



Republic of South Africa

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**HIGH COURT REF NO: 858/2002
CASE No: A759/2000
MAGISTRATE'S SERIAL No: 71/2000**

In the matter of

THE STATE

and

ADRIAAN VAN GRAAN

JUDGMENT DELIVERED : 1 NOVEMBER 2002

MOOSA, J:

The accused was arraigned in the Stellenbosch Magistrate's Court on a charge of theft

(case No A759/2000). He pleaded not guilty and exercised his right to silence. He was represented by a legal representative. After the State presented its case, the defence closed its case without leading evidence. On 10 July 2000, the accused was convicted. The matter was then postponed for purpose of record and sentence.

In the meantime, the accused appeared in another court of the same district on a charge of housebreaking and theft (case No B793/2000). In that case the accused was referred for observation in terms of Sections 77 and 78 of the Criminal Procedure Act, No 51 of 1977 ("the Act"). Pursuant to Section 79(4) of the Act, the accused was declared unfit to stand trial and found not to appreciate the wrongfulness of his act and to act in accordance with such appreciation. He was accordingly committed to a psychiatric institution.

On 27 November 2000 when this matter came before the trial court for sentence, the accused was not present. The magistrate who originally presided was not available, and in terms of Section 275 of the Act, he appeared before another presiding officer. The prosecutor handed in the report obtained in terms of Section 79(4) in case No B793/2000 as an exhibit ("first report"). The presiding magistrate, in the light of the findings in this report, was doubtful whether the proceedings in this case were in accordance with justice. He accordingly referred the matter to this court for special

review in terms of Section 304A of the Act, with the request that the conviction be set aside. Whether this court is competent to do so, is a matter which we do not have to grapple with at this stage, in view of the conclusions that have been reached.

While the special review was pending a further psychiatric report came to hand ("second report"). This report was obtained in another case, No A618/2002 in which the accused was also referred for observation. The findings in terms of the second report were that the accused is fit to stand trial and to appreciate the wrongfulness of his alleged offence. There are therefore two conflicting findings with regard to the accused's mental capacity.

In view of this development, I requested the Director of Public Prosecutions to comment on two issues. They are:

(a) whether the trial court can, in the circumstances of this case, change the plea from guilty to not guilty in terms of either Section 77(6)(b) and/or 78(6)(b) of the Criminal Procedure Act, or is the court **functus officio?**
and

(b) whether the trial court can make a finding that the accused is fit to stand trial and to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation on the basis of psychiatric reports

obtained in other cases?

I am indeed grateful to Adv **Van der Vijver** of the office of the Director of Public Prosecutions for his well-motivated response.

In the case under special review, the criminal responsibility of the accused was never challenged or placed in dispute. The presiding officer that referred this matter for special review points out that the accused did not show signs of mental incapacity; he appeared normal; there was nothing from his conduct that indicated that he suffered from mental illness and the legal representative of the accused made no mention of the mental incapacity of the accused prior to him being convicted.

The first report is dated 23 October 2000 and the second report is dated 23 July 2002. In both reports the clinical diagnosis of the accused is one of schizophrenia. However, in the second report, it is qualified by the words "*in remission*". The fact that the mental condition of a person can improve with the passage of time, cannot be excluded.

Section 77(6) deals with the capacity of the accused to understand the proceedings so as to make a proper defence. Should the trial court find that he lacks that

capacity, and he has already been convicted, it can set aside that conviction, provided the accused has not yet been sentenced.

Section 78(6) deals with mental illness or mental defect of the accused at the time of the commission of the offence. The trial court has the same powers as in the case of Section 77(6) to set aside the conviction of the accused where he has been convicted, but not yet sentenced.

Section 77(6)(b) and Section 78(b)(6) therefore empowers all trial courts to set aside its own convictions, provided the special circumstances set out in those sub-sections are present. (See **S v VAN AS** 1989 (3) SA 881 (W) 884B-C.) It was therefore not necessary for this matter to have been submitted to us for special review. I am supported in this conclusion by the Director of Public Prosecutions.

In view of the conflicting findings contained in the two psychiatric reports, the trial court would be required to determine the mental state of the accused at the time of the trial in terms of Section 77 and his mental state at the time of the commission of the act in terms of Section 78. These two inquiries normally go hand in hand as they are closely associated in time. Nothing prevents these inquiries from being conducted independently of each other or for that matter, conducting only one

inquiry, either the one as envisaged under Section 77 or that envisaged under Section 78.

The two psychiatric reports of the accused, obtained in the other two cases, in my view, can form the basis for referring the accused for observation. They, however, cannot form the basis for determining whether the accused is fit to stand trial in this matter and what his mental state was at the time of the commission of the alleged offence. The Director of Public Prosecutions also supports this view. The two psychiatric reports referred to different offences committed at different times and are unassociated to the offence in the present matter.

Once the circumstances envisaged by Section 77(1) exist, the court is obliged to refer the accused for observation. The provisions of Section 77(1) are mandatory and the court cannot act in terms of Section 77 unless a report in terms of Section 79 is obtained. (COMMENTARY ON THE CRIMINAL PROCEDURE ACT by DU TOIT et al at page 13-5.) Likewise, the court cannot make a finding under Section 78(6) without receiving a report in terms of Section 79 following the procedure prescribed in Section 78(2). (COMMENTARY ON THE CRIMINAL PROCEDURE ACT (**supra**) at page 13-12C.)

I conclude therefore, that in this matter the trial court would be obliged to refer the accused in terms of Sections 77 and 78 for assessment in terms of Section 79 of the Act. Once the psychiatric reports are obtained, the trial court can dispose of the matter in terms of Section 77 and/or Section 78 of the Act. The trial court is empowered, in terms of Sections 77(6)(b) and/or Section 78(6)(b) of the Act, to set aside the conviction should this be necessary in the light of its findings. This matter is accordingly remitted to the trial court to act accordingly.

.....

E MOOSA

COMRIE, J: I agree.

.....

R G COMRIE