

Bib 146/89

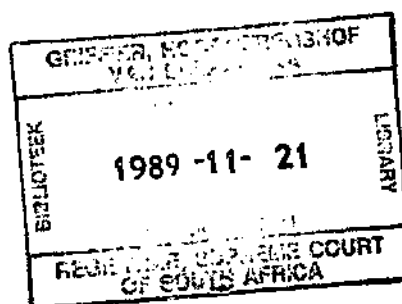
253/89
N v H

REYNOS DOKOTELA MALULEKE

and

THE STATE

SMALBERGER, JA



IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

REYNOS DOKOTELA MALULEKE

Appellant

and

THE STATE

Respondent

CORAM: BOTHA, SMALBERGER, JJA,
et FRIEDMAN, AJA

HEARD: 6 November 1989

DELIVERED: 20 November 1989

J U D G M E N T

SMALBERGER, JA:-

The appellant was convicted on 26 November 1984 in the Supreme Court of Venda by STRYDOM, ACJ and two assessors on counts of (1) murder and (2) attempted murder. No extenuating circumstances were found and he was sentenced to death on count 1; on count 2 he was sentenced to 10 years

imprisonment. Leave to appeal was not sought.

Some months later certain material information concerning the appellant's mental state came to the attention of counsel who had appeared for him at his trial. This led to the appellant being granted leave on 6 June 1985 to seek an order (a) condoning his late application for leave to appeal, (b) for leave to appeal against his convictions and sentences, and (c) for leave to lead further evidence with regard to his mental state. At the same time a stay of execution was granted and, after medical evidence was heard, the appellant was committed to Weskoppies Mental Hospital ("Weskoppies") for observation in terms of s 79(2) of Act 51 of 1977 ("the Act").

The appellant was duly examined by two psychiatrists, Drs Olivier and Verster, as provided for in s 79(1)(b) of the Act. On 16 October 1985 they furnished a report in terms of s 79(4) of the Act. Although it later

transpired that the report was only intended to be a provisional one, it was not so described. Their unanimous conclusion expressed in this report was that the appellant was not suffering from any mental defect.

The application envisaged in the order of 6 June 1985 was heard on 1 November 1985. In view of the conclusion reached by the psychiatrists the application to lead further evidence was abandoned. Condonation was granted, as was leave to appeal against the sentence on the murder count, including the finding that there were no extenuating circumstances.

Thereafter there was a dramatic turn of events. On 6 December 1985 an urgent telegram was dispatched to Venda Central Prison from Weskoppies. It requested the suspension of all proceedings relating to the appellant pending receipt of a further psychiatric report. On 9 December 1985 Drs Olivier and Verster furnished a

supplementary report. In it reference was made to a social welfare report that had been received. A diagnosis of schizophrenic disturbance was made and it was unanimously concluded that "(a)ldus die maatskaplike agtergrondsverslag was hy waarskynlik tydens die beweerde misdrywe deur geestesongesteldheid aangetas. Hoewel hy kon onderskei tussen reg en verkeerd kon hy waarskynlik weens geestesongesteldheid nie volgens dié onderskeid handel nie".

The upshot of this report was a further application by the appellant for condonation, leave to lead further evidence and leave to appeal against his convictions. The application was heard on 2 June 1986. Evidence was given by Dr Olivier. At his request the appellant was again referred to Weskoppies for a further period of observation. The application was postponed pending receipt of a further psychiatric report. On 7 October 1986 Drs Olivier and Verster furnished their final

report. They unanimously confirmed their diagnosis and findings in their previous report of 9 December 1985.

On 6 November 1986 the appellant was granted condonation and leave to lead further evidence. Dr Olivier once again gave evidence, and was fully cross-examined by the State's representative. He furnished convincing and acceptable reasons for the conclusions reached by himself and Dr Verster. No evidence was led in rebuttal by the State. The Court also had before it a full transcript of the evidence given at the appellant's trial. Leave to appeal to this Court against both convictions, as well as the sentence on count 2, was granted. It was further ordered that a transcript of the proceedings on 6 November 1986 be forwarded to this Court to form a portion of the appeal record.

In consequence of the foregoing the present appeal by the appellant against both his convictions and

sentences is properly before us, and the evidence of Dr Olivier forms part of the appeal record in terms of s 316(4) of the Act. It is common cause that the trial court was not empowered to set aside the convictions and sentences - had sentence not yet been passed the position would have been different and the convictions could have been set aside in terms of s 78(6)(b) of the Act.

It was contended on behalf of the appellant, and conceded by the respondent, that having regard to the terms of the final psychiatric report, and the evidence of Dr Olivier, the appellant was by reason of mental defect not criminally responsible for the acts which gave rise to the charges against him. The parties are ad idem that in the circumstances this Court, having regard to the powers conferred on it by s 322(1)(b) and (c) of the Act, is required to set aside the convictions and sentences of the appellant on both counts, and to make an order as envisaged

by s 78(6) of the Act. I am in full agreement with the contentions advanced and propose to follow the course suggested.

It appears from the record of appeal that a full three years elapsed from the time leave to appeal was granted to the hearing of the appeal. We were advised from the bar by counsel that this seemingly inordinate and unacceptable delay was occasioned by the unduly long time taken to prepare the record. The record itself is not a long one, and has been poorly prepared. Undue delays in the preparation of appeal records are to be deprecated. The responsible authorities must ensure that adequate administrative facilities exist, or that adequate arrangements are made, to ensure that appeal records are properly and expeditiously prepared in order to obviate unnecessary delays in the hearing of appeals.

The following order is made:-

...../8

1. The appeal succeeds, and the convictions and sentences of the appellant on both counts are set aside.
2. There is substituted for the judgment of the court a quo a verdict of not guilty on both counts by reason of mental defect.
3. In terms of s 78(6) of Act 51 of 1977 it is ordered that the appellant be detained in a mental hospital or a prison pending the signification of the decision of the State President.

J W SMALBERGER

JUDGE OF APPEAL

BOTHA, JA)
)
FRIEDMAN, AJA) CONCUR