THE STATE
versus
MICHEAL MILIFORT

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 21 & 27 October & 13 November,2023

Assessors: *Mrs. Mawoneke*
Mr. Manyangadze

Criminal Trial

K. Teveraishe, for the State
F. Mhishi, for the Accused

BACHI-MZAWAZI J:

Introduction and Charge

The remains of a four-year-old young girl were found lying in a pool of blood, her head crushed and her brains scattered on the floor of the wooden cabin they called their home in the early hours of the 18th of February 2023. The accused person, Micheal Milfort, the step father, was the last person to be seen with the deceased alive late in the night of the previous day. He was arrested in connection with the heinous killing and charged with murder as defined in s47 (1) of the Criminal Law Codification and reform Act [Chapter 9:23].

Accused's Defence

The accused person pleaded temporary mental insanity. He said that he neither had any recollection of the events of that tragic day nor the actual commission of the crime. It is his defence that if indeed he killed his stepchild, he thus lacked the requisite intention to do so. He alluded to a history of episodes or bouts of mental illness dating back to year 2020. Accused did not show any visible signs of unfitness to stand trial at the commencement of these proceedings.

Common Cause Facts and Issues

The common cause facts are that the deceased who was last seen with accused was found dead. It is not in dispute that accused killed her as his clothes where found soaked in blood. Accused had exhibited weird and bizzare behavior before and after the offence. This gives rise to the question, whether or not the accused had temporarily lost his mind during the attack on the minor child warranting a complete defence?

The Facts, State Case, Evidence and Analysis

The onus to prove the essential elements of the offence recognizably lies with the State like in most criminal cases, save those with statutory exceptions. However, in terms of common law there is a reverse onus on the accused to prove that he was mentally incapacitated at the time of the offence. See, *S v Mapfumo* & Ors 1983 (1) ZLR 250(S).

In support of their case, the State procedurally produced, two medical reports on accused's mental health status, the post mortem report, a confirmed warned and cautioned statement and summarized written evidence of seven out of ten witnesses unchallenged. Oral evidence was led from the remaining three witnesses. The pathology report disclosed the cause of death as severe head trauma.

Facts as detailed by the first State witness Georgina Advent Sande

The events leading to the murder are as chronicled by Georgina Advent Sande, the State's first witness to give oral evidence thereby formulating the facts of the case. This witness happened to be the wife of the accused as well as the mother of the deceased. On the day in question the witness narrated that she awoke in the middle of the night to find the accused acting abnormally, with blood shot eyes, speaking incomprehensibly and incoherently. When she noticed that he wanted to harm himself she then struggled to restrain him. She witnessed the accused attempting to drink poison and punching the walls of the wooden cable they were sleeping in. During that struggle the deceased indicated that he wanted to sleep in the metal cabin next door instead of his own wooden one. The metal cabin was home to the wife's cousin brother and his wife and who had already retired to bed.

As the accused's behavior grew increasingly violent with the progression of the evening, the second witness, Taurai Chinyanga joined in to assist his sister, the first witness. They both were overpowered and had to run for their dear life to yet another's brother Stephen's distant compound for shelter. Georgina, only managed to escape with her infant baby leaving the deceased behind.

She added that the deceased then followed her at Stephen's house in the company of the deceased who refused to remain behind when asked to. That was the last time she saw the deceased whom she discovered the following morning in the company of her sister-in-law, brutally murdered. They found the accused sleeping in the contentious metal cabin but when he was awakened by their wailing, he became more agitated and even more violent.

It was the witness's testimony that the accused person never exhibited any violent behavior towards anyone including the deceased prior to this occurrence. However, she alluded to the accused's history of repeated intermittent bouts of mental illness spanning over a considerable period. She also testified that a few days before the incident the mental disturbances had emerged compelling her and her relatives who lived with them to seek assistance from a spiritual healer. From her point of view, the accused's actions of that day were a culmination of what had transpired earlier giving rise to the involvement and intervention of a prophet.

She told the court that in the past the mental illness episodes would manifest through his weird and strange behavior with an inclination to self-harm, suicidal tendencies and the destruction of his own newly purchased property. In addition, she also mentioned an isolated solitary incident when she discovered some green pills from the accused's clothes which she suspected to be drugs. She was however, satisfied with the explanation from the accused that they were not drugs in the sense of illegal substances.

We found the evidence of this witness credible although there was a slight immaterial departure from her written statement on the general attitude of the deceased when brought by the accused to where they had sought shelter that night. Although she was torn between as the mother of the deceased and wife to the accused, the court found no reason or justification in her lying to save one at the expense of other. More so, when the rest of all the admitted witnesses evidence dove tailed and corroborated hers in all the material aspects of the accused behavior prior to and on the day of the awful incident.

Taurai Chinyanga's written testimony

Taurai Chinyanga, is a cousin brother to the first witness. He is the one whose metal cabin was next to the accused's. He is also the first person to make an effort to assist his sister in

restraining the accused. Chinyanga testified to the strange actions of the accused in making four visits to his adjacent metal cabin at night demanding to sleep therein instead of his own. He also corroborated the violent nature of the accused's disposition on the day and his futile efforts to restrain him ending with him running to seek shelter elsewhere.

Joyce Mwanza's written evidence

Joyce Mwanza, the third State witness, is a sister-in-law to both the accused and the first witness. She is also the wife of Stephen Zunde, the first witness's other brother where the refuge was sought on the disastrous night. She attested to the recurrent nature of the accused's mental health issues thereby giving credence to the history of the mental disturbances of the accused. Her evidence also revealed the continued violent behavior and instability of the accused the following morning after the discovery of the death of the infant child. She stated that the accused had to be restrained by her husband, Stephen with the help from other members of the public.

Stephen Zunde and Samantha Mairos' admitted evidence

Stephen Zunde, witnessed the accused pacing around topless the following morning as well as the events of the previous night when accused's family sought shelter at his residence. Samantha Mairos, a neighbor who came to the crime scene the following morning also witnessed the out of the ordinary ferocious deportment of the accused who frightened them away.

Of note, the admitted evidence of all the relatives of the first witness consonantly, spoke to the abnormal and bizarre behavior of the accused before and after the murder. These witnesses were also related to the deceased and the accused in one way or the other and had no reason to lie or fabricate their evidence. They are unsophisticated farm dwellers and evidently lacked the sophistication to tailor evidence. They are credible witnesses.

Investigating officer's admitted evidence

Peter Mutumwe, was the investigating police officer who was also the first to attend the crime scene on the 8th of February 2023. He found the accused tied by ropes. He examined the scene and made his own investigatory findings. When he tried to record a statement from

the accused on the 2Ot[h] of February 2023, he found him hallucinating. He only managed to record a warned and cautioned statement from the accused two months later, on the 27th of April, 2023.

The State's Second and Third Witnesses to give *viva voce* evidence

Doctors, Clement Mwamba and Nemia Sibanda, are the expert witnesses called to elaborate on the certificates compiled in the examinations they conducted above. The examination of the accused's mental state took place on the 28th of February 2023 at the behest of the Magistrates Court Kadoma. In terms, sections 5 and 26 of the Mental health Act, [Chapter 15;12] a magistrate can make an order for a psychiatric evaluation of a person believed to be mentally disordered or intellectually handicapped as the case may be brought before them.

At law expert evidence assists the court to come to an informed decision. It does not bind the court. Expert evidence is evidence from a person who is proficiently skilled in that special area, discipline or field of study. Its purpose is to assist in a subject matter beyond the knowledge and experience of in most cases a court, tribunal or a panel. At times the person has to be qualified in that discipline but sometimes it will be an area in which the expert is not specialized in but within his expertise. See, *S v Ndzombaane* –S-77-09. This was also clearly articulated in the South African cases of Oppelt *v Head: Department of Health Provincial Administration: Western cape [2015]* ZACC33, T*he MEC for Health and Social Development Gauteng Province v MM on behalf of OM 697/2021Z*ASCA.

Noticeably, in this case the two doctors are general practitioners not trained in psychiatry. However, mental health is within their area of study, medicine, and they have been employed by the relevant Ministry to carry such psychiatric examinations as part of their routine medical duties as physicians. The admissibility of their evidence is not issue as the medical reports have already been tendered unchallenged into evidence. What remains is the interrogation of the reliance and weight that can be attached to the expert opinion so embodied. See, *S v Motsi* HH24/2015 and *S v Ndzombaane*, above.

Doctors, Clement Mwamba and Nemia Sibanda's evidence both written and oral was a carbon copy of each other. Their findings were based only from the history taken from the accused which led them to omit other stages of the enquiries they were procedurally supposed to complete. They both attested to a three-stage approach which is a requisite to their enquiry. These are the history, the observation and the report compilation stage. These stages maybe

interlinked as each has a bearing on the other. The most crucial stage is the history segment which is divided into two parts. The first component is the recording of the patient's history from his acquaintances, relatives, community, or from any known documented medical history of the patient.

The second part of the enquiry, is the extraction of the history from the mental patient himself which is the clinical observation or examination, to determine the mental patient's behavior on the day of examination. This allows the doctors to see whether there are visible manifestations of mental disorder, disorientation, lack of coordination, coherence or comprehension. Obviously, they will not have any problems where the patient is visibly insane as they will quickly spring to the third stage whereby, they recommend further tests or toxicology reports.

The challenge lies in situations where, like the accused, the patient had bouts of sanity and insanity. In most cases acts or offences that are committed when a person is blanketed by the lunatic attack one hardly recollects or recalls anything linked to that sought of blank episode in their lives. Thus, it then does not make much sense to then think or suggest that they can relate to those incidences. In *casu* doctor, Clement Mwamba, conceded that they did not record the accused 's mental history from his relatives but from the accused and the prison guards who had brought him. The other doctor and Nemia Sibanda admitted to the complete omission of the history stage. He admitted to the physical observation he made and the questions he asked to test the accused's mental aptitude at the time of examination.

In assessment, doctor Mwamba's evidence in respect to gathering information pertaining to the accused's mental health condition from the prison guards is not acceptable for several reasons. No medical reports from prison senior officials, hospital, let alone his cell inmates was placed before the doctors in order for them to make a comprehensive report of the accused's mental health status mainly based on the prison guards history. Prison superiors or the clinic section are known to keep records of patients.

Secondly, those who escort prisoners outside the prison precincts may not necessarily be familiar with the in-mates behavior as they will only be assigned either to the transport section or as simple prison security. Further, if at all the prison officers were engaged as alleged, the Doctors could have been told of the motiveless and ghastly offence upon which they would have discerned some red flags prompting further tests. It is the court's view that

the assertion that the history was taken from the prison guards is improbable and unbelievable, hence rejected.

Against that background, we are compelled to believe the accused's version that only one doctor asked him a few preliminary questions and then compiled notes which the other duplicated and endorsed. This is understandable against the background of their workload as general practitioners and shortage of staff. We thus, have no reason not to believe the accused.

What is apparent is had the doctors canvassed and considered the accused's mental history as it had been relayed by his close relatives who testified in court and the bizzare and motiveless manner in which the crime had been committed they would have been prompted to venture into the last recommended stage of their enquiry. They could have been placed in a better position to allow them to explore the third rung of their recommended procedures, that of recommendation for further psychiatric evaluation, laboratory and toxicological investigations on the accused's mental health. It is evident that expert testimony omitted the crucial history part. It was thus incomplete and inconclusive. This diminishes its weight and probative value. See, *Sv Ndzombane S,77/04*.

The Applicable Legal Principles

After having grasped the gist of the facts and the evidence produced by the State in rebuttal of the accused's defence of temporal insanity, the next port of call is the analysis of the law. It is well established that the law recognizes the fragility and fallibility of the human mind and crimes that can be committed under such mental incapacitations. Hence, the Criminal Law Reform and Codification and reform Act, Chapter 9:23 and the Mental Health Act [Chapter 15:12], conjunctively play an integral role in the field of mental health and incapacitation in the Criminal justice administration and delivery system in our jurisdiction.

As such, mental disorder is defined in section 226 of Chapter 9:23 as,, "mental illness , arrested or incomplete development of the mind, psychopathic disorder or disability of the mind". Psychopathic disorder is further paraphrased in interpretation section, s2 (b) Mental Health Act, verbatim, as a persistent, disorder or disability of the mind, whether or not sub normality of intelligence is present which results in abnormally aggressive behavior or seriously irresponsible conduct on the part of the patient.

In terms of s227 of the Criminal law Code, temporary insanity if proved is a full defense in the crime of murder. This section provides for temporary insanity at the time of commission of the offence even though elements of insanity may have ceased at the time of the trial. However, it outlines that for the complete defence to be successful the mental disorder or defect must have made the person incapable of appreciating the nature of and unlawfulness of their conduct at the time of the commission of the offence. Section 227(2) States that the cause and duration of the mental disorder or defect shall be irrelevant. See, *Sv Mawonani* 1970 (1) ZLR 41, *Rv Senekai* 1969 4 SACR.

Section 227(3) ousts the application of the defence in instances where the mental disability has been occasioned by voluntary intoxication as defined by s219 of the Code. See Legal Forum, 1988 Vol 1 No.2.

Application of the law to the facts

Our law in section 227 of the Criminal law Code [Chapter, 9:23] recognizes temporal insanity at the time of the commission of the offence as a complete defence as illustrated above. The mental disposition of the accused at the time of the occurrences as described by the witnesses matched the definition of psychopathic disorder temporal insanity or dementia as described the Mental health Act as read with the Criminal Law Code. A comprehensive assessment of all the witness evidence inevitably points to the conclusion that the accused's behavior falls under the clinical symptoms of temporal insanity, psychosis, bipolar disorder, manic depression and psychopathic disorder as expounded by medical research and personnel. See, '*Psychosis Causes Symptoms and Treatment*'. Jabeen MD, August, 09, 2023, WEMD, editorial Contributors.

Conclusion

In a nutshell, the bizzare behavior of the accused before and after the killing, compounded with the mental history detailed by the State witnesses' his relatives as well as the absence of motive all point to the mental instability of the accused at the time of the murder. See, *S v Ndzombaane* S 77/ 09. S v Taanorwa 1987(1) ZLR 62(S) S v Mukombe 1991(1) ZLR 138(S) In addition, section 227(2) of the Criminal Law Code, provides that the cause and duration of the mental disorder or defect shall be irrelevant in considering the complete defence of

temporary insanity at the time of the commission of the crime. See, *Rv Senekal,*1969(2) RLR 398(A), *S v Mawonani*, 1970(1) RLR41(A) *Sv Mulumbe* HMT18/18

Further, the police confirmed that they could not record statements from him because of his mental state at the time of his arrest. A warned and cautioned statement taken two months later and is already part of the evidence does not detail a coherent story. It actually shows that the accused could not restate or recount the events of that day. There is no reason to believe that accused was into illegal drugs. His explanation of the tablets he was found with a known specie of blue Viagra tablets is believable. It is understable that out of sheer ignorance or colour blindness, a person may mistake the colour green to blue and vice versa. The summarised evidence of witnesses who are relatives of the accused which spoke to a history of mental disorders and how they manifested culminating in the murder was never sought, investigated or made part of the medical report. Had it been made part of the medical reports, the doctors will have carried out further investigations.

We also discredit the doctors' evidence that they adequately assessed the history of the accused from the accused himself. This as noted above, is because a person suffering from a temporal mental disorder or insanity may not be in a position to recall events that would have taken place during that the insanity spell. This is clearly spelt out in the, M'Naghten rules, Common law, standard test used to establish the applicability of a defence of this nature. Either one of the three requirements set out therein, qualifies a person pleading the defence of temporary insanity to a complete defence. Thus, firstly that the accused was unaware of the physical nature and quality of his actions because of his diseased mind. Secondly, if he was aware of the physical nature and the quality of his act, he was unaware that the act was wrong because of the disease of mind, and lastly, if he was aware of both the nature and quality of his act, and that it was wrong, but was unable to resist the impulse to commit the crime because of a disease of the mind. In our view, the red flag was right there before th See, 1993, ZLRev No.2 at p20, Geff Feltoe: *A Guide to Criminal Law of Zimbabwe* page 17 above. So it is beyond logic that the doctors could have extracted any meaningful information as regards the accused's mental illness from the accused himself.

The expert evidence led by the State, which was their main artillery, though admissible lost weight because of the analysis made herein and the admitted crucial omissions made by the experts rendering their findings inconclusive. It is therefore of no probative value.

That means the state has failed to establish the most essential ingredient of the offence charged. It thus has failed to prove its case against the accused beyond a reasonable doubt. On the other hand, the accused's burden of proof has been discharged by the evidence from the State's own witnesses as examined above. As a result, the accused is found not guilty of murder as charged. A special verdict is returned.

In terms of s29(2) of the Mental Health Act, [Chapter 15:12] the Court's has three options to consider after a special verdict has been returned. This is determined by the accused's mental condition during and after trial. In this case the accused appeared sober, sane and in full control of his mental faculties. However, the manner in which the offence was committed and the omission of a comprehensive mental health report on the accused's mental functions has swayed the court into ordering further psychiatric evaluation from psychiatrists in terms of the governing Act. This is to safeguard the danger of releasing a loose cannon onto the unsuspecting public. *See, S v CharidzaHMA10*/17.

Accordingly, it is ordered the accused be returned to prison and thereafter be transferred to Chikurubi Prison Psychiatric Unit for evaluation and or treatment in terms of s29 (2) (a) of the Mental Health Act [Chapter 15:12] and to be released in accordance with the provisions of the said Mental Health Act [Chapter 15:12].

The National Prosecuting Authority for the State,
Legal Directorate for the accused