

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

**CASE NO: A3873/14**

**High Court Case No: 23/15**

In the matter between:

**THE STATE**

and

**ZANDISILE FUZILE**

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**REVIEW JUDGMENT**

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**MBENENGE J:**

[1] The accused appeared before the Magistrate, Mdantsane, having been charged with assault, the allegation being that on or about 5 December 2014 and at or near [.....] Administrative Area, Potsdam, Mdantsane, he wrongfully and intentionally assaulted N. F. (the complainant) by stabbing her with a knife, with the intent of causing her grievous bodily harm.

[2] On the first appearance, on 17 December 2014, the prosecutor applied for the holding of an enquiry into the accused's fitness to stand trial. According to the manuscript version of the record, the enquiry was held on 5 January 2015, on which date the proceedings were "*recorded mechanically*". The mechanically recorded version of the transcript of those proceedings, however, does not appear to have been generated as indeed it does not form part of the enclosures in the file serving before this Court. The Magistrate is on record as having directed that in terms of section 77(1) and 78(2) the matter be enquired into and reported on in accordance with section 79(b) of the Criminal Procedure Act 51 of 1977 (the CPA).

[3] On 2 April 2015 the Magistrate referred the accused to Fort England Hospital for examination, with a directive that upon such examination a report in terms of section 79 of the CPA be compiled.

[4] A psychiatric report was thereafter generated on 10 April 2015. The report, signed by two psychiatrists<sup>1</sup>, confirmed that the accused is unable to follow Court proceedings so as to make a proper defence and that even though he is able to appreciate the wrongfulness of the act in question, he was unable to act in accordance with such appreciation of wrongfulness. The report also embodies a recommendation that the accused be admitted to Fort England as a State patient in terms Chapter VI of the Mental Health Act 17 of 2002.

[5] When next the matter was dealt with, on 22 May 2015, the complainant testified, after the Magistrate had received the psychiatric report, the correctness of which was confirmed by the prosecutor and the accused's legal representative. Her testimony established that the accused stabbed her once on her head. She sustained a stab wound which was sutured at Cecilia Makiwane Hospital. In the final analysis, the Magistrate ruled, on 26 May 2015, that evidence had "*linked the accused with the offence*", but the accused is not capable of understanding the proceedings so as to make a proper defence. The Magistrate thereupon referred the accused to a mental institution, Fort England, pending the decision of a Judge in chambers in terms of section 47 of the Mental Health Care Act 17 of 2002.

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<sup>1</sup> Psychiatrists for medical superintendent in terms of section 79(1)(b) (i), and another appointed for the accused in terms of section 79(1)(b)(iii)

[6] In my view, there was substantial compliance with section 77(6)(a) of the CPA. The Magistrate made a finding that the evidence “*linked the accused with the offence.*” It would, however, have been more appropriate for the Magistrate to have found that the accused had committed the offence than to merely find that the evidence linked the accused with the offence. The order of the Magistrate embodied in the M C 20 (J105) form puts the matter beyond doubt in that it is recorded therein that the Court “*found that the accused [had] committed the act in question*” and that it was in the public interest that the accused be detained in a psychiatric hospital pending the decision of a Judge in chambers.

[7] The procedure followed also suffers from a shortcoming: the prosecutor did not pertinently dispense with the appointment of a third psychiatrist. Accordingly, the panel required for the accused to be declared a State patient was not properly constituted.

[8] On the authority of *S v Booï Pedro*,<sup>2</sup> and indeed upon a proper construction of section 79(1)(b), three psychiatrists, including a private psychiatrist, must be appointed when the case falls within the section, unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed, in which case there must be two psychiatrists.<sup>3</sup>

[9] The accused was charged with an offence involving serious violence which called for the involvement of a third psychiatrist, unless the court, upon application by the prosecutor, had directed that a third psychiatrist did not have to be appointed.

[10] In all these circumstances, the proceedings conducted by the Magistrate, Mdantsane on and after 22 May 2015 are set aside. The matter is remitted to the Magistrate so as to be dealt with appropriately in terms of section 79(1)(b) of the CPA.

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<sup>2</sup> Unreported decision of the Western Cape Division, Cape Town by Binns-Ward *et* Rogers JJ delivered under High Court Ref no:14228 Oudtshoorn Case No:B247/11 on 9 July 2014

<sup>3</sup> Para [68] of the *Booi Pedro* judgement

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**S M MBENENGE**

**JUDGE OF THE HIGH COURT**

**11 September 2015**

I agree

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**I T STRETCH**

**JUDGE OF THE HIGH COURT**