

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**REVIEW CASE NO: 464/2015**

**DATE DELIVERED: 14/9/15**

**NOT REPORTABLE**

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS**

**and**

**MZWANELE RORO**

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**SPECIAL REVIEW: JUDGMENT**

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**PLASKET J**

[1] This is a special review concerning the regularity of an order made by the magistrate, Dordrecht in terms of s 78(6)(b)(ii)(aa) of the Criminal Procedure Act 51 of 1977 (the CPA) detaining the accused as an involuntary mental health care user.

[2] The background is that the accused was charged with malicious injury to property. At his first appearance in court, an order was made in terms of s 79 of the CPA that he be sent for observation at a mental hospital.

[3] In due course, the report of a psychiatrist from Komani Hospital was placed before the court to the effect that the accused was not fit to stand trial and that he be detained as a state patient. An order to this effect was made.

[4] The order was not competent because s 79 of the CPA requires that an order of this sort be made on the basis of a recommendation of a panel, as opposed to a single person. As a result, the accused was brought before the court again, a new order was made and he was sent to Fort England Hospital in Grahamstown where he was observed by a panel of two psychiatrists and a psychologist.

[5] In its report, the panel concluded that the accused was unfit for trial and not criminally responsible. It recommended that he be detained as a state patient. The panel made a specific finding that the accused was potentially dangerous.

[6] The prosecutor and the defence accepted the report and its recommendation. The court was addressed by them and both were in agreement that, for purposes of s 77(6), the available evidence showed that the accused committed the offence with which he had been charged.

[7] Despite the motivated recommendation of the panel that the accused be detained as a state patient in terms of s 77 of the CPA, the magistrate issued an order, purportedly in terms of s 78(6)(b)(ii)(aa) of the CPA that he be detained as an involuntary mental health care user.

[8] In issuing the order, the magistrate misdirected herself. She made an order in terms of s 78, whereas the proceedings before her were in terms of s 77. The latter section applies where, as in this case, the accused is not capable of understanding the proceedings so as to make a proper defence, due to mental illness or mental defect. Section 78 applies when a person has committed an offence and, at the time of the commission of the offence, he or she was unable to appreciate the wrongfulness of the act or was not able to act in accordance with that appreciation, as a result of mental illness or mental defect.

[9] The magistrate's order is not in accordance with the evidence before her. That evidence, which is not disputed, is that the accused is potentially dangerous as a result of his mental state. While I appreciate that the magistrate had a discretion, that discretion had to be exercised judicially in accordance with the evidence. The

evidence justified the recommendation made by the panel and accepted by both the prosecutor and the defence.

[10] In the result, I intend to set aside the order issued by the magistrate and replace it with the order that should have been made.

[11] I make the following order:

- (a) The order made by the magistrate on 20 October 2014 in terms of s 78(6)(b)(ii)(aa) of the Criminal Procedure Act 51 of 1977 is set aside and replaced with the order set out in paragraph (b) below.
- (b) ORDER IN TERMS OF SECTION 77(6)(a)(i) OF THE CRIMINAL PROCEDURE ACT 51 of 1977.

Case no: 10/2014

To: The Head, Komani Hospital / The Head of the Prison

WHEREAS the court found that MZWANELE RORO, who is awaiting trial on a charge of malicious injury to property, is not capable of understanding the proceedings so as to make a proper defence, that the accused has committed the act in question and that it is necessary in the public interest, THEREFORE a court order is hereby granted that the accused be detained in a psychiatric hospital or prison 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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**C. PLASKET**

**JUDGE OF THE HIGH COURT**

I agree.

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**J. PICKERING**

**JUDGE OF THE HIGH COURT**