THE STATE
versus
YEUKAI GRAHAM MUTERO

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 28 September 2022 and 9 March 2023

Assessors
Mr Chimonyo
Mr Kunaka

Criminal Trial

C Mutimusakwa, for the State
V Moyo, for the accused

MUTEVEDZI J: This case evokes once again, the raging debate regarding the administration of corporal punishment on children by parents and guardians.[1] Whichever side one takes in the discourse, it is a fact that some of the unintended consequences of that method of instilling discipline in children may be ghastly.

The accused wept uncontrollably from time to time throughout the course of the trial. She was arraigned before us on a charge of murder in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The State alleges that on 20 January 2022, Yeukai Graham Mutero (the accused) unlawfully and with intent to kill or realising that there was a real risk or possibility that death may occur and continuing in her conduct assaulted Desmond Kuzivakwashe Matsatsi (the deceased) all over the body using a mulberry stick and a fan belt. The prosecutor's detailed story was that on that date the deceased and her elder sister called Tinotenda (Tino) retired to bed around 2000 hours. In the odd hours of the morning, around 0200 hours the accused's brother called Ocean Mutero (Ocean), with whom she is jointly accused of this murder but whom the police have not yet accounted for, got into the room where the deceased and Tino were asleep. They tied the deceased to the base of the bed before assaulting him with sticks and a fan belt. It turned out during the trial that Ocean had been invited to come to assist the accused in

[1] See for instance the cases of *S v Chokuramba* HH 718/14 and *Pfungwa and Anorv Headmistress of Belvedere Junior Primary School and Ors* HH 178/17

disciplining the deceased. The accused joined in assaulting the deceased. The two assailants accused the deceased of having joined a cult of Nyau dancers. After about an hour Ocean went back to his room to sleep. The accused untied the deceased and they all slept. She woke up and left for work around 0500 hours whilst Tino went out to sweep the yard. Tino later went back into the room and noticed that the deceased was unconscious. It was later discovered that he had died. An autopsy was conducted and the pathologist concluded that the deceased died as a result of brain damage, subarachnoid haemorrhage in the right hemisphere and head trauma.

The accused pleaded not guilty to the charge. Her defence went as follows:

It is true that she assaulted the child but did so in a bid to discipline him for various issues of his misconduct. In disciplining the child, she used a switch and a fan belt, implements which were not expected to cause any serious harm on the boy let alone cause his death. The assault was on the buttocks and the thighs. She did not have the intention to kill her own son.

State Case

The State opened its case by applying to tender the post mortem report. The defence consented. It was duly admitted and the cause of death was as already stated. It was uncontested. Thereafter, the prosecutor called oral evidence. The testimonies of the witnesses were as recorded below:

Tinotenda Mutero

Her testimony was critical to the determination of the case. She is a daughter to the accused. In fact she is now the accused’s only child. She retold the story from the beginning. The deceased was her younger brother. He was barely 13 years old. He had lately become very delinquent. On some days he would not return home despite his tender age. On others, he would return home very late. His behaviour showed that he had joined a cult of dancers commonly called *Nyau* dancers. On the fateful night he returned home around 2200 hours. The witness said she had earlier seen him at the road near their house. When he got into the house the accused asked him where he had been. She reprimanded him and warned that his wayward behaviour was getting out of bounds. The witness and the deceased then had a misunderstanding over their cooking duties. The deceased did not want to prepare the family’s supper. He finally relented and cooked the supper. At the time he was cooking he took the accused’s phone and was playing games on it. They ate their supper and all retired to bed. The accused slept on the bed with the deceased whilst she slept on the floor. Around

0200 hours she said she woke up to someone crying and observed that the accused was assaulting the deceased. She supported that the deceased had to be disciplined and even commented that he had lately become very mischievous. The deceased struggled as he was being assaulted. He fell a dish that was hung on the wall. It hit him. He also tried to hide under the bed. He was retrieved from thereunder. Ocean arrived at that point. The witness said at that time she left the room because it hurt her to see the deceased being assaulted. The accused assaulted the deceased on the buttocks and the thighs with his hands tied together with a speaker cable.

Hours after the assault, the deceased actually woke up the accused reminding her that she was running late for work. The accused requested the deceased to boil bathing water for her. Later she again requested him to retrieve her shoes from under the bed. He did both tasks. The deceased then left for work around 0600 hours. The witness said she woke up around 0700 hours and went out of the house but not before she had spoken to deceased and teased him that he had deserved the beating because of his mischief. Outside she met Ocean who also remarked that he hoped the deceased would not be naughty again. At about 0800 hours Tino said she went back into the house because she wanted the deceased to tell her the passcode to the accused's phone. She tried to wake the deceased but he did not respond. She shook him but he still did not respond. She poured water on him but that did not help. She ran out to advise Ocean. He came but did not succeed in waking up the deceased. Tino then ran off to tell the accused at her workplace.

The witness confirmed that the accused had used a small switch plucked from a mulberry tree and a fan belt to assault the deceased. She also said at the time she tried to wake him up, she noticed that the deceased had vomited on himself. She did not however notice any bodily injuries on him. She was adamant that the accused did not kill the deceased. Asked if indeed the deceased had been initiated into the *Nyau* dancers' cult, the witness said the deceased had advised her that he been assaulted and forced to eat unsalted roast chicken meat as part of the initiation. He had also been previously assaulted by other people. Under cross examination, she maintained that the deceased had been assaulted by members of the *Nyau* cult in in addition to being made to eat food that he was not used to. She added that the deceased had not complained of any pain after the assault by the accused. He had slept well and actually woke up the accused to prepare for work in the morning. He had no bruises on the head. There were no blood stains on his clothes. She also revealed that the deceased was violent and would not pass an opportunity to pick up a fight in the streets. Earlier in the week

that he died, he had returned home crying and indicated that someone had assaulted him at the tuck-shop. He complained of a headache and was bleeding from the nose. The accused reprimanded him. Thereafter, the deceased did not attend school for a week. The witness occasionally broke down and cried during her testimony. She struck the court as a young woman who was traumatised by the sudden turn of events. When she composed herself her demeanour was honest personified. Despite the frequent mischief by her younger brother, it was clear she was very close to him. The two of them were equally very close to the accused. They were a small family who lived in bliss although the happiness was occasionally disturbed by the deceased's juvenile delinquency. She was forthright and did not prevaricate in her testimony. She did not seek to favour anybody but simply stated what happened and what she knew about the assault and the events leading to it. Her evidence was totally credible.

Margret Sithole

She investigated the homicide. When she arrived at the scene, she found the deceased lying inside the house covered with a blanket. She checked him but did not see any signs of life. His body was then ferried to Chitungwiza Hospital where it was certified dead. She recovered three switches, a fan belt, some car charger cables and a shoe lace at the crime scene. They were all produced as exhibits with the consent of counsel for the accused. There was no argument about their admission as exhibits and their use in the assault. The switches had a combined weight of 0.021 kg with an average length of about 65 cm and about 1.5 cm thick. The pieces of the broken fan belt weighed 0.097 kg. The longest of them was 30 cm long and the shortest around 20 cm. The thickest was 2 cm and the thinnest about a centimetre. The three pieces of the car charger cables had a combined weight of about 0.096 kg. The longest of them was about 1.5 metres and the shortest about 50 cm. All of them were around 1 cm thick. She further advised the court that she attended the post mortem examination of the deceased's body. The only injuries she noted on the body were bruises on the back and the legs. She did not observe any blood at the scene or on the deceased's clothes. She also noticed an almost imperceptible swelling on the forehead.

In addition to the above items the officer indicated that she also noticed that the surface on which the deceased was lying was wet, a sign that someone must have poured water on him. Further, she observed a greenish substance which she assumed was vomit or froth. She took the accused to court for remand where her warned and cautioned statement was confirmed by a magistrate. The prosecutor applied to have that warned and cautioned

statement admitted as an exhibit. There were no protestations by the accused and it was duly admitted.

As can be noted, the officer's evidence simply related to her attendance of the scene and nothing else. To us she was more of an attending detail than an investigation officer because she did not do any investigation.

After the evidence of the police officer, the state closed its case.

Defence Case

In her defence the accused emphasised the issues in her defence outline. She narrated that on the day in question she returned from work between 1900 and 2000 hours only to find out that both her children were not home. She took off her uniform and went to bed. Around 2100 hours she heard them arguing about who was supposed to prepare supper. The deceased whom she always affectionately called by his totem of *"Gono"* was refusing to cook. She intervened and asked *Gono* why he always returned home late at night. He simply smiled like he always did. Supper was finally prepared. They all ate and retired to bed. The accused added that she is a prayerful woman. Around 0200 hours, her alarm rang. She woke up to pray. She woke up the deceased and advised him that she wanted to discipline him and that thereafter they would pray together. She retrieved a fan belt which she already had in the house. She also had some switches. She beat the deceased with a switch. He jumped off the bed. She tried to hold him but he overpowered her. The accused then send a text message to her brother Ocean requesting him to come to aid her in tying up the deceased because she was not done with disciplining him. Ocean arrived and offered the assistance. The accused then assaulted the deceased further on the buttocks and on the thighs. As she spanked him she was actually telling him that she wanted to beat him where he would not be injured and that after this she expected not to beat him again. Ocean agreed with her that the deceased needed disciplining because his mischief had become excessive. After the beating, they all went back to bed. The deceased asked Tino to come on to the bed as he wanted to sleep on the floor. They exchanged places. Around 0400 hours the deceased woke up the accused as earlier narrated by Tino. She later went to work and only learnt about the deceased's death around 1000 hours when Tino came to report what had transpired after she left for work. She advised the court that she would beat the deceased as infrequently as once or twice a year despite his delinquency. She broke down but continued testifying. The deceased was her best friend. He was the first to know if the accused was happy or sick. She had struggled with him

a lot. She became a widow when he was just six months old. She was tested for the human immuno virus (HIV). The results were positive. She fought the illness and thought she had won. She loved the boy beyond measure.

Commenting on the character of the deceased the accused said he was a bully. Her neighbours and other parents in the neighbourhood would occasionally come to her to complain that the deceased was bullying their children. She had witnessed some of his fights. He would beat most children of his age. He would block their way to the shops or to school. During the fateful week she had been advised of an incident where the deceased had taken off the clothes of other children telling them that they were cheap labels and that his brands were expensive and imported. She had also learnt that he had earlier that week been assaulted by one Brian at the tuck-shop after an altercation about eggs. It was alleged that Brian had lifted him and thrown him to the ground. When the issue surfaced after the deceased had died, Brian actually closed his tuck-shop and disappeared from the neighbourhood. She said she wanted to discipline the deceased because of those issues and further that he had been initiated into the *Nyau* cult. He would play drums that mimicked the *Nyau* dancers'. At times he would do so subconsciously in the house. The neighbourhood was awash with rumours that he was now a *Nyau* dancer. All that went against her teachings as the family belonged to the Christian apostolic sect. When she confronted him he denied any knowledge of the cult but he admitted when she was assaulting him. He revealed that he had been taken to a bush where he and others were assaulted and taught how to dress like *Nyau* dancers. They were also taught how to administer herbs and how to chant the cult's recantations. They were, during the same ceremony, made to eat chicken without salt. Lastly before graduation, they were made to swear never to reveal their secrets. After those revelations, the accused said she was shocked and was literally powerless. She stopped beating him. She summed up her evidence by saying she was shocked by the results of the post mortem examination. She did not at any time hit him on the head. She did not see him hit on any object during the beating. Ocean did not beat the deceased but had only helped her tie the deceased's hands. To compound her misery, she failed to attend the burial of the deceased. She was arrested immediately after the deceased was discovered dead. She was put in the cells. By the time she was granted bail, her in laws whom she had not been in good books with since the death of her husband had already taken the deceased's body to their rural areas for burial without her knowledge. She maintained her version of events throughout her cross examination by the prosecutor.

The issue

The issue for determination in this case is whether the accused had the requisite intention to kill the deceased.

Intention in murder cases

Section 47 of the Criminal Law Code defines the crime of murder in the following terms:

> "**47 Murder**
> (1) Any person who causes the death of another person—
> (a) intending to kill the other person; or
> (b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder."

The mental element of the crime of murder is split into two distinct categories. The first category is called actual intention. It relates to instances where an accused desires to bring about his/her victim's death, sets out to do so and achieves that objective. In other words the accused's incentive for his actions is to kill his target. Little if any difficult usually arises from that. The second classification is what is called legal or constructive intention. Unlike actual intention, this class relates to deducing an accused's *mens rea* from inferential reasoning drawn from the proven facts and or circumstances surrounding the commission of the offence. The accused is not predisposed to murder the victim but commences conduct in which it is clear to him/her that death or serious injury may result. He or she nonetheless then persists with his/her actions regardless of his/her awareness of the risk of death or serious injury being the outcome of his/her conduct. In the case of *S* v *Mungwanda* 2002 (1) ZLR 574 (S), CHIDYAUSIKU CJ lucidly explained these concepts. At p 581 D-F he put it thus:

> "For a trial court to return a verdict of *murder with actual intent* it must be satisfied beyond reasonable doubt that:
>
> (a) Either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
> (b) While pursuing another objective, foresees the death of his victim as *a substantially certain* result of that activity and proceeds regardless.
>
> On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else). In the case of culpable homicide, he ought to, as a reasonable man, have foreseen the death of the deceased."

The above holding by the Supreme Court was the undebatable understanding of actual and legal intention at common-law. With the advent of the Criminal Law Code, the question of intention in murder and all other crimes which require it, became codified. Unfortunately

the statute does not define intention. Rather, it explains it under s 13 thereof. I hold that view because the distinction between a definition and an explanation is that a definition is a statement expressing the essential nature of something whereas an explanation is an account intended to make something clearer. I have already said actual intention under the common-law was fairly straight forward. If there were any modifications to it after codification, they are barely significant. What appears to have undergone perceptible mutation is constructive intention. To put those changes into context, it is necessary to start by pointing out that the Code divides the mental element into three distinct parts namely intention (which clearly refers to actual intention), knowledge and realisation of real risk or possibility (which is the equivalent of common law legal intention). In that respect the Code in s 13, s 14 and s 15 provides as follows:

> "**13. Intention**
> (1) Where intention is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequence he or she did.
> **14. Knowledge**
> Where knowledge is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue had knowledge of the relevant fact or circumstance.
> **15. Realisation of real risk or possibility**
> (1) Where realisation of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components—
> (*a*) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that—
> (i) his or her conduct might give rise to the relevant consequence; or
> (ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and
> (*b*) a component of recklessness, that is, whether, despite realising the risk or possibility referred to in paragraph (*a*), the person whose conduct is in issue continued to engage in that conduct.
> (2) If a crime of which the realisation of a real risk or possibility is an element is so defined in this Code or any other enactment that—
> (*a*) the words describing the component of awareness are omitted, the component of awareness shall be implicit in the word "recklessly" or any derivatives of that word; or
> (*b*) the words describing the component of recklessness are omitted, the component of recklessness shall be implicit in the expression "realise a real risk or possibility" or any derivatives of that expression.
> (3) Where, in a prosecution of a crime of which the realisation of a real risk or possibility is an element, the component of awareness is proved, the component of recklessness shall be inferred from the fact that—
> (a) the relevant consequence actually ensued from the conduct of the accused; or

> (*b*) the relevant fact or circumstance actually existed when the accused engaged in the conduct; as the case may be."

My interpretation of the concept '*realisation of real risk or possibility*' under s 15 is that it has reconfigured the test for legal intention. Whilst previously the test was that the accused would have legal intention where he/she undertook conduct in which he/she foresaw the possibility of the conduct resulting in the consequence and having foreseen such likelihood, he/she continued engaging in that conduct reckless as to whether the consequence materialised, under the Code the test is that the accused would have legal intention where he/she engages in conduct fully aware that there was *a real risk or possibility* (which phrase has been interpreted to mean that the risk or possibility must be more than a distant one) that the consequence may ensue and despite that awareness proceeds with the conduct heedless as to whether or not the result occurred. The major difference is therefore that under the common–law, an accused could be held to have had legal intention simply because he foresaw the possibility, no matter how remote it could have been that a consequence may ensue. There was no categorisation of the likelihood. It sufficed whether it was at the foot or at the summit of the ladder. Under the new regime, an accused must not be convicted on such basis. He/she can only be liable if the risk or possibility was strong or likely. In other words the threshold of the possibility has been heightened.

My view that the legislature intended to alter the common-law position is supported by s 15(4) which unequivocally states that:

> "(4) For the avoidance of doubt it is declared that the test for realisation of a real risk or possibility <u>supersedes</u> the common-law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable." (My emphasis).

As already stated, a finding that an accused had legal intention is usually drawn from the facts and circumstances of the case. For instance, in the case of *The State* v *Munodawafa* SC 220/95 the court pointed out that the weapon that is used, the manner in which it is used and the part of the body where it is directed assist in establishing an accused's intention. I would add that the force with which the weapon is thrust at the victim is equally significant in that determination. The victim's vulnerability where that is known to the accused must also be considered. In *S* v *Mhute* HH 784/15, it was held that the accused

was lucky to have escaped a charge of murder after assaulting to death his wife whom he knew to have been suffering from ill-health at the time of the assault.

The test for culpable homicide courts no controversy. As explained in *Mungwanda* (*supra*) it is simply that the accused ought to, as a reasonable man, have foreseen the death of his victim. The difference being that it is an objective test as opposed to the subjective tests applied under intention in its various subcategories.

In *S* v *Tafadzwa Mapfoche* SC 84/21 the Supreme Court emphasised the point that the reason for the distinction between actual and legal intention may have fallen away given the wording of s 47 of the Criminal Law Code. At p. 10 of the cyclostyled judgment, it expressed the view that:

> "Thus, under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under 47(1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section.
>
> It further appears to me that the distinction between a conviction of murder with actual intent and murder with constructive intent, which under the common law greatly influenced the court in assessing sentence is no longer as significant or material as it was."

Whether the accused committed murder with one or the other form of intention is therefore of little if any materiality because the sentencing procedures (which used to be distinct) for either class of intention have been conflated.

Application of the law to the facts

In her closing submissions, the prosecutor conceded that prosecution's evidence had not proved that the accused had either actual or legal intention to be liable for murder. She argued however that the evidence was sufficient to ground a conviction of culpable homicide. On the other hand, counsel for the accused's view was that the evidence did not even prove the lesser crime. The concession by the prosecutor was in our view, properly made. The accused person did not set out to kill her son. Her openly stated intention was to discipline the child who had become notorious in the neighbourhood for various misdemeanours. She woke up in the middle of the night with the intention of chastising the boy and calling him to prayer thereafter. The question of actual intention is therefore out. In relation to legal intention, the admitted and proven facts are that the accused assaulted the deceased with very thin mulberry sticks. We earlier on described those switches. For purposes of completeness, we restate that the three sticks had a cumulative weight of 0.021

kg with an average length of about 65 cm and about 1.5 cm thick. They were by any standard, far from being lethal weapons. The pieces of the broken fan belt could also not cause any foreseeable significant let alone fatal harm. They weighed 0.097 kg. The longest of them was barely a ruler and the shortest around 20 cm. The thickest was 2 cm and the thinnest about a centimetre. The same applies to the three pieces of the car charger cables which had a combined weight of about 0.096 kg. The longest of them was about 1.5 metres and the shortest about 50 cm. All of them were around 1 cm thick. The charger cables were not used to assault the deceased but to tie up his hands to facilitate the administration of corporal punishment. The evidence before us also reveals that the deceased was a sturdy boy who easily overpowered his mother when she wanted to assault him. Had she not called for her brother's assistance, she would not have been able to punish him. With those seemingly harmless weapons, the accused assaulted the deceased on the buttocks, back and thighs. Generally speaking an assault on those parts of the human anatomy is not commonly known to lead to fatalities. It is only in extreme beatings that the possibility of death may be foreseeable. Admittedly, the accused was angry with the boy because of his unruly behaviour but the evidence of Tino and to some extent that of the investigating officer shows that the assault remained within the bounds of moderation. The weapons and the manner in which they were used support that conclusion. Section 241(2) of the Criminal Law Code provides that:

> "**241 Discipline of children**
> (1) …
> (2) Subject to this section—
> (*a*) a parent or guardian shall have authority to administer moderate corporal punishment for disciplinary purposes upon his or her minor child or ward;
> (*b*) a school-teacher shall have authority to administer moderate corporal punishment for disciplinary purposes upon any minor male pupil or student; and, where moderate corporal punishment is administered upon a minor person by a parent, guardian or school-teacher within the scope of that authority, the authority shall be a complete defence to a criminal charge alleging the commission of a crime of which the administration of the punishment is an essential element."

If follows therefore that in cases of murder resulting from corporal punishment administered by a parent or other authorised person, it is not enough for prosecution to simply allege assault. The assault on its own is not criminal. The State must therefore lead evidence which tends to show that the accused acted beyond the bounds of moderation. Regard must be had to subsection 6 of s 241 which states that:

> “(6) In deciding whether or not any corporal punishment administered upon a minor person is moderate for the purposes of this section, a court shall take into account the following factors, in addition to any others that are relevant in the particular case—
> (*a*) the nature of the punishment and any instrument used to administer it; and
> (*b*) the degree of force with which the punishment was administered; and
> (*c*) the reason for the administration of the punishment; and
> (*d*) the age, physical condition and sex of the minor person upon whom it was administered; and
> (*e*) any social attitudes towards the discipline of children which are prevalent in the community among whom the minor person was living when the punishment was administered upon the minor person.”

The conjunctive *and* is used at the end of each of the first five factors in the provision signifying that they must all be considered. We have already described the weapons used for the assault, and concluded that they were thin mulberry sticks which are ordinarily used by parents in the administration of corporal punishment on their minor children. There was nothing out of the ordinary about them. We have also noted that the injuries which were observed by the witnesses (who included the investigating officer) on the body of the deceased illustrated that moderate force must have been used to assault the boy. The assault was therefore not vicious in any way. The assault was directed at non vulnerable parts of the body. We also concluded above that the deceased was a generally strong boy. That finding is supported by his activities. He fought in the streets, engaged in dances and the accused said young as he is he was so powerful that she needed someone else’s help to subdue him. This case happened in a high density suburb in Zimbabwe. Such communities generally embrace the administration of corporal punishment on minors. It is not out of the ordinary for parents of children in those neighbourhoods to resort to that form of disciplining children. The accused therefore ticked all the requirements which must be met for her actions to remain within the bounds of moderation. Moderation cannot be deduced from death of the minor. It is wrong for prosecution to infer that the parent or other authorised person exceeded moderation simply on the basis that death ensued such as in this case.

What complicates the situation in the instant case is that there is no evidence that the accused ever assaulted the deceased on the head yet the injuries which the pathologist concluded as having led to the death were head injuries. There is evidence that the deceased frequently engaged in fights with other children some of whom were even older than him. During the days preceding his death, he had been savagely attacked by an adult who had lifted him up and hit his head on the ground. He had by his own admission been attacked at the *Nyau* rituals. No one knows how badly those assaults might have affected the deceased

but at least we are aware that one of the assaults was directed on the deceased's head. The attacker at the tuck-shop must have been aware of the severity of the assault because when he heard that the boy had died, he closed shop and disappeared.

It is against the above background, that it becomes difficult to apportion any blame on the accused person. Taking the evidence and the circumstances of this case in their totality our conclusion is that the accused assaulted the deceased in the normal course of parental discipline. It was unfortunate that the bid for discipline resulted in the tragic consequences which may have been aided by the deceased's own violent behaviour in the community. There is no indication that the accused could have foreseen the possibility of death even in the remote sense of the word possibility. The weapons she used, the force she applied and the parts of the boy's body she aimed at all vindicate her.

The prosecutor's contention that the accused be convicted of culpable homicide is equally unsupportable. For that to happen, it must be shown that the accused ought to have, as a reasonable person, foreseen that her actions could lead to death. We have already shown above how the punishment meted out on the deceased remained within the permissible limits. Any reasonable parent who believes in the effectiveness and correctness of corporal punishment as a disciplinary measure would have acted in the same manner that the accused did and used the same light switches that the accused used. This death resulted from a permissible assault. It was incumbent upon the prosecutor to prove that in addition to the assault the accused must have reasonably foreseen that death might result from that assault. Or if the accused realised that death could occur from her conduct that she negligently failed to guard against the possibility of the occurrence of death. It is that negligent failure to foresee the possibility of death resulting from the assault that matters and not the intention to assault. See Professor Roger Whiting's article, *Negligence, Fault and Criminal Liability (1991) 108, SALJ 431.* We are constrained to hold that in this case, there was no way that the accused could have reasonably foreseen the possibility of death. Flowing from that conclusion, she was not expected to guard against the occurrence of a death which she did not reasonably foresee as a possibility.

Assault is a permissible verdict for the crime of murder. It means the accused can be convicted of assault in a murder trial if the evidence supports that. In this case we have already held that s 241 of the Criminal Law Code permits parents to administer corporal punishment on their minor children. We have also held that in our view the corporal

punishment did not degenerate into impermissible conduct. On that basis, the charge of assault cannot be sustained.

Disposition

A lot of criticism has been directed at the administration of corporal punishment on children by parents, teachers and other persons acting under the authority of the law. That criticism does not help as long as the law is clear that certain categories of people can act under its authority to beat children. Section 241 of the Code cited above is complemented by s 7 of the Children's Act [*Chapter 5:06*] which restates the permission of parents and guardians to administer reasonable punishment on their children in the following terms:

> "**7. Ill-treatment or neglect of children and young persons**
> (1) …
> (2) …
> (3) …
> (4) …
> (5)
> (6) Nothing in this section shall be construed as derogating from the right of any parent or guardian of any child or young person to administer reasonable punishment to such child or young person."

It was on the basis of that permission that we concluded that the accused did not do anything outside the law. Her beating of the deceased remained reasonable. She did not harbour any intention actual or legal, to hurt the deceased let alone kill him. For those reasons we are not convinced that the state managed to prove its case beyond reasonable doubt as required at law. Accordingly, the accused is found **not guilty and is acquitted** of the charge of murder.

National Prosecuting Authority, State's legal practitioners
Chambati Mataka and Makonese, accused's legal practitioners