

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 642/07
643/07

In the reviews between:-

THE STATE

versus

GERHARD JACOBUS POTGIETER (Review No. 642/07)

JEREMIA SERAME MOKHUANE (Review No. 643/07)

CORAM: KRUGER, J et C J MUSI, J

JUDGMENT BY: KRUGER, J

DELIVERED ON: 20 SEPTEMBER 2007

[1] The magistrate at Odendaalsrus sent these two cases on review. Both deal with sections 77, 78 and 79 of the Criminal Procedure Act, 51 of 1977. Those sections provide a special procedure for persons who cannot function according to society's normal rules because of their mental inadequacy. Simplistically stated, it is unfair to subject them to those rules.

Section 78 (the “then” question) deals with ability at the time of the offence. Section 77 (the “now” question) deals with ability to understand court proceedings and take part in the trial.

- [2] These two cases were sent on review by the trial magistrate, in spite of the fact that orders under sections 77 and 78 of the Criminal Procedure Act, 51 of 1977, are not reviewable (see **S v WILLS** [1996] 4 ALL SA 270 (T), 1996 (2) SACR 105 (T) at 108 a – b, Hiemstra **SA Strafproses** 6 edition page 207) a judge in chambers does not play any part in an order under section 77(6) **S v MALCOLM** 1998 (1) SACR 577 (ECD) at 581 a – c. The view in **S v RAMOKOKA** 2006 (2) SACR 57 (W) in paragraph [12] that a form of review is desirable at orders under Section 77 has not been taken up in legislation. That proposal is not without merit.

- [3] Courts use the power to review under the common law, as supplemented by Constitution 173 sparingly (see **S v**

WILLIAMS 2005 (2) SACR 290 (C) and will only review if special circumstances are present (paragraphs [37] – [38]). In these two reviews there were irregularities: (1) legal representation as contemplated by section 77(1A) was not considered. No legal representatives were appointed; (2) the psychiatric reports were not properly placed before the court; (there was no consent by the defence, and the experts did not testify); (3) In Review No. 642/07 an order for committal under section 78 (on form MC22) was signed by the magistrate although his finding on the J15 was one under section 77 only; (4) In Review No. 643/07 an order was made under section 77 for which there was no basis, even in the medical “evidence” (the report of Professor Pretorius concludes in paragraph 3.2 that the accused is able to follow court proceedings (section 77)). In the premises these are appropriate cases where the court’s common law powers of review should be used. (**S v RAMOKOKA**, *supra* par. [14]).

I S v GERHARD JACOBUS POTGIETER (Review No. 642/07)

[4] The accused was charged with malicious injury to property in the magistrates' court at Odendaalsrus. The magistrate declared the accused a state patient under section 77(6)(a)(i) of the Criminal Procedure Act, 51 of 1977.

[5] Section 77(6)(a) provides for a "trial of the facts" in a case where the court finds that the accused does not have the ability to understand court proceedings so as to enable the accused to conduct a proper defence. In response to my enquiry whether the magistrate found that it was not in the accused's interest to direct an investigation as contemplated in section 77(6)(a), the magistrate reported that he did not make such finding. He says he also did not try to determine, on the evidence available, whether the accused indeed perpetrated the act (as contemplated in section 77(6)(a)). The magistrate also did not ask the accused whether he disputes the report of Dr. Nichol, the psychiatrist who reported on the mental condition of the accused after observation, as contemplated in section 77(2). In

the premises, that report was not admissible.

[6] There is also a statement by the mother of the accused attached to the papers. It is not clear from the record how that document became part of the proceedings. The magistrate concedes it is inadmissible as evidence.

[7] The magistrate made an order in terms of section 77. Yet he also signed an order in accordance with section 78(6), (on form MC22). The magistrate confirms that he did not make an order in terms of section 78(6). Therefore the form MC22 should not have been signed by him.

[8] The magistrate also did not, in terms of section 77(1A), order that the accused be provided with the services of a legal practitioner in terms of section 3B of The Legal Aid Act, 22 of 1969, as he should have done. (See the Directives under GN 292 of 28 February 2002 (Government Gazette 23176) in particular paragraph 2.1, dealing with substantial injustice).

[9] The magistrate has requested that his order be set aside, the accused be released, and brought to court again. That request should be acceded to. The accused must be released from detention after arrangements have been made by the Senior Public Prosecutor at Odendaalsrus with the head of the establishment where the accused is being detained. Upon release the accused must be handed to the police who must forthwith take him to appear before magistrate Mr. T.J. Mamburu at Odendaalsrus, to deal with the matter in terms of section 77 of the Criminal Procedure Act, 51 of 1977, or such other provisions as may become relevant. At such resumed hearing:

- (1) A proper charge sheet should be framed (the annexure attached to the J15 is blank), stating the date and nature of the alleged malicious injury to property. (There are apparently two counts of malicious injury to property.)
- (2) A legal representative should be appointed for the accused as contemplated in section 77(1A). This should

be done in collaboration with the local Legal Aid Board.

(3) The State should lead evidence of someone who can testify that the accused performed the act(s), i.e. that he damaged the property. Alternatively “information” to that effect should be placed before the court (the attitude of accused’s legal representative is relevant here).

(4) The legal representative for accused should be asked whether the report of Dr. Nichol can be handed in by consent as contemplated in section 77(2).

(5) Once information or evidence has established that the accused “committed” the act in question, and once the report of Dr. Nichol is properly before the court (after consent by the defence attorney, or, failing that, after Dr. Nichol has testified), the court will be in a position to decide whether the accused is fit to stand trial (par. 3.1 of Dr. Nichol’s report).

(6) If the magistrate makes a finding that the accused is not fit to stand trial, that finding should be recorded on the J15. Form J105 should be completed, with the 2nd and 3rd parts of paragraph 4 thereof deleted.

II **S v JEREMIA SERAME MOKHUANE** (Review No. 643/07)

[10] In this case, the accused was charged with (1) assault with intent to do grievous bodily harm, (2) contravention of a protection order (domestic violence), and (3) attempted rape. It appears from a statement of the daughter of the accused that

the accused assaulted his wife by hitting her with a beer bottle and broken photo frame. He has not been living with them for the past three to four years. One evening he came to her room without pants on and pulled down his daughter's pantie. She rushed out to her mother's room.

[11] The accused was sent for observation and Professor Pretorius found that he suffers from "Tuberculosis medication induced psychotic disorder", and that he was fit to stand trial but not able to distinguish between right and wrong at the time of the alleged crime.

[12] According to the J15 the magistrate made a finding under section 77(6)(a)(i) that the accused was not fit to stand trial. Such finding is contrary to the report of Professor Pretorius, according to which the accused is fit to stand trial, but was not criminally responsible at the time of the alleged offence.

[13] The accused must be released from detention after

arrangements with the Senior Public Prosecutor at Odendaalsrus have been made. Upon release the accused must be handed to the police who must forthwith take him to appear before magistrate Mr. T.J. Mamburu at Odendaalsrus, to deal with the matter in terms of section 77 of the Criminal Procedure Act, 51 of 1977, or such other provisions as may become relevant. At the resumed hearing:

- (1) A proper charge sheet should be framed (the annexures to the J15 are blank).
- (2) A legal representative should be appointed for the accused as contemplated in section 77(1A). This should be done in collaboration with the local Legal Aid Board.
- (3) Evidence, or admissions through the legal representative should be placed before the court to enable the court to make a finding in terms of section 78(6) "that the accused committed the act". (This is a purely factual finding – **S v MAHLINZA** 1967 (1) SA 408 (A) at 415 H – 416 A.) The court must enquire into the facts (see Kruger, **Mental Health Law in South Africa (1980)** 181 – 182, fn 157).
- (4) The legal representative for accused should be asked

whether the report of Professor Pretorius can be handed in by consent as contemplated in section 78(3).

(5) Once the State has established that the accused “committed” the act in question, and once the report of Professor Pretorius is properly before the court (after consent by the defence attorney, or, failing that, after Professor Pretorius has testified), the court will be in a position to decide whether the accused is criminally responsible as contemplated in section 78 (par. 3.1 of the report by Professor Pretorius).

(6) If the magistrate makes a finding that the accused is not criminally responsible, that finding should be recorded on form J15. Form J105 should be completed, with the 1st and 3rd parts of paragraph 4 thereof deleted.

[14] The following order is made in Review No. 642/07 (Potgieter):

1. The order by the magistrate on 22 June 2007 that the accused be declared a state patient in terms of section 77(6)(a)(i) of Act 51 of 1977 is set aside.
2. The accused must be released from detention and forthwith taken to magistrate Mr. T.J. Mamburu at

Odendaalsrus to deal with the matter in terms of section 77 of Act 51 of 1977, or such other provisions as may become relevant.

[15] The following order is made in Review No 643/07 (Mokhuane):

1. The order by the magistrate on 22 June 2007 that the accused be declared a state patient in terms of section 77(6)(a)(i) of Act 51 of 1977 is set aside.
2. The accused must be released from detention and forthwith taken to magistrate Mr. T.J. Mamburu at Odendaalsrus to deal with the matter in terms of section 78 of Act 51 of 1977, or such other provisions as may become relevant.

A. KRUGER, J

I concur.

C. J. MUSI, J

/sp