STATE
versus
CUDWELL NDEGA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 07, 09 and 13 September 2021

ASSESSORS: 1. Mrs Mawoneke
2. Mr Magorokosho

Murder Trial

C Mukwena, for the Appellant
M Musarurwa for the Respondent

MUZENDA J: On 16 August 2020 accused and the now deceased had a confrontation which the state alleges resulted in accused fatally pulling now deceased's manhood leading to deceased's demise. Now accused is facing Murder Charges.

Accused is denying the charges and pleaded not guilty. In his defence he contends that on the fateful day he proceeded to Luckson Gavi's homestead at 8am where there was traditional brew for sale. He spent the better of the day drinking at that homestead with locals. Whilst at the beer drink he later joined deceased and shared the beer together. Around 1700 hours accused informed deceased about his intention to go home for he was then drunk. Deceased discouraged accused from going home. The deceased then confronted accused about his habit of leaking information of infidelity to deceased's wife. Deceased told accused that the latter was using his cellphone to send messages to the former's wife. Accused denied the allegations and walked off. Deceased followed the accused and an argument ensued between the two. The two grabbed hold of each other and started pushing and shoving each other. Accused freed himself from the deceased's grip and went to his home. He left deceased standing behind a building structure under construction. Accused totally denies grabbing deceased's manhood, and does not recall opening deceased's zip fly and pulling his genitalia. He was actually shocked when he was informed about the demise of the deceased and prays that he be acquitted.

Facts of the state are to the effect that accused and deceased were related as nephew and uncle respectively, deceased being a brother to accused's father. Accused would refer to deceased as his father and to deceased's wife as his mother. They both resided in Nyakunu Village under Chief Zimunya. Accused used to make allegations of extra marital affairs against the deceased. On 16 August 2020 both accused and deceased were at Luckson Gavi's homestead partaking traditional brew. Once again the issue of the deceased's adultery sparked an argument between the two. The two then went behind a building in the homestead and a fight ensued causing the deceased to fall. The accused then grabbed the deceased by his genitals and pulled them. The deceased started vomiting and the accused fled from the scene but was later apprehended and brought back to the scene. A check on the deceased showed that he had passed on. The post-mortem examination concluded that the death was a result of inhibition death due to severe testicles trauma.

The question is to determine whether the accused pulled deceased's genitalia which led to the demise of the deceased?

To prove its case on this aspect the state called two state witnesses to testify Chipo Hatinahama and her sibling Shamiso Hatinahama. Chipo Hatinahama was at the home where the traditional brew was. Both accused and deceased were present and both partaking alcohol. Around 1700 hours she noticed that a misunderstanding had arisen between accused and deceased pertaining to allegations of infidelity made by the accused to the deceased. The two pushed and shoved each other till they were behind an uncompleted building. She heard the deceased telling the accused about the former's desire to go home but accused pestered the deceased about settling the adultery issue first. She then heard deceased shouting at the accused to the effect that accused was killing him. She went to where the two were and observed that accused was holding the wall with one hand, whilst the other hand was inside deceased's pants. She discerned accused pulling deceased's testicles three times and on the third pull, deceased collapsed. She left the scene to seek for assistance, upon her return to the scene she observed deceased lying face upwards and accused standing there between the deceased's legs. People gathered at the scene and deceased was writhing in pain and vomiting. Accused fled from the scene but was chased after by by-stander**s** and was brought back to the scene.

Her sister Shamiso Hatinahama told the court that on that day, 16 August 2020, she was at home when she saw accused and deceased arriving separately for the ceremony at

Luckson Gavi's homestead. The beer was not for sale. The two among other revellers spent the day at the place. At around 1700 hours, the witness noticed the accused and deceased involve in some scuffle which resulted in shoving of each other and the two went behind the house. She proceeded to take a bathe in a semi-constructed structure. Whilst she was there, she heard accused threatening to kill the now deceased. She ventured to peep through an opening and observed accused pressing deceased against the wall. She concluded in her mind that deceased was in danger and rushed out of the bath to alert other people and ask for help. Upon her return she went to where deceased was and noticed the latter vomiting and the fly of his zip was open.

The admitted evidence of Luckson Gavi is that he heard one of the daughters of Hatinahama shouting that the deceased had been attacked by the accused who was then running away. He ran to the scene and found deceased lying on the ground in pain and vomiting. He alerted other people. Accused was brought back to the scene and he appeared drunk. Clemence Zvenyika's incontroverted evidence is that he heard Chipo Hatinahama shouting that the accused was killing the deceased. He rushed to the scene and saw deceased lying and vomiting. He spotted the accused fleeing from the scene. He gave chase and managed to apprehend accused and brought him back to the scene. The witness saw that deceased's clothes were wet. He also saw that the now deceased was dead and by that time accused had left the scene.

The state witness impressed us as being truthful witnesses. All of them have no reason to falsely incriminate the accused. Chipo and Shamiso Hatinahama share a relationship with both accused and deceased in that their mothers and the two's is Chirasha or porcupine, they regard accused and deceased as uncles. They were extensively cross examined by the defence counsel but they remained forthright especially on the aspect that accused pressed deceased against the wall and accessed his privacy and went on to pull deceased's genitalia. We find no hesitation in believing evidence of the state on that crucial aspect. Accused sought to explain the motive behind the witnesses' alleged conspiracy against him by stating that his uncles are after his piece of land but the Hatinahamas have no interest on that piece of land. They were simply telling the court what they saw. The defence counsel went at sea to critique the post-mortem and attributed the cause of death to vomiting. He went on further to contend that if the deceased's genitals had been pulled the doctors should have found them swollen but they were not. In our view these criticisms are unfounded at all. An expert has made a scientific finding and conclusion in an area where this court cannot venture into and in the

absence of another different view reposed to by an expert we have no hesitation in accepting the results of the post-mortems as being valid. In any case the scientific evidence is corroborated to a large extent by the oral evidence of Chipo Hatinahama which we have accepted as credible. Further the conduct of the accused led to the collapse of the deceased and to the subsequent vomiting of the deceased.

We also reject the accused's version that when he left deceased he was standing. Accused was seen by Chipo standing astride the body of the deceased which was lying on the ground. Why would accused run away from the scene, in our view accused realised that he had fatally injured deceased and wanted to disappear from the scene without being noticed. During his testimony in court accused performed poorly as a witness. He was evasive and contradictory and could not provide answers to simple questions put to him. In some instances he could not even respond to questions. His story is unsupported by facts on the ground and it cannot be sustained at all. We reject it.

Accused admitted during cross-examination by the state that he was aware that deceased was not staying well with his wife and accused was not happy about it. Accused admitted that the issue of infidelity was at the centre of the scuffle between him and deceased. In his confirmed warned and cautioned statement accused stated that when deceased went behind the house to relieve himself it was accused who followed him. We do not hesitate to find that it was the accused who confronted deceased about the alleged infidelity, it was accused who had an upper hand when he was seen by Chipo and Shamiso pressing deceased on the wall and it was accused who was heard uttering death threats to the deceased and it was accused who forcefully and dangerously pulled deceased's genitalia leading to his death. Accused had a cursory and not meaningful challenge of these facts and the state had managed capably to prove its case against the accused beyond reasonable doubt.

Accused caused the death of the now deceased and uttered words heard by the state witness that he was going to kill the deceased and did so by pulling deceased's manhood, hence he intended to kill him. The intention too has been proved by the state. On each pull of deceased's manhood deceased showed apparent pain by his body language and accused did not stop but continued to do so not once but thrice and only stopped when deceased succumbed to the attack and collapsed. Deceased warned accused that accused was killing him by his conduct but accused did not heed until he achieved his purpose. We are unable to buy accused's counsel submission that accused should be found guilty of culpable homicide and we found accused guilty of Murder with actual intent as charged.

Sentence

In arriving at an appropriate sentence the court will consider all the mitigatory aspects put before me by the defence counsel on behalf of the accused. I also look at the aggravatory circumstances put forward by the state. The disturbing thing in this case is that accused considered deceased his father, resolved to meddle into the dispute of the parents and got the courage to get hold of the father's private parts, turning himself into an arbiter in a family dispute and killed deceased. The force used by the accused was excessive in the circumstances because it led to the death of deceased. I fail to see the logic in the whole matter if it least the aggrieved wife of deceased had already sought the assistance of both the police and the courts. Deceased pleaded with accused to stop hurting him but accused ignored the request and it is clear that deceased died a painful death. Society does not take it lightly where a person in the position of accused assaults a parent or a person in such a position of deceased in the manner accused did. Accused's moral blameworthiness is very high and the sentence I am going to pass must show abhorrence to such a conduct.

Accordingly accused is sentenced as follows:

15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Gonese Ndlovu and Partners, Accused's legal practitioners