REPORTABLE ZLR (87)

Judgment No. SC 99/05

Criminal Appeal No. 144/03

CHRISPEN CHIKANDA v
THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, JUNE 23 , 2005 & OCTOBER 16, 2006

M J Remba , for the appellant

F Chimbaru, for the respondent

CHEDA JA: The appellant stabbed the two deceased persons, a mother and her child, and killed them. He was convicted of murder with actual intent.

The court accepted that there were extenuating circumstances and sentenced him to twelve years on each count and ordered four years imprisonment with labour of the second count to run concurrently with the sentence on the first count.

The appellant applied for leave to note his appeal in person against sentence only, but by the time the appeal came for argument he was legally represented and heads of argument filed includ ed argument against conviction as well.

The issues raised for argument were as follows:

"1. whether or not the appellant should have been convicted at all.

2. whether or not the appellant should have been convicted of murder.

3. whether or not the court *a quo* meted out an appropriate sentence."

Background Facts

Most of the background facts are common cause.

The appellant lived with the first deceased as his wife for a few years. They had domestic problems which resulted in the appellant moving out of their residence and leaving the deceased with her son and a younger child (the second deceased). The son, aged about 17 years, was not the appellant's child.

When the appellant was away, the first deceased's mother came and spent some days with her daughter and grandchildren. She would sleep in a kitchen next to the first deceased's bedroom with the grandchildren.

The appellant came to the residence on the night in question at about midnight, entered the first deceased's bedroom and stabbed her several times. She died as a result.

The appellant also stabbed the second deceased, who was his own child, and the child died. He was arrested, charged with murder, and convicted.

On appeal, not much was raised concerning this background. The thrust of the appeal was on the issue of the alleged diminished responsibility of the appellant at the time of the commission of the offence.

Evidence of State Witnesses

The evidence of the first deceased's mother is that she heard the first deceased's door being kicked open, and she next heard the first deceased calling out that the appellant was killing her.

She woke up the first deceased's son who was in the kitchen with her.

When she confronted the appellant about his killing of the first deceased, he replied in Shona by words to the effect "Is she dead?, Is she dead?"

After walking away for a few steps, the appellant returned, grabbed the young child, (the second deceased) who was with the grandmother and stabbed that child, killing her also.

Questioned about the appellant's general conduct she said the appellant was generally somebody who was not well and did not give

respect to elders. She described him as not being normal because of that behaviour and said he was not mentally normal. She said she could not say that he was insane.

The evidence of Jeffrey Phiri, the first deceased's son "Jeffrey", corroborates that of his grandmother on most of the material points. He added that when his grandmother called upon him to wake up he took a hoe handle with which he struck the appellant, after realising that the appellant had stabbed his mother. H e returned to the kitchen where he, together with his grandmother, held onto the door and pushed it so that the appellant could not gain entry into the kitchen.

The appellant was holding a knife and threatened to attack Jeffrey.

He said the appellant asked "Is she dead?" and then returned to the bedroom where he stabbed the first deceased again several times.

He said the appellant ran past him, snatched the baby (the second deceased), who was in her grandmother's arms, and stabbed the child three times on the abdomen.

He told the court that the first deceased and the appellant used

to fight, and this incident happened when they were about to go to court so that the first deceased could get a peace order against the appellant.

He also said that prior to this incident there was a time when he woke up at night and found that the appellant was there and telling the first deceased that she would never reject him.

The Appellant's Evidence

The appellant said he went to drink with his friends on the night in question. He said he drank strong alcohol which he was not used to, and felt very drunk.

He went to the first deceased's residence, got involved with her in an argument, and she insulted him and grabbed his private parts. He then took a knife from on top of the wardrobe and stabbed the first deceased. He said he did not intend to kill her.

He admitted that he used to fight with the first deceased, but he later said that was how they used to play. He admitted that the first deceased had caused his arrest.

He said the first deceased and he had bought the knife to cut a cake on the

birth date of their child.

When it was put to him that the so-called knife was not a knife but a bayonet, he alleged he bought it from a second-hand shop and did not know that it was a bayonet. He said he only saw the knife on two occasions.

I should point out here that he had previously said they bought it with many other knives.

In his evidence, the appellant suggested that he got very angry after his wife grabbed his private parts and he did not know what happened after that.

It is also common cause that after the murder, the appellant took rat poison in an attempt to kill himself but he was taken to hospital where he got treated and the attempted suicide was not successful.

Medical Evidence on Diminished Responsibility

The appellant claimed that he was not in his full senses at the time of the murder. He said he was drunk, he was angry, he was provoked by his wife, she was accusing him of having been with some prostitutes, and he even alleged at some stage that when he got to the house the first deceased was with a man who pushed him over and

bolted out of the house.

Most of these allegations are not stated in his Defence Outline or his evidence in-chief. Even his defence counsel did express some difficulty when it turned out that what appellant was telling the court was contrary to the instructions he gave his counsel.

While he sought to suggest that he did not know what he was doing, at times he gave details which he could not have appreciated if he had not known what he was doing.

The details were certainly inconsistent with a person who did not know what he was doing.

Doctor Chikara stated in his report that he examined the appellant twice after interviewing his mother. He recorded what she told him. On examining the appellant himself, he reported that he found that his "E.E.G. was normal" (my underlining).

The doctor then recorded that, in his opinion, at the time of the alleged offence, Chrispen was suffering from diminished responsibility.

He also said there was evidence of unstable abnormal behaviour and tendency to violence due to underlying suspiciousness of a paranoid nature.

The doctor's opinion is not based on any physical examination of the appellant immediately before or immediately after the incident.

It is based on the history only of the appellant's behaviour. It is based mainly on the interview that he had with the appellant's mother. It is not supported by the factual evidence of what happened at the time of the murders. There is no evidence which points to any strange conduct of the appellant immediately before or after the murders that he committed.

Even if one accepts that the appellant had consumed alcohol, there is no supportive evidence to suggest that he was so intoxicated that he did not appreciate what he was doing.

The appellant clearly lied about having purchased the alleged knife to cut a cake. The alleged knife was in fact a bayonet.

He could not give a satisfactory explanation as to how he came into possession of it. He even said he did not know that it was a bayonet.

After he suggested that it was on top of the wardrobe and he knew it was kept there he was asked, and failed to explain, how he managed to retrieve it from the top of the wardrobe if the first deceased was holding onto his private parts as he alleged. He even suggested that because of his height he had to get onto a stoep, but could not say how he could do so if the first deceased was holding him by his private parts.

The appellant's attempt to explain what happened betrays him. On the one hand, he suggested that he did not know what happened once he was angered by his wife. On the other hand, he narrated what he says happened when he got to the house, after walking to the house while feeling dizzy.

He did not explain where he got the rat poison which he took in an attempt to kill himself.

The cross-examination of the State witnesses, which was based on his instructions to his legal practitioner, does not support the claim that he had a black-out once he got angry.

His defence outline also contradicts him concerning the events of that night.

Although he claims to have been provoked by his wife, he could not explain his actions in grabbing the child from its grandmother and stabbing it three times. If he had acted on provocation, such provocation would have been from his wife only and not the child.

He suggested in his statement concerning the child, that he stabbed the child because its mother used the child as a shield when he was stabbing her. This is contradicted by the evidence of the two witnesses who said he grabbed the child from its grandmother and stabbed it. This was after he had already killed the mother.

It follows that his defence of not knowing what he was doing is false and must fail.

Diminished Responsibility

The *New English Dictionary* on *Historical Principles* edited by Sir John Murray, LLD, Vol III, gives the following definitions of diminished:

"Made small, lessened, lowered in condition, weakened, lowered in

importance."

among other definitions.

The above definition shows that diminished responsibility only reduces the level of responsibility but does not completely absolve a party from his actions.

It follows that where the court finds that the accused at the time of the commission of the act was criminally responsible for the act, but that his capacity to appreciate its wrongfulness and then acts in accordance with an appreciation of its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing him.

This confirms that the borderline between criminal responsibility and criminal non-responsibility is not an absolute one, but a question of degree.

A person may suffer from a mental illness yet nevertheless be able to appreciate the wrongfulness of his conduct and act in accordance with that appreciation. See Cr*iminal Law,* 2nd Edition by CR Snyman, pp 165-166.

The above comments would appear to be very generous in relation to the appellant in this case.

Other than the medical report and the interview by Doctor Chikara, there is nothing to point at the appellant having been under a state of abnormality at the time of the commission of the crime.

It should be borne in mind that medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence need to be supported by some other evidence. On their own, such reports may not be conclusive.

The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts.

In *Walton v The Queen* 1978(1) All ER 542, the House of Lords made it clear that where medical reports of diminished responsibility are not supported by some other facts from the evidence the jury is entitled to reject the claim of diminished responsibility if there are other factors which justify that rejection.

It held as follows:

> "In determining whether a defence of diminished responsibility had been established the jury were seeking to ascertain whether at the time of the killing the accused was suffering from a state of mind bordering on but not amounting to insanity. That task was to be approached in a broad common sense way.

The jury were bound to consider not only the medical evidence but the whole of the evidence as to the facts and circumstances of the case, including the nature of the killing, the conduct of the accused before, at the time of and after the killing and any history of mental abnormality.

Moreover, since the jury might properly refuse to accept any medical evidence, they were entitled to consider the quality and weight of such evidence. Having regard to the quality and weight of the medical evidence in the instant case, the jury had been entitled to regard it as not entirely convincing and not indicative of a mental state in the appellant bordering on insanity; and in view of the other evidence before them, as to the appellant's conduct before, during and after the killing, had been entitled to refuse to accept the psychiatrist's opinion that the appellant's mental condition satisfied the statutory definition of diminished responsibility.

The jury had therefore been entitled to conclude that on a balance of probabilities the plea of diminished responsibility had not been established. Accordingly the appeal would be dismissed."

In the present case, the circumstances, and the conduct of the appellant immediately before and immediately after the killing do not seem to support the defence of diminished responsibility.

The trial court, nevertheless found that the appellant suffered from diminished responsibility , I do not agree with that finding on the facts.

However, even if that is correct, it is not part of our law that such finding absolves the appellant and entitles him to an acquittal.

In *Collin Oneill v The State* SC 232/95 the Supreme Court, after deciding that the appellant suffered from diminished responsibility, set aside the death sentence and life imprisonment was substituted.

In *S v Chinono* 1910 (1) ZLR it was held that diminished responsibility was sufficient to establish extenuating circumstances only.

In both cases the verdict of guilty of murder was still upheld.

In this case the trial court did the same. It took into account its finding on diminished responsibility as an extenuating circumstance, and imposed a term of imprisonment.

Not withstanding the misdirection on the finding of diminished responsibility the verdict of

guilty of murder was still correct.

There is no merit in the appeal and it is dismissed.

SANDURA JA: I agree.

MALABA JA: I agree.

Pro deo