

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)

Case No. 12/16

Case reference

THE STATE

and

MANYANO MTHIMKHULU

REVIEW JUDGMENT

HARTLE J

[1] The accused was declared a state patient on 5 February 2014 pursuant to an enquiry in terms of Chapter 13 of the Criminal Procedure Act, No. 51 of 1977 (CPA), in the regional court sitting in Alice.

[2] On 17 September 2015 the Deputy Director of Public Prosecutions, Bhisho, noted that the enquiry and detention order had been issued pursuant to the provisions of section 77 rather than section 78 of the Criminal Procedure Act. She considered it necessary that the matter be referred to this court on “special review”.

[3] The basis upon which this court has been requested by the regional court to review and correct the order of the magistrate is framed in the following terms:

- “1. The accused was declared a state patient in terms of S 77(6) of the Criminal procedure Act in the Regional Court sitting at Alice.
2. The court acted upon the recommendation of the DPP which reads as follows:
 - * According to the psychiatric report the accused is currently fit to stand trial, but at the time of the commission of the offence he was suffering from a mental illness or intellectual disability that made him not criminally responsible for the alleged offence of (murder). According to the psychiatric report the accused is currently fit to stand trial, but at the time of the commission of the offence he was suffering from a mental illness or intellectual disability that made him not criminally responsible for the alleged offence of **Murder**.
 - * Since the charge is **Murder**, the proceedings in terms of Section 77 (6) of the Criminal Procedure Act 51 of 1977 must take place in Regional Court.
3. The court made an order as per the recommendation of the DPP.
4. The DPP has since made the following remarks:
 - * The enquiry into the mental status of the accused ought to have been dealt with in terms of section 78 of the Criminal Procedure Act 51 of 1977. However, the Regional Court Magistrate conducted the enquiry and made an order in terms of section 77 of the said Act.
 - * In order to remedy the situation the matter has to be sent on Special Review.
5. In the interim the Regional Magistrate, ... who conducted the enquiry, has retired.
6. I agree with the remarks express(ed) by the DPP. I therefore request the Honourable the reviewing Judge to set aside the proceedings so that a new enquiry may be held, alternatively, that the order made in terms of S77 (6) be substituted with an order in terms of S78(6) of the Criminal procedure Act.”

[4] The accused was charged with the murder of his mother committed at or near the Nkobo-Nkobo location, Alice, on 27 February 2013. It is alleged that he unlawfully and intentionally killed her by hitting her with a “stamp-kok”¹. According to the post mortem examination the deceased suffered multiple lacerations and abrasions to the head, as well as multiple fractured ribs and lacerated organs. The cause of death was attributed to “blunt force”. On anyone’s account this was a violent killing.

[5] According to a statement deposed to by the accused’s brother which was tendered into evidence at the enquiry with the consent of the accused’s legal representative, the latter had reported the incident to him shortly after it happened. When the brother arrived at the scene he found their mother lying on her face in a pool of blood. The accused had also smashed a corrugated iron bath and a radio cassette attesting to his behavior having been out of control at the crime scene. The accused confided in his brother that he had woken up and assaulted their mother without any reason and claimed to have attacked her because he was “mentally disturbed”.

[6] According to the J15 the accused was arrested on 27 February 2013, but the first date of appearance in the regional court was only on 27 January 2014. The record of the magistrate’s court proceedings was not included in the review documentation. The magistrate’s court proceedings would no doubt have revealed the basis upon which the accused was referred for observation (and should in any event have been placed before the regional court as well) but I will assume for

¹ The word “stamp-kok” according to one of the exhibits filed in the proceedings is an empty five litre paint can filled with “concrete and a big iron” which was apparently being used by the accused to lift when “training”.

present purposes, because of the focus in the psychiatric report on both aspects, that the accused was referred both in terms of sections 77 and 78 of the Criminal Procedure Act.

[7] The culmination of the enquiry was a psychiatric report addressed to the Senior Public Prosecutor, Alice, under cover of a letter dated 17 October 2013. It appears from this that the panel who examined the accused at the Fort England Hospital during the period 1 to 16 October 2013 was limited to a state psychiatrist,² a psychiatrist appointed by the court³ and a clinical psychologist.⁴ A diagnosis was made on Axis I of “psychotic disorder NOS, in full remission, without treatment”. The diagnoses on Axis II and III were deferred.

[8] The ultimate conclusion drawn by the panel was that the accused was able to follow court proceedings so as to make a proper defence but he was found, at the time of the alleged offence, to be unable to appreciate the wrongfulness of the act in question. The report concludes with the recommendation that he “be made a state patient at Fort England Hospital in accordance with the provisions of section 42 of the Mental Health Care Act, No. 17 of 2002 (MHCA)”.

[9] On 3 December 2013 the Deputy Director of Public Prosecutions addressed the Senior Public Prosecutor, Zwelitsha, enclosing the report and indicating that, since the charge was one of murder, the proceedings in terms of section 77 (6) of the Criminal Procedure Act should take place in the regional court. The suggested course to be followed by the prosecutor was outlined in the following terms:

² Section 79 (1) (b) (i).

³ Section 79 (1) (b) (iii).

⁴ Section 79 (1) (b) (iv).

- “3. The report should be submitted to the Court in terms of Section 77(2) of the Criminal Procedure Act 51 of 1977.
4. If the court finds that the accused is fit to stand trial, the prosecution against the accused must go ahead in order to prove that the accused committed the act in question, as required by Section 78(5) of the said Act.
5. If the court finds that the accused committed the act in question and that at the time of such commission the accused was by reason of mental illness or intellectual disability not criminally responsible for such act, a verdict of not guilty must follow. (See Section 78(6) of the said Act.)
6. The court must be requested, after the accused has been found not guilty in terms of Section 78(6) of the Act, to direct that, in terms of section 78(6)(i)(aa) of the Act, the accused be detained in Fort England hospital or prison pending the decision by a judge in chambers as contemplated in Section 47 of the Mental Health Care Act, 2002.”

[10] Attached to the Deputy Director of Public Prosecutions’ instruction was a copy of Form MC 22 for the prosecutor’s convenience. This form is the template used when an order is made in terms of the provisions of section 78 (6) of the Criminal Procedure Act.

[11] The accused was legally represented at the proceedings in the regional court. Regarding the “trial of the facts” it appeared to have been common cause that he had committed the crime of murder on the basis set forth in the charge sheet. Several documents comprising witness statements; the post mortem examination report; the psychiatric report and the directions of the Deputy Director of Public Prosecutions were admitted into evidence by consent. The accused’s legal representative conceded that there was “a case against the accused”, but added his request that “by reason of mental defect” the accused be declared a state patient. The prosecutor agreed with the submission and, apart from clarifying at which

facility the accused was to be held, the magistrate proceeded without further ado to make his order which was in the following terms:

“Therefore the Court is making the Order in terms of Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 as amended. And the Order is directed to Fort England Mental Hospital.

Whereas the Court found that Manyano Mthimkhulu who is awaiting trial on a charge of murder is not capable of understanding the proceedings so as to make a proper defence and the Court having found that the accused has committed the action in question to wit murder.

Therefore a Court Order is hereby granted to detain the said Manyano Mthimkhulu pending the decision of a judge in chambers in terms of Section 47 of the Mental Health Care Act 17 of 2002 until a further lawful order is given for his disposal.”

[12] Despite the MC 22 template provided, the order which the magistrate issued was handwritten on Form MC 20 which, by design, is for an order issued in terms of section 77 (6) (a) (i) of the CPA.

[13] It is not clear why the magistrate found that the accused was not fit to stand trial whereas the psychiatric evidence did not support such a finding. Further, without any indication on the record that he in fact adopted the procedure set forth in section 78 (6), the magistrate endorsed on the face of the J15 that “the accused is found not guilty by reason of mental illness and defect”. The latter finding would in fact have been the correct one to make, although the magistrate evidently did not follow the indicated practice in coming to this conclusion.

[14] The procedure to be adopted in terms of the provisions of section 77 of the Criminal Procedure Act, once the matter has been enquired into and reported on in

accordance with the provisions of section 79 of the Criminal Procedure Act, and the consequences flowing therefrom in the context of what is relevant to the present matter, are set forth as follows:

“77. Capacity of accused to understand proceedings.—(1)

(1A) ...

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.⁵

(3) ...

(4) ...

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.”

[15] That is as far as the first part of the enquiry should have proceeded. The magistrate ought to have made a finding in terms of section 77 (5) of the Criminal Procedure Act that the accused was capable of understanding the proceedings so as to make a proper defence, and thereafter to have continued the proceedings in the ordinary way.

[16] What is the “ordinary way” is that the accused should then have pleaded to the charge. This is because there was no issue regarding his triability. No doubt he would have pleaded not guilty “by reason of mental defect” as his legal representative had informally indicated to the court was his stance, and aligned

⁵ Neither the prosecutor or the accused’s legal representative were pertinently asked if the report was in contention, but it can reasonably be inferred from the record that the findings were accepted, thus providing the jurisdictional basis for the court to determine the matter on the basis of the report without hearing evidence.

himself with the panel's findings that he was not criminally responsible at the time he killed his mother. This would indeed have provided the necessary affirmation that the finding in the report was not in dispute as required by the provisions of section 78 (3) of the Criminal Procedure Act. The prosecutor's attitude should also have been noted on the record whereupon a "trial on the facts" was necessary to be proceeded with in terms of the provisions of sub-rule (6). Since such a trial had already established, albeit in the first part of the enquiry, that the accused had probably committed the act in question, and since the finding of the panel was not in dispute, the court would then have made a finding on the basis indicated by section 78 (6) (a) of the Criminal Procedure Act concluding that the accused was "not guilty".

[17] The relevant provisions of section 78 of the Criminal Procedure Act, dealing with the aspect of criminal responsibility are set out below:

"78. Mental illness or mental defect and criminal responsibility.—(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable—

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

(1A) Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the

burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) ...

(5) ...

(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—

(a) the court shall find the accused not guilty; ...

(b) ...”

[18] Pursuant to the court’s finding of not guilty, it would then have been incumbent on the magistrate to direct the accused’s fate in accordance with the provisions of section 78 (6) of the Criminal Procedure Act, which options are stated as follows:

“(i) in a case where the accused is charged with 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 another

charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—

(*aa*) 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;

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

(*cc*)

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

(*ee*) released unconditionally;”

[19] The Director of Public Prosecutions had suggested that the accused be detained at the Fort England Hospital or in prison on the basis envisaged in section 78 (6) (i) (*aa*) of the Criminal Procedure Act, which it appears would have been appropriate to the circumstances of the violent crime committed by the accused. The “decision” of the Director of Public Prosecutions in this instance, which was motivated to the court as being the appropriate course of action to be adopted in the circumstances, is wholly consistent with the relevant procedure set forth in section 78 (6). As an aside it needs to be emphasized that the Director of Public Prosecution’s “decision”, or directions regarding the manner of disposal of a matter, once a section 79 enquiry has been undertaken and the diagnosis and recommendation of the professionals is to hand, is critical to the process.

[20] As indicated in a recent opinion furnished to this court by Messrs N Henning & JPM Marais of the Director of Public Prosecutions : Grahamstown in the matter of *S v Thobile Hobaga*:⁶

⁶ Case no. CA&R 293/2015 : review number 20150147.

“Once the diagnosis and recommendation of the professionals are at hand, the decision as to the further disposal of the case (i.e. how the accused is to be dealt with) is reserved for the relevant Director of Public Prosecutions, and not the local public prosecutor.⁷ The eventual application to the Magistrate regarding the disposal of the accused is therefore a well-considered decision by the Director of Public Prosecutions, based on the professional assessment and recommendation of a panel of psychiatrists and psychologists.”⁸

[21] In this sense it serves an oversight purpose which, together with the observation and assessment process provided for in section 79 of the Criminal Procedure Act, ameliorates or eliminates the risk of an incorrect order for the detention of an accused, whether as a state patient or an involuntary mental health care user. This safeguard however requires the local prosecutor to ensure that the instruction from the Director is given effect to, an exhortation that was ostensibly ignored *in casu*.

[22] Consequent upon a finding of not guilty, and assuming a proper exercise of the magistrate’s discretion, this would most likely have culminated in the selection of the option predicated upon the provisions of section 78 (6) (i) (aa) of the Criminal Procedure Act. The detention order by the magistrate should further have

⁷ In terms of Part 25 of the National Prosecuting Authority Police Directives, issued in terms of the Constitution and the National Prosecuting Authority Act, 32 of 1996; it thus carries a statutory *imprimatur*. (This footnote is incorporated from the opinion referred to above.)

⁸ The opinion related specifically to the question whether this court has authority to review Chapter 13 proceedings under the usual rubric which they are submitted to this court, namely by way of “special review”. The court in that instance declined to accede to the invitation to review the proceedings on the premise that it was unnecessary to do so in the circumstances. These matters are, however, often referred to the court on a “special review” basis, which is strictly speaking not correct or appropriate. The time will come hopefully when this court’s oversight can be dispensed with on the assumption that the lower courts, ably guided by the Director of Public Prosecutions and the designated legal representatives, are properly applying the specialized machinery of Chapter 13 to the issues of triability and criminal responsibility.

been on form MC 22, which would have indicated to those taking custody of the accused the proper nature of the basis for his detention.

[23] There is a clear distinction in purpose between the provisions of section 77 and 78 of the Criminal Procedure Act although the outcome might be the same in effect if a serious offence is alleged to have been committed. This distinction was highlighted in the recent judgment of *S v Pedro*⁹ which, although for a different reason than is relevant to the facts of the present matter, demonstrates how the magistrate in this instance confused the two enquiries:

“[80] ... Section 78(6) applies where an accused, who has the mental capacity to understand the proceedings against him as contemplated in s 77, has entered a plea of not guilty. In terms of ss 78(1A) and (1B) a person is presumed to have been criminally responsible at the time he perpetrated the alleged offence, and an accused who puts his criminal responsibility in issue bears the burden of proving the lack of criminal responsibility. Section 78(6) applies where, pursuant to criminal responsibility having been raised as an issue, the court finds that the accused lacked criminal responsibility at the relevant time. (Throughout this judgment I refer to lack of criminal responsibility only where it is brought about by mental illness or mental defect.)

[81] Where, by contrast, an accused is not capable of understanding proceedings as contemplated in s 77, he cannot in the nature of things enter a plea and the question of his criminal responsibility at the time of the alleged offence cannot be judicially determined in accordance with s 78. An accused who by reason of mental illness or mental defect is not capable of understanding the proceedings may or may not also have lacked criminal responsibility at the time he perpetrated the alleged offence; either way, he must be dealt with in accordance with s 77, not s 78. This means that he can be found neither guilty nor not guilty; no verdict is entered, and instead a direction must be made in accordance with

⁹ 2015 (1) SACR 42 (WCC) at [80] – [81].

either sub-para (i) or (ii) of s 77(6)(a). There are several cases in which erroneous verdicts in terms of s 78(6) have on this basis been set aside on review (see, for example, S v Matumbela Case 104/02/2012 WCHC Reference 2/13; S v Hendricks Case B690 WCHC Ref No 13195).”

[24] Despite the misdirected approach, however, the correct conclusion of not guilty by reason of mental illness was justified, and the accused’s detention as a state patient properly warranted by the fact that he had on a balance of probabilities committed a serious and violent offence, for which act he was not criminally responsible at the time of the commission due to mental illness.

[25] Based on the foregoing it follows that the incorrect order ought to be set aside and the enquiry undertaken afresh, but given the delay since the accused was committed, and the probability that his rehabilitation will be disrupted if the matter is remitted to the regional court, I requested the Director of Public Prosecutions, Bhisho, to advise how this anomaly should be addressed. Ms. De Kock and Mr. Bezuidenhout obliged with their helpful submissions as follows:

“A. Following your request for my views on the above matter dated 14 March 2016 Adv. De Kock of my office furnished me with the following opinion, namely that the order declaring the accused State Patient should not be set aside:

- “1. The accused was charged with murder in the Regional Court. After having been referred for mental observation, a panel of two psychiatrists and a psychologist found the accused to be fit to stand trial but not criminally responsible for the murder due to mental illness at the time of the event.
2. It is at first glance not clear in terms of which section of the Criminal Procedure Act (“the CPA”) the Regional Magistrate dealt with and concluded the matter. The charge sheet reflects “The accused is found not

guilty by reason of mental illness or defect”. This suggests that the Regional Magistrate dealt with the accused in terms of section 78 of the CPA.

3. However, the court order (MC20) reflects that the order was made in terms of section 77(6)(a)(i) of the CPA.
4. Unfortunately the full record of the court proceedings was despite several requests to the Clerk of the Court not made available to us up to now.
5. I am of the opinion that the accused was correctly declared a State Patient. From the available information to us, it is possible that the Regional Court Magistrate conducted the proceedings correctly in terms of section 78 of the CPA, but used the wrong *pro forma* document when issuing the order.
6. In light of the fact that two years have passed since the accused has been declared a State Patient and as he is currently receiving treatment, it is in my opinion that it would not be in the interests of justice to disrupt the treatment of the accused as a patient in order for the enquiry to be conducted *de novo*.”

B.

1. I agree with Adv. De Kock’s opinion as expressed in paragraph 6 (supra).
2. Taking into account the finding of the assessment panel the correct order would have been in terms of section 78 of the CPA. There was just no evidential basis for the Regional Magistrate to declare the accused State Patient in terms of section 77 of the CPA.
3. The ratio behind declaring an accused State Patient is not to punish him but to facilitate his treatment, and, if possible his recovery from a mental illness. That being the situation, once it is established that an accused should have been declared State Patient, the emphasis should not be on whether the correct section in the CPA or the correct legal procedural was followed, but rather whether the outcome was fair in that the desired result was reached.
4. A pragmatic approach would then in my view be appropriate, and in this case, taking into account that the setting aside of the proceedings to start all over again will put the accused right at the back of the very long row of those accused

awaiting admission to mental hospitals, and taking into account that this would probably seriously disrupt the accused's treatment, the whole purpose of declaring the accused State Patient may be defeated.

5. Furthermore, even if the Regional Magistrate intended to declare the accused State Patient in terms of section 77 of the CPA and he therefore should not have been found guilty, thus running the risk to be prosecuted should he recover from his mental illness, that risk can be excluded as I give an undertaking from the prosecution's side that in that unlikely event, the State will not institute criminal proceedings against the accused for this offence."

[26] I am inclined to agree that despite the irregularities in these proceedings under review, the end result is the same, i.e. that the accused has been declared a state patient under the provisions of section 47 of the Mental Health Care Act, and that it would be harmful to his rehabilitation, and not serve the interests of justice, to remit the matter to the regional court. Mr. Bezuidenhout correctly emphasizes the *ratio* behind the declaration of an accused person as a state patient, which is not to punish him, but to facilitate his treatment and, hopefully, his recovery from mental illness. Despite having being received into the programme pursuant to the wrong provisions of the Criminal Procedure Act, this is an insignificant detail against this objective and the gains made by the treatment he has undergone since the "wrong" order was issued more than two years ago.

[27] This court is in any event in as good a position as the regional court to make the appropriate finding warranted by the clear circumstances of the matter and the obvious outcome which ought to have ensued.

[28] In the result the following order issues:

1. The finding endorsed on the face of the J15 to the effect that the accused is “not guilty by reason of mental illness or defect” is confirmed.
2. The detention warrant is substituted, retrospective to 5 February 2014, with the correct warrant on Form MC 22 (attached marked Annexure “A”).

B HARTLE
JUDGE OF THE HIGH COURT

I AGREE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
BHISHO

DATE OF JUDGMENT: 5 April 2016