IN THE EASTERN CAPE HIGH COURT
BHISHO

CASE NO. CA & R 7/2012
REVIEW CASE NO. 73/11

In the matter between:

THE STATE

and

ZWELETHEMBA SIKUTU

REVIEW JUDGMENT

HARTLE J:

1. This matter came before me in December 2011 as a special review at the instance of the State after the regional magistrate, Mdantsane, issued an order that the accused person be detained as a state patient pursuant to the provisions of section 47 of the Mental Health Care Act, No. 17 of 2002.

2. Before dealing with the relevant background to the matter, I pause briefly to mention that the order was issued as far back as 23 February 2011 already. Although the Director of Public Prosecution's correspondence raising their particular concern is absent from the review record, the regional court president wrote on 23 September 2011 only to express the view that the State could note an appeal if it was dissatisfied with the finding.

3. When the matter first came before me on 5 December 2011, I referred a query asking for the record to be supplemented with reference to the J15 and certain exhibits which were admitted into evidence during the course of the trial proceedings. The J15 was particularly relevant to establish the basis for the accused's referral for observation in the first place. The file only made its way back to me in the week of 19 March 2012, some three months later. Further, although the clerk of court supplemented the record as requested, the typed transcript of the J15 (which is somewhat illegible) is incomplete and a medical report - ostensibly preliminary in nature and obtained prior to the referral – was not included.

4. I cannot comprehend what has caused the substantial delay in returning a proper record, or why my query could not be responded to promptly. The prejudice to both the accused and the State by the delay is palpable. An application for his discharge has already been received by the curator *ad litem* on the basis that he is not mentally ill, but I was informed by the office of the Director Public Prosecutions that this application cannot be entertained for so long as the review is still pending. Conversely the accused has for a year now been detained as a state patient. This is a most

unsatisfactory state of affairs deserving of censure and calling for an appropriate explanation by the responsible clerk of the court. I note incidentally too that the magistrate was never requested to offer his comments, alternatively these were not appended to the record.

5. I turn now to deal with the substance of the review.

6. In this matter the accused was charged with the murder of his father, it being alleged that he stabbed him with a knife. A plea of not guilty was tendered on his behalf. The plea explanation - which was confirmed by him - was to the following effect:

"(H)*e doesn't know what had happened on that day. He could not understand what was happening – he has no knowledge of what happened, he only regained consciousness or knowledge of what – or appreciating what was happening around him when he was already in the police station, ...*"

7. Several admissions were made relating to the identity of the deceased, cause of death and handling of the body. The post mortem report - recording a fatal wound to his chest and a further wound to his scalp - was admitted into evidence.

8. Ten months before pleading the accused was referred for observation pursuant to the provisions of section 79 of the Criminal Procedure Act, No. 51 of 1977 ("**CPA**"). As indicated above, in the absence of the preliminary

medical report forming part of the record, it is unclear on what basis the court felt it necessary to request an inquiry into his mental condition. The typed transcript of the record at least reflects, however, that the provisions of section 78 were thought by the defence to be of application.

9. The accused was ultimately examined by four experts as envisaged by section 79(1)(b) of the CPA, including a clinical psychologist. The panel unanimously concluded both that he was able to follow proceedings so as to make a proper defence and that, at the time of the commission of the offence, he was able to appreciate the wrongfulness of the act in question and to act in accordance with such appreciation. The diagnosis on axis 1 was one of a substance abuse disorder : ("*Alcohol Abuse Psychotic Disorder NOS* ("not otherwise specified*") in full remission*").

10. The report was undisputed and the magistrate concluded on 25 October 2010 that the accused was fit to proceed with the trial.

11. Except to assert that the accused did not know what happened on the day in question, his criminal capacity was not pertinently placed in dispute at the trial. The State called a single witness, a neighbour of the deceased's family, who testified that the deceased came into his yard shouting that the accused was stabbing him. He happened to observe the accused sitting in front of his yard on the street holding a fixed blade knife that was covered in blood. When he enquired from him what he was doing to his father, he got up and ran away towards his house, dropping the knife in the process.

12. The witness was not present later when the accused was arrested. Under cross examination by the court he said he was too shocked to observe the accused's state of sobriety, yet proffered a view under cross examination that since the accused had ran towards his home without staggering this meant that he was in his sober senses and conscious that he was doing something wrong. Further in response to a question from the court, the witness said he was unaware that the accused suffered from any mental illness.

13. The accused testified in his own defence, claiming to have no recall of the events of the day until he came to in the police station. Under cross examination he alluded vaguely to a mental illness but drew no connection with this to the pleaded amnesia. No additional psychiatric or other expert evidence was presented to the court.

14. Despite this the magistrate concluded that he was not criminally responsible for the act by reason of mental illness. His reasoning in this regard is illuminating:

"*It is also the evidence of the accused that he was not eating for four days because when he has these mental problems he loses his appetite. And that his father asked the police to take him to have an injection, and he was given an injection. Then he went home to eat and sleep but he could not remember anything after that. It* (is) *also the evidence of the accused that he has never been violent towards his father. And that he did use to smoke mandrax and dagga but not during this period because he did not have*

money.

Now, the question I am asking myself is, can I reject the accused's version as being false beyond reasonable doubt? It is here a question of him just saying that he cannot remember what happened? That he is possibly trying to distance himself for what he had done on that day that his brain does not want to accept that he killed his own father? Or is it a question of him not really knowing what happened on the day in question because of mental illness? I feel that in the light of there not being any other evidence other than Mr Kulati's evidence to show that he really knew what he was doing, I feel that I should give the accused the benefit of the doubt. But I also then find that the accused did commit the act in question, but by reason of mental illness he was not criminally responsible for that act. And I therefore find the accused NOT GUILTY. *But as the accused is being charged for murder I order that the accused be detained in a psychiatric hospital or prison pending the decision of the judge in chambers in terms of Section 47 of the Mental Health Act of 2002."*

15. Although the magistrate concluded that he had "*no evidence*" before him concerning the accused's state of mind at the time of the commission of the offence, this was certainly not the case. The panel had unanimously determined that he was able at the relevant time to appreciate the wrongfulness of his conduct and to act in accordance with such appreciation. Further the magistrate allowed himself to be swayed by the accused's casual reference to his so-called mental health problems which he almost surmised existed as a fact without any proper basis for drawing such a conclusion.

16. ***Nugent JA*** remarked in **S v Mabena & Another**[1] that "*mental illness*" and "*mental defect*" are morbid disorders that are not capable of being diagnosed by a lay court without the guidance of expert psychiatric evidence. An enquiry into the mental status of an accused person which is embarked upon without such guidance is bound to be "*directionless and futile*".

17. Chapter 13 of the CPA creates the specialised machinery for the "*insanity defence*" to be properly investigated and reported upon. Indeed the whole intent of section 77 to 79 is that where issues relating to mental illness and capacity arise, the court will be guided by expert evidence so that it does not have to make an uninformed judgment on such specialised issues.[2]

18. Since there appears to be absolutely no foundation in the present matter for the unanimous opinion of the panel to have been called into question, and in the absence of anything other than speculation on the part of the magistrate as to a lack of criminal responsibility of the accused due to mental illness, the remarks of ***Nugent JA*** above are particularly resonant.

19. The magistrate is not at liberty to simply ignore the psychiatric report prepared pursuant to the specialised machinery of Chapter 13. The panel's investigation is not a discrete once-off enquiry that is considered in isolation, but remains in my view pertinent and alive to any determination envisaged in section 78(6) of the CPA concerning whether at the time of the committal of the offence the accused was by reason of mental illness or intellectual

1 2007(1) SACR 482 (SCA) at [16].

2 *Commentary on Criminal Procedure Act*, Du Toit, at p13-1.

disability criminally responsible for the act or not, or section 78(7) concerning the question whether at the time of the commission of the act in question his capacity to appreciate the wrongfulness of the act was diminished by reason of mental illness or mental defect.

20. In **S v Motshekgwa**[3] it was held that all previous and relevant psychiatric reports completed in respect of a specific accused should be placed before the trial court, confirming the necessity for trial court to be apprised of all the relevant facts when deciding the mental condition of an accused.

21. In this instance critical relevant evidence was overlooked whilst the magistrate attempted in isolation to reach a decision as to the accused's criminal capacity on the supposed basis of a mental illness.

22. In the premises it is proper in my view to set aside his finding and direction respectively and to remit the matter for a re-trial.

23. In the result I make the following order:

1. Both the finding of the regional magistrate, Mdantsane, that the accused was not criminally responsible for the murder by reason of mental illness or defect; and further direction in terms of section 78(6)(b)(i)(aa) of the Criminal Procedure Act No. 51 of 1977 that he be detained in a psychiatric hospital or prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2000, are hereby

3 1993 (2) SACR 247(A).

set aside;

2. The matter is remitted to the Regional Court, Mdantsane, for trial *de novo*;

3. A copy of this judgment is to be brought to the attention of the chief clerk of the Regional Court, Mdantsane, to investigate the reason for the delay in promptly submitting a complete review record and to furnish an explanation to the court in this regard.

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B C HARTLE

JUDGE OF THE HIGH COURT

28 March 2012

I agree

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A E B DHLODHLO

JUDGE OF THE HIGH COURT