IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

REVIEW CASE NO:A1870/15

In the matter between:

THE STATE

and

THEMBALAKHE MAPHUKO **ACUSSED**

REVIEW JUDGMENT

MBENENGE J:

[1] The accused appeared before the Magistrate, Mdantsane charged with contravening the provisions of section 17(a) read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act 116 of 1998, the allegation being that he had wrongfully and unlawfully contravened a prohibition and / or order imposed on him by entering the residence of Sinduko Maphuko (the complainant) and thereupon insulted the complainant and

other members of his family by calling them witches, and threatened to kill the complainant. He pleaded not guilty to the charge. He made certain admissions at the commencement of the trial. The State led the evidence of the complainant and thereafter closed its case, culminating in the accused being put to his defence.

[2] During the course of the defence case, when the accused was still testifying, the Magistrate became of the view that the accused was not capable of understanding the proceedings. The Magistrate observed:

> "...when you started giving evidence you started going off about things that happened since 2001 despite this Court trying to confine your evidence to 26 February and 9 April. You start your evidence on one thread and you run a direction with it then you stop, then you start a new thread and you run in a different direction. Never mind the new information and you contradicting yourself, more often than not you don't make sense. You talk about irrelevant things such as God clearing things up for you but you don't explain it. More often than not you are moving around like somebody that's on heat, even allowing the emotional outbursts like the one you had just now, sitting down crying, talking about you don't want to be with this life anymore. All this together with your reference that you underwent psychiatric treatment at some stage, raise a concern with this Court regarding your understanding of the court procedure. It brings us into the realm of the provisions of Section 78 of the Criminal Procedure Act that says if the Court has any doubt as to your mental capabilities, that the Court must refer you for mental observation. This may result in a lengthy delay of trial and it will at some stage have the effect that you will be detained at Fort England Hospital."

[3] The Magistrate did in fact refer the accused to Fort England Hospital "*for mental observation for a period of 30 days."* This was done purportedly in terms of section 78 of the Criminal Procedure Act 51 of 1977 (the CPA). Reference to only that

section, must have come about through inadvertence, as indeed the warrant for the removal of the accused refers to sub-sections 77(1) and 78(2) of the CPA.

[4] In the interim, a report was compiled by two psychiatrists (Prof M Nagdee and Dr H Jordaan) and served before the Magistrate when the trial resumed. The report embodies the following recommendation:

> "Due to the history of assaultive behaviour in the past, and his unfavourable risk profile when mentally ill, it is respectfully recommended that accused be admitted to Fort England Hospital as a State Patient in terms of Section 42 (sic) of the Mental Care Act."

[5] There was some debate between the State and the accused's legal representative regarding the procedure to be followed consequent upon the recommendation. In the final analysis, the Magistrate, in light of the findings, *inter alia,* that the accused had committed the offence in question, is not capable of understanding the proceedings so as to make a proper defence and was unable to appreciate the wrongfulness of his actions at the time of the commission of the offence, gave heed to the recommendation that the accused be admitted to Fort England Hospital as a State patient in terms of section 47[1] of the Mental Health Care Act 17 of 2002, and ordered that the accused be detained, pending the decision of a Judge in chambers, in a psychiatric hospital or prison. The Magistrate further ordered, "*[i]n in terms of section 77(6)(a)(ii)(bb),"* that

[1] The Magistrate observed that reference in the recommendation to "section 42" had come about through inadvertence.

the accused is not entitled to a judgment in terms of section 106(4) of the CPA.

[6] When the matter came before Lowe J he posed the following questions:

> "1. Generally was the Accused dealt with correctly in terms of section 77 of the Criminal Procedure Act or should he have been referred in terms of section 78 of the Criminal Procedure Act?
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> 2. In either event as this was an offence not involving serious violence should the finding and order not have been made in terms of section 77(6)(a)(ii)-not (i) alternatively section 78(6)(a)(ii) not (i)?
>
> 3. Why was it in the "*public interest*" necessary to order otherwise?"

[7] The views of the Director of Public Prosecutions, Bhisho, for which this court is grateful, were sought and obtained.

[8] Section 77(1) provides that if it appears to the court at any stage of criminal proceedings that the accused is, 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. Section 78(2) is to the same effect, but deals with criminal responsibility. In this matter it would appear that the accused was correctly referred for mental observation and that there was substantial compliance with the provisions of sections 77(1) of the CPA insofar as that section makes provision for

conducting an enquiry where it appears that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence.

[9] It remains to consider whether the matter was correctly reported on in accordance with the provisions of section 79. The offence of which the accused was charged is not one involving serious violence. Insofar as relevant hereto (if the court considers it to be necessary in the public interest, or where the court in any particular case so directs), section 79(1)(b) of the CPA[2] makes provision for the conducting of an enquiry reported on by –

(a) the medical superintended of a psychiatrist appointed hospital designated by the court, or by a psychiatrist appointed by the medical superintended at the request of the court;

(b) a psychiatrist appointed by the court and who is not in full-time service of the Sate unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issued under subsection (13) by the National Director of Public Prosecutions;

[2] As amended by section 10(a) of the Judicial matter Amendment Act 66 of 2008

(c) a psychiatrist appointed for the accused by the court; and

(d) a clinical psychologist where the court so directs.[3]

[10] The ambit of section 79(1)(b) is sufficiently wide to encompass, not only an instance where a charge involves serious violence, but instances where the court considers it in the public interest or where the court in any particular case so directs.

[11] On the authority of *S v Booi Pedro*,[4] 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.[5]

[12] The Office of the Director of Public Prosecutions, Bhisho has, in its helpful response made pursuant to the query raised by Lowe J referred to above, pointed out that there is a paucity of

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3 Section 79(1)(b)(i)-(iv) of the CPA

4 Unreported decision of the Western Cape Division, Cape Town by Binns-Ward *et* Rogers JJ delivered under High Court ref no.: 14229 Oudtshoorn Case No. B247/11 on 9 July 2014; also see *S v Xolani Elvis Ralane* review judgment of this court delivered under review case no. A222/14 delivered on 21 July 2015

5 Para [68] of the *Booi Pedro* judgement

psychiatrists in this region, hence the Eastern Cape Director of Public Prosecutions has, by Circular 1 of 2005 (as amended on 14 July 2014) given written authority to all prosecutors to apply to the court to dispense with a third psychiatrist in cases where a third psychiatrist would otherwise form part of the panel.[6]

[13] Nothing, from a reading of the record, points to the prosecutor as having requested the court to dispense with the third psychiatrist. Therefore, the panel was not correctly constituted and the Magistrate could not declare the accused a State patient.

[14] Even though the subject charge does not involve serious violence, there are, in my view, ample grounds on the strength of which the Magistrate could have considered it necessary in the public interest to invoke section 79(1)(b). The accused has previously undergone psychiatric treatment. The facts of this matter do not point to a once-off incident, but to a continuous problem besetting the accused and his family. Also, the recommendation by the doctors that the accused be declared a State patient is not without significance.

[15] In the result, the proceedings conducted by the Magistrate, Mdantsane on and after 13 March 2015 are set aside. The

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6 Paragraph 25 of the Circular

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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S M MBENENGE

JUDGE OF THE HIGH COURT

30 July 2015

I agree

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D VAN ZYL

ACTING DEPUTY JUDGE PRESIDENT