

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

REVIEW CASE NO: CA&R 8/11

Date of judgment: 23 March 2011

Judgment delivered: 24 March 2011

In the matter between:

THE STATE

and

JONGITHEMBA MATU

REVIEW JUDGMENT

HARTLE J

1. This matter came before me as a special review pursuant to the provisions of section 304 of the Criminal Procedure Act, No. 51 of 1977 ("CPA").

2. The judicial head, Keiskammahoek, requests this court to set aside a

court order recorded on Form MC 20 (J105)¹, marked annexure "C" to the record. She explains that the incorrect form was used to "*detain*" the accused and that it is not in accordance with the order noted on the face of the J15 to the effect that he "*must be admitted and detained in a mental institution as an involuntary mental health care user as contemplated in section 37 of the Mental Health Care Act of 2002*". Also attached to the record is a signed form MC 21 (J105)² which she proposes "*....be considered as the correct one*".

3. The accused was charged with the offence of assault with intent to do grievous bodily harm, read with the provisions of section 51(2) of the Criminal Law Amendment Act (105 of 1997)³, it being alleged that on 22 January 2009 and at or near Rabula Admin Area in the district of Keiskammahoek, he unlawfully and intentionally assaulted one Nontobeko Adelaide Matu by hitting her with a stick, causing her grievous bodily harm.

4. The "*rights to legal representation*" form annexed to the charge sheet is incomplete, so it is not clear whether the accused elected to engage the

1 This is the standard form of the order in terms of s 77(6)(a)(i) of the CPA, where the accused is not capable of understanding the proceedings due to mental illness or defect, in respect of "*violent acts*".

2 This is the standard form of the order in terms of s 77 (6)(a)(ii) of the CPA in respect of "*non-violent acts*".

3 This section provides for discretionary minimum sentences for certain "*serious offences*". However, the offence with which the accused was charged (on the limited information at the court's disposal), does not appear to fall under any of the schedules to which reference is made in the subsection. I will assume for present purposes that it has no application and should have been deleted.

services of a state legal advisor, or appoint a practitioner of his own choice. By the second appearance, however, the record reflects that he was represented by Ms *Tomose* who was ostensibly in attendance on his behalf at seven subsequent appearances. On 14 September 2009 she requested that her client be referred for "*mental observation*" as she suspected that he was mentally retarded. The mother of the accused, the complainant in the matter, was present in court. The record reflects her confirmation that he was receiving "*treatment*".

5. Thus the matter was postponed for such assessment on several occasions, seemingly awaiting a vacancy at the Fort England Hospital. Ultimately the accused was referred for observation on 18 March 2010.

6. The record reflects that, on 18 March 2010, and in the absence of Ms *Tomose*, the prosecutor handed in the "*results of the thirty days observation*". Presumably this is a reference to the report prepared pursuant to the psychiatric evaluation in accordance with section 79 of the CPA. The diagnosis reflected therein is, *inter alia*, "*Psychotic Disorder*" on Axis 1.

7. The section 79 panel concluded unanimously that the accused is unable to follow court proceedings so as to make a proper defence; and that

it is "*most likely*" that he was mentally ill at the time of the alleged offence and thus unable to appreciate the wrongfulness of the act in question. Their recommendation was that he be dealt with as a state patient, in accordance with section 77(6) of the CPA, and detained until discharged by a judge-in-chambers in accordance with section 47 of the Mental Health Care Act, no 17 of 2002.

8. The matter was subsequently remanded for the "*DPP's decision*", which ostensibly came to hand to 20 May 2010.

9. The "*decision*", which is a communication addressed by the Deputy Director of Public Prosecutions Bhisho, to the prosecutor - presumably for the latter's guidance - is annexed to the record marked annexure "B". It does no more than comment on the conclusion stated in the psychiatric report and thereupon directs the prosecutor to the relevant options set forth in section 77 (6) (a) of the CPA.

10. Thereupon it appears that the magistrate purported to hold an "*enquiry*" in terms of "*Sec .77(6)()(ii)(aa)*" (sic).

11. The procedure to be adopted, once a matter has been enquired into and reported on in accordance with the provisions of section 79 of the CPA,

is set out in Chapter 13 of the act. The particular section, relevant for present purposes, reads as follows:

'77. Capacity of the accused to understand proceedings

- 1)
- (1A)
- 2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.
- 3) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.
- 4) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 has enquired into the mental condition of the accused.
- 5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.
- 6) 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) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court

- finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; or
- 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)'

12. This “*enquiry*” was proceeded with in the absence of the accused’s legal representative. There is no indication in the record whatsoever why she was absent when the matter proceeded, or why and at what stage the accused came to be unrepresented. The magistrate said not a word in this regard, but given the complexity of the proceedings under chapter 13, and the severe consequences which it holds for an accused person against whom an order might be made that he be detained indefinitely - not as a result of his actions, but due to a lack of understanding and inability to make a proper defence - it is to my mind imperative that he be assisted. Not surprisingly, subsection (1A) recognizes the possible infringement of such a person’s fundamental rights in that it provides that a court may, in respect of both the section 79 enquiry and the further proceedings envisaged in subsection (2), if it is of the opinion that “*substantial injustice would otherwise result*”, order that he be provided with the services of a legal practitioner in terms of

section 3 of the Legal Aid Amendment Act, no 20 of 1996⁴.

13. Leaving aside for the moment that the accused was unassisted, the magistrate further skipped ahead to the enquiry without first making the determination that the accused is not capable of understanding the proceedings so as to make a proper defence in terms of section 77(6)(a) of the CPA. Even antecedent to that, she failed to establish from the parties whether the section 79 report was disputed. It is only on the basis of a unanimous and undisputed report that the matter may be determined without hearing further evidence⁵.

14. She appears to have assumed, with reference to annexure B, that the prosecutor accepted the finding of the panel, but this ought to have been clearly established and an indication made on the record to this effect. As for the accused, the record is innocent of any invitation extended to him to indicate if he wished to dispute the finding; or of any explanation made to him concerning his right to lead evidence on the basis provided for in subsection 3 or indeed as to the consequences which might ensue arising from the drastic provisions of Chapter 13. In my view the phrase "*is not disputed by ...the accused*" referred to in the subsection cannot be equated with an accused person being unable to dispute it by virtue of mental illness

⁴ See also the remarks of Willis J in *S v Ramokoka* 2006 (2) SACR 57 (W), at 60*d*, concerning the "*potential for serious prejudice*" to an accused person where an order in terms of s 77(6) is made. He suggests some kind of review mechanism to counteract this.

⁵ Section 77(2)

or defect. The accused has a clear election to challenge a section 79 finding and to present evidence towards this end.⁶ I have already remarked above on the prejudice to him occasioned by the absence of his legal representative at so critical an enquiry.

15. The enquiry which ensued (no doubt on the assumption that the report was not disputed by either the prosecutor or the accused) consisted of questions being put to the unrepresented accused⁷ and a brief address by the public prosecutor:

“Q : Where do you reside?

A : At Rabula Admin. Area.

Q : Do you know Nontembo Matu?

A : I do not know her.

Q : Why are you in court?

A : I do not know.

Public Prosecutor address by State

On the day in question accused’s mother was preparing a dough to make bread. Accused demanded food. He grabbed the dough and took a stick assaulting his mother. The mother sustained two lacerations, swollen arms and fingers.

Q : Is it alleged that you assaulted your mother?

A : That is not true.

Q : Who is your mother?

A : It is Nontembo.

6 See *S v Malcolm* 1998 (1) SACR 577 (E) in which a court’s curtailment of the accused’s evidence constituted a fatal defect in the enquiry before it on the basis that it was potentially crucial to the facts from which the conclusions had to be drawn.

7 This exchange with the accused demonstrates the obvious prejudice to an unrepresented person in a Chapter 13 enquiry, particularly where the very basis for it arises from him being unable to understand the proceedings so as to make a proper defence.

Q : Is it not the one you said you don't know?

A : I know her."

16. The magistrate's enquiry elicited from the prosecutor at the very least that the accused had committed the act in question⁸, which provides the jurisdictional basis for the peremptory alternatives outlined in subsections 6(a)(i) and (ii). Despite this she concluded that:

"The accused is not capable of understanding the proceedings so as to make a proper defence. The accused has committed the said offence though he denies that."

17. In the result she ordered that he "*be admitted and detained in a institution stated as an involuntary mental health care user as contemplated in Section 37 of MCH Act 2002*". Presumably she thought the provisions of section 77(6)(a)(ii)(aa) to be applicable, based on his denial that he committed the offence. This approach was, however, erroneous.

18. Assuming the determination that the accused is incapable of understanding the proceedings so as to make a proper defence had been properly arrived at in accordance with the unanimous report of the section

⁸ See *S v Sithole* 2005 (1) SACR 311 (W), where it was held that an assurance from the State that the accused committed the act in question would suffice. The phrase "*has committed the act in question*" carries no connotation of *mens rea* or criminal responsibility and is intended to refer to the physical commission of the *actus reus*. The subsection does not envisage at this stage of the proceedings any enquiry in the nature of a trial or "*determination*" or "*finding*" in the sense of a verdict or judgment. (At page 314 *h – i*); See also the unreported judgment in this division in the matter of *S v Loyiso Makaphela* (CA&R29/10), in which the court endorsed and followed the approach in *Sithole* in determining whether the *actus reus* had been committed.

79 panel – leaving aside the fact that the accused was unrepresented and not invited to dispute the report - the court is thereupon enjoined by the provisions of section 77 (6) to give a directive as to the detention or treatment of the accused in terms of the Mental Health Care Act. This directive is dependent, in turn, on a prior "*finding*"⁹ as to whether or not the accused has committed the act in question. It is in this regard that the magistrate appears to have stumbled, not surprisingly, however, given the obscure provisions of section 77 (6) concerning the basis on which this "*finding*" is to be arrived at.

19. *S v Sithole*¹⁰ provides some useful insight in this connection. Whilst a court has a discretion to order that such information or evidence be placed before it as it deems fit to determine the issue, it appears unnecessary to invoke same where it "*can be proved on a balance of probabilities that, on the limited evidence available, the accused committed the act in question.*"

Du Toit AJ notes as follows in that matter:

"The proviso is framed in the subjunctive mood and appears to envisage the availability of such proof, or an ability to furnish it, rather than the actual adducing or disclosure thereof to the court. The latter interpretation in my opinion would be virtually indistinguishable from the placing of 'information or evidence' before the court, and therefore tautologous, and could hardly have been intended by the Legislature. I further point out that the *onus* mentioned is proof on a balance of probabilities, and not the criminal burden of proof beyond reasonable doubt. The subsection then further provides that a court finding an accused to be incapable of understanding the proceedings so as to make a proper defence,

9 See footnote 8 above

10 2005 (1) SACR 311 (W) at p314-315

'shall direct' that the accused be detained as provided in para (a)(i) if he is charged with an offence involving serious violence, or if the court considers it necessary in the public interest, 'where the court finds that the accused has committed the act in question or any other offence involving serious violence'. In the premises the second proviso, in my view, enables a court to make a finding that the accused committed an act on the strength of a reliable assurance that there is available evidence to justify such a finding on a balance of probabilities.

It follows that, in my view, the two provisos in effect severely restrict the exercise of a court's discretion to order that information or evidence be placed before it.

I canvassed both provisos with counsel during argument. As regards the first proviso, I invited their submissions as to whether it is in the interest of the accused that I order information or evidence to be placed before me. They were *ad idem* in submitting that the interests of the accused did not require such an order. I agree with those submissions.

As regards the second proviso, counsel for the State, having consulted with the investigating officer in the case, assured me that there was evidence that the accused committed the acts in question and that a witness was available to testify to such commission. I naturally have no hesitation in accepting such assurance, which was not queried by counsel for the accused, and on the strength thereof find that the accused probably committed the aforesaid acts alleged in the summary of substantial facts."¹¹

20. In the present matter the limited information available that the accused committed an offence involving serious violence is that as outlined by the State in its address. But this should be sufficient to establish, on the basis of the *Sithole* test, that there is available evidence to justify the finding that the act complained of was committed and that it involved serious violence. I expect too that the complainant will be available to testify as to its commission if necessary. In the light thereof, it appears unlikely that it will be necessary for the court to have to invoke the discretion referred to in section 77 (6) to order that evidence be placed before it.

¹¹ *Sithole*, *supra* at p314-315

21. That said, the finding ought to provide the necessary jurisdictional basis for the following stage in the enquiry, which is to determine whether the act committed falls into one or the other of the two categories contemplated in subsections (i) or (ii). The first such category includes the scenarios where the accused is: (a) charged with the obviously serious offences of murder, culpable homicide or rape; or (b) the charge is one "*involving serious violence*"; (c) where - in relation to a finding that he has committed the act in question (I assume the act referred to in the charge) - the court considers it in the public interest to detain him as a judge's patient; or (d) he is charged with any other offence involving serious violence. (The reference in (d) to "*any other offence*" was probably envisaged with reference to a situation where the act with which an accused is charged is not established, but another of equally grave import, because it involves serious violence, alternatively the option purports to cover the gap left by the fact that, although it is an offence involving serious violence, it does not resort under the limited specified list of offences. Although the subsection is not framed very helpfully, it is clear, however, that the emphasis is on keeping under one umbrella all manner of conduct on the part of the accused involving serious violence.)

22. The alternative category includes offences other than those

contemplated in subparagraph (i) found to be committed, in other words non-violent offences, and also includes in its reach those instances in which the court finds that the accused has not committed any offence.

23. In the case of the first category, the court is obliged to direct that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, and in the latter, that he be admitted to and detained in an institution as if he were an involuntary mental health care user contemplated by section 37 of the Mental Health Care Act.

24. In this instance, on the bases both that the charge itself involves serious violence, and that the available evidence points to the commission of the "*act in question*" - this much is apparent from the State's address - the court will most likely be obliged to act in terms of the provisions of section 77 (6)(a)(i), rather than section (6) (a) (ii).

25. In the context of the test adopted in *Sithole* in arriving at the finding whether the accused committed the offence - and indeed whether the act involves serious violence - the accused's denial is, in my view, of no significance. This is because the question whether he committed an act involving serious violence is focused on its physical commission only and is

not directed to the question whether he is guilty of the offence charged in the ordinary sense of a verdict or judgment.

26. That the court is bound to issue the directive pertaining to the first category entailing all manner of conduct involving serious violence - notwithstanding a perhaps inequitable result - is evident from *S v Mc Bride*¹², which dealt with the analogous provisions of s 78 of the CPA. *Mc Ewan J* wrestled with the peremptory nature of the provisions of s 78(6) as follows:

"The argument was to the effect that a case like the present, where the evidence indicates that it is more likely to be harmful than beneficial to the accused to be detained in a mental hospital, and, of course, even more so in prison, shows that it is manifestly absurd that the Court should not have discretion. I am, however, unable to accept that argument. The fact that the result in this case may be unfortunate does not in my view indicate clearly that the Legislature must have intended otherwise. It is possible that there is a hiatus in the Act in that the Legislature did not clearly contemplate a case such as this and consequently did not provide a means of dealing with a person who has recovered from his mental illness. However, it is not for the Court to fill any such possible gap by inventing its own procedure to meet the case." ¹³

27. I find that the magistrate was wrong to make the order which she did. The conclusion which she drew was only competent upon a finding that the accused had "*not committed any offence*", alternatively that he had committed an offence not contemplated in subparagraph (i)¹⁴. Neither was in my view capable of being found.

12 1979 (4) SA 313 (W) See also *S v Sithole supra*

13 At p 324 C-D

14 In my view the same test in *Sithole* applies to determine whether an offence was "*not committed*" as provided for in section 77(6) (ii).

28. Notwithstanding the erroneous outcome and failure on the part of the magistrate to appreciate what was expected of her in the circumstances, I do not think it appropriate, however, to simply substitute her finding. In my view substantial injustice has resulted by virtue of the fact that the accused was unrepresented at the enquiry. In the result I propose to set aside the order (and both template orders issued pursuant thereto), and remit the matter back to the magistrate to determine the matter afresh, even if the input of a legal practitioner turns out to be perfunctory only in such further proceedings¹⁵. The object of this order, however, is to ensure that the fundamental rights of the accused are respected in that process. In enquiries such as these where much store is set by assurances given that there is available evidence to justify a finding that the act in question has been committed, and that it involves serious violence putting it in the category of complaints that require the more drastic directive referred to in section 77(6)(i), legal assistance is not merely desirable but necessary.

29. Before concluding, and without intending to be prescriptive, the following might provide a useful guide in section 77 enquiries once the matter has been enquired into and the section 79 report has come to hand:

29.1. The court should first consider whether the section 79 report is
compliant with the provisions of that section in all necessary respects;

¹⁵ I anticipate this to be the case in view of the fact that it was the accused's own representative who first raised the concern that he might be unable to understand the proceedings so as to make a proper defence.

29.2. Next it should consider the import and effect of the findings of the panel, and whether it is unanimous;

29.3. It should then establish whether the report is disputed by either the prosecutor or the accused, and note their responses in this regard on the record;

29.4. If unanimous, and not disputed by either, it should proceed to determine the matter on the report without hearing further evidence:

29.4.1 If the report is to the effect that the accused is capable of understanding the proceedings so as to make a proper defence, it should make a determination in terms of section 77 (5) to the effect that the proceedings be continued in the ordinary way;

29.4.2 If to the effect that the accused is not capable of understanding the proceedings so as to make a proper defence, it should make a determination in terms of section 77 (6);

29.5. If not unanimous, or disputed by either:

29.5.1. It should invite the parties to adduce evidence on the basis set forth in section 77 (3) and offer any assistance as may be necessary with regard to the issue of *subpoenas*; etc;

29.5.2 In undertaking the necessary enquiry, it should strive to ensure a full ventilation of matters bearing on the

determination required to be made. In this regard it should allow the accused person, if he wishes and is able to do so, to himself testify and permit cross examination of all witness;

29.6. Pursuant to such enquiry, the court should make its determination, on a balance of probabilities, whether in terms of subsection (5) or (6).

29.7. If a determination in terms of subsection 6 is made:

29.7.1 It should establish if it can be proved on a balance of probabilities that there is evidence available (albeit limited) that the accused committed the offence, alternatively it should consider whether it is necessary to invoke the discretion to order that evidence be placed before it to determine this issue. (In this regard the test adopted in *Sithole* as to how this "*finding*" is to be arrived at is commended);

29.7.2 Thereupon it should determine the issue (as to whether the accused committed the offence) after hearing evidence or making the value judgment, as the case may be, on the strength of assurances given concerning the evidence available;

29.8. Allied to the question whether the accused committed the act in

question, it should establish whether the act resorts under the first category referred to in paragraph 21, or the second referred to in paragraph 22 above;

29.9. If under the first, it should issue the directive referred to in section 77 (6) (i), on form MC20;

29.10. If the second category applies, it should issue the directive in terms of section 77 (6) (a) (ii), on form MC21.

30. It needs to be particularly highlighted that it is unnecessary, even where the accused has already pleaded to the charge, to make any determination of his guilt. He is not entitled to a verdict on the charge in the usual sense of the word. The directive issued is an outcome in itself. It is further advisable, incidentally, to ensure that the charge is not withdrawn at this stage if the accused has not pleaded, because this will remove the legal basis for the directive. (See *S v Malcolm supra* in this regard).

31. In the final result, I make the following order:

a. The magistrate's order dated 20 May 2010 recorded on the face of the J15 (as well as both orders referred to as annexures "C" and "D" respectively) are set aside;

- b. The matter is remitted to the magistrate to make a determination pursuant to the provisions of section 77 (2) or (3) of the Criminal Procedure Act, no 51 of 1977, as the case may be, and such further order and directive thereupon as is appropriate to the circumstances; and
- c. The accused is to be provided with the services of a legal practitioner in terms of section 3 of the Legal Aid Amendment Act, No. 20 of 1996 in respect of the envisaged proceedings.

pp B C HARTLE
JUDGE OF THE HIGH COURT

23 March 2011

I agree

Y EBRAHIM
JUDGE OF THE HIGH COURT

23 March 2011