

SOUTH AFRICA / JUDGMENT

S v Eshane (HC02/2022) [2022] ZANWHC 30 (29 June 2022)

[2022] ZANWHC 30**COURT**

North West High Court, Mafikeng

BEFORE

Petersen, Hendricks

CASE / FILE NUMBER

HC 02/2022

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO.: HC 02/2022

MAGISTRATES SERIAL NO: 1/2022

MAGISTRATES CASE NO: VRC 02/2022

In the matter between

THE STATE

and

TSHEPISO ESHANE

ACCUSED

JUDGMENT

PETERSEN J

Introduction

- [1] This matter was placed before me in Chambers on 20 June 2022 under cover of a J4 form (J4) which is utilized when a criminal matter is sent on automatic review from the Magistrates' Court. It is recorded on the J4 that the accused was convicted of contravening section 9 of Act 32 of 2007 (Exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older: Flashing). The J4 further reflects that a sentence was imposed in terms of section 77(6)(a)(i) of Act 51 of 1977 in terms of which the court directs that the accused be detained in Bophelong Psychiatric hospital pending the

decision of a judge in chambers in terms of section 47 of the Mental Health Care Act 17 of 2002. The Acting Regional Magistrate marked the matter reviewable on form J15 (the charge sheet).

Background

- [2] The accused, a male aged 27 years, was arrested on 30 January 2020 and made his first appearance in the District Court at Vryburg on 01 February 2020 on two charges of contravening section 9 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The two contraventions are alleged to have occurred on 29 January 2020 when the accused allegedly held his erect penis with both hands and exposed it to a female and male complainant respectively. The accused was released in the care of his grandmother who was warned to bring him back to Court on each of the remand dates. From the outset indications were that the accused needed to be referred for psychiatric evaluation. Following numerous postponements in the District Court, the matter was subsequently transferred for trial to the Regional Court, Vryburg on 18 January 2022.
- [3] On 8 March 2022, the accused was referred for psychiatric evaluation to Sterkfontein Hospital in terms of section 77(1) and 78(2) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act). A joint psychiatric report was compiled and signed off by two (2) psychiatrists on 21 and 22 April 2022 respectively, following separate and independent examinations of the accused at Sterkfontein Hospital, during the period 09 March 2022 to 22 April 2022.
- [4] The accused was diagnosed with Cannabis Induced Psychotic Disorder, Cannabis Use Disorder and Moderate Intellectual Disability in terms of section 79(4)(b) of the Criminal Procedure Act. The accused was consequently found not fit to stand trial in terms of section 79(4)(c) on the section 77(1) referral; and unable to appreciate the wrongfulness of his actions in terms of section 79(4)(d) on the section 78(2) referral. As a result, the two psychiatrists recommended that the accused be admitted as a State patient to Bophelong Hospital in terms of section 42 of the Mental Health Care Act 17 of 2002.

The proceedings of 25 May 2022 before the Acting Regional Magistrate

- [5] At his appearance on 25 May 2022, the accused was legally represented by a Mr Shimano. The proceedings of 25 May 2022 were predicated in the main on the provisions of section 77(2) and 77(6) of the Criminal Procedure Act. I cannot fault the Acting Regional Magistrate for the step by step process followed as dictated by the aforesaid provisions of the Criminal Procedure Act. However, the question is whether or not there was substantive compliance with the tenets of section 77(2) and 77(6) of the Criminal Procedure Act, when regard is had to the serious implications for the accused in depriving him of his liberty.
- [6] I turn to the conduct of the enquiry by the Acting Regional Magistrate. The first step in the enquiry is found in section 77(2)(a) of the Criminal Procedure Act which provides that:

"77(2)(a) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence."

[7] The relevant portion of the record relevant to section 77(2) of the Criminal Procedure Act reads as follows:

"PROSECUTOR: ... I handed in that report, the psychiatric report from Sterkfontein Psychiatric Hospital that was compiled that the accused is not fit to stand trial in the matter ...

COURT: Okay, report received as Exhibit A.

Mr Shimano

MR SHIMANO: Your Worship ...

COURT: Is the, is the findings of the report disputed? MR SHIMANO: No Your Worship they are not disputed.

COURT: Okay where is the finding contained the relevant report, marked as Exhibit A is unanimous finding and not disputed by the Prosecutor or the accused. The Court shall now determine the matter on such report without hearing further evidence.

[8] The Magistrate remarked that the Prosecutor and the accused did not dispute the report. However, the Prosecutor merely handed in the report. Nothing was said regarding the States attitude to the findings in the psychiatric report. The first time any mention was made that the Prosecutor accepts the findings was immediately prior to the Acting Regional Magistrate handing down the order which forms the subject matter of this review. The fact that the Prosecutor at a later stage stated that he accepted all the recommendations and evidence does not alter the fact that this was to be placed on record earlier in the proceedings. In respect of the defence, Mr Shimano, stated that the findings of the report are not disputed. Having regard to the recommendation of the psychiatrists, something more was required from Mr Shimano than a mere indication that the findings were not disputed.

[9] The sentiments expressed in *S v Matu* 2012

(1) SACR 68 (ECB) by Hartle J are apposite in this regard, where in an analogous review matter, he said:

"14. She (the Magistrate - mv insertion) appears to have assumed, with reference to annexure B, that the prosecutor accepted the finding of the panel. but this ought to have been clearly established and an indication made on the record to this effect. As for the accused, the record is innocent of any invitation extended to him to indicate if he wished to dispute the finding; or of any explanation made to him concerning his right to lead evidence on the basis provided for in subsection 3 or indeed as to the consequences which might ensue arising from the drastic provisions of Chapter 13. In my view the phrase "is not disputed by ...the accused" referred to in

the subsection cannot be equated with an accused person being unable to dispute it by virtue of mental illness or defect. The accused has a clear election to challenge a section 79 finding and to present evidence towards this end.

(my emphasis)

[10] Moving from the premise that the accused by virtue of mental illness or defect is not fit to stand trial, the submission by Mr Shimano that the findings in the report are not disputed, with no indication on what basis he made the concession, constitutes an irregularity. It would reasonably be expected that the record at the very least should reflect that the accused's grandmother who accompanied him to Court, for example, or other family members, or the accused himself if in a lucid interval, were consulted on the findings in the report.

[11] On a reading of the record, there was no substantial compliance with the provisions of section 77(2)(a) of the Criminal Procedure Act. On that basis alone, the proceedings stand to be reviewed and set aside with an order referring the matter back to the Acting Regional Magistrate to comply with the tenets of section 77(2).

[12] However, considering the order of the Acting Regional Magistrate, I am constrained to deal with the approach adopted by the Acting Regional Magistrate to section 77(6)(a) of the Criminal Procedure Act. Section 77(6)(a) of the Criminal Procedure Act provides that:

"77(6)(a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court may direct that the accused -

(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be -

(aa) detained in a psychiatric hospital; pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; ..."

[13] The record reflects that the Acting Regional Magistrate dealt with the provisions of section 77(6) as follows:

"COURT: ... The Court has jurisdiction in terms of Section 75 of Act 51 of 1977 to try the case and finds in terms of Section 77(6)(a) of Act 51 of 1977 that the accused is not capable of understanding the proceedings so as to make a proper defence.

The Prosecutor can now proceed with leading evidence on the commission of the offence.

PROSECUTOR: ... Your Worship in support of the evidence of commission of the offence, the state will read the affidavit. The affidavit compiled by the Investigation Officer in this matter, ..."

[14] The only portion of the affidavit of the investigating officer which purports to deal with the evidence at the disposal of the State, reads as follows:

"The two complainants being clearly in their statements they mentioned what the accused did on the day of the alleged commission of the offences.

They link the accused to the commission of the offence, (sic) They is a prima facie case against the accused ..."

[15] Mr Shimano on enquiry from the Acting Regional Magistrate, following the reading of the investigating officer's affidavit into the record, states as follows:

"The contents of the Investigating Officer affidavit will not be challenged or will not be disputed as it is in line with my

consultation with the accused as well. Therefore, I will not have any objections should the said affidavit be handed in to Court as an Exhibit Your Worship."

[16] The Acting Regional Magistrate pronounced judgment as follows:

"The Court finds that it has been proved (sic) a balance of probabilities that the accused committed the act contemplated in Section 77(6)(a)(i) after receiving the statement by the 10 as, Exhibit B."

[17] The prosecution is required to place before Court admissible evidence as contained in the police case docket, which will enable the Court to determine if the accused has in fact committed the act inherent in the elements of the offence so charged.

[18] The judgment of the Acting Regional Magistrate as aforesaid simply states "... that the accused committed the act contemplated in section 77(6)(a)(i)". It is not clear from the judgment what 'act' is being referred to. This is exacerbated by the fact that the affidavit of the investigating (Exhibit B) relied on by the Acting Regional Magistrate for this finding is of no assistance, as there is a dearth of evidence on what the accused allegedly did in contravention of the offences charged. The Acting Regional Magistrate should have invoked the remedy in section 77(6)(a), when regard is had to the investigating officer's affidavit and ordered "that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question."

[19] As the evidence stood before the Acting Regional Magistrate the finding handed down could not have been made. The finding in the circumstances constitutes a material misdirection which is a further ground vitiating the proceedings.

[20] Further as to the finding and the use of the J4, the following sentiments expressed in *S v Cacambile*[1] are apposite and equally applicable to the present matter:

"[14] The record must show whether any facts were presented to the presiding officer, enabling him to determine and find whether the accused committed the *actus reus* complained of (see *S v Sika* 2010 (2) SACR 406 (ECB) at 408a-b). It seems to me from the ruling, that the magistrate did not convict the accused as recorded in the J4 but merely found that he committed the offence in question. This finding would have been a proper one had the court been apprised of information or evidence to support such a finding. Not only was this not done, but the review cover sheet suggests that the accused was convicted and sentenced. This is confusing. The portions of the standard form J4 for review proceedings relating to conviction and sentence should not be completed by rote in matters of this nature."

Conclusion

[21] In the circumstances, the matter stands to be remitted to the Acting Regional Magistrate to deal with the requisite enquiry in accordance with the reasons set out in this

judgment.

[22] In the interim, and considering the best interests of the accused, he shall remain admitted as a patient at the Bophelong Hospital, pending finalization of the enquiry by the Acting Regional Magistrate.

[23] Having regard to the urgency of the matter, the enquiry by the Acting Regional Magistrate is to be finalized within a period of thirty (30) days from date of the order of this Court. Upon conclusion of the enquiry the matter must be remitted for re-consideration by a Judge in Chambers.

Order

[24] The following order is consequently made:

- (i) The Acting Regional Magistrate's order granted on 25 May 2022 in terms of section 77(6)(a)(i) of the Criminal Procedure Act, Act 51 of 1977 is hereby reviewed and set aside.
- (ii) The matter is remitted to the Acting Regional Magistrate to deal with the matter in accordance with the reasons set out in this judgment, pursuant to the applicable provisions of section 77 of the Criminal Procedure Act 51 of 1977, within a period of thirty (30) days from date of this order.
- (iii) The accused shall in the interim remain an admitted patient at the Bophelong Hospital.

A H PETERSEN

JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

Date review received 20 June 2022

Date of judgment 29 June 2022

[1] (CA&R19/17, 22/17) [2017] ZAECBHC 6; 2018 (1) SACR 8 (ECB) (14 September 2017).

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