

STATE
versus
LUCKMORE MAPOSA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15, 16 February 2016, 25 & 26 February 2016

Assessors: 1. Mr Mutambira
2. Mr Chikvinga

Criminal Trial

Ms N Mazvimbakupa, for the State
F F Hwenhira with him *Miss R Muvishi* and *Miss V F Nyamukapa*, for the accused (*pro deo*)

CHITAPI J: The accused is charged with the crime of murder as defined in s 47 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. It is alleged against him that on 24 July, 2014 at Maposa village 2A Sarukweza Sanyati, he unlawfully and with intention to kill caused the death of Admire Maposa by striking the deceased once on the left shoulder and once on the head using a metal arm of a plough thereby inflicting certain injuries from which the deceased succumbed to his death. The State further alleges that when the accused struck the deceased as aforesaid, he realized that there was a real risk or possibility that his conduct might result in death but continued in that conduct despite his realization of the real risk or possibility of the occurrence of the death of the deceased.

The accused pleaded not guilty to the charge and in his defence which will be adverted to in due course he pleaded self defence and prayed for his acquittal on the charge or any competent verdicts which can be founded on the charge.

The State opened its case by seeking admissions from the accused in terms of s 314 of the Criminal Procedure and Evidence [*Chapter 9:23*]. In terms of the said section, it is competent for

the accused, the prosecutor or accused's legal representative to make an admission of fact relevant to the issue before the court. Once admitted, the fact so admitted is taken by the court as sufficient evidence of that fact. The purpose of seeking and making admissions is to curtail the duration of the trial by obviating the need to adduce oral evidence of the admitted facts. The admitted facts become common cause facts. The accused through his defence counsel made the admissions as sought by the State Counsel.

On his part and before making the admissions which will be dealt with hereunder, Mr *Hwenhira* for the accused applied to amend the accused's defence outline by the deletion of paragraphs 9, 10 and 13 therefrom. The amendments were granted and duly noted on record. The admissions which the State Counsel sought and were duly made by the accused related to the summary of evidence of State witnesses Taurai Gundura, Mathew Tarusenga, Vimbai Rega and Doctors Mutombo and Mauricio Gonzalez. It is convenient to outline the admitted evidence at this juncture.

1. Taurai Gundura is a nurse and was on duty on 25 July, 2014 at Nyaunde Clinic when the deceased was referred to the clinic by the police for medical attention. He attended on the deceased and referred the deceased to Sanyati Hospital for further treatment.
2. Mathew Tarusenga, is a miner at Laston 12 Goldmine, Sanyati. He knew the deceased as a local person within the same area of Sarukweza. He acted as a good Samaritan and used his motor vehicle to convey the deceased to Sanyati Hospital after referral from Nyaunde Clinic and at the request of Workington Maposa.
3. Vimbai Rega is a nurse and was on duty at Sanyati Hospital on 25 July, 2014 when the deceased was brought to the hospital. The deceased was attended to by Doctor Mutombo in her presence.
4. Doctor Mutombo is a medical doctor stationed at Sanyati Hospital. He attended to the deceased and later referred him to Kadoma hospital from where he was referred further to Parirenyatwa Hospital where he died.
5. Dr Mauricio Gonzales is a forensic pathologist whose qualifications are legal medicine specialist. He conducted a postmortem examination upon the deceased. He compiled a report ref 820/14 which was produced in evidence by consent and its contents admitted.

The highlights of his report following an examination of the deceased's body at Parirenyatwa hospital were as follows:

- External examination : injuries on the left parietal area with surface wounds measuring about 6cm and being injuries suffered ante mortem.
 - Internal examination:
 - (i) Head: subgaleal haematoma on the left and right parietal area.
 - (ii) Skull: depressed skull fracture (2cm x 5cm) on the left parietal bone.
 - (iii) Brain: epidural haematoma on the right parietal lobe and marked brain oedema
- Cause of death: - epidural haematoma
- head trauma
 - assault

6. The State also produced by consent of the accused the ox-drawn plough handle used by the accused to assault the deceased with.
7. The State also produced by consent the accused's warned and cautioned which incorporated the accused's reply to the charge of unlawfully assaulting the deceased with an arm of a plough resulting in his death. It reads as follows:

"I admit that I caused the death of Admire Maposa. I struck him once on the head with an arm of a plough. I first fought with Calvin Mpofo who had taken away my religious worshipping stick which he used to stir traditional beer, which angered me. I latter assaulted Admire who intervened and supported Calvin Mpofo. He later died at Parirenyatwa Hospital. I had no intention of killing my young brother."

The admitted evidence is thus as summarized above. The accused's defence outline in summary was to the following effect.

8. Accused admitted being at the scene of the crime on the day and time of the incident.
9. He initially passed by the scene and observed the deceased in the company of other persons drinking alcohol and his nephew Ndabiso Mathe was also at the beer drink.
10. He subsequently returned to the scene and observed his nephew Ndabiso Mathe crying and on enquiry as to why Ndabiso was crying, the accused was advised by the deceased's wife that Calvin Maphosa was harassing Ndabiso and had dipped the accused's religious staff into a pot with and used it to stir the beer, such an act being contrary to the

accused's religious beliefs. Additionally, Calvin was repeatedly branding Ndabiso a bastard.

11. That upon enquiry of Calvin as to why he was behaving in an unbecoming manner, Calvin grabbed the religious staff and threw it into the fire whereupon the deceased admonished Calvin that he should not throw the stick into the fire but should instead just go ahead to assault the accused if that is what he intended to do.
12. That Calvin then attacked him and a fight between the two ensued away from the fire in the shadows.
13. That the deceased joined in the fight and in a moment of panic the accused grabbed the nearest object that he could, struck Calvin on the shoulder and struck the deceased on the head.
14. That the deceased fell upon a car bumper and a wooden stool after which the accused found his way out of the fight and fled into the night.
15. That the accused later returned to the scene and conversed with the deceased who reported that he was no longer feeling well after the assault and the family started to make arrangements to take the deceased to the hospital.
16. That he only acted in self defence under the circumstances prevailing on that day and that any reasonable person could have acted likewise in the given circumstances.
17. That he was scared because of interacting with people who were drunk, out of their minds and as such feared for his life and limb and further that his only motivation in lashing out was to find an escape route from the melee.

The state called viva-voce evidence from three witnesses namely Calvin Maposa, (Calvin), Luckmore Mposa (Luckmore); the two being brothers to the accused and the deceased as well as from Constable Hove, the attending police detail who also recorded witness statements, accused's warned and cautioned statement and would appear to have been the investigating officer although he did not expressly state so.

The summary of the evidence of the aforesaid State witnesses and its analysis is as follows;

Calvin Maposa

He is the eldest of the siblings who were at the scene or had everything to do with the case. He was the person involved in the goings on or claimed to have witnessed what happened. He stated that there was a beer drink at the deceased parents homestead. The deceased's homestead was an extension of the parents homestead. When he arrived at the beer drink, there were already some 'boys' there. The 'boys' bought beer and asked for something to use to stir it. The deceased gave the 'boys' a stick. He was drinking with the said 'boys'. Whilst drinking the beer Ndabiso, his nephew came and complained that his religious stick had been used to stir beer. An argument arose and Ndabiso started crying over what had been done to his stick. He said that the deceased intervened and said that it was a mistake committed in using the stick. The witness believed that the stick was a remnant of a log that his father had left when he was moulding knobkerries. He stated that it was suggested to Ndabiso that he should get another stick and take it to the shrine to be blessed to replace the stick which had been used to stir beer.

The witness further testified that the accused who was nearby appeared not to be himself as he pace up and down different roads which adjoined the homestead. The accused did not greet him. Ndabiso made a report to the accused after which the accused and the deceased argued over the religious stick with the accused questioning why the deceased had used the stick to stir beer when he knew its purpose. He, the witness intervened in the argument and apologised for the mishap. The accused appeared to have understood. He did not notice where the accused went to after the altercation had subsided. The next thing he heard was a cry by someone who was seated by a car bumper. When he checked to see what the noise was about he was struck on the left collar bone with an iron bar. The witness staggered over the fire around which the beer drinkers sat. After striking the witness, the accused turned towards the deceased and then towards the accused and they tussled. The witness managed to disarm the accused and the accused ran away.

The witness rushed to where the deceased lay and lifted him. He observed blood flowing all over the deceased's body. The deceased then told the witness that the real problem between him and the accused concerned a goat. He knew nothing about the goat and asked the deceased why the issue had not been brought to him for mediation. The deceased then said "just leave me so that he finishes me off. I am finished." The witness continued with his testimony and said that

the accused was at that stage throwing stones at the witness and the deceased. The witness then took the iron bar and fled.

In answer to questions of clarification by the prosecutor, the witness stated that he did not see how the assault upon the deceased was perpetrated because it was at night and he was warming himself by the fire. He did not hear any argument prior to the fighting that took place. According to the witness, the accused said that stick should be burnt and the witness and other dissuaded the accused and threw the stick aside. The deceased was 1 ½ meters away from the accused though they were not facing each other. He said that he could not hear any conversations between the accused and the deceased. He denied that the accused was attacked by the deceased nor that he was defending himself. He denied attacking the deceased.

Under cross-examination the witness disowned his statement to the police and stated that the signature on it was not his but a woman's in its construction. He said that the statement was made by the person who accompanied the deceased to the hospital. He stated that he was part of the beer imbibers but was not drunk. He agreed with defence counsel that the accused was a non alcoholic drinker and more in control of his faculties than the accused. Further questioned on his statement, he said that he never gave a statement to the police and that he was made to follow whatever was already written on it. He denied that he fought with the accused. He said that the accused continued with wanting to burn the stick but the witness ordered him not to do so and removed the stick from the fire where the accused had thrown it and threw it where there was some rubbish. He disputed that the accused was overpowered by the witness and the deceased.

When defence counsel read para 6 of the statement in which the witness was recorded as having said "the accused said harshly to the deceased, you are an onus", he agreed that he had said so and the words had been uttered prior to the assault. In re-examination he denied that the accused and deceased had fought

Questioned by the court to name other beer imbibers apart from him and deceased, he said that there was Talent, Honest, Sizaleleni, Anyway and Moses Dube. He said that these persons did not become involved. He said that Talent accompanied the accused from the gathering before accused returned after an hour. He said that on his return, the accused appeared like he was troubled and he would pace up and down. When the witness greeted the accused, the accused just snorted (huh). He said that there were family issues in the polygamous marriage of

his father whereby one of the siblings from the fathers other marriage was jailed for rape. The father had said that another one of them would be jailed upon the release of the jailed sibling. Only the accused, their mother, a sister and Ntabiso had converted to Johane Masowe religious cult with the rest of the family following traditional cults and this strained relations. When asked again if there was any exchange between the accused and the deceased, he said that he heard deceased saying, “why are you still here? Why not go to your shrine. Others have gone. This is not your house. I rule here”. He said that when the deceased and accused continued shouting at each other, he then said that he was leaving at which point the deceased said “why should you go away because of this mboko. I rule here.” He denied uttering anything bad mouthed himself. The witness did not impress the court. He was evasive and did not answer questions directly. He denied giving a statement to the police although when some aspects of the statements attributed to him were put to him, he agreed with them. He gave different versions which were contradictory in regard to the cause and nature of the altercation. He sought to distance himself from blame and portrayed himself as the pacifier or peacemaker. In the court’s assessment, the witness was coy with the truth and appeared to be on the defensive as though he was the one on trial. The court formed the view that the witness was simply not forthcoming with the whole truth because he wanted to distance himself from any insinuations of wrong doing.

The court agreed with the criticism of this witness by the defence counsel when he submitted that the witness’s testimony could not be relied upon as he was given to lying when it suited him. His testimony tended to shift under cross-examination and in answer to questions by the court. The court took note that the state counsel advisedly did not seek to portray the witness as reliable. It was clear that the witness chose not to involve himself too much. This is to be expected when blood siblings have to testify against each other in circumstances where there would have been an altercation. The tendency is to minimize one’s involvement or to distance one’s self from the occurrence. The court will in the circumstances treat this witness’s evidence with some degree of caution because of the above reasons. The court was also fortified in its approach to treating the witness’ evidence with caution by the fact that the state has equally conceded that this was a case in which reliance could properly be placed upon the evidence of the accused without expressly stating so, it is implied in the state’s approach to the assessment of

the evidence of this witness that he could not be depended upon as a witness with regards to what took place at the scene of assault upon the deceased by the accused.

Luckmore Maposa

Is also an elder brother to both the accused and deceased and comes after Calvin, the last witness, in their order of birth. He was not at the beer drink at the material time and did not witness the altercation leading to the assault upon the deceased. He received a report of the altercation and proceeded to the deceased's homestead and observed that the deceased was injured. He suggested to the deceased that they should go to the hospital but the deceased initially refused. Later that same night the deceased sent for him as he now wanted to be taken to hospital. Obviously his condition had worsened.

The witness woke-up and tried to locate cattle to yoke them and pull a scotch cart which would be used to transport the deceased to the clinic. He yoked the cattle and ferried the deceased in a scotch cart to Nyaunde Clinic. He went there in the company of the deceased's wife. The clinic staff referred him to the police where he made a report. After the deceased had been attended to by a nurse at the clinic, he was referred to Sanyati Hospital for further medical management of the deceased. The trio was at Sanyati Hospital for three days before the deceased was further transferred to Kadoma Hospital. At Kadoma Hospital the deceased spent only one night before he was transferred by ambulance to Parirenyatwa hospital where the deceased succumbed to his injuries on the following day after his admission thereat. He only saw the accused after the death of the deceased.

Nothing really turns out on the evidence of this witness who gave a straightforward narration of events post the assault and the movements he made and assistance he rendered in seeking that deceased receives medical attention. The witness was forthright and no one raised issue with his evidence. He was the direct opposite of his brother Calvin, the first witness.

Aleck Hove

Is a police constable in the Zimbabwe Republic Police. He attended on the deceased's wife and the last witness on 25 July 2014 when they made a report of the assault upon the deceased. He observed the deceased lying in agony in a scotch cart. The deceased could not

speak. His head was covered in a towel. He uncovered the towel and observed that the deceased had a head injury. He then referred the trio for treatment at Nyaunde clinic. He recovered exh 5, the plough handle which had been used to assault the deceased. He also recovered the deceased's blood stained golf T/Shirt which he produced as exh 6 by consent. On 30 July, 2014 the witness learnt of the deceased's death. He attended the post-mortem examination on the deceased on 5 August, 2014. On 17 August, 2014 he proceeded to the crime scene where he invited witnesses to make indications and drew a sketch plan. He also recorded statements from witnesses.

Under cross-examination the witness confirmed that he recorded Calvin Maposa's statement and identified Calvin Maposa's signature on the statement. He confirmed that the contents of the statement signed by Calvin were Calvin's depositions. This witness was not contentious and his evidence was again not controverted. The court noted from exh 4 that the witness is the one who recorded accused's warned and cautioned statement on 22 September, 2014 i.e. almost 3 months after the death of the deceased. No explanation was given as to why the accused was only charged of the murder of the deceased 3 months after the event.

The state closed its case after applying that the evidence of Ntabiso Mathe as set out in the summary of the state case be expunged from the record. Given the poor showing by Clavin Maposa as a witness, one would have expected that the state would call further evidence from Ntabiso Mathe who was at the scene and appears to have been involved in the argument over the religious stick which argument degenerated into a physical confrontation of the Maposa siblings, ultimately resulting in the death of one of them. The state did not produce the sketch plan drawn by the police constable and the court was left to try and visualize the scene of the assault, a task that any court cannot be capable of doing with certainty.

The accused gave evidence in his defence. His evidence was to the following effect. It was a day of worship for him, his mother and Ndabiso Mathe because they had converted to the Johanne Masowe church. His mother had asked him to collect Ndabiso his nephew who had been herding cattle so that they join their mother at the worship shrine. He did not manage to collect Ndabiso because of the intervening incident which ended in him assaulting the deceased.

He confirmed that there was a beer drink as already alluded to and that for the past two days people were drinking beer which was on sale. When he arrived at the homestead to collect Ndabiso he found that Ndabiso had been sent to give an unnamed person some beer residue to

use when fishing. He proceeded to his elder brother's place (Vengai) another worshipper to await the return of Ndabiso.

He stayed at Vengai's homestead for a while and returned to the scene where he found Ndabiso crying. He said that he chided him for being spoilt after he had enquired of him why he was crying and did not receive any answer. He then received a report from deceased's wife who was the cashier that Calvin had been tormenting Ndabiso by calling him a bastard who should go to his father. Ndabiso had placed his church gown and religious stick against the wall waiting for the accused and Calvin had taken the stick and used it to stir beer. The deceased according to the report had tried to pacify the situation by telling Ndabiso that perhaps he should get a replacement stick. He approached Calvin to enquire as to why he had been tormenting their nephew. Calvin responded by insulting the witness on his religion saying there was no place for religion in their family and that he would burn the stick to show that nothing would happen to him. He proceeded to put the stick into the fire but the deceased removed it saying that it was wrong to burn it. Calvin once again got hold of the stick and put it back into the fire. The witness removed the stick from the fire. Calvin then attacked him and the two started fighting. He was assaulted on the forehead and fell down and in the process lost grip of the stick which he had been holding. As he groped around for it was then that he got hold of a metal object. He said that the deceased had become involved in the fighting although he could not say whether the deceased actually attacked him. He was being hit but could not say who of the two, Calvin or the deceased was hitting him.

The witness got hold of the metal object whilst he was on the ground where he had fallen. He fell 1 ½ metres away from the accused and the deceased whom he says were side by side. When he stood up from the ground he struck Calvin on the back of the left shoulder with the metal object. The deceased was then advancing towards him and he struck him on the head with the same weapon. He did not aim for any target on striking the deceased and the episode lasted less than a minute. After he struck the deceased Calvin advanced towards him and wrestled the weapon from him, overpowered him and the witness ran away. It was dark and deceased and Calvin were drunk. Upon striking the deceased on the head, the deceased jumped up and fell down on his back hitting against a car bumper. After people had dispersed, he returned to the scene to check on the deceased who reported that he the accused had injured him. He expressed

his regrets to him. He said that the religious stick was given to Ndabiso at the shrine to protect him because he was a troubled child.

Under cross examination the accused admitted that in all this fray it was Calvin who started it and he is also the one who attacked the accused first. He said that as they fought or tussled with Calvin the deceased was nearby. He could not say that the deceased attacked him but that deceased was nearby and was advancing towards him. He agreed that there would have been no motive for the deceased to attack him and that it did not occur to him that by advancing towards them deceased would have wanted to intervene to stop the fighting. Although the accused did not see what weapon it was that he got hold of when he fell to the ground after being struck by Calvin, he appreciated that it was not the religious stick but a metal object. On striking Calvin and the deceased he was able to see who was who between the two. When asked for the second time to confirm that he actually noticed that it was the deceased before striking him, he changed his answer and said that he thought it was someone else advancing. The court did not believe him on changing his answer. The accused was however truthful in accepting that he appreciated that the object which he used could cause injury to someone. He also agreed that the deceased did not at any stage verbally or physically assault him

In the court's assessment, the accused was a more forthright and honest witness than Calvin and where the evidence of the two differed, the court preferred that of the accused. The facts of the matter are generally common cause of which the material ones are that:

- (i) The altercation leading to the deceased's death occurred at a beer drink at the deceased's/ his parents homestead.
- (ii) The main actors at the centre of the altercation were Calvin and the accused.
- (iii) The accused attacked both Calvin and the deceased with the plough handle
- (iv) The accused appreciated who he was striking between Calvin and the deceased.
- (v) The accused struck Calvin on the shoulder and deceased on the head.
- (vi) The accused appreciated that he had gotten hold of a metal object before striking Calvin and the deceased.
- (vii) The accused was sober whilst the deceased and Calvin were under the influence of alcohol.

The task of this court is to determine whether or not the State has proved its case beyond a reasonable doubt.

The accused advanced a defence of self-defence. The elements of this defence are provided for in s 253 of the Criminal Codification and Law Reform Act which provides that self-defence constitutes a complete defence to the murder charge if, when the accused acted or omitted to act in the manner he acted, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced and that his conduct was necessary to avert the unlawful attack. Further, it must be shown that the accused could not otherwise escape from or avert that attack or believed on reasonable grounds that his conduct was necessary to avert the unlawful attack, and he could not otherwise escape from that attack. Accused must also show that the means he used to avert the attack were reasonable in all the circumstances. Any harm or injury caused by his or her conduct should have been caused to the attacker and not to an innocent third party. Lastly the injury he caused should not be grossly disproportionate to that liable to be caused by the unlawful attack.

The law provides further that in determining these requirements the court should also take into account the capabilities of the deceased, and any stresses or fears that might have been operating on his mind. The court was not satisfied that the requirements of self-defence were met in the circumstances of this case. The court accepted that there was an unlawful upon the accused by Calvin but did not accept that the means used by the accused was necessary to avert the unlawful attack. The court was not satisfied that the accused could not have escaped from the attack. Indeed the accused did not state that he was cornered and could not have run away, or that that opportunity was not there. The accused appreciated that what he had gotten hold of was a metal object. The blow that the accused delivered was not directed at the attacker only but was directed at both the attacker and an innocent third party. We say the deceased was an innocent third party because no evidence was led before us to show that the deceased tried to attack or attacked the accused. The accused only suspected that the deceased was advancing toward him to attack him, had the deceased uttered anything verbally to the accused or attacked him in whatever manner I could have considered the defence otherwise. However it is in fact the accused who testified that the deceased did not attack him either verbally or physically. The court accepted the accused's evidence in that regard. Even if one were to argue to the contrary,

the court did not believe that the reaction of the accused was proportionate to the unlawful attack. The reaction was in fact disproportionate because whilst the accused was being attacked with clenched fists, he decided to use a weapon.

In terms of s 254 of the Criminal Codification Law Reform Act the accused will be found guilty of culpable homicide if the requirements of self-defence are satisfied except that the means that the accused used to avert the unlawful attack upon him were not reasonable. The State argued that the accused should be found guilty of murder with constructive intent in contravention of s 47 1 (b) of the Criminal Code. Its argument was that the court must find that the accused realized that there was a real risk or possibility that his conduct could result in death but nonetheless continued to engage in that conduct despite that realisation. The evidence adduced was that the accused only struck the deceased once albeit on the head. Despite the consequences of the blow being tragic it could not be said that the accused continued in the unlawful attack despite realizing the risk let alone a real risk of death ensuing from his conduct.

Dealing with culpable homicide, the law provides that the person who has caused the death of another negligently failing to realize that death may result from his or her conduct or realizing that death may result from his or her conduct and negligently failing to guard against that possibility shall be guilty of culpable homicide. The person charged with the offence of murder may be found guilty of the offence of culpable homicide, if the facts prove the offence of culpable homicide instead of murder.

As already indicated the accused appreciated that what he got hold of was a dangerous weapon and that it was a metal object. He was not cornered. He could tell who he was striking with the metal weapon. He struck the deceased because he just suspected that the deceased wanted to attack him but he had not attacked him. The accused just acted out of emotion. The deceased may well have been advancing towards the accused in order to stop the fighting between him and Calvin. The accused did not give the deceased a chance. The court must determine whether a reasonable person placed in the circumstances which the accused found himself under would have reacted in the manner that he did. The court was of the view that a reasonable person placed in the shoes of the accused person would not just attack another person on a suspicion not backed by any prior conduct which threatens the accused. The accused just assumed that the deceased wanted to attack him without ascertaining whether this was so.

The court was guided in the approach to the determination of this matter by the case of *State v Zivange* HH78/15 in which under more or less similar circumstances the accused who had been charged with murder was found guilty of culpable homicide on the basis that the means that he had used to avert the attack were not reasonable. In the circumstances and taking into account the totality of all the evidence and the circumstances in which the attack upon the accused as alleged by him was perpetrated, it is clear that he acted too precipitately and struck the deceased whom even in his evidence the accused agreed that he had not wronged him. There was no basis to excuse the accused's conduct under the circumstances. The court accepted that in attacking the deceased whom he never gave a chance to wait to see what he really wanted to do to him, the accused in striking the deceased on the head thereby inflicting the head injury upon the deceased and which injury caused his death.

In the circumstances the accused was found not guilty of murder as charged but guilty of the offence of culpable homicide in contravention of s 49 of the Criminal Codification and Law Reform Act.

SENTENCE

The court found the accused guilty of the crime of culpable homicide. The legislature under s 49 of the Criminal Law (Codification & Reform) Act has provided for the range of sentence for the offence. The competent penalty for such offence has been legislated as "...imprisonment for life or any shorter period or a fine up to or exceeding level 14 or both". Level 14 is the highest level in terms of the fines levels which is USD\$5 000-00. By giving the court a discretion to impose a fine above the highest legislated level; it shows that the legislature takes a serious view of the crime. Indeed the legislature's position is easily understood when regard is had to s 48 (1) of the Constitution which provides the right to life as a fundamental human right. Life can only be taken away in terms of the law or by an act of God, i.e natural causes.

A person who takes away another's life unlawfully therefore commits a serious offence. The courts must give effect to the constitutional provision under s 48. Human life is sacrosanct and should be safeguarded jealously. In a civilized society, humanity must respect life and it is only when life is safeguarded that a society does not perish. The court must therefore bear in

mind that in this case the accused caused the loss of human life needlessly. Death could have been avoided had the accused not acted negligently. In crimes of negligence, the court should punish the offender taking into account the degree of negligence exhibited by the offender. *In casu* the accused's degree of negligence was moderate. He used the plough handle upon the deceased when the deceased was advancing towards him. Had the accused not been fighting with Calvin Maposa immediately prior to striking the deceased, the degree of negligence would have been adjudged to be very high. The gravity of an accused's conduct in negligence case should not be judged by its actual consequences because the consequences are not intended *R v Msimango* 1950 (2) SA 205 N 209-210. It should be adjudged by considering the degree of negligence or moral blame.

The accused acted whilst in a state of provocation. He is a religious person of the Johane Masowe cult. A religious stick is of significance to his church beliefs albeit it having been intended as some kind of protection for the nephew of both accused and deceased, Ndabiso who was at the centre of the altercation. The accused was also attacked by Calvin. Tempers were high but there is no suggestion that the accused was the aggressor. The court accepted that he was the one who was attacked but it was not the deceased who attacked him. The accused killed an innocent person. The accused was the one who was sober and ought to have behaved in an exemplary manner. By engaging in the fighting and not retracing, he ended up acting just like his drunken brother Calvin.

The deceased was 20 years old at the time of his death. The accused was much older. It is arguable whether the use of a weapon against the youthful deceased or the drunken Calvin was called for at all. The accused allowed his emotions to override reason. The accused and deceased were brothers. This was a family quarrel. Accused's culpa may have been moderate but the result however stirs an understandable call from society at large and the immediate family for the sentence to visit tangible retribution upon the accused. Striking a balance between the seriousness of the offence and the subjective features pertaining to the accused remains an inherently difficult task. The Maposa family lost one of them and the deceased his young brother. The accused has been in custody since his arrest in July, 2014. The circumstances of the case cry out to the court to show mercy upon the accused. Sentencing him to an effective jail

term does not appear to serve any further useful purpose. The accused will therefore be sentenced as follows:

4 years imprisonment with labour wholly suspended for 5 years on condition the accused is not within that period convicted of an offence as defined in s 47 or 49 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] or an offence of which violence is an element and in respect of which upon conviction the accused is sentenced to serve a term of imprisonment without the option of a fine.

National Prosecuting Authority, applicant's legal practitioners
Muringi Kamdefwere, respondent's legal practitioners