

SOUTH AFRICA / JUDGMENT

S v Dumba (K/S 23/08) [2010] ZANCHC 73 (23 June 2010)

[2010] ZANCHC 73

COURT

Northern Cape High Court, Kimberley

BEFORE

F Diale Kgomo

CASE / FILE NUMBER

K/S 23/08

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape High Court, Kimberley)

Case No: K/S 23/08

Heard: 01/02/2010

Delivered: 23/06/2010
In

the matter between: THE
STATE
v
ANTONIO
DUMBA
.....Accused

JUDGMENT

KGOMO JP

The accused, a 51 year old man of Platfontien, Kimberley, is charged with the murder of his wife, Annatjie Dumba, at Platfontein on 26 September 2007. He pleaded not guilty to this charge and proffered the following plea-explanation in terms of s115 of the Criminal Procedure Act, 51 of 1977 (the CPA): On the day in question he was unable to figure out what was happening around him. It all started at Schmitsdrift (where his family stayed before relocating to Platfontein). He experienced dark interludes during which “die siekte in my kop” caused him mental confusion. He says when he suffered these attacks he became oblivious of whether he was dead or alive.

The accused says he cannot recall what precisely happened that eventful evening. His recollection is of the police arresting and ushering him onto the police van. He suffered another similar mental attack a few days later in the police cells. However, after the police had spoken to him about the incident “het ek onthou dat ek die oorledene met die byl gekap het, maar ek weet nie waarom ek dit gedoen het nie.”

The issue that falls for determination is whether the accused was corpus mentis when he attacked the deceased and chopped her to death. According to the evidence of Dr Adin Don Surtie who conducted the medico-legal autopsy on the body of the deceased on 27 September 2007 the chief autopsy findings and the cause of death are:

“(b) Multiple incisions on head and neck, with multiple fractures of skull and 6th/7th cervical vertebrae fracture dislocation.

(c) Fracture – dislocation of the right jaw.

That the cause of death was: head and neck injuries.”

It was common cause that the deceased died instantly.

Prior to the accused pleading and more specifically on 10 March 2009, I issued the following order to the Superintendent of the Valkenburg Hospital, Cape Town, as a similar mental observation facility did not exist in the Northern Cape:

“1. In accordance with the provisions of sections 77,78,79 of the Criminal Procedure Act, 1997, I direct that ANTONIO DUMBA be removed to the Valkenburg Hospital and that he be there examined.

2. I direct also that the above-named psychiatrist(s)/superintendent enquire into whether the accused, by reason of mental illness or mental defect –

(a) is capable of understanding the court proceedings so as to make a proper defence; and/or

(b) was at the time of the commission of the offence criminally responsible for the offence charged, whether he was capable –

(i) of appreciating the wrongfulness of his act; or

(ii) of acting in accordance with an appreciation of the wrongfulness of his act.

3. I direct also that the Medical Superintendent/Psychiatrist(s) submit their reports, made in terms of section 79(1) (b) of the Criminal Procedure Act, 1977, in quadruplicate to the Registrar at Kimberley and one copy to the Director of Public Prosecutions at Kimberley on or before the 08 April 2009.”

Pursuant to this order a psychiatric report on the observation of the accused was compiled by Prof S. Kaliski (a specialist psychiatrist) and senior medical superintendent, Dr M Roffey (a specialist psychiatrist) and Ms M Swart (a clinical psychologist). When Dr Kaliski was due to testify both counsel were of the view that s79(1) (b) of the CPA was not fully complied with in the respect that s79(1)(b)(iii) contemplates that the Court appoints a psychiatrist for the accused.

State Counsel, Adv T Barnard, was particularly concerned that this aberration may vitiate the State's case on account of the irregularity, if found to be material.

Section 79(1)(b) where relevant provides that:

“79 Panel for purposes of enquiry and report under sections 77 and 78

- (1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on-
 - (a) ----.
 - (b) where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-
 - (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;
 - (ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State;
 - (iii) by a psychiatrist appointed for the accused by the court; and
 - (iv) by a clinical psychologist where the court so directs.”

The report by the medical officers (para 5 above) is unanimous. They concluded that the accused “provided a good account, although he insisted that he was confused at the time of the alleged offence. No symptoms of mental illness were evident. In the ward he behaved and functioned normally, and he impressed as being of low average intelligence (taking into account his lack of education).”

Prof Kaliski testified, nevertheless, and supported the report. The credibility of his evidence was supported by State counsel and not challenged by Mr Van Tonder for the accused. What was challenged though was the lack of appointment of a psychiatrist for the accused by the Court. Mr Van Tonder contended that the provisions of s79(1)(b) with the exception of s79(1)(b)(iv) which allows the Court a discretion gleaned from the wording that the court can issue a direction that the requisite enquiry be conducted and reported on “(iv) by a clinical psychologist where the court so directs.”

In the premises, Dr Kaliski's evidence must be approached in the same manner as that of a psychiatrist who has done a preliminary investigation to assist the Court to determine whether an accused ought to be referred for mental observation for purposes of ss77, 78 and 79 of the CPA. For the same reason that this Court cannot ignore the evidence of Maria Rosa, Kosta Lumeta and the accused himself on whether the accused displayed deviant behaviour so too should Dr Kaliski's evidence be considered. Indeed, his evidence, for me, ranks higher because he is independent and the non-compliance with the provisions of s79(1)(b)(iii) does not detract from

his expertise. In *R v Trupedo* 1920 AD 58 at 62 the Appellate Division stated that:

“The general rule is that all facts relevant to the issue in legal proceedings may be proved. Much of the law of evidence is concerned with exceptions to the operation of this general principle, as for example the exclusion of testimony on grounds of hearsay and remoteness. But where its operation is not so excluded it must remain as the fundamental test of admissibility. And a fact is relevant when inferences can be properly drawn from it as to the existence of a fact in issue.”

In *S v Lubisi*: In re *S v Lubisi and Others* 2003(2) SACR 589(T) at 594a and 595d Bertelsmann J found the provisions of s79(1)(b) (as qualified by me above) to be peremptory. In *S v Ramokoka* 2006(2) SACR 57(W) the Court stated at 62d-g (paras 25 – 27) that:

“[25] Before me there appeared to have been only one psychiatric report - that of Dr V Khanyile. The research and investigations of the office of the Director of Public Prosecutions established that 'having regard to the relevant and available documents presented in this matter, it appears that only one report, that of Dr V Khanyile was obtained and that the magistrate's order was based on this report only'.

[26] In Commentary on the Criminal Procedure Act by Du Toit et al (13-5 Service 32, 2004), it is said that 'the court is not empowered to act under s 77 unless a report as envisaged by s 79 has been received'.

[27] The office of the Director of Public Prosecutions expressed the opinion that the learned magistrate 'only has a discretion in respect of whether a clinical psychologist should be appointed or not' and that 'in respect of the appointment and evaluation by other medical practitioners' there must be at least two, one of whom is a psychiatrist not in the full-time service of the State. In the opinion of the office of the Director of Public Prosecutions, this requirement is prescriptive and binding on the magistrate. I agree that, in terms of s 79, at least two reports by the medical practitioners specifically referred to must be obtained.”

As can be noted in para 6 (above) s79(1)(b) enjoins currently that it is peremptory that at least three specialist medical practitioners must observe an accused. I was accordingly constrained, although reluctantly, to re-order the observation because a court must be astute not to deprive a person's liberty unless it is unavoidable and in the interest of justice to do so. The accused was on bail and agreed to undergo the exercise oncemore without any ostensible demur.

On this occasion the observation facilities were available in the Northern Cape (Kimberley). The observation was conducted by Dr N K Kiriimi (State Psychiatrist), Kimberley (S79(1)(b)(i)); Prof C Visser (Psychiatrist appointed by the Court, Grahamstown (S79(1)(b)(ii)); and Dr Z Piotrowski (Psychiatrist appointed by the Court, for the accused, Kimberley (S79(1)(b)(iii)). Their unanimous report state in part:

“Section 79(4)(a): Nature of Enquiry

The accused was admitted to Kimberley Prison on 03 February 2010, following an order made by the Judge of the Northern Cape High Court of South Africa at Kimberley, in accordance with the provisions of Section 79(2) of Act 51/1977, dated 10 February 2010.

During the period of observation, the accused had psychiatric interviews; physical and neurological examinations; a psychological assessment; blood tests; electro-encephalography; social work investigations and was kept under observation by the nursing staff. Reference was made to the prosecutor's report.

Section 79(4)(b) : Diagnosis

Axis I : No Diagnosis or Condition on Axis I

Axis II : No Diagnosis or Condition on Axis II

Axis III : No Diagnosis or Condition on Axis III

Section 79(4)(c): Ability to follow court proceedings

The accused is able to follow proceedings so as to make a proper defence.

Section 79(4)(d) : Responsibility

At the time of the alleged offence, the accused was able to appreciate the wrongfulness of the act in question and able to act in accordance with such appreciation of wrongfulness.

Recommendation:

It is respectfully recommended that the law should take its course."

Dr Kirimi's evidence wherein he speaks to the report and his part therein is vital. A few excerpts therefrom will suffice:

13.1 On the Axis I, Axis II and Axis III concepts he says:

"Can you just explain that to us. What is this Axis all about, Axis 1, 2 and 3? === Axial diagnosis is a holistic way of discovering what is wrong with a mentally ill patient. Under Axis 1 we are expected to specify the mental illness.

Can you maybe give us examples of what – can fit in there? === The specific mental illness could be for instance depression or schizophrenia or bipolar mood disorder or panic attack disorder and so forth. Axis 2 we describe personality disorders and mental retardation. And under Axis 3 we describe physical illnesses, for instance epilepsy or chest infection or tonsillitis, any physical illnesses that could be present under Axis 3."

13.2 "Doctor, did you know of the Accused being involved in the war in Angola? === Yes, I am aware that he was a soldier or he was involved, something to that effect, in the war in Angola yes.

And according to you, did that lead to any mental illness of the Accused? === During the entire observation I didn't pick up evidence of mental illness associated with the processes in Angola.

Court: Is that now a reference to post traumatic disorder?

Mr Barnard: Maybe any mental illness. I'm not specifically talking about a specific illness. I'm talking of any mental illness. And maybe what the Court just said, did you maybe pick up any of that?

Court: Post traumatic disorder. === I didn't pick up any evidence to that effect My Lord."

13.3 Was it also brought under your attention the issue about the Accused – if I put it correct now, certain stages maybe he sees some people who want to kill him or attack him? Did you know of that and did you look into that issue also? That he would think that he sees something like that but it was not the situation. === During the initial interview [in 2007] there was no relation of hallucinations or perceptual disturbances. During the 30 days observation I picked up from the Prosecutor's notes [in fact the Court record] in the referral to us that there was mention of hearing of a voice that was giving him instructions. His voice was normal during the period of observation. And it doesn't appear to have been there some time before the case of the murder. I went deep into enquiring about this hallucination or this voice. It doesn't appear to fit into any psychiatry syndromes that I know of."

13.4 "Court: Can I just enquire, hallucinations are they audio or are they audio and visual or one of the two? === Hallucinations My Lord, can

affect any of the five senses. So one can have auditory hallucinations or visual hallucinations or sensory hallucinations or tactile hallucinations or olfactory or smelling hallucinations. And they occur in different contexts, perceptual –hallucinations,

sometimes we call them perceptual disturbances. They occur in different situations, different syndromes.

And let me say My Lord, hallucinations happen in specific syndromes in psychiatry. Auditory hallucinations would usually most commonly occur in schizophrenic illnesses. These are pretty dramatic symptoms that present in very specific ways, which for an experienced clinician or psychiatrist will pick up very easily as part of a syndrome of mental illness. And patients experiencing these symptoms behave in certain ways which an experienced clinician should be able to pick up fairly easily. And the patients when they describe these hallucinations, they describe them in a certain way that you easily pick up that this is something that is being experienced. Mr Dumba did mention to me that he heard some voice which was telling him that he was going to die, that he was going to kill somebody. And that voice appeared to have been there only around 2007 and doesn't appear to have been re-experienced at any point beyond

2007. And when I tried to go into real details around the auditory hallucinations. I wasn't convinced that it is an indication of a mental illness like schizophrenia."

13.5 "Will it be normal for a schizophrenic person or a person with a mental illness having hallucinations, to only have such an occurrence once- the hearing of voices now? === For hallucinations or auditory hallucinations associated with schizophrenia, no. It is an experience that comes and goes, depending on whether or not the person is on treatment. Sometimes even when they are on treatment, you find it difficult to dampen the voices. So it is not a once-off

experience. But having mentioned that, I should say that auditory hallucinations is not only a symptom of schizophrenia. There are many other situations where auditory hallucinations can happen, for instance you know, people who use drugs, all sorts of drugs, people can experience auditory hallucinations. If they use the Ecstasy once, I suppose they can have the hallucinations once and then they will not experience them again. And there will be physical problems or physical illness where a patient can present with auditory hallucinations as well, for instance you know, epilepsy, for instance you know, brain tumors sometimes can present with auditory hallucinations. And so we did physical examinations. We did EEG's, we did a brain scan, we examined him to exclude physical problems that he could be having.

Doctor, what is an EEG? === EEG is an acronym. It stands for electroencephalography."

13.6 "The last question Doctor, if a family member would come and say that before this incident, I don't know how long, the Accused would have told them that he saw some people who wanted to attack him. What would your reaction be to that? === They could say that but I was told that one swallow doesn't make a summer. A picture of mental illness is a whole complex. There are many things that must come into play for somebody to say yes, there is mental illness here."

Mr Van Tonder in cross-examination put a number of propositions to Dr Kirimi all of which rather strengthened the view that the accused might be shamming his mental disposition. The Alzheimers proposition, which Dr Kirimi discounted, stands out. The probing yielded these answers:

"And is it possible that someone suffering from this very early form of Alzheimers disease can do certain things and then not remember it? === It is possible, yes.

So in this specific instance then would you also say it is possible that the accused did kill his wife but cannot remember it, or parts of it? === Possible but improbable.

Why would you say it is improbable? === Patients who present with Alzheimers disease are not known to present with aggression and violence and even whilst we were doing the 30 days observation at Correctional Services, there were no instances or bouts of gross memory deficits. So in instances where you have Alzheimers, patients forget their date of birth, they forget their names, they forget their husbands or wife forgets husband and so forth and they will not know where they are. They get lost and there could have been reports, that Mr Dumba has got severe deficits in terms of his memory in the ward. If indeed the memory deficits are due to Alzheimers, then it is highly unlikely."

Maria Rosa, the daughter of the accused, testifying for the State, gave the following account: She is totally illiterate and does not know how old she is. She is, however, an adult married woman with children of her own. She stayed with her husband and children elsewhere but was at her parental home when the incident happened. Upon her arrival she greeted her father but he did not return her greetings. He appeared calm to her. Her mother was home. There was no quarrel between her parents or amongst any of the members of her family. She did not hang around but went to one of the bedrooms to sleep, and fell asleep.

Rosa was awakened by her niece, Elsmarie, who reported that her grandfather has just killed her grandmother. Rosa saw her prostrate mortally wounded mother. She cried and confronted her father by enquiring from him who is going to care for them now that he killed their mother. The accused remained as silent as the grave and as calm, she says, as he is in Court. (That unruly horse again called demeanour. My observation was that the accused appeared to be expressionless, but he was certainly unruffled by the court occasion). The only thing that the accused did in her presence, Rosa went on to say, was to turn the deceased on her back and pull her to the door. He was arrested and removed by the police in that state.

Rosa was emphatic that her father never acted strangely or shown any signs that something was wrong with him mentally nor had he reported to the family that he suffered mental blackouts or saw visions. She was unshaken under cross-examination.

It was common cause that the “murder weapon” was a home-made axe made by the accused himself and was used for domestic purposes before the incident. It was kept under the bed that the accused shared with the deceased. The axe was pointed out to the police by the accused after he was duly warned and arrested.

Ms Ester Pieterse, a social worker for the past 31 years, testified that Elsmarie was adversely affected by what she witnessed. She was only 10 years old, and is now 12 years. If called upon to testify she may have to do so through an intermediary in terms of s170(A) of the CPA. In the end Elsmarie was not called by the State and was made available to the defence. In the first place because her evidence would not have advanced the State case and, apparently, due to her emotional state.

That in essence is the State’s case.

Although the accused testified before his son-in-law, Kosta Lumeta, as the CPA prescribes in s151(1)(b)(i), I prefer to deal with Kosta’s evidence first. He was married to accused youngest daughter, Zulette, who has since passed away. He has known his father-in-law since 2002. He and Zulette lived in their own house.

As regards the accused’s alleged mental disposition Kosta testified as follows in-chief (translated):

“Your father-in-law testified in Court that he sometimes hears voices speaking to him and sees apparitions. Do you know anything about this? === I am not in a position to know what goes on in the mind of another person.

Yes, an incident where you were present when he spoke of experiencing visions? === I recall only one such incident. I was watching TV. My father-in-law stood in the doorway. He then called us to witness a group of people who were approaching him, threatening to kill him. It was the first time [on 12 April 2007] that I noticed that he acted strangely.

Did you check out his report? === I went out but there were no people.

Did it happen only once? === Yes. I know of no other occurrences.”

Under cross-examination he shifted ground and waffled anecdotally about what he gleaned from others. Clearly inadmissible hearsay evidence.

What emanated from the cross-examination by State counsel and elucidatory questions by the Court later, which is of significance, is that Kosta says his father-in-law had sent him (and Zvette) to look for the deceased on the fateful day. They found her at a relative's place (apparently a shebeen) drinking liquor. They conveyed to her the message from the accused. The deceased carried on drinking but left in due course in the company of Zvette. Kosta called in somewhere but caught up with the deceased and Zvette before they reached his in-law's place. Nothing untoward happened. Zvette served food to her father. Kosta left temporarily and was met by the horrendous scene on his return. His mother-in-law was already dead.

Kosta was wishy-washy and vague under cross-examination pertaining to the accused's alleged abnormal behaviour. He certainly did not glean his anecdotal knowledge on this aspect from his sister-in-law, Maria Rosa, who knew her father more intimately than Kosta did. Rosa was an exceedingly good witness whose evidence, as I pointed out earlier, remained unshaken. In the event of a conflict in the two's evidence I will prefer Rosa's above that of Kosta.

The accused testified that he was born and bred in Angola and married the deceased in that country. He saw military service in Angola and sought asylum in Namibia because of the war in his native country. He is totally illiterate and does not know when he was born or how old he is. He also does not know how long he stayed in Angola but he was already a married man with children when he sought refuge in Namibia. He does not know how long he stayed in Namibia either. He knows, though, that in 1990 (evidently with the advent of the Namibian independence) there was a second trek for him, on this occasion his destination was South Africa.

The accused went on to testify in-chief as follows (translated):

"Yes? === In 2003 when we stayed in Schmidtsdrift something happened to me.

What happened to you? === One day I was seated in front of my house. I saw people who were looking for me. They then fled towards the river.

Yes? === The people threatened to return but they never did. Yes, and then? === From that day onwards I started hearing voices. I heard these voices continually from Schmidtsdrift to Platfontein.

Yes, and when you reached Platfontein? === At Platfontein the hearing of voices diminished. I was a seasonal worker on the farms. Out of season when I returned home the occasions on which I heard voices increased.

When you heard these voices how did you feel? === I sometimes got frightened because the voices threatened to kill me.

Now, the evening of your wife's death, what happened that night? === I spent that day at home. I entered my house. Thereafter I saw an apparition¹. The image said it is going to kill me today. The image was outside the house and attempted to gain entry by trying to break the

windowpanes. Yes, and then? === At that moment I started panicking. At that juncture my wife was also inside the house. I don't

know what happened to me. Afterwards I heard people crying. I later noticed that I had chopped my wife to death.

Yes, and then? === At that point I still did not realize what was happening around me. My next recollection is of me standing at the door when the police arrived. I had a coat with me. The police said I must untie my shoelaces, which I did. They arrested me.

Is that all that you know concerning the evening of your wife's death? === I knew when they arrested me that evening that I had killed my wife."

From the evidence highlighted hereinbefore it is evident that:

27.1 The accused did not suffer from a post-traumatic stress disorder resulting from the Angolan war. First, because has not made such a claim in his evidence. Secondly, he last saw possible military action in Angola several years before the 1990 Namibian independence. Thirdly, he claims to have experienced his first hallucination only in 2003. Consequently, even if he experienced such bouts of hallucination there appears to be no rational connection between the fantasies and the military action. In the fourth place, both Dr Kirimi and Prof Kaliski detected no evidence of post-traumatic stress disorder;

27.2 The suggestion that the accused may be suffering from an early onset of Alzheimers was merely "kite-flying". Dr Kirimi described Alzheimers as follows:

"Alzheimers is what we call dementia. It is characterized mainly by memory deficits. It is a progressive neurological disorder that usually occurs after say the age 65. Before that you could refer to it as early onset Alzheimers."

The doctor went on later:

"Hallucinations occur fairly late in Alzheimers disease and early forms of Alzheimers it is usually memory deficits. And the memory deficits are also not so obvious. But hallucinations occur much, much later."

And yet further on:

"Alzheimers disease is described as a chronic progressive degenerative condition. It is largely a progressive disorder. From diagnosis, then it becomes a downward process and initially it is memory deficits, but then eventually it is also accompanied by physical deficits down the line. Usually like I mentioned, it is also an illness of the above 65's, in fact, over 70's and when it occurs in the 50's and it is early onset Alzheimers and usually it is also of a very aggressive nature when Alzheimers starts at an early age."

Based both on the professional and lay evidence before me there is no evidence of a “chronic progressive degeneration” downward mental spiral in the condition of the accused since 2003. Alzheimers is therefore excluded at this stage.

27.3 The evidence from the mouth of the accused demonstrates clearly that he has a vivid recollection that just before he chopped the deceased to death she was playing with their grandchildren on the marital bed; he remembers the children leaving the bedroom; and that the deceased made up the bed, that must have been in disarray because of the children’s escapades. The amnesia then kicked in with the sight of the intruding ghosts or shadows at the window and subsequently he was back to the real world with the wailing of people and the realization that he had just killed his wife.

Based on the psychiatric evidence and the lay evidence as well as the accused’s evidence I am far from being persuaded that at the time that the accused killed the deceased, his wife, he was suffering from a mental illness or defect. I am also satisfied that he was able to appreciate the wrongfulness of his conduct and was further able to act in accordance with such appreciation or insight.

In the result, I am satisfied that the accused wrongfully and intentionally killed his wife and that he had the intention to do so.

Whereas motive, our law lays down, is not an element of a crime it does appear to me that the accused, from his own mouth, was unhappy that over the years, from Namibia to Platfontein, the deceased conducted an illicit love relationship with one of his friends, whom he named (and has died in 2009). He said this man and the deceased usually drank together. From the evidence of Kosta it is gleaned that the accused sent for the deceased, who came home drunk. That might have been the spark that caused her her life. The alternative would be that the accused must have killed the deceased in cold blood.

Order:

The accused is found guilty of murder with the direct intention to kill.

F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape High Court, Kimberley

On behalf of the State: Adv T Barnard

Instructed by: Director of Public Prosecutions

On behalf of the Accused: Mr A Van Tonder

Instructed by: Legal Aid Board

1Interpreted as a shadow or a ghost or a vision or hallucinations. The accused spoke !Xu (a Khoisan language).

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