

STATE
versus
FLORENCE NYATI

HIGH COURT OF ZIMBABWE
HUNGWE J
MASVINGO, 3 & 8 October 2012 & 23 August 2013

Assessors 1. Mr Dhauramanzi
 2. Mr Gweru

Criminal Trial

T Matenga, for the State
C Ndhlovu, for the Accused

HUNGWE J: The accused, Florence Nyati, a 38 year old woman, faces a charge of murder is defined in s 47 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (“the Criminal Law Code”) and two counts of attempted murder as defined in s 189 as read with s 47(1) of the Criminal Law Code. She pleaded not guilty to the charge of murder but guilty to the charge of attempted murder.

Most of the facts in this case were common cause or not in serious dispute.

Trial commenced on the October 2012 in the third High Court Circuit for Masvingo. State counsel, Ms *Matenga*, proceeded in terms of s 314 of the Criminal Procedure and Evidence Act, [*Chapter 9:23*] in terms of which the necessity to call *viva voce* evidence is dispensed with. As a result the evidence of the following witnesses was admitted on the record as it appears in the State Summary of Case, exh 1:

1. Aggripa Mutero
2. Jemina Mutero
3. Tiniel Mutero

4. Elton Chizanga
5. Patricia Tsatsi; and
6. Doctor Godfrey Zimbwa.

Consequently only the accused's daughter, Tendai Mutero, testified. She was, at the time of the offence, aged 10 years and 12 years when she gave the testimony. Her testimony was brief and understandably so given the fact that she was testifying against the own mother. Besides, she was directly affected by what a mother, the accused did to her and his siblings one of whom died as a result. After the child's testimony, the mother gave the evidence. She was cross-examined. In one day or evidence that been led. The matter was postponed to 8 October 2012 for us to consider judgment. On one 8th October 2012 with us that the accused him admitted for psychiatric assessment in light of the evidence she proffered regarding what he husband's nephew had indicated. She said that the nephew had telephoned a husband informing him that he was taking her as he considered her mentally unstable. In our view this aspect was never properly investigated. The trial was therefore adjourned to allow for the examination of the accused. On 15 July 2013 the Attorney-General's Office advised the registrar Brett and the accused had been discharged from Monday's institution and which she had been held in terms of the directive of this court. The notice was issued by Dr. Mangezi, a psychiatrist and is dated 3 June 2013. In the notice the Attorney-General directed that the prosecution of the accused be proceeded with. I arranged for the resumption of trial during the mid-year vacation. The Judicial Service Commission accordingly caused a notice to be published in the government gazette giving notice that the chief justice had directed that is the high court sits on 23 August 2013 at Masvingo in Geneva notice 393 of 2013. Unfortunately I learned that one of our assessors, Mr Gweru, would be out of the country and the unable to sit with us after finalizing the above arrangements. I consulted the parties on whether they were agreeable to proceed without Mr. Gweru. The parties consented in terms of s 8(1) of the High Court Act, [Chapter 7:06] to the trial proceeding with only one assessor.

Summary of the state case

The allegations of murder and attempted murder arose out of the following circumstances. On 5 May 2009 the accused had a heated argument with her customary law husband in Mabvuku, Harare over his infidelity and general abusive conduct towards her. As a result, he threw her and the children out of the house. This was not the first time such an incident

had occurred. She decided to go to his rural home in Gutu together with their three children aged 10, 7 and 1. The four boarded the bus and traveled to Gutu. They arrived at the station late at night. They put up for the night in a nearby village not far from their destination. The following morning he proceeded towards their village. Along the way the accused took out some provisions which included cordials feed to the children. Before she gave them to drink she passed them to close their eyes in prayer. The other two children close their eyes but Tendai did not. The accused then laced the children's cordials with rat poison and then offered it to the children to drink. The other children drank except Tendai as she had seen what had happened. The accused also drink poisoned fruit juice left over by the younger children. Tendai ran ahead towards her paternal grandmother's residence which by then was in sight shouting for help. As soon as they arrived home the three started to vomit except for Tendai. They were taken to hospital for treatment. Trish died whilst the rest survived.

At the trial Tendai gave evidence against her mother regarding how the alleged offenses were committed. She told the court that they traveled to their rural home by bus. Is there were walking home, the accused took out bottled fruit juice and asked them to close the eyes to pray. She however that's not close their eyes. As prayers were being said, she noticed that a mother administer the explosion into the fruit juice bottles. When she was asked to drink she refused. Accused forced her and she pretended to drink but she spat it out. She so the accused drink the poisoned fruit juice. By that time there were close to their destination which is her paternal grandmother's residence. She called out for a grandmother who arrived and found the accused Aggripa and Trish vomiting. They were taken to a nearby rural clinic. Trish passed away.

Under cross-examination, Tendai confirmed that they had, at some point, stayed with their father's second wife at Bora, Murehwa. A father and send them there. Her mother was against this arrangement. She was however reluctant to describe the treatment to which her father subjected her mother. She confirmed that he would assault the accused and cause the family to sleep outside the house or in the toilet whilst he and his new wife were inside. They would be denied food very often. When they were in Murehwa, Tendai told the court that the children would be left to their own devices. As a result she skipped going to school in order to look after their youngest sibling, Trish, who was by then only one year old. Aggripa would only intermittently attend school.

This evidence was not challenged.

Evidence for the defence

The accused for her part, gave the following evidence.

She was orphaned when she was in grade one. As a result the maternal grandmother raised her. When she was doing form three, her guardian and grandmother passed on. No one else could pay for their education. She left school and began to engage in domestic employment. She then met her customary law husband, Robert Mutero. They set-up family in Mabvuku. They lived a normal life until she got pregnant with Trish. He was upset by her arrival. She sent her and the children to his communal Lanes home in Gutu when his mother lived. Around the time there was a general shortage of commodities including food. Poor families were hardest hit. Her mother-in-law begged around the village for food for them. Upon realizing that her family was straining the old lady she wrote a letter to the husband asking him to send money for food. His reaction was surprising and devastated her. He wrote that if food was a problem she should leave his home. He would marry another wife. She however would have to leave his children with his mother. She read this letter to her mother-in-law. The two discussed their predicament. She proposed that she travel to Harare to establish the cause for this attitude from her husband. Her mother-in-law agreed to this but suggested that she take her children along. She had no bus fare for herself and the children. She wrote to husband again, this time advising him that his mother could not accommodate his children in her absence. His response was that she should bring the children to Harare so that he looks after them himself. He sent her bus fare.

She traveled back to Harare with the children. Upon arrival, the landlord expressed his unwillingness to carry a large family on his premises and inquired with her why they had not advised that her sister would join them. She apologized for the “aunt” although she was unaware of this woman. When her husband came back from work, she confronted him over this other woman. He assaulted her using a switch. She ran away and reported the matter to police. Police did not arrest her husband. Police told her that this was a domestic matter and referred her to a Community Liaison Officer. Her husband did not change his behavior. He told her that he was taking the children to his aunt. She assumed there would be taken to an aunt in Warren Park, Harare. Later, she sent his brothers to check on the children. It was then that she learned that the children were not there. The situation changed swiftly dramatically. He no longer came home nor buy her food or pay rent. She was breast-feeding Trish. She asked the landlord for food. She had

to sell her kitchen unit to pay rent. She fell ill. Her husband and his brothers visited her occasionally.

On one such visit, she stumbled upon grave information about her two children's whereabouts. She picked up that the children, Tendai and Agrippa, were learning at a school called St Johns. The husband was failing to pay for the children's school fees since it was expensive. When she re-entered the room the conversation from which she had picked this information abruptly ended. She did not know where this school was. From her own inquiries, she identified one school going by this name in Harare. It was an expensive upmarket private school which clearly her husband could not afford. It could not be this. The other was said to be near Juru Growth point, in Murehwa. She told the court that at that point in time she resolved that she would mount a search for the children once she was financially able to do so. Around that time, she fell ill. Her husband's elder brother visited her. She explained to him her circumstances as well as that of the children. Her husband's brother offered to assist her by giving her information regarding where she might locate her children. During this period, accused's husband had caused her lover to live amongst his friends. This meant that the accused's minor children were fending for themselves somewhere in the rural areas around Juru Growth Point. She became desperate to rescue them. She only had the baby who was breast-feeding. A fate would have it, when her husband's brother visited her, in the company of his wife, it was suggested that it would be better if she relinquished the breast-feeding baby into her sister-in-law's custody since she was ill. She refused. They cajoled her into thinking that they would turn her over to her paternal grandmother in Gutu. In the end they prevailed over her. Now left alone, she decided to sell household property and look for work as a house maid in order to fend for herself.

Later a nephew of her husband's offered her accommodation. Since she was not well and upon realizing that it would be easier to get information about her children, she accepted the invitation to stay with the nephew. It was then that she learnt that all her three children were staying with her husband's girlfriend, not with her husbands' relatives as she had been made to believe. They were out there in Murehwa. Her husband's nephew indicated that he had quizzed his uncle over this issue and had been advised that he had made this arrangement because he had realized that the accused was not mentally stable. Through this nephew's mediation, the husband had returned Trish who was breast-feeding and gave accused money for rent and buy food for the

two of them. The other two remained out of her reach. She decided to use the money at her disposal to put an end to her children's separation from her. By then she knew that the elder one had stopped going to school in order to look after the younger one. They were literally fending for themselves.

She went to look for her children in Juru area so as to take them into her custody. When her husband learnt that she had travelled to Juru he followed her up. He found her with the children and confronted her as to why she was removing them from their "home". He assaulted her with a little help from his girl-friend. Members of the public intervened and counselled the three adults regarding the need to consider the children's welfare in every decision they made. The elders counselled that the best interest of the children lay in their return into their biological mother's custody. Accused took this advice and packed the children's bags in preparation for the journey to Harare. On the way accused carried Trish on her back whilst her husband carried the luggage. At some point he gave the suitcase to the older of the two children to carry although it was too heavy for that child. When that child complained, he took the bag and threw it into the bush. They continued with their journey.

In Harare, the accused husband one day came home and removed all electric appliances indicating that no-one was to cook food at the place. He chased the family out of the home. Their landlord helped them out for only one month, April. As the school beckoned, the husband told her that he would look for their school requirements and take them back to Juru to continue with classes. When she indicated her unwillingness to put the children through the Juru trauma once more she was again assaulted and ejected from the house since according to him the children were his. Because she was no longer at home, the children were taken back to Juru against her will. She told the court that she was frustrated to the limit. She decided that when she would have eventually taken the children back, she would travel to Gutu and stay there with the children for their own wellbeing. This she eventually did but when she arrived from Juru with the children, she was severely assaulted. She noticed the assault were more persistent and unrelenting. She feared for her own life and resolved to travel to Gutu communal lands home as soon as she could.

The next day she was on her way to Gutu with the three children. It was late in the evening when they got off the bus. They put up in a village before their own. As she slept she settled on putting her misery as well as those of her children to an end. In the morning they set

off on their way home. She had procured a milk and juice cordial for the children as well as rat poison in Harare. When it was time for the cordial she asked her children to close their eyes in prayer. She then spiked the cordial with rat poison before administering it to them. She fed the children first but the elder one only pretended to drink as she had not swallowed her portion. She then took her own measure of the poisoned drink. At that stage, Tendayi, the oldest of the three children ran off to her grandmother's homestead which was now quite near. She and the other children remained in agony. They fell sick till help came. They were taken to the nearest health facility but Trish died.

Under cross-examination she told the court that she had decided to end her children's wretched lives as they would suffer worse if they lived after her. It was clear to her that in this whole saga her husband's relatives took his side. As an example, her husband's elder brother had travelled to Harare to tell her husband that they did not want her at the homestead in the rural areas. Her husband was abusive in the extreme towards her and the children. She felt that she had nowhere to turn to since the police had refused to entertain her case on the basis that it was a domestic dispute. Her mother-in law also indicated her unwillingness to look after the children since their father did not send them food.

The State urged the court to find the accused guilty of murder with actual intent as the accused did not put in issue the factual circumstances which constitute the crime charged.

On the other hand, the accused, in a round-about way, pleaded diminished responsibility. The extreme brutality of the crime contemplated by the accused and executed by her against her own children prompted the court to look closely to the facts and ask itself whether, in spite of the clarity with which the accused gave her evidence, there could possibly be other other tale-tell signs of diminished responsibility. The court recalled the evidence given in chief by the accused when she testified that the nephew gave the reason behind the taking of the children as being that it was felt, at some point, that the accused was mentally unstable. If the brutal nature of the intended action in which three other people were destined to die is put into its proper perspective, it could not be doubted that there was sufficient basis to question the mental capacity of the accused. As a result, the accused was referred for psychiatric assessment in respect of her mental capacity at the time she committed the offence.

On 3 June 2013 the accused was examined by a psychiatric nursing practitioner, Bazondile Marimbe. Before she examine her, the nurse had perused the accused's medical

records made available by Chikurubi Female Section Prison, an affidavit by her uncle, one Punish Temera, her husband Robert Mutero as well as other medical examination records availed to her. The psychiatric nurse concluded that at the time of committing the crime, the accused was suffering from a mental disorder.

Where a person is suffering from a disease of the mind at the time of commission of the crime, such a person may be able to appreciate the nature and quality of his or her conduct but fail to conduct himself or herself in accordance with such an appreciation as a reasonable person who did not suffer from such mental disorder would do.

The law assumes that ordinarily a person intends the probable consequences of his or her conduct. The assumption is that a person understands and appreciates his own actions and therefore is able to appreciate their wrongfulness if called to account. In legal parlance, this is captured in the stamen that there can be no liability without fault. The mental abilities which a person must have in order to have criminal capacity are (a) the ability to appreciate the wrongfulness of his conduct and (b) the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct. In *S v Wiid* 1990 (1) SA 561 (A); and *S v Eadie* 2002 (1) SACR 663 (SCA) the South African Courts accepted that severe emotional stress can deprive a person of capacity and responsibility. See also *S v Moses* 1996 (1) SACR 701. It has been held in South African courts that mental illness may cause an accused to act involuntarily (insane automatism), alternatively to lack criminal capacity due to the inability to distinguish between right and wrong or to act in accordance with that appreciation. See also *S v Kavin* 1978 (2) SA 731 (A). The court finding that an accused lacked criminal capacity due to severe emotional stress in relying on the failure by the prosecution to show that in the circumstances of the case such an accused person could subjectively have formed the necessary intent.

In the Criminal Law (Codification and Reform) Act, [Chapter 9:23], (“the Code”) s 9 provides:

“9 Liability for criminal conduct

A person shall not be guilty of or liable to be punished for a crime unless:-

- (a) the crime is defined by this Code or any other enactment; and
- (b) the person committed the crime or was a party to its commission as provided in this Code or in the enactment concerned; and
- (c) his or her liability is based upon voluntary conduct; and
- (d) subject to subsection (5) of section *seventeen*, the person engaged in the conduct constituting the crime with any of the blameworthy states of mind referred to in sections *thirteen* to *sixteen*, as this Code or any other enactment may require; and

(e) his or her liability is based upon unlawful conduct, that is, upon conduct for which there is no lawful excuse affording that person a complete defence to the criminal charge, whether in terms of Chapter XIV or otherwise.”

It seems to me that the use in the Code of the conjunctive “and” throughout indicates the common law requirement that all five requirements set out in the section must be present before conduct attracts criminal sanction. In respect of *mens rea*, subs(s) 9 (d) specifically refers to the states of mind set out in subs(s) 13 to 16 of the Code. It follows, in my view that where, as here, there is doubt as to whether one of the elements has been proved beyond a reasonable doubt then the accused will be entitled to his or her acquittal. Consequently, as a result of the fact that the accused at the time she committed acts which constitute the crime charged at a time when she was suffering from a disease of the mind, a special verdict must be returned in terms of s 29 (1) (a) of the Mental Health Act, [*Chapter 15:12*].

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