MVULA v THE PEOPLE (1990 - 1992) Z.R. 54 (S.C.)

SUPREME COURT
SILUNGWE, C.J., SAKALA AND LAWRENCE JJ.S.
20TH FEBRUARY, 20TH MARCH, 25TH MAY AND 10TH JULY, 1990 AND 1ST AUGUST, 1991
(S.C.Z. JUDGMENT NO. 6 OF 1991)

Flynote

Criminal law - Provocation - Accused attempting to create provocation - Cannot rely on same.
Criminal law - Diminished responsibility - accused not producing evidence to show mental responsibility substantially impaired - Not able to rely on diminished responsibility.

Headnote

One Sunday morning the appellant had had an altercation with his ex-wife, B, during which he threatened that he was planning to do something to her family and she would never forget it. The appellant, a soldier, had then reported for duty at his barracks, although he was off duty that day. There he obtained an automatic rifle after which he left the base. That night he visited B and members of her family. He demanded that he be killed. B's sister asked him if he was mad. The appellant then left, returned and left again. On returning once more the appellant took the rifle with him and proceeded to fire at B and her family. B's sister and mother were killed and B and another person seriously wounded. The appellant was found guilty of murder and attempted murder in the High Court and sentenced to death. On appeal it was contended on behalf of the appellant that he was acting under provocation and that he was entitled to the benefit of an amendment to the Penal Code, introduced after the offences were committed, permitting the reduction of a murder charge to manslaughter where diminished responsibility was present.

Held:

(1) That the appellant had gone to the house to look for provocation so that he could use it as an excuse to fulfil his scheme. The whole scenario had been a clear manifestation of premeditation, or malice aforethought, on the part of the appellant. Accordingly the appellant could not rely upon provocation as a defence.

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(2) Further, that the appellant had elected to remain silent and called no witnesses. It was impossible to glean from the evidence before the Court that the appellant's mental responsibility was substantially impaired. Accordingly he could not avail himself of the defence of diminished responsibility .

(3) Further, that, in any event, the amendment to the Penal Code had no retrospective application to this or any other case. Held, accordingly, that the appeal had to be dismissed.

For the appellant: W. Henriques, Senior Legal Aid Counsel.
For the respondent: M. Mukelabai, State Advocate.

Judgment

SILUNGWE, C.J.: delivered the judgment of the Court.

The appellant was tried in the High Court on an information containing four counts, two of which related to murder and the other two to attempted murder. It was alleged that on 10th November, 1985 in Lusaka, the appellant murdered Beatrice Sibbuku and Mary Mukubesa and that, on the same date and at the same place, he attempted to murder Beauty Sibbuku and Douglas Mukubesa. The appellant was convicted as charged on all four counts and was sentenced to death on the murder counts. This appeal is against the said convictions.

The facts of this case are straightforward. Mary Mukubesa, the deceased, was the mother of Beauty Sibbuku and of Beauty's elder sister, Beatrice Sibbuku, also deceased. It would appear that Mary was also the mother of a three and a quarter year old child named Douglas Mukubesa. All these four persons, as well as Beauty's young sister named Bridget Sibbuku, lived together at the material time at a family house, No 96/4, Garden Compound, Lusaka.

The appellant, a corporal in the Zambian Army, is Beauty's former husband. They got married in 1981 and had two children. Theirs was an unhappy marriage which was dissolved by a local court sometime during the period June-August, 1985.

On 10th November, 1985, at about 08:30 hours, Beauty, together with her elder sister Beatrice, and her young sister, Bridget Sibbuku, left the family home to go to church. As they proceeded to church, they passed by the appellant's house and Beauty saw her children outside the house. Beauty then called the elder child so that she could greet both children but the appellant stopped the children from going to their mother and told her never to come there. The appellant further said that he was planning to do something against her family and that she would never forget it. He did not elaborate. Beatrice asked the appellant why he was threatening them and told him that dissolution of the marriage did not mean that one spouse should be denied access to children of the marriage. The appellant alleged that Beauty had infected him with a venereal disease, an allegation that was denied by Beauty. Beatrice said she was not interested in the allegation and that they were leaving him with his children. As the voices of the appellant and Beauty became high-pitched, some neighbours were attracted to the scene. Beauty's party then left the scene and went to church. After church service, and as they walked back home along a main road, they noticed that there was no one at the appellant's house.

In the meantime, however, the appellant - though off duty - had

decided to report on duty at the Burma Army Barracks. He went there dressed in combat uniform. On arrival there, at about 10:00 hours (ie on the same date), the appellant's Guard Commander, Corporal Simon Mumpalamba (PW2), told him that he was not on that day's duty roster. The appellant responded, falsely, that he had reported on duty because an Administration Corporal had given him extras, that is, punishment. After the matter had been discussed between the Guard Commander and Corporal Musonda, a Barracks Officer, it was agreed to allow the appellant to be on duty.

Sometime after lunch time, the Guard Commander saw the appellant come out of a Sentries' office, carrying with him an AK 47 automatic assault rifle. When asked where he was taking the gun to, he replied that he was going to clean it. The Guard Commander thought that was a good idea and so allowed the appellant to clean the gun. The appellant then took the gun into a motor vehicle. Such cleaning entails the dismantling of a gun. The gun had a magazine but the Guard Commander did not check whether the appellant had some ammunition.

Sometime later, the appellant disappeared from the Barracks, together with the rifle and thirty rounds of ammunition. Enquiries in the Barracks as to his whereabouts, or point of exit, were to no avail.

Later that day, when Beauty went to visit her friend, Agness Chola, she met the appellant. The appellant spoke first and told her that when they were going to church in the morning, he was not pleased with what they had said to him and that, in the evening, he would go to their home so that they could kill him. Beauty went away immediately leaving the appellant talking to himself.

At about 20:30 hours that day, the appellant visited his mother-in-law's home and found Beauty and other members of the family there. Beauty's mother, Mary Mukubesa, was having a bath at the time. On arrival, the appellant demanded that he be killed. Beatrice asked him if he was mad as they had not killed anybody before. The appellant kept saying 'Just kill me.' He was, however, ignored and so he went away. A few minutes later, the appellant returned and, on that occasion, Beauty's mother had had her bath and was with her family. The appellant continued to demand that he be killed. This took place in the verandah of the house. Beauty's mother pleaded with him to go away. After a short while, the appellant went away but before he could do so he said that he would never come back. About five minutes later, however, he reappeared, this time armed with an AK 47 automatic assault rifle. Bridget was some three metres away from him when he opened fire at the family residence. Bridget ran away and took refuge nearby but was apparently unnoticed by the appellant. By the time the appellant exhausted all the thirty rounds of ammunition, Beatrice had been fatally injured and was lying dead; Mary and Douglas Mukubesa had sustained grave injuries and Beauty herself had been seriously injured and rendered unconscious. Mary Mukubesa later died at the University Teaching Hospital about 30 minutes after her admission. Beauty and Douglas were hospitalised for two weeks and three days before they could be discharged. It was upon her discharge that Beauty learnt of the tragic demise of her mother, Mary, and of her sister, Beatrice.

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About 30 minutes after the shooting incident, the appellant arrived at Emmasdale Police Station (which was nearby) and there reported the incident and surrendered himself as well as the AK 47 assault rifle, plus an empty magazine. As he was being interviewed by Constable Nkhoma, Bridget arrived - in tears - and reported that the appellant had killed her mother and sisterat home. Before he could be taken into custody, the appellant stated, *inter alia*, that he had been provoked. His voluntary statement to the police corroborated the prosecution evidence in virtually all material respects.

After the first two prosecution witnesses had given evidence, Mr *I. C. Ng'onga*, learned Legal Aid Counsel, applied for the appellant's medical examination in terms of s. 17 of the Criminal Procedure Code Cap. 160, in order to establish his state of mind at the time that the offences charged were committed. The application was granted and the appellant later underwent medical examination at Chainama Hills Hospital. Although the judgment of the trial Court showed that a medical report certified that the appellant 'was fit to plead', no such report appeared on the record of appeal.

When this case first came before us on appeal, Ms *Henriques*, learned Senior Legal Aid counsel, applied for the production of the medical report on the appellant and the calling of Professor Harworth who had examined the appellant so that he could be cross-examined. The application was granted, pursuant to s. 16(b) of the Supreme Court Act of Zambia, Cap. 52 of

the Laws.

Subsequently, the medical report on the appellant was produced and Professor Harworth gave his testimony as to the appellant's state of mind at the time that the present offences were committed and during the period that the appellant was medically examined. Ideally, it is desirable for such testimony to be received by the trial Court in terms of s. 16(d) of the Supreme Court of Zambia Act so that the Court can make such observations or findings thereon as it may deem necessary.

The gist of Professor Harworth's evidence is that the appellant was under his charge from 17th June, 1986 until 26th May, 1987, when he was discharged.

The appellant was fourth-born in a family of seven children. His father (now deceased) used to suffer from epilepsy and his mother still does so and displays a tendency to become violent. Further, one of his sisters is mentally subnormal and epileptic; and his elder brother reportedly becomes very violent after beer drinking.

Professor Harworth testified that where both parents suffer from epilepsy, there is chance that one in four children may also suffer from epilepsy. Epilepsy is, however, not a disease of the mind, though it may sometimes affect the mind.

He further said that there was history to the effect that the appellant had suffered from fits before the age of 5 years; and that he apparently had one fit at the age of 12 years, but no subsequent fits have since occurred. If a person suffers from epilepsy, there is potential of having fits throughout his life. According to Professor Harworth, he found no evidence of epilepsy in this case at the material time and the fact that the appellant remembers clearly what he did suggests that there is no evidence of

epileptic phenomenon. Although Professor Harworth holds the opinion that the appellant was under intense mental stress at the time that the offences were committed and wanted to commit suicide during his hospitalisation, the Professor is equally of the opinion that the appellant knew what he was doing at the material time. The witness could find no evidence of mental illness in this case.

In her argument, Ms *Henriques* raised two main grounds of appeal. Firstly, she argued that there had been provocation in this case; and, secondly, she contended that the new defence of diminished responsibility - introduced by a recent amendment to the Penal Code - should be available to her client.

With regard to the defence or provocation, Ms *Henriques* submitted that the learned trial judge had misdirected himself by holding that the appellant had not been provoked. She argued that her client had been provoked by his former wife at his residence in the morning of 10th November, 1985 and that he had further been provoked by her and her relatives at his mother-in-law's house in the evening of that day.

The evidence on record does not support Ms *Henriques*, submission that Beauty ever provoked the appellant in the morning. It seems clear the appellant did not want Beauty to talk, or have access, to either of the two children of their broken marriage, let alone to visit his residence.

More importantly, it would appear that he was incensed by the thought that Beauty had allegedly infected him with venereal disease and that his manhood had thereby been impaired. In any event, even assuming that he had been provoked in the morning (but we do not so assume), such provocation could not possibly have amounted to legal provocation later in the evening as the appellant would have had time to cool down.

The second part of this argument was that, later in the evening, the appellant was provoked by Beauty and her relatives at the house of Beauty's mother.

It is not in dispute that when the appellant visited his mother-in-law's house that evening, he demanded that he be killed. He was, however, ignored. He insisted again on being killed. He was again ignored. He then went away but he was back within a few minutes. Once again, the appellant made similar demands. On that occasion, his mother-in-law, who was then present, pleaded with him to go away. He appeared to heed the pleas and went away. But, within five minutes he was back, this time armed with the AK 47 automatic assault rifle. He then opened fire at the mother-in-law's house, shooting indiscriminately until all the 30 rounds of ammunition were exhausted. As a direct result of the appellant's conduct, two human lives were lost and attempt was made at the other two.

It is further not in dispute that, as the appellant made demands to be killed, his sister-in-law, Beatrice, who was shortly afterwards to become one of his victims and to lose her own life, asked him whether he was mad to make such demands as they had not killed anyone before. It was the question 'Are you mad?', asked in the preceding context, that Ms *Henriques* describes as 'a very grave insult' offered to the appellant and that that constituted provocation.

Ms *Henriques* submitted that there were two different versions as to

whether what was referred to as 'insult' had been offered during the appellant's first or second visit. She then drew attention to the evidence of PW3 , Beauty, and said that in examination-in-chief, the witness averred that the 'insult' had been offered during the appellant's first visit; but that her cross-examination, at page 26, line 10 of the record of appeal, showed that the 'insult' had been uttered during the appellant's second visit.

Indeed, Beauty's evidence at page 20 of the record clearly reveals that it was during the appellant's first visit that Beatrice asked him whether he was mad by insisting that he be killed as they had never killed anyone. However, Beauty's cross-examination at page 26 of the record offers no support for Ms *Henriques'* submission, neither does any such support exist on record. The upshot of all this is that, during the appellant's first visit, Beatrice reacted to what appeared to be his unreasonable demands; during his second visit, he repeated the demands but he was apparently prevailed upon by his mother-in-law's pleas that he should go away; no one asked him on that occasion whether he was mad; and during his third visit, he unleashed gunfire at his mother-in-law's house and its occupants.

It would appear that when PW4, Bridget, testified that no 'insult' had been offered; she did not regard what Beatrice had said to the appellant as amounting to an 'insult'.

The question must now be asked whether Beatrice's intervention that tragic evening amounted to provocation. In the circumstances of this case, we think that it did not. Our considered standpoint is that the whole scenario was in itself a clear manifestation of premeditation, that

is, malice aforethought, on the part of the appellant. Taking advantage of the altercation that he and Beauty had in the morning, the appellant threatened that he was planning to do something against her family and that she would never forget. Although he was off-duty on that day, he put on his army combat uniform and pretended to report on duty at the Burma Army Barracks so that he could gain access to a firearm. He then took an AK 47 automatic assault rifle (and concealed a magazine containing 30 rounds of ammunition) under the pretext that he was going to clean the said rifle. The rifle was dismantled, concealed in a coat and stealthly smuggled out of the Barracks together with the magazine. The appellant returned to his home (which was apparently in Garden Compound) where he assembled the rifle. Later in the evening, at about 20:30 hours, he went to his mother-in-law's house where his former wife was residing and there demanded that he be killed. As his demands were unreasonable, Beatrice asked him whether he was mad. When he repeated his demands, he was ignored and so he went away momentarily. He returned and made similar demands. He then took heed of his mother-in-law's pleas and went away for about five minutes before he could return of perpetrate despicable violence against his former wife and her family, resulting in human injury and loss of life. This was truly a fulfilment of his threat earlier on in the morning that he would do something against his former wife's family that she would not forget. Indeed, Beauty would never forget the sad events of that night. As can be seen the appellant must have hidden the rifle nearby before he visited his mother-in-law's house on the first occasion. He had carried it for the

purpose of teaching his former wife and her family a lesson which she would never forget. He had gone there to look for provocation so that he could use it as an excuse to fulfil his dastardly scheme but he did not get it.

In any event, even if Beatrice's reaction were to be translated into provocation, which we are unable to do, such provocation cannot amount to a legal defence as her reaction took place on the first visit; and the second visit ended with pleas for the appellant to go away, which he heeded. It was on the third visit that he resorted to gunfire. He had brought the gun with him and hid it nearby, not for the purpose of using it to commit suicide, but in order to use it against his former wife and her family. We have no hesitation in holding that the appellant's violent conduct was premeditated. It seems to us that his main grievance was the thought that his former wife had brought venereal disease to him and thereby impaired his manhood.

Having said all this, we are satisfied that the learned trial judge did not misdirect himself on the defence of provocation. The appeal based on this ground cannot, therefore, succeed.

As a subsidiary ground, Ms *Henriques* submitted that the evidence given by Beauty and Bridget should have been treated with caution as they were not particularly fond of the appellant and that their account was probably coloured by their dislike of him.

In our judgment, where the evidence of a witness is virtually common ground, or not seriously controverted, as is the evidence of Beauty and Bridget, then no issue of the kind here canvassed arises. Moreover, although Beauty and Bridget must have disapproved of the appellant's deplorable conduct on that tragic night, there was no evidence to show that either Beauty or Bridget disliked the appellant. We consider that the submission under consideration is *non sequitur.*

Finally, it was submitted that the appellant's behaviour by going to his mother-in-law's house and there demanding that he be killed was abnormal, as a normal person would not do such a

thing. Furthermore, it was submitted that as the appellant had been under intense mental stress at the time that the offences were committed and that he even spoke of wishing to commit suicide during his admission at the Chainama Hills Hospital, the defence of diminished responsibility recently introduced by s. 12A of the Penal Code, Act. 3 of 1990, should be available to the appellant and thereby make him liable to be convicted of manslaughter.

The new law which came into force on 11th May, 1990, is couched in these terms:

''12A (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or is induced by disease or injury) which has substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.
(2) The provisions of ss. (2) of s. 13 shall apply with necessary modifications to the defence of diminished responsibility under this section:
'Provided that the transient effect of intoxication as described in that subsection shall be deemed not to amount to disease or injury for purposes of this section.
(3) On a charge of murder it shall be for the defence to prove the defence of

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diminished responsibility and the burden of proof shall be on a balance of probabilities.
(4) Where the defence of diminished responsibility is proved in accordance with this section, a person charged with murder shall be liable to be convicted of manslaughter or any other offence which is less than murder.''

For the defence of diminished responsibility to succeed, the defence must prove, on a balance of probabilities, that the accused's mental responsibility for his acts or omissions in doing, or being a party to, the killing of another was substantially impaired.

In this case, the appellant elected to remain silent and to call no witnesses, as he was entitled to do. This means that, apart from the cross-examination of prosecution witnesses, his only evidence was the confession statement made to the police. We are, however, unable to glean, either from the appellant's confession statement or the prosecution evidence, that his mental responsibility for his part in the killing of two of his victims was ''substantially impaired.'' Professor Harworth's testimony was that although the appellant was under severe mental stress at the time that he committed the homicides, he was not suffering from any abnormality and that he knew what he was doing. It follows that he cannot avail himself of the defence of diminished responsibility.

In any case, we are satisfied in our minds that s. 12A has no retrospective application to this or any other case of a similar nature. This is in conformity with s. 15(3) of the Interpretation and General Provisions Act,Cap. 2 of the Laws of Zambia, the relevant paragraphs of which read as follows:

''15(3) Where a written law repeals in whole or in part any other written law, the repeal shall not :

(a) Revive anything not in force or existing at the time at which the repeal takes effect; or
(b) Affect the previous operation of any written law so repealed or anything

duly done or suffered under any written law so repealed.''

It follows, therefore, that the relevant law applicable here is one that was in force at the time when the killings already referred to were perpetrated.

It is obviously clear from the totality of what we have said above that the findings of the learned trial judge cannot be disturbed. Accordingly, the appeal against convictions on the murder and attempted murder counts is dismissed.

It now remains for us to consider what kind of sentence is appropriate in this case. Prior to the enactment of Act. 3 of 1990, part of which has already been referred to in another context, there was one sentence only for murder, namely, death; this sentence was mandatory, notwithstanding the existence of extenuating circumstances. However, the severity of the death penalty under s. 201 of the Penal Code has been mitigated by Act. 3 which makes provision for the imposition of a lesser sentence where extenuating circumstances are present. Section 201, as amended, now provides that :

> ''201(1) Any person convicted of murder shall be sentenced :
> (a) To death; or

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> (b) Where there are extenuating circumstances, to any sentence other than death: Provided that para (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under s. 294.''
>
> ''(2) For the purpose of this section:
> (a) An extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt;
> (b) In deciding whether or not there are extenuating circumstances, the Court shall consider the standard of behavior of an ordinary person of class of the community to which the convicted person belongs.''

Having considered the standard of behavior of an ordinary person of a class of the community to which the appellant belongs, in light of his violent conduct in executing the carefully planned homicides, we are satisfied that there are no extenuating circumstances present in this case. This means that the only sentence available here is death.

Appeal dismissed.