

TONY MANGANDA KWIIMBE v THE PEOPLE (1982) Z.R. 32 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., CULLINAN, J.S. AND MUWO, AG. J.S.
16TH FEBRUARY, 1982.
(S.C.Z. JUDGMENT NO. 5 OF 1982)
APPLICATION NO. 221 OF 1980

Flynote

Criminal Law and procedure - Defence - Automatism - Evidence required to support plea of.

Headnote

The applicant, a court clerk, was charged with theft by public servant involving K270.51; which money he received for purposes of paying the local court staff. However the staff were not paid and he failed to account for the money. He pleaded insanity and the magistrate made a special finding under s. 167 of the Criminal Procedure Code and remanded him in custody during the President's pleasure. He sought leave to appeal against the finding and the states filed a cross-appeal.

Held:

- (i) The burden of proving insanity on a balance of probabilities lies upon the accused.
- (ii) Sufficient medical or scientific evidence supporting the defence that the accused was mentally incapacitated is required to displace the presumption of mental capacity. The accused's bald word cannot suffice.

Cases cited:

- (1) Chinkashila v The People (1978) Z.R. 217.
- (2) Bratty v A.-G. for Northern Ireland [1961] 3 All E.R. 523 (HL).
- (3) Hill v Baxter [1958] 1 All E.R. 193.

For the applicant: G.F.Kambiti, Ag. Director of Legal Aid .
For the respondent: F. V. Bruce - Lyle, State Advocate.

Judgment

CULLINAN, J.S.: delivered the judgment of the court.

The applicant, a court clerk in a local court, was charged with theft by public servant involving K270.51. It was established that he received the money in question for payment of the staff at the local court. The staff were never paid. In a statement to the police, and in his defence, the applicant admitted receiving the money, but in effect raised the defence of insanity. In delivering the judgment, the learned trial magistrate made a special finding under s. 167 of the Criminal Procedure Code, and ordered that the applicant be detained during the President's pleasure. The applicant seeks leave to appeal against that finding and order. The learned State Advocate Mr Bruce - Lyle has entered a cross appeal by the State against the special finding. He submits that there was

insufficient evidence on which the learned trial magistrate could have made that finding. The learned acting Director of Legal Aid, Mr Kambiti, adopts those submissions. Indeed the applicant's grounds of appeal clearly resile from the defence put forward in the trial.

The applicant in that defence, whilst stating that he was then, that is at the time of making the police statement and at the time of the trial, quite normal, claimed that, on his way to effect payment of the local court staff, he "got mixed up in the head and . . . became confused and . . . went into the bush walking about aimlessly": he suffered a mental

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blackout for some ten months and when he regained his senses, in February, 1979, he discovered that the money in question was missing; he did not, however, report the matter to his superior officer and he was apprehended by the police a month later. This was the first time, he said, that he had suffered from such mental blackout, but added that his father also suffered from the same "disease". The learned trial magistrate correctly observed that the burden of proving insanity lay upon the applicant, that is, on the balance of probabilities. He further observed that there was no medical evidence, however, before the court and that the court was "placed in a difficult position due to the absence of such evidence". Thereafter the learned trial magistrate concluded that he was "inclined to find in favour of the accused that the defence for insanity applied to him".

In the case of *Chinkashila v The People* (1) the applicant introduced in effect the defence of automatism arising out of intoxication. In delivering the judgment of this court Baron, D.C.J., observed at p. 221:

"It is all too easy for an accused person to say that he remembers nothing, and not unnaturally the law looks for something more than his bald word. In *Bratty* (2) Lord Denning said at p.535:

"In order to displace the presumption of mental capacity the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a black-out"; for "Black-out" as Stable, J. said . . . "is one of the first refuges of a guilty conscience, and popular excuse." The words of Delvin, J. in *Hill v Baxter* (3) should be remembered:

"I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent."

There was nothing in the present case to assist the learned trial judge to distinguish between genuine and the fraudulent."

Those observations are completely in point in the present case. In the absence of medical evidence, on the basis of the applicant's evidence, merely that he was confused and had had mental black-out, we cannot see how the learned trial magistrate could have been satisfied that the applicant was suffering from a disease affecting his mind, so as not to be responsible for his actions. Under the

circumstances, the cross-appeal by the State is allowed; the application by the applicant therefore falls away. The special finding under s. 167 of the Criminal Procedure Code, and the order of detention during the President's pleasure, are set aside,

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and we substitute conviction of theft by public servant contrary to ss. 272 and 227 of the Penal Code in respect of the particulars of offence charged.

(Mr Bruce - Lyle informed the court that the applicant had no previous convictions. Mr Kambiti addressed the court in mitigation of sentence).

We sentence the applicant to two years' imprisonment with effect from 22nd March, 1979, the time spent under detention during the President's pleasure to be regarded as such imprisonment.

Conviction and sentence substituted
