

THE STATE
versus
JACOB CHIKANDIWA

HIGH COUR OF ZIMBABWE
HUNGWE J
MUTARE, 16-24 June 2015 and 4 March 2016

Assessors: 1. Mr Magorokosho
2. Mr Chagonda

Criminal Trial

M Musarurwa, for the state
Mrs M Mandingwa, for the accused

HUNGWE J: The accused pleaded not guilty to a charge of murder as defined in section 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (“the Criminal Law Code”) in which it is alleged that on 8 August 2014 at Farm 414 Zviyambe East, Wedza, the accused, with intent to kill, forced Ashley Ruvarashe Chikandiwa, his biological daughter, to drink some poisonous substance thereby causing her to die.

The brief allegations forming the basis of the charge are that the accused took methamidophos insecticide, a poisonous substance, and forced his child to drink it. He also drank from the same bottle containing the poisonous substance. Matheus Tawanda Chikandiwa saw the accused act in this way and rushed to the scene and grabbed the container away from the accused. Both the accused and his daughter were rushed to Murambinda Hospital. The child was pronounced dead on arrival. Doctor Gonzalez who prepared the post mortem report concluded that the cause of death was pulmonary oedema secondary to ingestion of poison.

The accused does not dispute the factual allegations contained in the charge nor does he challenge the events leading to the administration of poison on the deceased. He however contends that he had no intention to commit the crime charged on the basis that he suffered from psychological break down.

The undisputed facts are the following:

1. On 8 August 2014 the accused received a document from the Zimbabwe Republic Police at Wedza delivered to him by an omnibus driver.
2. Soon afterwards the accused broke down and cried over the contents of the document he received.
3. Thereafter the accused took the deceased to a spot outside the yard. He had a plastic container which had a pesticide.
4. He forced his daughter, the deceased to ingest it. Mathias Chikandiwa who observed what the accused was doing rushed to the scene.
5. Mathias Chikandiwa grabbed away the container as the accused had just commenced to drink from the same container
6. Both father and daughter were rushed to hospital. The daughter did not make it.

The only issue for decision is whether the accused had the requisite intention to kill his daughter.

The accused raised the defence of temporary insanity based on the following facts which are stated in the defence outline as follows:

“The accused shall admit to administering poison to the minor but shall state that his intention was clouded by an urge to commit suicide and at the same time relieve the child of hardships of life. The accused will contend that at the time of the commission of the offence, he suffered from a psychological breakdown or disintegration of his personality temporarily to negate his culpability in the circumstances. He will state that he once suffered from mental illness in the 1988’s (sic) for which he was hospitalized at Ngomahuru Hospital in Masvingo. The emotional and mental strain that preceded the commission of the offence placed a strain on him to an extent that it triggered a **moment of insanity**.” (My own emphasis).

Requirements for the defence of insanity

With this defence the onus is on the defence to prove on a balance of probabilities that the accused was insane at time he committed the crime. This is an exception to the general rule that the prosecution has to disprove any defence after a proper foundation has been laid for that defence. What this means in practice is that the defence will call psychiatric evidence to establish that the accused was mentally irresponsible at the time he committed the crime. (See *Criminal Law Guide: 2005*; G Feltoe)

Under the common law these questions would be asked:

- (a) Was the accused unaware of physical nature and quality of act because of a disease of mind?
 - (b) If the accused was aware of the physical nature and quality of his act, was he unaware that the act was wrong because of a disease of the mind?
 - (c) If the accused was aware both of the nature and quality of his act, and that it was wrong, was he unable to resist the impulse to commit the crime because of a disease of the mind?
- If the answer to any of these questions is yes, the defence of insanity will succeed.

The legislation governing this area is the Mental Health Act [*Chapter 15:12*] s 29, read with s 2 of this Act, deals with the defence that accused was “mentally disordered or intellectually handicapped so as not to be responsible according to law for his action at the time when the act was done or the omission made.” The phrase “mentally disordered or intellectually handicapped is defined in s 2 to mean a “mental illness, arrested or incomplete development of the mind, psychopathic disorder or any other disorder or disability of the mind.” This is the same definition provided in s 226 of the Criminal Law Code. Section 227 then provides:-

“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 nineteen*.”

Thus in order to avoid liability for the crime of murder, the onus was on the accused to establish that when he administered the poison on his daughter, he was suffering from a mental disorder or some other disease of the mind which prevented him from appreciating the nature of his conduct or that his conduct was unlawful or both. Alternatively, he could show the court, on a balance of probabilities that notwithstanding that he appreciated the nature of his conduct or that

his conduct was unlawful, he nevertheless was incapable of acting in accordance with such an appreciation.

In discharging the onus upon it the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged *actus reus* and, if involuntary, that this was attributable to some cause other than mental pathology. See *S v Stephen* 1992 (1) ZLR 115 (HC). See also *S v Trickett* 1973 (3) SA 526 (T) at 532G-533A, 537D-F). It follows that in most if not all cases medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference just mentioned. (See also *R v Romeo* [1991] 1 S.C.R. 86 where the court held that an accused is presumed sane until the contrary is proved; *R v Chaulk* [1990] 3 S.C.R 1303 insanity to be proved on a balance of probability; sanity is presumed by statute).

Two psychological factors render a person responsible for his voluntary acts: firstly, the free choice, decision and voluntary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil, (insight) *before* committing the act.

In respect of incapacity for self-control/involuntariness in the absence of mental illness or defect, it is clear that the accused must adduce expert psychiatric or psychological evidence to establish a reasonable doubt. In *S v Trickett* 1973 (3) SA 526 (T) it was suggested that the accused could only meet the burden if he or she led medical or other expert evidence. This would appear especially necessary in the light of the 'natural inference' which assists the prosecution - *S v Cunningham* 1996 (1) SACR 631 (A) 635-6 (cited with approval in *S v Henry* 1999 (1) SACR 13 (SCA)):

The accused called his brother to confirm that he had previously been treated for a mental disorder sometime in 1988 at Ngomahuru Psychiatric Hospital in Masvingo. He also called the evidence of a psychiatric nurse one Gibson Jiyangwa of Sakubva Psychiatric Hospital. He assessed him during the sitting of the court on circuit in June 2015. Clearly, besides not being an expert in psychiatry and psychology, his assessment did not relate to the time of the commission of the offence which in our view, is the critical time for the determination of whether he suffered

from a mental illness at the time of the admitted conduct. Therefore, in our view the accused could not discharge the onus upon him to show on a balance of probabilities that at the time of the commission of the offence, he suffered from a mental disease or disorder such as would prevent him from appreciating the nature of his conduct or that such conduct was unlawful. We arrive at this conclusion on the following basis. His warned and cautioned statement recorded soon after the incident shows that he was incensed by his wife's refusal to come back and continue to live with him as husband and wife. He threatened to kill the deceased if she did not return. His wife was not moved by this threat and he carried out the threat. Secondly, he announced to his nephew that this would be the last day they would see him alive at home, clearly evincing an intention to end his life. He then took the poison and the deceased to a secluded spot where he administered it to her. Thirdly, the attendance at Ngomahuru, it turned out were due to substance abuse. As such any relapse was due to either continued abuse of substances or default in treatment. This cannot by any stretch of imagination be a disease of the mind as contemplated in the Act. In any event it would have to be a defined mental illness or disorder at the relevant time. There was no suggestion from any of the witnesses that at the time he was suffering or had relapsed into the substance induced psychosis. The only witness close to an expert was Doctor Manyara of Zvishavane Government Hospital. The report he filed on behalf of the accused states:

“This letter serves to confirm that the above mentioned was seen at this hospital as a known psychiatric patient for assessment and resupply of drugs from October 2009. His mental status examination has been cycling in nature with occasional episodes of auditory hallucinations (in the third person), depressive affect, thought blocking and lacking insight. He has not shown any signs of danger to self or suicidal ideations.

Currently he is stable on a cocktail of tranquilizers and neuroleptics.
Please assist him.”

There is no suggestion that the doctor is a psychiatrist. He did not present himself for cross-examination. His evidence in our view exclude the impact of the evidence of Dr Maramba of Ngomahuru Psychiatric Hospital in that it does not exclude the origin of the problem in that Dr Maramba points to the voluntary acts of the accused as inducing the mental disorder. None of the doctors were able to confirm that the accused was suffering from the condition on the day of the offence. Indeed, as I pointed out above, there is a presumption of sanity operating in everyone's favour. Where the defence wishes to plead insanity, it must discharge this onus on a balance of probabilities. The objective evidence of his conduct

does not suggest any mental disorder. There is no medical or expert evidence to suggest that he possibly could have been suffering from such a mental disorder on the day in question.

The accused told Lawrence Kondo that this was the last time to see him since he wanted to commit suicide. In our view, that was an expression of intent to kill not just himself but also his daughter who was in his company at the time as he led her to the spot where he forced her to drink the poison. He also later drank the poison. He knew then that the poison would produce the consequence that it produced i.e. killing the deceased.

Motive for the person's doing or omitting to do anything or forming any intention is immaterial to his criminal liability. (Section 13 (2) of Code). In our view the evidence regarding the accused's relationship with his former wife goes to his motive or the underlying reason for doing what he did. It does not negate his intention in any way. He is legally liable for the death of his daughter.

In short he intended the consequences of his action and cannot escape conviction.

He is therefore guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

SENTENCE

In assessing sentence I take into account the fact that you acted under stressful situation in that you were undergoing separation with your erstwhile wife. This must have contributed significantly to your failure to control your emotions to the extent that you believed that if you threatened your wife with your own death she would come back. In the process you killed your daughter who had not in any way contributed to your problems with your wife.

The killing was callous, brutal and heartless. Your daughter must have suffered an agonizing death upon you administering the poison. Although you ingested it yourself, you escaped its fatal effects. Without speculating, it is cruel for a parent to inflict such kind of torture to a child. She was your daughter. Society expected, and indeed, she must have trusted that you were her protector, but you turned out to be her killer. You were angry with your wife who had deserted you yet you decided to take it out on a defenceless child. This is one of the worst type of domestic violence cases to come before this court this term. Society expects the court to pass sentences which reflect the revulsion with which these cases are viewed.

Had it not been your drug abuse history, I would have sentenced you to a lengthier jail term. The following sentence is appropriate.

12 years imprisonment

*National prosecuting Authority, State's legal practitioners
Mhungu & Associates, accused's legal practitioners*