

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE-PORT ELIZABETH)**

REVIEW CASE NO: 53/10

Date delivered: 22 November 2011

In the matter between:

THE STATE

VS

PATRICK LANCE DEWHURST

REVIEW JUDGMENT

MAKAULA J:

[1] The accused appeared before the magistrate's court charged in the main with intimidation and in the alternative with assault. The defence counsel requested that the accused be sent for mental observation. Indeed,

he was referred for mental observation in terms of **Section 79 (2) of the Criminal Procedure Act, Act 51 of 1977** (*the Act*). A joint psychiatric report in terms of **Section 79 (1) (iii) of the Act** was submitted by **Professor H Erlacher** and **Professor Nagdee**. They found as follows:

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

[2] Their recommendation reads thus;

“It is respectfully recommended that the accused be dealt with as an involuntary patient, in accordance with Section 78 (6) of Act 51 of 1977, and the provisions of Chapter 5 of the Mental Health Care Act, Act 17 of 2002.”

[3] When the report came to hand, the prosecutor presented it to court. The accused through his representative did not dispute the findings and the recommendations made. The prosecutor informed court that there was a *prima facie* case against the accused. The representative of the accused did not add anything to that except to request the court to make an order in terms of **Section 47 of the Mental Health Act 17 of 2002** (*the Mental Health Act*). Having heard both counsel, the magistrate made the following order;

“In the light of what was found by the panel the order is then that the accused be detained in a psychiatric hospital or a prison – that is what the Act says, pending the decision of a judge in chambers, in terms of Sect 47 of the Mental Health Care Act of 2002, if it deems to be in the interest of the public.”
(sic)

[4] The matter was brought on special review by the additional magistrate on the grounds that the order was erroneously granted by the magistrate concerned because he/she failed to make a finding as to whether the accused committed the offence he is charged with in terms of **Section 77 (6) (a) (i) of the Act**.

[5] The Director of Public Prosecutions (DPP) was given the record and asked to comment. The DPP correctly, in my view, makes the point that:

“7. 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. The legislature did not intend this procedure to be a mini-trial on the merits. A court can rely on information or evidence and need only be convinced on a balance of probabilities that an accused committed the act in question. . .

9. The prosecutor made no submissions to court as to the circumstances of the case which warranted, in the public interest, committal of the accused to a psychiatric hospital or prison pending the decision by a Judge in chambers, despite the recommendation in the psychiatric report that the accused be dealt with as an involuntary health care user.”

[6] **Section 77 (6) (a) (i) of the Act** provides as follows:

“If the court which has jurisdiction in terms of section 75 to try the case, 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 and the court shall direct that the accused –

- i) In the case of . . . 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.” (Emphasis added).

[7] It is apparent from the record that no evidence was placed before court so as to determine whether the accused had committed the offence with which he had been charged. Such could have been done by the prosecutor outlining the nature of evidence he/she had in the docket which links the accused to the commission of the offence. Such facts would probably have been confirmed by defence counsel as it appears *ex facie* the record. It would only be thereafter that the court would have been able to find that the circumstances warranted that the accused be committed in terms of **Section 47 of the Mental Health Care Act, No 17 of 2002**. The failure by the magistrate to comply with the provisions of **Section 77 (6) (a) (i) of the Act** constitutes an irregularity.

Consequently, I make the following order:

- (a) The order made by the magistrate on 12 May 2011 detaining Patrick Lance Dewhurst in terms of **Section 47 of the Mental Health Care**

Act, 17 of 2002 is set aside;

(b) The matter is remitted to the magistrate to make a proper determination in terms of Section 77 (6) (a) (i) of the Criminal Procedure Act 51 of 1977.

M MAKAULA

JUDGE OF THE HIGH COURT

I agree:

E REVELAS

JUDGE OF THE HIGH COURT