HB 18/17
HCAR 1722/16
CRB TSHO 65/16

THE STATE

Versus

WELCOME NDLOVU

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 2 FEBRUARY 2017

Criminal Review

TAKUVA J: The handling of this matter by the learned magistrate is marked by considerable carelessness that is incomprehensible. The accused appeared before the resident magistrate, Tsholotsho charged with malicious damage to property as defined in section 140 (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 in that on 18th day of February 2016 at Dlamini Line, Tsholotsho, the accused burnt kitchen and bedroom huts intending to cause damage.

The facts of this case are that on the 18th day of February 2016 at around 0000 hours the complainant was awakened by Nkazimulo Dube alerting him that the kitchen and bedroom huts were in flames. The complainant and other villagers noticed accused's foot prints and tracked them leading to his arrest. The total value of the damaged property is US$410,00.

The accused was arrested and a magistrate ordered that he be mentally examined by 2 doctors in terms of the Mental Health Act Chapter 15:12 (the Act). The two concurred that in their opinion the accused is a mentally disordered or defective person in terms of the Act and requires care, treatment and control in a special institution. The two medical reports compiled on 17 and 31 March 2016 respectively are filed of record.

Subsequently, the accused was referred to a psychiatrist at Ingutsheni Central Hospital, who after examining him concluded that in her opinion:

"5. There is a reasonable possibility that at the time of the alleged crime the accused was suffering from mental problem (substance induced psychosis). He was mentally disturbed and not responsible for his actions.
6. He is fit to stand trial."

Upon receipt of this report the Prosecutor-General expressed its intention in terms of section 31 (2) of the Act to proceed with the prosecution which was pending at the time of his committal. The accused was then brought before the magistrate who convicted him on his own plea of guilty instead of returning a special verdict in terms of section 29 of the Act. In so convicting and sentencing the accused to 24 months imprisonment of which 6 months were suspended on conditions o good behaviour the magistrate committed a monumental error which led me to raise a query when the record was placed before me on automatic review. The query was why a special verdict was not retained in view of the psychiatrist's findings.

The trial magistrate's response was as follows:

"The trial magistrate appreciates and is indebted to the observations of the reviewing Judge in this matter.

The trial magistrate overlooked the procedure to follow in view of the psychiatrist's findings. May the learned Judge take the pleasure to rectify the errors made herein. The trial magistrate stands guided and will not make such future omission."

This reply only enhanced the impression of careless inefficiency deriving from a complete lack of dialogue.

Section 29 of the Act provides:

"29 Procedure where person charged is found mentally disordered or intellectually handicapped at time of committing offence

(1) …

(2) 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 227 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; or

(b) if the judge or magistrate considers that, had the accused person been convicted of the offence concerned, he would not have been sentence 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 otherwise fit to be discharged, order his discharge and where appropriate order his release from custody." (the underlining is mine)

In my view, the above section is clear and allows no ambiguity. Once the conditions set out in subsection (2) are met like *in casu,* it becomes mandatory to return a special verdict to the effect that the accused person is not guilty because of insanity. After returning a special verdict, the trial court is given wide discretion as regards what should happen to such an accused.

What I find to be cause for concern *in casu* is the magistrate's sloppy and perfunctory approach to his work. Such a careless approach by a judicial officer towards his work is not acceptable as serious prejudice could be occasioned by such conduct. Magistrates must as a rule always read the provisions of a statute that they are applying. To proceed blindly invariably

results in injustice and irreparable harm to accused persons. Coming back to the facts of this case, I have no doubt that a special verdict should have been returned. I find also that by torching two huts, the accused committed a serious offence for which upon conviction would have been sentenced to imprisonment without the option of a fine. Therefore, in considering accused's fate, the options provided in paragraphs (b) and (c) are inapplicable. Also the record shows that the accused is not a first offender in that he had recently been convicted of a similar offence committed in the same area.

When asked by the trial magistrate why he omitted the offence, the accused's reply was;

"I do not know what happened. I just heard voices telling me to set houses alight. The voices stopped when I am in Mlondolozi. I had taken smoke". In view of this and the reports by the doctor and the psychiatrist, it is crystal clear that the accused is a danger to others. It would therefore be inappropriate to have him released from custody.

In the circumstances it is ordered that:

1. The verdict by the court *a quo* be and is hereby quashed and in its place is substituted the following; Not guilty because of insanity.
2. The accused must be transferred to a special institution for treatment.

Makonese J …….. I agree