

THE STATE  
versus  
FREDRICK CHAFADZA

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
MASVINGO, 22 & 30 January 2018; 15 & 29 March 2018; 24 May 2018

**Criminal trial**

Assessors: Messrs Gweru & Mushuku

Mr *T. Chikwati*, for the State  
Mr *C. Ndlovu, pro Deo*, for the accused

MAFUSIRE J:

- [1] The accused, Fredrick Chafadza, 30, was charged with two counts. The first was the murder of Charles Kudubva, 34 [*“the deceased”*]. The second was the attempted murder of one Kudakwashe Musvamhuri [*“Kuda”*].
- [2] The accused and the deceased had been friends. Both had been teachers at some local primary school. The incident giving rise to the charges occurred around midnight on 17 October 2013 at a rural bottle store in Zaka, Masvingo Province.
- [3] Uncontested facts were that from about 17:00 or 18:00 hours the accused and the deceased had been drinking beer at the bottle store. Also drinking beer at that bottle store was Kuda and his friend or relative, Kizito Mutongoza [*“Kizito”*]. There was an altercation between the accused and the deceased on the one hand, and Kuda and Kizito on the other.
- [4] The State’s case was that in an effort to strike Kuda with a piece of wood, the accused missed. The blow caught the deceased on the forehead. He fell down and never woke up again. He died on the way to hospital.

- [5] In relation to the deceased, the accused was charged with murder as defined in s 47[1] of the Criminal Law [Codification and Reform] Act, [Cap 9:23] [*“the Code”*]. In relation to Kuda, the accused was charged with attempted murder as defined in s 189, as read with s 47[1] of the Code. He pleaded not guilty to both counts.
- [6] The accused alleged that it was Kuda who, on the night in question, mercilessly pummelled the deceased with a log and killed him.
- [7] Kuda and Kizito were the key State witnesses. The intrinsic aspect of Kuda’s evidence was that sometime towards midnight the accused and Kizito had an altercation.
- [8] Kuda said when he enquired of the accused what the cause of the altercation with Kizito had been, the accused had responded by slapping him. Kuda had retaliated. The two had fought. Their fight had taken them outside the bottle store. Kuda said he had been overpowered. He had run away. However, after a few metres he realised he had left his sandals behind. He had come back for them. He saw that the accused and the deceased had armed themselves with wooden logs. He picked a stone to protect himself. The accused and the deceased advanced. The accused swung the log to strike him. He ducked. The blow missed. It landed on the deceased. The deceased fell down and lay unconscious on the ground. The accused asked Kuda to fetch some water so that he could render first aid to the deceased. Kuda refused. By then Kizito had come out of the bottle store. Together they walked away.
- [9] Kizito’s evidence was more or less the same as that of Kuda. He denied he was ever involved in the fight with the accused. He said as the accused and Kuda fought outside the bottle, he had remained inside with the deceased and the bar lady, one Tariro Kurengu [*“Tariro”*]. The deceased had later gone outside to join the fight. Later on he heard Kuda shouting to the accused: *“Look, you have struck your friend!”* When he went outside he saw the accused dropping a log. The deceased was lying prostrate on the ground. The accused asked Kuda to help him resuscitate the deceased, but Kuda refused. He and Kuda went home.

- [10] The third State witness was one Dominic Mombeyarara Tofara [*“Mombeyarara”*]. He was a teacher. He was also the village constabulary. He said he had been friends with both the accused and the deceased.
- [11] The key aspect of Mombeyarara’s evidence lay in what the accused allegedly told him on that fateful night. It was common cause that after the fracas at the bottle store, and the deceased lay dying, the accused rushed to one Mike Mazhara Mutsava [*“Mazhara”*] who was the village head and whose homestead was very close to the business centre at which the bottle was situated. Together with Mazhara, the accused had proceeded to Mombeyarara to make a report. Mombeyarara said the accused told him that he had accidentally struck his friend, the deceased, when they had been fighting with Kuda and Kizito. Mombeyarara further said that the accused said he could not really understand what exactly had happened.
- [12] It was Mombeyarara who assisted the accused to arrange transport for the deceased to be ferried to hospital.
- [13] The last State witness was police officer Trymore Hweta [*“Hweta”*]. He was the investigating officer. Among other things, he recorded the accused’s warned and cautioned statement. The significant aspect of his evidence was that despite his being adamant that the accused had confessed to him that he had mistakenly struck his friend, which confession he had allegedly taken down in writing, in the warned and cautioned statement, the accused completely denied the charge and blamed Kuda for striking the deceased dead.
- [14] After the close of the State case, the defence applied for discharge in terms of s 198[3] of the Criminal Procedure & Evidence Act, [*Cap 9: 07*]. It reads:
- “If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”
- [15] It is trite that where the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit: see *Attorney-General v*

*Bvuma & Anor*<sup>1</sup> and *S v Tsvangirai & Ors*<sup>2</sup>. There are three basic considerations. The court shall discharge at the close of the State case:

- where there is no evidence to prove an essential element of the offence [*Bvuma & Anor, supra*, at p 102];
- where there is no evidence on which a reasonable court, acting carefully, might properly convict [*Attorney-General v Mzizi*<sup>3</sup>]; and
- where the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely convict on it [*S v Tarwire*<sup>4</sup>].

[16] In applying for discharge, Mr *Ndlovu*, for the accused, argued that Kuda and Kizito were accomplice witnesses. This argument stemmed from the fact that it was common cause that these two had also been initially arrested and charged together with the accused for the alleged murder of the deceased. They had remained on remand for close to three years as the matter awaited trial. It was only towards the days of trial that they had been removed from remand and turned into State witnesses.

[17] Mr *Ndlovu's* point was that as accomplice witnesses Kuda and Kizito had a major reason to lie so as to completely extricate themselves from the crime by blaming it all on the accused.

[18] Of Mombeyarara, Mr *Ndlovu* said he should not be believed. As the village constabulary, he had all the powers of arrest. Yet on the night in question, not only had he refrained from arresting the accused, but he had also allowed him the freedom to ferry the deceased to hospital all by himself whilst he [Mombeyarara] had remained behind. Therefore, the argument concluded, it could be inferred that no such confession as alleged by Mombeyarara had been made by the accused.

[19] Of Hweta, Mr *Ndlovu* said one only had to compare what he was saying in his evidence in court with the contents of the warned and cautioned statement that he himself had

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<sup>1</sup> 1987 [2] ZLR 96 [S]

<sup>2</sup> 2003 [2] ZLR 88 [H]

<sup>3</sup> 1991 [2] ZLR 321 [S] @ 323B

<sup>4</sup> 1997 [1] ZLR 575 [S], at p 576

recorded from the accused, to see that no such confession as alleged by him had been made by the accused.

[20] We dismissed the application for discharge at the close of the State case for lack of merit. Among other things, even though Kuda and Kizito had once been arrested for the alleged murder of the deceased, their evidence was quite incriminatory. They were not accomplices in the sense that the term is understood in criminology. Regarding Mombeyarara, nothing done by him on the night in question could reasonably be used to impugn his evidence in court. Hweta's evidence might have been unhelpful, but enough had been led by the State to warrant the accused taking the witness' stand.

[21] When he took the witness' stand, the accused maintained that it was Kuda who had struck and killed the deceased. He alleged that both Kuda and Kizito had been quite aggressive on the night in question. Kizito had deliberately spilt opaque beer on his clothes when he had refused to buy him a round. He said both Kuda and Kizito had at one time accused the accused and the deceased of having stolen their cigarettes. They had caused the bottle store entrance to be shut. Kuda had attacked him unprovoked. He had chased him. At one stage Kuda had asked for his knife. At another stage he had armed himself with a stone and a log, threatening to raze the bottle store window panes to the ground unless the entrance was reopened to enable him to assault and kill the deceased.

[22] The accused said the bar lady, Tariro, had eventually relented. She had opened the bottle store door. But she had also ordered the deceased out. Kuda had grabbed the deceased and had started to mercilessly assault him all over the body. Fearing for his friend's life, the accused said he grabbed a log and advanced towards where Kuda was busy pounding the deceased. He said his intention was to scare Kuda away and rescue the deceased. This had worked. He said he never had to use the log because when Kuda saw him advancing, he ran away. But as he ran away, Kuda shouted to the accused to pour some water on the deceased. The deceased never woke up. The accused reported the matter to the police. He also arranged transport for the accused to be ferried to hospital.

- [23] The accused called Mazhara as his witness. The significant aspect of Mazhara's evidence was that when the accused called on him for assistance on the night in question, he informed him that the deceased had been assaulted by Kuda.
- [24] In the closing submissions the State presses for a conviction on culpable homicide, not murder. It sticks by the evidence of all the State witnesses except Hweta. It argues that the accused intended to assault Kuda but missed. He hit the deceased instead. It says the fact that Kuda and Kizito had at one time faced the same charge of murder as the accused, arising from the same incident, does not affect the quality of their evidence in court. They remained credible. Their version of events remained consistent.
- [25] The State further argues that Mombeyarara's evidence was robust. It remained unchallenged. He had no reason to lie against the accused. His evidence was supportive of that of Kuda and Kizito.
- [26] The State concludes by saying that even if the accused had intended to ward off Kuda in defence of his friend, he had used excessive force. He had used a very big log to hit a vulnerable part of the body, the head. Thus such force, when used in defence of a person, was unreasonable. For that, the accused should be found guilty of culpable homicide as contemplated by s 259 of the Code.
- [27] On the other hand, the defence argues that the State has failed to discharge the onus resting upon it. Not only was there no proof of murder beyond any reasonable doubt, but also a conviction of culpable homicide is inappropriate because the accused was entitled to defend his friend who was under attack. The log that he picked was the only available weapon. The accused had no other means to ward off the unlawful attack on his friend.
- [28] The defence persists with the argument that Kuda and Kizito were accomplice witnesses whose evidence should not be relied upon. The defence also says that these two witnesses were furthermore shown to have lied in respects that were not even material to the case. In this regard, Mr *Ndlovu* was referring to the issue of the kind of relationship between Kuda and Kizito. Kuda said he and Kizito were half-brothers from

their mothers' sides. But Kizito denied it vehemently, referring to Kuda as no more than one who had once been a herd boy at their homestead.

[29] Mr *Ndlovu* was also referring to the issue of Tariro's love relationship with Kizito and the accused. Certain impressions had been given that Kizito and the accused were rival suitors to Tariro. Kizito begrudgingly admitted in cross-examination that the girl had once eloped to him sometime after the incident, something he had seemed to have concealed or denied.

[30] On the apparent conflict between the evidence of Mazhara and Mombeyarara, regarding whether or not the accused had confessed that it was him who had struck the deceased, or whether he had said that it was Kuda who had struck the fatal blow, the defence maintained that Mazhara's evidence had to be preferred instead of that of Mombeyarara for two reasons: 1) because the State had refrained from calling Mazhara as a witness as it knew that he would contradict what Mombeyarara would be saying; and 2) because Mombeyarara was unworthy of belief since there was no reason why he had not promptly arrested the accused for the murder of the deceased after he had allegedly confessed, but had, instead, left him to ferry the deceased to hospital all by himself.

[31] We have reached a verdict. In arriving at it we have analysed the facts and the law under the following headings:

- between Kuda and the accused, who struck the fatal blow on the deceased?
- if it was the accused, was it an *aberratio ictus* [deflected blow] situation?
- if indeed it was an *aberratio ictus* situation, is the accused nevertheless guilty of the crimes charged, or some other crimes?

i] *Who struck the deceased?*

[32] This is a question of fact. It is answered upon a thorough consideration of all the evidence led.

[33] Mr *Ndlovu* says Kuda and Kizito should not be believed because they were accomplices to the murder. They were once arrested and remained on remand for close to three years before they were turned into State witnesses. As such, their evidence should not be accepted since they had the motive and the intention to incriminate the accused and thereby save themselves from any possible prosecution of the crime.

[34] But with all due respect, the defence is mistaken. In relation to the alleged murder of the deceased, Kuda and Kizito were not accomplices in the sense contemplated by s 267 of the Criminal Procedure and Evidence Act, [*Cap 9:07*]. They were not turned into State witnesses and granted immunity from prosecution on condition they answered all questions put to them satisfactorily. As Mr *Chikwati* explained, the State made the decision that the police had arrested and charged them wrongly. There was no intention to prosecute them.

[35] An accomplice is an accessory to the commission of the crime. He is not the actual perpetrator. His liability stems from his own conduct [coupled with the requisite *mens rea*] but which is accessory in nature: see JONATHAN BURCHELL *South African Criminal Procedure*<sup>5</sup> and *S v Williams*<sup>6</sup>. The accomplice wittingly makes common cause with the actual perpetrator of the crime. He affords the actual perpetrator the opportunity, the means and the information that furthers the commission of the crime. But he lacks the *actus reus* of the perpetrator.

[36] Plainly, Kuda and Kizito fall outside the definition of an accomplice. If the accused is to be believed, Kuda was the actual perpetrator of the crime from his own individual act. If he should be charged, and the accused's allegations were proved, Kuda would be guilty as the actual perpetrator, not as an accomplice.

[37] We are satisfied that the evidence of Kuda and Kizito is credible. We are mindful that this is a tale told by drunks. They had all been drinking opaque beer non-stop from about 17:00 hours of the previous day to the early hours of the following day when the

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<sup>5</sup> Vol 1 General Principles of Criminal Law, 4<sup>th</sup> ed., p 515

<sup>6</sup> 1980 [1] SA 60 [A] at p 63

incident happened. But the version by Kuda and Kizito is coherent. On the other hand, the accused's version is unworthy of belief beyond any reasonable doubt.

[38] We consider the version by the accused unworthy of belief for a number of factors. Although his warned and cautioned statement, his defence outline and his *viva voce* testimony in court were all consistent on one thing: that it was Kuda who assaulted the deceased, beyond that, everything else is incoherent. For example, how Kuda ended up “*mercilessly*” thrashing the deceased with the log; how he himself got pummelled by the same Kuda on several occasions but each time managing to escape; why only his log was recovered from the scene, and not the other logs that Kuda and Kizito allegedly used; how the deceased would not let out any sound as Kuda thrashed him; why, after pounding the deceased, Kuda, on seeing the accused advancing armed with a log, he would concern himself with the deceased's terminal condition to the extent of advising the accused to pour water on the deceased as he himself was running away; and so many other aspects, are some of the inherent improbabilities in his evidence.

[39] The post-mortem report that was produced without objection put the cause of death as head injury and cervical subluxation [misalignment of the seven uppermost vertebrae of the spine, the neck]. The doctor noted, among other things, occipital haematoma [collection of blood at the back of the head]. This is consistent with a full-on blow to the head. The wooden log was produced in court. It was 2.32 metres long. It weighed 3.565 kilogrammes. It was the only log recovered from the scene. The accused admitted that it was the log that he carried on the night in question. He denies ever using it. But that is like a toddler denying raiding the cookie jar, or the sugar basin, when his face and mouth are plastered all over with cookie crumbs or sugar crystals!

[40] Mombeyarara's evidence dovetailed with the rest of the other evidence led by the state. His deportment was impressive. He did not strike as one who is easily excitable. He was straightforward in his answers and his explanations. In contrast, Mazhara, who was quite elderly, seemed too eager to assist the accused whom he regarded as an uncle. He made it evident that he owed the accused's lineage a debt of gratitude for having allocated him the territory over which he reigned as village head. At first he claimed he heard the accused telling Mombeyarara the same thing that he had told him earlier on,

namely that it was Kuda who had assaulted the deceased. However, in further probing by the court Mazhara changed his story and said he had heard nothing since he was too sleepy.

[41] Mombeyarara said he was friends with both the accused and the deceased. This was not refuted. The accused tried to cast aspersions on his character by alleging that he was jealousy that they did not patronise his bottle store more frequently. That was manifestly a long shot which we discount. It is our finding that the accused did tell Mombeyarara that he had struck the deceased by mistake. It is our finding that it was the accused that struck the deceased.

ii] Was the death of the deceased an aberratio ictus situation?

[42] An *aberratio ictus* [or deflected blow] situation occurs where A, intending to kill B, aims the blow at him but misses, the blow landing on C instead. If C dies from the blow, whether or not A may be found guilty of murder or of culpable homicide or of some other crime, depends on a number of factors.

[43] Our conclusion in this case is that the facts are classically an *aberratio ictus* situation. Our finding is that on the night in question, following an altercation, the accused armed himself with a huge piece of wood which he swung with much force, intending to strike Kuda with whom he was fighting; that Kuda ducked and the accused missed. The blow landed on the deceased who had joined the brawl on the side of the accused. The blow knocked the deceased down and he died on the way to hospital.

iii] Is the accused guilty of the murder of the deceased?

[44] The State has already conceded that the accused cannot be found guilty of murder in relation to the accused. The concession is well made. Certainly the accused had no actual intent to kill the deceased.

[45] For a killing to be murder, both the *mens rea* and the *actus reus* have to converge in respect of the victim. In this case, the accused's actual or direct intention to do harm [*dolus directus*] was aimed at Kuda. But the *actus reus* in relation to Kuda was not completed or successful. Instead it was completed or successful in relation to the

deceased. But since there was no direct or actual intention in relation to the deceased, he cannot be found guilty on that account.

[46] That leaves the question whether the accused can be found guilty of the murder of the deceased with legal or constructive intent [*dolus eventualis*]. To do so, there must be a finding that the accused subjectively foresaw his blow missing Kuda and landing on the person of the deceased. A finding must be made that the accused was conscious of the presence of the deceased within the reach of his log, and that despite appreciating that his blow might miss and land on the deceased, he nevertheless went ahead to swing, aim and thrust it.

[47] In *S v Ncube*<sup>7</sup> the accused was found not guilty of the murder of the deceased, his brother, where, with the intention of stabbing their uncle with a spear, the brother interposed in between and received the fatal blow. The Supreme Court found neither actual nor legal intent on the part of the accused.

[48] In the present case, there was no such evidence as would enable the drawing of an inference that at the crucial moment the accused was conscious of the presence of the deceased standing next to him.

iv] *Is the accused guilty of culpable homicide in relation to the death of the deceased?*

[49] Of culpable homicide, the Code says in s 49:

“Any person who causes the death of another person-

- (a) negligently failing to realise that death may result from his or her conduct; or
- (b) realising that death may result from his or her conduct and negligently failing to guard against that possibility;

shall be guilty of culpable homicide and liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level fourteen or both.”

[50] Thus, negligence [*culpa*] is the bedrock of this crime. The yardstick to measure it is the proverbial reasonable person, the *diligens paterfamilias*. Whereas with murder with

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<sup>7</sup> 1983 [2] ZLR 111 [SC]

legal intent the test is subjective: being whether the accused himself did foresee the consequences of his conduct, but nonetheless continued; with culpable homicide, the test is whether a reasonable person would have foreseen the consequences of the accused's conduct, and whether the accused failed to measure up to that standard.

[51] It is sometimes a very thin line between the worst form of culpable homicide and murder with legal intent. In *R v John*<sup>8</sup>, it was said murder [with legal intent] and culpable homicide are closely related offences. Together, they cover the whole field of criminal liability for bodily injury, the one taking over where the other leaves off.

[52] In this case the evidence did not clearly establish at what point during the accused's altercation with Kuda did the deceased join in. The accused's brawl with Kuda started in the bottle store. They ended being outside. It seemed common cause that Kizito, Tariro and the deceased at one point remained inside. But Kuda said when he came back for his sandals he saw both the accused and the deceased armed with logs. The accused himself said he armed himself with the log to scare off Kuda who was mercilessly pummelling the deceased after he had fallen down. So this means the accused ought to have been aware of the presence of the deceased in the vicinity of the fight. He might not have subjectively foreseen his blow missing Kuda, his intended object, and hitting the deceased instead. However, he ought to have appreciated the danger of arming himself with such a dangerous weapon and plunging it forward when visibility was very poor, and when he ought to have appreciated that some people other than Kuda were nearby. We find that the accused was negligent and that it was such negligence that led to the death of the deceased.

v] *Is the accused guilty of attempted murder in relation to Kuda?*

[53] Section 189 of the Code describes attempt in general as follows:

**“189 Attempt**

(1) Subject to subsection (1) [*sic*], any person who-

(a) intending to commit a crime, whether in terms of this Code or any other enactment; or

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<sup>8</sup> 1969 [2] RLR 23

- (b) realising that there is a real risk or possibility that a crime, whether in terms of this Code or any other enactment, may be committed;

does or omits to do anything in preparation for or in furtherance of the commission of the crime, shall be guilty of attempting to commit the crime concerned.”

[54] Intention is a necessary ingredient for attempted murder as it is for murder. As mentioned already, the wooden log that the accused armed himself with was over two metres long. It was over three kilogrammes in weight. Undoubtedly, it was a dangerous weapon. Unquestionably, when he armed himself with it his intention was to inflict considerable damage on Kuda. The accused did act on his intention. He swung the blow. He aimed it at Kuda. However, he missed because at the critical moment Kuda ducked.

[55] Whether the accused’s conduct amounted to intention to murder or mere assault is judged from all the surrounding circumstances. He must have used tremendous force because the same blow that missed Kuda killed the deceased. The blow caught the deceased on the forehead. The post mortem report estimated the height of the deceased at 170 cm and his weight at 85 kilogrammes. Thus he was a man of medium built. It seems as he plunged the log, the accused aimed at the upper part of the body. Therefore, given the weight of the log, its length, the force used and the region of the body aimed at, the accused intended, or was undoubtedly reckless as to whether or not death would ensue if his blow connected. He had the requested intention for murder.

[56] However, despite our finding of *dolus* for murder in relation to Kuda, we nevertheless find that the *actus reus* was absent or incomplete. The blow did not connect. There was no contact. Therefore, the accused cannot be found guilty of the attempted murder of Kuda.

[57] Assault is a competent verdict on a charge of attempted murder. In terms of s 89[1][b] of the Code, it is an “assault” if any person threatens, whether by words or gestures, to assault another person, intending to inspire, or realising that there is a real risk or possibility of inspiring, in the mind of the person threatened, a reasonable fear or belief that force will immediately be used against him or her. In relation to Kuda, the accused did not merely threaten. He acted on his intention.

[58] Defence Counsel says, somewhat cursorily, and at the tail-end of the argument, that the accused was entitled to defend himself and or his friend from Kuda's unlawful attack. No attempt at all was made to analyse the requirements of this defence as defined in s 253 of the Code to see whether it could apply to the accused's situation.

[59] The Code sets out stringent requirements before the defence of person can be available as a complete defence. From our conclusion earlier on that it was the accused who armed himself with a log to strike Kuda, we are satisfied that the defence of person is not available to the accused because:

- it has not been shown that the accused could not otherwise escape from, or avert the alleged attack by Kuda [s 253(1)(b)];
- it has not been shown that the means the accused used to avert the attack were reasonable in all the circumstances [s 253(1)(c)];
- most crucially, the harm done by the accused was on an innocent third party [the deceased], not Kuda [s 253(1)(d)(i)], and
- the harm [the death of the deceased] was unquestionably grossly disproportionate to that liable to be caused by Kuda who was unarmed [s 253(1)(d)(ii)].

[60] Again Defence Counsel lamely argues that the accused is not guilty because he was drunk. But no evidence was led on what amount of alcohol the accused had consumed. At any rate, in terms of Chapter XIV Part IV of the Code, voluntary intoxication that leads to unlawful conduct is not a defence to crimes committed with the requisite state of mind.

[61] In the final analysis, the following verdicts are returned:

- The accused is found not guilty of the murder of the deceased, Charles Kudubva, and is hereby discharged.
- The accused is found not guilty of the attempted murder of Kudakwashe Musvamhuri, and is hereby discharged.

- The accused is hereby found guilty of culpable homicide for the death of the deceased, Charles Kudubva, on 17 October 2013, at Cherechere Business Centre, Zaka, Masvingo Province.
- The accused is hereby found guilty of assault on Kudakwashe Musvamhuri on 17 October 2013, at Cherechere Business Centre, Zaka, Masvingo Province.

[62] In assessing sentence, the court has taken into account the very strong mitigatory features that both the defence and the State have highlighted. They include the following circumstances personal to the accused:

- He is a first offender. He is now 35 years of age. He was 30 at the time of the commission of the offence. Thus, he has been a law abiding citizen for much of his life. As much as possible, such people should be kept out of jail.
- He has two wives and four minor children. They all look up to him for maintenance and support. Any period of incarceration will inevitably result in much hardship to such dependants.
- He is a trained teacher of relative experience. Jail will undoubtedly cost him his job. Jobs being scarce, chances of getting another after time in prison will be slim.

[63] Also highlighted in mitigation were the circumstances surrounding the commission of the crime. They include:

- The deceased was a friend and a professional colleague. The accused will have to live with the stigma of his death. It will probably haunt him for the rest of his life.
- There was nothing like premeditation or planning in the commission of the crime. It happened on the spur of the moment in an effort to ward off a common enemy. The accused and the deceased had gone to the bottle together to enjoy themselves, not to look for trouble.

- After realising that he had struck and severely injured his friend, the accused did all he could to save his life, namely applying crude first aid, seeking help from the nearby village, and ferrying the deceased to hospital. Unfortunately it was too little too late.
- Given the length of time that they had been drinking, the accused must have been drunk by the time of the commission of the offence. Alcohol impairs one's sense of judgment. Furthermore, Kudakwashe and Kizito were the aggressors. They provoked the brawl that led to the demise of the deceased.
- The crime was committed in 2013. The trial was concluded in 2018. It was a long five year wait. The accused lived with anxiety and anguish for such a long time awaiting his fate.

[64] Both the defence and the prosecution have concurred that in the circumstances of this case the appropriate sentence for culpable homicide should be 3 years imprisonment, with one year suspended on condition of good behaviour. For assault they propose a fine in the region of \$150 to \$200, or a period of imprisonment in the region of 6 months which should run concurrently with the sentence for culpable homicide.

[65] It was evident that both the defence and the prosecution had no conviction in the appropriateness of the kind of sentences they were suggesting. It was evident they both felt a non-custodial sentence would meet the justice of the case. However, they felt constrained to suggest that type of sentence in view of the fact that an innocent life was lost and that the sentencing trends by the courts in cases of culpable homicide are to impose jail terms. Mr *Ndlovu* cited the case of *S v Watanhuka*<sup>9</sup> in which a wholly suspended 12 months jail term was imposed for culpable homicide in circumstances which were roughly similar to those of the present. Mr *Chikwati* alluded to cases of culpable homicide, especially in traffic offences, where sometimes the State declines to prosecute or where, on conviction, the accused escapes with a fine.

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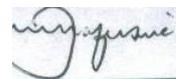
<sup>9</sup> HH 342-13

[66] Counsel's discomfitures are well understood. Sentencing is a complex exercise. The cardinal principle is that in any crime the penalty must suit the offence and the offender. In the present case we have wondered whether if we imposed a custodial sentence, would the accused appreciate the justice of the case? The error of his ways on the night in question was undoubtedly to arm himself with a dangerous weapon and to use it. But this was to ward off an unlawful attack. However, given the manner the whole incident panned out, will the accused appreciate that jail is the only form of retribution or recompense or rehabilitation for the error of his ways? We think not.

[67] After taking all the circumstances of this case into account, we have settled for a non-custodial sentence. The accused is sentenced as follows:

- Both counts [culpable homicide and assault] are taken as one for the purposes of sentence.
- The accused is sentenced to a fine of three hundred dollars [\$300], or in default of payment, 3 months imprisonment.
- In addition, the accused is sentenced to 12 [twelve] months imprisonment wholly suspended for 5 years on condition that during this period he is not convicted of an offence involving violence for which he is sentenced to a term of imprisonment without the option of a fine.

24 May 2018



*National Prosecuting Authority, legal practitioners for the State;  
Ndlovu & Hwacha, legal practitioners for the accused, pro Deo*