

THE STATE
versus
TREVOR MABHUGU
and
LOVENESS MABHUGU

HIGH COURT OF ZIMBABWE
MUSAKWA J
MASVINGO, 15, 16 February 2016 and 10 April 2017

Assessors: 1. Mr E. Gweru
2. Mr S. Mutomba

Criminal Trial

T. Chikwati, for the state
J. Ruvengo, for the 1st accused
E. Zvanaka, for the 2nd accused

MUSAKWA J: In this unusual case, the two accused who are siblings are charged with murder and attempted murder. Apart from the bizarre circumstances surrounding the charges, the other unusual aspect is that the victim of the murder was the accused's mother and the victim in the attempted murder is their sister.

It is not in dispute that on 20 February 2012 and at Mabhugu village in the Gutu area the accused persons behaved strangely. In the process they attacked their mother and sister. On the following morning it was discovered that the mother had died. The post-mortem report noted multiple bruises on the neck with strangulation marks. There was a human bite mark on the right cheek and the deceased was bleeding from the nostrils. The cause of death was strangulation.

In pleading not guilty the first accused's defence is that he does not recall what transpired at the material time. This is because he was suffering from a mental illness. He was only told of what happened by those who witnessed the event. However what he recalls is

that after supper they retired to bed. He shared the same room with his sisters whilst the deceased used a separate room. He was only told of what happened on 23 February 2012 when he was now in Police custody. He does not recall having a misunderstanding with members of his family. Thus he had no cause to strangle his mother or to assault his elder sister, Sunungurai Mabhugu as he had cordial relations with them.

The second accused's defence is that on the day in question she together with the deceased and Sunungurai conducted prayers whilst at home. This was necessitated by the first accused's prior warning of an impending attack on Sunungurai. However she has no recollection of what subsequently occurred. She later woke up at night and noted that the deceased and Sunungurai were not in the room they all shared with the first accused. This was unusual as the four of them had resolved to sleep in the same room on account of strange occurrences at the home. Upon enquiring with the first accused she was informed that he had sent them where it was safe. She did not pursue the issue as the first accused had recently become psychic.

On the morning of 21 the first accused told her to leave the room since she was in danger of an attack by some unknown foes. The first accused then left to purportedly collect Sunungurai. The second accused was only able to leave the room when an aunt opened the door for her. That is when she observed people who had gathered at the house. The deceased leaned against the wall. She was informed that the deceased had died. She was arrested amid claims that she was mentally unwell.

At the commencement of the proceedings both defence counsels applied for the court to order the examination of the accused persons in terms of s 28 of the Mental Health Act [*Chapter 15:12*]. This was predicated on the strange behaviour that was exhibited by the accused persons during the commission of the offences. However, both counsels conceded that the accused persons were able to understand the proceedings. This is confirmed by their respective defence outlines. Thus the court ordered that the trial proceed. An order for psychiatric evaluation was only made at the close of the defence cases.

The evidence led is not contentious, notwithstanding the bizarre conduct exhibited by the accused persons and Sunungurai as well. Warned and cautioned statements that were recorded from the accused persons were produced by consent. The state also produced, with the consent of the defence, the post-mortem report and the medical report in respect of Sunungurai. The evidence of Maria Mushoriwa and Constable Chisikana was also admitted.

Sunungurai who is younger to the accused persons testified that the day prior to the incident they heard voices outside the room in which they slept. This was around midnight. The two accused had previously had the same experience during her absence. Thus they conducted some prayers.

Having arrived home around 6 p.m. on the material day she observed the first accused striking a chicken with an umbrella. The first accused claimed that the chicken had evil spirits. The deceased was in the kitchen whilst the second accused sat by the door to the kitchen.

The first accused approached the witness and asked why her voice was failing. He suggested that they conduct prayers. They went into the dining room. As they prayed the first accused insisted that the witness should continue coughing until her voice was restored. The second accused had also joined in prayers. The first accused urged the witness to spit out. She did as directed and her voice was ultimately restored. As they stood, the first accused placed his hand on the witness's head whilst the second accused placed her hand on the shoulder.

The witness felt weak and fell down. The first accused urged her to stand and remarked that if she did not she was succumbing to the evil things they were seeing. The first accused retrieved a knife from the kitchen unit and cut the witness on the cheeks whilst the second accused held her mouth. Then the second accused prodded the witness with an umbrella. The odd thing was that the witness said she felt no pain from the knife cuts.

When the deceased came from the kitchen she asked what was happening. The accused persons replied that they were cutting evil spirits. It was as if the accused persons did not appreciate who the witness was. They told the deceased to cut the witness with the knife but the deceased declined. The first accused then ordered the deceased to lie down on the blood from the witness. This, she was told, would enable her to overcome the challenges. The witness heard the deceased complain about her arm.

The first accused lit a fire outside. The witness was led outside where the first accused said he wanted to burn the 'thing'. The witness was made to lie on top of the fire. She later rose on her own and walked towards the bush. She sustained burns all over the body. She showed the court a severe burn mark on the right arm.

Meanwhile the second accused was praying whilst inside the house.

Having slept in the house, when the witness woke up, the accused persons were still praying. The deceased sat by the veranda. When she asked for water the first accused replied

that he did not know who she was. Later the first accused said he was going to collect his mother's child. He then left for their aunt's place. The first accused was later returned whilst bound with some ropes. Again, the odd thing was that the witness said she was affected by the manner in which the first accused was bound. In other words she felt as if she herself had been bound. Meanwhile, the second accused continued to pray. The witness was eventually taken to hospital. She only realised after a month that she had been injured. All along she had not felt any pain.

Darlington Chaputika who is related to the accused persons and resides within the neighbourhood testified that the accused persons led a normal life. Early in the morning he heard his aunt crying and he went to the aunt's home. There he saw the first accused who wore no shirt and held the shaft of an umbrella. The first accused was praying for a dumb and deaf person at the home. According to the witness the first accused was normally reserved but on this day he talked a lot. He then escorted the first accused to their home.

When he arrived with the first accused he observed Sunungurai lying down. She had cuts and burns on the back. The deceased sat in the veranda with her eyes closed. When he shook the deceased she then fell. The witness tied the first accused with rope. Both accused persons were making religious chants. The accused continued doing this until Police officers took them away around 9 a.m. At that stage the accused persons had interlocked their hands by the elbows. The witness confirmed that when he tied the first accused Sunungurai complained of experiencing pain as if she is the one who was being tied. The first accused also indicated to Police officers the knife they used on Sunungurai.

Police officers who attended the scene and interviewed the accused persons got incoherent replies related to the bible. The deceased was bleeding from the nose and had a wound on the right cheek. There were multiple bruises on the neck. They recovered a blood stained kitchen knife on the periphery of the home. Whilst in detention the accused persons continued to talk no sense. It was only on the 23rd that the accused persons became coherent and warned and cautioned statements were recorded from them. The first accused appeared to be surprised about the deceased's death when the allegations were read to him.

The accused persons testified and maintained their defences. The first accused maintained that he has no recollection of what transpired. He only recalled what transpired prior to the incident and was later surprised to be informed that his mother had died. He recounted the episodes of voices they heard outside the house during the night. They

conducted prayers as a way of countering the challenges. He could not recount what the voices said. The first episode happened when Sunungurai was away attending church.

The second episode happened in the presence of Sunungurai. This time he and his sisters were now sleeping in the dining room. Sunungurai was the first to hear the voices. As a result she woke up and started to pray. The rest of them joined in the prayers. It was on the following morning they realised that Sunungurai's voice was very faint. As for events of that day he only recalled having supper. Later he realised being at the Police Station. He was surprised to learn that his mother had died. He maintained that he had no recollection of how the deceased met her death. This is because they lived harmoniously and he had no motive to kill the deceased.

The second accused testified that on the day in question the first accused suggested that they pray on account of an enemy he said wanted to attack Sunungurai. She recalled that two days before, the first accused had screamed from his room. The first accused was collected from his room and the whole family conducted prayers. The deceased had confirmed hearing some voices as well. The second accused also heard some voices on the second night after they had resolved to put up in the same room with the first accused.

Thereafter she does not recall what happened. She only recalled waking up to find that Sunungurai was absent. When she asked the first accused he told her he had taken Sunungurai somewhere safe. They conducted prayers. The first accused then indicated that he was going to collect Sunungurai. During the prayer session the first accused acted as if he was seeing something. After the first accused had gone she heard voices. She then saw people who had gathered. She saw the deceased who was seated in the veranda. She sought to talk to the deceased but the people prevented her. She could not comprehend what was happening. She had no recollection of further developments until they went to the Police Station.

Following the close of the defence cases, it became incumbent on the court to order that accused persons be examined in terms of s 28 (2) of the Mental Health Act [*Chapter 15:12*]. This was on account of the unusual facts of the matter as well as the defences proffered by the accused persons.

By way of background, both accused persons were previously examined by a medical doctor. This was in 2012 at Masvingo Provincial Hospital. In respect of the first accused doctors Clocuh and Yona did not observe any signs of mental disorder or defect. However,

both doctors noted (as communicated to them by a nurse from Masvingo Prison Clinic) the following-

“Auditory hallucinations, religious delusions, paranoid, visual delusions, potentially dangerous to other (sic).”

As for the second accused, she was examined by doctor Clocuh and a psychiatric nurse and both found no signs of mental illness or defect.

Doctor Mhaka, a psychiatrist examined the two accused persons in August 2016 at Chikurubi. His report notes that he had access to medical records and a deposition from the accused’s sister, Coleta Mabhugu. In respect of the first accused, he had signs of mental illness. These included auditory hallucinations (hearing voices in his head). He exhibited severe abnormal behaviour. He was also psychotic (a sign of mental illness) at the time of the offences. He was treated with Haloperidol (a medication for mental disorder). It was noted that he was no longer psychotic as he was now behaving normally. He concluded that the first accused was mentally disordered at the time of commission of the offences.

As for the second accused it was also noted that she was psychotic at the time of commission of the offences. She had paranoid delusions (abnormal suspiciousness) at the time of commission of the offences. She also had auditory hallucinations. She could not have appreciated the wrongfulness of her conduct. She was also put on treatment with Haloperidol and she recovered. He also concluded that at the time of commission of the offences she was mentally disordered.

The State and the defence urged the court to return a special verdict in terms of the Mental Health Act. As can be noted from the reports from the psychiatrist, the accused persons were mentally disordered at the time of the commission of the offences. This is despite the fact that prior to the incident they led perfectly normal lives. This was the same when they were released on bail. Even during the trial they presented like any perfectly normal persons. As was held in *R v Mawonani* 1970 (1) RLR 41, the mental disorder need not be permanent. It may be transient and may never recur. In addition, the cause of the disorder is of no relevance. What matters is the accused’s state of mind at the time of commission of the offence. In *S v Chin’ono* 1990 (1) ZLR 244 (H) evidence was accepted from a psychiatrist to the effect that psychiatry is not an exact science as it is evolving all the time.

Despite the fact that they committed the offences, the accused persons are not criminally liable. A full defence is afforded to them in terms of s 227 of the Code. Taking into account the medical evidence before us, in terms of s 29 (2) of the Mental Health Act, a special verdict is returned to the effect that the accused persons are found not guilty by reason of insanity.

The court can either order that the accused persons be returned to Prison for transfer to an institution or special institution for further treatment or order that the accused persons be discharged if satisfied that they have recovered from the mental illness or are otherwise fit to be released from custody. The state is of the view that the accused persons should be further detained. The defence is of the view that the accused persons should be discharged.

It is noted that whilst on bail pending trial the first accused returned to stay at their home. The second accused went to stay with an aunt. They testified that they did not have any recurrences of what they experienced prior to and around the time of commission of the offences. Even during the trial, the accused persons presented themselves well. Apart from failure to recall some aspects of what took place at the time of commission of the offences they were quite lucid. Apart from the State's fears there is nothing to suggest that the accused persons are not fit for release.

Accordingly, it is ordered that the accused persons be discharged from custody.

National Prosecuting Authority, legal practitioners for the State
Ruvengo Maboke And Company, first accused's legal practitioners
Saratoga Makausi Law Chambers, second accused's legal practitioners