THE STATE
versus
LEARNMORE MICHAEL

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 15 September 2022 & 15 May 2023

Assessors: Mr Chokuvinga
Mr Mpofu

Criminal Trial

Ms *L Masango*, for the State
F Nyamayaro & Ms *M Tlou*, for the accused

MUTEVEDZI J: The history of mental illness runs deep in Learnmore Michael (the accused)'s family. His mother lives with mental illness. He has a sister who lives with the same condition whilst another of his sisters committed suicide. She was driven into it by a mental health problem. As will be illustrated later in this judgment, there is evidence that the accused may have been mentally ill at the time he committed this murder. It may not be possible to apportion blame on him for his actions.

The charge is that on 24 March 2021, at Nyamburi Village, Chief Mangwende in Murewa, the accused person unlawfully and with intent to kill caused the death of Christopher Michael (the deceased) by strangling him and thereby causing him injuries from which he died. The accused pleaded not guilty to the charge. He stated that he was mentally disordered at the time he committed the crime. His explanation was that at some time before this incident, he had experienced severe headaches. He approached the deceased to ask for painkillers but the deceased instead gave him traditional snuff. Soon after taking the snuff he experienced occasional hallucinations. He realised that his mental state had become disturbed. He questioned the deceased about it. The deceased denied ever giving him any snuff. It was at that point that the accused then force marched the deceased to his (deceased's) brother, Philip Michael's residence to have the issue resolved. He further alleged that when they arrived at Philip Michael's place, there was no one at the premises. The deceased then suddenly picked an axe and charged at the accused. A scuffle ensued between

them. The accused overpowered the deceased. The deceased was unrelenting despite being disarmed. He attempted to strangle the accused and to pull his private parts. The accused, in an attempt to defend himself got hold of the deceased's neck and pressed for a few seconds with the intention of weakening him to avert further attacks. Later he realised that the deceased had lost consciousness. The accused said he made attempts to resuscitate him but without success.

State case

The prosecutor opened her case by tendering the accused person's warned and cautioned statement which was confirmed by a magistrate. There was no objection from the accused. The court duly admitted the statement. The long and short of the statement is that the accused admitted to strangling the deceased as alleged by the state. In it he stated the same issues which appear in his defence outline. The state also applied to tender the post mortem report which detailed what caused the deceased's death. It was uncontentious. Death resulted from mechanical asphyxia, compression of the neck vessel and manual strangulation. Thereafter the state led oral evidence from three witnesses.

Jacqueline Tigere

She is the deceased's widow. She saw the accused force marching the deceased to Philip Michael's place. She then alerted some relatives particularly Philip Michael (junior) to follow the accused and the deceased because she suspected that the accused intended to kill the deceased.

Philip Michael Jnr

He is a nephew to the deceased in that the deceased and his father were brothers. After receiving the report from the deceased's widow, he rushed to his father's place to check on the deceased. When he arrived he saw the accused sitting abreast the deceased's chest and ranting. He noted that the deceased's tongue protruded from his mouth in a clear sign that he was already dead. He was scared to approach the accused who was shouting that the person who was causing problems in the family was no more. The witness said he also observed the accused smashing the deceased's snuff container with a knobkerrie. He then called out the accused's name. The accused turned on him intending to attack him. He said it appeared like the accused was in a trance or was possessed by some spirit. The witness further said he panicked and ran to report to the police. When they returned the accused had left the crime scene. He was apprehended at the deceased's homestead where he was removing the deceased's property and artefacts which he used as a traditional healer from the house.

More importantly, the witness narrated the accused's personal predisposition. He said it was known that the accused suffered from a mental illness. At one time, the accused had attempted to commit suicide by throwing himself on to a moving vehicle. The suicidal tendencies were so bad that at times the relatives would spend the whole day guarding him to prevent him from carrying out his suicidal threats. The problem had started when the accused was working at a tobacco auction floor. He stopped going to work due to the mental health condition. The problem ran in the family. The accused's mother suffered from the same illness. Accused's sister was also a victim of mental health problems. Another of his sisters committed suicide which was triggered by mental health problems.

Tichafara Kabasa

He was both the arresting detail and the investigating officer in the case. When he attended the scene, he said he found the accused at the deceased's homestead as earlier stated by witness number two. The accused was holding a knobkerrie. The officer instructed him to throw it down but the accused refused. He instructed him to sit down but he again refused. The officer and his colleagues actually had to use police dogs to subdue the accused. The witness said he was completely taken aback by the accused's behaviour. He could not put his finger on whether the accused was drunk or was possessed. He gathered that in the four days preceding the murder, the accused had not slept and had been behaving abnormally. He had at one time returned home drunk.

Thereafter, the state closed its case. In view of the evidence which had been adduced, it became clear that the accused may have been mentally disordered at the time he allegedly committed the murder. The court directed the accused's examination in terms of s 29(2) of the Mental Health Act [*Chapter 5:12*] to ascertain that fact. The examination was done. The psychiatrist compiled a medical report to that effect. We will return to deal with it.

Defence case

In his defence, the accused repeated essentially all that he had stated in his defence outline. He added that the deceased was not only his grandfather but was a man who was very close to him. He said he had absolutely no reason to kill him.

Common cause issues

a. The accused strangled the deceased
b. The deceased's death resulted from the factors stated by the pathologist
c. The accused and the deceased's relations were very cordial before this incident

d. There is history of mental illness in the accused's family

The issue for determination

It is clear that the only issue which stands out for determination in this case is whether the accused was mentally disordered at the time that he committed the acts alleged.

The Law

The defence of mental disorder at the time of commission of the crime is born out of the common-law defence of insanity. Its operation is guided by s 29 of the Mental Health Act [*Chapter 15:12*] (the MHA) which prescribes the procedure which courts must adhere to and Part V of the Criminal Law Code which creates the substantive defence. Part V provides that:

> **"PART V**
>
> MENTAL DISORDER
>
> **226 Interpretation in Part V of Chapter XIV**
>
> In this Part—
> "mental disorder or defect" means mental illness, arrested or incomplete development of mind, psycho-pathic disorder or any other disorder or disability of the mind.
>
> **227 Mental disorder at time of commission of crime**
> (1) The fact that a person charged with a crime was suffering from a mental disorder or defect when the person did or omitted to do anything which is an essential element of the crime charged shall be a complete defence to the charge if the mental disorder or defect made him or her—
> (*a*) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or
> (*b*) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.
> (2) For the purposes of subsection (1), the cause and duration of the mental disorder or defect shall be immaterial.
> (3) Subsection (1) shall not apply to a mental disorder or defect which is neither permanent nor long-lasting, suffered by a person as a result of voluntary intoxication as defined in section *two hundred and nine-teen*."

Two requirements stand out from the statute as cited above each of which entitles the accused's defence to succeed if successfully pleaded. In summary they are that:

a. The accused must have lacked appreciation of the nature of his/her conduct or that the conduct was unlawful or both; or

b. If he/she had the necessary appreciation, it must be shown that he/she failed to act in accordance with such appreciation

A person is considered *mentally disordered or intellectually handicapped* if he/she is suffering from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind.[1] It must be proved therefore that at the relevant time the accused's mind was so diseased that he/she was unable to appreciate the nature and quality of his/her conduct or that if he/she did, he /she was unable to act in accordance with that appreciation. The requirement is that the mental affliction must be pathologic. The length or duration of the mental illness is immaterial.[2] The cause of the mental illness is equally non consequential. Just like with common law insanity, the accused bears the onus to prove, on a balance of probabilities, that he/she was mentally disordered at the material time. The accused must discharge that burden without losing sight of the requirements of s 29(2) of the MHA which enjoins him/her to ensure that medical evidence among other evidence of the illness is availed to the court. The reasoning behind the requirement is not difficult to discern. Issues to do with mental illnesses are not ordinarily the domain of courts of law. The courts would therefore require assistance from experts who have better knowledge in the workings of the human brain, the afflictions it can suffer from and the attendant consequences of such diseases. The court however remains with the responsibility of deciding whether or not the particular accused person in the totality of the circumstances given indeed suffered from a pathologic condition which impeded against his/her appreciation of the nature and quality of his actions or to act in accordance with that appreciation. Such a decision is obviously the sum of the medical and factual evidence placed before a court.

Application of the law to the facts

In this case, the medical evidence relating to the accused's mental illness was provided by Christopher Njanjeni, a psychiatric nurse practitioner employed by the Zimbabwe Prisons and Correctional Services. . His qualifications are stated on the medical report he submitted to the court as MSc NS Psych (UZ) RMHN CMN RN. He further stated that after a personal examination of the accused person, he came to the conclusion that the accused may be suffering from a mental illness called psychosis as a result of a temporal lobe

[1] See s 2 of the Mental Health Act and s 226 of the Criminal law (Codification and Reform) Act

[2] S 227(3) of the Criminal Law Code is clear that only those temporary diseases of the mind caused by voluntary intoxication must be excluded

epileptic attack. He then added that the accused might benefit from a medical examination called Electroencephalogram (EEG) to establish the mental disorder in a mental institution. This court has previously stated the difficulties which arise in instances where an accused has never previously been medically examined for the presence of a mental disorder but suddenly springs that as a defence after the commission of an offence. Not that he is precluded from doing so. I acknowledge that a lot of people with diseases of the mind live in circumstances where both the means to seek medical/expert advice on their ailments and the appreciation of such diseases may be completely lacking. It is therefore not surprising that examinations are only carried out after the commission of offences at the instance of law enforcement agencies. The absence of a previous examination must not therefore on its own be taken as evidence that the defence of mental disorder is being raised as an afterthought particularly where there is independent evidence to support it. In the instant case, the state witnesses admitted that it was common knowledge that the accused had mental health issues well before he committed this crime. The court also notes two other medical reports compiled by two medical doctors at an earlier stage than Christopher Njanjeni's medical examination. Although the examinations were carried out with a view to ascertain whether or not the accused was fit to stand trial, what is telling is that both doctors indicated that the accused used to abuse a drug called marijuana. That added to the conclusions drawn by Njanjeni may be indicative not only of the origins of the accused's mental health issues but also adds to the argument that he may have been mentally disordered at the relevant time. I have already stated that the accused's collateral history supports his argument of a hereditary mental health problem.

The above considerations must also be read together with the fact that the murder we are dealing with here appeared motiveless. The accused killed his grandfather with whom he had not had any dispute before. Their relationship was in fact described as being very cordial. The deceased was the man who accused had stayed with during the time he was going to school. He turned to him when he lost employment in Harare as a result of mental health challenges. The meaninglessness of the crime itself is a pointer which adds to the growing list of factors tending to suggest mental disorder on the part of the accused.

What however seems disconcerting is the attempt by the accused to rationalise his conduct. He wanted the court to believe that the deceased had at some stage tried to attack him and that he acted to defend himself. A look at both the state's and counsel for the accused's closing submissions shows that the argument was simply hopeless. Nothing was

shown during the trial to support those allegations. The conclusion is that they were utterly preposterous and not worth of consideration. Even in his warned and cautioned statement the accused admitted that he overpowered the deceased and then strangled him. By that he removed himself from a possible defence of self-defence. The warned and cautioned statement itself however appears confused. Whilst it starts off from the premises that the deceased may have been attacking the accused, it proceeds to then allege an intentional desire to kill the deceased because of the accused's belief that he practised witchcraft. No sooner had the accused said that than he once more turned around and alleged that he did not have any intention to kill the deceased. It must have been clear to the recording officer that there was something not right with the accused's statement because it did not make sense. The investigating officer acknowledges those inconsistences but said he thought the accused simply wanted to hide behind insanity to ward off a charge for the heinous crime. In our respectful view, the officer took a cursory approach to his investigations because the evidence available pointed to a clear mental disorder on the accused. He apprehended the accused when he was ransacking the deceased's house rummaging for artefacts which he believed had been used to bewitch him. He faced off with the police and openly defied police instructions. He made no attempt to run away after committing the crime. All those should have been red flags to the investigating officer that the accused's mind may have been diseased.

Disposition

We have already held that the onus which an accused has where he/she raises a defence of mental disorder at the material time must be discharged on a balance of probabilities. Thereafter the state is obliged to disprove the defence. In this case, the accused laid the foundation which illustrated the existence of a history of mental disorder in his family. He laid the basis of his own trials and tribulations with mental disorder prior to the commission of the murder. His attempt to commit suicide stemming from persecutorial delusions and the medical evidence of a psychiatric expert all supported the probability of him having been mentally disordered at the time he killed his grandfather. On its part prosecution made a very timid attempt if any to disprove those assertions. The prosecutor bore that responsibility. We have no apprehension as a result, to hold that the accused person satisfactorily discharged the onus on him. He did not appreciate the nature and quality of his strangulation of the deceased person. If he did he clearly was not able to act in accordance with that appreciation. It is from the above that we have no choice but to find as we hereby do that **the accused person is not guilty because of insanity.**

The accused is clearly dangerous. His behaviour remains unpredictable. It is not appropriate to have him discharged at this stage. As such it is directed that the accused shall be returned to prison for transfer to an institution for purposes of treatment.

National Prosecuting Authority, State's legal practitioners
Farai Nyamayaro Law Chmabers, accused's legal practitioners