



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Review case no: R33/18

In the matter between:

**THE STATE**

and

**SIPHO NXUMALO**

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**REVIEW JUDGMENT**

Delivered on: 16/02/2018

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**MNGADI, AJ:**

[1] This matter serves before me on referral by the magistrate for review and setting aside of an enquiry held in terms of s 77 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused is according to the charge sheet, 48 years old. He was arrested on 10 January 2015 and the first appeared before the magistrate at Madadeni on 12 January 2015 on a charge of rape of a three (3) year old child. The charge was read with section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[3] The record indicates that the accused looked mentally unstable. The learned Magistrate with concurrence of the legal representative of the accused referred him for mental observation in terms of sections 77 (1), and 78 (2) of the CPA. During the period 31 August 2015 to 18 September 2015 at Fort Napier Psychiatric Hospital the accused was observed and assessed by Dr Bretram MaClea Brayshaw a registered specialist psychiatrist in private practice. Further, the accused was observed by Dr A Houidi a specialist psychiatrist appointed by the Head of the establishment of Fort Napier Hospital. The two doctors found that the accused is able to understand and follow court proceedings.

[4] The findings of the doctors were contested by the accused. On 18 April 2017 the magistrate held an enquiry in terms of s 77 (3) of the CPA. The accused was legally represented. Both the above-mentioned doctors testified during the enquiry and they confirmed the contents of their reports which were handed to court as exhibits. No other evidence was presented. At the conclusion of the enquiry, the learned magistrate found that the accused was fit to stand trial.

[5] On 17 August 2017 a different magistrate noted that there were only two reports submitted during the enquiry instead of three reports as required by s 79 (1) (b) of the CPA. On 17 January 2018 the regional magistrate sent the matter to the High Court for Special Review to set aside the enquiry held on 5 May 2017 and to have the inquiry started *denovo*.

[6] Section 79 (1) (b) of the CPA provides that the relevant enquiry shall be conducted and reported on: 'where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in section 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 carried under subsection (13) by the National Director of Public Prosecution;
- (iii) by a psychiatrist appointed for the accused by the court and;
- (iv) by a clinical psychiatrist where the court so directs ."

[7] The provisions of s 79 (1) (b) are peremptory. The enquiry held did not comply with the said provisions. (See: *S v Ramokoka* 2006 (2) SACR 57 (W) para 25 and 27).

The learned magistrate referred the matter to this court without specifying the provisions authorising such a procedure. However, the high court enjoys an inherent power to regulate proceedings of the lower courts in order to avoid injustice.

[8] I accordingly propose that the following order be made:-

- (1) The enquiry envisaged in terms of s 77 (3) of the CPA held before the magistrate M. T Lubuzo which commenced on 18 April 2017 and finalised on 5 May 2017 is declared invalid and it is set aside.
- (2) Any renewed enquiry in terms of s 77 (3) shall comply with the provision of s 79(1) (b) of the CPA .



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MNGADI AJ



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VAN ZYL J