HB 87/17
HCAR 1249/16
CRB BTB 441/16

THE STATE

Versus

HUMBULANI NDOU

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 13 APRIL 2017

Review Judgment

TAKUVA J: This matter came before me on automatic review.

The facts are that the accused and the complainant are lovers and have been lovers since 2013. At the time of the offence the complainant was aged 14 years while the accused was 25 years old. During the period stretching from 2013 up to 21st February 2015, the accused had on divers occasions extra-marital sexual intercourse with the complainant. The accused impregnated the complainant in 2013 and she delivered in July 2014. The accused started staying with the complainant at his home. The matter was reported to the police by the accused's mother resulting in accused's arrest.

The accused appeared before the learned magistrate at Beitbridge on 20 May 2016 where he pleaded guilty to the charge of contravening section 70 of the Criminal Law (Codification and Reform) Act Chapter 9:23 [The Code]. He was found guilty as pleaded after he admitted all the essential elements of the charge. The verdict was recorded as "guilty as pleaded". However, on a separate piece of paper, the learned magistrate recorded the following: "Plea – guilty s271 (2) (b); Judgment special verdict."

When I pored over the documents filed in the record, I discovered what purports to be an affidavit by Elena Poskotchinova, a psychiatrist stationed at Ingutsheni Central Hospital, Bulawayo. The report was not signed by a Commissioner of Oaths. It is therefore not an affidavit which can be admitted in terms of section 278 (3) of the Criminal Procedure and

Evidence Act Chapter 9:07. Be that as it may, that document found its way into the record of proceedings. It was not marked as an exhibit at all.

In paragraphs 3 and 5 of that document, the psychiatrist stated:

"3. I examined accused Humbulani Ndou (CR 13/02/15 Beitbridge) charged with the crime of sexual intercourse with a minor at Mlondolozi special institute on 22/07/15 and 19/08/15 …
4. …
5. In my opinion, there is a reasonable possibility that at the time of the alleged crime the accused was suffering from mental disorder (mild intellectual disability). He was in state of diminished responsibility.
6. He is fit to stand trial, but would need more time for examination. …" (my emphasis)

Having detected some apparent anomalies, I raised the following query with the trial magistrate;

"Is this how a special verdict is recorded?

What happened to the accused after these proceedings were completed?" I got the following response;

"I believe this is how a special verdict is recorded in terms of section 28 (1) of the Mental Health Act. The court found the accused guilty of contravening 70 (sic) of the Criminal Law (Codification and Reform) Act but found that he could not be held responsible for his actions due to mental disorder thus the court returned a special verdict.

It is normal therefore to endorse in the relevant space of the indictment "special verdict in terms of s28 (1) of the Mental Health Act."

The court however failed to quote the relevant section when it made such an endorsement. The court released the accused after the proceedings. It felt that at the time he was certified to be fit for trial thus the court felt he had recovered. The court saw no need to commit him to specific institution. (the emphasis is mine)

I however stand guided." (my emphasis)

This response shows that the magistrate has superficial knowledge about how to handle such cases. Firstly, she used a report that is not an affidavit. Secondly, assuming the correct verdict was that of a special verdict, she did not record it properly. The verdict is recorded thus, "The accused is found not guilty because of insanity". See section 29 of the Mental Health Act Chapter 15:12. Thirdly, the learned magistrate could not distinguish between "partial mental disorder or defect" and "mental disorder or defect". The distinction is an important one when one deals with "mental disorder" on one hand and "diminished responsibility" on the other hand. See sections 216, 217 and 218 in respect of diminished responsibility and sections 226 and 229 which relate to "mental disorder".

In *S* v *Chikanda* 2006 (2) ZLR 224 (S) it was held that the borderline between criminal responsibility and criminal non-responsibility on account of mental incapacity or illness is not an absolute one, but a question of degree. A person may suffer from a mental illness, yet nevertheless be able to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation. Diminished responsibility only reduces the level of responsibility but does not completely absolve an accused person from his actions. Where the court finds that the accused, at the time of the commission of the act, was criminally responsible for the act, but that his capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing him.

It was held further, that medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence need to be supported by some other evidence. On their own, such reports may not be conclusive. The decision as to whether there is diminished responsibility is to be made by the court and not just by medical reports. Where medical reports of diminished responsibility are not supported by some other facts from the evidence the court is entitled to reject the claim of diminished responsibility if there are other factors which justify that rejection". (my emphasis) See also *S* v *Chin'no* 1990 (1) ZLR 244 (H).

This common law position has since been codified. However, the two concepts of "diminished responsibility" and "mental disorder or defect" are kept separate – see sections 217, 218 and 226 – 228 of the Code. What should be noted is that diminished responsibility is not a defence to a crime, but a court convicting such person shall take it into account when imposing sentence upon him or her for the crime – see section 218 (1) (b) of the Code. On the other hand "mental disorder or defect" is a complete defence to the charge where requirements set out in section 227 (1) (a) (b) of the Code are met.

In casu the court *a quo* failed firstly to appreciate the above distinction and secondly to apply these principles properly resulting in a miscarriage of justice. The accused was not punished when the law demands that he should have been punished. The record of proceedings does not even show how the court arrived at the decision to discharge him. Put differently no reasons were given for letting the accused off the hook in light of the fact that the circumstances of this case clearly show that the accused's capacity to appreciate the nature of his conduct was merely diminished. A proper inquiry should have been conducted before the accused could be released especially in view of the psychiatrist's opinion that "more time for examination" was required.

Further, it was fundamentally wrong in the circumstances of this case to return a special verdict because the accused was not mentally disordered so as to have a complete defence in terms of section 227 of the Code. The correct verdict is that the accused is found "guilty as pleaded".

Since these proceedings are not in accordance with real and substantial justice, all I can do at this stage is to withhold my certificate.