

NOT REPORTABLE

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

CASE NO: 3/2015

In the matter between

THE STATE

versus

MXOLISI DLALI

REVIEW JUDGMENT

HARTLE J

1. The matter came before me as a routine review.¹ It concerns the purported issue of a direction by the magistrate in Whittlesea that the

¹ The clerk of the court referred the matter on the basis provided for in section 302(1) (a) (i) of the Criminal Procedure Act, No. 51 of 1977 (“CPA”) no doubt because of the recent appointment of the magistrate. This section is not applicable, however, since there was no “sentence imposed” by her. (See *S v Blaauw* 1980 (1) SA 536 (C) and *S v Zondi* 2012 (2) SACR 445 (KZP)). Neither for that matter are the review procedures in terms of sections 302 (4) or 304A of the CPA applicable because a person who is detained pursuant to the provisions of section 77 (6) is not “convicted” in the ordinary sense of the word, neither

accused person be detained as a state patient pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, No 17 of 2002 (“MHCA”).

2. The accused was charged with assault common committed on 12 June 2013.

3. On 17 June 2014 the prosecutor placed on record that he “has (a) history of mental illness”. He was remanded in custody then and on several subsequent dates for “bed space” at the Fort England Psychiatric Hospital in anticipation of being referred for “psychiatric observation”.

4. Without any indication as to the objective for the referral being stated on the record on 8 October 2014 the accused was referred to Fort England on the application of the prosecutor “for assessment” for the statutory period of thirty days.

5. The record contains no copy of the relevant warrant issued at the time; neither does it appear that the court issued any direction, whether in terms of sections 77(1) or 78(2) of the Criminal Procedure Act, No 51 of 1977 (“CPA”) constituting the necessary basis for a section 79 enquiry.

6. The accused appeared again on 4 November 2014 and was remanded in custody on several further dates, this time for the decision of the Deputy Director of Public Prosecutions, and on two further dates in January 2015 for “an inquiry in terms of section 77 of the Criminal Procedure Act”. This enquiry ultimately ensued on 28 January 2015.

7. Before I turn to deal with what happened on this date, a copy of the “decision” of the Deputy Director of Public Prosecution, Bhisho, addressed to the “Control Prosecutor” dated 27 November 2014 is attached to the J15, although given no context in the record. The practice appears to be that the prosecutor produces this document as confirmation of the State’s attitude once the psychiatric report comes to hand in order to guide the prosecutor in the submissions which he or she is required to make in taking the matter forward. Invariably it forms part of the record and as I say attests to the State’s stance, but it should be merely supplementary to the magistrate’s own notes on the record as to what submissions were made by the parties concerning the findings of the examining panel expressed in the report. In this instance the magistrate gives no indication in the record whatsoever as to whether the psychiatric report was accepted or contested by either of them.

8. The content of the report is repeated below:

“OBSERVATION PATIENT: MXOLISI DLALI

1. The psychiatric report indicates that the accused is mentally ill or defective and that he is incapable of standing trial for the accused is mentally ill or defective and that he is incapable of standing trial and/or not criminally responsible for the offence of Assault (sic).²
2. The report should be submitted to the Court in terms of Section 77(2) of the Criminal Procedure Act 51 of 1977.
3. If the Court finds that the accused is not capable of understanding the proceedings, as to make a proper defense, kindly:-
 - 3.1 request the Court to make a finding on whether the accused committed the act in question, and for that purpose inform the Court what evidence is

² It is a misstatement that the examining panel found the accused not to be criminally responsible at the time of the commission of the offence. For the rest this paragraph is gibberish.

available in the docket linking the accused to the offence, in order to enable the Court to determine whether the accused committed the act; and

3.2 submit to the Court that, since it is necessary in the public interest, to direct that the accused be detained (at the) Komani hospital OR prison pending the decision by a Judge in chambers.

4. Please take note that the accused must be legally represented during the enquiry held in terms of Section 77 of the Criminal Procedure Act, No. 51 of 1977. **[See S v Matu 2012(1) SACR 68 (ECB)]**
5. Find a copy of a draft order attached hereto for the use and convenience of the magistrate.”

9. The “draft order” referred to in the Director of Public Prosecution’s decision is attached to the J15 and reads as follows:

“
ORDER IN TERMS OF SECTION 77(6) (a) (i)
OF THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977
[ACCUSED NOT CAPABLE OF UNDERSTANDING THE
PROCEEDINGS DUE TO MENTAL ILLNESS OR MENTAL
DEFECT (VIOLENT ACTS)]

CASE NO. 57/14

THE STATE versus MXOLISI DLALI

To : The Superintendent, Komani Hospital, Queenstown

WHEREAS the court found that **MXOLISI DLALI**, who is awaiting trial on a charge of **Assault**, 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 act in question to wit:

- ☐ Murder
- ☐ Culpable Homicide
- ☐ Rape
- ☐ Any offence involving serious violence or
- ☐ Necessary in the public interest

THEREFORE a court order is hereby granted to detain the said **MXOLISI DLALI** pending the decision of a judge in chamber in terms of section 47 of the Mental Health Care Act, Act 17/2002 until a further lawful order is given for his disposal.”

10. The copy in the court file was dated and signed by the magistrate on 28 January 2015. She did so mechanically. I say so because no selection was made by her on the template order concerning the options indicated therein -

put forward as suggestions, despite an instruction at the foot thereof to delete the inapplicable options. The inappropriate syntax was also simply glossed over.

11. The psychiatric report records the result of the enquiry in terms of section 79 of the CPA in the following terms:

“The purpose of the enquiry was a psychiatric evaluation, in accordance with the provisions of Section 79 of the Criminal Procedure Act, Act 51 of 1977, as amended, of:

NAME OF ACCUSED : **Dlali Mxolisi**
AGE : **43 years**
CHARGE : **Assault**
CASE NUMBER : **B122/14**
HOSPITAL NUMBER : **MO 367/14**

SECTION 79(1) : **PANEL FOR THE PURPOSE OF ENQUIRY AND REPORT**

Dr. W. Esterhuysen (Psychiatrist)

Dr. H. Loffstadt (Psychiatrist)

We, the panel members, hereby declare that we are duly registered with the Health Professions Council of South Africa and that we examined the accused at Fort England

Hospital during the period 8 October 2014 to 31 October 2014. We held discussions and report as follows:

SECTION 79(4) : **NATURE OF ENQUIRY**

The accused was admitted to Fort England on 08 Oct 2014, following an order made by the Magistrate of Whittlesea in accordance with the provisions of Section 79(2) of Act 51/77, dated 08 Oct 2014. During the period of observation at Fort England Hospital, the accused had psychiatric interviews, physical and neurological examinations, blood tests and was kept under constant observation by the psychiatric nursing staff. Reference was made to the prosecutor's report.

SECTION 79(4)(b) : **DIAGNOSIS**

Axis I : **Psychotic Disorder not otherwise specified**
Alcohol Abuse

Axis II : **Defer**

Axis III : **[...]**

SECTION 79(4)(c) : **ABILITY TO FOLLOW COURT PROCEEDINGS**

The accused is unable to follow court proceedings so as to make a proper defence.

SECTION 79(4)(d) : **RESPONSIBILITY**

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

RECOMMENDATION

It is respectfully recommended that the accused be admitted to Komani Hospital as a State Prison in terms of Section 42 of the Mental Health Care Act.”

12. The report is signed by the two psychiatrists and is dated 31 October 2014.

13. To return to the court’s enquiry on 28 January 2015, the purpose recorded in the transcript is limited to “make a finding whether the accused person committed the act in question and for the Court to decide whether there is any evidence that (is) linking the accused person to the offence”. No reason is given why the enquiry was considered necessary in the circumstances.³ Further, no prior finding was recorded by the magistrate concerning the accused’s fitness to stand trial, which appears to be a pre-requisite before conducting an enquiry into the facts⁴.

14. At the enquiry the complainant (the accused’s mother) testified that the accused had demanded money from her on 12 June 2014. She had none to give him. She sought to borrow money from someone as per the accused’s instructions. When this request turned up empty and she informed him, the accused struck her with an open hand. When she challenged why he was hitting her, he struck her a second time and she fell to the ground. In

³ The enquiry is only held if the court is of the view that it would be in the accused’s interest that one be held (S77 (6)). That would be the case, for example, where doubt exists that he was involved in the commission of the offence. Perhaps it was not so clear in this case that there was probably a *prima facie* case against the accused based on the information at everyone’s disposal, but the magistrate gives no inkling why she thought it necessary to hold such an enquiry. One gains the distinct impression from the exercise, however, that she perceived this enquiry to be the single determining factor in the matter whilst glossing over other requirements and necessary enquiries in the Chapter 13 trajectory.

⁴ See the introduction to section 77(6) (a) which follows if a finding in terms of subsection (5) is not made.

the process she bit herself and bled. Someone else present intervened to stop the accused from further assaulting her. He was arrested the following day because, so she explained, the accused “ran”.

15. The facts enquiry went unchallenged (the defence attorney asked no questions)⁵, and without inviting any further submissions from the parties, the magistrate concluded that there was a “prima facie case” against the accused.

16. Again without inviting submissions from the state or the accused as to whether the more serious direction referred to in section 77(6)(a)(i) rather than subsection (ii)(aa) was indicated (especially since the charge was one of assault common), and without furnishing any reasons in this regard, she ruled that “the accused ... be detained in Komani Hospital pending the decision of the Judge in Chambers in terms of section 47 of the Mental Health Care Act until a further lawful order is given for his disposal”. This “ruling” co-incides with the draft order referred to in paragraph 9 above, placed at her disposal for her convenience and to which she appended her signature as I said before without ostensibly giving the matter any proper thought.

17. The court’s handling of this matter from the outset to the date of the issue of the purported directive is perturbing in a number of respects.

18. There is no indication other than the reference in the record to the accused’s history of mental illness to discern the basis for the ordering of the section 79 enquiry in the first place. The criterion for fitness to stand trial is

⁵ This suggests that the parties were likely in agreement that it could be proved on a balance of probabilities that on the limited evidence available the accused committed the act in question.

whether the accused is “by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence”.⁶ This concerns the question whether at the time of consideration he lacks fitness to stand trial. The criterion for criminal responsibility, assessed at the time of the commission or omission of the offence, is provided for in section 78. Before a court can refer an accused for observation whether in terms of section 77 (1) or 78 (2), it must be satisfied as to the existence of a factual or medical basis for the allegations of lack of fitness to stand trial and or of criminal incapacity.⁷

19. The record in this instance suffers from a dearth of information. It fails to elucidate or give any context or significance to the issue of the accused’s so-called mental history. The prosecutor ostensibly failed to say more than what is recorded in the J15. No discussion appears to have been pursued in this regard and certainly no input appears to have come from the accused’s legal representative concerning whether she was, for example, able to elicit proper instructions from him and/or whether he could meaningfully participate in or follow the court proceedings. It should appear from the record that a reasonable possibility exists on an objective consideration of all the information placed before the court that an inquiry is called for. A referral in itself holds serious consequences for an accused and it follows in my view that it should be transparent that a proper and relevant reason exists to invoke the provisions of section 77(1) or section 78(2), or both, in the particular circumstances of the matter.

⁶ Section 77(1).

⁷ S v Mogorosi 1979 (2) SA 938 (A) at 941H – 942B; S v Makoka 1979 (2) SA 933 (A) at 937 B – H.

20. The court must then make its direction, either in terms of section 77 (1) or 78 (2), or both, because this is the necessary jurisdictional basis for the relevant enquiry in terms of section 79 (1) to be conducted and reported on.

21. It is also necessary for reasons of transparency which I refer to above that the specific objective of the enquiry be clearly stated. In this instance the panel ostensibly concerned itself with issues of both triability and criminal capacity. With hindsight one can say that the referral was perhaps objectively justified on both bases because “mental illness” was at the root of the accused’s inability to understand the proceedings or to act with the requisite criminal capacity, but this should not be left to fathom by those examining the accused.

22. Further, a distinction is to be drawn between a referral expected to result in the issue of a direction in terms of section 77(6)(a)(i) as opposed to one in terms of subsection (ii) (aa). In the former case the court is obliged to receive a report under section 79(1)(b) from a plenary panel (although not necessarily including a psychologist except where the court so directs), whereas in respect of the latter the report of a single psychiatrist under section 79(1)(a) will suffice. In this regard it appears that except where the accused is charged with the listed crimes, i.e. murder or culpable homicide or rape or compelled rape, or another charge involving serious violence, the court must also give consideration to the question whether a plenary panel should enquire into and report on the issue of the accused’s fitness to stand trial or his criminal responsibility, as the case may be, in accordance with the provisions of section 79 on the basis that the court considers it to be

necessary in the public interest that the more serious direction that the accused be detained as a state patient ultimately be issued.⁸

23. Given the absence of any firm indication of the reason for or objective to be attained by the referral in this particular instance, it was not surprising that the panel was not constituted as it ought to have been for the relevant order which the court ultimately purported to grant. As it turned out only two psychiatrists examined the accused whereas he ought to have been interviewed in accordance with the requirements of section 79(1)(b). This entails at the very least a three member panel of suitably qualified psychiatrists including one appointed for the accused by the court. Absent such an enquiry, peremptory in terms of section 77(1) read with section 79(1), the court was therefore not empowered to act in terms of section 77(6)(a)(ii) by issuing the order which it did and this on its own constitutes a gross irregularity in the circumstances.⁹

24. The accused was charged with assault common. I make no comment whether the matter could not have been concluded on the basis provided for in section 77(6)(ii)(aa) on the strength of the psychiatric report as it presently stands, but the state obviously had its brief to pursue the detention of the accused on the basis of section 42, read with section 47, of the Mental Health Care Act instead.

⁸ It appears that the court may in considering who is required to conduct the relevant enquiry and report on the matter simply direct that a full panel be appointed anyway. The last ground on which a plenary panel may be appointed under section 79 (1) (b) is “....or where the court in any particular case so directs – “ Given the prohibitive cost of a referral and the logistics of putting together a plenary panel (not to mention the imposition to the accused being subjected to the enquiry), a court should be astute at the time of ordering the referral to consider whether the need is justified and, if necessary, to hear argument in this regard. The appointment of a plenary panel must in my view be properly justified with the end objective in sight and not just routinely ordered.

⁹ S v Siko 2010 (2) SACR 406 (ECB) at paragraphs [9] and [10].

25. A further glaring irregularity is that the court made no finding on the issue whether the accused was capable of understanding the proceedings due to mental illness or defect, an obvious prerequisite before he could be detained, whether as a state patient or an involuntary mental health care user.

26. The magistrate appears further to have floundered generally in respect of the required processes and oversight. She failed, for example once the psychiatric report was to hand, to determine (or at least to record) what the stance was of the State¹⁰ and the defence in respect thereof (assuming it to be compliant with the provisions of provisions 79 (1)), and more particularly whether it was disputed.¹¹ This is a necessary question to be asked, the reply to which might involve the leading of further evidence before the determination as to the accused's fitness to stand trial can be made.

27. I have remarked above too on her failure to receive submissions at the appropriate times when these were indicated. I mention in this regard that she appears to have blindly followed the recommendation of the Director of Public Prosecution in issuing her direction which she ultimately purported to without applying her mind independently or even canvassing the views of the parties.

28. I repeat the guidelines outlined in *S v Matu*,¹² in applying the provisions of section 77 with the added caveat that the relevant directions in terms of section 77(1) or section 78(2) (or both) should be recorded on the

¹⁰ The decision of the Director of Public Prosecution suggests the attitude of the state which the court ought to have questioned at least in respect of the mistaken impression set forth in the document that the panel had found that the accused was not criminally responsible at the time of the commission of the offence. Either this was a typographical error in the document, or it should have evoked a discussion around the question whether an order in term of section 78 (6) was necessary in the circumstances. This oversight confirms to my mind that the magistrate was simply going through the motions without applying her mind along the way.

¹¹ See section 77 (2).

¹² 2012 (1) SACR 68 (ECD) at para [29].

file and that care should also be taken to ensure that the correct warrant is issued to the superintendent of the relevant institution concerning the nature of the enquiry in terms of section 79(1) to be undertaken. If any doubt exists concerning the nature of the charge and/or whether it is one that culminates in a direction that the accused should be detained as a state patient rather than as an involuntary mental health care patient, this aspect should be properly ventilated and a firm indication given in this regard that the proper panel be appointed.

29. In this matter the accused was represented by an attorney. In *S v Matu*¹³ I stressed both the desirability and necessity for such representation in matters such as these. My reference to the anticipated “perfunctory” involvement of a practitioner in that judgment was premised on the inevitability of the processes which would follow once the matter was remitted to the court in question, but that should not be taken to mean that anything but meaningful representation should be afforded to an accused who finds himself subjected to the very complex provisions of Chapter 13 of the CPA.

30. It is regrettable that the practitioner in this instance appeared to adopt such a lackluster approach in safeguarding the accused’s interests¹⁴.

31. Seemingly no input was offered by her either at the interval when it was determined that a jurisdictional basis existed to order an investigation in terms of section 79 (whether on the grounds set forth in section 77(1) or 78(2) of the CPA), or when the psychiatric report came to hand (whether in respect of the aspect of its compliance with the provisions of section

¹³ (supra at par [28]).

¹⁴ I immediately concede that it may only appear so because of the absence of any recording by the magistrate at the various intervals of any interaction with the parties before her.

79(1)(b) or its merits). She also made no submissions at the juncture when the magistrate had to determine which direction it was appropriate to issue in the circumstances. The matter could also have been concluded with greater alacrity it not being readily apparent why the determination and issue of a direction was delayed so substantially despite the psychiatric report being made available on 31 October 2014 already.

32. I cannot imagine a more vulnerable category of accused persons than those subject to the provisions of Chapter 13.

33. Such an accused person is present in court yet possibly mentally absent, particularly if he cannot instruct his legal representative or meaningfully participate in the court proceedings. He is displaced to a foreign environment in a psychiatric hospital where he is subjected to an enquiry of a different kind (before a “trial” on the facts is undertaken to determine if he probably perpetrated the crime)¹⁵, the relevance of which may have no significance to him (yet infringe upon his fair trial rights), by an array of professionals he has no affinity with. This is an experience which in itself must be anxiety provoking. Thereupon the court may issue an order appointing him as a state patient which has potentially serious consequences but which might not be warranted in all the circumstances (especially if the charge is in respect of a petty offence) or be more damning than if he were just convicted and sentenced in the ordinary course.

34. In *S v Siko*¹⁶ the court pointed out that it is more complicated to secure a state patient’s discharge in terms of section 47 of the Mental Health

¹⁵ In my view it would be more constitutionally sound to conduct the limited enquiry into the facts, if there is any doubt that the accused committed the offence, before rather than after the referral and finding concerning his capacity to stand trial is made.

¹⁶ 2010 (2) SACR 406 ECB.

Care Act than the discharge of an involuntary patient as provided for in section 37 of the same act. The directive is also not automatically reviewable, neither is the oversight afforded to the state patient by a judge in chambers in terms of section 47 of the Mental Health Care Act tantamount to such a review.

35. The fact that an accused in respect of whom a direction in terms of section 77(6)(a)(i) has been made has the right to appeal against it, is cold comfort for one who has been declared unfit to stand trial and who may well, because of the very jurisdictional fact justifying the referral in the first place, not appreciate the meaning and extent of such right.

36. The potentially serious prejudice to the accused affected by the provisions of Chapter 13 of the CPA accordingly demonstrates the absolute need by a legal practitioner to be vigilant in ensuring that his or her fair trial rights are respected throughout the process and properly weighed against the need to protect the community from mentally ill members of society who brush with the law.

37. In summary the detention order issued by the magistrate falls to be set aside and the matter remitted to the court to be appropriately dealt with. Being mindful that the state had cause to approach the court on the basis that the accused had committed an act in respect of which it was “necessary in the public interest” to have him detained as a state patient as a consequence I consider it prudent, as the court did in *S v Siko*,¹⁷ to have him detained in the meantime at the Komani Hospital as if he were an involuntary mental health care user pending the finalisation of the matter.

¹⁷ Supra.

38. In the premises I issue the following order:

38.1 The finding and purported direction of the magistrate dated 28 January 2015 are hereby set aside.

38.2 The matter is referred back to the magistrate's court to be dealt with appropriately in terms of the provisions of Chapter 13 of the Criminal Procedure Act, No. 51 of 1977 and the corresponding relevant provisions of the Mental Health Care Act, No. 17 of 2002.

38.3 Pending the remission of the matter, the accused is to be detained at the Komani Hospital, Queenstown, as if he were an involuntary mental health care user as contemplated by the provisions of section 37 of the Mental Health Care Act, No. 17 of 2002.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

D VAN ZYL

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 27 FEBRUARY 2015