



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG**

CASE NO: 1801/15

In the matter of:

JIMMY YOUNG

MENTAL HEALTH CARE USER

REVIEW JUDGMENT

Delivered on: 3 March 2015

MAHARAJ AJ (K PILLAY J concurring)

Introduction:

- [1] The above mentioned matter was sent to the High Court by P.S Gebashe the Chairperson of the Unthungulu Mental Health Review Board for consideration and an order by this Court in terms of Section 34(7)(c) of the Mental Health Care Act 17 of 2002.
- [2] Save for the typographic errors on pages 3 and 4 of the application relating to the dates on 14th January 2014 which should read 14 January 2015 and 17 January 2015 respectively, the application is well motivated and was of great assistance in writing this judgment. I am indebted to P.S. Gebashe for the effort.

- [3] At the outset I wish to emphasize that this matter is not before me as a review in terms of section 304 or 304A of the Criminal Procedure Act 51 of 1977. The accused was not convicted of an offence in the court *a quo*, and the order made by the magistrate in terms of section 77(6)(a)(ii) is not a sentence as contemplated in section 302 (1) (a).
- [4] This does not mean that the High Court does not have jurisdiction to review and set aside the proceedings of the Lower Court. In terms of section 22(1) of the Superior Courts Act 10 of 2013, the proceedings of the Lower Court may be brought under review in the High Court if there is “gross irregularity in the proceedings”. An error of law might in some instances or circumstances amount to a gross irregularity (see *Quozeleni v Minister of Law and Order and Another* 1994(3) SA 625 at 638 D-H)
- [5] The High Court also has inherent powers to review proceedings of the Lower Courts on the basis of the constitutional principle of legality. In this instance, in the interest of justice, a less formal process is followed or condoned where the Review Board has already sent the matter to the High Court for direction.

The Issues:

- [6] The circumstances surrounding this application by the Review Board can be distilled as follows:
- (i) The health care user Jimmy Young was initially charged with a sexual assault contravention in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
 - (ii) A report by the control prosecutor, Empangeni, indicated that the health care user flashed his genitals to a member of the public and was of the opinion that the nature of the charge warranted detention in terms of the Mental Health Act 17 of 2002.

(iii) The prosecutor also mentions in the report that the mental state of the accused is not mentally balanced and makes reference to the copy of the District Surgeon's report.

[7] The District Surgeon, Dr F.A. Van Niekerk on the 15th October 2014 submitted a report which states "He is not 100% insane, however not 100% in full 'compos mentos' with his environment. He is a loner and makes an income by begging at robots".

[8] Subsequently the learned magistrate, on the 27th November 2014 ordered the detention of the accused, Jimmy Young, to be detained at Ngwelezane in terms of section 77 (6)(a)(ii) of the Criminal Procedure Act 51 of 1977, as if the accused were an involuntary mental health care user contemplated in terms of section 33 of the Mental Health Care Act 17 of 2002.

[9] The health care provider, Mthandeni Nyawo, applied for the assisted care of Jimmy Young on the 14th January 2015, having filled out the form MHCA 04, wherein he mentions that there are no known relatives and the health care user is unable to give an account of himself and lacks insight into his mental state and is likely to inflict harm on others.

[10] On 15th January 2015 Dr P.A. Ngema recorded on the MHCA 05 on the mental health care user as follows:

- (i) was illogical with incoherent speech, loss of reality testing;
- (ii) is dangerous
- (iii) is incapable of making an informed decision on the need to receive case, treatment and rehabilitation services.

[11] On the 17th January 2015 Dr P.S. Mabuza also recorded on the MHCA 05 that the mental Health care user:-

- (i) had restricted affect; illogical at times, gives a poor and incoherent account of self, loss of reality testing;

- (ii) suffers from psychotic disorder;
- (iii) is dangerous
- (iv) is incapable of making an informal decision on the need to receive case, treatment and rehabilitation services;
- (v) is not willing to receive case treatment and rehabilitation services;
- (vi) is likely to inflict serious harm on himself and others;
- (vii) should receive involuntary care, treatment and rehabilitation.

[12] The Chairperson of the Uthungulu Mental Health Review Board had certain reservations about the procedure followed by the court *a quo* in which the mental health user was referred.

[13] The gravamen of his concerns can be crystalized as follows:-

- (i) the correct interpretation of the phrase 'admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health user' in section 77(6)(a)(ii) of the Criminal Procedure Act.
- (ii) there being no certainty if the mental health care user could be discharged from the hospital, if fit for discharge, without reverting to the court.
- (iii) the order in terms of section 77(6)(a)(ii) of the Criminal Procedure Act was made without the mental health care user, having being referred in terms of section 77(1) of the Criminal Procedure Act for an enquiry and reports in accordance with the provisions of section 79(1) of the Criminal Procedure Act.

[14] The learned Chairperson also raised the following question and sought direction from this court, namely:

- (i) whether an order issued in terms of section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977 dispensed with the statutory requirements of section 33(1)(a) of the Mental Health Care Act 17 of 2002 read with Regulation 10(1) of the General Regulations made in terms of section 66(1) of the said Act which makes provision for an application for involuntary care, treatment and rehabilitation to be made on form MHCA 04 by a spouse, next of kin, partner, associate, parent, guardian, by a health care provider. Section 33(4)(a) requires the head of the establishment, upon receipt of the application to cause the mental health care user to be examined by two mental health care practitioners. The mental health care practitioners submit their reports in writing to the head of the establishment. It is on the basis of these reports that the head of the establishment approves the application for involuntary care, treatment and rehabilitation. Where the treatment is approved the mental health care user will be admitted and subjected to a 72 hour assessment as prescribed in section 34(1) of the said Act.
- (ii) whether the mental health care user can be referred to another institution if such institution is not selected by the court in terms of section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977, without reverting to the court.
- (iii) where there is an order in terms of section 77(6)(a)(ii) of the Criminal Procedure Act and upon admission of a mental health care user, the examination findings are that conditions for involuntary care, treatment and rehabilitation do not exist, the effects of the court order need to be ascertained.
- (iv) the history of a mental health care user is a vital element of a diagnosis procedure. The reports in terms of section 79(3) and (4) of the Criminal Procedure Act contain invaluable material of such history. It is necessary that copies of such reports

accompany a section 77(6)(a)(ii) order. A directive to this effect will be of great assistance to mental health care practitioners.

Interpretation of section 77(6) of the Criminal Procedure Act 51 of 1977:

- [15] The provision of section 77(6) of the Criminal Procedure Act, suggests that an accused person is not fit to stand trial by reason of mental illness (see S v Skeyi 1981(4) SA 191 (E)).
- [16] The mental illness is indicative of a pathological disturbance of the accused's mental capacity (See S v Skellmacher 1983 (2)SA 181 (SWA)).
- [17] Before a court can find that the accused is not fit to stand trial, it has to receive a report under section 79. The court must also be satisfied that some factual or medical basis has been laid for the allegation. (See S v Mogorosi 1979 (2)SA 938 (A)).
- [18] Detention pursuant to section 77(6)(a) of the Criminal Procedure Act, is an inroad on the liberty of an accused person. Such detention should not be ordered unless the accused has been found unfit to stand trial in accordance with the procedure laid down in section 79 of the Criminal Procedure Act.
- [19] Section 77 and 78 of the Criminal Procedure deal respectively with fitness of an accused person to stand trial and criminal responsibility where one or more of these capacities is said to be lacking on account of mental illness or defect. In either instance, the accused person must be referred for psychiatric assessment which is governed by section 79.

The Mental Health Care Act 17 of 2002

- [20] Chapter V of the Mental Health Care Act deals with 'voluntary, assisted and involuntary mental health care'. Section 37 of the Mental Health Care Act applies to so called 'involuntary mental health care user'. Ordinarily a patient

is admitted to a psychiatric facility as an involuntary mental health care user pursuant to an application under section 33.

[21] Chapter VI of the Mental Health Care Act deals with 'State Patients' ie persons who are ordered in terms of the Criminal Procedure Act to be admitted as state patients. A person is detained as a state patient remains in detention indefinitely until, on application made to a Judge in chambers in terms of section 47 of the Mental Health Care Act, he or she is discharged.

[22] The Mental Health Review Board may decide that the mental health care user should be discharged or may approve further involuntary care.

[23] The High Court has a discretion to order a person be detained as an involuntary health care user in terms of section 37 of the Mental Health Act, or that the user should be released conditionally or unconditionally.

The detention order

[24] In the absence of a proper enquiry by the court *a quo*, the referral by the magistrate in terms of section 77(6)(a)(ii) of the Criminal Procedure Act, in my view should be declared a nullity and set aside.

Direction by the court in regard to the questions posed in paragraph [14] of the judgment

[25] The provisions of the Mental Health Care Act cannot be dispensed with or superseded by the provisions of section 77(6)(a)(ii) of the Criminal Procedure Act. In my view they work in conjunction with each other serving different purposes namely:-

- (i) The detention of persons under section 37 of the Mental Health Act caters for cases where persons are not criminally charged for any offences whereas section 77(6)(a)(ii) of the Criminal

Procedure Act, provides for referral of accused persons who are charged for offences and are found unfit to stand trial.

- (ii) Where an institution is not specified in the court order referring a person in terms of section 77(6)(a)(ii) of the Criminal Procedure Act, the Chairperson of the Mental Health Review Board would be at liberty to select an institution which will be in the best interest of the mental health care user; without reverting to the court.
- (iii) Where the Mental Health Review Board finds that the person referred does not require involuntary care, treatment and rehabilitation, an application should be made to the High Court for the release of such person.
- (iv) Where the referral is done in terms of section 77(6)(a)(ii) and the mental health reports pursuant to the provisions of section 79(3) and (4) of the Criminal Procedure Act are done, such reports must be sent to the Mental Health care practitioners of the institution specified in the referral in terms of section 77(6)(ii) of the Criminal Procedure Act.

Conclusion:

[26] In the premises, I propose that the order of the magistrate referring the accused to Ngwelezane dated 27th November 2014 in terms of section 77(6)(a)(ii) of the Criminal Procedure Act be set aside.

[27] The application by the Chairperson of the Uthungulu Mental Health Review Board to have the mental health care user, Jimmy Young, be kept and provided with care and treatment and rehabilitation services until the said user has recovered or is otherwise legally discharged, is hereby granted in terms of section 34(7) (c) of the Mental Health Care Act 17 of 2002.

[28] I would propose that a copy of this judgment be forwarded to the Office of the Director of Public Prosecutions, Kwazulu-Natal; the Chief Magistrate for the District of Empangeni and to the Chairperson of the Uthungulu Mental Health Review Board.

MAHARAJ AJ

PILLAY J