

**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE: BHISHO**

**REVIEW CASE NO A 1942/08**

**CASE NO: CA&R 29/10**

In the matter between:

**THE STATE**

And

**LOYISO MAKAPELA**

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**REVIEW JUDGEMENT**

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**KEMP AJ**

- 1] This matter was submitted for special review so that the error in respect of the order issued by Magistrate N G Nkume and that signed by her could be corrected. In terms of s 77(6)(a)(i) of the Criminal Procedure Act No. 51 of 1977 Magistrate Nkume declared the accused a state patient but then incorrectly signed an order detaining the accused as an involuntary mental health user in terms of s 32 of the Mental Health Care Act No. 17 of 2002.
- 2] The office of the Director of Public Prosecutions, Bhisho ('DPP'), at the request of the Court, submitted a memorandum which confirms that the order declaring the accused a state patient is correct and that it was in the public interest that the accused be so detained.

The DPP's office therefore proposed that this Court issue such an order.

3] The proposal by the DPP's office appears to be sound and it is what I propose doing. However, for the sake of completeness I wish to deal with another matter and the history of this matter, which is set out hereunder.

4] On the 17<sup>th</sup> December 2009 a request was addressed to the magistrate for his comments on four further aspects, which I quote hereunder:

*“Where is the original record of proceedings including the charge sheet?*

- a) Why was the report from Fort England Mental Hospital not attached? Please provide it.*
- b) On what basis was the Court satisfied that the evidence of the witness, Gcobani Gqibitole, established that the accused had committed the crimes of which he was charge?*
- c) Was the order that was issued in terms of sub-section (i) or (11) of section 77(6)?”*

5] On the 25<sup>th</sup> February 2010 a response was drafted, which I quote hereunder:

*“ The Clerk of the Court forgot to attach the original record of proceedings including the charge sheet.*

- a) The Clerk of the Court was supposed to attach it.*
- b) The court in this instance called the witness GCOBANI GQIBITOLE to testify under oath but the State didn't lead witness the court then asked questions to*

*establish whether accused has committed the alleged offences of Robbery and indecent assault.*

c) *The court was supposed to order accused to 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 Act 17 of 2002. the mistake is regretted.”*

6] No explanation was tendered for the delay of over two months in replying to the request by this court. The failure by the Clerk of the Court to attach the original record as well as the report by Fort England Mental Hospital is explained by forgetfulness. No attempt appears to be made to comply with the expedition one expects to apply to cases such as the present where the accused is in custody<sup>1</sup> and no attempt is made to explain why there is such a delay. The failure to explain the delay is regarded not only as discourteous to this court, but potentially prejudicial to the rights of the accused in this matter.

7] The delays unfortunately did not stop there. This matter served before me in March this year. I recall that I finalized the judgment but neither the Registrar's office nor the DPP's office has any record of the judgment being handed down. To the extent that I played a role in any further delay I must apologize.

8] What concerns me in this matter is the superficial manner in which the magistrate purported to establish whether the accused had committed the *actus reus* in question.

9] The accused had been charged with robbery and indecent assault in

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<sup>1</sup> See *S v Hlungwane* 2000 (2) SACR 422 (T) at 428 g-h: “It may be so that the seven day period allowed by the Act may in some cases be unrealistic especially where records are lengthy. In such cases, however, full explanations for the late sending of a record for review must be forwarded by the clerk of the court and the magistrate concerned. Cases where records are submitted late must be the exception and not the rule. (my emphasis)

the District court in Zwelitsha. The magistrate, purporting to act in terms of Section 77 (6) of the *CPA*,<sup>2</sup> called one Gcobani Gqibitole ("Gqibitole") as a witness. I presume that Gqibitole is the investigating officer, as the magistrate asked him what the accused had been charged with, to which he responded that it was two counts – common robbery and indecent assault. No attempt was made to record who Gqibitole was and I assume he was not the complainant. The magistrate then asked whether Gqibitole knew whether the accused had committed the act to which the witness replied that he had. The witness was then asked whether in his view the accused was 'fit to stand trial or [was] in a position to appreciate the act of wrongfulness,' to which the witness replied that the accused was 'unable to appreciate the wrongfulness because he cannot give a straight answer'.

10] This line of questioning seems to fall far short of even the liberal interpretation adopted in *S v Sithole*<sup>3</sup> that a court may make a finding that the accused omitted an act

“on the strength of a reliable assurance that there is available evidence to justify such a finding on a balance of probabilities.”

The court in the present case appears to have paid little more than lip service to the requirements of the section, and when one considers the far-reaching effect that a finding and an order in terms of the section has for an accused, it is a matter of some concern.

11] It is apparent that Gqibitole is the investigating officer and came to

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<sup>2</sup> The *Criminal Procedure Act* No 51 of 1977

<sup>3</sup> 2005 (1) SACR 311 at 315 f-g

this conclusion on the evidence in the docket and his interview of the accused. In future, however, it would be advisable for the magistrate to conduct a more purposeful enquiry than what was undertaken in this case.

12]In view of the long delay that has already occurred it is not in the interests of justice that this matter be referred back to the magistrate so that the correct order may be implemented. It is imperative that this matter be finalized expeditiously.

13]The finding of the panel of Psychiatrists who interviewed the accused was that he was unable to follow court proceedings. Section 77(1) of the *CPA* provides that if the accused is not capable of understanding the proceedings so as to make a proper defence, that the court shall direct that the matter shall be enquired into and be reported on in accordance with the provisions of section 79. Section 77 (2) provides that if the finding contained in the report is unanimous and is not disputed by either the prosecutor or the accused, that the court may determine the matter on such report without hearing further evidence. Once the court makes a determination as to whether the accused is fit to stand trial or not, the court moves on to consider the provisions of subsection 6 which provides *inter alia*, that if the court is satisfied that it can determine that the accused committed the act in question on a balance of probabilities, it may order 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, 2002.

14]In the event, I am of the view that an appropriate order is the

following:

- a) The magistrate's findings in terms of section 77(2) and (6) of the Criminal Procedure Act No 51 of 1977 are hereby set aside.
- b) The accused is declared unable to follow court proceedings so as to make out a proper defence, and at the time of the alleged offence, although able to appreciate the wrongfulness of the act in question, was unable to act in accordance with such appreciation.
- c) The accused is to 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 No. 17 of 2002.

**Dated at Bhisho this 15<sup>th</sup> September 2010**

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LD KEMP

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

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Y EBRAHIM

JUDGE OF THE HIGH COURT