IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Review No.: 140060
CA&R No.: 348/2014
Date delivered: 07 November 2014

In the matter between:

THE STATE

and

NOMAWABO EMILY THANDA

R E V I E W J U D G M E N T

MEY, AJ:

[1] This matter has come before me on review from the regional court, Humansdorp, where the accused was charged with the murder of her husband and was found to have committed the offence of murder.

[2] It is clear from the record that, during the accused's initial appearances in the regional court, her various legal representatives advised the court that she believed her husband to be alive, indicating that she still saw and spoke to him regularly, and that she intended calling him as a witness in the proceedings. It was recorded that the matter should proceed in compliance with the provisions of sections 77 – 79 of the

Criminal Procedure Act[1] (the Act), and informal arrangements were made for the accused to be medically evaluated.

[3] On 7 March 2014, on the recommendation of the doctor who consulted with the accused[2], an order was made by regional magistrate Claassen, in terms of sections 77(1) and 78(2) of the Act, that the accused be referred for psychological evaluation, as prescribed by section 79 of the Act.[3] I shall return to this referral later.

[4] At the hearing of the matter on 30 June 2014 the case against the accused was heard. The presiding magistrate, Mrs M Viljoen, after considering the psychiatric report submitted in respect of the accused, held that *"the accused is not capable of understanding proceedings so as to make a proper defence"* and proceeded to find that the accused had committed the offence of murder. She further granted an order that the accused should be detained, *"pending the decision of a Judge in Chambers in terms of Section 47 of the Metal (sic) Health Care Act 17 of 2002 until (sic) further lawful order is given for her disposal."*

[5] This matter was initially considered, on review, by Brooks AJ, who, on 28 July 2014, addressed the following queries to magistrate Viljoen:

[1] 51 of 1977

[2] The memorandum of one Dr Onibiyi, dated 14 February 2014, recorded that the police had presented the accused to him, after she had reported her husband as missing, and that psychiatric evaluation by the police was recommended.

[3] Section 77(1) of the Act reads as follows: *"If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79".*

> “1. The psychiatric report prepared in respect of the accused contained unanimous findings and was accepted by the Magistrate.
>
> 2. Comments are required in respect of further conduct of the proceedings, with particular regard to the provisions of s 77(6)(a) and s 78(6)(a) of the Criminal Procedure Act 51 of 1977, as read with s 79(2)(c) thereof, in light of the unanimous findings expressed by the panel of experts.”

[6] Magistrate Viljoen has replied to such query, her undated response having been received by the registrar of this Court on 13 October 2014. Under the heading *“Reasons for Judgment”* she states as follows:

> “1. With reference to reasons requested by the Honourable Judge, dated 28 July 2014: I respectfully refer the Honourable Judge to Exhibit A of the record. The findings of the panel of experts were anonymous *(sic)*. The defence did not dispute the findings.
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> 2. With respect I do not see the unanimous findings expressed by the panel of experts. If I still have it wrong I respectfully request to give me guidance on this aspect.”

[7] The Magistrate’s *“reasons”* are unhelpful and do not serve to address, at all, the queries raised by Brooks AJ.

[8] The joint, unanimous psychiatric report, purportedly in compliance with the provisions of section 79 of the Act, and dated 25 June 2014, was compiled by a panel consisting of two psychiatrists and a clinical psychologist, after their evaluation of the accused at Fort England

Hospital. They diagnosed the accused with *"Psychotic disorder (unspecified); alcohol dependence"* and *"Traumatic brain injury".* Their finding was made following a period of observation of the accused for almost a full month, during the course of which she underwent psychiatric interviews, physical and neurological examinations, blood tests, and constant observation by the psychiatric nursing staff.

[9] Their recommendation reads as follows: *"It is respectfully recommended that the accused be admitted to Fort England Hospital as a State Patient in terms of Section 42 of the Mental Health Care Act".*[4]

[10] This report was submitted to the court by the prosecutor, in terms of section 77(2) of the Act, without objection by the accused, who was legally represented. The accused's legal representative did not dispute the findings and the recommendations made in the report, indicating that her defence was in fact premised on her mental incapacity and her lack of criminal responsibility at the time that the offence was committed.

[11] The magistrate, having considered the report and no further evidence, made a finding that the accused was *"not capable of understanding proceedings so as to make a proper defence".*

[4] 17 of 2002.

[12] It does not appear from the record that the composition of the panel was considered by the regional court upon the numerous postponements of the matter or the referral of the accused for psychological assessment, or that it was considered by magistrate Viljoen upon receipt of the report. Despite the issue of the accused's referral for psychiatric assessment being raised before court on a number of occasions, there is no indication whatsoever in the record of proceedings that an order was granted specifically appointing a private psychiatrist (as required by section 79(1)(b)(ii)), or a psychiatrist specifically for the accused (as required in section 79(1)(b)(iii)). Furthermore, no order was made directing that a clinical psychologist should be appointed as part of the panel (as contemplated in section 79(1)(b)(iv)), although it is apparent that a clinical psychologist did form part of the panel that evaluated the accused.[5]

[13] No indication is provided as to whether or not Dr Jordaan and Ms Sakasa are in the employ of the state. It is only indicated in the report that they are registered with the Health Professions Council of South

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[5] Section 79 of the Act provides as follows: "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) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court; or
(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for 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 the 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 unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;
(iii) by a psychiatrist appointed for the accused by the court; and
(iv) by a clinical psychologist where the court so directs."

Africa and that they, together with Dr Nagdee, conducted their assessments at Fort England Hospital.

[14] The report is further silent as to how the panel members were identified and appointed. No reference at all is made to the provisions of sections 79(1)(b)(ii), 79(1)(b)(iii) or 79(1)(b)(iv) or any order made in terms of those provisions.

[15] It appears from Dr Nagdee's letter directed to the senior public prosecutor enclosing the psychiatric report (included as part of the record in this matter) that he is the acting clinical head of Fort England Hospital. His inclusion on the panel thus appears to be in compliance with section 79(1)(b)(i).

[16] It is not apparent from the record how it was determined that Fort England Hospital was identified as the appropriate hospital to which the accused should be admitted.[6] There is no (express) instruction by the lower court that the accused be evaluated there. Unfortunately, no documentation is contained in the record received in the present matter, other than magistrate Claassen's note that an order was granted that the accused be *"referred for psychological evaluation as prescribed in section 79"* and the indication in the psychiatric report that

[6] Although reference is made in the psychiatric report to an order made in terms of section 79(2) of the Act, no such order is apparent from the record submitted in respect of this matter.

the accused was admitted following an order made in accordance with the provisions of section 79(2) of the Act.[7]

[17] In order to obtain clarity in respect of these issues, the record was sent to the Director of Public Prosecutions, Port Elizabeth, for comment.

[18] Adv Hannelie Bakker, the Deputy Director of Public Prosecutions, without delay provided me with comprehensive submissions addressing my queries raised in this regard. Together with her comments she included a copy of the J138A form completed in respect of the accused, which she obtained from Fort England Hospital.

[19] Adv Bakker indicates that the J138A form is a document that has been developed by the Department of Justice to ensure that the statutory prescripts are adhered to in matters of this nature. The J138A form (headed "Lasbrief tot oorplasing van 'n person wat aangehou word, na 'n inrigting, vir ondersoek kragtens die bepalings van hoofstuk 13 van die Strafproseswet, 1977 (Wet 51 van 1977)") was completed and signed by magistrate Claassen.

[20] The form requires the referring judicial officer to insert the name of the psychiatric hospital whose medical superintendent is appointed as a psychiatrist on the panel. Provision is also made on the form for two further psychiatrists' names to be inserted, recording their appointment.

[7]No J138 form referred to in paras 71-72 of *S v Pedro* [2014] ZAWCHC 106 is included in the record.

Adv Bakker indicates that, as a matter of practice, magistrates identify the psychiatrists by way of inserting their names in the J138A form and that this is not ordinarily done in open court.

[21] In the present matter the J138A form identified "Dr Nagtie" as the first psychiatrist appointed to the panel and Dr Jordaan was appointed as the second psychiatrist. No indication is given in the form as to whether such appointments were made in terms of section 79(1)(b)(i), (ii), or (iii). No third psychiatrist was appointed. Furthermore, no directive is contained therein that a clinical psychologist should form part of the panel – in terms of section 79(1)(b)(iv) – and it is not clear how Ms Sakasa was appointed to the panel.

[22] Adv Bakker advises that, due to the shortage of psychiatrists in the region, the Director of Public Prosecutions: Eastern Cape, Port Elizabeth and Bhisho communicated to all prosecutors that the appointment of a third psychiatrist should be the exception rather than the rule. Accordingly, the prosecutor ought to have brought an application to dispense with the appointment of the third psychiatrist. This was never done.

[23] I agree with Adv Bakker's submission that the regional court's failure to comply with the provisions of section 79 in relation to the appointment of the panel, the psychiatric assessment of the accused was irregular and that the matter ought to be remitted to the regional court in order

that a psychiatric assessment may be ordered afresh, in compliance with the provisions of section 79.[8]

[24] Before proceeding to deal with the matter any further, magistrate Viljoen ought to have considered whether or not the panel had been properly constituted and the report correctly compiled. Since the assessment of the accused was irregular, all further steps taken in prosecution of the matter are also irregular.

[25] The matter was, however, considered further and, in the circumstances, I deem it necessary to indicate the appropriate course of conduct of a matter, following a psychiatric evaluation that concludes that an accused lacks capacity to understand the proceedings and probably lacked criminal responsibility at the time of the alleged offence.

[26] In the present matter, and after the court's finding that the accused was unable to follow the trial proceedings, the prosecutor sought an order that the accused be found to have committed the murder to which the charge related. It is apparent from the record that no charges were ever put to the accused, nor was she, at any stage, required to enter a plea.[9]

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[8] See in this regard *S v Pedro* [2014] ZAWCHC 106 at paras 68 -70 and 75

[9] This is only required where the accused is capable of following legal proceedings. See section 78(6) of the Act and *S v Luphuwana* 2014 (1) SACR 503 (GJ) at para 17.

[27] The prosecutor indicated that he intended submitting the affidavits of three state witnesses, together with a post-mortem report, which would serve to connect the accused to the murder. At the court's request, and before the documents were presented, the prosecutor summarised the contents of the affidavits as follows: The accused, her husband (the deceased) and her son were at home when the accused and the deceased began arguing. The accused accosted the deceased, pushing and pulling him. The deceased fell to the ground, at which stage their son left the scene to go and seek help. When the police arrived at the scene they found the accused, together with the deceased's body. She advised them that she had argued with the deceased and had hit him with a pick. She repeated this explanation to one of her friends, at the police station. The state accordingly submitted that, in the circumstances, a *prima facie* case was established.

[28] In response to a query by the court, the accused's legal representative confirmed that the defence had been afforded insight into the affidavits and confirmed that the affidavits established, at least, a *prima facie* case against the accused.

[29] It is clear that neither the prosecutor, nor the accused's legal representative, considered whether or not such evidence constituted sufficient evidence on which the accused could be convicted. The accused's legal representative notably made no submissions in respect

of the possible conviction of the accused on the charge of murder. He may well have anticipated that no conviction would follow, in view of the provisions of section 77(6).

[30] It would further appear that neither the prosecutor, nor the accused's legal representative, properly considered whether or not the affidavits, considered together with the J88 medical report, constituted evidence on which the court, on a balance of probabilities, could make a determination that the accused had unlawfully caused her husband's death. Both the prosecutor and the defence declined the opportunity to address the court before it gave judgment in the matter.

[31] When regard is had to the documents submitted by the prosecutor, his summary does not accord with the affidavits. Upon a perusal of the affidavits the following discrepancies appear: the accused's son (who was only 11 years old) did not run away from the scene of his parents' argument to go and fetch help. He simply ran away and went to stay overnight with his uncle. The police only went to the accused's home the following day, where they found the accused and the deceased. In his affidavit the arresting police officer, warrant officer Pullen, explains that the accused told him how she had been surprised by her injured, naked husband entering the house, together with people looking for money from both her and the deceased. She later repeated this story to her brother. While she admitted to the police officer and her brother that she hit the deceased with a pick, she was not certain where she

had hit him. It is however clear that, according to the accused, the deceased was already injured on entering their home, where she was lying asleep.

[32] Pullen's statement further reflects that he found the deceased's left shoe, underpants and blood-stained jeans outside, under the broken bedroom window. He also found a wooden chair below the window.

[33] The J88 medical report states that the deceased died of multiple injuries. The injuries recorded are substantial, including a dislocated knee, multiple abrasions, lacerations and contusions of the face, head and limbs, fractured ribs, and haemorrhaging of his right kidney. The admission by the accused that she had hit the accused once with a pick, does not accord with the multiple injuries he sustained, as recorded in the post-mortem report. None of the affidavits filed exclude the possibility (even considered on a balance of probabilities) that, after the accused went to sleep, the deceased may have been in the company of a group of men, seeking money, and that he may have already been seriously injured when he was sitting on the ground, crying and the accused hit him with the pick.

[34] Adv Bakker correctly submits in this regard that the court *a quo* could not, on the evidence presented, find on a balance of probabilities that the accused had committed the act in question. She suggests that the magistrate ought to have, in the exercise of her discretion, required that

further evidence be placed before her in order to determine whether or not the accused had unlawfully caused the deceased's death.[10]

[35] Magistrate Viljoen however, in her judgment, repeated her finding that the accused was incapable of understanding the proceedings so as to make a proper defence and further held that, having considered the evidence placed before her, the accused had *"committed the offence of Murder".*[11] She made no reference to the indication in the psychiatric report that "*At the time of the alleged offence, the accused was unable to appreciate the wrongfulness of the act in question*."

[36] Once a court makes a finding that an accused is not fit to stand trial, it is required of the court to consider whether the accused committed the act in question or not. It is however inappropriate for that court to consider and make a finding on the offence with which an accused has been charged.[12] What is required is simply a determination of whether or not, based on information or evidence presented to court, it is convinced on a balance of probabilities that an accused committed the *actus reus* element of the offence in question.

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[10]Section 77(6)(a) of the Act provides that "If the court .. finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question ..."

[11]This finding is recorded on the front of the charge sheet and is signed by magistrate Viljoen.

[12] No determination is made on the merits. Thus, should the accused later recover, she could be recharged without being able to claim *autrefoit acquit au convict*. See *S v Leew* 1987 (3) SA 97 (A)

[37] The issue of whether or not the accused lacked criminal responsibility at the relevant time (and may in due course be entitled to an acquittal in terms of section 78(6)) is not a matter that requires the court's consideration.[13] It is not "a mini-trial on the merits".[14]

[38] In the case of murder the *actus reus* is the unlawful causing of the deceased victim's death.[15] Accordingly, in the present matter, the court *a quo* could do no more than make a finding, on a balance of probabilities, that the accused's unlawful conduct caused her husband's death (if the facts presented to court warranted such a finding). As the undisputed facts presented to court do not warrant a finding that the accused committed the act in question, the provisions of section 77(6)(a)(ii) find application to the matter.[16]

[39] Magistrate Viljoen thus erred in finding that the accused committed the offence of murder. Such error warrants this court setting aside the finding.

[40] It is evident from the record in this matter that, following this finding, and without affording either the state or the defence an opportunity to

[13] *S v Pedro supra* at paras 94 – 95

[14] *S v Dewhurst* 2012 (1) SACR 627 (ECP)

[15] See *S v Pedro supra* at para 102

[16] See in this regard the comments below in respect of the interim provisions relating to detention, provided for *De Vos N.O. and Another v Minister of Justice and Constitutional Development and Others; In Re: Snyders and Another v Minister of Justice and Constitutional Development and Others* [2014] ZAWCHC 135

make representations in respect of the order that should follow, magistrate Viljoen granted the order to detain the accused.

[41] In making such order it appears as though her intention was to proceed in accordance with the provisions of section 77(6)(a)(i) of the Act. This intention is also reflected in the order prepared by the Director of Public Prosecutions, Grahamstown, signed by the magistrate, which identifies the order as being one made in terms of section 77(6)(a)(i) of the Act.

[42] It bears mentioning that, subsequent to the finalisation of the proceedings in the court *a quo*, the constitutionality of the provisions relating to detention was considered by Griesel J in *De Vos N.O. and Another v Minister of Justice and Constitutional Development and Others; In Re: Snyders and Another v Minister of Justice and Constitutional Development and Others*[17], where he held as follows:[18]

"…

(a) It is declared that sub-paragraphs 77(6)(a)(i) and (ii) of the Criminal Procedure Act, 1977, are unconstitutional.

(b) The declaration in para (a) above is not retrospective and its effect is suspended for 24 months to afford the legislature an opportunity to cure the invalidity.

(c) During the period of suspension, section 77(6)(a)(i) is deemed to read as follows (words inserted by this order are underlined and words omitted are deleted):

[17] [2014] ZAWCHC 135

[18] at para 72

‘(i) in the case of a charge of 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 a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be ~~detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002~~

(aa) detained in a psychiatric hospital or prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(bb) be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc) released subject to such conditions as the court considers appropriate; or

(dd) released unconditionally.’

(d) During the period of suspension, sub-paragraph 77(6)(a)(ii) is deemed to read as follows (words inserted by this order are underlined):

‘(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence –

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(bb) released subject to such conditions as the court considers appropriate; or

(cc) released unconditionally.’

…"

[43] Although this finding was not binding on the court *a quo* at the time that the matter was initially considered, it may well be of application when the present matter is once again considered by the lower court, and is for that reason drawn to its attention.

[44] Consequently, I make the following order:

1. The order of magistrate Claassen, on 7 March 2014, referring the accused for psychiatric assessment, is reviewed and set aside.

2. The judgment of magistrate Viljoen, on 30 June 2014, finding that the accused had committed the offence of murder and her further order in terms of section 77(6)(a)(i) of the Criminal Procedure Act, No 51 of 1977, for the admission and detention of the accused in terms of section 42 of the Mental Health Care Act, are reviewed and set aside.

3. The matter is remitted to the regional court.

4. The accused shall be caused, by lawful means and procedures, to appear before the magistrate, who shall deal with the matter and finalise it, with due regard to this judgment, and in accordance with the provisions of the Criminal Procedure Act, more particularly sections 77(1) and 79(1)(b) thereof.

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C K MEY
JUDGE OF THE HIGH COURT (ACTING)

ROBERSON, J

I agree.

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J ROBERSON
JUDGE OF THE HIGH COURT