

THE STATE
versus
DAMBUDZO POTERAI
and
MATHEW POTERAI
and
JOSEPH DZINGIRAI
and
THOMAS HARUZIVISHE MAZHAMBE
and
LLOYD MAROYI
and
LEVISON NYAMANDE
and
AMON MASACHA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 15, 16,17,18,21 November, & 1st December, 2016

Assesors

Mr S. Mutomba
Mr E. Gweru

Criminal Trial

Mr T. Chikwati, for the state
Mr I. Muzenda, for the 1st and 2nd accused
Mr L. Muvengeranwa, for the 3rd accused
Mr C. Ndlovu, for the 4th accused
Mr J. Maweni, for the 5th accused
Ms S. Moffat, for the 6th accused
Ms S. Sithole, for the 7th accused

MAWADZE J: All the 7 accused persons who are males except accused 1 DAMBUDZO POTERAI are charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on the 30 January 2012 at Mandishona Village, Headman Gororo, Chivi, Masvingo the accused persons or one or more of them unlawfully assaulted the now deceased GIVEN TOGARA a male adult aged about 25 years several times all over his body with switches, rubber whip, hoe handle and on the head with a stone intending to kill him or realising that their conduct might cause death and continued to engage in that conduct despite the risk or possibility.

All the 7 accused at the material time were residing under Headman Gororo, Chivi, Masvingo but in different villages. Accused 1 DAMBUDZO POTERAI (Dambudzo) was 50 years old and is the mother of accused 2 MATHEW POTERAI (Mathew) whom she stayed with in Jere Village, Gororo, Chivi, Masvingo. Accused 3 JOSEPH DZINGIRAI (Joseph) was 65 years old and was residing in Mandishona Village, Gororo, Chivi, Masvingo. Accused 4 THOMAS HARUZIVISHE MAZHAMBE (Mazhambe) who is now 52 years old was residing in Mashenjere Village, Gororo, Chivi, Masvingo. Accused 5 LLOYD MAROYI (Maroyi) then aged 28 years was residing in the same Mandishona Village with accused 3 Joseph. Accused 6 LEVISON NYAMANDE (Levison) then aged 36 years was residing in the same Jere Village with accused 1 Dambudzo and accused 2 Mathew. Accused 7 AMON MASOCHA (Amon) then aged 44 years was residing in the same Jere Village with accused 1 Dambudzo, accused 2 Mathew and accused 6 Levison. The now deceased GIVEN TOGARA was residing in Madenga Village, Headman Gororo, Chivi, Masvingo.

The facts giving rise to these rather tragic events are largely common cause. There had been a spate of thefts at accused 1 Dambudzo and accused Mathew's homestead and this was confirmed by Sgt. Raymond Mafudza the Investigating Officer in this case. On 30 January 2012 in the morning accused 1 Dambudzo who was near her homestead was alerted to the presence of the now deceased at her homestead due to incessant barking of her dogs. Accused 1 Dambudzo suspected that the now deceased was a thief and called out to her husband Taru Poterai, her son accused 2 Mathew and a fellow villager Koke Maruma. The now deceased who apparently was a thief fled into the nearby mountain as he was pursued. The now deceased was however caught in the mountain hiding in a thicket by Koke Maruma who descended with

him from the mountain at the same time alerting fellow villagers that he had apprehended the thief. A number of villagers including the 7 accused persons attended to the scene albeit at different stages.

The State alleges that accused 2 Mathew and Vengai Gundumuri were the first to arrive at the scene as Koke Maruma and the now deceased had just descended from the mountain. It is at this stage the State alleges that the assault of the now deceased commenced which ultimately led to his demise.

The State alleges that accused 2 Mathew was the first to assault the now deceased once in the face with open hands, kicked him several times all over the body and struck him with a switch.

It is alleged that accused 4 Mazhambe then arrived holding a whip which he used to assault the now deceased on the buttocks. The State alleges that accused 5 Maroyi used a switch to assault the now deceased on the buttocks. It is alleged accused 3 Joseph then arrived at the scene and assaulted the now deceased on the leg with a hoe handle. Accused 6 Levison then came and used a switch to assault the now deceased all over the body.

It is the State case that the now deceased thereafter had his hands tied and force marched towards the homestead of a local neighbourhood watch committee member. Along the way the State alleges the now deceased was ordered to sit down at the kraal of Koke Maruma's father where the assaults resumed. The State alleges that it is at that stage that accused 1 Dambudzo arrived and hit the now deceased on the head with a hoe handle once causing the hoe handle to break. Accused 1 Dambudzo is then alleged to have picked a stone and hit the now deceased on the head. Accused 7 Amon is alleged to have arrived and also assaulted the now deceased all over the body with a switch. The State alleges at this stage the now deceased was unable to walk and he was put in a wheel barrow enroute to Zunga Business Centre where the Police who had been alerted of the now deceased's apprehension were waiting for him to be brought. The now deceased was unable to reach Zunga Business Centre as he passed on at Chikoso Village. The cause of death is said to be head injury.

The summary of the defence outlines given by the accused persons are as follows:

Accused 1 Dambudzo and accused 2 Mathew said they had experienced a spate of offences at their homestead involving unlawful entry and stock theft. Accused 1 Dambudzo confirmed that she is the one who alerted other villagers of presence of the now deceased at her homestead on 30 January 2012 as she was doing laundry at a nearby well and her husband and accused 2 Mathew were weeding in the fields. Accused 1 Dambudzo said the now deceased had stolen a car battery, inverter and radio which he dropped as he fled into the mountain. Accused 1 Dambudzo said she followed after the now deceased with one Vengai Gundumuri and accused 2 and her husband followed using a different route. She confirmed that it is Koke Maruma who apprehended the now deceased and that it is Vengai Gundumuri who called fellow villagers to come and discipline the thief. Accused 1 Dambudzo said at the time she got to the scene she found that the now deceased's hands and legs were tied and that the deceased was bleeding from the nose. Accused 1 Dambudzo said Koke Maruma showed her a knife allegedly recovered from the now deceased. She said Koke Maruma had a machete which he was using to cut switches given to various villagers to assault the now deceased. Accused 1 Dambudzo said at the time she got to the scene the now deceased was visibly weary and struggling to walk as he was being ordered to walk to the police station. Accused 1 Dambudzo said she however thought the now deceased was deliberately faking inability to walk and this prompted her to take a sweeping brush which she used to assault the now deceased twice on the shoulder. She said this is the only assault she perpetrated on the now deceased. Accused 1 Dambudzo denied assaulting the now deceased with a hoe handle or a stone as alleged. In fact she said it is those other people who apprehended the now deceased who injured him. It is accused 1 Dambudzo's view that she is being falsely implicated or incriminated due to connivance by other people simply because she was the victim of the now deceased's conduct. In fact, accused 1 Dambudzo said that Vengai Gundumura told her that it is Koke Maruma who had caused the now deceased's death when he assaulted the now deceased causing him to vomit.

In her confirmed warned and cautioned statement "Exhibit 2" accused 1 Dambudzo seemed to give a somewhat different version. In that statement she said she never got to the place where the now deceased was being severely assaulted. She further said when she got to the scene she only assaulted the now deceased twice with a stick not a sweeping brush on the

left shoulder when deceased was being pushed in a wheel barrow near her homestead not that as he was refusing to get into the wheel barrow.

Accused 2 Mathew said he only assaulted the now deceased three times with a switch on the back. He denied kicking the now deceased. Accused 2 Mathew said at the time he assaulted the now deceased, the now deceased had already been injured. He thus denied causing the now deceased's death. This is the same version accused 2 Mathew gave in his confirmed warned and cautioned statement on how he assaulted the now deceased "Exhibit 3". As per Exhibit 3 he said he only assaulted the now deceased with a very thin switch from a tree called "*mubhubhunu*" in Shona thrice on the back.

Accused 3 Joseph in his defence outline said he rushed to the scene from his fields when he heard people shouting that a thief had been caught. He said when he got to the scene the now deceased had already been beaten by several villagers. Accused 3 Joseph said he in turn picked a stick and hit the now deceased once on the leg. By then he said the now deceased's hands had been tied as people gathered there said they were taking him to the police. Accused 3 Joseph said he then left the scene. Accused 3 Joseph said he would only plead guilty to assault and denied causing the now deceased's death. In his confirmed warned and cautioned statement "Exhibit 4", accused 3 Joseph seems to say he used a different weapon to assault the now deceased on the leg. In that statement he said he used a handle ("*mupinyu*") in Shona, once on the left leg when he arrived at the scene and found the now deceased being assaulted with switches after which he left the scene.

Accused 4 Mazhambe adopted his confirmed warned and cautioned statement "Exhibit 5" as his defence outline. In that statement accused 4 Mazhambe said he went to the scene when he heard people shouting that a thief had been caught and had a knife hence should be beaten. Accused 4 Mazhambe said he was in his fields driving donkeys. At the scene he said he found the now deceased's hands tied with a rope. He said he proceeded to strike the now deceased twice with a whip on the buttocks but went on to stop other people from assaulting the now deceased when he learnt that the now deceased had already been subjected to prolonged assault. Accused 4 Mazhambe said he then saw accused 7 Amon assaulting the now deceased with a switch on the back. Thereafter he said accused 1 Dambudzo arrived carrying a hoe with a wooden handle and proceeded to hit the now deceased once on the centre of the

head causing the hoe handle to break. Accused 4 Mazhambe said accused 1 Dambudzo then picked a stone using two hands and struck the now deceased once again on the head. At that stage accused 4 Mazhambe said accused 1 Dambudzo was then restrained by her husband from further assaulting the now deceased. Accused 4 Mazhambe said accused 2 Mathew proceeded to assault the now deceased with a stick, clenched fists and open hands as accused 4 Mazhambe pleaded with accused 2 Mathew to stop the assault. He said accused 2 Mathew did not heed to his pleas as accused 2 said accused 4 was being sympathetic to the now deceased because accused 4 Mazhambe was not a victim of the now deceased's misdeeds. Accused 4 Mazhambe said he would plead guilty to assault and denies causing the now deceased's death.

Accused 5 Maroyi also adopted his confirmed warned and cautioned statement as his defence outline "Exhibit 6" in which he said he only assaulted the now deceased twice with a small stick on the buttocks. Accused 5 Maroyi said it is accused 1 Dambudzo whom he saw picking a big stone and striking the now deceased on the head. He also said accused 2 Mathew assaulted the now deceased twice with a small stick on the buttocks. Accused 5 Maroyi said it is accused 1 Dambudzo whom he saw picking a big stone and striking the now deceased on the head. He also said accused 2 Mathew assaulted the now deceased several times with a stick.

Accused 6 Levison said in his defence outline that the now deceased was his cousin as their mothers are sisters. He said on the day in question he was attracted to the scene by the commotion of people saying a thief had been caught. On arrival he realised the said thief was the now deceased. He said he then asked the now deceased what was going on and the now deceased said in Shona "*mazheti*" meaning some deals. Accused 6 Levison said it was out of concern that he then took a switch and assaulted the now deceased twice on the legs after which people present agreed to take the now deceased to the police. Accused 6 Levison said he then left to attend to his cattle after which he returned to assist other villagers to take the now deceased to Zunga Business Centre where the police were waiting. He said the now deceased was unable to walk properly hence he was put in a wheel barrow. Accused 6 Levison said he again left to go and look for drinking water which the now deceased had requested and that when he returned with the drinking water he found that the now deceased had passed on and police were already at the scene. Accused 6 Levison denied causing deceased's death. In his confirmed warned and cautioned statement "Exhibit 7", accused 6 Levison does not mention

he so called relationship to the now deceased. He simply said in that statement that he assaulted the now deceased twice with a stick while holding the now deceased's left hand.

In his defence outline accused 7 Amon said his wife telephoned him that day when he was 4 km away advising him that a thief had been caught at accused 1 Dambudzo's homestead. Accused 7 Amon said upon arrival at the scene he picked a switch intending to assault the now deceased but refrained from doing so when he realised the now deceased was tied on the wrists and ankles. He said he also noticed some greenish substance coming from the now deceased's mouth. Accused 7 Amon said his brother in law Peter Gundumuri advised accused 7 Amon that the now deceased had already been assaulted and injured by other people. Accused 7 Amon said he then used his mobile telephone to contact the police who told him that they had no motor vehicle and that the villagers were to bring the now deceased to the police. He said the now deceased was then put in wheel barrow as he could not walk. Accused 7 said when he noticed that the now deceased was losing breath he rushed to Zunga Business Centre to advise the police who were there and that when he went back to the scene with the police he found that the now deceased had died. Accused 7 Amon therefore denies assaulting the now deceased. In his confirmed warned and cautioned statement "Exhibit 8" accused 7 Amon said he only arrived at the scene after the now deceased had been assaulted and that he called the police who in turn advised accused 7 Amon to bring the now deceased to the police using a wheel barrow. He said he then complied but rushed to Zunga Business Centre to alert the police when the now deceased's condition worsened. He said he found that the now deceased had died upon his return with the police. In essence he denies assaulting the now deceased.

In support of its case the State led evidence from 3 witnesses, VENGAI GUNDUMURI, KOKE MARUMA and the Investigating Officer – Sgt RAYMOND MUFUDZA. All the 7 accused persons gave evidence and did not call any witnesses.

A total of 8 Exhibits were produced by consent. "Exhibit 1" is the post mortem report. "Exhibits 2" to "8" are confirmed warned and cautioned statements by accused 1 to 7 respectively whose contents we have already referred to and juxtaposed with the accused persons defence outlines.

The cause of the now deceased's death is not in issue. All the accused persons in our view were not able to dispute the cause of the now deceased's death as set out in "Exhibit 1" the post mortem report. *Mr Muzenda* counsel for accused 1 Dambudzo and accused 2 Mathew belatedly in his address attempted to somehow put in issue the admissibility of and or the contents of "Exhibit 1" the post mortem report. In our view these protestations should not detain us at all. To start with *Mr Muzenda* consented to the production of "Exhibit 1" the post mortem report. It is therefore not clear to us as to when he met his Damascene moment. Secondly, *Mr Muzenda* sought to rely on the sentiments expressed by GILLESPIE J in the case of *S v Hurle & Ors.* (2) 1998 (2) ZLR 42 (H) in relation to the post mortem tendered in that case. It is clear that *Mr Muzenda* has misread the issues raised by GILLESPIE J in that case as far as it relates to the matter before us. Suffice to say that those shortcomings noted by GILLESPIE J are not applicable in this case. The criticisms by Mr Muzenda in relation to the post mortem report "Exhibit 1" are therefore misplaced and ill founded.

As per "Exhibit 1" the now deceased's body was examined by Godfrey Zimbwa on 31 January 2012, a day after the now deceased's death. The original copy of "Exhibit 1" shows that "Exhibit 1" was commissioned on the same day 31 January 2012. It is the typed copy of "Exhibit 1" which is date stamped 23 February 2012 and 27 February 2012 but the date of examination remains 31 January 2012. In our view nothing turns even on the typed copy of "Exhibit 1".

As per "Exhibit 1" the post mortem report the Doctor observed the following injuries;

- i) multiple lacerations and bruises on the lower limbs
- ii) lacerations or bruises on frontal area of the head
- iii) bleeding from the nostrils

The conclusion by the Doctor is that the cause of death was due to head injury.

In our view the various injuries noted by the Doctor on the now deceased are consistent with the nature and manner of assault the now deceased was subjected to as per the State witnesses and concessions by the accused persons. While the nature of the head injury is not explained in any specific terms that would not distract from the cause of death. From the evidence placed before us there was no *novus actus interveniens* that might have broken the

chain of causation and explain the cause of the now deceased's death. We therefore accept that the now deceased died as a result of the head injury.

We wish to briefly comment on the non-production of the weapons used to assault the now deceased referred to by both the State witnesses and some of the accused persons.

Sgt. Raymond Mufudza (Sgt Mufudza) who was then based at ZRP Ngundu but is now in Victoria Falls said he took the 7 accused for indications and recovered switches of various sizes, a rubber whip with a stick 42 cm long, a 52.5 cm long hoe handle and a 6.5 kg stone. He said these Exhibits were recovered at the instance of State witnesses and some of the accused persons although he was now unable to relate who led to the recovery of what Exhibit besides Koke Maruma who pointed to him the stone allegedly used by accused 1 Dambudzo. He said the Exhibits were then taken to ZRP Chivi from ZRP Ngundu and again back to ZRP Ngundu where they can now not be found.

While it would have been desirable to produce the Exhibits we believe the recovered Exhibits are sufficiently described by Sgt Mufudza, Koke Maruma and some of the accused persons to the extent that we fairly appreciate the nature of these Exhibits. Further, the nature of these Exhibits are consistent with the injuries sustained by the now deceased as outlined in the post mortem report Exhibit 1 and as described by Koke Maruma and some of the accused persons. It is therefore our view that the non-production of the said Exhibits is not fatal to the State case. In any case some of the accused persons admit to have used some of those weapons to assault the now deceased.

The next issue to be resolved is whether one, some or all of the accused are responsible for the now deceased's death. In order to answer that question, we would turn to the relevant *viva voce* evidence placed before us.

THE EVIDENCE

SGT. RAYMOND MUFUDZA

According to Sgt. Mufudza the first person to advise him of the suspects in this matter was accused 7 Amon. Sgt. Mufudza then interviewed some of the said suspects and other villagers and initially came out with 12 suspects whom he took for further interrogation. He said 5 of them were then exonerated as none of the accused persons implicated them and he

made Koke Maruma and Vengai Gundumuri State witnesses and charged the 7 accused persons. Sgt. Mufudza said this was on the basis of what each of the accused said he did and witnessed relevant to the now deceased's assault. It is therefore clear that Sgt. Mufudza did not resort to a dragnet arrest of all villagers and he clearly gave a rationale and objective basis upon which he arrested and charged the 7 accused persons.

In relation to accused 1 Dambudzo he said initially accused 1 Dambudzo lied to him that the now deceased had fallen on a slope in the mountain and got injured. This was dismissed as false by other witnesses and accused persons. In fact, this was corroborated by Vengai Gundumuri who said after the now deceased's death accused 1 Dambudzo approached Vengai Gundumuri and urged him to lie to the police by saying the now deceased had been injured when he fell over cliff or slope, a lie which Vengai Gundumari could not accept.

The evidence of Sgt. Mufudza as the Investigating Officer is clear and we have no cause not to accept it.

VENGAI GUNDUMURI

VENGAI GUNDUMURI (Vengai) is a fairly old man and resides in same Mandishona Village with accused 3 Joseph and accused 5 Maroyi. He is known to other accused persons but did not know the now deceased. As already said it is accused 1 Dambudzo who called him from his fields to assist in the apprehension of a thief the now deceased.

Vengai said he and accused 2 Mathew were the first people to arrive at the scene where Koke Maruma had apprehended the now deceased. He said upon arrived accused 2 Mathew assaulted the now deceased with open hands and that Vengai pleaded with accused 2 Mathew to stop the assault and take now deceased to the police. He said accused 2 Mathew disregarded his plea and kicked the now deceased. After this he said other villagers arrived and the now deceased's hands were tied as the now deceased was force marched towards the homestead of Koke Maruma senior. Vengai said he followed behind and that when he got at where deceased was at Koke Maruma senior's homestead the now deceased had already been injured on the head.

The only accused implicated by Vengai in the assault of the now deceased is accused 2 Mathew, whom he said used open hands and kicked the now deceased several times. The only blemish aspect his evidence is that he was unclear on whether he witnessed the other persons besides accused 2 Mathew assaulting the now deceased. Out of the 7 accused persons he said he caused the arrest of accused 1 Dambudzo (on basis of hearsay that she had assaulted the now deceased) and accused 2 Mathew.

KOKE MARUMA

In our view Koke Maruma (Koke) is the critical witness to the State case. He resides in the same Mashenjere Village with accused 4 Mazhambe and is known to all 7 accused persons. He did not know the deceased. It is Koke who apprehended the now deceased on top of the mountain and brought him down. He explained how each of the 7 accused persons assaulted the now deceased.

According to Koke it is accused 2 Mathew who first arrived just as Koke had descended Chimhandire mountain with the now deceased. He explained how the now deceased was first assaulted at Chimhandire mountain and later at his kraal.

At Chimhandire mountain he said the following happened;

- (i) He said before any other persons arrived accused 2 Mathew assaulted the now deceased with open hands and kicked him on the back. Koke said Vengai who had arrived with accused 2 Mathew told accused 2 Mathew to stop assaulting the now deceased and instead take him to the police.
- (ii) Thereafter Koke said accused 5 Maroyi arrived and used a switch to assault the now deceased on the buttocks twice. He described the switch as about 1-metre-long and 3cm in diameter.
- (iii) At that stage he said accused 4 Mazhambe arrived holding a whip about 30 cm long and about 2 cm in diameter and hit the now deceased on the back although he was not able to tell the degree of force.
- (iv) Koke said accused 3 Joseph arrived with a hoe handle about 70 cm long and 6 cm in diameter and hit the now deceased twice on the leg as the now deceased was seated crying.

After the assault by accused 2 Mathew, accused 5 Maroyi, accused 4 Mazhambe and accused 3 Joseph at the foot of Chimhandire mountain, Koke said he ordered the now deceased to stand and proceed to the homestead of a local member of the neighbourhood watch committee called Mashanda. As they walked with the now deceased and other villagers Koke said the now deceased fell into water when they crossed a stream but the now deceased picked himself up and proceeded from Dande stream until they got to the kraal of Koke's father where he said accused 6 Levison, accused 1 Dambudzo and accused 7 Amon arrived. In a chronological order. Koke explained how the now deceased was assaulted at this place.

- (v) Koke said when accused 6 Levison arrived he claimed the now deceased was his relative and that he, accused 6 Levison wanted to chastise the now deceased. Koke said accused 6 Levison then plucked a switch about 6.5 cm long and 3 cm in diameter and proceeded to assault the now deceased on the back several times causing the now deceased to cry out.
- (vi) Thereafter Koke said accused 7 Amon picked a switch which was on the ground whose specifications Koke could not recall and assaulted the now deceased several times on the buttocks.
- (vii) According to Koke the last accused to arrive was accused 1 Dambudzo who arrived carrying a hoe handle about 1 metre long and quite thick. He said accused 1 Dambudzo assaulted the now deceased who was seated with the hoe handle on the centre of the head. He said immediately thereafter accused 1 Dambudzo picked a fairly big stone with both her hands and threw it on to now deceased's head. The stoned landed on top of the now deceased's head. He said the now deceased reacted by crying out more loudly evidently in severe pain, writhing and rolling on to the ground. He said from that point the now deceased was unable to walk hence had to be put in a wheel barrow as Koke pushed a wheel barrow with accused 2 Mathew, accused 5 Maroyi as others followed. Koke said they did not reach Zunga Business Centre as the now deceased passed on near one Mhlanga's homestead and accused 7 Amon rushed to Zunga Business Centre to advise the police.

According to Koke the last person to assault the now deceased was accused 1 Dambudzo with a hoe handle and a stone both on the head and had to be restrained by her husband. Koke said there were not so many villages but he could recall accused 1's husband one Clifford, Koke's father, Vengai and the 7 accused persons. He said after being hit with hoe handle and stone on head by accused 1 the now deceased could no longer walk or help himself and died within about 45 minutes. He confirmed the recovery of Exhibits by the police which included switches, hoe handle, rubber whip and the stone. Koke confirmed that he too was taken by police as a suspect but was released latter after 4 days of investigations by the police.

We noted that there were discrepancies between Koke and Vengai's evidence in some respects. While Koke said he descended the Chimhandire mountain walking some 5 meters behind the now deceased Vengai said Koke was holding the now deceased's hand. Vengai said it is Koke who ordered the now deceased to sit down at the foot of the Chimhandire mountain but Koke said it was accused 2 Mathew who did so while interrogating the now deceased about the alleged theft. Koke and Vengai differ on the part of the body and the number of times accused 2 Mathew kicked the now deceased. Lastly Koke denied that the now deceased was not wearing a shirt as they descended Chimhandire mountain contrary to Vengai's evidence. Instead Koke said it is him, Koke who had removed his shirt not the now deceased.

Koke was subjected to lengthy and precise cross examination by *Mr Muzenda* for accused 1 Dambudzo and accused 2 Mathew but the colour of his evidence did not change in material aspects. The contradictions outlined above between Koke and Vengai's evidence in our view are not material to the relevant issue to be resolved by this Court.

The thrust of *Mr Muzenda's* cross examination of Koke was that accused Dambudzo did not assault the now deceased with a hoe handle or a stone. Instead *Mr Muzenda* proffered accused 1 Dambudzo's version of the assault. The second leg of *Mr Muzenda's* cross examination of Koke was that Koke had an unspecified hand in now deceased's death. Koke remained unshaken and was clear that it was accused 1 Dambudzo who assaulted he now deceased on the head with a hoe handle and stone. He denied having a hand in the now deceased's death.

The other material part of Koke's evidence was that when accused 1 Dambudzo arrived at the scene, accused 3 Joseph had already left. Koke remained adamant however that accused 3 Joseph assaulted the now deceased twice on the leg with a hoe handle not once.

Under cross examination by *Mr Ndlovu* for accused 4 Mazhambe Koke said it is not him but his father who tied the now deceased's hands. He admitted that after delivering two blows with the whip on now deceased's back accused 4 Mazhambe stopped the assault on his own.

In relation to accused 5 Maroyi he said accused 5 Maroyi only delivered two blows with a switch and later participated in pushing the wheel barrow. Koke was adamant that accused 6 Levison assaulted the now deceased several times all over the body at the kraal of Koke's father.

Under cross examination by *Ms Sithole* for accused 7 Amon, Koke said although accused 7 Amon is the one who telephoned the police and later rushed to Zunga Business centre to bring the police, accused 7 Amon had assaulted the now deceased all over the body with a switch.

In our assessment Koke gave clear, coherent and straight forward evidence. He clearly outlined the sequence of events until the time the now deceased passed on. Koke was able to explain the role played by each of the 7 accused persons and what stage. His evidence neatly dovetails with that of Sgt. Mufudza on why each of the 7 accused persons were charged and how Koke and Vengai were made State witnesses. He materially explained how exhibits were recovered and the type of those exhibits. In any case all accused persons except accused 1 Dambudzo and accused 7 Amon deny assaulting the now deceased with accused 1 Dambudzo disputing the manner she assaulted the now deceased and the weapon she used. All in all Koke was an impressive witness whose lucid evidence was largely consistent. We find him to be a credible witness and accept his evidence.

We turn to the evidence of the accused persons which we have already alluded to in their defence outlines and warned and cautioned statements. All the 7 accused persons virtually adopted that evidence and no useful purpose would be served by repeating it except to highlight material findings we made.

Accused 1 Dambudzo

Accused 1 Dambudzo admitted assaulting the now deceased but put into issue the weapon she used and where she directed the blows. In her confirmed warned and cautioned statement “Exhibit 2” she said she used a stick on now deceased’s shoulders. In her defence outline she said she used a sweeping brush on the shoulders and maintained this version in court. In her confirmed warned and cautioned statement accused 1 Dambudzo said when she assaulted the now deceased with a stick the now deceased was in a wheel barrow as he passed through her homestead. In her evidence she said she assaulted the now deceased to cause him to get into the wheel barrow.

We reject accused 1 Dambudzo’s version for a number of reasons. We find no plausible reason as to why people like Koke who had gone out of their way to assist her to apprehend a thief would suddenly turn against her and lie. Why would accused 1 Dambudzo try to influence an old man like Vengai to lie to Police on how the now deceased had been fatally injured? In court accused 1 Dambudzo seemed to suggest that it is Koke who fatally kicked the now deceased causing him to vomit but alludes this to what she said Vengai told her. No one else gives this version. It is also surprising that according to accused 1 Dambudzo she saw all other exhibits being recovered at the scene except the stone attributed to her. All in all, she is not able to explain who fatally assaulted the now deceased and how but would want this court to rely on hearsay and speculation. We again find no reason why the other accused persons accused 4 Mazhambe and accused 5 Maroyi would incriminate accused 1 Dambudzo when they themselves are not giving exculpatory evidence in respect of themselves. For those reasons we reject accused 1 Dambudzo’s version of events on how she assaulted the now deceased and accept the version given by Koke and corroborated by accused 4 Mazhambe and accused 5 Maroyi.

Accused 2 Mathew

Accused 2 Mathew admits assaulting the now deceased but merely disputed the manner of the assault denying firstly that he assaulted the now deceased at Chimhandire mountain and then at the kraal of Koke’s father and secondly that he used open hands and kicked the now deceased. In our view there is no reason for Vengai and Koke to lie on how accused 2 Mathew assaulted the now deceased. It is accused 2 Mathew who has every reason to try and underplay

the manner he perpetrated the assault. It is therefore our finding that accused 2 Mathew assaulted the now deceased with open hands, switches and kicked him both at Chimhandire mountain and the kraal of Koke's father.

Accused 3 Joseph

Accused 3 Joseph admits assaulting the now deceased but denies using a hoe handle and that it was only once on the leg with a walking stick. He also witnessed accused 4 Mazhambe, accused 5 Maroyi and accused 6 Levison assaulting the now deceased. It is common cause that he left the scene before the arrival of accused 1 Dambudzo. In our view the denial by accused 3 Joseph is inconsequential but our view is that he used a hoe handle twice on the now deceased as explained by Koke.

Accused 4 Mazhambe

In our view no issues arise in respect of how accused 4 Mazhambe assaulted the now deceased. It has not been disputed that he used a rubber whip twice on now deceased's buttocks.

The other material aspect of accused 4's evidence which we accept is that he witnessed accused 1 Dambudzo assaulting the now deceased firstly with hoe handle on the head which got broken and then with a fairly big stone picked with both hands on the middle of the head while they were at the kraal of Koke Maruma. Accused 4 Mazhambe graphically demonstrated in court how accused 1 Dambudzo used the stone. He also explained how as a result the now deceased who was seated fell down writhing in agony and that his head began to swell. Accused 4 said he failed to restrain accused 1 Dambudzo who was only held by her husband. We note that when accused 4 Mazhambe took the witness stand he did not only brilliantly present his evidence but did so eloquently without any contradictions.

Accused 5 Maroyi

Accused 5 Maroyi admits assaulting the now deceased with a switch at Chimhandire mountain and this version is not challenged. Accused 5 Maroyi corroborated accused 4 Mazhambe on how accused 1 assaulted the now deceased with hoe handled and the stone. He also pointed out that the stone was recovered at the scene by the police. According to accused 5 Maroyi it is accused 1 Dambudzo who delivered the fatal blow and explained how thereafter deceased rolled on to the ground in agony with his head swelling.

Accused 6 Levison

Accused 6 Levison admits assaulting the now deceased but justified his conduct on the basis that he was now deceased's cousin. He disputed the number of blows he delivered and where he directed them preferring to saying it was twice on the legs with a switch. We have no cause not to accept the version that it was several times with a switch all over the body. We find no reason for those present to exaggerate the manner accused 6 assaulted the now deceased.

Accused 6 Levison sought to exonerate accused 1 in the assault of the now deceased with a hoe handle and a stone. This was despite his own evidence that he left the scene at some point to attend to his cattle. Surprisingly he wanted us to believe that no stone was recovered at the scene by the police. No wonder why he was unable to explain the injuries his so called cousin sustained or why he was unable to walk. We reject accused 6 Levison's evidence as it does not explain what caused the fatal injury. All we can say is that accused 6 Levison was a lying and pathetic witness.

Accused 7 Amon

Among all the 7 accused persons it is only accused 7 Amon who denies that he assaulted the now deceased. The story accused 7 Amon sold to us is that he was like the biblical good Samaritan whose only role was to ensure the now deceased got help. What we find surprising is that when he got to the scene he said he wanted to assault the now deceased and proceeded to pick a switch but decided not to on account of now deceased's injuries and one Peter's advice. Suffice to say this version is totally different from what he said in his confirmed warned and cautioned statement and we there is no reason as to why he would omit such material evidence. We also find no reason why Koke and accused 4 Mazhambe would incriminate accused 7 Amon whose positive role they acknowledged. Our finding is that accused 7 Amon despite being the good Samaritan assaulted the now deceased with a switch on the buttocks several times.

The law and verdict

Having made these findings of fact the last question we have to address relates to the proper verdict in respect of each of the accused.

In our view accused 1 Dambudzo cannot escape liability for contravening Section 47(1)(b) of the Criminal Law (Codification and Reform) Act [Cap 9:23] which relates to murder with constructive intent or legal intention or *dolus eventualis*. While we accept that accused 1 Dambudzo may not have intended to kill the now deceased (that is actual intention) she obviously realised that there was a real risk or possibility that her conduct of hitting the now deceased with a hoe handle on the head which broke and with a 6.5 kg stone again on the head may cause death. Accused 1 Dambudzo nonetheless continued to engage in that conduct despite that risk or possibility. As was aptly put by Mc NALLY JA in the case of *S v Gumbi* 1994 (2) ZLR 323 (S) constructive intent can be explained in these simple terms;

“I know I may kill this person if I shoot (or in our case if I assault the now deceased with a hoe handle and a stone on the head in this manner) but I am going to do it anyway.”

This is exactly what accused 1 Dambudzo did. See also *S v Tachiona & Anor.* 1994 (2) ZLR 402 (H) which clearly explains that *dolus eventualis* entails both recklessness and carelessness as to whether or not harm would result.

In respect of accused 2 to 7 we are constrained to accept the argument by the State that we should return a verdict of guilty of murder on the basis of the provision of s 196 A of the Criminal Law (Codification and Reform) Act [Cap 9:23] which is an amendment in the Criminal Code [Cap 9:23] dealing with liability of co-perpetrators introduced through Act No. 3/16. A proper reading of that provision would clearly show that there is need to prove the requisite *mens rea* to commit the crime in issue before liability can be visited on accused 2 to 7. In fact, s 196 A of the Criminal Code [Cap 9:23] simply reinforces the common law doctrine of common purpose.

The *locus classicus* in respect of the doctrine of common purpose is the case of *S v Mubaiwa & Anor.* 1992 (2) ZLR 362 (S) in which it was said;

“for the doctrine of common purpose to apply in case of murder it would have to be proved that the accused did something to associate himself with the actions of the person who actually did the killing knowing that the other person intended to kill or foreseeing the possibility that he intended to kill.”

This was put differently by SANDURA JA in the case of *S v Chauke & Anor.* 2000 (2) ZLR 494 (S) at 497 A in which the learned JUDGE OF APPEAL quoted the author Burchell

in South African Criminal Law and Procedure Vol I 3rd edition at pp 307 in explaining the doctrine by common purpose;

“where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.”

The question we have to answer is a simple one in respect of accused 2 to 7; which is was the hitting of the now deceased, by accused 1 Dambudzo at the time she arrived, with a hoe handle and a 6.5 kg stone on the head fall within the common design of accused 2 to 7. The answer is clearly no.!

From the proved facts there was no prior agreement between accused 1 Dambudzo and all the others to commit murder or even assault. In fact, accused 1 Dambudzo arrived at the scene after accused 3 Joseph had left. While the other accused persons were present when accused 1 Dambudzo arrived they did not make common cause with accused 1 Dambudzo to assault the now deceased let alone with hoe handle or the stone on the head. The facts before us do not show that accused 2,4,5,6 and 7 associated themselves with the nature of the assault perpetrated by accused 1 Dambudzo. It is legally untenable to infer that their presence per se constitute an act of association.

It is clear to us that the other accused persons had no requisite mens rea kill the now deceased nor did they foresee that accused 1 Dambudzo would arrive and engage in a murderous enterprise by suddenly using a hoe handle and picking a stone to assault the now deceased on the head with such viciousness. In our view they did not perform any act of association with accused 1 Dambudzo recklessly and carelessly as to whether death would ensue. From the facts proved, it is clearly a far cry to say that such an intent can be imputed to other accused persons. The proved facts show that accused 2 to 7 arrived at the scene at different times with accused 1 Dambudzo. They then proceeded to assault the now deceased in a different manner from accused 1 Dambudzo. It cannot therefore by any stretch of imagination be inferred from the proved facts that they acted with a common purpose with accused 1 Dambudzo.

The unavoidable conclusion is that accused 2 to 7 did not casually contribute to the death of the now deceased which was clearly caused by vicious assault on the head with a hoe

handle which broke and a 6.5 kg stone. All what has been shown is that accused 2 to 7 assaulted the now deceased in the manner already stated.

Accordingly, we have arrived at the following verdicts.

Verdict:

Accused 1 Dambudzo:

Guilty of murder as defined in s 47(1)(b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*): murder with constructive intent.

Accused 2 Mathew; accused 3 Joseph; accused 4 Mazhambe; accused 5 Maroyi; accused 6 Nyamande & accused 7 Amon:

Guilty of assault in contravention of s 89(1)(a) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*].

SENTENCE

There is now a clear distinction that accused 1 Dambudzo has been convicted of murder with constructive intent in contravention of s 47(1)(b) of the Criminal Code [*Cap 9:23*] and accused 2 to 7 stand convicted of assault in contravention of s 89(1)(a) of the Criminal Code [*Cap 9:23*]. This implies that accused 1 Dambudzo would be punished differently from the other accused persons.

The other distinctive feature is that accused 1 Dambudzo is the only female offender and her advanced age is of 60 years is only comparable to accused 3 Joseph.

Accused 2 to 7 have been convicted of assault which is not a very serious offence. The manner in which accused 2 to 7 assaulted the now deceased is clear from the record. The motivation for the assault is that they took the now deceased as a thief who should be punished.

Contrary to the submissions by the State Counsel there is no objective basis to sentence accused 2 to 7 differently from the other. The principle of uniformity of sentence is more appropriate in this case. This is so despite the differences of weapons used by each of the accused in assaulting the now deceased, the number of blows they each inflicted, the part of

the body the blows landed and the different ages of accused 2 to 7 especially accused 3 Joseph who is 70 years old and suffers from chronic diabetes.

All the accused persons are unsophisticated rural people with families to support. They all largely survive on subsistence farming and their manual labour. All the accused are first offenders hence they deserve to be treated with some measure of leniency. Other than accused 1 Dambudzo and accused 7 Amon all the other accused admitted from the beginning that they assaulted the now deceased and to that extent they did not dispute the offence they now stand convicted of.

It is mitigatory that there was a delay of 4 years in finalising this matter and this should have weighed heavily the minds of the Accused persons and their resources attending court. Accused 3 to 7 did suffer from pre-trial incarceration of 8 months.

The social stigma that accused 2 to 7 are associated with the now deceased's death would always be attached to them for the rest of their lives. It is clear that you all acted out of what may be termed mob psychology. It has not been disputed that a series of offences have been experienced at the homestead of accused 1 Dambudzo and accused 2 Mathew. It may well be true that the now deceased was not a saint after all judging by his conduct of fleeing into the mountain and hiding. It was therefore well within your rights to effect citizen's arrest but you should have acted within the confines of the law.

In relation to accused 1 she stands convicted of a very serious offence. Human blood is sacred and the courts have a duty to uphold the sanctity of human life. It should be made clear to accused 1 Dambudzo that no one has the right to take the life of another whatever the circumstances. Even those accused of crime should be subjected to due process. It was therefore imperative for accused 1 Dambudzo to control herself because once a life is lost it is irreplaceable.

The vicious attack accused 1 Dambudzo perpetrated on the now deceased was uncalled for and elevates her moral blameworthiness. The now deceased had not only been apprehended but severely assaulted. This did not deter accused 1 Dambudzo who attacked the now deceased fatally with a hoe handle and a 6.5 kg stone on the head. Such conduct by accused 1 Dambudzo

is not expected of a female more so one of her age who should have exhibited motherly behaviour and be a voice of reason.

The concept of mob justice should be discouraged at all costs. Be that as it may accused 2 to 7 have been convicted of a non-serious offence. As a result, a custodial sentence as prayed for by the State is not called for. It would therefore be proper to give accused 2 to 7 the option to pay fines. The fine should be well within their means and judicial notice should be taken about the current liquidity problems hence they should be allowed time to pay.

In the result, we believe the following sentence in respect of each of the accused is appropriate.

Accused 1 Dambudzo:

10 years imprisonment.

Accused 2 to 7 :

Each accused is to pay a fine of \$200.00 or in default of payment 2 months imprisonment.

National Prosecuting Authority, counsel for the State

Muzenda & Partners, counsel for accused 1 and 2

Legal Aid Directorate, pro deo counsel for accused 3

Ndlovu & Hwacha, pro deo counsel for accused 4

Mutendi, Mudisi & Shumba, pro deo counsel for accused 5

Legal Resources Foundation, Masvingo, pro deo counsel for accused 6

Pundu & Company, pro deo counsel for accused 7