

SOUTH AFRICA / JUDGMENT

S v J.M (CC112/2017) [2020] ZAMPMBHC 22 (5 November 2020)

[2020] ZAMPMBHC 22

COURT

Mbombela High Court, Mpumalanga

BEFORE

T.V. Ratshibvumo

CASE / FILE NUMBER

CC112/2017

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION OF THE HIGH COURT

BREYTEN

CIRCUIT COURT

CASE

NO: CC 112/2017

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED

DATE:

05 NOVEMBER 2020

In

the matter between: THE
 STATE
 And
 J
 M
 (THE ACCUSED)

JUDGMENT

RATSHIBVUMO AJ:

Background

1. The accused was arrested on 16 January
2016. The indictment in the court file reflects that the State has levelled two charges of murder and one of robbery with aggravating circumstances against him. These offences were allegedly committed on the date of his arrest. He is yet to plead to these charges.
2. On 20 November 2017, an order was made by the court, for the accused to be observed in terms of section 77 and 78 of Act 51 of 1977 (the Criminal Procedure Act), and that a report be compiled in accordance with section 79 thereof.
3. From the date of his arrest, the accused was represented by various attorneys appointed by the Legal Aid South Africa. At the commencement of this inquiry, Mr. Mabasa from the Legal Aid was available to take instructions from the accused. He however reported that he could not get instructions because he could not make sense of the accused's utterances. He then requested that he should be appointed to represent the accused for purposes of the inquiry in line with the provisions of section 77 (1A) of the Criminal Procedure Act. In view of the fact that the accused was not communicating or responsive to the court, I deemed it to be in the interest of justice for the accused to be represented as substantial injustice would otherwise result. The request was allowed and Mr. Mabasa appeared for the accused.

Section 77& 78 Inquiry

4. After the 30 days of observation was ordered as above, no report was made available to the court. In fact, it transpired in this inquiry that after the 30-day period had lapsed, the observation was still going on and it continued for over two years. Unbeknown to the court, several reports were compiled at the same time but not availed to the court. As late as 16 September 2019, the case was postponed for the "psychiatric report" as none was availed to the court. When the reports were finally made available, evidence by the psychiatrist had to be led in an inquiry because the defence disputed the findings in the final report.

5. In an inquiry before the court, Dr. Weiss, gave detailed evidence on how they observed the accused and compiled the reports. Dr. Weiss is a psychiatrist who together with Dr. Nkoana prepared several reports. Five reports were handed in as exhibits and were marked as Exhibits A, B, C, D and F. Exhibits A, D & F dated 14 March 2018, 22 January and 24 January 2019 respectively were

signed by the two doctors. Exhibits B & C, dated 12 April and 01 October 2018 respectively, were signed only by Dr Weiss.

The Reports.

6. From Exhibit A, the following could be gleaned. In a period of 5 months spanning from November 2017 to March 2018, Dr Weiss saw the accused in Ermelo Prison on 5 days being, 22 Nov 2017, 18 Jan, 12 Feb, 12 and 14 Mar 2018. Before stating that he concurred with the findings recorded by Dr. Weiss, Dr. Nkoana stated in this report that he independently observed the accused on 14 March 2018 at Ermelo Hospital. Under Mental State Examination the report states that even though the interview where the accused actually talks sounds bizarre, there is still a degree of suspicion that he could be malingering (pretending to suffer from a mental disturbance for secondary gain, in this case, avoiding court). The following is further recorded.

- Comment: It has been four months that he has been observed and the consensus currently is that he is not fit to stand trial. However the possibility that he was not mentally ill at the time of the alleged offence cannot be excluded and considering the nature of the alleged offence, he could have had the capacity to appreciate what he was doing.
- Diagnosis: Psychosis Not Otherwise specified. Malingering. He is not fit to stand trial.
- Based on available information: He possibly did have the capacity to appreciate the wrongfulness of his action at the time of the alleged offence and his ability to act accordingly was at that time not impaired by mental illness or defect.
- Recommendation: The court process could be delayed until such time that we see a response to treatment or when he abandons the current behaviour. He will remain under psychiatric care at Ermelo Prison. Alternatively he would need to be declared a State Patient for containment in correctional services and his accountability would need to be reported upon when and if he recovers from his condition and starts giving information.

7. Exhibit B on the other hand, is an extension of Exhibit A. It reflects that the accused was seen on all the dates reflected on Exhibit A with an additional date of 11 April 2018. Although Dr. Nkoana also signed this report, he did not see the accused again other than the

observation of 14 March 2018. Under Accountability, Exhibit B states, “since the accused has not been willing to communicate about anything in a sensible manner, it cannot be determine at this point what his condition was at the time of the alleged offence. The nature of the alleged offence does not immediately support the presence of mental illness at the time of the alleged offence.”

8. Exhibit C which was written on 01 October 2018, reflects that after 11 April 2018, which was the last day Dr. Weiss saw the accused in Exhibit B; she visited him once every month before compiling it. Under summary, she wrote: "It can be said with certainty that he will not be fit to stand trial since he does not engage in a meaningful way when it comes to a defence or during an interview. It cannot be predicted if this will change and what time frame would be. No assessment could be made about his accountability. If he will ever talk about or deny the alleged offence cannot be predicted." As indicated above, this report was not signed by Dr. Nkoana.
9. Exhibit D is a continuation from where Exhibit C ended. Exhibit D no longer reflects the dates on which the accused was seen by the psychiatrists. Instead, it simply reflects that he was seen once every month and the last such visit was on 22 January 2019, the date on which the report was written. Surprisingly, Dr. Nkoana in this report stated that he independently assessed the accused at Ermelo Hospital from 22 November 2017 and every second month thereafter, the last being on 12 November 2018. In Exhibit A and B, he had stated that he assessed the accused on 14 March 2018.
10. From Exhibit D, it is recorded that the accused suddenly opened up and started talking about the alleged offence and his role therein. This took place when Dr. Weiss conducted the monthly visits on the accused, which was on 12 November and 10

December 2018. Besides talking about the alleged offence, the accused had also stopped a number of bizarre behaviours and gesturing using his hands by this time. Under conclusion, Exhibit D states the following,

- There is no evidence of psychosis now or at the time of the alleged offence.
 - There is consistent evidence that the accused was and is still malingering.
 - There is no evidence that he is intellectually impaired. It takes a significance amount of intelligence to maintain malingering over such a long period of time.
 - There is the possibility that he might not co-operate in court and revert to more serious behaviours he has shown before, in which case his behaviour should be ignored.
 - Findings: Diagnosis: Not mentally ill, possibly substance abuse.
 - He is fit to stand trial.
 - He had the capacity to appreciate his actions at the time of the alleged offence and his ability to act accordingly was not impaired by mental illness or defect.
11. Exhibit F, which was prepared on 24 January 2018, is not different from Exhibit D except that it contains further details of the interaction Dr. Weiss had with the accused. Dr. Nkoana was not called to give evidence.

Closing arguments

12. In closing arguments, both the State counsel and the accused's legal representative submitted that there has not been adherence with the statutory provisions, in particular sec 79 of the Criminal Procedure Act. For that reason, they requested that the court should order that the accused be re-evaluated with full compliance with the statutory provisions. The defence further submitted that if this request is allowed, the court should also appoint a third psychiatrist for the accused in view of the serious charges involved.

The Detention Warrant

13. Form J138E titled WARRANT FOR THE REMOVAL OF A PERSON DETAINED UNDER PROVISIONS OF CHAPTER 13 OF THE CRIMINAL PROCEDURE ACT, 1977 TO AN INSTITUTION FOR AN INQUIRY AS TO HIS OR HER MENTAL CAPACITY was signed by the presiding officer on 20 November 2017. Although this pro forma was prepared before section 79 of the Criminal Procedure Act was amended by section 3 of Act 4 of 2017, it provided the blank spaces for the names of psychiatrists and a clinical psychologist to be added by the responsible judicial officer. The reason for the blank spaces can be traced to the statutory provisions.

The Legal Position

14. Section 79 (1) (b) provides,

“1.Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on

- (b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-
- (i) by the head of the designated health establishment, or by another psychiatrist delegated by the head concerned;
- (ii) by a psychiatrist appointed by the court;
- (iii) by a psychiatrist appointed by the court, upon application and on good cause shown by the accused for such appointment; and
- (iv) by a clinical psychologist where the court so directs.”

15. From the above it is clear that the head of the mental institution to which the accused is transferred for mental observation, or a psychiatrist delegated by him, would by default be the first person in the panel of experts to conduct an inquiry and prepare a report. The second person in this panel is a psychiatrist appointed by the court. Upon good cause shown by the accused, the court can appoint a third psychiatrist to this panel. Where the court so directs, a clinical psychologist can also be appointed by the court.[1]
16. Section 79(8) and (9) provides,
 - (8) A psychiatrist and a clinical psychologist appointed under subsection (1), other than a psychiatrist and a clinical psychologist appointed for the accused, shall, subject to the provisions of subsection (10), be appointed from the list of psychiatrists and clinical psychologists referred to in subsection (9)(a).
 - (9) The Director-General: Health shall compile and keep a list of-
 - (a) psychiatrists and clinical psychologists who are prepared to conduct any enquiry under this section; and
 - (b) ...

and shall provide the registrars of the High Courts and all clerks of magistrates' courts with a copy thereof.

17. In the form referred to above, the judicial officer concerned did not fill in the three blank spots reserved for the "full names of psychiatrists". Irrespective of these omissions, the order made it clear that the accused was to be removed from prison to Ermelo Hospital and that he should be kept there for observation for 30 days. Whereas this order was made on 20 November

2017, it is difficult to explain why the matter was then postponed to 11 December 2017, as by that date, 30 days would not have lapsed.

The accused's observation

18. Of importance for this judgment is that the court order dated 20 November 2017 was not complied with. The accused was not removed from Ermelo Prison to Ermelo Hospital for mental observation. The accused was observed while in prison hence Dr. Weiss had to visit him there. In November 2017, Dr. Weiss visited the accused once. The next visit after that was in January 2018 and again he was visited once that month. There is no way that a report was going to be ready in 30 days given the once in two or three months'

visits or observation of the accused by the psychiatrist. In fact, the accused never received the 30-days observation that was iordered by the court. While all the reports noted that Dr. Weiss requested more time to observe the accused, these were never communicated to the court. The court only became aware of these when the reports were made available during the inquiry.

19. As no request for further 30 days detention was made to the court, there was no other order made for the accused to be detained for mental observation except the order dated 20 November 2017. This did not stop Dr. Weiss from continuing with the observation of the accused. It appears from the reports that the accused was at some stage moved to the hospital section of the prison, but he was again moved to the prison section when there were allegations that he stole a purse belonging to the hospital staff. Without any further authorisation order by the court, the observation lasted from November 2017 to October 2020.
20. In *S v MN*,^[2] it was held that the mental observation should take place at a designated mental health establishment. If there were challenges in implementing court order, one would expect that the same court would have been approached with the request to amend its order to accommodate the challenges. In this case, the court was not approached. It is not clear as to how Dr. Nkoana observed the accused

at Ermelo Hospital as the accused was not detained there. It is possible that the accused was taken to visit the psychiatrist in

hospital on the day of his observation. This in my view defeats the scope and the goals in the statute providing for the accused to be observed for 30 days at a mental institution, as opposed to visits that resemble a few minutes or hours consultation by a patient.

21. The statutory provision to the effect that the accused should be committed to a psychiatric institution is not without merit. It was envisaged that the patient would be under constant observation, 24/7; and when the psychiatrist is off, the psychiatric nurses would keep an eye on him. Failure to give effect to the court order contributed to not having the report ready after 30 days. The report that was finally prepared and made available was not sanctioned by a court order. When the accused faces serious charges that are read with section 51(1) of Act 105 of 1997, a possibility that a sentence of life imprisonment may be imposed in case of conviction, cannot be excluded. The foundation of such trial has to safeguard the rights and interests of the accused to avoid any margin of error.
22. Lastly, the amended section 79 provides further that if the enquiry is in terms of section 78(2), it must include a finding as to “the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission of the offence, affected by mental illness or intellectual disability or by any other cause.”^[3] Whereas Exhibit D notes the possible substance abuse by the accused, it is silent on the extent to which the accused’s capacity to appreciate the wrongfulness of the act or to act in accordance with the appreciation of the wrongfulness was affected by drug abuse, intellectual disability or by any other cause.

23. It is not uncommon for the court to request the re-evaluation of the accused even in instances where the initial evaluation was conducted in full compliance with the statutory provisions and the court order. In *S v Uraib*,^[4] Liebenberg J ordered that the accused be re-evaluated at the end of the trial, with just the judgment outstanding. The court further

ordered that the full trial transcript should be made available to the psychiatrists who were to re-evaluate the accused.

24. I agree with the submissions made by the State and the defence that the accused should be re-evaluated. I also agree that a good cause was shown by the defence that a third psychiatrist be appointed for the accused in view of the serious charges against him, that there is no background information about him or his family and the fact that he is not talking at all. I therefore make the following order.

Order

24.1 The accused should be committed to a psychiatric hospital for 30 days, to be observed in accordance with section 77(1) and 78(2) of the Criminal Procedure Act, and for the report to be prepared in terms of section 79 thereof.

24.2 The Registrar, Mpumalanga Division of the High Court, with the help from the office of the Director of Public Prosecutions, should liaise with the Department of Health to facilitate the identification of the psychiatric hospital for purposes of the accused's observation.

24.3 The Registrar, Mpumalanga Division of the High Court should source and/or avail the list of psychiatrists, to the court for the necessary appointments.

24.4 A request by the defence for the appointment of a third psychiatrist to be added to the panel of psychiatrists to observe the accused is granted. The defence should avail the name of the psychiatrist for the necessary appointment.

24.5 All the reports prepared and handed in as exhibits in this matter, should be made available to the panel of psychiatrists to be appointed to re-evaluate the accused.

T.V. RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT

Date heard: 02-03 November 2020 Date of judgment: 05 November 2020 For the State: Adv.

Poodhun Instructed by: DPP

- Mpumalanga For Accused: Mr. Mavasa Instructed by: Legal Aid South Africa - Mbombela

[1] See *S v Pedro* 2015

- (1) SACR 42 (WCC) decided prior to the amendment of section 79 by section 3 of Act 4 of 2017 where it was mandatory to have at least three psychiatrists to observe a person referred for mental observation. With the 2017 amendment, two psychiatrists, one of whom would be appointed by the court, can now compile a report. A third psychiatrist can be appointed upon a good cause shown by the accused.
- [2] 2018
- (2) SACR p580 para 34, 37 & 38
- [3] See section 79(4)(d) of the Criminal Procedure Act. Para.
- (d) substituted by s. 6 of Act 68/98 and s. 3 of Act 4/2017
- [4] 2016
- (2) NR 543 (HC).

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