THE STATE
versus
KUDAKWASHE WILSON NOKO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 January 2017

Criminal Trial

Assessors: 1. Mr Gonzo
2. Mr Gweme

H M Muringani, for the State
D Ndawi, for the accused (*pro-deo*)

CHITAPI J: The accused is charged with the crime of Murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It was alleged against him that on 25 April 2015 and at house number 2356 Glen Norah A, Harare, the accused acting with intent to kill or realizing a real risk or possibility that his conduct could cause death and persisting in such conduct despite the realization aforesaid struck Mabi Noko with a metal hoe on the head causing injuries from which Mabi Noko died.

When the charge was put to the accused and understood by him as he confirmed, the court asked him what his plea was to the charge. The accused responded as follows: "I do not admit to the charge. I do not recall anything which happened on the day in question." A plea of not guilty was recorded by the court following on the response by the accused. Accused's counsel confirmed the not guilty plea as according with her instructions.

State Counsel submitted that on the evidence available, the accused when he committed the offence suffered from a mental disorder which rendered him incapable of appreciating the

nature of his conduct nor that the conduct was unlawful. Counsel submitted that the case be dealt with in terms of s 29 of the Mental Health Act, [*Chapter 15:12*]. State counsel tendered a statement of agreed facts as to what transpired in relation to the case. The Defence Counsel consented to and confirmed the authenticity of the statement.

The statement of agreed facts was admitted in evidence as annexure 'A'. Its contents are as follows;

> "It is agreed that:-
>
> 1. The accused person was deceased's biological son.
> 2. On the 25th day of April 2015 and at House number 2336 Glen Norah, Harare, the now deceased was seated alone in the dining room watching television whilst the accused was outside the house.
> 3. The accused armed himself with a metal hoe which he picked in the garden and got into the dining room where he struck the now deceased with it.
> 4. Accused got out of the house and hid the hoe in the garden leaving now deceased lying on the ground.
> 5. Accused surrendered himself to the police ZRP Glen Norah.
> 6. The now deceased's nephew Tatenda Sixpence entered into the dining room and found now deceased lying in a pool of blood and informed his brother Garikai Sixpence who made a police report.
> 7. Police officers attended the scene and recovered the metal hoe before taking now deceased to hospital where he was confirmed dead upon arrival.
> 8. At the time the accused committed the offence he was mentally disturbed.
> 9. On the 27th of April 2015 a post mortem was conducted on the remains of now deceased and it was concluded that death was due to *"skull fracture and head trauma."*
> 10. On the 4th of August 2016 Doctor Patrick Mhaka examined the accused and concluded that he was mentally disordered when he committed the offence.
> 11. May matter proceed in terms of section 29 (2) – (a) of the mental health Act [*Chapter 15:12*]."

The state counsel further produced by consent the post-mortem report as exh 1 and a psychiatrist's report as exh 2. The post-mortem report was prepared by Doctor Mauricio Gonzalez. He is a forensic pathologist. He examined the deceased's remains at Harare Hospital on 27 April, 2015. He concluded that the cause of the death of the deceased was due to subarachnoid haemorrhage, skull fracture and head trauma. The court was satisfied that the injuries were inflicted by the hoe handle which the accused struck the deceased with.

Exhibit 2, the psychiatric report was compiled by Dr Patrick Mhaka, a psychiatrist. He examined the accused at Chikurubi Prison Psychiatric Unit on 4 August 2016. His report is in affidavit form and the material depositions therein are to the following effect:

> **"I examined the accused Wilson K Noko on** – 4 August 2016
> **at Chikurubi Psychiatric Unit.**
> **I have also had sight of these depositions:** Chikurubi medical records and an affidavit by Christina Jackson (the mother)
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> **My examination reveal the following:** Wilson's first episode of mental illness was in 2013 in South Africa. He was treated and defaulted treatment. He then had a relapse and became psychotic (sign of mental disorder) on 9 April 2015. He was treated at Harare Psychiatric Unit. He then committed the offence on 25 April 2015 because the medications had not taken effect. He was having auditory hallucinations (hearing voices in his head). Medical certificates also indicate that he was psychotic. He is now on treatment with Chlorpromazine (medication for mental disorder). He is no longer psychotic and is no longer hallucinating. He is cooperative and shows remorse for his offence, I have examined and have found him of a sound mind.
>
> **In my opinion at the time of the alleged crime the accused was** mentally disordered.
> **The accused is fit to stand trial"**

The court considered the agreed the facts, the post mortem report and the psychiatric report and was satisfied that when the accused committed the offence charged, he was suffering from a mental defect which rendered him incapable of appreciating what he was doing. Accordingly he is entitled to rely on mental disorder as a complete defence to the charge in terms of s 227 (1) (a) of the Criminal Law (Codification and Reform) Act.

Having made the finding that the accused is excused from criminal liability as a result of his having suffered from a mental disorder as aforesaid at the time that he committed the conduct or wrong complained of, the accused should be dealt with in terms of s 229 of the Criminal (Codification and Reform) Act. In terms of the section aforesaid, the fact that an accused has been excused of criminal liability on account of mental disorder does not affect the operation of the provisions of the Mental Health Act. [*Chapter 15:12*] in relation to how he should be dealt at his trial. The law requires that the accused be dealt with as provided for under the said Act. Section 29 (2) of the Mental Health Act prescribes the verdict which the court must pronounce. The verdict is *sui generis* and is given the name "a special verdict". Therefore, in line with the provisions of the Mental Health Act, the order of the court following the provisions of s 29 (2) of the Mental Health is as follows:

"A special verdict to the effect that the accused person is not guilty because of insanity" is hereby returned.

The last issue is for the court to determine the fate of the accused. The options open to the court are provided for in s 29 (2) (a), (b) and (c) of the Mental Health Act. The operative provisions read as follows in setting out what the court may do:

> "(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; or
> (b) if the judge or magistrate considers that, had the accused person been convicted of the offence concerned, he would not have been sentenced to imprisonment without the option of a fine or to a fine exceeding level three, order-
> (i) the accused person to submit himself for examination and additionally, or alternatively, treatment in any institution or other place in terms of Part VI; or
> (ii) the accused person's guardian, spouse or close relative to make an application for the person to be received for examination and additionally, or alternatively, treatment in any institution or place in terms of Part VII or Part VIII;
> and may give such orders as may be appropriate for the accused person's release from custody for the purpose of such examination or treatment; or
> (c) if the judge or magistrate is satisfied that the accused person is no longer mentally disordered or intellectually handicapped or is fit to be discharged, order his discharge and, where appropriate, his release from custody."

As clearly appears from the quoted provisions, the court exercises a discretion. It may order that the accused be returned to prison from where he will be transferred to an "institution or special institution" for examination of his mental state or for treatment. This is as provided for in s 29 (2) (a). The next option provided for in s 29 (2) (b) as above quoted is exercisable in respect of petty or less serious offences for which if the accused had been convicted but for the finding of mental disorder as a complete defecne, the accused would not have been liable to imprisonment without the option of a fine or to a fine exceeding level three. It is not necessary to ventilate the provisions of s 29 (2) (b) because the offence *in casu* being murder would not be punishable with a fine but the death sentence where there are aggravatory circumstances or a lesser defined term of imprisonment. The last option is provided for in s 29 (2) (c) as above quoted. The court in terms thereof may if satisfied that the accused is "no longer mentally disordered or intellectually handicapped or otherwise fit to be discharged, order his discharge, and where appropriate, his release from custody".

As can be seen from the agreed facts, counsel were agreed that the accused be dealt with in terms of s 29 (2) (a) of the Mental Health Act. The decision as to how the accused should be

dealt with after the finding of a special verdict is a judicial decision to be made by the judicial officer. It is a decision which must be carefully considered and the available options weighed taking into account all the circumstances of the case relevant to exercise of the choice of the orders which can competently be made. It follows that the decision should not be left to counsel to make nor agree between them. The court is not bound by what counsel may have agreed and should not delegate its functions to counsel. As with sentence in any other case, the duty to assess and come up with an appropriate order vests in the judge or magistrate as the case may be.

Since the court was not appraised of why counsel had agreed that the accused be dealt with in terms of s 29 (2) (a) of the Mental Health Act, I asked counsel to address me on the issue. State counsel submitted that the evidence available showed that the accused had in fact been on treatment prior to the commission of the offence. He defaulted treatment and therefore suffered a relapse. It was during the period of relapse and before the medicine which he had commenced to take had steadied him that he committed the offence. He submitted that the accused could therefore not be trusted to continue to adhere to his treatment and that it would be risky to release him. He lastly submitted that none of the accused's known relatives were willing to take custody of him.

Miss *Ndawi* agreed with State counsel. She referred the court to the case of *S* v *Khumalo* HB 61/06 as authority to the effect that the court should be guided by what the interests of justice dictated and that the nature of the offence committed by the accused had to be considered. I have previously observed in *State* v *Sabawo Babau* HH 61/16 that the provisions of s 29 (2) (a) do not amount to a sentence or punishment for the accused. They provide for an administrative mechanism whereby the accused person continues to be managed by qualified personnel following which his release is then recommended by the Mental Health Review Tribunal. Miss *Ndawi* further submitted that she had interviewed the accused's mother and sister, being the accused's known relatives. The two had advised counsel that they could not look after the accused nor monitor that he adhered to his treatments. The two had told counsel that in their previous experience with the accused, the accused had defaulted taking treatment and become violent.

After hearing submissions from counsel, the court was satisfied that counsels' suggestion that the accused be dealt with in terms of s 29 (2) (a) was well informed and made after making

necessary investigations as to the appropriateness of such a course. The court considered the third option of ordering the discharge and/or release of the accused from custody as provided for in s 29 (2) (c). Although the medical evidence available indicated that the accused was no longer psychotic and no longer hallucinating, it fell far short of certifying the accused as being "no longer mentally disordered". Indeed the accused's mental condition has not been cured completely but has been controlled. The condition remains there and the accused has to continue to take medication. In the view of this court, it would not be appropriate in the absence of evidence that the accused has been completely cured of the mental disorder or handicap to order the accused's release or discharge. The field of mental health and psychiatry is a specialised field in respect of which the court would not be qualified without receiving adequate expert evidence to conclusively make an informed decision thereon. The provisions of s 29 (2) (c) should therefore be resorted to where there has been adduced clear and convincing evidence that the accused has been completely cured of his mental disorder and that there is no possibility of recurrence. Where the accused's condition is being managed through continued treatment, the court should act in terms of s 29 (2) (a) so that society is protected from the likehood of accused suffering from a lapse. The accused is also protected in his own health in that he continues to be monitored until such time that a special board properly constituted and qualified in terms of the Mental Health Act recommends his release.

The order of the court is therefore that:

> "The accused shall be returned to custody for transfer to Chikurubi Prison Psychiatric Unit or other similar specialized institution for treatment and further management in terms of s 29 (2) (a) and consequential provisions of the Mental Health Act, [*Chapter 15:12*]"

National Prosecuting Authority, State's legal practitioners
Dondo & Partners, accused's legal practitioners (*pro-deo*)