

A239/15

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

Review Case No: SR3/2015/APW

In the matter between:

THE STATE

and

S D N NONJINI

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : YES ☒ NO

(2) OF INTEREST TO OTHER JUDGES : YES ☒ NO

(3) REVISED ☒

DATE 2/4/15. SIGNATURE 

20/4/2015

Summary: Review of criminal proceedings; Sec 22(1)(c) of the Superior Courts Act no 10 of 2013; Sec 77(6)(a) of the Criminal Procedure Act no 51 of 1977; Gross irregularity in proceedings.

REVIEW JUDGMENT

D S FOURIE, J:

[1] The accused was charged with theft of a motor vehicle in the Magistrate's Court and then referred to the Sterkfontein Hospital for 30 days mental observation in terms of section 77(1) of the Criminal Procedure Act, No 51 of 1977. A psychiatric report was presented to the Court *a quo* indicating that the accused is not fit to stand trial and also that he, at the time of the alleged offence, was unable to appreciate the wrongfulness of his actions. It was recommended that the accused be admitted to the

Sterkfontein Hospital as an involuntary patient under Chapter V of the Mental Health Care Act, No 17 of 2002.

[2] Subsequent to the receipt of the psychiatric report the matter was postponed for a decision of the Director of Public Prosecutions. An instruction was then issued that the prosecution must proceed and that the Court should be requested to act in terms of section 77(6)(a) of the Criminal Procedure Act. The Court *a quo* then proceeded to hold an inquiry in terms of section 77(6)(a) of the Act. The Magistrate found that the accused could not be linked to any offence and promptly released the accused back into society.

[3] The Director of Public Prosecutions then requested the Court *a quo* to refer the matter to the High Court for review. The Acting Senior Magistrate requested a special review in terms of section 304(4) of the Act. In his submission he pointed out that the presiding Magistrate had failed to establish from the prosecution and the defence whether the findings in the psychiatric report are disputed or accepted, to make a finding in terms of section 77(6)(a) and to direct that the accused shall be admitted to and detained in an institution as if he were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, No 17 of 2002.

[4] The first question to be decided is whether these proceedings are reviewable. The matter is not serving before us as a review in terms of section 304 or 304A as the accused was not convicted of an offence or

sentenced as envisaged by these sections. However, this is not the end of the matter. In terms of section 22(1)(c) of the Superior Courts Act no 10 of 2013 the proceedings of any Magistrate's Court may be brought under review if there was a "gross irregularity in the proceedings". In Qozeleni v Minister of Law and Order 1994 (3) SA 625 (ECD) at 638E-G Froneman J said the following in this regard:

"If the magistrate did err in his interpretation of s 241(8), the effect thereof would be that he had decided not to apply the (supreme) law of the land in a court of law. That, in my view, is as fundamental an irregularity as one can get. Mistakes of law by officials exercising judicial functions are under certain circumstances liable to lead to the review of decisions made in consequence thereof ... That does not mean that any wrong application of the law by a magistrate will lead to review: there is a distinction between a mistake of law leading to a situation where the supreme law of the land is not applied at all, and a situation where the law of the land is applied, but incorrectly. In the latter case, generally speaking, there will be no possibility of review ...".

[5] I fully associate myself with this *dictum*. Although this was said with regard to the (repealed) interim Constitution of 1993, the same principle should apply where a Magistrate fails to comply with a statutory provision which is peremptory. Such a failure will amount, in my view, to a gross irregularity in the proceedings rendering it reviewable in terms of section 22(1)(c) of the Superior Courts Act.

[6] The next question to be considered is whether the presiding Magistrate committed a gross irregularity. Section 77(6)(a) of the Criminal Procedure 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) ...

(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) ...

and if the Court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question."

[7] The provisions of subsection (6)(a)(ii)(aa) appear to be peremptory. That also applies to a case where a Court finds that the accused has not committed any offence. In either event the Court “shall direct” that the accused be admitted to and detained in an institution as referred to in the subsection.

[8] In the matter before us the Court *a quo* found that the accused could not be linked to any offence, but failed to apply the provisions of section 77(6)(a)(ii)(aa) of the Act. This is not a mistake where a statutory provision is applied incorrectly. This is a mistake where a statutory provision which is peremptory, was not applied at all. This, in my view, amounts to a gross irregularity in the proceedings which necessitates that the proceedings and order in terms whereof the accused was released, should be set aside.

ORDER: In the result I propose the following order:

- (1) The proceedings and the order in terms whereof the accused was released are set aside *in toto*;
- (2) The matter is remitted to the Magistrate, Vereeniging to be dealt with *de novo* in terms of the provisions of section 77 of the Criminal Procedure Act, No 51 of 1977, with specific reference to subsection (6)(a)(ii)(aa) thereof

and for this purpose the accused must be brought before
the Court again.


D.S. FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

I agree and it is so ordered.


N B TUCHTEN
JUDGE OF THE HIGH COURT
PRETORIA

Date: 2 APRIL 2015.