



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

CASE NO: A259/10

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
...18/04/2013.....	
DATE	SIGNATURE

In the matter between:

OBED LESIBA MALATJI

Appellant

and

THE STATE

Respondent

JUDGMENT OF THE COURT

MAKGOKA J et RATSHIBVUMO AJ

[1] This appeal, which is against both the conviction and the sentence, is with leave of the trial court. The appellant was convicted of murder and sentenced to 20 years' imprisonment by the regional court, Mokopane. The appeal raises two primary issues.

First, whether the trial court erred in not referring the appellant for mental observation in terms of s 79 of the Criminal Procedure Act 51 of 1977 (the CPA). Second, the effect of the failure by the regional court to appoint two assessors in terms of s 93ter of the CPA. The State supports the conviction and the sentence.

[2] The appellant was legally represented. He was convicted on the basis of his own admissions in terms of s 220 of the CPA, and the formal evidence of Inspector Frans Madimetja Maleka. The appellant did not testify during the trial, and closed his case without calling any witnesses to testify in his defence. During the sentencing proceedings, the SAP 69 form revealed that the appellant was convicted of murder in 1984, and was **declared a State President's patient during**.

[3] During his address in mitigation of sentence, the appellant's legal representative confirmed to the court that the appellant had been **detained** in a mental hospital for a long time, but according to the documentation in his possession the appellant had 'fully recovered.' The circumstances relating to the history of his medical condition, or his release, were not investigated further, and the appellant was summarily sentenced to 20 years' imprisonment.¹

¹The appellant's murder conviction, which resulted in him being declared a State President's patient, was taken by the learned regional magistrate to be a previous conviction, hence he regarded the appellant as a second offender. This brought the sentencing within the purview of s 51 of the Criminal Law Amendment Act 105 of 1977, which prescribes 20 years' imprisonment, unless the court found to exist, substantial and compelling circumstances. Having found no such circumstances, the appellant was sentenced to 20 years' imprisonment. There is doubt whether, in light of the declaration of the appellant as a State President's patient, the appellant could be regarded as a second offender. However, we express no firm view on the issue, as nothing turns on it, given the view we take of the appeal.

[4] The conviction on the merits is not in dispute. Before us, the only contention is that the appellant should have been referred for mental observation in terms of s 79 of the CPA, once the information about his mental history was disclosed. Referral for mental observation is governed by s 78(2) of the CPA, which provides:

78(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 s 79.²

(own emphasis)

[5] An order in terms of s 78(2) can be made at any stage of the proceedings (*S v Mogorosi* 1979 (2) 938 (A); *S v Majola* 1980 SA 705 (W)). It can even be made after the conviction, but before the sentence, as provided for in s 78(6)(b) of the CPA (*S v Van As* 1989 (3) SA 881 (W) at 884B-C). When acting under s 78(2), the court does not do so on a mere allegation of criminal incapacity without some indication of the reasons therefor (*S v Makoka* 1979 (2) SA 933 (A)).

² When the accused is charged with murder, culpable homicide, rape, or another charge which involves serious violence, the accused's mental condition is investigated by a medical superintendent of a psychiatric mental hospital or a psychiatrist appointed by such medical superintendent at the request of the court, or a clinical psychologist.

[6] There is no onus on the accused. There need only be a reasonable possibility that the accused might not be criminally liable. If there is such possibility, the court is obliged to order the enquiry. The jurisdictional threshold set out in s 78(2) is therefore met when there is a reasonable possibility, with regard to an objective assessment of all the information before the court, that the accused is not criminally responsible or has diminished criminal capacity.

[7] From the plain reading of s 78(2) it is clear that in the case of an allegation or appearance of mental illness or mental defect, the court is obliged to direct that an enquiry be made under s 79. However, if the allegation is made or appearance relates to 'any other reason' the court has a discretion whether or not to direct that an enquiry be made under s 79. In my view the present case falls under the former category. The very fact of the appellant having in the past been detained as the State President's patient, was sufficient for the court to direct that an enquiry be made under s 79. There was more than an allegation.

[8] For example, in *S v Mandlasi* 1987 (3) SA 14 (A), the accused had been convicted of murder. Before sentence, an application was made on his behalf in terms of s 78(2) to have him referred for observation on the ground that he was not criminally liable when the murder was committed. A district surgeon had examined the accused on the morning of the application and was of the opinion that the accused was normal, but could form no opinion as to the accused's mental condition at the time of the murder. Evidence had been led that the accused had made confession to priests of his church and had told them of his seeing visions and hearing the deceased scream.

The appellant's father had also testified that at some time in the past the appellant was 'mad' but that at the time of the murder he was normal. The application for referral was refused. On appeal, the appellate division held that on the information before the trial court there was a reasonable possibility that the appellant was mentally disturbed or suffered from a mental disorder when he committed the murder and that the application should have been granted.

See also *S v Mphela* 1994 (1) SACR (A) at 493f-g; *S v Matu* 2012 (1) SACR 68 (ECB); and *S v Siko* 2010 (2) SACR 406 (ECB).

[9] Having regard to all the above considerations, we conclude that the trial court was obliged to act under s 78(2) of the CPA and refer the appellant for observation. The conviction, in the circumstances, cannot stand.

[10] We now turn to consider the second issue in the appeal – the failure by the learned regional magistrate to appoint two assessors in terms of s 93*ter* of the CPA.³ The issue is whether the court was properly constituted (with one assessor). What happened is this. The appellant pleaded not guilty on 21 January 2008 and elected not to offer any plea explanation. On 25 January 2008 the appellant's legal representative requested that 'an assessor may be arranged'. On 17 April 2008, one assessor, Ms. Susara Aletta Coetzee, was appointed, and the trial commenced, and culminated in the appellant's conviction and sentence, on the same day.

³ This issue was not raised by either party in their written submissions, but which we raised during argument. Both counsel agreed that it is an important procedural one, which is dispositive of the appeal, and therefore deserve to be addressed in this judgment.

[11] In terms of s 93ter(1) of the Magistrate Court Act 32 of 1944 a regional court is enjoined to appoint, and be assisted by, *two* assessors if an accused faces a charge of murder before it, unless such an accused requests that the trial be proceeded with without assessors. Once an accused makes his election to be tried with the assistance of assessors, the peremptory nature of the provisions of s 93ter (1) are triggered, and the regional court retains no residual discretion to appoint one assessor. Counsel for the State, Mr. *Mashile*, contended that it does not appear that the appellant was prejudiced by failure to appoint two assessors. This argument found favour in *S v Naicker* 2008 2 SACR 54 (N).

[12] However, *Naicker* has not been followed by the Gauteng courts (*S v Mokalaka* 2010 (1) SACR 88 (GNP) and *S v Du Plessis* 2012 (2) SACR 247 (GSJ)). It can now be accepted in this court that failure to appoint assessors as provided for in s 93ter, where the requisite jurisdictional facts were present, amounts to an irregularity which vitiates the proceedings.

[13] Apart from the failure by the learned regional magistrate to appoint two assessors, there are two further procedural issues. The first is that there is no indication from the record of any directions given to the assessor. It appears that after the closing addresses, the learned regional magistrate adjourned to deliberate with the assessor, after which judgment was given. There was no indication of any finding by the assessor or which facts were found unanimously if any or if he overruled her. In short, there is nothing indicating any participation by the assessor during the trial or the fact-finding process.

[14] In *S v Gambushe* 1997 (1) SACR 638 (N) at 645a-c it was held that any directions given to the assessors as to their duties and contribution to the trial and the fact-finding process, should also be recorded. In the absence of any record of these, in the present case, it is not possible to make any assessment that the assessor performed the duties reposed in her by the Act. It was remarked in *S v Jaipal* 2005 (4) SA 581 (CC) para 53 that assessors have considerable power and could play an important role in the functioning as well as the legitimacy of criminal courts.

[15] The second issue is that the appellant pleaded before the assessor was sworn in. The Act only requires that assessors be sworn in before evidence is led. In our view, it is desirable that, where practically possible, the assessors should be sworn in, and be part of the court, when the plea is entered. Where this is not possible, and the assessors are sworn in later, as was the situation in the present case, the presiding officer should, on record, inform the assessors of the plea, and where applicable, a full and detailed exposition of the accused's plea explanation. The plea forms part of the trial, and feeds into the evidence, which has to be assessed in the fact-finding process.

[16] In *S v M en 'n Ander* 1996 (1) SACR 519 an assessor had been appointed. The matter was postponed and at the resumption, the original magistrate and the assessor were not available. The matter resumed before a different magistrate without an assessor. On review from the regional magistrate to whom the matter had been sent for sentence, it was held that the appointment of an assessor was a step in the furtherance of the trial, and that the case ought to have been resumed either before the original magistrate and the assessor, and in case of permanent unavailability, afresh before another magistrate who would consider afresh the appointment of assessors and act accordingly.

[17] Having regard to all the considerations, we conclude that the irregularities identified in the judgment are such that a miscarriage of justice occurred, which vitiates the proceedings. The conviction and sentence should be set aside. The matter should be remitted to the regional court for it to act under s 78(2). What happens thereafter would depend on the results of the observation, and the court would proceed in terms of s 78(6). Given the view we take, it becomes unnecessary to consider the sentence imposed by the regional court, which falls off consequentially.

[18] In the result the following order is made:

1. The conviction and the sentence are set aside, subject to paragraph 2 below;
2. The matter is remitted to the regional court, which is directed to:
 - (a) comply with the provisions of section 93*ter* of the Magistrate Court Act 32 of 1944;
 - (b) take the necessary steps in terms of section 78(2) of the Criminal Procedure Act, 51 of 1977 to refer the appellant for observation and report in terms of section 79, and once such report is available, to proceed in accordance with the report.

TM MAKGOKA
JUDGE OF THE HIGH COURT

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

DATE HEARD : 8 APRIL 2013

JUDGMENT DELIVERED : 18 APRIL 2013

FOR THE APPELLANT : ADV J. VAN ROOYEN

INSTRUCTED BY : PRETORIA JUSTICE CENTRE, PRETORIA

FOR THE STATE : ADV K.M. MASHILE

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTIONS,
PRETORIA