**REPORTABLE (60)**

**NKOSIYABO NDZOMBANE**
**v**
**THE STATE**

**SUPREME COURT OF ZIMBABWE**
**ZIYAMBI JA, HLATSHWAYO JA & MAVANGIRA AJA.**
**BULAWAYO, JULY 28 & 30, 2014**

*P Mvundla*, for the appellant
*W Mabaudhi*, for the respondent

**HLATSHWAYO JA:** The appellant was convicted of murder with actual intent by the High Court sitting at Hwange on 5 July 2013.

It was not in dispute that on 26 April 2011 the appellant killed the deceased, his own brother, by decapitation with a sharpened axe. What, however, remained unclear at the close of the defence case was what had motivated the appellant to commit such a gruesome murder. Unconvinced by the appellant's explanation for his conduct, the court ordered an examination of the appellant by two doctors in terms of the Mental Health Act [*Cap 15:12*]. The two doctors on 22 July 2011, three months after the commission of the offence, found some evidence of mental defect and recommended that the appellant be referred to a psychiatrist. Some seven months later on 17 February 2012, the psychiatrist carried out her first of several

assessments from which she concluded that the appellant was not labouring under any mental illness at the time of the commission of the offence.

Placing reliance on the findings of the psychiatrist, the trial court convicted the appellant of murder with actual intent and sentenced him to death after finding that there were no extenuating circumstances. The appellant has now approached this Court on automatic appeal against both conviction and sentence.

The facts of this case are bizarre. The two brothers – the deceased and the appellant – aged 31 and 27 years respectively at the time of the commission of the offence had a disagreement over the sharing of groundnuts with the deceased claiming that the appellant had taken a greater portion of the nuts. The deceased then proceeded to chastise the appellant with a switch as if he was a child. The appellant says that this humiliating treatment infuriated him. Nonetheless, he carried on with the day's task of herding cattle with the events of the morning apparently forgotten. However, upon seeing his brother in the evening, the appellant claims that his anger was reignited. After they had retired for the night, the appellant woke up, sharpened an axe and decapitated the deceased in his sleep.

The only witness who was called by the State, Nobantu Mabhena, aunt to both deceased and appellant, maintained that the brothers had never fought, not even on the fateful day, and generally lived peacefully together. She could not say that the appellant was a violent person although she speculated that he could have acquired some violent streak from his stay in South Africa.

This apparently motiveless, odd and bizarre murder should have alerted the defence counsel, prosecution and the court – but more so the defence counsel – to the possibilities of "mental or emotional fragility" on the part of the appellant as was observed in *S v Mukombe* 1991 (1) ZLR 138 (SC) p. 139. Commendably, the court *a quo* did institute the procedures for the mental examination of the appellant, but the final consideration of the psychiatric report still left a lot to be desired as will be shown below. However, the defence counsel woefully failed to heed the clanging alarm bells. The defence counsel should have interviewed "the appellant's family, friends, co-workers and former employers, in an attempt to discover whether [the appellant] had any history of strange behaviour," as was said in *Mukombe (supra).*

As it turned out the crucial evidence of the appellant's "mental and emotional fragility" appears in his mother [Sibongile Ndzombane]'s affidavit submitted to the psychiatrist as follows:

> "During childhood he used to isolate himself, being shy person. Went to school up to Grade 7, was good student, failed to further his education due to financial problem. Went to Republic of South Africa to look for job and in 2007 was hit by gangsters and suffering from head trauma, hospitalised for some time due to head trauma. After discharge in 2007, displayed mental disturbance, was said to wander about and eating from street bins. The friends brought him back to Zimbabwe. He was talking to himself, smiling into space. I took him to hospital, United Bulawayo Hospital, but the doctor did not send him for treatment for mental problem, they wanted to see him displaying mental problem only gave him Paracetamol for headache. I sent him to father (as we divorced) and I don't know what happened to him during his stay with his brother only heard that he axed his brother and hid the corpse away in the bush."

Now, the mother, Sibongile Ndzombane, was never called to testify at the trial, even after the above testimony had come to light with the production of the psychiatrist's affidavit. Had she been called her evidence could have been weighed by the court side by side

with the expert conclusion of the psychiatrist. But as it is, her evidence is as good as a footnote in the psychiatrist's report.

The Russian – trained psychiatrist – one of the very few in the whole country – Dr Elena Poskotchinova concluded her affidavit as follows:

> "In my opinion there is no evidence of mental illness or mental retardation at present. He was mentally stable at the time of crime and responsible for his action, probably he got head trauma in 2007 [result of EEG confirmed moderate to high amplitude *posterior dominant alpha*] and had psychotic behaviour in 2007 – 2008. But since 2010 there is no evidence of mental disorder (OPD cards confirm only pain on old suture line by doctor from United Bulawayo Hospital)".

However, the psychiatrist was not called to give *viva voce* evidence – her evidence being just formerly and routinely admitted into the record. After her evidence was read into the record, the learned trial Judge just expressed gratitude to the psychiatrist and proceeded straight away to judgment in which he observed in this regard as follows:

> "The court referred the accused to be examined by a psychiatrist to ascertain his mental state in the light of the bizarre manner in which the murder was committed. Dr. Elena Poskotchinova's report was produced as Exhibit 8. The psychiatrist concluded that there was no evidence of mental illness or mental retardation at present on accused. The accused was mentally stable at the time of the crime and responsible for his action. He is fit to stand trial. The accused waited for deceased to fall asleep. He sharpened the axe and then struck deceased firstly on the head followed by several blows on the neck to the extent of chopping the head off to ensure that he was dead. The accused is therefore guilty of murder with actual intent."

It was submitted that it was incumbent on the court *a quo* to conduct an inquiry through calling of oral evidence from the psychiatrist who examined the appellant. I agree. It was necessary to hear *viva voce* evidence from the psychiatrist, from the mother of the appellant and any other relevant person. The psychiatrist would have had to explain to the court the basis

for her affirmative finding that from 2010 onwards the appellant no longer suffered from any mental illness especially in the light of the fact that she accepted that the appellant had suffered from some "psychotic disorder" between 2007 and 2008. There are more questions which remained unanswered because of this oversight such as whether considering the lapse of seven months between being seen by the two doctors and the appellant's assessment by the psychiatrist evidence of mental defect that had been observed by the doctors could have disappeared? Whether in the light of the two doctors' observation in 2011, the psychiatrist's affirmative assessment that from 2010 onwards the appellant suffered no mental illness was sustainable? What was it that the two doctors observed post 2010 which necessitated the referral to a psychiatrist if not some mental defect?

And as regards the appellant's previous mental infirmity, the psychiatrist could have helped shed light on whether the possibility existed for an illness induced by the noted head injury to recur even be it only temporarily.

Section 278 of the Criminal Procedure and Evidence Act (CPEA) allows the production of medical reports from doctors in affidavit form. However, the court has the discretion in terms of s 280 to order that the doctor be summoned to give oral evidence at the trial. The court may also send written questions to the expert who is enjoined to reply thereto. As was observed in G. Feltoe's *Judges' Handbook For Criminal Cases* 1st ed, 2009 Legal Resources Foundation p. 71.

> "It will be necessary to use the power to ask the doctor to give oral testimony when the original affidavit is inadequate and the court is unable to arrive at a just decision on the basis of this report. If the information is very scanty or vital information is omitted, or the information in the report seems to be contradictory, this power should be exercised.

> But if it contains all the necessary information there will be no need to summon the doctor. *Anock* 1973 RLR 154 (A); *Sibanda A* – 10 – 72 Melrose 1984 (2) ZLR 217 (S)."

The interrogation through oral testimony of expert evidence given on affidavit is necessary to avoid the error of treating such evidence as gospel truth or divine revelation.

Expert opinion evidence is admitted to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. In *Mandy v Protea Assurance Co. Ltd* 1976 (1) SA 565 at p. 569 it was stated that it was not the mere opinion of the expert witness which is decisive but his or her ability to satisfy the court that, because of the special skill, training and experience, the reasons for the opinion expressed are acceptable. However, in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed by the proffered opinion, and simply adopt it without questioning or testing it against known parameters.

In *S v Zuma* 2006 (2) SACR 257 at p. 263 the court held that the expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in drawing inferences from the evidence. And, in my view, the court can only do this well if it requires the expert witness to give oral evidence in the clarification and elucidation of an affidavit that is otherwise technically dense and incomprehensible, contradictory or inadequate in all respects except the conclusion. A court errs when it merely adopts the conclusions of an expert report without exercising its mind on it by, for example, calling for oral testimony or drawing the necessary inferences from the evidence.

Did the court *a quo*, therefore misdirect itself in accepting the expert evidence of the psychiatrist in the manner it did? It appears to me that the court below did err in this regard. However, I am of the considered view that the misdirection was not of such a magnitude as to vitiate the conclusion that it reached on conviction. The psychiatrist's affidavit taken in its totality shows that an Assistant Clinical Psychologist N. T. Mpofu who examined the appellant also concluded that the "patient does not show any sign of mental illness, and was stable at the time." The same conclusion was reached when the appellant was examined at a clinic as an outpatient in July 2010. The mother's quoted evidence also shows that when she took the appellant to hospital on suspicion of mental illness the doctors discounted it and instead treated him for an ordinary headache. The psychiatrist also set out cogent reasons for her conclusion, thus:

> "When examined by me the accused appeared to be free from any acute psychotic symptoms. He was full oriented in all aspects, calm, cooperative. Denied any type of hallucination and did not display any symptom of delusional behaviour. No decline in memory or intellect. Denied alcohol abuse in past. Admitted his crime of killing his brother, said the brother had spanked him like a child early morning on the day of the crime. He complained that accused was eating too much peanuts. "I was angry and after that axed him as punishment," he has insight into his mental illness. According to staff report: No evidence of unpredictable behaviour since admission."

Accordingly, the court *a quo*'s decision on conviction cannot be interfered with. However, there are consequences for the court below's failure to have the psychiatrist and other witnesses called as well as the unquestioning manner in which it adopted the expert report as already discussed. The consequences are that the possibility remains open of the appellant having been labouring under some form of diminished responsibility or "partial mental disorder or defect" as it is termed in the Criminal Law (Codification and Reform) Act [Cap 9:23] (hereinafter called "The Criminal Code").

> "Partial mental disorder or defect" is defined in section 217 of the Criminal Code as "mental disorder or defect --- the effect of which is not such as to entirely deprive the person suffering from it of the capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation."

In terms of s 218 if at the time a crime is committed the capacity of the person committing it "is diminished on account of acute mental or emotional stress, or partial mental disorder or defect, such diminished responsibility shall not be a defence to the crime, but a court convicting such person shall take it into account when imposing sentence upon him or her for the crime."

MCNALLY JA in *S v Taanorwa* 1987 (1) ZLR 62 (SC) quoted BEADLE CJ in *S v Sulpisio* A – 104 – 71 (not reported), thus:

> "A man may not be certifiable under the Mental Disorder Act [now the Mental Health Act] and he may not be mentally disordered within the meaning of the criminal law, but nevertheless his mentality may be that of a man who suffers from a diminished sense of responsibility and such a condition, while it may not be relevant in considering verdict, may be very relevant indeed in determining whether or not, in a case such as this, a proper sentence should be the death sentence. If the court was satisfied that the appellant suffered from some unusual state of mind such as having a genuine persecution mania or that he was suffering from diminished sense of responsibility at the time when he committed the offence, this would be a most important factor to be taken into consideration in deciding what the appropriate sentence should be."

In *S v Mukombe (supra)* where a psychiatric examination had not been carried out it was held as follows:

> "Finally it is pointed out that even if it is not possible to obtain meaningful background information on the appellant, and psychiatric evidence is inconclusive, the trial court may nevertheless come to the conclusion, on the stark facts as they presently exist, that the appellant's mental condition warrants a finding of diminished responsibility." p. 141

In my respectful view, the court in *S v Mukombe* may have gone too far in suggesting as it did above that where no meaningful background information on the appellant's mental health can be obtained and consequently the psychiatric evidence is inconclusive a finding of diminished responsibility may still be made on the mere "stark", bizarre or inexplicable nature or execution of the offence.

In the present case, however, the difficulty perceived in the *Mukombe* scenario does not arise. The bizarre facts in the present case led to the production of a psychiatric report which contained useful background information on the appellant's health. We have already noted that while the psychiatric report concluded that the appellant was legally responsible for his actions, the uncritical manner in which the report was adopted left the possibility open that the appellant might have been suffering from some form of diminished responsibility, which affected his moral blameworthiness.

Accordingly, the trial court should have found extenuating circumstances on the basis of appellant's diminished responsibility.

In assessing the appropriate sentence, it must be noted that the appellant showed contrition for the callous murder of his brother blaming his actions on the anger he felt after he had been humiliatingly chastised by the deceased. The appellant fully confessed his crime and did not seek to minimize his culpability even where he could easily have done so, for example, by insisting on a version of events that placed the provocation in space and time closer to the murder. This saved the court's time and must count in his favour. It was submitted on behalf of

the appellant that a sentence of a term of imprisonment in the range of 20 years would meet the justice of the case. However, I am of the view that in the light of the weighty mitigatory factors already noted the appropriate sentence should be 15 years.

Accordingly, the appeal succeeds in part. The conviction of murder with actual intent is upheld. However, the sentence of death is set aside, as there has been a finding of extenuating circumstances and substituted with the following:

"The accused is sentenced to a term of 15 (fifteen) years imprisonment."

**Ziyambi JA** I agree

**Mavangira AJA** I agree

*D. W. Mhiribidi & company,* appellant's legal practitioners

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