



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED.
<i>26 June 2019.</i>	
DATE	SIGNATURE

**Appeal Case No: A/258/2018
DPP Ref No: PA43/2018**

In the matter between:

THOMAS LEDWABA

Appellant

and

THE STATE

Respondent

JUDGMENT

HF JACOBS, AJ:

[1] The appellant, a 29-year-old male, was convicted on a charge of robbery with aggravating circumstances (Count 1) and of rape (Count 2) allegedly committed on 26 September 2015. The appellant was convicted and sentenced on 16 October 2017 to life imprisonment. The two convictions were taken together for purposes of sentence and the appellant was declared to be unfit to possess a firearm in terms of section 103(1)(g) of Act 60 of 2000.

[2] At the commencement of the proceedings before the Court *a quo* the appellant had legal representation. The matter was postponed several times awaiting DNA evidence. On 14 November 2016 his legal representative informed the regional magistrate that *"the accused give me different instructions I apply to withdraw he does not take me into his confidence I cannot proceed"*. From that date the appellant conducted his own defence but had legal representation on appeal. The trial took place between 3 February 2017 (when the charge was put to the appellant) and 16 October 2017 (when sentence was passed). On 6 March 2017 at conclusion of the cross-examination of Dr Makgotso, the medical doctor who examined the complainant after the alleged rape and robbery and who also completed the statutory Form J88, the appellant mentioned that he had been a patient in a psychiatric hospital. The trial Court thereupon postponed the case to 2 May 2017 to allow the prosecution time to obtain information about the appellant's alleged sojourn in a psychiatric institution. On 2 May the case was postponed to 23 May and on 23 May the prosecutor handed to the court a report of two psychiatrists, Dr Banda and Prof Roos dated 12 May 2017. That report was, as will be shown presently, not a report in terms of Chapter 13 of the Criminal Procedure Act of 1977 ("the Act").

[3] The report reads as follows:

"The abovenamed has a history of cannabis intoxication causing psychosis starting from 2010. He was admitted at Weskoppies Hospital in 2010, 2011 and 2012 with a working diagnosis of cannabis induced psychiatric disorder. Most recently, he was admitted after he was brought by his uncle with the history of having gone missing, found tied up and speaking to himself. He was depressed and found

to be psychotic. He was admitted at Kalafong Hospital on 26 December 2013, transferred to Weskoppies on 3 January 2014 and discharged on 13 February 2014. He was diagnosed with schizophrenia as well as cannabis use disorder."

[4] The case was then postponed to 28 July for the typing of the record. The record had to be submitted to the examining psychiatrists. The transcript of 28 July does not form part of the record but the magistrate's notes show that there was not a bed available for the appellant at the psychiatric hospital at the time and the case was postponed to 4 August and again to 7 August and again to 13 September and then to 15 September when the report of Drs Makgobe and Pooe, the psychiatrists who examined the appellant in terms of Chapter 13 of the Criminal Procedure Act of 1977, was presented to court. The report is dated 11 September 2017. Before I deal with the report, mention must be made of the statutory amendments to Chapter 13 of the Act around that time.

[5] On 26 June 2015 the Constitutional Court declared the provisions of section 77(6)(a)(i) and (ii) of the Act invalid. The declaration of invalidity led to the amendment of Chapter 13 (sections 77, 78 and 79) of the Act with effect 29 June 2017.¹ The advent of the amendment was between the date on which the Court *a quo* was informed of the appellant's treatment in a psychiatric hospital and the presentation of the report to the Court *a quo* on 15 September 2017.

¹ See: Act 4 of 2017; De Vos N.O. & Another v Minister: Justice and Constitutional Development and Others 2015 (2) SACR 217 (CC).

[6] The amendment did away with the words "mental defect" and introduced the term "intellectual disability" into the Act. Du Toit et al: Commentary on the Criminal Procedure Act² mentions that "The move to the term 'intellectual disability' is in step with the times. It was also taken by the vast panel of specialist authors of the leading text on mental disorders, the 'Diagnostic and Statistical Manual of Mental Disorders', in its fifth edition, published in 2013 (American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders 5 ed (2013). In this 2013 edition, the authors opted for the term 'intellectual disability' instead of the term 'mental retardation' which had been used until then." Post amendment of section 77(1) it provides that "If it appears to the Court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability 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." The Act does not define the term "mental illness" or the term "intellectual disability". Section 1 of the Mental Health Care Act³ defines "mental illness" as "a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental healthcare practitioner authorised to make such a diagnosis". The Mental Health Care Act defines "severe or profound intellectual disability" to mean "a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to severely restricted sensory and

² Volume 1, p 13-2.

³ 17 of 2002.

motor functioning and requiring a nursing care." That act also does not define the term *"intellectual disability"*.

[7] The examining psychiatrists, Drs Makgobe and Pooe, did not report on the *"intellectual disability"* of the appellant. The doctors, the court and the prosecutor were apparently unaware of the amendment of the Act at the time. That explains why the report of Drs Makgobe and Pooe does not refer to the terms *"intellectual disability"* while it expressly mentions *"mental defect"*, words that no longer appear in that context in the Act. The body of the report of Drs Makgobe and Pooe, reads as follows:

"We hereby certify and report as follows regarding the mental condition of the above named person, hereafter the accused, who is apparently 29 years old.

A. *The examination consisted of clinical interviews with the accused and observation of his general behaviour in the ward. He was physically examined. A summary of court proceedings was made available to us.*

B. *Psychiatric diagnosis: **NONE.***

We are aware of previous Psychiatric interventions, but this has no bearing into C and D below.

C. *The accused is capable of understanding court proceedings and is able to contribute meaningfully to his defence.*

D. *At the time of the alleged offence the accused did not suffer from a mental disorder or mental defect that affected his ability to distinguish between the rightful or wrongful nature of his deeds. A mental disorder or mental defect did not affect his ability to act in accordance with the said appreciation of the rightful or wrongful nature of his deeds."*

[8] As mentioned above, the appellant had no legal representation at the time. He faced serious charges, including charges that would, on conviction, oblige the trial Court to invoke minimum sentence provisions of which he and his erstwhile representative have been informed. I have mentioned the postponement dates between the time when the Court *a quo* learnt of the appellant's treatment in a psychiatric hospital and the presentation of the report of Drs Makgobe and Pooe on 13 September. In terms of sub-section 77(1A) of the Act, the magistrate had a discretion to order that the appellant be provided with the service of a legal practitioner in terms of section 3B of the Legal Aid Amendment Act, 20 of 1996. I am of the view that she should have done so. I hold the view mindful of the fact that the appellant had legal representation at one stage in the proceedings. But, at the stage of his referral in terms of Chapter 13 of the Act he had no such legal representation. I am also mindful thereof that the Court *a quo* enjoyed, in terms of section 77(2) of the Act, a discretion to determine the issue at hand on the report without hearing further evidence if the report was not challenged by the appellant or the prosecution. However, one must remain mindful of the principle that a finding in the context of Chapter 13 of the Act remains a finding of the Court and not that of the psychiatrists.⁴ I am of the opinion that in the circumstances the appellant as unrepresented accused who underwent psychiatric examination without having appointed the psychiatrist of his choice to the panel, was in no position to answer whether the report of the two psychiatrists was contested. For reasons that follow there exists, in my view, reasonable doubt that the proceedings in terms of Chapter 13 of the Act took place without substantial injustice towards the

⁴ See the provisions of section 77(2) and (3) of the Act.

appellant who was an unrepresented accused at the time and a person with a long history of mental illness.⁵

[9] After pleading not guilty to both charges the Regional Magistrate put questions to the appellant. In this regard the record reads as follows:

"COURT: You pleaded not guilty to both counts. You now have the opportunity to tell the court why you plead not guilty. What the basis of your defence is. The court may also question you to establish, which facts are in dispute between you and the state and which are not in dispute. You are not compelled to make a statement or to answer any questions the court may put to you. Do you understand?

ACCUSED: Yes, I understand.

COURT: Before we proceed. All the witnesses for the state and the defence must leave the court. Do you want to make a statement or not? Ja, just raise your voice so, that it can be recorded, proceed please? Please raise your voice?

ACCUSED: Your Worship, I did rape Selina. We communicated on a cellphone, your Worship and we agreed that we are going to meet at the playgrounds and that is where we met and we went somewhere at the stone where we were sitting at Your Worship and then [intervene]

COURT: The stone?

ACCUSED: Yes, we sat on that stone we started kissing and then that is when we had sexual intercourse.

COURT: The first count is that of robbery with aggravating circumstances. The state alleges that you did on 26 September take with force a touch screen cellphone from Selinga Mahlangu by

⁵ *S v Matu* 2012 (1) SACR (68) (ECB) at [28].

threatening to stab her. This is the first count. Can we please start with the first count?

ACCUSED: *Yes, Your Worship and while we were still busy with the intercourse Your Worship a cellphone rang and there was another person calling, Selina and then [intervene]*

COURT: *Just a minute. Ja?*

ACCUSED: *And when that cellphone rang she answered it and that particular person said to her that he is at the playgrounds and he is waiting for Selina and I said to her, she is making fool of me. So, we should go and see [indistinct]*

COURT: *Just a minute. She is making a fool of you and?*

ACCUSED: *We should go and see that person and she refused. That is when I took that cellphone.*

COURT: *Just a minute. You then took the cellphone and?*

ACCUSED: *I smashed it on the ground and that is when she complained that I have ruined her cellphone [and the accused person is about to say something else]*

COURT: *The complainant said?*

ACCUSED: *I have ruined her cellphone.*

COURT: *And?*

ACCUSED: *And Your Worship after that she said I should give her simcard.*

COURT: *Should give her a simcard?*

ACCUSED: *Yes and then we looked for and we found it and then we took off.*

COURT: *Yes?*

ACCUSED: *Then after that she said she wants to tie her shoelaces and then after that we [indistinct]*

COURT: *And after that did you go or?*

ACCUSED: *She ran away, Your Worship."*

[10] The appellant's explanation in terms of section 115 of the Criminal Procedure Act suggests that he and the complainant had consensual sexual intercourse. That was also the appellant's evidence when he testified. That makes his statement that he raped the complainant during the section 115 proceedings appear to be out of kilter with his defence. The report of Drs Banda and Prof Roos records treatment over a long period of time and implies a diagnosis of schizophrenia, a condition that, depending on the severity thereof in a patient, might impact on a person in the position of the appellant. The report of Drs Makgobe and Pooe records that no diagnosis was made. That part of the report, in my view, read in context with the report of Dr Banda and Prof Roos, that evidence of one of the psychiatrists should have been considered by the trial Court. The magistrate asked the appellant on 15 September whether he admits the report. He was as unrepresented accused not in a position to admit so without the benefit of the advice of a legal practitioner and, if so advised, the appointment of a psychiatrist. The withdrawal of the appellant's legal representative and the reason mentioned for her withdrawal compels me to question the fairness of the proceedings that gave rise to the appellant's conviction. I am not convinced that the appellant has had a fair trial regard being had to the facts mentioned above. Section 35 of the Constitution guarantees that to every person no matter how serious the charges are that he or she faces.

[11] I am therefore of the view that the orders of the Court *a quo* should be set aside and that the matter be remitted to the regional court to determine the referral of the appellant in terms of Chapter 13 of the Act afresh.

Under the circumstances I propose the following order:

1. That the appeal be upheld, and the conviction and sentence be set aside; and
2. That the appellant's referral for examination in terms of sections 77, 78 and 79 of the Criminal Procedure Act, No 51 of 1977 be remitted to the trial Court to take place afresh.



H F JACOBS
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I agree, and it is so ordered.



S N MOKOŠE, J
JUDGE OF THE HIGH COURT
PRETORIA