THE STATE

versus

PIKIRAI MAMBODO

HIGH COURT OF ZIMBABWE

BERE J

MASVINGO, 1 June 2011 & 2 June 2011

**Criminal Trial**

Assessors:

Mr Dauramanzi

Mr Mushuku

*C. Chavarika*, State Counsel

*J. Shumba*, defence Counsel

 On 6 April 2008 the accused who was 17 years old and in the company of his cousin the late Trust Macharangwanda approached the deceased and accused her of practicing witchcraft and being responsible for death and illnesses in the family. The deceased who was 69 years old protested her innocence and suggested that the accusations required the presence of family elders. The result was a combined assault initiated by Trust and joined in by the accused. The two randomly assaulted the deceased using two sticks leading to the subsequent death of the deceased.

 The post mortem report compiled by Dr David Tarumbwa recorded that there were multiple bruises and abrasions on the deceased’s body. The doctor also observed and recorded the deceased had sustained a fractured occipital skull which was depressed with massive haemorrhage. The doctor concluded that the cause of the deceased’s death was the head injury caused by the assault perpetrated on her.

 The State alleged the accused was partly to blame because of his involvement in the tragic assault and in doing so they relied on the doctrine of common purpose.

 Whilst agreeing to having taken part in assaulting the deceased the accused raised the defence of compulsion which was basically an averment by the accused that he had been compelled or forced to commit the assault by the late Trust who was older than him and assumed control of the proceedings leading to the assault and subsequent death of the deceased.

 The basic requirements of the defence of compulsion has been eloquently stated and unanimously agreed by both counsel and it is not my intention to re-state it. Suffice it to say that it basically requires that for it to succeed evidence must abound to demonstrate in very clear terms that the crime in issue was induced by real and substantial threat and not cosmetic threats. Committing the crime in issue must have been the only avenue open to the accused in the given circumstances. The evidence must also show very clearly that the accused could not reasonably have been expected to have avoided the crime.

 Authorities are in agreement that this defence will not avail itself to someone who voluntarily joins in advancing a criminal objective.

 Having carefully weighed the requirements of the defence of compulsion both th State and the defence concluded the defence of compulsion was not sustainable in this case. We entirely agree with counsels’ reading of the evidence presented and the conclusion arrived at. The issue of compulsion is accordingly put to rest.

 The viva voce evidence of Esinath Mwareka took us through how the assault itself was carried out. The accused also testified on the assault itself. We are satisfied that despite some unconvincing aspects of her testimony like her indifference in describing to the court’s satisfaction the type of switch used by the accused, Esinath’s version of events leading to the death of the deceased was quite credible. Her version was more revealing as opposed to the version given by the accused person which was characterised by rough edges.

 We found it to have been quite revealing and significant that the accused’s version of what transpired as explained by him in court almost 3 years after the event was at variance with his summary of events given on 26 April 2008 at Mukurasine Police Station and subsequently confirmed at Chiredzi Court on 26 June 2008. We are satisfied his explanation in Court was calculated to mislead the Court and therefore we had no hesitation in rejecting it.

 From the agreed evidence, the prosecution advocated for the accused to be found guilty of the crime of murder with construction intent whilst the defence passionately argued that the evidence suggested no more than the commission of the crime of culpable homicide.

 From a practical point there is a very thin line between murder with construction intent and the offence of culpable homicide but the distinction must and has always been maintained.

 For murder with constructive intent to be returned as a verdict the issue which must occupy the mind of the Court is whether as a matter of inference deriving from the set of facts accepted by the Court it can be said the accused foresaw that his conduct would result in the death of the deceased. An accused can only be convicted of murder if the only reasonable inference that can be drawn from the facts proved is that the accused had legal intention to do so. The test becomes a subjective one. The Court is enjoined to take into account factual evidence which bears upon and could have affected the accused’s perception, powers of judgment and state of mind deriving from such factors like level of accused’s intelligence, age of the accused person, personality etc-the list is endless.

 If the Court concludes that the accused could not have foreseen the possibility of death but that he should have foreseen it (relying on reasonable man’s test) and that a reasonable man would have guarded against it, the correct verdict must be culpable homicide.

 It must be emphasised that in borderline cases the Court must lean in favour of the verdict of culpable homicide and this approach appears to be influenced by the time honoured and well cherished principle of our approach that the accused as opposed to the State must generally be granted the benefit of doubt.

 It is never an easy walk. In the instant case the Court has had the benefit of seeing one of the sticks used. We have assessed the accused’s level of intelligence, age at the time of the committing of the offence and the fact that there is overwhelming evidence that the accused was not himself in control of the situation that led to the accused’s tragic assault.

 We are in agreement that it cannot be concluded with a degree of certainty that the accused could have foreseen that his involvement in the assault of the deceased would ultimately lead to the deceased’s death.

 However it is our firm view that although the accused did not foresee death as a result of his conduct, a reasonable man placed in the shoes of the accused person would have foreseen that subjecting a sixty nine year old woman to the assault with the sticks or switches described to the Court would have resulted in her death and that the accused should have guarded against it. He did not do so and we are enjoined to return a verdict of guilty of culpable homicide.

Verdict – Not guilty of murder but guilty of Culpable Homicide.

Sentence

 There is no specific formula prescribed to the sentencing approach. It is a question of a value judgment borrowing heavily from a given set of facts as coloured by both the mitigating and aggravating factors. These must be carefully balanced to enable the Court to arrive at what it perceives to be an appropriate sentence.

 In sentencing the accused the court accepts that he is a youthful first offender, 17 years of age at the time of the commission of the offence but now is 19 years old.

 The accused did not himself mastermind the assault in question and was not in control of the proceedings leading to the assault of the deceased. He is being punished for joining in the assault that led to the death of the deceased.

 It is also highly mitigatory that he took the initiative to dissuade his late cousin from continuing with the deceased’s assault.

 The accused’s conduct led to the death of a close relative and we have no doubt this will probably haunt him for the rest of his life. That is some form of punishment.

 We accept in aggravation that the accused demonstrated no respect at all by assaulting her aunt who was 69 years old at the time and almost 52 years old than him.

 The conduct exhibited by the accused was barbaric to say the least. The elders have invested so much in the youth and the youth are expected to demonstrate a reciprocal obligation by rendering maximum respect.

 It is not the responsibility of young persons like the accused to met out punishments on their parents but the inverse is true.

 Whilst accepting the accused is a youthful first offender, our concern as a court is that it is these youth who are at the centre of committing these violent crimes in our society. The message must go loud and clear that this Court will not fold its hands and allow disorderly conduct out there.

 The sentence imposed must send the message to other like minded youth and at the same time assist in the rehabilitation of the accused person.

 It must be stated and re-emphasized that it is animals which quarrel and fight but people must find civilised methods of resolving their differences.

 The conduct of some of our traditional healers and self proclaimed profits has not escaped our attention. So much confusion and hatred are sometimes as a result of the conduct of such traditional healers.

 The issues which led to the death of the deceased should have been handled in a better way than the conduct resorted to by the accused person.

 The accused is sentenced as follows:-

8 years imprisonment, 2 years of which is suspended for 5 years on condition the accused does not within this period commit any offence involving violence upon the person of another and for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine.

*Attorney General’s Office*, for the State

*Muzenda & Partners*, for defence counsel