THE STATE

versus

FARAI GAPARA

and

DHANAI GAPARA

HIGH COURT OF ZIMBABWE

BERE J

MUTARE, 21 and 22 June 2011

**Criminal Trial**

**Assessors**

Mr Magorokosho

Mr Chidawanyika

*Matsikidze*, for the State

*A J Dhliwayo*, for the State

*S Chikambi*, for the defence

BERE J: On 9 December 2010 the deceased who was aged 53 years was unwell and in bed. She was accused of practising witchcraft and severely assaulted leading to her death about two or three hours after the fatal assault. The severity of the assault is well spelt out in the post mortem report tendered in these proceedings as exh 4. The doctor who carried out that examination noted that the deceased had a deep cut on the head (temporal ocipita) more to the right side of the back of the head. He also noted some bleeding from the deceased and general body swelling. The examination was conducted about six days after the assault. The doctor’s conclusion was that the deceased died as a result of assault. The findings of the doctor as regards the cause of the death are not in issue.

The State’s position is that the tragic assault was authored by the two accused persons who acted in common purpose in assaulting the deceased person and that both must be found guilty of the offence of murder with constructive intention as opposed to murder with actual intent.

The first accused’s position is that whilst he accepts having assaulted the deceased on the fateful day, the totality of the evidence points to no more than the offence of culpable homicide. Consequently his counsel urged the court to acquit him on the murder charge and return a verdict of culpable homicide. During submissions counsel grudgingly conceded to murder with constructive intent.

The second accused denied ever participating in the assault at all and prayed for his acquittal. The thrust of his evidence to the police (as laid out in his confirmed warned and cautioned statement exh 5) was that his presence at the scene was merely to restrain his brother the first accused from assaulting the deceased. He maintained this position when he gave his evidence. His view was that those who testified against him hated him and his brother and were determined to see the two brothers being send to gaol. In addition, he also reasoned that the witnesses wanted to protect themselves from the deceased’s relatives if their evidence would result in the acquittal of the accused himself. There was a veiled attempt to try and blame the police officers who recorded the statement for having influenced its contents. These allegations were not substantiated and we did not consider it necessary to make an attempt to even consider them. Suffice it to say that exh 5 was confirmed at Chipinge Magistrates’ Court on 13 December 2010, barely five days after the deceased’s death. During submissions and after probing by the court and with extreme reluctance the accused’s counsel conceded that the accused two had participated in the assault of the deceased.

From the different positions adopted by the State and the defence we discern the following to be the issues at stake:

1. Who assaulted the deceased on 9 December 2010?
2. What would be the appropriate verdict when the pieces of evidence presented are weaved together to make a coherent story?

**Who assaulted the deceased**

The evidence to support the State’s contention that both accused persons participated in the assault started with the evidence of the deceased’s daughter Irene. Her evidence introduced us to the scene of the crime and she was adamant that the two accused persons entered the scene of crime together and that she spoke to them when she realised they were in a combative mood and armed with sticks. Having made a quick rudimentary assessment of the situation she realised her sickling mother was in trouble. She burst into a scream for help to alert other sympathetic neighbours and the second accused chased her in an attempt to silence her. It was the witness’s testimony that the second accused was called back by the first accused to deal with the real culprit.

The witness also confirmed the accused’s position of a strained relationship between the witness’s family and the accused’s family over the deceased’s alleged involvement in witchcraft. The witness explained that this strained relationship could be traced back to 2003 or thereabout, when her father passed away.

The witness told the court that she did not see the accused assaulting the deceased but was frightened into running away and screaming for attention before the assault started.

We accept that the witness’s testimony must be looked at with extreme caution given the strained family relations and also the fact that the loss of her mother must have pained her.

We have carefully assessed her evidence and we are satisfied she told the whole truth and we are unanimous in accepting her evidence as told.

There can be no denial that when the accused persons visited the deceased’s homestead they were two and the two of them confronted the deceased about her alleged involvement in witchcraft. It was this accusation which acted as a prelude to the attack on her that followed and eventually took her life.

We have also considered the other evidence led from the other witnesses which dealt with the assault on the deceased. Other than Irene’s evidence we critically looked at the evidence of Edward Panganayi Jambaya, Farai Mangwayana, Givemore Chigweremba and tried as much as we could to locate aspects of exaggerations and distortions of their evidence. We considered the criticism mounted against these witnesses’ testimony in cross examination following their evidence in chief. We are in total agreement that there is no reason to disbelieve their evidence. We accept their evidence as being true and accurate to the events of 9 December 2010 and relevant to this case.

We are further satisfied that the accused two was not being candid with the court when he painted the picture of not having participated in the assault. He was determined, first, to mislead the police when exh 5 was recorded and secondly he made a spirited effort to mislead the court in this trial. He has carefully calculated the effect of putting up the posture of his alleged non-participation in the assault and hoped to successfully sell the story to the court. Our view is that his was no more than a stout effort to poison the mind of the court in order to cloud issues and deprive us of the opportunity to get to the truth of this matter. The accused two made a very bad impression on us as a witness.

We are more than satisfied that accused two participated in the assault together with the accused one in the manner alleged by the State.

We accept the persuasive argument put forward by Mr *Dhliwayo*, counsel for the accused one that the two accused persons, having had at their disposal a lethal weapon in the form of a machete would have used it against the deceased if their actual intention was to kill the deceased. Add to this the knife which was reported to be in the hands of the accused two.

We comment the approach adopted by the prosecution in arguing for a conviction of murder bordering on legal intent. We are satisfied it was a perfect reading of the evidence.

We come to this conclusion because of the following considerations.

At the time the accused persons teamed up to assault the deceased, the deceased was already a vulnerable person having been unwell for three days.

When the accused approached the deceased person they were armed with sticks which were produced in court as exhibits I and II whose weights were given in exhibits 1 (a) and II.

To approach the deceased armed with such sticks and using such sticks to assault her in the manner demonstrated by the credible testimony of the witnesses who testified on the assault clearly demonstrate the accused’s reckless conduct on the day in question. Add to this, the use of safety shoes attributed to the second accused.

We are satisfied that anyone in the position of the accused persons irrespective of their youthfulness would have subjectively foreseen the possibility of causing death to the deceased who was already in bed and unwell. Both accused persons were reckless as to whether or not death resulted. We believe that even in the face of their spirited denials, this is the only inference to be derived from the evidence and facts presented to us in this case.

Consequently both accused persons are found guilty of having committed the offence of murder with constructive intention.

**Sentence**

Some legal writers have lamented that sentencing is the blind end of justice. It is so because it does not follow an mathematical formulae. It is a question of value judgment deriving mainly from the facts presented which tend to mitigate and aggravate the offence.

We have considered that the accused two, despite being five years younger than accused person demonstrated more maturity than the first accused person when he conducted his defence. Even when he perpetrated the assault he did not show lack of maturity.

Despite this however we remain convinced that the aspect of his immaturity cannot be swept under the carpet. We believe his conduct was heavily influenced by the accused number one and we are inclined to differentiate the sentence that we will impose.

Evidence was led in this court and to our satisfaction that at the time of the offence the accused person two was no longer in school. We accept this to be the probable position.

Both accused persons are by any standard youthful first offenders and this category of our society is prone to being negatively influenced by others.

Both believed their misfortunes were being caused by the deceased person hence this fatal assault. We have no doubt that they may not have themselves originated this idea of witchcraft but must have been cascaded down to them from their elders.

It is commendable that the accused person families participated in the deceased’s burial by making the contributions as highlighted but this aspect must not be over emphasised.

In aggravation we consider that an innocent life was lost. Society has invested so much into the youths and these youths are expected to be in the forefront in protecting elders and not to cut short their lives like what happened in this case.

The belief in witchcraft has torn apart and continue to tear apart many families in this country.

As courts we do not have the capacity to regulate people’s belief systems but the message must go loud and clear that these courts as the custodians of our law, do not take lightly the spilling of blood of any individual.

The tragedy with loss of human life is that it is irreplaceable. Once lost it is lost forever hence the need to emphasize the sacredness of life.

We are concerned with serious crimes like murder which are committed to a great extent by those who fall into the age group of the accused persons.

We believe whatever sentence is passed must not result in trivialising the offence. We must aim *inter alia* to maintain the dignity of our courts by passing out sentences which will fulfil the expectations of our societies.

**In the result it is ordered that:**

The accused one is sentenced to ten years imprisonment and the accused two to twelve years imprisonment.

*Attorney General’s Office,* State counsel

*Dhliwawo & Associates*, for accused 1

*Mutungura & Partners*, for accused 2