

KEITH ZITA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 2nd August 2006

Bail Application

Mr *Chikumbirike*, for the applicant
Mr *Phiri*, for the respondent

BHUNU J: The accused was arrested and detained in custody on 3 counts of murder and one count of attempted murder. He allegedly shot dead his girlfriend, her father and her sister. He also shot and seriously wounded his girlfriend's mother in the same fracas.

He subsequently appeared in court and was remanded in custody where he remains incarcerated up to this date.

Following his remand in custody the accused was indicted for trial in the High Court on the 10th December 2004 and on the 1st of February 2005, he was arraigned before me for trial in the High Court.

At the commencement of the trial the accused through his lawyer Mr *Chikumbirike* vigorously objected to the commencement of the trial.

It was argued on his behalf that the nature of his defence was that of diminished mental responsibility. He was suffering from a disease of the mind caused by external stimuli triggered by anger, provocation and stress. He therefore at the material time suffered mental dissociation, his mind snapped and he lost self control leading to the fatal shooting and wounding of his victims so the argument went.

The defence acknowledged that despite the alleged diminished mental responsibility the accused knew what he was doing and to that extent they tendered a plea of guilty to culpable homicide which plea was rejected by the State.

Thereafter the defence applied that the trial be stayed until such time that accused has been examined by a psychiatrist to determine the accused's mental status at the time of the fatal shooting. In making the application the defence fully appreciated that the onus was squarely on the accused to establish his mental status at the material time.

The State vigorously opposed the application for postponement pointing out that since the accused was fit to stand trial and his current mental status was not in issue the trial could proceed while he was undergoing the psychiatric examination. The State made it clear that it was ready to proceed to trial and was not in a position to entertain any further delay.

After considering the submissions made by both parties, I ruled in favour of the State that the trial should proceed. Both parties complied with my ruling and the trial commenced. When the State had led its evidence the accused objected to be placed on his defence without a psychiatrist report. As a result I postponed the matter *sine die* on the 13th June 2005 and recorded on the case file cover that the purpose of the postponement was to facilitate mental examination of the accused.

On the 21st June 2005 the registrar wrote to the officer-in-charge Harare Remand Prison requesting that the accused be mentally examined.

Apparently the prison authorities did not respond timeously to the request. This prompted the State counsel, defence counsel and the registrar to write reminders urging the prison authorities to expedite the examination.

It will be noted that the registrar's letter did not specifically request that the accused be examined by a psychiatrist. The registrar is not to blame because there was nothing in my notes to suggest that the accused should be examined by a psychiatrist. I had assumed that since the examination was at the behest of the defence they were going to make the necessary arrangements with the authorities spelling out exactly what they wanted done.

Unfortunately the defence took the stance that since the accused was in custody they had to leave everything to the prison authorities.

The net result was that the prison authorities eventually caused the accused to be examined by a medical doctor instead of a psychiatrist. The medical doctor simply diagnosed that the accused is mentally stable.

On the 31st July 2006 both counsel appeared before me in Chambers wherein Mr *Chikumbirike* bitterly complained of the inordinate delay in having the accused examined. He accused the prison authorities of not complying with the court order directing them to have the accused examined by a psychiatrist.

The truth of the matter is however that there was no such court order. They were simply requested by the registrar to have the accused mentally examined. There was therefore no defiance of a court order. It appears that whatever delay there was emanated from a breakdown in communication.

The accused has now approached this court complaining bitterly that his constitutional rights to a fair hearing within a reasonable time enshrined in section 13(2) as read with section 18(2) of the constitution has been breached.

What he has been unable to do is to lay the blame for the delay at anyone's door.

The State did not cause the delay they have always been and are ready to proceed to trial. It is the accused himself who asked for the postponement to enable him to collect evidence to establish his defence. The onus was squarely on him to establish the existence or otherwise of the special defence he was proffering. The State could only assist where possible in the gathering of such evidence. They played their duty but the defence was in the driving seat.

The matter was postponed for the medical report on the 13th June 2005 and when there was no satisfactory progress the defence did not make any follow up until about a year later on the 31st of May 2006. That hardly

exhibits any urgency on the part of the accused. That conduct is inconsistent with someone who is anxious to get on with the trial.

The onus having been on the accused to collect evidence for his special defence and the postponement which led to the delay having been at his special instance and request, the blame for the delay can squarely be laid at the accused's door. I am therefore in total agreement with State counsel that the accused cannot be allowed to benefit from his own fault.

I have since made a specific order to facilitate the examination of the accused by both a private and State psychiatrist. The order is couched in the following terms:-

- “1. The matter is postponed sine die for the accused to be examined by a psychiatrist to ascertain his mental status at the time of the alleged commission of the offence.
2. The accused's psychiatrist be granted access to the accused subject to prison regulations.”

The accused says that he is a person of a violent disposition when subjected to external stimuli such as provocation, stress and anger. He is prone to mental dissociation and loss of self control which may have fatal consequences as happened in this case.

His violent conduct in this regard is said to be the result of a mental disease but there has been no evidence to show that he has been cured of the alleged illness. Is it therefore safe to release such a person into society? Is any reasonable court or society at large prepared to take the risk of a repeat of this horrific drama unfolding in this court? The answer must be an emphatic no.

That being the case the application for bail cannot succeed. It is accordingly ordered that the application for bail be and is hereby dismissed.

The Attorney-General's Office, the respondent's legal practitioners