STATE
versus
FELIX SHOWN CHITIMBE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 3 March 2017

Assessors: 1. Mr. Barwa
2. Mr. Chivanda

Criminal Trial

B. Murevanhema, for the State
T Muzana for the accused (*pro-deo*)

TSANGA J: The accused was charged with the crime of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleged that on the 11th of August 2013 at Tsuwa Harbor Gatshe Fishing Camp, Kariba, Shown Felix Chitimbe unlawfully and with intent to kill or realizing that there was a real risk or possibility that his conduct might cause death, murdered Maringisanwa Mugoro by stabbing him in the lower chest with a knife causing injuries from which the said Maringisanwa died.

These facts were not disputed and the trial proceeded with the State and Defence counsels submitting a statement of agreed facts which the court admitted in evidence as Annexure 1. The material facts surrounding the matter were put as follows:

1. The accused and deceased were not related.
2. On the 11th day of August at Tsuwa Harbor Gatshe, Kariba accused confronted deceased wielding a knife demanding his fishing nets which had been confiscated by the deceased.
3. The deceased tried to disarm the accused and in the process the deceased was cut on his left arm after which the accused stabbed deceased on his lower chest once with a knife.
4. The deceased bled profusely and died on his way to hospital.
5. A postmortem was carried out by Dr. Malvern Dhliwayo and concluded that death was due to asphyxia secondary penetration and thoracic trauma.
6. At the time of the offence the accused was mentally unstable.

7. Doctor Walter Mangezi who is a psychiatrist conducted an examination on the accused and compiled an affidavit to the effect the accused was mentally disordered at the time of commission of the offence.

In addition to the statement of agreed facts, the following documents were produced by consent:

a) The postmortem report as Exhibit 1
b) The affidavit by Dr Walter Mangezi dated 7 October 2016 as Exhibit 2. He certified that the accused had become mentally ill in 2009 where he was violent and would see visions and hear voices inside his head. Felix would at times wonder around aimlessly. He stated that the medical certificates indicate Felix had visual hallucinations (see visions) and auditory hallucinations (hear voices inside his head). He further stated that the EEG results were abnormal, confirming abnormal electrical activities in Felix's head indicating epilepsy. He further stated that the Chikurubi medical records indicate Felix became of a sound mind after taking Haloperidol (medication for mental disorder) and Sodium Valproate (medication for epilepsy. He had examined Felix and found him to be of sound mind. He concluded that in his opinion at the time of the alleged crime, the accused was mentally disordered and that he will remain of a sound mind if he takes his medication daily and not take intoxicating substances. He was deemed fit to stand trial.
c) Notice of Discharge of detained person by Dr Mangezi from Chikurubi Mental Health Institution dated 23 September 2016, as exhibit 3. This notice recorded that he was being released from the mental institution to a prison in order to stand trial.

State and defence counsels submitted that the totality of the evidence showed that the accused was not criminally responsible for his actions by reason of his mental defect. They moved the court to act in terms of s 29 (2) of the Mental Health Act [*Chapter 15:12*]. We were in agreement with the State and Defence submissions and accordingly found the accused not guilty because of insanity and returned a special verdict as required by law.

In determining the fate of the accused following his acquittal by reason of insanity, suffice it to note that he had been released from the mental institution into custody to stand trial as he was deemed fit to understand the proceedings. The pre-trial psychiatric report that was placed before this court is clear however that compliance with the medication regime and abstention from alcohol are key factors to maintaining his state of sanity. In other words, what is implied therein is that assaultive behaviour with its attendant dangerous consequences, or the inability to make a reasonable appraisal of a situation or to communicate reasonably with others, could be triggered by non-compliance with the medication regime.

Society and the law accept that a person who is not mentally responsible for his acts should not be punished. At the same time, society has a right to be safeguarded from persons acquitted of serious offences because of insanity. However, that right to protect society should certainly not lead to arbitrary or unreasonable confinement of an acquitted accused. Fitness to stand trial denotes a partial recovery of sanity and may seem to suggest that the court should make its judgment for release utilising s 29 (2) (c). This provision provides that "if the judge or magistrate is satisfied that the accused person is no longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged, the court may order his/her discharge". The courts, in other words, are competent to make a decision on release but needless to say this can only be done with adequate facts before them.

In this instance, with the accused's sanity being largely dependent on taking anti-psychotic medication, unequivocal information on insanity after care and adequate support measures would have been crucial in assisting the court to assess if s 29 (2) (c) was applicable in this instance. With no relative who knows his condition having come before this court offering to take on responsibility to ensure that the acquitted adheres to the medical regime, institutional control of his release makes sense in this instance.

An adequate safeguard *in casu* which balances all interests is provided by utilising s29 (2) (a) states as follows:

> "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 248 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, and may—
>
> (*a*) Order the accused person to be returned to prison for transfer to an institution or special institution for examination as to his mental state or for treatment;"

Having noted that the acquitted is still under medication, and that his sanity is dependent on his taking medication and abstention from alcohol, the court deems it in the interests of the accused that he continues to be treated and that he be returned to Chikurubi Psychiatric Unit or such other appropriate place. Discharge can be delayed until after care facilities have been put in place without being in violation of the fundamental right to liberty. See for instance in this regard the case of *Johnson v United Kingdom* (1997) 27 EHRR 296, a decision of the European Court of Human Rights. The court found therein that even if there is

no longer any justification under the applicable Act for continuing to detain a person, it does not mean that a patient should be released immediately if he continues to pose a risk to others. Also, as stated in *State* v *Sabawo Babau* HH 61/16 which drew on the cases of *S* v *Chikomba* 2000 (Z) ZLR 311; *S* v *Sindiso Donald Khumalo* HB 61/06, *S* v *Zvoushe* HB 28/13, and *S* v *Pretty Matunga* HH 23/2013, committal to an institution is an administrative measure rather than a punishment.

Given the thrust and observations in the medical report, whether or not the accused poses a danger to society if released, or whether there is still something for society to protect itself against if he is returned to the community, is a medical judgment. The utilization of the above provision in this case would allow medical personnel to assess the acquitted's current mental condition. A post acquittal examination would also presumably be more thorough given the societal interests to be balanced and protected by his release. His release would also be a decision for the appropriate administrative tribunal dealing with the mentally challenged.

The court accordingly orders in terms of s 29 (2) (a) of the Mental Health Act that the accused be returned to prison for transfer to Chikurubi Psychiatric Unit or such other appropriate institution for his continued treatment and management until discharged therefrom.

National Prosecuting Authority; State's Legal Practitioners
Mushangwe & Company; Accused's Legal Practitioners (*Pro deo*)