

THE STATE

Versus

BLEYA MUNGA

IN THE HIGH COURT OF ZIMBABWE
NDOU J (with Assessors Messrs Hadebe and Ndondo)
BULAWAYO 23 MAY 2003

H Ushewokunze III for the state
L Nkomo for the accused, *pro deo*

Criminal Judgment

NDOU J: Before us is a young man aged 21 who has brutally caused the death of his wife. The manner in which the accused brought about the death of his wife is common cause. His defence is one of criminal incapacity. What is not clear from his defence is whether this alleged incapacity is on account of insanity or a non-pathological one. I will deal with this issue later in the judgment.

The salient facts of this case are that on 10 March 2000 the accused took the deceased to his rural home at George Zingwa's homestead, Sianungu Village, Kanyangwe area in Binga. He introduced the deceased to his relatives as his wife. He lived with her at his elder brother's above-mentioned homestead. This extended family lived together happily save for one minor dispute between the accused and the deceased. The 18th April is Independence Day in this country. Like many Zimbabweans on 18 April 2000 the George Zingwa extended family, inclusive of the head of the family, George, his wife Ivies, the accused and the deceased, proceeded to the venue of the celebrations. At the celebrations the accused did not drink alcohol, or at least the evidence before us shows that he was not seen drinking and there were no symptoms of alcohol consumption. The family returned home in the evening and

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shared the evening meal. The sole witness, Ivies Zingwa, who testified did not observe any beer at the homestead. She stated that there was no beer at the homestead. It can safely be inferred from her evidence that until the time that she retired to bed at around 2000 hours the accused was sober and normal. According to Mr s Zingwa the accused was not a habitual drinker. She had, however, seen him once showing some effect of alcohol consumption. But certainly on the fateful day there was nothing unusual about his sobriety. She has known the accused as a child from the time he was in primary school to right through until he did his grade 7. He was staying with her at the same homestead as he is a young brother to her husband. She described the accused as a very reserved and quiet character. According to her description of the accused's personality he was an introvert but he was normal. He had not suffered any mental illness during the time she had known him. She knew the accused person very well.

Coming to the events of the fateful day. She had reason to be close to the couple's bedroom hut. She heard the deceased's voice in normal conversation with the accused. She did not hear the accused as he usually speaks softly. This was around 0600 hours. She later herd the deceased screaming loudly calling her saying some words to the effect – "Mai Priscillah". The deceased's voice emanated from the couple's bedroom and sounded frightened. She ran to the couple's hut and heard the deceased crying, "Maye ngafa" loosely translated "Oh mother I am dying". She tried to open the couple's closed bedroom hut door by pushing it but failed as it was locked or bolted from inside. She peeped through a gap on the door. She saw the deceased lying down facing the floor and her head full of blood. The deceased was bleeding profusely that the witness ended up crying. The accused continued to swing the

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hammer which he was wielding upwards and with full force struck the deceased several times about her head. At some point the deceased stopped crying. After some time George Zingwa arrived and forced the door open. He actually chopped it with an axe. At that stage the accused had set the couple's clothes on fire. The deceased was breathing heavily. George went to report to the police and seek medical assistance. When George was away and before the police and the ambulance personnel arrived, the accused was quiet. He took a blanket and covered the deceased. Mrs Zingwa testified that at that time she formed an opinion that the accused had not taken alcohol. He was not drunk. The accused did not smoke. The police arrived and the accused was arrested. As the accused was being led into the ambulance the accused told Mrs Zingwa that he assaulted the deceased because she was no longer listening to him but instead was listening to her. He said this in response to bad words to him emanating from Mrs Zingwa and others who were present. At the time the accused was still locked inside with the deceased and those outside were shouting why he was killing someone's child the accused uttered words to the effect – "If anyone comes in, that person is no more."

From the undisputed testimony of Mrs Zingwa we are satisfied that the accused was not under the influence of alcohol. She knows the accused very well and would have observed it if he was drunk. She did not smell alcohol and at that time of the day the accused would not have started drinking in any event. All we can discern from his defence outline and what he told the specialist psychiatrist is that, if indeed he consumed alcohol and smoked two dagga cigarettes it would have occurred between 2000 hours of 18 April 2000 and 0600 hours of 19 April 2000. This, in our view, is far fetched and a fabrication. In his extra-curial statement he did not give

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drunkenness or insanity as a reason for the assault. When everything was still vivid in his mind he gave a coherent and understandable explanation for the assault. He said he assaulted her because of disobedience. He ordered her to go and fetch water to mould bricks to build a house. Not only did the deceased decline to do so, she further stated that house “was not hers”. During our deliberations it became clear that such a response might be taken in a very serious light in a rural set up where women are not expected to disobey marital instructions of their husbands. To further state that the house is not hers can infuriate a man in the accused’s position. This is consistent with what he told those who were present at the time that he assaulted her because she no longer listened to him but instead listened to Mrs Zingwa. This is also consistent with what he stated in his extra-curial statement.

In the circumstances, the accused’s rage and actions subsequent to that have to be viewed in that context. *Mr Nkomo*, for the accused rightly conceded that this whole issue of drinking beer and smoking two dagga cigarettes is an after thought. A year later, when he was seen by the specialist psychiatrist the accused must have tried to give a plausible explanation for the assault and in the process deviated from the truth. We do not agree that when the accused killed the deceased he was labouring under such a defect of reason, from a disease of the mind, that he did not know the nature and quality of what he did and that what he did was wrong. From the expert evidence of Dr Poskotchinova the accused was free from any psychotic symptoms. He was orientated in all respects and there was no evidence of cognitive impairment. He denied any delusions and hallucinations of any kind. The doctor opined that due to alcohol and drugs that he had consumed the accused was in a state of diminished responsibility at the time of killing. We have already indicated that the

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alleged intake of alcohol and cannabis is a mere fabrication exposed as such by the credible testimony of Mrs Zingwa. This fabrication, unfortunately does impact on the conclusion arrived at by the psychiatrist. The opinion would be correct if the accused told her the truth. He did not, so the opinion is affected thereby.

In our view the accused's mental condition at the time of the offence, does not satisfy the requirements of insanity. We may at most be dealing with the case of abnormal condition and as such the accused is legally responsible for the offence and must be convicted. So even if we accept the findings of the psychiatrist that there was diminished responsibility the accused would still be convicted. Diminished responsibility reduced the accused's moral blameworthiness and not guilt – *S v Sibiya* 1984 (1) SA 91(A); *S v Chitiyo* 1987(1) ZLR 235 at 239 and *Criminal Procedure in Zimbabwe* by John Reid Rowland at 12-12 to 12-13.

In our view, in light of the findings of fact about the allegation of intake of alcohol and drugs the issue of diminished responsibility does not arise. The only other issue that we have to consider is one of non-pathological criminal incapacity. The evidence show that the accused is a very quiet person. The cause of mental inability seems to emanate from anger linked to mental or physical exhaustion resulting from a perceived disobedient wife. This strained the accused's powers of self-control until these powers snapped – *S v Arnold* 1985(3) SA 256 (C). What is important is not the cause or the description of the cause but the inability itself – see *Criminal Law* by C R Snyman 3rd Ed at page 152-3. This defence has to be treated with great caution as it can be raised easily by the accused but very difficult for the state to refute. Non-pathological incapacity as a complete defence ought not to succeed easily. Our courts should not allow this defence to succeed easily otherwise

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our criminal justice system would easily become discredited – see *Chretien v S* 1981 (1) SA 1097 at 1105H and 1106D. *In casu*, the emotional disturbance was only for a brief moment before or during the act and as such its chances of success as a defence are almost non-existent. According to Snyman (*supra*) on page 154 it is significant that in those cases in which the defence was raised or in which the court was at least prepared to consider it seriously, the accused's act was preceded by a very long period months or years in which his level of emotional stress increased progressively – see also *S v Campher* 1987(1) SA 940(A); *S v Calitz* 1990(1) SA 119(A) and *S v Smith* 1990(1) SACR 130 (A). This was not the case *in casu*.

The burden of proving a defence of the kind raised by the accused lies on the accused. *R v Moyo* 1969(1) RLR 162G and *R v Benjamin* 1968(1) RLR 126(G) and *S v Taanorura* 1987(1) ZLR 62 (S). With this in mind one would have thought the accused would have found it prudent to testify under oath to establish a foundation for his defence. He chose not to do so. Fortunately, the state adduced evidence of the specialist psychiatrist. Having regard to the totality of the evidence and our findings the accused has not established a defence of non-pathological incapacity either. We hold the view that the accused appreciated what he was doing. His utterances during and after the assaults are consistent with a husband who was annoyed with a wife who did not follow his instructions or “command” as the psychiatrist recalls it in her report. This is a case of domestic rage. The accused should be held criminally responsible for his act. The accused used a hammer weighing 2.11 kilogrammes. The length of its head is 12.5 centimetres and circumference of the head 18.9 centimetres. The length of the handle is 29 centimetres and the circumference of the handle is 10 centimetres. He aimed his blows indiscriminately about her head. She was

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defenceless. According to the post mortem report the cause of death was multiple skull and jaw fractures and violent murder. Whilst we accept that the accused's emotional state has to do with the assault, we find that the proven facts establish the crime of murder with legal intent. This is not a case where the accused had successfully established diminished responsibility entitling him the reduction of his conduct to one of culpable homicide.

We, accordingly find the accused guilty of murder with constructive intent.

Attorney-General's Office applicant's legal practitioners
Webb.Llow & Barry respondent's legal practitioners