THE STATE
and
ZEXTEEN DZEMWA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 23 & 25 May, 26 & 28 July & 11 November 2022

Assessors
Mr *Mabandla*
Mr *Chimonyo*

Criminal Trial

B Murevanhema, for the State
Z Makwanya with Ms L Mukutiri, for the accused

MUTEVEDZI J: This murder is what was described in the case of *R v Kemp*[1] as a motiveless and irrational attack. It illustrates the imperceptible gradations between sanity and insanity and responsibility and irresponsibility. The accused person Zexteen Dzemwa(the accused) who appeared to us to be a totally unsophisticated villager was arraigned before this court facing a charge of murder under s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The allegations were that on 17 August 2021 at Madhishi village, Chief Musana in Shamva, the accused, with intent to kill attacked his daughter Valentine Nyasha Dzemwa (the deceased) with an axe and a stick. She sustained mortal injuries to which she instantly succumbed.

The accused pleaded not guilty to the charge. His defence outline was characterised by weird facts. He said on that apocalyptic day, his wife left him in the custody of their two minor daughters Ruvarashe and the deceased as she went to pray on a nearby mountain. He decided to prepare breakfast for the children. As he proceeded to light up a fire at the cooking place which, like in many rural homesteads, was outside the house, he suddenly saw what he thought was a huge snake coiled around the fireplace. At the same time a whirlwind suddenly built up. After these supernatural sightings, the accused said he remembered nothing else between that

[1] ([1957] 1 QB 399; [1956] 3 All ER 249)

time and the moment he found himself tied with a rope under a tree with multitudes of neighbours, other villagers and police officers gathered at his homestead. It was then that he was advised that he had killed one of his daughters. He said he was dumbfounded, confused, pained and crestfallen. He was not aware of what had transpired. He alleged that there must have been an external force which besieged him. He could not appreciate his conduct and could not restrain himself from doing what he is alleged to have done. He pleaded the defence of what counsel called insane automatism.

To support that defence, he said there was no reason why he would have killed the deceased. She was a daughter whom he loved dearly. He loved his wife, the deceased's mother. He loved both his other surviving children. He toiled every day to happily provide for his family. He also alleged that some years back, he was advised that he once experienced some episode of abnormality where he could not appreciate his actions.

The state's case

In the course of the trial the state applied that the evidence of Ruvarashe Dzemwa be formally admitted into evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. With the consent of the defence, the evidence of that witness was duly admitted. The prosecutor also led oral evidence from two witnesses, Getrude Chiromba –the accused's wife and deceased's mother and Washington Dzemwa- the accused's younger brother and deceased's uncle. Several exhibits were also produced by consent. These included, medical reports compiled by two medical practitioners which showed that the accused was mentally fit to stand trial, the post mortem report which showed what killed the deceased, the accused's confirmed warned and cautioned statement, an axe and a wooden stick which were allegedly used to attack the deceased. All these exhibits related to issues which were common cause. In fact the majority of issues in this trial were common cause. They can be summarised as follows:

1. On the day in question, the accused inexplicably attacked the deceased with an axe
2. The attack killed the little girl instantly
3. The deceased continued to rant and rave after the attack. He actually threatened to also attack those who arrived and attempted to rescue the girl.
4. He was later restrained and was tied to a tree with ropes
5. The police were called and later arrived to arrest him

6. From the time he attacked the deceased early that morning until sometime later that day, he appeared to have been in a trance. He was muttering incoherently and could not comprehend what was going on
7. The attack on the girl was for no apparent reason. The accused lived happily and related well with all his family members.

Below, we summarise the evidence of the witnesses in so far as it relates to the issues which arise for determination.

Getrude Chiromba

She is wife to the accused. She is mother to the deceased. We have no doubt that she found herself between a hard place and a rock. She lost a daughter at the hands of a husband who appeared genuinely loving but had lost control of his faculties. Her testimony supported the accused's argument that he did not appreciate his actions on the day in question. It was exactly like accused indicated in his defence outline up to the point she climbed the mountain to pray. She left accused running around with household chores and making preparations for the children's breakfast. She told us that since the time they married in 2001, the accused had not at any time exhibited signs of violence. If anything all she knew from him was love. He had love for his children. When she was up the mountain, she heard singing from the homestead. It was accused who was singing a church hymn. Part of the song's lyrics was that *"I refuse to be led by my family spirits."* She observed that as the accused sang, he was running around the yard holding wooden rods which the court understood to be the equivalent of what was referred to as the 'staff' by rabbinical scholars in the Bible. He stopped singing and started talking to himself. She couldn't hear everything that he was saying. Part of what she picked up was that he was saying *"they were troubling him but his bones had arisen."* He then send one of their daughters, the one who survived the attack, to the mountain to collect a Bible. He said he wanted to read the Bible and preach the word of God to the people. As the girl came up the mountain and she was climbing down, the witness said she then saw the accused savagely assault the child until she collapsed. She couldn't reach her homestead because accused was threatening that he wanted both of them. She feared he would attack them also. She shouted for help. Neighbours came but were afraid to get near him given the violent state he was in. It was only Gilbert Nhepera and Washington Dzemwa his younger brother who were brave enough to approach him and restrain him. He tried to attack them. He was muttering and making noise. The helpers were clear that they needed to restrain him because it

appeared he did not know any of the things that he was doing. They tied him up. During all that time, the accused didn't attempt to run away. He remained in that trance. Importantly, the witness said that the accused had never behaved like he did that day. He had never lost control of his faculties to the extent he did on the day in question. She only remembered that sometime in the past, he had fallen ill to the extent of failing to comprehend what was around him. They took him for spiritual assistance from members of their apostolic sect.

During cross examination, it came out that the accused and the witness's marriage had been blessed with six children. Unfortunately three had died of natural causes. The deceased became their fourth child to die. She stressed that the accused's behaviour on the day in question was unusual. The singing, the chanting, the muttering and the running around the yard were all things that showed that something was wrong. She genuinely thought the accused was possessed by some spirit.

Washington Dzemwa

As already said, he is younger brother to the accused. His testimony was that he knew his brother as a calm person who was very accommodative and would assist everyone solve any problems they would have taken to him. When the accused's wife called for help he ran to the homestead. He arrived when other people were already there. He noticed that the accused was belligerent. He was holding two 'staffs'. One of them was dripping blood. The accused tried to attack him but he ducked. The witness with the help of others ultimately subdued the accused and tied him. He was completely delirious. By the time they achieved that the child had already died. They called the police. From the scene, they recovered an adze with which accused was carving, the 'staffs' and two axes. Amongst those only one of the 'staffs' had blood on it. He said they tried to question the accused but it was hopeless. He was restless, his answers were incoherent and meaningless. He claimed to be a prophet and blubbered a lot about church. He was vulgar and utterly confused. He was so violent that had the ropes not ben strong he would have ripped them apart. The police arrived about four hours after they had restrained the accused. Unfortunately he was still in that confused state.

After leading this witness, the state applied to produce doctors' reports which were compiled following examinations done to ascertain whether the accused was mentally disordered or handicapped. The defence did not object and the court duly admitted the report. We must however hasten to comment that the dearth of psychiatric practitioners in the country is threatening to derail all efforts to expedite the delivery of criminal justice system in the

country. Almost every week a trial or two fail to proceed because an accused person has not been mentally evaluated as directed by judges. The reason that we are always told is that there is a serious shortage of medical practitioners qualified in psychiatry. In fact we are advised that the Zimbabwe Prisons and Correctional Services does not have any psychiatric doctor in its employ. Financial challenges in turn make it difficult if not impossible for them to outsource the examination of mental patients. Having noted this *lacuna* in the administrative processes, many accused persons who wish to avoid trial simply come to court and plead that they are mentally ill in the full knowledge that the court will not be able to proceed in the absence of medical evidence to prove or disprove those claims. The accused know they can buy time. At times it works for them. Crucial witnesses may die during that intervening period leaving the state's allegations against an accused hanging by a thread. In this case, we first ordered the mental examination of the accused on 26 May 2022. Nothing came out of that order. Another directive was made on 15 June 2022. It was not acted upon timeously. The accused was only examined on 15 July 2022.

The issue for determination

Given the above, the only issue which falls for determination in this trial is whether accused had the requisite *mens rea* to commit the crime. The prosecutor was adamant that the chain of events as narrated shows that he did whilst the defence maintained that he did not.

The defence of automatism

As already said the accused alleged that he experienced what his counsel called insane automatism. The defence of automatism is provided for under Part II of Chapter XIV of the Criminal Law Code which caters for general defences and mitigating factors. S216 (1), (2) and (3) are couched as follows:

> **"AUTOMATISM**
> **216 Involuntary conduct**
> (1) Subject to subsection (3), the fact that the conduct of a person charged with a crime was not voluntary as required by paragraph (*c*) of section *nine*, that is, that the person did or omitted to do anything that is an essential element of the crime without conscious knowledge or control, shall be a complete defence to the charge.
> (2) Without derogating from the generality of the meaning of "voluntary conduct", the following do not constitute voluntary conduct–
> (*a*) a reflex movement, spasm or convulsion;
> (b) a bodily movement during unconsciousness or sleep;
> (c) conduct during hypnosis, or which results from hypnotic suggestion;
> (*d*) conduct over which a person has no control, his or her body or part of his or her body being merely an instrument in the hands of a human or natural agency outside him or her;
> and the expression "involuntary conduct" shall be construed accordingly.

> (3) If a situation in which a person's conduct is involuntary is brought about through the person's own fault, a court may regard the conduct as voluntary."

Clearly, the above constitutes a full defence to a crime where it is proved that the actions or omissions of an accused person were a result of involuntary conduct. There is no requirement that the involuntary conduct must be induced by a mental disorder or defect.

On the other hand, s 227 provides for the defence of mental disorder or defect in the following terms:

> **"227 Mental disorder at time of commission of crime**
> (1) The fact that a person charged with a crime was suffering from a mental disorder or defect when the person did or omitted to do anything which is an essential element of the crime charged shall be a complete defence to the charge if the mental disorder or defect made him or her–
> (*a*) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or
> (*b*) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.
> (2) For the purposes of subsection (1), the cause and duration of the mental disorder or defect shall be immaterial.
> (3) Subsection (1) shall not apply to a mental disorder or defect which is neither permanent nor long-lasting, suffered by a person as a result of voluntary intoxication as defined in section *two hundred and nine-teen*."

Automatism and insanity

Needless to point out automatism and insanity are two separate defences provided for under two different sections of the Criminal Law Code. In this instance, by claiming insane automatism I understood counsel to be conflating the defence of automatism which is provided under s 216(1) as shown above and mental disorder at the time of commission of the crime provided for in terms of s 227. As will be explained below, sane automatism is markedly different from insanity because with sane automatism, although the accused would have lost control of his muscular movements at the time of commission of the offence, his brain remains untainted. Yet a closer analysis of the provisions illustrates that it is possible for an accused to plead insane automatism. The combination of automatism and mental disorder or defect is justified by s 216 (4) which states that:

> "(4) If it is found that the conduct of a person upon which he or she is charged with a crime was involuntary, and that <u>such involuntary conduct was the result of a mental disorder or defect</u> as defined in section *two hundred and twenty-six*, a court shall return a special verdict in terms of section 29 of the Mental Health Act [*Chapter 15:12*]. "(Underlining is for emphasis)

Without a doubt therefore, automatism or involuntary conduct can be a result of mental disorder. In my view automatism caused by mental disorder or defect can indeed be classified

as insane automatism as distinct from sane automatism. There was however a period in the development of the Zimbabwean criminal jurisprudence that sane automatism as a defence became redundant because the courts had interpreted that there existed no difference between sane automatism and insanity.

G. Feltoe, in his article titled *Sane Automatism: The Demise of a Defence?* Rhodesia Law Journal, 1979 critiqued the cases of *R v Senekal*[2], and *R v Mavonani*[3]. Both cases dealt with the common law defence of sane automatism. He argued that right from its inception as a defence, automatism introduced grave difficulties to the concept of criminal responsibility chiefly because there was a very thin divide between it and insanity. As a result its existence had always been precarious. He concluded that the defence of sane automatism had been all but wiped out by the wide interpretation put upon the Mental Disorders Act by the Rhodesian courts. He added that any residual cases which remained could best be dealt with under some other category than automatism, such as accident, compulsion, etc. The author's argument that the defence of sane automatism was on its death bed was supported by BEADLE CJ's remarks in the *Senekal* case at p 489 where he said:

> "I prefer to express no firm views as to whether or not, as a question of fact, there is such a thing as 'sane automatism' under Rhodesian statutory law, in view of the new definition of a 'mentally disordered or defective person'; nor, if there is such a thing, do I express any view on the place such automatism now occupies in our criminal law."

The inescapable conclusion is that in essence, the court held that there was no difference between insanity and a situation where "a man's mind becomes so affected that he acts without in the least knowing why or how he is acting." The reality was that that man's mind could only be described as being 'disabled' at the material time. As a result of the decisions in the *Senekal* and *Mavonani* cases resort to the defence of sane automatism became less and less. In fact it is difficult to find any reported cases on sane automatism between that time and now. It signified the crucifixion of that common law defence in the Zimbabwean courts. Other lesser concepts such as diminished responsibility[4] and hysterical dissociation cropped up to protect accused persons who did not qualify to rely on the defence of insanity.[5]

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[2] 1969 (4) *S.A.* 478
[3] 1970 *(3) S.A.* 448
[4] See *S v Khumalo* HB61/06)
[5] See *S v Sheena Chikunda* HH563/14 quoting with approval the dicta in *Obert Nyamini Mapfumo* v *The State*

The advent of the Criminal Law (Codification and Reform) Act around the year 2006 saw the legislation of the hitherto common law Zimbabwean criminal law. The process encompassed codification of all crimes and the defences available to those charged with committing such crimes. The inclusion of the defence of involuntary conduct under s 216 of the Criminal Law Code signified the resurrection of sane automatism as already explained. Once that happened the defence was reintroduced with all its common law frailties. For instance, the raging debate on whether there is need for a court to investigate mental capacity or *mens rea* where automatism is pleaded is reignited. [6]There is no question therefore that both sane and insane automatism are valid and complete defences. However unlike the approach taken in both the *Senekal* and *Mavonani* cases, these two statutory defences although falling under one head cannot be conflated for a number of reasons. The consequences of the two forms of automatism are different. Whilst on one hand, sane automatism would result in an outright acquittal of the accused on the basis of lack of criminal capacity a finding of insane automatism on the other, would result in the court returning a special verdict in terms of s29(2) of the Mental Health Act. In the former scenario, the accused walks free with no strings attached as it were but with the latter situation, the court is obligated to consider the various options prescribed by law on how to deal with an accused who was mentally disordered at the time of commission of the crime.

My understanding of automatism in its different forms is that it is behaviour which is exhibited whilst the accused is in a state of impaired consciousness. Criminal responsibility cannot be attributed to an accused who acts or omits to act whilst in a state of automatism.[7] The accused's appreciation of his/her conduct is so damaged that he/she usually has no recollection of the events which led to the alleged criminal conduct. Automatism is a state in which one's conduct is simply mechanical. It is done without thought, is not willed and is a reflex. It is for that reason that the law stipulates that the *actus reus* of the offence is absent. The accused would have done the act or made the omission involuntarily. That behaviour is akin to impotence. You have the facility but completely lack the ability. The issue therefore is not whether the accused remembers the events but rather whether at the

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[6] Thus in *R. v. Mkize,* 1959 (2) S.A. 265 at p. 1 where the argument was made that voluntariness of the act or omission is fundamental. In its absence it is futile to investigate the presence or absence of *mens rea.* It follows that it is excluded; Yet C. 1. R. Dugard in 1967 *S.A.L.1.* 131, 135 argued that the approach in S. *v. Mahlinza,* 1967 (I) S.A. 408 (A.D.) was more preferable. In this court's the defence of automatism deals with the presence or absence of mental capacity more than it concentrates on the *actus reas* of the offence.
[7] *Ryan v The Queen* (1967) 121 CLR 205 at 213; *R v Falconer* (1990) 171 CLR 30 at 39.

crucial moment he acted involuntarily. For instance, amnesia which sets in after the conduct will not qualify as automatism.

Sane automatism is a condition which has been largely attributed to factors which include stress, intoxication, provocation and kindred circumstances.[8] As is clear, it is therefore a condition which in most cases is non-pathological. In simpler terminology, it is not caused by an infirmity of the mind. It is a transient, non-recurrent mental malfunction caused by external stimuli which the mind of an ordinary person would be likely not to have withstood and which produces an incapacity to control his or her acts.[9] It matters not that the external factor was physical or psychological. In contradistinction, insane automatism which I have said in essence is insanity relates to an underlying mental infirmity which is prone to recur, which removes the accused's capacity to control his or her actions and which prevents him or her from appreciating the nature and quality of such actions. The presence of a disease of the mind or mental illness is therefore central to a plea of insane automatism. It is not a requirement where sane automatism is pleaded. Some of the diseases which have been known to cause insane automatism which results in an accused losing total control and direction of their will are schizophrenia, brain injury, tumour or cerebral arteriosclerosis among several others. Put bluntly, by pleading insane automatism, the accused is in reality alleging that he or she was mentally disordered or intellectually handicapped at the time of commission of the offence.

Having pointed out these distinctions and restating that the Criminal Law Code distinguishes between sane and insane automatism, I hasten to emphasise that the defence of involuntary conduct (automatism) falls into that category of defences where the courts have been urged to be very circumspect in accepting. The defence of sane automatism is easy to allege but extremely difficult for prosecution to disprove. It would be dangerous to the administration of justice were the courts to simply accept such a defence for the mere say so. An accused person therefore bears the evidential onus to at least illustrate that there is a reasonable possibility that the act was not voluntary. That burden is relatively lower than that which is required in instances where the accused pleads insane automatism or outright insanity. The accused is required to prove insane automatism or insanity on a balance of probabilities.[10] I have already indicated that these evidential challenges were part of the reason why the courts sought to attenuate the span of the defence of sane automatism.

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[8] https://sherlawyers.com.au/automatism-

[9] See *R v Falconer* (1990) 171 CLR 30 at 30, 53.

[10] *R v Youssef* (1990) 50 A Crim R 1 at 3

Application of the law to the facts *in casu*

In this case, the accused pleaded insane automatism. In other words he alleged that the automatism he suffered was in one way or another caused by a disease of the mind. The witnesses called by the state were unanimous that what the accused did on the day in question was not only out of his character but clearly showed that he had lost control of his faculties in some big way. It must be noted right from the beginning that the accused is a man who appears to be deeply religious. His history of worship before this tragedy was unremarkable. He went to church with his family like any other congregant would do. He worshipped under an apostolic sect which has ultraconservative practices which include the belief that their sick members do not need medical care. Instead, they are dogmatic that healing of the sick can only be achieved through faith and prayer. As a result of his faith, the accused did not seek medical attention some years back when he suffered an unexplained abnormality which resulted from what started off as a suspected insect bite in the fields. That bite left him unable to appreciate some of his actions. He only got better when prophets from his sect prayed for his deliverance from the unnatural ailment. I mention medical care and hospitals because of the nature of the defence of insane automatism/insanity. It is automatism which results from a disease of the mind. The requirements that must be met for that defence to succeed are that:

a. the accused must have been unaware of the physical nature and quality of the act he committed because of a disease of the mind
b. If he was aware of the physical nature and quality of his act, he was unaware that the act was wrong because of a disease of the mind
c. If he was aware of both the nature and quality of his act, and that it was wrong, he was unable to resist the impulse to commit the crime because of a disease of the mind. That constitutes the so-called irresistible impulse.

In each of the three requirements the element of a disease of the mind recurs. The defence therefore places on the accused the reverse onus to prove on a balance of probabilities that he was insane at the time he committed the crime. The requirement is obviously a departure from the established rule in criminal law that the accused has no onus to prove his innocence. Once he/she has laid the basis of how he/she denies the crime it becomes the duty of the prosecutor to disprove that defence. As stated by HUNGWE J (as he then was) in the case

of *S* v *Chikandiwa*[11] it follows that in practice the defence is required to call psychiatric evidence to establish that the accused was not mentally responsible for his conduct at the time he committed the crime. That finding by HUNGWE J is supported by the wording of s 29(2) of the Mental Health Act [12]which provides that:

> "(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 248 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." (Underlining is for emphasis)

The word *including* whether used as a verb or a preposition means to consider as part of something or to add to a category. Viewed from that meaning, s 29(2) requires a judge or magistrate as of necessity, to consider medical evidence in addition to any other evidence available when ascertaining the mental status of an accused person at the time that he committed the conduct constituting the crime. It is not possible and will constitute an irregularity were any court to declare an accused person mentally disordered or handicapped in terms of s 29 (2) without the aid of medical evidence. In my view, medical evidence connotes the testimony of a medically qualified person, who is competent to provide admissible information falling outside the competence of the court. Like any other evidence it may manifest as *viva voce* testimony or may be provided in the form of a statement, report, medical notes or affidavit.

Common-sense will dictate that where the prosecution disputes the insanity of an accused person, it cannot be their duty to procure evidence which shows that the accused was mentally disordered at the material time. It is critical therefore for the accused to produce medical evidence. Without attending or having previously attended at a medical facility, it will not be easy for the accused to discharge the onus. The only other alternative will be to call psychiatric experts during trial. Even then it might be an insurmountable task if no prior proper psychiatric examinations would have been carried out. In this case, by not seeking medical treatment when he suffered the abnormality he complained of in the past, the accused inadvertently deprived himself of the opportunity to have doctors certify that he suffered from a disease of the mind when he attacked and killed his daughter.

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[11] HH 281/2017
[12] [Chapter 15:12]

To his credit, Mr *Makwanya,* counsel for the accused, must have appreciated that for their defence to succeed it was vital that medical evidence of the accused's mental condition at the material time be availed to the court. On 15 July 2022 and in pursuance of that objective the accused person underwent a psychiatric examination. It was conducted by *Christopher Njanjeni,* a forensic Psychiatric Nurse Practitioner whose qualifications were stated as Msc. NS Psch (UZ) RMHN CMN RN. Below I reproduce verbatim the material aspects of his report. They were that:

> "Zexteen Dzemwa had not been well since 2017 when he developed a mental blackout and was treated by traditional faith-based healers. He could not remember anything after a claimed bite by a scorpion in the fields. He completed one and a half days in a confusional state in 2017. The patient is however not able properly account for his actions at the time of committing the crime. He only remembers the sight of a big snake around the fireplace and followed by a weird wind which obscured his consciousness. Zexteen had a paternal aunt who suffered from a mental illness and passed away. Zexteen was examined by a psychiatrist at Parirenyatwa Psychiatric Unit and was treated for mental illness with carbamazepine 200mg per oral twice daily. He also experienced talking to himself, confusional and depressive states which would cause him to weep at times. All of the above were treated by traditional faith-based healers. The patient is very remorseful to the death of his daughter. The patient is likely to be suffering from Temporal Lobe Epilepsy. He can benefit from a medical investigation known as Electroencephalogram (EEG) to properly establish the diagnosis in a mental institution."

The inadequacies in the report are conspicuous. The first and most glaring one is that the report does not state the psychiatrist's opinion on whether or not the accused was mentally disordered or handicapped at the time he committed the offence. A verdict in terms of s 29 (2) is not possible without evidence showing what the accused's mental status at the time of commission of the offence was. Further the report omits to state the findings of the psychiatrist who treated the accused ostensibly for mental illness at Parirenyatwa Psychiatric Unit. Instead it emphasised the fact that the accused sought treatment from faith-based healers. Unfortunately, the law does not recognise any psychiatric diagnosis which may be carried out by a faith-based traditional healer no matter how strong a patient's beliefs in the powers of the traditional healer may be. To seek to present such evidence in a court of law is a futile exercise. Thirdly, the report concludes with a statement which suggests that its author's investigations were inconclusive. It suggests that further tests must be carried out to properly diagnose the problem. That suggestion is an acceptance that the expert who examined the accused could not determine the critical issue relating to whether the accused's mind was diseased at the material time. With those shortcomings the report becomes unhelpful. The accused fell far short of discharging the onus on him even on the lower scale of proof on a preponderance of probabilities. The defence of insane automatism in terms of s 216 (4) cannot be sustained.

Yet if looked at differently, there is little doubt if any that the accused lacked criminal capacity. There are marked differences between criminal and civil procedure. In civil proceedings litigants are tied to their pleadings. For instance, a court cannot extend to a defendant a defence that he/she/it will not have pleaded. In criminal procedure however, it is permissible for a court to acquit an accused person on the basis of a defence he/she did not directly plead provided the evidence supports the availability of that defence and that the accused will have whether deliberately or inadvertently, laid a basis for that defence. I have already said the defence of sane automatism provided for in s 216 (1) relates to a non-pathological condition which could be transient in nature. There is no onus on an accused person to prove it. He or she is simply required to lay a foundation of that defence. The state is then required to disprove it.

In earlier paragraphs of this judgment, I described the accused person's religiosity under the auspices of a conservative apostolic sect which discourages its followers from accessing medical care. There is unrefuted evidence that the accused's family has a history of mental illness. His aunt suffered from mental illness. There is equally uncontroverted evidence that the accused in 2017 suffered an abnormality which caused him some kind of mental blackout after being bitten by an insect whilst working the fields. He went for a whole day without appreciating any of his actions. In addition, the accused and his wife's marriage was blessed with six children. Three of the children died of natural causes. The fourth one died in this tragedy. We are advised that that history of deaths in his family troubled the accused. As a result, he suffered from confusion. He would weep without cause and often went into delusional soliloquy accompanied by depression. He did not seek medical attention for that.

In *S v Pamela Mashungu* [13] this court discussed criminal capacity and held that:

> "…diminished criminal capacity amounts to, where the evidence shows it, a statement that due to overwhelming severe psychological and emotional stress which worked to deprive the accused of the capacity to appreciate the wrongfulness of her conduct, she could not, in that state, form the necessary capacity to act in accordance with the appreciation of the wrongfulness of her conduct."

Although the Court in *Pamela Mashungu* was dealing with the defence of diminished responsibility which is only a partial defence, what is key is the acceptance that overwhelming psychological and emotional stress may prohibit an accused person from acting in full appreciation of the wrongfulness of his conduct. As earlier stated, sane automatism results

[13] HH 375/13

from external stimuli. The accused in this case suffered from acute psychological and emotional stresses. The stimuli were so powerful that in the end he must have been on the brink of insanity. Those stimuli drove him into a barbaric attack on a defenceless child he loved immensely. He did not know anything about it. Hours after the attack he remained in that frenzy. Even at the time of this trial he still had no recollection of the events which led to the child's death. The evidence that we have, which again remained uncontested by prosecution is that the circumstances under which the accused finally fell into this trance started with him singing and chanting incoherently. That taken together with his extremist religious beliefs resulted in him sliding into the dissociative disorder which ended with catastrophic consequences. In that state he did not know what he was doing. This finding is supported by the fact that the accused's assault on the deceased was strangely out of his character as described by all the witnesses who gave *viva voce* testimonies in this trial.

The State sought to disprove the accused's defence by producing two medical reports compiled on 30 January 2022 and 31 January 2022 by Doctors Moses Kajawo and I. Machera respectively. Both reports stated quite unequivocally that there were no facts indicating that the accused was mentally disordered and was fit to stand trial. Unfortunately, the examinations conducted on the accused person were pursuant to s28 of the Mental Health Act which provides as follows:

> **"28. Procedure where person found mentally disordered or intellectually handicapped during preparatory examination or trial**
> (1) …
> (2) If, at any time during a preparatory examination against, or trial of, any person—
> (*a*) it appears to the judge or magistrate presiding at the preparatory examination or trial that the person is mentally disordered or intellectually handicapped; or
> (*b*) …
> the judge or magistrate shall inquire into that person's mental state.
> (3) For the purposes of inquiring into a person's mental state in terms of subsection (2), the judge or magistrate may—
> (*a*) …
> (*b*) direct two medical practitioners to examine the person and inquire into his mental state and, after such examination, the medical practitioners shall certify in writing in the prescribed form as to the person's mental state"

Clearly, the purpose of an examination in terms of s 28 is to ascertain the accused's mental state at the time of his trial. That examination is concerned with whether the accused is capable of understanding the proceedings. That is so because a person may become mentally disordered or intellectually handicapped after the commission of an offence. The procedure

under s 28 is therefore not meant to determine the accused's state of mind at the time he allegedly committed the offence which is provided separately under s 29. A determination of whether or not an accused's mind was diseased at the time of commission of the offence requires more than the general assessment followed under s 28. It usually requires the intervention of psychiatrists who among other assessment methods must collect collateral history by interviewing the accused's relatives and other people who knew him during the material times. The medical reports by the two doctors in this instance are therefore completely useless for purposes of disproving the accused person's defence. He never alleged that he was mentally disordered or intellectually handicapped during trial.

In the final analysis, the accused successfully discharged the evidentiary burden of laying the foundation of the defence of automatism. The state proceeded on the side show of seeking to disprove that he was mentally ill. In the end, prosecution failed to show beyond reasonable doubt that sane automatism did not exist in this case. Once that conclusion is reached, the time honoured principle of the criminal law that it is neither just nor worthwhile to expose people to criminal sanction for unintended actions or the unforeseen consequences of an act except in instances of inexcusable recklessness applies. There is in criminal law, always a distinction between intentional and unintentional conduct. The accused committed this act, heinous as it is, unwillingly and involuntarily. He completely lacked control over his muscular movements and actions as to afford him the defence of automatism. We have already highlighted the fact that where the defence of sane automatism succeeds the accused is not discharged on the basis of insanity under s 29 (2) which would make him subject to the restraints imposable regardless of the acquittal. Instead he is entitled to an unconditional acquittal.

In the circumstances, it is the court's finding that the state failed to prove the accused's guilt beyond a reasonable doubt as required at law. **Accordingly the court finds him not guilty and he is acquitted of the charge of murder.**

National Prosecuting Authority, State's legal practitioners
Makwanya Legal Practice, accused's legal practitioners