm, as the one who had sold him that stolen cell phone. He in turn had been interviewed and had implicated the second accused, Chikerema Manyerere, and, his twin brother Scott Bobo and others who were not before the court. This was on the night of 24 May 2016. They had checked this out and had managed to locate the second accused and his brother at a drinking place within the compound. The three of them that is both accused persons and the second accused's twin brother, had led the police to the house where they said they stayed together. It was a large room partitioned into three sections. The first accused stayed in one partition with his wife whilst the second accused stayed in another room with this twin

brother. The third room was used as a living space. A search of the house had been conducted and the iPad had been recovered together with other items which included memory sticks and cell phones. Detective Constable Gutsa in particular told the court that the property found was expensive in comparison to the their living conditions and also that the accused persons had nowhere to insert the memory sticks which had bolstered their assumption at the time that it had been stolen. The iPad had been recovered in the first accused's bedroom in particular. Both accused persons had signed the notebook listing all the recovered property. It was admitted as Exhibit 2. Both accused, including the second accused's brother, Scott Bobo, had been taken to CID homicide. Scott Bobo had however later been exonerated on the basis that on the day in question being 4 January 2016, he had still been in prison on a separate offence.

The first accused as well as second accused had failed to punch in the pin to the iPad and had revealed to the police that they had stolen the iPad from a house in Marlborough. The house had turned out to be the same house that had been ransacked and where the deceased had been murdered. The accused had not known in narrating where they had gotten the property that the person attacked, had died. The police had been able to link them to the murder as the iPad in their possession had been taken at the time of the unlawful entry. Following the accused's arrest on 24 May, the police had again gone there the following day 24 May and had recovered clothes which the accused had also stolen. They had not been looking for clothes the previous night.

In their evidence both detectives Hove and Gutsa dismissed the allegation that the accused had been assaulted and had been forced to lead them to their place. They also dismissed the second accused's claim that he did not reside with first accused, highlighting that it was only after he had been found with the stolen property at the house he resided with first accused that he had attempted to distance himself from that house. They both told the court that the second accused's clothes were at the house he stayed with the first accused. Detective Constable Gutsa told the court that the one room on the compound that second accused later led him to, did not show any evidence of men's clothing. Only a few pieces of women's clothing had been found there. Further investigations the following day had also revealed that only a woman resided there. The first accused's wife who had been present at the house where the accused persons resided, had confirmed that the second accused resided

with them. Both detectives dismissed the allegation that the second accused had been assaulted and maintained the accused had voluntarily led to the recovery of the property.

In essence the property from the murder scene taken on the day of the murder and positively identified by witnesses had been recovered at the house where both accused were staying together.

The first accused's evidence

Besides his alibi that he was at his rural home on the date of the alleged murder on 4 January 2016, the first accused told the court that the phone had been sold to him by Lestara Lapsen and not the other way round. Even though Lestara had sold him the phone, he had retained possession of that phone. However, this version of the phone having been sold to first accused had not been put to the investigating detectives when they gave their evidence. He also denied that the house was partitioned into three. Again, this denial was not put to the detectives when they gave their evidence describing the house. He equally denied that the police had recovered an iPad from his house. He further denied that he had accompanied the police to where the second accused was with his brother Scott Bobo. He stated that they had been taken there by Lestara Lapsen. He also told the court that it was at the police station that he had learnt that the phone he had bought from Lestara had been stolen in a robbery case. None of the various elements of this version of events involving the sale by Lestara had been put to the detectives whilst they were still on the witness stand.

He said he had been assaulted on a table by the police in order to force him to admit to a series of robberies. He had ended up admitting all charges against him. He denied being ever asked to punch in a password into the iPad. He denied that the police had recovered anything from his house. His version was that on 25 May 2016, the police had requested to go the house to take pictures with the items that had been recovered. He had been made to sign a notebook at Police Central. Nothing was ever signed at his house. The issue of signing the notebook at the police station had also not been put to the detectives when they gave evidence. He said he had called out names of accomplices because the police had suggested those names to him of persons they said were his accomplices. He denied knowing the second accused or his brother.

Where an accused's evidence differs so much from that of the state witness and yet none of the critical points of departure are put to the state witnesses at a time when they are

available on the witness stand then, it is safe to conclude that the subsequent denials are merely meant to confuse.

The second accused's evidence

He told the court that he worked at Wildale Company loading bricks for delivery. He stayed at Lumanda farm with his wife and child. He too said he was forced by the police to admit to the charges. On the 4th of January 2016, he had been at home with his wife and child. On the 24th of May he had been drinking with Scott Bobo when the police approached him in the company of Lestara Lapsen. They had called Scott aside and had come back to fetch accused on the basis that they wanted to search his house. They had proceeded to his house where he, the accused lives with his wife and child. They had not recovered anything. At no time had he gone to the first accused's house at all and neither did he know the first accused at the time.

Thereafter the police had taken them to Central Police Homicide and had assaulted him on the basis of having committed many robberies. He had been handcuffed and turned upside down before being assaulted on the soles of his feet. He had admitted to the offences they wanted him to admit to as a result of the assault. He had also been forced to sign the document with his confession. He had complied as a result of torture. He stated that the police officers were the ones who had provided the names of co accused.

On 25 May they had taken him back to Lumanda farm to search his house. They had carried out a search leaving everything in disarray but did not find anything. He said the only clothes at his house were those of his wife and child. He denied signing any document at the first accused's house. He also denied being related to Scott Bobo and said they merely come from the same rural area. He also denied being given an iPad to enter a password at any point. In fact he had never seen the said iPad. He did not know the first accused's wife Nancy Tembo who had also signed the said inventory at the house at the time of the search. Regarding his participation in indications, he said it was the police who had shown him goods that they had from the said house. He had no knowledge of any of the property. He had signed the inventory under duress and did not know what he was signing.

It was pointed out by the State that he had not mentioned in his defence outline that he stayed with his wife and child. He said that the police were crafting a story regarding finding only women's clothes at the house that he took them to.

The legal arguments

The State's counsel Mr Muzivi argued that since the first accused's defence was an *alibi* all the state had to do in proving its case was to place the accused at the scene to destroy that alibi. He argued that the State had managed to do so and that the defence of an *alibi* was indeed a wild goose chase. The state had found the accused persons with the property taken from the scene on the date of the murder. He also drew on s 258 of the Criminal Procedure and Evidence Act which makes it lawful to admit evidence that anything was pointed out even if it forms part of a statement that is later not admitted. *S* v *Ndlovu* 1998 (2) ZLR 465 at 467.

Regarding the torture allegations, these he argued, had been satisfactorily rebutted and in any event the claims had not been backed by medical reports or names of assailants. Furthermore, they were inconsistencies between the defence outlines and viva voce evidence. Inferences were therefore to be drawn from their lying. *S* v *Gijima* 1986 (1) ZLR SC at p 35 F-H. Whilst the evidence was circumstantial, the state argued that in its totality it led to the conclusion that the accused had committed the offence of unlawful entry and murder which they had carried out callously with disregard for the safety of the deceased. The state pressed for a verdict of murder in terms of s 47 (1) (a) of the criminal Code against both the accused.

Mr Mupangwa for the 1st accused argued that the state had failed to lead direct evidence through eye witnesses to prove that the accused had unlawfully entered the premises. He also argued that that there was no direct evidence that the accused had caused the death of the deceased. He argued that the statement made by the first accused ought to have been confirmed as this was a serious case even if this was not a hard and fast rule. He reasoned that the fact that the police had failed to take the 1st accused for confirmation proceedings was in itself a strong indicator that he had been assaulted. He also contended that the State is not entitled to dismiss the accused's explanation unless convinced of its falsity. *S* v *Kuiper* 2000 (1) ZLR 113 at p 118. He therefore prayed for his acquittal and discharge.

Mr Mupwanyiwa similarly argued on behalf of the 2nd accused that the state had to find him guilty beyond a shadow of doubt. On unlawful entry he must be found to have entered without permission to do so. On murder, he must have caused death intentionally. He also emphasised the lack of direct evidence against the second accused on both allegations. He too said all evidence was circumstantial. He argued that the evidence led did not establish

the essential elements against the accused person. He also maintained that the evidence of the recoveries that the police had made had since been challenged. He therefore prayed for the acquittal of the second accused.

The legal position

The essential elements of unlawful entry are an intentional entry into premises without the authority of the lawful occupier or other lawful authority. See *S* v *Chirinda & Ors* 2009 (2) ZLR 82 (H). The crime is aggravated by the fact that the accused person entered a dwelling-house; or knew there were people present in the premises; carried a weapon; used violence against any person, or damaged or destroyed any property, in effecting the entry; committed or intended to commit some other crime. Therefore to convict the two accused of unlawful entry under aggravated circumstances this court must find every essential element of the offence charged beyond reasonable doubt.

The essential elements of murder under s 47 (1) (a) are that: (i) the accused must unlawfully cause the death of deceased; (ii) must have intended to kill the deceased; or (iii) continued to engage in conduct after realising that there is a real risk that the conduct may cause death.

The principles governing circumstantial evidence were articulated in the case of *R v Blom* 1939 AD 188 at p 202 by WATERMEYER JA. As regards inferential reasoning from circumstantial evidence, the first requirement is that the inference sought to be drawn must be consistent with all the proved facts. The second is that the proved facts should be such that they exclude every reasonable inference, save the one sought to be drawn.

These principles have found application in our law. The cogency of circumstantial evidence comes from looking at all the evidence in totality. As explained in the Supreme Court case of *Attorney General* v *Paweni Trade Corp (Pvt) Ltd* 1990 (1) ZLR (SC) at p 32C, drawing on the case of *R* v *Sibanda & Ors* 1965 RLR 363 (A), it is not necessary that each fact be taken in isolation and its existence proven beyond a reasonable doubt. It is sufficient if **all** facts, taken together prove, the guilt of the accused beyond a reasonable doubt. In *S* v *Hartlebury* 1985 (1) ZLR 1 at p 7B it was stated by MCNALLY J that the question one must ask oneself with regards to circumstantial evidence is "whether a reasonable man (sic) might draw the inference sought to be drawn by the State".

However, what is also discernible from our case law is that the attitude towards circumstantial evidence in our jurisdiction in terms of its weight seems to have attracted two

different standpoints by the Supreme Court. For example, the case of *S* v *Shoniwa* 1987 (1) ZLR 215 (SC), gives actual evidence and circumstantial evidence the same weighting in proving murder, if the circumstantial evidence meets the stipulated criteria. In other words, it matters not that the evidence before the court is circumstantial as opposed to direct evidence.

As the court put it at p 218 E-G:

> "The law is that on a criminal charge the fact that a person was murdered can, like any other fact, be proved by actual evidence or circumstantial evidence, if that evidence leads to one conclusion of fact, although nobody or corpse was found. The court must, as in any other criminal case, be satisfied beyond reasonable doubt of the guilt of the accused person"…….The evidence can be wholly circumstantial, provided it is sufficient to preclude every reasonable inference of innocence of the accused."

On the other hand, a different bench in the case of *S v Marange & Ors* 1991 (1) ZLR 244 (SC) at 249 B-C, drew attention to what it termed as the inherent dangers of relying on circumstantial evidence. It cited the English case of *Teper* v *R* [1952] AC 480 at 489 which emphasised the need to treat circumstantial evidence with caution:

> "Circumstantial evidence **may sometimes** be conclusive, but it **must always** be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another…."

The above observation appears to suggest that circumstantial evidence should be treated with heightened caution whereas the case of *S* v *Shoniwa* (*supra*) appears to put both actual and circumstantial evidence at par, with the ultimate deciding factor in the case of both types of evidence being the court's need to be satisfied beyond reasonable doubt of the guilt of the accused.

The following has been observed as regarding bias against circumstantial evidence:

> "Bias against circumstantial evidence is problematic when dealing with either direct or circumstantial evidence. The high probative value of circumstantial evidence coupled with the fact that both types of evidence suffer from similar underlying issues of reliability serves to undermine any justification for attributing different levels of worth to circumstantial and direct evidence"[1]

This line of reasoning is also expressed in the case of *S* v *Vhera* 2003 (1) ZLR 668 (H) which rightly observed that direct evidence can also be dangerously unreliable unless it is supported by other evidence. In modern day terms, circumstantial evidence such as DNA results and finger prints, for instance, may even be more accurate than direct evidence thus making it a fallacy to treat circumstantial evidence as less reliable.

[1] Eugenee M. Heeter, Chance of Rain: Rethinking Evidence Jury Instructions, 64 Hastings L.J. 527, [ix]

The case of S v *Marange* supra does not make reference at all to the case *S* v *Shoniwa* so it is not as if it overturns the standpoint in that case regarding the treatment of circumstantial evidence being at par with direct evidence. In this present matter, the approach of the Supreme Court in the case of *S* v *Shoniwa* will be adopted in terms of its treatment of circumstantial evidence as equally cogent as actual evidence. This is more so given that the need to guard against "hasty and false deductions" applies to the entire spectre of evidence and not just circumstantial evidence. In the final analysis, it is all evidence that requires consideration of reliability, accuracy, and sufficiency. It is not only direct evidence which speaks to the elements of an offence.

Legal and factual analysis

The admitted evidence of the domestics was that the house had been unlawfully entered and was in disarray when they turned up for work on 5 January 2016. There was clear evidence that the house had been ransacked. The evidence from the police revealed that some of the stolen items which included the iPad and clothing was recovered at the house where the first accused and second accused were staying. The stolen items were further identified by the deceased's sister whose evidence was admitted without challenge. The inference to be drawn is that the accused obtained the property when they entered the house unlawfully. This, together with the fact that the stolen items from the house were found with the two accused excludes every inference save that the accused must have entered the house on the night on question and stolen these items when they unlawfully entered the house.

The defence of alibi by the first accused was rebutted by the State's finding of the items with the accused which he must have taken on the night in question when the deceased was murdered. The two accused had not offered an acceptable explanation as to why they were in possession of those items save to say that the police had implicated them. The accused were in fact the ones who led the police to their house where the items were found. We were satisfied that the evidence given by the police officers was truthful that they had been led to the first accused because he had sold a stolen phone.

Both accused persons leading the police to the house where they stayed, the police recovering certain items from that house, the failure by both accused to supply a pin to the iPad, the confession by both accused as to where they had obtained the *iPad* which was the house where the deceased had been murdered, had indeed happened as stated by the police. Further, the property had been positively identified. Since it is all the pieces of circumstantial

evidence considered together which must reasonably lead to the conclusion that the defendant is guilty beyond a reasonable doubt, *in casu* these particular facts put together were clearly not consistent with the innocence of both accused.

We were therefore also satisfied that the State established beyond a reasonable doubt that the accused entered the deceased's house unlawfully in furtherance of committing further offence. The unlawful entry was committed under aggravated circumstances in that they broke into domestic premises and stole property.

Furthermore, they killed the deceased. The autopsy and post mortem report had been done against the background of intruder inflicted injuries who had accessed the home during the night. It showed that the deceased was incapacitated by ligatures tied around his ankles and wrists. His body had abrasions, bruises and lacerations. His head had been hit with an object. The autopsy report also found evidence of external pressure to the neck blood vessels and air passages causing injury to the tissue of the neck. There was also strap muscular bruising to the neck. The nature of the injuries had been fatal. The manner of death was consistent with the application of external force. The cause of death was recorded as mechanical asphyxia due to strangulation and suffocation and cerebro–cranial injuries. The report is sufficient to find a clear intention to kill.

As to the claims of the accused that they were tortured, violence is almost always considered as undue influence. Where a court is convinced that a violation did indeed take place in the manner of obtaining evidence, it would not sanction such violation as this would be contrary to the Constitution. There must, however, be evidence to such claims other than an accused's mere say so. In this case no evidence was placed before the court to support the claims. Because such claims of assault are often loosely made by accused persons and also in some cases the police may indeed have used some measure of coercion to extract evidence, a balance has to be struck in dealing with these claims especially when there is no evidence to support them. The wording of s 70 (3) of the Constitution is such that the improperly obtained evidence must be excluded, if it renders the trial unfair or if it would be detrimental to the administration of justice. The provision is therefore not technical or mechanical.

What was found was real evidence of the stolen items at the time of arrest which led to the recovery of further items the following day. This evidence was not a result of brutality. The accused do not state how the admission of the direct evidence found on them would render the trial unfair or hamper the administration of justice. In South Africa for example, s 35 of their Constitution similarly deals with the exclusion of evidence which violates the Bill

of Rights if its admission would render the trial unfair or otherwise detrimental to the administration of justice. As observed in the cases *Key* v *Attorney General Provincial Division* 1996 (4) SA 187 (CC) and *Shaik* v *Minister of Justice and Constitutional Development* 2004 (1) SACR 105 (CC) in interpreting that provision, the key in reading this provision is not to elevate fairness to a suspect in such a manner that the community at large loses faith in the criminal justice process. What must be considered is not only the interests of the accused but also the interests of the victim. The claim that the evidence was planted on them by the police makes no sense because if the police had already recovered the items from someone or somewhere they would have no reason to plant the evidence on the accused.

Verdict

We find both accused guilty of one count of unlawful entry under aggravated circumstances and one count of murder with a direct intention to kill.

Mitigation, aggravation and sentence

The mitigating features put forward for the first accused were that he is a father of four children aged 9, 6, 4 and 1 year 8 months respectively. He was their sole breadwinner and was self-employed. He is 37 years old. Also he was said to have assisted the police with the recovery of the stolen property thus saving their time. He is also already serving on other robbery charges.

With respect to the second accused, it was said that he is 28 years old and that he may have been coerced into unlawful behaviour because of his relative youth. He is married with one child who is four years old. He also takes care of his parents. His father is 75 and his mother is 55. It was therefore argued that this court should spare him the harshest sentence so as to give him another chance at life for him to look after his family.

Save for the fact that the accused persons showed police the stolen property leading to the unveiling of the murder, the factors put forward as mitigation which relate to their family status were known to the accused at the time that they committed the offences, so it is difficult to see how they serve as mitigation. As breadwinners it was their duty and responsibility to do so through legitimate means. When they went ahead to commit the offence they knew that they had families and that if caught they would have to face the law with all its consequences.

The State in aggravation sought the highest penalty being the death sentence on the basis that the murderous act was cowardly and showed total disrespect for the sanctity of life.

Our Criminal Code has been amended through Amendment Act No 3 of 2016. It has adopted a list of aggravating circumstances which the court "shall" consider in murder cases calling for death penalty before it can impose that penalty. Section 47 (2) for instance outlines capital murders as those committed in four situations, namely where:

a) the murder is committed in the course of insurgency, banditry, sabotage or terrorism, rape, kidnaping, robbery hijacking, unlawful entry into premises among some of the listed crimes.
b) the murder is one of two committed at the same time or part of a series of two or more murders
c) the murder is preceded or accompanied by torture of physical mutilation committed by the accused
d) and where the victim was murdered in a public place or in an aircraft, or public transport vessel among others.

The incorporated amendments do not take away the consideration of mitigating circumstances as it is this aspect that provides the avenue for the individualization of sentencing to suit the offender.

Since a murder committed in the course of unlawful entry is among the situations listed, the State inevitably argued that the murder fell within the definition of aggravated murders as provided by the relevant section of the Criminal Code as amended. The State argued that the murder had been carefully planned.

In casu there is no doubt that the conduct of the accused persons did cause the death of the deceased and that it was committed deliberately knowing that death would result. There is also no doubt that it was committed in the course of unlawful entry. Counsel for each accused person also highlighted that both accused are currently serving a sentence for other related robberies. This will be considered but in crafting an appropriate sentence it is also necessary for this court to consider the probability of whether they would commit acts of violence that would constitute a threat to society. In other words, their propensity for committing crime cannot be ignored even if the court is not able with a degree of accuracy to look into the future.

As regards the imposition of the death penalty there is some controversy on whether the amendments to the Criminal Code are Constitutional. Crozier and Feltoe[2] for example point out that in setting out the non-exhaustive list of circumstances that a court must

[2] B Crozier and G Feltoe **Have the procedural rules in criminal cases been properly aligned to the Constitution and are the new provisions on the death penalty for murder satisfactory.** In Zimbabwe Electronic Law Journal 2017 (1)

("shall") take into account the public was not involved. The gist of their argument is that the use of the word "may" with regard to the imposition of the death penalty gives the discretion to parliament as to whether the death penalty should continue to be used as a form of punishment. They argue that a Parliamentary debate was required especially given the current Minister of Justice's own reservation on the imposition of this penalty. As such, they conclude that the list of aggravating circumstances is unconstitutional. They further point out that suggests that the courts must impose the death penalty in murder cases where the identified circumstances are present. It is said that the Act does not make it sufficiently clear that the death penalty is not mandatory.

The relevant provision in the Constitution dealing with the death penalty is couched 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 committed in aggravating circumstances, and—
> (*a*) the law must permit the court a discretion whether or not to impose the penalty;

In listing the factors to be taken into account as aggravating, the amended s 47 (2) of the Criminal Code which deals with murder is mandates the court in the following terms:

> **47 Murder**
> (1)……
> (2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court **shall regard it as an aggravating circumstance** if—

The argument is that the Constitution in providing the guiding principle makes the death penalty non mandatory whereas the amended Code in using the word "shall" in outlining the applicable law is said to now cloud this clarity. Clearly the Constitution must prevail in giving the courts a discretion as to whether the aggravating circumstances so identified justify the imposition of the death penalty. Suffice it to also point out that any lack of clarity on the discretionary aspect in passing the death sentence also disappears when regard is had to s 337 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] which states that:

> **337 (1) Sentence for murder**
> Subject to section 338, the |High Court **may** pass sentence of death upon an offender convicted by it of murder if it finds that the murder was committed in aggravating circumstances.

Furthermore, in terms of sentencing, the Criminal Code in s 47 (4) also maintains that discretion when it provides for either a sentence of death, imprisonment of life or a period of imprisonment of not less than twenty years be imposed where a murder is committed in aggravating circumstances. In other words, what can be gleaned from the spirit of the Constitution, as well as s 338 of the Criminal procedure and this provision in the Code is that even where aggravating circumstances are found it does not follow that the death penalty should be imposed.

> **Section 47 (4)**
> (4) A person convicted of murder shall be liable—
> (*a*) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or(3); or
> (*b*) in any other case to imprisonment for any definite period

In casu, indeed death by strangulation is particularly callous in that it involves a deliberate extinguishing of someone's life. No doubt the murder was a deliberate loss of life carried out in the course of an unlawful entry. Though this is an aggravating circumstance, this was not the worst of murders. It is important that in practice the circumstances under which the courts actually order the death penalty, remain narrowly rather than broadly applied. This is more so in view of the continued controversy as to whether the penalty ultimately represents a form of cruel and unusual punishment. To the extent that it represents the highest form of punishment, it should be reserved for the most egregious of cases. It should not be applied wantonly. Crozier and Feltoe interpret our Constitutional position thus:

> "In other words, by providing that the death penalty should only be imposed where there are aggravating circumstances, the Constitution envisages that the death penalty will only be imposed where the murder is exceptionally grave or heinous".

I would agree and there is some evidence of embracing these parameters. For example, in the case of *State* v *Lovemore Mlambo Mafukidze* HH 255-17 which involved strangulation of an elderly woman in her hut, the court reached the conclusion that the crime though heinous could not be said to have been aggravated to warrant the maximum penalty.

The circumstances in question though aggravating warrant a lengthy prison sentence rather than the death penalty.

Each accused is sentenced as follows:

On the count of unlawful entry under aggravated circumstances: 5 years imprisonment.

On the count of murder 30 years imprisonment.

The sentence on unlawful entry to run concurrently with the 30 year sentence for murder.

Effective sentence: 30 years

National Prosecuting Authority: State's legal Practitioners.
Masawi and Partners: 1st Accused's Legal Practitioners (Pro deo)
Mufadza & Associates: 2nd Accused's legal practitioners (Pro Deo)