

STATE
versus
CHRISPEN GARIKAI CHISAMBA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 2 November 2021

Criminal Trial

ASSESORS: 1. Mrs Mawoneke
2. Mr Mudzinge

Ms T. L Katsiru, for the State
HBRT Tanaya assisted by *D Mutiure*, for the accused

MUZENDA J: On 21 November 2017 and at Chisamba Village Dorapindo, Chief Zimunya, Mutare, accused, who is aged 44 years and an uncle to Lameck Matsa now deceased, had an altercation over the resignation of the former President of Zimbabwe, Robert Gabriel Mugabe. Both accused and deceased were partaking beer with fellow patrons at 2 Hills Tuck Shop. Admittedly deceased was drunk. An altercation ensued between deceased and accused, deceased attacked accused first and accused eventually retaliated by assaulting now deceased with a fist on the cheek. Later accused struck now deceased with a sisal fibre stem on the neck and deceased died on 23 November 2017. Accused was charged of Murder and he pleaded not guilty and tendered a plea of guilty to a lesser charge of Culpable Homicide. The state accepted the lesser charge and the parties prepared a statement of agreed facts which were spelt as follows:

1. Accused is aged 40 years and self-employed as a carpenter and tiler.
2. The now deceased was aged 34 years and was employed as a general hand by Mega Market Mutare. Accused and deceased were related as uncle and nephew.
3. On 21 November 2017 at around 1900 hours, the accused was drinking beer with fellow patrons outside 2 Hills Tuck Shop, talking about the resignation of former President Robert Mugabe. The deceased who was drunk approached accused and other drinkers, and started accusing them of lying that the president had resigned. When accused

confirmed that he had just received a message confirming the resignation, the deceased focused his attention on him, accusing him of lying.

4. Accused moved aside and sat down on a bench outside the tuck shop. The deceased started to insult the accused, poking fingers at him. Accused stood up and pushed the now deceased who staggered backwards, appearing to fall. Bystanders told now deceased to stop his provocative behaviour and go home but now deceased refused to go.
5. The accused and now deceased tussled and wrestled and fellow patrons refrained them from fighting. Deceased freed himself from the people restraining him and charged at the accused. Accused picked a sisal fibre log from a pile nearby and advanced to meet the now deceased, he struck deceased on the neck and deceased fell. Deceased proceeded to his homestead where his health deteriorated and he died on 23 November 2017. A post-mortem report No 142272 *exh 1* shows that the doctor noted that deceased was swollen on the left neck and face, blood was noted in the neck and face internally, and blood was emanating from neck vessels, he concluded that the cause of death was *internal haemorrhage*. The sisal fibre pole was produced and accepted and marked as *exh 2*, it was 2,56 metres long, the circumference of the largest end measured 22 cm and it weighed 1,6kg.

In mitigation Mr *HBRT Tanaya* submitted that accused is a first offender and that he pleaded guilty to a charge committed due to the carelessness of the accused. There was no premeditation and the offence was committed out of an impulse at a beer drink. Accused was provoked by the deceased's behaviour, and provocation was also worsened by intoxication, which badly impaired accused's judgment. Accused did not repeatedly attack the deceased, he only struck him once and to the accused the attack cannot be described as excessive so as to warrant a custodial sentence. There were no visible injuries nor external injuries and deceased did not die instantly he died after two nights and a day later. Accused is a family man and has a history of mental problem though he was last attacked long back some twenty years ago. It was submitted further that accused had other responsibilities of looking after his elderly relatives. In addition he had been anxiously waiting for four years for the case to be completed. He financially contributed towards funeral expenses to bury now deceased and has already paid some retribution to deceased's family and would complete the residue in due course. Counsel for the accused strongly advocated for a non-custodial sentence, more particularly a monetary penalty coupled with a wholly suspended prison sentence. He cited a number of cases and

eventually and alternatively submitted that if a monetary penalty is not foreseeable then a sentence of 3 years imprisonment, 2 years of which be suspended for future good behaviour.

On the other hand Ms *Katsiru* submitted that a custodial sentence in the region of eight to ten years with a portion suspended would meet the justice of the matter. In aggravation she submitted that life was unnecessarily lost, accused who was older than the now deceased ought to have acted maturely by self controlling himself than to use such a lethal weapon and deliver a blow on a vulnerable part of the body. She added that a fine or community service will trivialise the offence accused stands convicted of. She urged the court to pass a custodial sentence.

In assessing the appropriate sentence the court will closely and carefully look at the circumstances of this matter and what has been submitted in aggravation and mitigation. It is not in dispute that deceased largely contributed to the build-up of the confrontation leading to the assault by the accused, accused was actually assaulted also by the now deceased. Both accused and deceased are related and accused was older than now deceased and comparably sober to the deceased. He ought to have exercised self-restraint and avoid deceased at all costs. At the time accused picked the sisal fibre stem, he was not under any imminent danger from the deceased, accused actually walked towards where deceased was and struck the deceased. His behaviour was not called for at all. He struck deceased on the neck with a log, internally injuring the veins of deceased which led to the deceased's death.

Accused had pleaded guilty to culpable homicide, had been dutifully attending all remands from 2017 to the date of hearing, cooperated with state machinery and shows remorsefulness by contributing towards deceased's burial and had paid retribution to deceased's family. In my view such a conduct of paying part of the retribution should weigh heavily in mitigation.

When the court balances both mitigatory and aggravatory features in this matter, the aggravatory features far outweigh the mitigatory features. Life was lost, and no matter how much retribution accused is going to pay now deceased's family it will not replace the life of deceased. For two nights deceased was undergoing gruelling pain and on 23 November 2017 the doctor noted that deceased's body and face were swollen. For the veins or vessels to be cracked or opened, severe force should have been used. However from the sentence I am going to pass a large portion of it will be conditionally suspended as a deduction for the accused's plea of guilty, provocation, assault and contributions towards the funeral expenses as well as retribution.

Accordingly accused is sentenced as follows:

3 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition within that period accused is not convicted of an offence involving violence to the person of another and to which he is sentenced to imprisonment without an option of a fine.

*National Prosecuting Authority, state's legal practitioners
Tanaya Law Firm, accused's legal practitioners*