

**THE STATE**

**Versus**

**SINDISO DONALD KHUMALO**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J (with Messrs Hadebe and Damba)  
BULAWAYO 8 AND 9 JUNE & 13 JULY 2006

*Ms B Wozhele with Ms Sigauke for the state*  
*N M Fuzwayo for the accused*

Criminal Trial

**NDOU J:** The accused appears before us on a charge of murder. Briefly, the accused was aged 47 and the deceased 27 at the time of the death of the deceased. The two were customarily married and were residing at Number 4 St Albans Road, Parklands in Bulawayo. They had one minor child. On 13 February 2004 the two were at home when a domestic dispute arose between them. The deceased attacked accused with clenched fists. In retaliation accused armed himself with a hoe which he used to strike deceased on the back of the head. The accused struck deceased with the said hoe several times on the head, leading to the death of the deceased. The accused then made a report to the police who came to attend to the scene, leading to his arrest. In his defence the accused states:

2. He will say that he does not remember what happened
3. He will say he had no intention of killing his customary wife
4. Accused will say that he suffered from diminished responsibility to the extent that he could not appreciate

5. the consequences of his conduct  
Accused will pray for his acquittal.”

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The prosecution called two witnesses *viz*: Detective Assistant Inspector Darlington Mtunzi and accused's brother Benson Khumalo.

Officer Mtunzi said he attended the scene soon after the murder. Most of his evidence seems to us to be common cause or at least beyond dispute. I will focus on his observations of the accused at scene insofar as they shed light on the accused's state of mind. He said it was apparent that the accused and deceased fought or struggled in three rooms i.e. their main bedroom, the sitting room and the kitchen as items were thrown all over and there were signs of blood in these rooms.

He said that the accused appeared confused and shocked. He also gave account of the accused's behaviour in the holding cells which resulted in him being placed in solitary confinement after a complaint by fellow inmates. He conceded that from the accused's general behaviour mental illness cannot be ruled out. He further stated that the accused was generally calm but only preferred to speak to him and not the other police officers.

Benson Khumalo testified that the accused started having epileptic fits or seizures around 1977 and 1978 when he was teaching in Binga. He gave two instances when the seizures occurred in his presence and whilst he (i.e the witness) was driving

in the accused's presence. He said such fits or seizures would be followed by blackouts and loss of memory. Re-orientation had to take place for the accused to recall what had transpired before the fit. He said the accused usually had such seizures about once or twice per month. At some stage the accused told him that a doctor in

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Harare had prescribed medication for him. At the close of the state case the state counsel submitted that the accused be acquitted in terms of section 28 of the Mental Health Act [15 of 1996]. This submission is premised on the evidence adduced and the report of the psychiatrist Dr E Poskotchinova who examined accused at Mlondolozhi Mental Special Institution on 19 September 2005, 26 September 2005, 14 October 2005 and 4 November 2005. Dr Poskotchinova compiled her report after having access to two medical affidavits by the clinic psychologist Mr D Broomberg and one by Dr A P Baker, a psychiatrist . This is what the doctor said in her report:

“... I have also had sight of summary of case, two medical reports, ... and result of EEG. In his affidavit clinical psychologist Mr Broomberg stated: “ He is not suffering any mental illness and the question is whether in a state of epilepsy he could have murdered juvenile.” Request of EEG done on 23 September 2005, at Ingutsheni Hospital confirmed by Dr A P Baker – “a normal record”

4. When examined by me (4 times) the accused appeared to be free from any psychotic symptoms. He was calm, cooperative with coherent speech. Denied

any type of hallucinations and did not display any symptoms of delusional behaviour. No decline of memory or intellect. Said he is suffering from epilepsy since 1976. Has been on Phenobarbitone in the past and was on Carbamazepine 3-5 years before crime. Denied alcohol and cannabis abuse in past. He passed 6 'O' level subjects and worked at Air Zimbabwe from 1980 to 1998 on an administrative role. Admitted his crime of killing his girlfriend said he got epileptic fit (generalized type) 3 days before the crime. On the day of crime he had headache and was irritable, he was with his girlfriend (deceased) on 13 February 2005 [should be 2004]. She was cooking and the phone rang and she walked through to answer phone and when she finished talking on the phone she walked behind him and grabbed him in an aggressive way. He was frightened and next thing he saw was he lying with a cloth in a pool of blood. He claims he does not remember what happened and believed that he had a seizure and attacked her, feels remorse.

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According to the staff report: he got generalized type epileptic fit on 21 September 2005 which was noted by psychiatrist nurse Mr Mpabanga with loss of consciousness, involuntary movement of both upper and lower limbs, biting tongue, but no evidence of unpredictable behaviour at Mlondolozi Prison Hospital.

5. In my opinion there is a reasonable possibility that at the time of the alleged crime the accused was suffering from mental disorder (epilepsy, generalized type, psychotic episode, automatism). To assist the court I quote from the Oxford Textbook of Psychiatry ( Gelder 1994) "after the seizure there may occasionally be a prolonged abnormal behaviour and impatient awareness - automatism" He was in a state of diminished responsibility.
6. He is fit to stand the trial..."

Mr *Fuzwayo*, for the accused, agrees with the submission by the state. He, however, argued that the accused should not only be acquitted on account of the mental disorder but should be released from prison custody free of any conditions i.e. he should not be committed to any institution. He referred to *S v Dhongi* 1999(2) ZLR 252(H). In this case, save for the epileptic seizure revealed by evidence of witness Khumalo, report of Dr Poskotchninova and results of the electro-encephalogram (EEG) tests, the accused seems to be generally free of any sign of mental disorder. Since the promulgation of the new Mental Health Act [Act 15 of 1996] a special verdict is a finding of not guilty. The verdict, for all purposes other than formal procedural purposes such as review, the reservation of a question of law; or the noting of an appeal, is an acquittal – see *S v Chikamba* HH-276-00 at pages 6-7 of GILLESPIE J's cyclostyled judgment. The learned judge rightly observed:

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“The institutionalisation of the mental patient thereafter [after the acquittal] is properly seen as a protective measure whereby the law sanctions certain restrictions to be placed on the liberty of a non-criminal person. It is not the sentence of the court pronounced upon a convict.”

In returning a special verdict under the current post 1996 dispensation there are three possible ways in which the court may exercise its discretion.

First, the court may return a special verdict and discharge the accused person immediately. I believe this is what Mr *Fuzwayo* is suggesting we do.

Second, the court may release the accused on condition of his/her submission for examination and treatment on an informal basis i.e. as a so called civil patient in terms of Part VI or of an application for his temporary treatment or training in terms of Part VII or VIII of the Act,

Third, the court may commit the accused into a Special Institution (Mlondolozzi) in terms of section 29 of the Act. I believe in exercising this discretion the court has to consider all the circumstances of the case, in particular, weigh the interests of the accused and the protection of society against relapses by the accused. There is no magical or scientific formula as such but the court has to consider, *inter alia*, the nature of the offence, the extent of the mental illness; and the degree of danger posed by the accused to the community if released. In this case the charge is very serious, i.e. murder, the extent of the mental illness is mild i.e. generalized epilepsy. The accused was on bail until I committed him for mental

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examination in June 2005. There were no problems reported during the period he was on bail.

In our view, the second option outlined best fits the

circumstances of this case.

Accordingly, the following order is made.

1. The accused be and is hereby found not guilty and he is acquitted and discharged.
2. It is ordered that the accused be released from prison custody.
3. It is ordered that the accused attends the clinic at Ingutsheni Mental Hospital at least once per month i.e on the last week of each month.

*Attorney-General's Officer*, legal practitioners for the state  
*Calderwood, Bryce Hendrie & Partners*, legal practitioners for the accused