STATE
versus
PATRICK NYAMAPANDA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 14 September, 21 December 2022, 22 June,
6, 10 & 27 July, 23 & 25 October 2023

Criminal trial

Assessors: Mr *Mhandu*
Mr *Mpofu*

Ms B Mugebe & B Murevanhema, for the State
A Chimhofu, for the accused

MUREMBA J: The accused is facing a murder charge as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Before trial commenced the court ordered a mental examination of the accused by two medical doctors in terms of the Mental Health Act after it had been submitted that the accused had a history of mental illness.

The two doctors who examined the accused furnished reports that stated that the accused is a known psychiatric patient who was on treatment. However, it was said that at the time of examination he was mentally stable and fit to stand trial. On that basis trial commenced on 14 September 2022 and ended on 10 July 2023. The trial took long to complete because the prosecutor who started the trial, Ms *Mugebe* left prosecution and Mr *Murevanhema* had to take over the case. Before the trial could proceed, the record of proceedings had to be transcribed first for the benefit of Mr *Murevanhema* who did not have the notes of the case.

The allegations against the accused are that on 6 May 2020 he assaulted his blood brother with a hoe handle, a piece of firewood and a makeshift iron stove all over the

body thereby causing him injuries from which he died. The accused pleaded not guilty to the charge. Apparently, the deceased was also a mental patient just like the accused. In 2008 he had violently attacked his father and killed him. He was charged with murder, but he was found not guilty because of insanity. After receiving treatment at a special institution, he was discharged and went back home to stay with the accused and their mother, just the three of them. They stayed together for about 3 years before the fateful day in May 2020.

Evidence that was led from both the accused and the mother was that the deceased continued to be violent as he was mentally ill. Before the fateful day he was refusing to go to hospital to collect his medication. So, he was no longer taking any medication. The mother said that the deceased would urinate in the pot as she was cooking relish. He would also defecate near the fireplace as she was cooking. On the fateful day in the afternoon, he entered the bedroom hut where their mother was resting since she was not feeling well. He grabbed a hoe handle and started assaulting his mother. He struck her on the face severely. The mother screamed for help from the accused who was bathing. The accused ran to the bedroom to rescue her. He found her bleeding profusely from the nose. He wrestled the hoe handle from the deceased and their mother managed to escape. She ran away from home leaving the two brothers fighting. She came back the next morning only to find the deceased lying dead by the door way of the kitchen hut. Apparently, the accused had also not slept at home. A report was made to the police who then attended the scene on the very day. They made a follow up of the accused and found him at a bus stop and arrested him.

In denying the charge the accused denied assaulting the deceased. He said that after mother had left home the two of them ended up in the kitchen where the accused wanted to retrieve an axe which was clutched to the roof of the hut. In trying to climb up the roof, the deceased missed a step on the window seal and fell on top of a plough and a harrow which was lying upside down. He seemed to suggest that this is what caused the multiple injuries that caused the death of the deceased. The accused said that after the deceased had fallen on top of the harrow, he (the accused), went to the shops to while away time. He said he did not go back home because he then got carried away and

realised that it was too late to go home. He said he then slept at a friend's place at the shops and the police arrested him on the following day as he was on his way home.

After completing the trial, we postponed the matter for the handing down of judgment on 27 July 2023. In writing the judgment, we were not convinced with the defence that was given by the accused. We came to the conclusion that the accused had severely assaulted his elder brother resulting in him sustaining the multiple injuries which resulted in his death. The multiple injuries as per the post mortem report which was produced by the State were fractures on both lower parts of the legs, bilateral rib fractures with pneumothorax and a fracture of the left temporal region of the skull. Dr Taruona Joseph Tendai who testified during trial said that the injuries that were noted on the deceased were high energy injuries which mean that a lot of force was applied in inflicting them. He said that the injuries are not consistent with a person who fell on top of a harrow. He said that if a person falls on a harrow that is lying upside down, they do not sustain fractures as the deceased did. Instead, they sustain low energy injuries that are consistent with the use of a sharp object yet in this case the injuries that the deceased sustained are consistent with the use of a blunt object. What the doctor said is consistent with the suspicions of the State that the accused used a makeshift iron stove and a piece of firewood which were found at the scene of crime to inflict the injuries. When the mother of both the deceased and the accused testified, she said that when she got home the following morning to find the deceased lying by the kitchen doorway dead, she found her makeshift iron stove outside the kitchen hut yet when she left home the previous day, she had left this iron stove inside the kitchen hut. She also found a piece of firewood outside the kitchen hut close to the iron stove yet when she left home the previous day there was no such piece of firewood outside the kitchen hut. According to what the doctor said, such objects cause blunt injuries such as the fractures the deceased sustained. He explained that pneumothorax is the presence of air in the cavity between the lungs and the chest wall causing the lungs to collapse. He said that in a normal person air should be found inside the lungs and not outside. He further explained that in the case of the deceased, the ribs that were fractured are the ones that pricked the lungs thereby causing pneumothorax.

After making a finding that the accused was the one who had severely assaulted the deceased thereby causing his death, the issue that we needed to resolve was whether the accused had intentionally killed the deceased. Evidence led from the accused's mother and her neighbour Theresa Chikukwa who both testified for the State was to the effect that the accused, just like the deceased, also suffers from a mental illness which started some years before the fateful incident in 2020. When the accused also testified during the defence case, he said that the mental illness started in 2016. He confirmed what his mother said about him hallucinating and running around the village naked and being tied and restrained by fellow villagers. The accused said he was taken to some faith healers and the consultations they made at the faith healers revealed that he together with the deceased were afflicted by an avenging spirit. He said that he never got medical treatment for his mental illness until after he was arrested over the present case. He said that he received medical treatment and took medication for the very first time in prison after his incarceration pending trial. He said over the years before he committed the offence, he would fall ill and recover every now and then. So, he would have lucid and non–lucid moments. His mother had said the same things when she testified. Even Theresa Chikukwa the neighbour had confirmed this. The accused said that it seemed to him that the mental illness was contagious because whenever the deceased would get close to him physically, he (the accused) would fall sick and recover after about 5 days or so.

Presented with this history of mental illness we were not sure whether the accused had the requisite *mens rea* when committed the severe assault that resulted in the death of his brother on 6 May 2020. Judging by the severity of the injuries the deceased sustained, it was our conclusion that the assault that he perpetrated on the deceased was very vicious. This is not an assault that the accused had planned. It just happened in the heat of the moment when he went to save his mother who was under attack by the deceased. The viciousness with which he assaulted his brother made us wonder whether his mental illness had been triggered by the fear that his mother was under attack and the need to protect her out of fear that the deceased would kill her the same way he had killed their father. It is common cause that after causing multiple fractures on the legs and ribs

of the deceased, the accused left him lying by the doorway as he proceeded to the shops where he spent the night as if nothing had happened. It was our considered view that this was not normal behaviour for a person who used to treat his brother with love, patience and kindness as was explained by both the accused himself and his mother. We were told that the two brothers used to enjoy very good relations with the accused always assisting the deceased by making sure that he was fed and that he bathed. It was said that the accused was always looking out for the deceased who was suffering from a mental illness which was worse than his. It was therefore evident to us that on the fateful day the accused had behaved out of the ordinary and went too far even if he had been trying to protect his mother.

What made it hard for us to determine the accused's state of mind on the day in question was the fact that in denying the charge the accused did not tell us the truth that he had assaulted the deceased. He gave the defence that he did not assault the deceased. He did not raise the defence that he did assault the deceased and that when he did so, he was mentally ill. No evidence was led by the defence during trial to show that an on the fateful day, the accused behaved abnormally so as to suggest that he could have been mentally ill when he assaulted the deceased. Whilst the accused could have been well, we wondered whether the violent situation that erupted on that day could have triggered his mental illness thereby causing him to viciously assault his brother the way he did.

The prayer by the State counsel, Mr *Murevanhema* in his closing submissions was for us to convict the accused of culpable homicide. He submitted that the State had no direct evidence to prove that the accused had intentionally caused the death of the deceased. He further submitted that the safety of the accused and his mother had been endangered by the deceased who had once killed their father. Mr *Murevanhema* submitted that the means used by the accused and the attack that was perpetrated on the deceased were not commensurate with what the deceased had done. We found the submissions by Mr. *Murevanhema* misplaced because the accused did not raise the defence of self defence or the defence of another person. These submissions would have been appropriate if the accused had raised the defence of persons.

On the other hand, the defence counsel Mr *Chimhofu* made a prayer for the accused to be found not guilty because of insanity. We failed to understand the logic of his submission. How can an accused person who never admitted to having assaulted the deceased throughout the trial make a sudden turn and pray for an acquittal on the basis of insanity at the time of the commission of the offence? The submission was self-contradictory on the part of the accused. An accused person cannot throughout the trial deny the physical ingredients of a crime (also referred to as the *actus reus*) and then turn around during the closing submissions and pray that he or she be acquitted on the basis of lack of intention (also referred to as the *mens rea*). No person can be convicted of a crime if the physical ingredients of the particular crime are missing.

The defence of insanity must be raised at the outset of the trial by the accused person. This is so because the defence of insanity is the one exception to the rule that the onus rests upon the State throughout to disprove the accused's defence. It is the accused who has the onus to prove the defence of insanity and he or she must prove it on a balance of probabilities. The proviso to s 18 (4) of the Criminal Law Code reads,

> "Provided that where an accused **pleads** that, at the time of the commission of a crime, he or she was suffering from a mental disorder or defect as defined in section two hundred and twenty-six, or a partial mental disorder or defect as defined in section two hundred and seventeen, or acute mental or emotional stress, the burden shall rest upon the accused to prove, on a balance of probabilities, that he or she was suffering from such mental disorder or defect or acute mental or emotional stress" (My underlining for emphasis)

When a criminal trial commences, the charge is put to the accused. He or she must answer to that charge and it is this formal answer which is called a plea. So, when the proviso to s 18(4) says "*Provided that where an accused **pleads** that, at the time of the commission of a crime, he or she was suffering from a mental disorder or defect...,*" it means that when an accused person intends to rely on the defence of insanity, he or she must make it clear at the time that he or she tenders his or her plea. For proceedings in the High Court as is the case in the present matter, in terms of s 66 (6) (b) of the CPEA, the accused is required to give his or her defence outline, if any, to the charge and to also supply the names of any witnesses he or she proposes to call in his or her defence together with a summary of the evidence which each witness will give. If the accused is legally represented, the legal practitioner is required to send to the Prosecutor-General

and to lodge with the registrar of the High Court the defence outline and the list of witnesses together with the summaries of their evidence at least three working days before the trial commences: See s 66(8) of the CPEA. It is in that defence outline that the accused person states his or her plea to the charge and then goes on to outline the nature of his or her defence. In other words, the accused states that he or she is pleading not guilty to the charge on the basis that when he or she committed the offence he or she was suffering from a mental illness. During trial the defence lawyer or the accused must then call evidence, including psychiatric evidence, to prove the defence.[1] The foregoing therefore shows that the defence of insanity is not a defence that the defence can stumble upon during the course of the trial.

For an accused person to make a prayer in the closing submissions that he or she be acquitted on the basis of insanity, he or she must have made an admission in his or her defence during the course of the trial that he or she indeed committed the *actus reus* of the crime that he or she is being charged with. The accused must then go on to aver that he or she however did not have the requisite *mens rea* because he or she was suffering from a mental illness at the material time. In the present case we took note that the accused neither pleaded insanity as his defence at plea stage nor mentioned it as his defence in his defence outline. This was despite the fact that the defence was aware that the accused was a psychiatric patient. No psychiatric evidence was led by the defence during trial to prove that at the time the accused assaulted the deceased he (the accused) was suffering from a mental illness. We were therefore not persuaded to grant the prayer by Mr. *Chimhofu* that the accused be found not guilty because of insanity. Firstly, the defence ought to have raised insanity as its defence at the outset of the trial. Secondly, the defence ought to have led evidence, including psychiatric evidence to prove this defence on a balance of probabilities. It did none of the two.

However, despite the failure by the defence to properly raise the defence of insanity, the court remained doubtful about the accused's state of mind as at the time that he assaulted his brother considering how brutal and vicious the assault was. This was at the backdrop of the fact that the evidence that came out from the accused's mother, the

[1] G Feltoe *A Guide to the Criminal Law of Zimbabwe* 3rd Ed LRF 2004 at p 16.

accused and their neighbour during trial was very clear that the accused is a mental patient. In the interests of justice, we decided to order that the accused person be examined by a psychiatrist in order to ascertain his state of mind as at the time that he viciously assaulted the deceased. Despite the fact that the accused person has the burden of proof in respect of the defence of insanity, the State and the court may request a psychiatric examination of the accused person if there seems to be doubt as to his or her mental stability when he committed the offence.[2] We thus ordered the accused's psychiatric evaluation on 27 July 2023 and only received the psychiatric evaluation report on 23 October 2023. It was compiled on 22 October 2023. The evaluation revealed that the accused had a strong history of mental illness which started in 2014. It was indicated that the accused would experience commanding auditory hallucinations and grandiose delusions. He would also visualize a half image of a human being who would not be able to speak. The EEG report revealed the presence of temporal Lobe Epilepsy which is said to be a psychotic type of an epileptic seizure. It was concluded that at the time of the commission of the offence, the accused would not be able to fully account for his decisions and actions and would not be able to fully comprehend the nature of the crime. The conclusion of the evaluation was that the accused was mentally disordered at the time of the commission of the crime.

When the counsels in this matter had sight of the psychiatric evaluation report, both submitted that a special verdict of not guilty because of insanity in terms of s 29 (2) of the Mental Health Act [*Chapter 15:12*] be returned against the accused. Section 29 (2) of the Mental Health Act provides that:

> "If a judge or magistrate presiding over a criminal trial is satisfied from evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or any other offence of which he may be convicted on the charge, but that when he did the act he was mentally disordered or intellectually handicapped so as to have a complete defence in terms of section 227 of the Criminal Law Code, the judge or magistrate shall return a special verdict to the effect that the accused person is not guilty because of insanity."

We find no reason(s) to depart from the findings that were made in the psychiatric evaluation report and the submissions that were made by the two counsels. The report has

[2] G Feltoe *A Guide to the Criminal Law of Zimbabwe* 3rd Ed LRF 2004 at p 16.

made it clear to us that the accused person was not responsible for his actions on the fateful day. This explains the viciousness with which the accused assaulted his brother to the extent of causing him multiple fractures on the legs, ribs and the skull yet this was a person that he had always cared for with so much love. We are satisfied that the accused was mentally disordered at the material time. We thus find him not guilty because of insanity in terms of s 29 (2) of the Mental Health Act.

Order

By the consent of both the State counsel and the defence counsel we shall order the accused person to be returned to prison for transfer to a special institution for examination as to his mental state or for treatment in terms of s 29 (2) (a) of the Mental Health Act. We are inclined to give this order because although the psychiatric evaluation report says that the accused is now stable and on medication and is very remorseful of his actions, it does not say that he is now fit to be discharged to go back to society. The report does not deal with that specific issue. The accused may still be a danger to society. Besides, there is no mechanism in place for how the accused should go back home. His mother with whom he was staying before he committed the offence is not in attendance. It is not known whether she is willing to stay with him. With all that she has experienced starting with the death of her husband at the hands of the deceased and then the death of the deceased at the hands of the accused, she might not be willing to stay with the accused out of fear. The deceased who was also a mental patient just like the accused killed her husband. When the deceased was tried for the murder of his father, a special verdict of not guilty because of insanity was returned. He was committed to a special institution for treatment. After receiving treatment, he was discharged and went back home. For the three years that he stayed with the accused and their mother, he gave them a torrid time until the day that he was then killed by the accused. It seems he had relapsed because he was now refusing to take his medication. On this day he had suddenly become violent and was attacking his mother when the accused heard his mother’s cry for help and went to rescue her. After rescuing his mother, the accused also became very violent towards the deceased and killed him. The mother may not be

comfortable to stay with him. For the accused to be discharged, there has to be a person who is willing to stay with him. The person has to ensure that the accused person takes his medication religiously. The person has to know the measures to take if the accused refuses to take his medication or if he relapses. Besides, this is the person who takes the accused home from court. In the absence of all these measures, the court is not able to discharge the accused to go home.

Disposition

In the result, it is ordered that:

1. The accused is found not guilty because of insanity in terms of s 29 (2) of the Mental Health Act.
2. The accused person shall be returned to prison for transfer to a special institution for examination as to his mental state or for treatment in terms of s 29 (2) (a) of the Mental Health Act.

National Prosecuting Authority, State's legal practitioners
Rusinahama-Rabvukwa Attorneys, accused's legal practitioners