

JOSEPH MUTAPA TOBO v THE PEOPLE (1985) Z.R. 158 (H.C.)

HIGH  
(COMMISSIONER  
24TH  
(CASE NO.HN/23/81)

N.N.  
APRIL,

COURT  
KABAMBA)  
1985

Flynote

Criminal Law and Procedure - Insanity - Disease of the mind - Whether every disease of the mind can sustain a defence of insanity.

Evidence - Medical Expert - Value of opinion based on what the medical expert has merely surmised or has been told by others.

Headnote

When defence counsel suspected that the accused could have been suffering from disease of the mind he applied to the court to have the accused medically examined to ascertain whether the defence of insanity could be available to him.

The medical officer who examined the accused relied on accused's own story without endeavoring to make findings based on independent facts or information.

**Held:**

- (i) It does not follow that just because an accused suffers from disease of the mind, his actions should be dismissed as those of lunatic. The kind of disease of the mind which is relevant to the defence of insanity is that which produces the kind of act or omission complained against.
- (ii) The real value of the evidence of a medical expert consists of the logical inferences which he draws from what he has himself observed, not from what he has merely surmised or has been told by others.

**Cases referred to:**

- (1) Earle v Picken 5C & P 542W
- (2) Metropolitan Asylum Dist. v Hill 474 T. 29.
- (3) Aveson v Lord Kinnard 6 East 188.

**Legislation referred to:**

Penal Code, Cap. 146ss. 11,12.

For the Accused: Munthali and one other Counsel, both of legal Aid.  
For the State: F.M.Mwiinga, Senior State Advocate.

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Judgment

**KABAMBA, COMMISSIONER:** dealt with matters which are not the subject of this report and continued:

At the first session where the accused appeared, he pleaded not guilty without more. The defence of insanity was first alluded to in October, 1981, when the Learned Advocate who handled the defence made an application to have the accused sent to Chainama for examination concerning his state of mind. The reason Counsel gave was that he had

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not been able to get proper instructions from the accused. Yet, the Accused had seemingly given instructions to the learned Senior Legal Aid Counsel, Mr Munthali earlier without any apparent difficulty and was ready for trial at the July sessions. The matter was not heard during the July sessions solely because the key witness for the prosecution was ill at Chilubula Mission Hospital. Munthali is not one advocate who can miss any element of mental instability in a client. The application by the other advocate, baffled not only the learned Senior State Advocate, Mr Mwiinga but His Lordship Commissioner Musumali too. His Lordship was forced to remark on record:

"My own view of this accused person is that he is sane. Since I am not a Psychiatrist however, I will reluctantly grant this application..."

Having been sent to Chainama Hospital, the Accused ganged up with other two suspects who were sent there by the courts to have their mental states determined before trying them and escaped at night on the 11th March, 1983. Fortunately, they were all recaptured in Kasama and the accused was detained at Lusaka remand prison from where observations about his mental state continued to be made by a Doctor who resided and had wards with nurses at Chainama.

It is in this light that I proposed to consider the medical report and the evidence of the Doctor. This is the only evidence led for the defence to establish the defence of insanity, which, I am forced to assume, was the defence raised notwithstanding the fact that it was not specifically mentioned by either the accused or his Counsel as the defence upon which they relied. It then becomes the accused's burden to prove that he was insane at the time he committed the offence in order for him to rebut the presumption of intention:

"Every man is presumed to be sane until the contrary is shown. Every sane man is presumed to have known and to have intended the natural and necessary consequences of his act."

Section 11 of the Penal Code Cap. 146 puts the first segment even more ruthlessly:

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

To prove the contrary, the accused must show, on the balance of probability, that he was labouring under such a defect of reason, due to disease of the mind, as either not to know the nature and quality of his act, or if he did know this, not to know that he was doing wrong, section 12 of the Penal Code Cap.146, spells this out in the following words:

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what

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he is doing, or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above-mentioned in reference to that act or omission."

This exception expressed in the last part of the section is of tremendous significance to the success or failure of this defence. It does not follow that just because an accused suffers from a disease of the mind, his actions should be dismissed as those of a lunatic. The kind of disease of mind which is relevant to this defence is that which produced that kind of act or omission complained against. It therefore becomes necessary to show, on the part of the accused, systematic course of conduct, propensitively leading to the act or omission in question. It ought, for instance in this case, to be demonstrated by evidence that the accused's disease of the mind had rendered him acquire the propensity to assault women sexually or to terminate the lives of living things or even to resort to ordinary physical violence against a class of persons or all and sundry. This position is in consonance with the advice given by the Judges to the House of Lords after M'Naghten was acquitted of murdering Sir Robert Peel's Private Secretary on the grounds that M'Naghten was insane. (1843) 10 CI & Fin 200).

In this case before me, the accused person has not told me himself whether at the time he killed Salome Safeli Chitabo he did not know what he was doing or that he knew what he was doing but that he did not know that it was wrong; or that he heard voices threatening to kill him and he believed those voices to represent Salome Safeli Chitabo and therefore killed her in self-defence. He did not even say that to the Police. There is nothing to that effect on it. He killed Salome on 21st September, 1980 and did not tell anybody about these voices. He was admitted to Chainama Hills Hospital on 16th November, 1981, that is 14 months later, and that is when the story about voices came out. Even at the time when his Counsel Mr Matsiko applied for him to be sent to Chainama, no mention was made of the accused having been hearing voices. Instead, it was the stars he claimed to see and told the court so. The brief question and answer between him and the court reveals this clearly:

"Court: How are you feeling accused person?  
Accused: Not very well.  
Court: What do you mean by not very well?  
Accused: I am seeing stars.  
Court: Since when?  
Accused: A long time ago. I was seeing them even when I went to Mansa."

This story of seeing stars never reached the doctor's ear. The accused substituted voices for stars and the doctor took it all in and based his

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opinion on it. The substance of the doctor's report on facts upon which he relied for his opinion clearly speaks that it was the Accused's own story the Doctor used:

"About past psychiatric history he stated that he required treatment from Kasama Psychiatric Unit but cannot remember the year. He was reported to be mentally sick before the alleged offence (murder) which took place in September, 1981."

It is worth to note here that the report does not mention the name of the person who reported that the accused was mentally sick before the alleged offence took place. The report continues:

"Since 1979, he has been complaining of hearing voices of some unknown people. He used to hear these voices even when nobody was around. These voices were accusing in nature and used to threaten to kill him. He was surprised by these voices and told relatives in 1979. During that period he was treated by traditional healer."

Here again, not a single name of those relatives whom the accused said he told about those voices is disclosed. Not even the name of the traditional healer. The report goes on:

"About the alleged offence the Accused on admission to this hospital, stated that he did not know that he had killed the woman. But later on claimed that for three months before the incident, he was hearing both male and female voices insulting him. When he saw the deceased, he thought that she was the one insulting him. At the time of admission to this hospital, his affect was flat and he admitted to hearing of some unknown voices."

This is all the evidence upon which the Doctor founded his opinion:

"In my opinion, Mr Joseph M. Tobo suffers from "Psychotic illness."

The doctor explained that this is one of the major psychiatric disorders where the patient holds a false belief which is a product of irrational thinking. He goes on to conclude:

"These voices he thought were coming from the deceased and there is a strong likelihood that at that time of alleged offence, he was mentally disturbed by his illness and acted on false belief."

He went on to say that the accused no longer hallucinates because of prescribed medication. The prescription remained unrevealed in the report too.

It is quite impossible for me to accept an opinion based on data spoon-fed to Doctor from the mouth of an accused himself for whom there is good reason to believe that he embarked upon a course of evading justice by deceiving the tribunal and those whose views it has been known to value highly in making its decisions. The Doctor said himself in his

evidence before me that his attempt to contact the accused's relatives to give him further information or verify that which the accused gave him proved fruitless because none of his relatives was prepared to come forward to confirm the accused's illness story. The doctor's opinion is of course based on reason, but we know that reasoning is secondary industry which is fed with the raw material of precepts. The kind of conclusions made from the process of reasoning will of necessity reflect the rich flavour or the vacancy of the raw material used in the exercise. Here, I have recognised the raw material supplied to the doctor as pure deceit. The opinion cannot therefore be correct. It is vacant. Let it be known from now on that the real value of the evidence of a medical expert consists in the logical inferences which he draws from what he has himself observed, not from what; he merely surmises or has been told by others (*A.G. v. Nottingham Corporation* (1904) Ch.673; *Metropolitan Asylum Dist. v. Hill* 47. T. 29) (2). The medical report lacks those logical inferences. It has no value to this investigation.

The evidence of Martin Mulikita refutes the idea of insanity on the part of the accused. He told me that he has known the Accused since the accused was born and he, accused, has never suffered from any mental illness. The witness was emphatic:

"If anybody came and told me that the accused was suffering from or was insane, I would say he is lying. I have known the accused since he was born. He is not mad and he was not mad at the time."

Remmy Mutupa also refuted the idea of insanity. The witness swore that the accused has never been insane and that he never heard of accused complaining about hearing voices nor was he ever taken to Kasama Hospital as a mental patient at any time he has known the accused. The witness added that the accused even pleaded for mercy when he was apprehended.

This, and the fact that the character that the killing took did not reflect the act of self-defence as we understand it, makes the attempted rebuttal against the sanity presumption fail despite the required standard (the preponderance of probability). It is not an action of a man who believes to be in immediate physical danger of death at the hands of woman to concentrate on forcible sexual intercourse as a means of self defence before finally killing the woman by strangling her. This and the absence of any evidential data to show any systematic course of conduct pointing to a propensity to rape women or cause or involvement in violence of any kind as product of the mental disease, completely makes the defence of insanity faked and therefore unacceptable. This is why I concluded that Tobo was guilty without making any reservations.

Malice aforethought, which is a necessary ingredient for convictions in murder cases is ostensibly present in this case. Salome Safeli Chitabo

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was killed in the process of being raped as I have said earlier. The offence of rape is a felony and the law makes proof of any felonious circumstance as proof of malice too:

"204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following :

- (a) .....
- (b) .....
- (c) an intent to commit a felony;
- (d) .....

The definition of rape in the Penal Code, Cap. 146 is contained in section 132 and it is described as a felony "..... is guilty of the felony termed "rape".

Even if rape is denied and the prosecution failed to go all out and prove that offence specifically, as appears to be the case here in the absence of any request for evidence of spermatozoa from Dr Mathur, this would only shift the character of the felony from rape to indecent assault provided for under section 137 (1) which is also described as felony. The fact that Salome Safeli Chitabo's body was found not only naked but also her genitalia was found to have sustained bruises and laceration of the postorial vaginal wall, can only point to the fact that some one other than the deceased herself tempered with that part of her body without the deceased's consent. Indecent assault will have been established against Tobo, he being the person who did it.

I am satisfied that the prosecution have proved Joseph Mutapa Tobo guilty of murder in breach of section 200 of the Penal Code beyond all reasonable doubt. I find Tobo guilty and convict him of the murder of Salome Safeli Chitabo.

Accused convicted of murder

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