

THE STATE
versus
MAXSEN BVUMBE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 21, 22 September and 23 & 26 November 2021

Assessors: Mr Shenje
Mr Chakuvinga

Criminal trial

D H Chesa, for the State
Mrs M M Ushe, for the accused

MUREMBA J: The accused (29) is facing a charge of murder as defined in s 47 (1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 21 July 2020 and at Madzinga village, Centenary he assaulted Stephen Bvumbe (39) with fists all over his body thereby causing injuries from which Stephen Bvumbe died. The accused pleaded not guilty to the charge.

In his defence the accused stated that on the fateful day, the deceased came home drunk. He was a nuisance and was spoiling for a fight. Apparently, the accused and the deceased were first cousins, their mothers were blood sisters. However, the deceased's mother was already deceased. After the death of the deceased's mother, the accused's mother, her children and husband came to stay at the deceased's late mother's homestead. The deceased was not happy about this arrangement. He wanted the accused's mother and her family to leave. He had told them on different occasions to leave.

The accused said that on the fateful night, when the deceased got home in the evening, he was insulting the accused's mother using vulgar language. The accused who was in his hut heard the noise and proceeded to his mother's kitchen where the disturbance was. Upon arrival, he admonished the deceased and told him to go and sleep. The deceased appeared admonished and left for his homestead with the accused following behind. The accused said that he wanted to ensure that the deceased proceeded to his home. When the deceased got into his kitchen, he took an axe and threw it at the accused who ducked and avoided it. The accused took the axe

and gave it to the deceased's wife and asked her to hide it. The deceased proceeded to assault his wife who fled to an uncle's homestead where she sought refuge. The uncle is called Special Bvumbe. When the deceased's wife fled from home, the accused had returned to his mother's kitchen. The deceased returned to this kitchen and started attacking the accused. He fell the accused to the floor and sat on him as he continued to punch him. The accused said that he punched the deceased a few times on the chest and stomach and also pushed the deceased as he tried to free himself. The accused's step father arrived at the scene and managed to pull the deceased from the accused. The accused got out of his mother's kitchen and decided to take the deceased's axe to a neighbourhood watch officer. He went with his uncle Blessmore Bvumbe. They failed to find the officer and returned with the axe. It was after about 30 minutes. They found the deceased still being militant. This did not go down well with Blessmore Bvumbe who started to admonish the deceased. The deceased started throwing stones at Blessmore. Blessmore said that he was going to teach the deceased a lesson. The accused left the deceased and Blessmore Bvumbe fighting. The accused denied ever hitting the deceased on the head. Apparently, the post mortem says that the cause of deceased's death was brain injury, haemorrhage and severe head trauma. The accused said that the deceased did not bleed at all during the time he fought with him. The accused stated that he believed that Blessmore Bvumbe is the one who dealt the fatal blow (s) to the deceased. He said that this was more so since Blessmore Bvumbe fled from home the moment he heard that the deceased had died. The accused prayed for his acquittal.

The State's Evidence

Lilian Kamhangara, the deceased's wife testified as follows. The deceased came home very drunk on the evening in question around 7pm. He started shouting about issues to do with the homestead. He was a very argumentative person. She tried to calm him down but he would not listen. Blessing also known as Blessmore Bvumbe arrived. Blessmore Bvumbe and the deceased were first cousins. Blessmore's father was a brother to the deceased's mother. The accused and the deceased were using the surname Bvumbe because it is their mothers' brother who acquired birth certificates for them. When Blessmore arrived, the deceased started an altercation with him. Both were claiming ownership of the homestead. They went out of Lilian Kamhangara's kitchen and proceeded to the accused's mother's kitchen. Lilian's yard and the accused's mother's yard share a boundary. Lilian Kamhangara said that as the deceased and Blessmore Bvumbe were in the accused's mother's kitchen, the accused came from his hut and

proceeded to his mother's kitchen. Lillian Kamhangara said that she could hear voices from the accused's mother's kitchen hut. She said that she heard the accused telling the deceased that he was in the habit of insulting his mother and that he was now going to kill him. She said the accused was saying "I will kill you, I will kill you." The deceased then came back to her kitchen bleeding from the mouth and nose. The deceased was saying that the accused had assaulted him and that he wanted to go back and retaliate; but she advised him against it. She said that it was now around 8pm. She said that she came back home the following morning just before 6am. She did not say where she had slept and why. She said that she found the deceased lying in the kitchen. His legs were stretched and could not be folded; but the upper part of his body showed that he was still breathing. Lillian said that she only noticed that the deceased's one eye was swollen and shut.

It was only during cross-examination that Lillian Kamhangara said that the deceased had slapped her once when she was trying to restrain him from going to cause havoc with the accused. She said that she did not see the deceased and Blessmore having a fist fight that night. Lillian Kamhangara said that she saw Blessmore Bvumbe the next morning and he told her that he had given the deceased some porridge. She denied that the accused gave her an axe to hide. Lillian Kamhangara said that her kitchen hut is about 10 – 15 metres from the accused's mother's kitchen hut.

Enita Bvumbe testified as follows. She is the mother of the accused and the deceased was her late sister's son. On the fateful evening the deceased came to her kitchen hut drunk. He was shouting and hailing insults and obscenities as he was telling her to vacate his late mother's homestead. Enita said that she did not dispute, but was simply requesting the deceased to give her enough time to look for an alternative stand from the village head. When the deceased was shouting no one answered him. He then left for his homestead saying that he wanted to kill someone. He said that he was not going to die alone that night. He said that a number of people were going to die on that night. The deceased came back to Enita's kitchen, lit his cigarette and went back to his homestead. His wife was trying to restrain him. She was telling him that what he was doing was bad. He threatened to assault his wife. She ran away and came to Enita's kitchen. Enita said that she told her to go and hide behind the door; but she chose to go to an uncle's homestead. The deceased came back to Enita's kitchen hut where upon arrival, he grabbed the accused by the collar. The two struggled as the deceased was on top of the accused. The accused managed to free himself and the deceased went to his homestead to fetch an axe. He was grabbed by Blessmore Bvumbe who told him that he was

misbehaving. It took about 2 hours as the deceased and Blessmore Bvumbe were having an altercation. Enita said that the two fought but people were no longer watching as they had gone inside their houses. She said that she could hear the voices of the deceased and Blessmore, but she could not go outside. The accused had gone to his house to sleep. Enita said that when the altercation between the deceased and Blessmore Bvumbe ended she had already fallen asleep. Enita said the next morning she proceeded to the garden. Her husband, Brian Christmas followed her there and informed her that the deceased had been found lying outside the house in the morning. She said that Blessmore Bvumbe fled from home and only came back after the deceased had been taken to hospital. He then left on the day the deceased was buried and never came back.

Brian Christmas testified as follows. He is the husband of Enita Bvumbe and the step father to the accused. On the fateful evening, he had gone to the neighbours to look for relish for that evening. When he came back, he found the accused and the deceased having fought. He did not witness the fight but was told about it by the accused. The accused told him that when he managed to free himself, he left the deceased fighting with Blessmore Bvumbe. The next morning Blessmore Bvumbe came and told him that the deceased was lying outside his (deceased's) house. Brian Christmas said that he instructed Blessmore Bvumbe to cook porridge for the deceased. Brian Christmas said that it was Blessmore Bvumbe who caused the death of the deceased. He said that this was because when he got home and the accused told him that he had fought with the deceased, the deceased was still alive. In addition, he said that when the police came to attend the scene and to record statements, he (Brian Christmas) sent for Blessmore Bvumbe but his place was locked and he was not there. He came back in the evening and took his belongings and went away. Blessmore Bvumbe This was on the day the deceased was buried.

Under cross-examination Brian Christmas maintained that he did not witness the fight between the accused and the deceased. He said that he left them quarrelling as he went to inform his brother-in-law Francis Bvumbe about the quarrelling. He denied telling the police that the accused assaulted the deceased viciously and that the deceased was hopelessly drunk.

Upon being asked questions by the court, the witness said that when he came back from calling his brother-in-law, the fight between the deceased and the accused had already happened and the place was quiet. The deceased was in his kitchen with his wife. Brian Christmas said that his wife was in her kitchen. The accused was also in his kitchen which is

within the same yard. Brian Christmas said that the accused told him about the fight that had happened between him and the deceased as he was passing by the accused's kitchen. Brian Christmas said that he did not talk to the deceased because he was still shouting and that was his nature. Asked why he was saying that the deceased and Blessmore Bvumbe had fought that evening, Brian Christmas said that it was because Blessmore Bvumbe had come to him in the morning indicating that the deceased was lying outside his (deceased's) hut.

Floyd Skin, the investigating officer testified as follows. He arrived at the decision that the accused is the one who was responsible for the deceased's death because that is the information that he was told by the informant of the death. He could no longer remember who the informant was. The investigating officer said that when he attended the scene, he also gathered that the accused was the one who had caused the death of the deceased. The information he gathered was that the accused had assaulted the deceased with fists and open hands. He said that no other person was mentioned as having been involved in a fight with the deceased. He said that he recorded a warned and cautioned statement from the accused on 24 July 2020 and there was no mention by the accused of any other person having been involved in the death of the deceased. The investigating officer said that he is the one who also recorded witness statements when he attended the scene, and no one mentioned any Blessing or Blessmore Bvumbe being connected to the case. The investigating officer said that if the name had been mentioned, he would not have had any reason not to arrest this person. The investigating officer said that he was hearing for the first time the name of Blessmore Bvumbe being mentioned in court. He said that from his investigations he gathered that no weapon was used during the commission of the offence. He further said that it was Brian Christmas who told him that the accused is the one who had assaulted the deceased. Brian Christmas said that he was one of the people who were inside the kitchen hut where the assault happened hence, he recorded a statement from him. The Investigating Officer was adamant that during the course of his investigations, he never came across the name of Blessing or Blessmore Bvumbe.

Doctor Yoandry Mayedo a Forensic Pathologist who examined the remains of the deceased concluded that death was due to brain injury, haemorrhagic subarachnoid global and severe head trauma. His evidence was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It was accepted as it appears in the summary of the State case. The post mortem report was produced by consent and was marked as exhibit 1.

The affidavit by Dr Kelvin Mupunga was also produced by consent as exhibit 2. The affidavit states that Doctor Mupunga is stationed at St Alberts Mission Hospital. On 22 July 2020 he received the deceased who was accompanied by his wife and Special Bvumbe. The deceased came with a history of being involved in a fist fight with his brother Maxsen Bvumbe (the accused). He noted no visible external injuries on the deceased. He made a diagnosis of alcohol intoxication with superimposed assault. The patient died within 8 hours past admission the same day.

The accused's confirmed and warned and auctioned statement was produced by the consent. In his reply to the murder charge the accused said;

"I have understood the nature of the caution and admit that I assaulted the now deceased and overpowered him as we were fighting after he had insulted me as well as my mother and he also wanted to strike me with an axe."

The evidence led by the accused

The accused was the sole witness for his case. Although he adhered to his defence outline, there are areas where he departed from what he said in his defence outline. For instance, he said that when the deceased returned from the beer drink and started shouting insults, he was not present. Brian Christmas is the one who came and fetched him together with Francis Bvumbe and Blessmore Bvumbe. They proceeded to where the deceased was and found him still shouting insults, but he was at his homestead. Francis Bvumbe tasked his son, Blessmore Bvumbe to go and calm him down but he failed. When Blessmore Bvumbe came to the accused's mother's kitchen where everyone was, the deceased followed. He continued with his insults. He was hailing obscenities at the accused's mother. This version is different from what the accused said in his defence outline. In his defence outline he said that just before 8pm he heard the deceased verbally abusing and insulting his (accused's) mother and he proceeded to his mother's kitchen where the deceased was.

The accused also said that he went to surrender the axe to the neighborhood watch officer alone and on his way back he met Blessmore Bvumbe. In his defence outline he had said that he went with Blessmore Bvumbe to surrender the axe to the member of the neighborhood watch.

The accused said that he left for his house to retire to bed when the deceased was throwing stones at Blessmore Bvumbe and Blessmore was walking towards the deceased's house saying that he wanted to teach the deceased a lesson. The accused said that he proceeded to his house. About 10-15 minutes later, Blessmore Bvumbe came to the accused's house and

said that he had left the deceased lying down. The accused said that he told Blessmore to go to his place, which he did. The accused said that he then retired to bed. Early in the morning around 5 am, Blessmore Bvumbe came and told him that the deceased was still lying at the same spot where he had left him the previous night. The accused said that they then both went to where the deceased was lying. They lifted him and put him in the house. The accused said that he then left for Mvurwi where his sister resides. On the next day, whilst in Mvurwi he was phoned by an uncle who advised him that the deceased had been ferried to hospital where he later passed on. This same uncle later told him that he was with the police and they were waiting for him. He then went to the police station where a statement was recorded from him. The accused said that the police asked him about the whereabouts of Blessmore Bvumbe and he told them that he had also been trying to call him on his phone, but he was not responding. The accused said that he was arrested and taken to court. The deceased was buried whilst the accused was already in remand prison.

The accused said that when he struggled with the deceased, he did not see the deceased bleed. He denied threatening to kill the deceased. The accused said that he never formulated an intention to kill the deceased. Under cross-examination he said that he does not drink beer. He said that on the fateful night the deceased was heavily drunk. He could not be restrained. The accused said that he used to enjoy a cordial relationship with the deceased's wife. He said that in his warned and cautioned statement to the police he admitted that he had been involved in a fight with the deceased and that he had overpowered him. The accused said that although he mentioned Blessmore Bvumbe to the Police, he did not see Blessmore's name in his warned and cautioned statement when he was taken to court. When it was put to the accused that his behaviour of running away from home was consistent with the behaviour of a person who is guilty, the accused said that he would not know. Asked why he had gone to Mvurwi, the accused said that he had gone to tell his sister what had happened. Asked if he had seen the deceased and Blessmore fighting, the accused said that he did not, but Blessmore later came saying that he had left the deceased lying down. He said that Blessmore only told him about it the next morning that he had fought with the deceased. Asked why he had left home for Mvurwi instead of rendering assistance to the deceased, the accused said that it never occurred to him that he should render assistance. He admitted though that when they carried the deceased into the house, he was bleeding from the nose and mouth. He said that the deceased was still breathing but it was a laboured breath. He said that things did not look well. He said that he left home because he was no longer settled. He went on to say that people actually thought that

he had taken some poison. He said that the police arrested him because he had also fought with the deceased.

Analysis of evidence

The following issues are common cause in this matter. The deceased came home very drunk on the evening in question. He verbally abused his maternal aunt, the accused's mother using vulgar language. The reason for his rant was that he wanted the accused's mother and her family to vacate his late mother's homestead. The deceased had been ranting about this issue for a long time. Blessmore Bvumbe was present on the fateful evening but there is no single witness and not even the accused who observed him assaulting the deceased. Only some vague allusions were made by Enita Bvumbe to the effect that when she was in bed, she heard some noise and concluded that there was a fight between the deceased and Blessmore. The deceased's wife, Lillian fled to an uncle's place that evening and she did not witness what transpired after she had left. It is common cause that the deceased was very aggressive on the night in question. The deceased's body had no visible external injuries. According to the post mortem report, the deceased bled from the mouth, ear and nose. The cause of death was brain, injury, hemorrhage and severe head trauma.

The issue for determination is whether or not it is the accused who caused the death of the deceased. The guilt of the accused must be proved by the State beyond reasonable doubt – See *State v Mdiniso* [2010] ZAECGHC 18. When a court finds that the guilt of the accused has not been proven beyond reasonable doubt, that accused person is entitled to an acquittal, even if there may be suspicions that he indeed was the perpetrator of the offence in question. See *S v T* 2005 (2) SACR 318 (E).

In casu we believe that the State managed to prove its case beyond reasonable doubt against the accused for the following reasons. In his confirmed warned and cautioned statement the accused admitted that he assaulted the deceased and overpowered him as they were fighting after he had insulted him as well as his mother. He further said that the deceased had also wanted to strike him with an axe. The accused thus admitted that he is the one who assaulted the deceased. In the statement the accused made no mention of Blessmore Bvumbe. The reason why the accused did not mention him is because Blessmore did not assault the deceased. The accused's statement to the police was made freely and voluntarily as evidenced by its confirmation in court by a magistrate. Since the accused made his statement freely and voluntarily, there is no reason why he failed to mention that Blessmore was responsible for the

death of the deceased. His failure to mention him simply shows that Blessmore Bvumbe played no part in the death of the deceased. It was only at this trial that the accused sought to cast the blame on Blessmore Bvumbe. However, it is clear that this was an after-thought. We say this because the accused said that it was during confirmation proceedings in the Magistrates Court that he realised that there was no mention of Blessmore's name in his warned and cautioned statement despite him having told the police about it. Upon that realisation the accused should therefore not have had his statement confirmed by the Magistrate. The fact that he had his statement confirmed despite this omission shows that Blessmore had played no part in the death of the deceased. It also shows that the accused had made no mention of Blessmore to the investigating officer when his warned and cautioned statement was recorded.

Blessmore Bvumbe was mentioned as the assailant for the first time at trial showing that this was an after-thought on the part of the accused, his mother and step-father. None of them had mentioned this to the investigating officer when they all gave their statements to him. The investigating officer had no interest in the matter. He was not known to the accused, the deceased and their family. So, he had no reason to lie that the accused, his mother and step father did not tell him about the involvement of Blessmore, if they had told him. He impressed the court as a credible witness. On the contrary the accused's mother and her husband did not impress the court as credible witnesses. They fared very badly because they wholly departed from the versions they gave to the police. Considering their relationship to the accused, their departure stems from the need to extricate the accused from the offence. They just wanted to exonerate the accused and nothing else. The State's summary of Enita Bvumbe's evidence states that the deceased grabbed the accused and slapped him, *"the accused retaliated, assaulting the deceased with fists all over the face and body. The deceased started bleeding from the nose, mouth and ears as a result of the assault. The deceased was found lying outside his bedroom hut unconscious on the morning of 22 July 2020"*.

The summary of Brian Christmas' evidence said that when the deceased grabbed the accused by the collar and slapped him, a fist fight started in the kitchen. He tried to stop the fight but the accused was vicious. He severely assaulted the deceased who was helplessly drunk. The deceased bled from the mouth, nose and ears as a result of the assault. On 22 July 2020 and at around 0600 hours when he woke up he found the deceased lying unconscious outside his house.

This is what the accused's mother and her husband told the police soon after the incident when events were still fresh in their memories. So, this must have been the truth of what transpired. They did not implicate Blessmore Bvumbe because he had not assaulted the deceased. This explains why even in court none of them could explain how Blessmore had assaulted the deceased. Both of them as well as the accused claimed that when the fight happened between the deceased and Blessmore, they had gone to sleep. What is striking about what the accused's mother and the accused's stepfather told the police is that it is consistent with the observation that was made by the deceased's wife on the evening in question before she left for the uncle's place where she slept. She said that when the deceased came back from the accused's mother's kitchen where he had gone shouting and hailing insults, he was bleeding from the nose and mouth. Even the doctor who conducted the post-mortem made the same observations about the bleeding. The deceased had no external injuries. He died from brain injury, haemorrhage and severe head trauma. These injuries are consistent with the bleeding from the nose, mouth and ears that the deceased suffered after he had been assaulted by the accused. The injuries and the bleeding speak to an assault that was perpetrated on the head.

The accused's mother and her husband were the eye witnesses to this assault by the accused as evidenced from what they told the investigating officer. This is thus proof that it is the assault that was perpetrated by the accused that resulted in the death of the deceased. Even the deceased's wife's evidence confirms that. It shows that before she left home that evening, the accused had already assaulted the deceased badly. The deceased came to her kitchen bleeding from the nose and mouth. This is consistent with her evidence that she heard the accused assaulting the deceased making utterances that he was going to kill the deceased on that day because the deceased had misbehaved for too long. The deceased's wife is one person who did not depart from her statement to the police. She was consistent thereby showing that she was a reliable witness. Her evidence as corroborated by the post mortem report shows that it is the accused who delivered the fatal blows. By the time the deceased's wife left home that evening, the damage to the deceased had already been done. The accused's confirmed warned and cautioned statement is further corroboration. The accused on his own said that he assaulted the now deceased and overpowered him. This is consistent with the accused's mother's and step father's statements that the deceased had grabbed the accused by the collar and slapped him once on the face and the accused retaliated by assaulting him viciously resulting in the bleeding of the deceased from the mouth, nose and ears.

The accused fled from home on the morning of 22 July 2020 when the deceased was found lying on the ground outside his house. Things did not look well as his breathing was laboured. Soon after carrying the deceased into the kitchen, the accused escaped to Mvurwi. He did not render any assistance to the deceased despite it being obvious that the deceased needed to be taken to hospital. The accused's explanation was that he did not think of it. That cannot be true. Clearly, it was the realisation that the deceased's life was in danger that made the accused to flee from home. He was in shock because of what he had done to the deceased. It was unpleasant and upsetting to be around the deceased hence he fled. On the other hand, Blessmore Bvumbe attended to the deceased. He prepared porridge for him. He attended his burial. That Blessmore fled from home is evidence which only came from the accused, his mother and his step father at trial. The deceased's wife was never asked about the whereabouts of Blessmore. The investigating officer said that he never looked for Blessmore because he had no reason to since nobody ever mentioned his name during investigations. It cannot therefore be said with certainty that Blessmore Bvumbe ran away from home after the commission of this offence. The accused said that people suspected that he had committed suicide. This actually speaks to the fact that people knew that he is the one who had assaulted the deceased and that it was not Blessmore Bvumbe.

The accused did not impress as a credible witness. He departed from his confirmed warned and cautioned statement and his story was riddled with inconsistencies. He wanted to give a story which matched the new story that he and his mother and step father had come up with in a bid to exonerate him from the offence. Unfortunately for them, they did a poor job of it as all their three stories put together did not add up. Each gave a different and confused story. Brian Christmas was the worst. His oral evidence just did not make sense.

Mr *Chesa* for the State submitted that the accused be found guilty as charged for the following reasons. Whilst the deceased was drunk the accused was not. He consciously decided to assault the deceased, hence he made utterances that he was going to kill the deceased. Mr *Chesa* went on to submit that, "*He consciously realized the possibility that the deceased who was drunk may fatally be injured but accepted the possible outcome of the assault.*" On the other hand, Mrs *Ushu* for the defence prayed for the complete acquittal of the accused saying that the State did not manage to prove the accused' guilt as its case was riddled with inconsistencies.

We have already made a finding that it is the accused who assaulted the deceased and caused his death. We cannot therefore find him not guilty as prayed for by the defence counsel.

On the other hand, we are not inclined to convict the accused of murder as prayed for by Mr *Chesa* either. Mr *Chesa* did not explain in what way the accused realised that there was a real risk or possibility of death occurring out of his action and nonetheless persisted with his action. Instead, he submitted that the accused “*consciously realized the possibility that the deceased who was drunk may fatally be injured but accepted the possible outcome of the assault.*” This statement does not explain the mental element of murder that the State alleged against the accused in its charge. The State needed to prove that the accused subjectively realised the risk of death arising out of his action but nonetheless persisted with his action. To begin with, there is no evidence that although the accused assaulted the deceased viciously, he intended to kill him. Evidence shows that the deceased was excessively drunk and he was being a nuisance and was very aggressive on the evening in question. His wife failed to restrain him. She said that he even slapped her. She said that he was an argumentative person by nature. Even the accused’s mother and step father also said the same thing. It is not in dispute that on the evening in question the deceased was uttering some obscenities against the accused’s mother and it was not the first time. Initially the accused had tried to admonish the deceased, but the deceased did not listen. The accused lost it when the deceased grabbed him by the collar and slapped him in the face. It appears that the provocation by the deceased was too much and the accused retaliated viciously. The utterances that were made by the accused that he was going to kill the deceased on that day only showed that he was very angry. We do not believe that the words should be literally interpreted to say he meant what he said. This is even evidenced by the fact that the accused only used fists to assault the deceased. It appears to us that out of anger the accused assaulted the deceased carelessly on the head with fists and negligently failed to realise that death could result from his conduct. He assaulted the deceased until he bled from his mouth, nose and mouth. Although no evidence was led by the State to show how the accused stopped assaulting, it is clear that the accused eventually stopped assaulting the deceased. The deceased then went to look for an axe in a bid to retaliate. His wife tried to restrain him and he slapped her and she fled from home. So, even after having been assaulted, the deceased still wanted to fight the accused . The evidence as presented by the State supports a conviction of culpable homicide.

In the result, the accused is found not guilty and acquitted of murder. He is found guilty of culpable homicide as defined in s 49 (a) of the Criminal Law (Codification and Reform) Act.

Sentence

In mitigation we considered the following factors. The accused is 29 years old. He is family man with a wife and children to take care of. He also takes care of his mother-in-law and her mentally ill brother. 2 beasts of the accused were sold to fund the funeral of the deceased. The accused was closely related to the deceased. The two were first cousins as their mothers were blood sisters. The accused reacted to extreme provocation by the deceased who was always insulting both the accused's mother and the accused himself using vulgar words. The deceased was an argumentative person. On the fateful day the deceased was extremely drunk and was ranting. He grabbed the accused and slapped him. He even slapped his wife when she tried to restrain him. The accused retaliated in the heat of the moment. The accused will live with the guilt of having killed his first cousin for the rest of his life.

The accused should realise that even under extreme provocation he ought to exercise self-restraint. It is aggravatory that although the accused assaulted the deceased using clenched fists only, he assaulted him viciously on the head until he bled from the mouth, ears and nose. This resulted in brain injury, severe head trauma and haemorrhage. The head is a delicate part of a person. The accused was negligent in the manner he assaulted the deceased.

Mrs *Ushe* proposed that the accused be sentenced to 7 years' imprisonment, of which 5 years' imprisonment is suspended on condition of future good behaviour and the remaining 2 years being suspended on condition of performance of community service. Mr *Chesa* proposed a wholly suspended sentence of 5 years' imprisonment. It is our considered view that the sentences as proposed by both counsels will trivialise the matter. In as much as the deceased was a nuisance to the accused's family, there is need to uphold and respect the sanctity of human life. The deceased was a family man and had a family to take care of. That family no longer has a father to provide for it. Effective imprisonment is called for. The court will impose a term of imprisonment and suspend a portion thereof on condition of future good behaviour. The objective is to rehabilitate and deter the accused in future as well as to deter other would-be offenders. The accused is thus sentenced as follows.

5 years' imprisonment of which 2 ½ years' imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving violence on the person of another and for which upon conviction he is sentenced to imprisonment without the option of a fine. Effective 2 ½ years' imprisonment.

The National Prosecuting Authority, State's legal practitioners
Sachikonye – Ushe Legal Practice, accused's legal practitioners