

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MTHATHA

REVIEW CASE NO. CA&R114/2025

In the matter between:

STATE

And

NOXOLO SOMGQEZA

ACCUSED

REVIEW JUDGMENT

SOMACALA AJ

[1] This matter was referred to this court for 'special review' by the office of the Director of Public Prosecutions (DPP), Mthatha. The basis upon which this matter comes for 'special review' is that accused is facing a charge of murder in which the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 is applicable, and that upon obtaining the charge sheet of this case the office of the DPP observed that the accused was declared a State Patient by a district court magistrate who had no jurisdiction over the matter as it is justiciable in the regional court and therefore such order should have been issued by the regional court magistrate.

[2] This matter has a long and unpleasant history immersed with problems dating 2014 which persisted unabated till to date. It is unfortunate that accused is in custody as she was arrested on 01 May 2014.

[3] The original record of the proceedings is missing, and this, on its own, demonstrate the tribulations that have befallen this matter. The copies of the record appear to be incomplete as can be gleaned from correspondence dated 04 May 2018, from the office of the DPP, Mthatha, stating; *"On 26 April 2018, the Review Judge Justice Toni AJ issued a*

query on the matter, which were (sic) addressed on 02 May 2018". The query referred to in the letter is not on the file and I do not have its benefit. There is a letter from the office of the DPP dated 26 April 2018, addressed to the Reviewing Judge, which, in the face of it, appears to be addressing a query which may have been raised. On the file there is no letter dated 02 May 2018 from the office of the DPP.

[4] It is important to note that, on my assessment of the record, I have queries that I would have raised with the magistrate pertaining the proceedings at the district court, but lucidity proclaims that I desist from doing so, as that will be a fruitless exercise which will bear more prejudice to the accused, because as a matter of fact the magistrate who had presided over this matter has since left his service of employment.

[5] The total evaluation of the copies of the record provide a clear understanding of what happened in court. It is on that basis that I will deal with it as it is presented before me. It is not in the interests of justice to return it back to the district court to attend to my queries as that will not yield any positive results, and to do so would be to unnecessarily prolong its finalization. The longer the delays of this matter, the more prejudice suffered by the accused.

[6] The accused first appeared in the district court on 02 May 2014, facing a charge of murder, and the matter was postponed to 15 May 2014 for accused to apply for legal aid. She was remanded in custody.

[7] The record of 15 May 2014 reflects;

"15/05/2014

Presiding Officer: Mr Mgudlwa

State Prosecutor: Ms Maarman

Court Clerk: Mr Pita

Interpreter: Ms Mtakati

Accused appears

*PP reports **Investigating Officer has a feeling accused is mentally disturbed.** (my emphasis)*

Remanded in custody 22/05/2014 for accused to be seen by a District Surgeon to evaluate her mental capacity.

MAGISTRATE MGUDLWA”.

It appears from the record that on this day accused did not have a legal representative and there is no indication about the outcomes pertaining her legal aid. The record does not show that accused was given an opportunity to address court on any issue. It is the events of this day which culminated to the accused being detained at Komani Hospital.

[8] On 21 May 2014 accused was examined by Dr S. Jwaqa, who recorded;

“21/05/2014

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Mental state examination revealed that the patient was psychotic as evidenced by impaired cognitive function.

I recommend that she be admitted for a 30 day observation at a mental institution.”

[9] On 08 September 2014, two psychiatrists and a psychologist, from Fort England Hospital prepared a psychiatrists report in respect of the accused and they recommended that she be admitted at Komani Hospital as a State Patient in terms of section 42 of the Mental Health Care Act.

[10] The record reflects that in the period between 15 May 2014 and 10 September 2014, the matter was postponed for four times, and on three occasions during those court appearances she was legally represented. The case would be postponed for various reasons and with no submissions were made by her legal representatives.

[11] On 10 September 2014, the record reflects;

Presiding Officer: Mr Mgudlwa

State Prosecutor: Mr Dwakaza

Interpreter: Mr Mbovane

Defence: In person

Accused appears

Mr Dwakaza hands in report and Fort England Exh "A" in terms of section 42 of Mental Health Act and accused is committed to Komani Hospital as a State Patient as recommended by Panel of Experts at Fort England.

MAGISTRATE: MR MGUDLWA.

It is apparent from the record of proceedings that on the day of the granting of the order committing accused for detention at Komani Hospital, she was not legally represented.

[12] Section 77(1) of the Criminal Procedure Act 51 of 1977 (the Act) provides, "If it appears to the court at any stage of the proceedings that the accused by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79." The enquiry envisaged by section 77 of the Act prescribes a two stage approach, firstly the court has to satisfy itself about accused's mental status and his capability to understand the proceedings so as to make a proper defence. The court has to gather all the evidence to assist in this regard including sending the accused to a District Surgeon for observation and prima facie opinion. The court shall thereafter direct that the matter be enquired into and be reported on in accordance with the provisions of section 79 of the Act.

[13] The second enquiry which shall be done by a court with substantive jurisdiction follows after receipt of a report by two psychiatrist who had examined the accused. During the second enquiry issues to determine are, firstly, did the accused commit the offence with which charged. In doing so the court has to consider all the limited evidence available on a balance of probabilities. Secondly, the court has to consider whether the offence committed by the accused is a serious violent crime or not. If the finding of the court is that, the accused, prima facie committed a serious violent act the order shall be made in terms of section 77(6)(a)(i) of the Act. Where the court finds that the accused, prima facie, did not commit the offence or that the offence committed is not serious and violent it shall issue an order in terms of section 77(6)(a)(ii)(aa).

[14] In my view the provisions of section 77(1) of the Act do not preclude the court of first instance to enquire into the mental status of the accused in so far as the first stage of the enquiry and the second leg of the enquiry is exclusively reserved for the court with jurisdiction. The challenge reminiscent to section 77 enquiry where the court has no substantive jurisdiction is the prejudice suffered by the accused who is in custody. This evolve from the delays which normally precede transfer of cases from the district court to the trial court. It cuts both ways, whether the lower court initiates the first stage of enquiry or it does not, it is the accused who is in custody who get affected by the procedural delays.

[15] Section 77(1A) of the Act provides, “At proceedings in terms of sections 77(1) and 78(2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 3 of the Legal Aid Amendment Act, 1996 (Act 20 of 1996).”¹ Section 35 (2) (c) of the Constitution provides, “Everyone who is detained, including every sentenced prisoner, has the right – to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”²

[16] In **S v MATU**³, the Honourable Hartle J, stated, “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 proceedings. The object of this order, however, is to ensure that fundamental rights of the accused are respected in that process.” Section 77 (1A) provisions are discretionary in nature but cannot override the fundamental right of accused as provided for by the Constitution. In my view, the mere fact that doubt has been created about the accused mental status in a criminal case calls him or her to be provided with legal representation. The glaring feature of this matter is that accused was a mere spectator with no voice as she was never afforded an

¹ now repealed by section 22 of Legal Aid South Africa Act 39 of 2014

² Act 108 of 1996

³ 2012 (1) SACR 68 (ECB)

opportunity to address the court despite that the outcomes of the whole process had a bearing on her liberty.

[17] The approach adopted by the magistrate in this matter is absurd and disturbing. It demonstrates a clear lack of understanding of substantive law and procedure on the applicability of the provisions of sections 77; 78 and 79 of the Act. Firstly, the magistrate acted on what the State prosecutor referred to as *“the feelings of the investigating officer that the accused is mentally disturbed.”* The magistrate issued an order in terms of section 77(1) without conducting an enquiry to satisfy himself that by reason of mental illness or defect the accused was not capable of understanding the proceedings so as to make a proper defence.

[18] The district court does not have jurisdiction to try a case of murder. In this matter, the district court magistrate lacked the authority to issue an order in terms of section 77 (6) of the Act. The magistrate failed to conduct an enquiry to determine whether on the limited evidence, the accused prima facie, committed an offence of a serious violence crime.

[19] The magistrate committed the accused to be detained at Komani Hospital as a State Patient without affording her the right to legal representation when it was conspicuously clear that the order he issued had all the traits of causing substantial injustice to the accused.

[20] The whole process followed by the magistrate in the purported section 77 enquiry of this matter is flawed and grossly irregular. It eludes me how it came about that this matter came to the attention of the office of the Director of Public Prosecutions five years after the order detaining the accused as a State Patient was granted by the magistrate, and it took almost another seven years for it to reach finality. It is rather unfortunate that despite all the more than a decade long prejudice that the accused had to endure, this matter has to start afresh.

[21] In the result, I make the following order:

1. The order of the magistrate detaining Noxolo Somgqeza at Komani Hospital as a State Patient in terms of section 77

(6) of the Criminal Procedure Act 51 of 1977 (as amended)
is hereby reviewed and set aside.

2. The matter is remitted back to the magistrate court to deal with the accused in terms of sections 77, 78 and 79 of the Criminal Procedure Act.
3. The Senior Magistrate, Lady Frere, must facilitate the immediate release from detention of Noxolo Somgqeza at Komani Hospital, unless the medical superintendent of the said hospital recommends that in her best interests she remains kept in hospital as an in-patient for medical reasons.

B SOMACALA

ACTING JUDGE OF THE HIGH COURT

I agree

B R TOKOTA

ACTING DEPUTY JUDGE PRESIDENT

DELIVERED ON : 13 NOVEMBER 2025