THE STATE
versus
LAST SCOTCH
and
GARIKAI KAMUTOTORA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 15 September 2010, 11 October 2010, 12 October 2010, 10 November 2010, 28 March 2011, 9 May 2011, 10 September 2012, 29 July 2013, 23 January and 8 July and 24 July 2014

ASSESSORS: 1. Mr Gonzo 2. Mr Musengezi

D. H Chesa, for the State
J. Samukange, for the Defence

BHUNU J: The two accused persons are charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*]. They are alleged to have assaulted the now deceased Henry Kativhu on 24 August 2008 with fists, open hands and booted feet at Johane Temba's Homestead. The deceased managed to escape but the accused pursued and caught up with him and started to assault him again with sticks thereby inflicting fatal injuries on the deceased.

The post-mortem report compiled by Doctor Mujuru states that death was due to haemorrhage secondary to multiple lacerations caused by a sharp object.

Both accused pleaded not guilty to the charge. They, however, admitted fighting the deceased in a drunken brawl sparked by a long standing grudge. The state alleges that the accused persons started the fight as a carryover of a previous fight in 2007. Both accused admitted the existence of the grudge but denied having started the fight on the day in question. They countered that the deceased was a village bully who was in the habit of abusing his position as a neighbourhood watch policeman to assault them. On the day in question he started the fight without any provocation prompting them to fight back.

They both admit having overpowered the deceased who fled. They, however, deny chasing after him in hot pursuit. Their defence is that upon running away the deceased who was a known bully engaged in another fight with some unknown villagers during which he may have fallen and hit his head against a sharp object possibly a stone.

The difficult with that defence is that Doctor Mujuru who compiled the post mortem report was of the opinion that death was due to haemorrhage secondary to multiple lacerations caused by a sharp object. If death was due to multiple lacerations then, the accused have a case to answer as to the effect of the initial fight which they admit.

Murder being a direct intent crime, it has competent verdicts comprising attempted murder, culpable homicide or assault. The mere fact that both accused admitted that they engaged in a fight with the deceased and the evidence point to him sustaining serious injuries in that fight as observed by the doctor renders the accused liable to any of the competent verdicts of murder if not murder at the end of the day.

The state having conceded in its written submissions that there was no intention to kill, one wonders on the wisdom of persisting with the charge of murder when the evidence clearly points in a different direction.

It would, however, be incompetent and wholly inappropriate to discharge the accused at the close of the state case in terms of s 198 (3) in circumstances where the state has established a *prima facie* case against both accused pointing to the existence of a competent verdict. The court finds that the state has established a *prima facie* case against both accused persons at the closure of its case. The accused have a case to answer, they must therefore be put on their defence.

It is accordingly ordered that the application for acquittal at the closure of the state case be and is hereby dismissed.

SENTENCE

Both accused stand convicted on their own plea of guilty to a charge of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. Initially the accused were charged with the crime of murder. After hearing evidence both the State and the defence came to an understanding that the facts disclosed the lesser charge of assault.

In assessing sentence the court takes into account that the offence was committed during a drunken brawl in which the two accused vented their anger on their long standing

enemy. Both accused persons are youthful, first offenders. They are married and have attendant family responsibilities.

The court will however, not lose sight of the fact that offences of this nature are prevalent and on the increase. People must not hide behind beer so as to commit unnecessary assaults which may lead to fatal consequences. In this case the two accused persons were fortunate that no link could be proved between the assaults which they perpetrated and the cause of death. But nevertheless this court has a responsibility to protect society from that type of conduct.

Reference has been made to the recent case over which I presided of *Mukomba* in which the accused in a bid to commit suicide exposed his own child to the poison in which he intended to take with fatal consequences. That is totally different from what happened in this case because in the *Mukomba* case it was a question of negligence, in this case it is a question of one person deliberately assaulting another. In this case there is need to pass a deterrent sentence so that the accused will be reminded to keep the narrow and straight path whenever they are drinking.

In the circumstances, each accused person is sentenced to pay a fine of US$100-00 or in default of payment 30 days imprisonment. In addition six months imprisonment the whole of which is suspended for a period of five years on condition the accused does not again, within that period commit any offence involving assault and for which he is sentenced to imprisonment without the option of fine.

The National Prosecuting Authority, the State's Legal Practitioners
Venturas and Samukange, the Defence's Legal Practitioners