



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Criminal Case No. 91/2004

In the matter between

REX

versus

SENZANGAKHONA TSABEDZE

Coram

J.P. ANNANDALE, ACJ

For The Crown
For the Defence

Mr. Phila Dlamini
Mr. E. Maziya

**EX TEMPORE
JUDGMENT**
5 FEBRUARY 2007

[1] The matter initially was before one of my learned brothers in a different court on a previous occasion many, many months ago. At that time the court directed

that the accused person be referred for psychiatric observation and evaluation. That was done as long ago as 23 August 2004. It is with the greatest of displeasure and concern that it is noted that it has taken such an inordinately long time since the referral for psychiatric evaluation and report, August 2004, until today when the accused again appears before court. When the matter came before this court today the crown and defence indicated that they are both ready to proceed and I may add that this matter was not scheduled for this court but before another judge in today's roll. For reasons not necessary to report this court then agreed to hear the matter.

[2] When the crown put the charge of murder to the accused person he gave an indication that he understood the charge but that he pleads not guilty and added that at the time of the incident he was mentally unwell. His attorney Mr. Maziya ~~confirmed the plea to be in accordance with his instructions~~ and by consent between the prosecution and the defence prior to leading oral evidence the court received as evidence four documents, namely three reports on the mental condition of the accused person and the fourth exhibit the post-mortem report concerning the deceased. I will revert to the documentary exhibits later.

[3] In *viva voce* evidence the court heard from two witnesses that on the date, time and place in issue the accused person came during the night to the hut of the deceased, forced entry into it, took the deceased from it, the deceased being the grandmother of the first crown witness, and took her outside. There it was observed by both the first and the second witnesses that deceased person was being assaulted with the first witness adding that he noticed that the assault was carried out by the accused person while the second one was not able to identify the perpetrator.

[4] From their evidence it is common cause and uncontroverted that on the date, time and place as alleged in the indictment the deceased person was assaulted by the accused person with unknown objects. Possibly it might also incorporate a pick but is not necessary for such finding to be made. At minimum the accused person used an instrument or instruments to inflict injuries. It is also common cause from Exhibit "B" that the deceased sustained severe burns all over her body and also what could be termed a "stab wound". The Pathologist describes it as a "penetrating wound" over the back of the left chest. Clearly it was an injury of mortal consequence and in addition thereto the deceased was

set alight which fire was doused by the police when they arrived.

[5] It is therefore the finding of this court, having heard and considered the evidence available to it, also taking into account the uncontroverted evidence produced by the crown and in the absence of any evidence or explanation to the contrary by the accused that indeed the act that the accused person was charged with was in fact committed by him.

[6] However, despite such a factual finding, before a court can arrive at a possible conviction it is necessary to decide a further aspect and that is whether at the time that the offence was committed the accused or the perpetrator or the person who committed the act can be held liable for it, whether he infact possessed the necessary *mens rea*. If it is ~~found that the person at such a time was *doli incapax* or that~~ he lacked the ability to distinguish between right or wrong and also the ability to properly act in accordance with the distinction between right and wrong, then in the ordinary course as is applicable here, I do find, based on the evidence I will discuss just now, that the accused person indeed lacked *mens rea* to sustain a conviction in that he was *doli*

incapax and this finding is also based on evidence before the court.

[7] By consent documentary evidence has been placed before the court to indicate that at the time of the commission of the crime the accused person was suffering from a disease of the mind which is diagnosed as "schizophrenia complicated by cannabis abuse". Schizophrenia is a chronic psychotic disorder characterized by a disturbance of emotion, behaviour and perception leading to a disintegration of personality. People with this disorder can be unpredictable, suddenly violent and grossly irrational in their actions. This disorder is treatable. This opinion is accepted by the court for reason of its uncontroverted nature, further, the court accepts it because it is formed by Dr. Ndlangamandla, a Psychiatrist with the necessary specialist qualifications and in service of the National Psychiatric Hospital at the time ~~when this report was made in July 2004.~~

[8] It is necessary to underline the fact that from this report, in the opinion of the Psychiatrist who in the present circumstances without further ado can be labelled or termed as an expert with sufficient knowledge in the field of Psychiatry, is that when the accused did what he is charged with, at that time he was unable to distinguish

between right and wrong and unable to control his actions in accordance with that knowledge of distinction.

[9] Subsequent to the opinion formed in 2004 the accused person has again on at least two occasions been examined firstly by the same Dr. Ndlangamandla who compiled exhibit "A" which I have just referred to, who then later in 2006 said that the accused person is in remission without signs of mental disease or illness and that he is capable of giving a fluent and coherent account of himself and that he has an insight into his present circumstances and is therefore fit for trial. A similar opinion was held by Dr. Freeman, a medical Psychiatrist also of the National Psychiatric Hospital, who states in exhibit "C" that when he examined the patient in September 2006 he found that he continues to have symptoms of mental illness but that he is able to appreciate the circumstances of the crime and to participate in his ~~defence and that in his clinical opinion the accused is fit for~~ trial.

[10] As repeatedly said, these opinions are uncontroverted and uncontroversial, expressed by experts in their field. The situation as it is currently before court is not always the case. This court does not inevitably accept expert opinions. It is on the basis of the experts opinions that

firstly, the accused was indeed fit to plead to the charge and raise his defence in court in so far as is appropriate through his legal representative. It is also clear that the accused cannot be convicted of the crime he was charged with.

[11] Therefore, the legislature in its foresight and having knowledge that such occasions do from time to time arise, has made specific provision under Section 165 of the Criminal Code for such a situation.

[12] Having heard submissions and considered the outcome of this matter, it is indeed the finding of this court as is contemplated under Section 165 of the Criminal Procedure and Evidence Act and as outcome of this matter the judgment of the court is recorded in the following terms:

"It is found that the commission of the offence in respect of
which the accused has been charged was in fact done by him. He did the act charged with but he was insane at the time, lacking *mens rea*. He was *doli incapax*. Wherefore a finding as contemplated under Section 165 (1) of the Criminal Procedure and Evidence Act 1938 (Act 67 of 1938) is made. Under Section 165(2) (Act 67 of 1938) this matter is reported to the Attorney General for

the information of His Majesty, inclusive of the transcript of the record, exhibits, indictment, summary of evidence and submissions, if any, by the accused. Meanwhile, until such time an appropriate order is made by His Majesty, it is ordered that the accused be detained in custody as a criminal lunatic at such place as is designated by the Commissioner of Prisons."

A handwritten signature in black ink, appearing to read 'J. Annandale', with a long horizontal stroke extending to the left.

JACOBUS P. ANNANDALE
ACTING CHIEF JUSTICE
