

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

REVIEW CASE NO: A222 / 14

In the matter between:

THE STATE

and

XOLANE ELVIS RALANE

REVIEW JUDGMENT

MBENENGE J:

[1] The accused stood charged before the Magistrate, Whittlesea with assault to do grievous bodily harm, it being alleged that on or about 22 October 2014 and at or near Sada township, Hewu district, he (the accused) unlawfully and intentionally assaulted T. M. R. by stabbing her with a pair of scissors with the intent of causing her grievous bodily harm. The information and evidence placed before

Court, including a J88 medico legal report under cover of the relevant affidavit, pointed to the accused as having inflicted five stab wounds on his [.....] year old mother, the complainant.

[2] Both the prosecutor and the accused's legal representative were in agreement that the accused was not capable of understanding the proceedings so as to make a proper defence. Consequently, the provisions of section 79 of the Criminal Procedure Act 51 of 1977 (the CPA) were invoked, culminating in the accused being referred for mental observation.

[3] Reports compiled by 2 psychiatrists were subsequently generated and served before the Magistrate. Not being satisfied that there was compliance with the provisions of section 79(1)(b) of the CPA, the Magistrate ordered, in terms of section 77(6)(a) of the CPA, that the accused be detained at the Komani Hospital *"whilst awaiting trial on a charge of assault with intent to do grievous bodily harm, pending the decision of the Judge in chambers in terms of section 37 of the Mental Health Care Act until a further lawful order is given for his disposal."*

[4] When the matter came before Van Zyl ADJP on review, he remarked as follows:

"Having been charged with assault with the intent to do grievous bodily harm, should the accused not have been examined by a panel as provided for in section 29(1)(b) of the Criminal Procedure Act? If so, how does that affect the proceedings conducted by the Magistrate and his findings made thereat? It would appear that the Magistrate was of the view that the report did not comply with that section as contended on behalf of the accused, and then made the order in terms of section 77(6)(a)(ii) instead. Could he do that in

light of the fact that the accused was charged with an offence involving serious violence?”

[5] The remarks were directed at and attracted the views of the Director of Public Prosecutions, Bhisho for which this Court is grateful.

[6] Section 79(1)(b) of the CPA¹, insofar as it relates to an accused charged with an offence involving serious violence, makes provision for the conducting of an enquiry reported on by –

- (a) 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;
- (b) 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 issued under subsection (13) by the National Director of Public Prosecutions;
- (c) by a psychiatrist appointed for the accused by the court; and
- (d) by a clinical psychologist where the court so directs.²

[7] On the authority of *S v Booie Pedro*,³ and indeed upon a proper construction of section 79(1)(b), three psychiatrists, including a

¹ As amended by section 10(a) of the Judicial Matters Amendment Act 66 of 2008

² Section 79(1)(b)(i)-(iv) of the CPA

³ Unreported decision of the Western Cape Division, Cape Town by Binnis- Ward et Rogers JJ delivered under High Court Ref no:14228 Oudtshoorn Case No:B247/11 on 9 July 2014

private psychiatrist, must be appointed when the case falls within the section, unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed, in which case there must be two psychiatrists.⁴

[8] The Office of the Director of Public Prosecutions, Bhisho has, in its helpful response made pursuant to the remarks quoted above, pointed out that there is a paucity of psychiatrists in this region, hence the Eastern Cape Director of Public Prosecutions has, by circular 1 of 2005 (as amended on 14 July 2014) given written authority to all prosecutors to apply to the court to dispense with a third psychiatrist in cases where a third psychiatrist would otherwise form part of the panel.⁵

[9] The record in the instant proceedings does not point to the prosecutor as having applied to the court to dispense with a third psychiatrist. The procedure followed by the Magistrate therefore does not pass muster. The accused was charged with an offence involving serious violence and called for the involvement of a third psychiatrist, unless the court, upon application by the prosecutor, had directed that a third psychiatrist did not have to be appointed.

[10] In all these circumstances, the proceedings conducted by the Magistrate, Whittlesea on and after 13 May 2015 are set aside. The matter is remitted to the Magistrate so as to be dealt with appropriately in terms of section 79(1)(b) of the CPA.

⁴ Para [68] of the *Booi Pedro* judgement

⁵ Paragraph 25 of the Circular

S M MBENENGE

JUDGE OF THE HIGH COURT

21 July 2015

I agree

D VAN ZYL

ACTING DEPUTY JUDGE PRESIDENT

