

THE STATE
versus
PARADZAI CHONYONDA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27, 28 February 2017 and 2 March, 2017

Assessors: 1. Mr Mhandu
2. Mr Mutambira

Criminal Trial-Murder

C. Chimbare, for the State
R.T Matsika, for Accused

CHITAPI J: the accused faces one count of murder and 2 counts of attempted murder as defined respectively in ss 47 and 189 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. When the matter was called, the State and defence counsels advised the court that they needed time to draft an agreed statement of facts. The defence counsel had also just hurriedly taken instructions from the accused whom she had failed to access because he had not been transferred from Mutoko prison to Harare. The hearing was postponed to the following day, the 28th February, 2017. The prosecution moved the court to excuse the State witness from further attendance and this was done.

When the hearing resumed, the indictment was put to the accused. In count 1, it was alleged that the accused on 20 July, 2015, unlawfully and intentionally caused the death of Artwell Chonyonda by striking him on the head with a stone. In counts 2 and 3, it was alleged that on the same date, the accused unlawfully attempted to cause the deaths respectively of Maidei Pfuridzo and Susan Chonyonda whom he struck with stones on their heads causing serious injuries to them. In respect of each of the three counts, the accused responded that he did not know anything and was not well at the time. He however understood the nature and scope of the charges which were alleged against him. The court entered not guilty pleas in respect of each count. The prosecutor advised the court that the accused was certified to have been suffering from a mental disorder which rendered him incapable of appreciating his

actions. The case was therefore to be dealt with in terms of the Mental Health Act, [*Chapter 15:12*].

A statement of agreed facts was tendered by consent and accepted as Annexure 'A'. The content of the statement are as follows:

“AGREED FACTS

1. On the 20th of July 2015, the accused person woke up at around 6am and summoned his younger brother, Fungai Chonyonda, to his homestead.
2. He invited Fungai Chonyonda to accompany him to their father's homestead. He appeared unstable. They went together to their father's homestead and the accused later proceeded to his grandfather's homestead while Fungai Chonyonda remained at their father's homestead.
3. The accused proceeded to Misheck Katsande's shop where he took some cigarette and left without paying. Misheck Katsande followed him to Fungai Chonyonda's homestead.
4. The accused person entered the bedroom and found Maidei Pfulidzo, who is Fungai Chonyonda's wife, inside. The accused person proceeded to ask her why she and Fungai Chonyonda were keeping his television set at their house.
5. Maidei responded to the effect that she would return the television set. The accused person then picked up a bucket of water which he threw at Maidei. The bucket hit her on the shoulder.
6. The accused person, who seemed to be possessed, became violent and started to chase Maidei who ran away towards the gate. The accused person ran after her, picked up a stone and threw it at Maidei. The stone hit her on the head. She fell down unconscious.
7. The accused person was restrained by Misheck Katsande from further assaulting her. Misheck Katsande proceeded to rush to a nearby homestead to call for help.
8. While Misheck Katsande was away the accused person approached Maidei Pfulidzo's two children, Susan Chonyonda and Artwell Chonyonda, aged four years and one year respectively, who were crying after witnessing the assault on their mother.
9. The accused person proceeded to assault them on their heads. The children became unconscious.
10. Shortly thereafter, Fungai Chonyonda arrived at his homestead and apprehended the accused person who also threatened to assault him.
11. Fungai Chonyonda carried Maidei Pfulidzo and the two children to a nearby homestead, where he secured transport to ferry them to Chikwizo Clinic for treatment.
12. Artwell Chonyonda was pronounced dead upon arrival at the clinic. Maidei Pfulidzo and Susan Chonyonda were referred to Parirenyatwa Hospital for treatment.

13. The post-mortem which was conducted on the remains of Artwell Chonyonda established that death was due to compound skull fracture and head trauma due to assault.
14. At the time that the accused committed the offence, he was mentally disturbed. The State will tender a psychiatric report which was compiled by Doctor Patrick Mhaka. The report demonstrates that the accused person committed the offence while mentally disordered.
15. The doctor's report will also reveal that the accused person underwent treatment while he was held at Chikurubi Psychiatric Unit and that he is no longer psychotic. He accordingly fit to be discharged.
16. The accused person will, in the circumstances, pray that this Honourable Court returns a special verdict in terms of Section 29 (2) (c) of the Mental Health Act [*Chapter 15:12*] as read with section 229 of the Criminal Law (Reform and Codification) Act [*Chapter 9:23*].”

In addition to the agreed facts, the prosecutor produced as exh 1 by consent a psychiatrist's report prepared by Doctor Patrick Mhaka following his examination of the accused person on 15 August, 2016 at Chikurumbi Psychiatric Unit. The doctor noted that the accused was a psychiatric patient since 2015. He used to experience auditory hallucinations. He was only placed on treatment after the commission of the offences herein and following committal for examination and treatment by the magistrates court. The doctor noted that on committal, the accused exhibited abnormal behaviour and was psychotic. The accused was placed on treatment and has since recovered. He is on treatment with haloperidol drug. The treatment is for mental disorder. The doctor concluded that the accused was mentally disordered when he committed the offences in question.

The prosecutor also produced by consent as exh 2, the post-mortem report prepared by Doctor Mauricio Gonzalez following an examination of the body of the deceased Artwell Chonyondo on 23 July, 2015. The doctor concluded that the deceased died from subarachnoid haemorrhage, compound skull fracture and head trauma secondary to assault. The injuries from which the deceased succumbed to his death were caused by the accused as was accepted in the agreed facts.

The court was satisfied that the accused at the time that he committed the offences was suffering from a mental disorder or defect which rendered him incapable of appreciating the nature of his conduct nor its unlawfulness or both. The court was further satisfied in any event that even if the accused were to be held to have appreciated the nature of his conduct, he was incapable of acting in accordance with such appreciation. In consequence of the provisions of s 227 (1) (a) and (b) of the Criminal Law Codification & Reform Act, the court

accepted that the accused was entitled to rely on mental disorder or defect as a full or complete defence to the charges.

Where the accused has been excused from liability for the offence charged on account of a mental disorder or defect as aforesaid, s 229 of the Criminal Law Codification & Reform Act provides that the court should follow the procedure provided for under the Mental Health [*Chapter 15:12*] in respect of law a person being tried is found to be mentally disordered or defect and the verdict which should be returned. In terms of s 29 (2) of the Mental Health Act, where the court finds that the accused is excused from liability as provided for in s 227 of the Criminal Law Codification & Reform Act, it should return a verdict which is described as ‘a special verdict to the effect that the accused is not guilty because of insanity.’ The court accordingly returns such verdict in respect of the accused person herein.

What remains to be dealt with is the fate of the accused in the aftermath of the special verdict declaring him not guilty because of insanity. In the agreed facts, counsel agreed between them that the accused be treated in accordance with the provisions of s 29 (c) of the Mental Health Act.

Section 29 (2) (c) gives the court a discretion to order the accused’s discharge and if appropriate, his release from custody. For the avoidance of doubt, the section reads as follows:

“(c) if the judge is satisfied that the accused is no longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged, order his discharge and, where appropriate, his release from custody.”

The discretion to discharge and/or order the release of an accused in terms of the provisions of s 29 (2) (c) should not lightly be exercised. The court should consider and balance the interests of both the accused and society at large. As a matter of course, the court should be guided by medical evidence. It is only in circumstances where the medical evidence recommends the discharge of the accused and/or his release from custody that such an order may properly be made. Such a decision will be easy and proper to make where evidence or facts are laid before the court bearing not only on the fact of the accused being no longer mentally disordered or intellectually handicapped but where in addition, there is evidence that there has been full recovery with no further treatment being required. The court should also have evidence of where the accused will go to following release and who will look after him or her. There has got to be a thorough investigation of the aftermaths of ordering a discharge and release from custody. Where counsel seek the court to discharge and

order the release of the accused in terms of the said section, they should place evidence and facts before the court which persuade the court that it is safe to release the accused person back into society. Where the court has not been furnished with sufficient facts and information from which to exercise its discretion as given, the correct approach should be to prefer the provisions of s 29 (2) (a) of the Mental Health Act which provides for the court to:

“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.”

For minor offences which would not attract imprisonment without the option of a fine or a fine not exceeding level 3, the court may have recourse to the provisions of s 29 (2) (b). The court will not dwell on the provisions of this section because they do not come into play in this case.

The accused person in this case admittedly is now behaving normally. However this is because he is now on medication. He obviously must continue to take the medication. The court has no idea as to whether there is no possibility of a relapse. It equally does not have information from which to infer that the accused will not default taking the medication or what provisions have been put in place to ensure the continued supply of the medication. There is no evidence as to where he will be, who will monitor him and look after his needs.

Finally it should be noted that there is no law which stipulates that only an accused who will have committed a petty offence whilst mentally disordered and a special verdict is returned qualifies for discharge and/or release under s 29 (2) (c). The gravamen of s 29 (2) (c) lies in the court being satisfied that it is safe to release the accused into society out rightly. Had sufficient relevant and material facts been placed before the court to disabuse it of any notion that there is no likelihood of the accused being a danger to society and himself if discharged and/or released the accused may well have been so discharged and his release from custody ordered.

In the premises an order is hereby made in terms of s 29 (2) (a) of the Mental Health Act that accused shall be returned to prison for transfer to a mental health institution where his discharge there from will be dealt with in terms of the relevant provisions of the said Act.

*The Prosecutor General's Office's, for the State
Wintertons, Accused's legal practitioners*