

SOUTH AFRICA / JUDGMENT

S v Monamotsane (R264/2018) [2019] ZAFSHC 61 (30 May 2019)

[2019] ZAFSHC 61

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane, Chesiwe

CASE / FILE NUMBER

R264/2018

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No: R264/2018

In the matter between:

STATE

and

SIMON MONAMOTSANE

CORAM:

CHESIWE, J et MOLITSOANE J

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 30 MAY 2019

[1] This matter was sent on review by the Acting Senior Magistrate purportedly in terms of s 304(4) of the Criminal Procedure 51 of 1977. When the matter first came before me I sent a query soliciting the reasons or comments from the presiding officer. In the query I also requested the presiding officer to comment on the submissions of the Acting Senior Magistrate. The presiding judicial officer has since confirmed that she agreed with the submissions of the Acting Senior Magistrate

and made no further submissions of her own.

[2] The matter was sent for review essentially as it was submitted that the presiding officer applied the provisions of s77 (6)(a) of the CPA incorrectly. In this case the accused was neither convicted nor sentenced. Both sections

302 and 304(4) of the CPA refers to proceedings where the accused has been sentenced. Section 304A, however, refers to the proceedings in which the accused has been convicted but where the sentence has not been imposed. Section 77 makes no provision for automatic review. The High Court has the power at common law to review the decisions of the lower courts in appropriate cases. Section 22(1)(c) of the Superior Court's Act provides that proceedings of any Magistrate's Court may be reviewed by the High Court on the basis of gross irregularity in the proceedings. I am satisfied that this court may review the proceedings of the lower court with regard to the application of s 77 of the CPA.

[3] The accused in this case was charged with the offence of assault with intent to cause grievous bodily harm. Upon his appearance at court an application was made that he be sent for a 30 day mental evaluation. A report was made in terms of s79 and the panel of psychiatrists made the following findings:

- a) Due to mental illness the observatus does not have the ability to understand court proceedings nor to give proper instructions to his defence;
- b) Due to mental illness the observatus was not able to distinguish between right or wrong at the time of the alleged crime;
- c) The accused is at risk of repeating a similar offence if left untreated;
- d) It is recommended that he receives further care and treatment as a state patient.

[4] Upon his appearance following receipt of the report aforesaid the following the transpired in court:

"PROSECUTOR: Your worship at this stage the state request that the matter be transferred in terms of section 77(6)(a) of Act 51 of 1977, your worship.

And also in terms of section 47 of the Mental Health Care Act of 2002 to a psychiatric hospital your worship.

The state will hand in Your worship an A1 statement that would prove beyond the Honourable Court Your Worship that there is indeed a prima facie case against the accused.

There is also psychiatrist report your worship from the doctor attached to the DPP report, Your worship, that clearly indicates that the accused is suffering from schizophrenia.

Your worship, I have been informed that there are still no available beds at Orange Hospital.

However, I have been informed that the accused should be kept at Grootvlei Health Facility Your Worship until the said bed is available. As it pleases the court.

COURT: Sir, are you still maintaining that you will conduct your own defence?

ACCUSED: Legal Aid now, your Worship.

FEMALE SPEAKER: I confirm my appearance, Your worship. No objection Your Worship to the said evidence being admitted as an exhibit.

Do you have any objection?

FEMALE SPEAKER: None, Your Worship.

COURT: The application is granted.

PROSECUTOR: As it pleases the court, Your Worship

COURT: Have you tried to check with Orange Hospital.

PROSECUTOR: They are not there, Your Worship.

COURT: Let us just transfer... Held in custody?

PROSECUTOR: Kept in custody Your Worship at Grootvlei Health Facility, Your Worship.

COURT: Grootvlei Health Facility. The matter is transferred to Grootvlei Health Facility in terms of section 77(6)(a)(i) of Act 51 of 1977.”

[5] In dealing with an enquiry in terms of s77(6)(a) the court must first make a finding that the accused is not capable of understanding the proceedings so as to make a proper defence. In this regard the court may take into account the nature of the incapacity of the accused as contemplated in s77(1). If the report compiled in terms of s79 is unanimous and uncontested by any of the parties as in this case, the court may determine the matter on the basis of the report without hearing

further evidence[1]. During the address by the state the prosecutor said that the report ‘clearly indicates that the accused is suffering from schizophrenia.’ The court did not make this finding and this is not what the court is called upon to make a finding on. The court did not make any finding as to whether the accused was capable of understanding the proceedings so as to make a proper defence this despite the fact that the state handed a unanimous report by the panel of psychiatrist. In this regard the court committed an irregularity.

[6] Once the court finds that the accused is not capable of understanding the proceedings so as to mount his defence, the court should then proceed with the second leg of the enquiry, namely, whether on the balance of probabilities the accused committed the act in question. In this case whether the accused committed the assault with intent to cause grievous bodily harm. It should be borne in mind that the enquiry is not whether the accused could be convicted of the offence on the available evidence. In dealing with the concept of ‘committed the act in question’ the court in *State v Pedro*[2] said the following:

“[89] In context, the expression ‘the act in question’ has reference to the actus reus element of the offence with which the accused is charged. If the lawmaker had intended the court to enquire into the question whether the accused would probably be convicted of the charged offence if and when he became capable of understanding the proceedings, this would have been said. The use of the words ‘committed the act in question’ points to a more limited enquiry.”

The court went further to say:

“[93]the evidential enquiry which s77(6) (a) requires the court to undertake is limited to whether the accused ‘committed the act in question’ the same enquiry contemplated in s78(6). Sub-par (i) does not extend the enquiry to the question whether the accused is probably guilty of one of the offences specified in that sub-paragraph. Sub-para(i) states that if the charge against the accused is one of those offences and if he committed the act in question, he must be dealt with in the manner prescribed in that sub-paragraph. The charge sheet thus determines the charge which the accused is facing; and the actus reus elements of that charge in turn determines the act or omission which must be evidentially investigated in order to determine whether the accused probably ‘committed the act in question.’”

- [7] In casu, the court failed to conduct an enquiry and make a finding whether the accused committed the act in question. The court is obliged as of law to make such a finding in terms of s77(6) of the Act[3]. Failure to make such a finding rendered the proceedings irregular.
- [8] The Act obliges the court upon finding that the accused committed any of the following offences, namely, murder, culpable homicide, rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters Amendment Act, 2007, or charge involving serious violence or if the court finds it to be in the public interest to order that the accused be detained in a psychiatrist hospital pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act 17 of 2002. In the absence of the availability of a bed in a psychiatrist hospital, the court may direct that the accused be temporarily

detained in a correctional facility of a prison and be transferred to a psychiatrist hospital ‘if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger to himself or herself or to members of the public[4].

- [9] Except in matters of murder, culpable homicide, rape or compelled rape, the court is obliged to make an additional finding that the offence involves serious violence or in the opinion of the court it would be necessary in the public interest that the accused be detained in the psychiatrist hospital. I refrain from making any finding in this regard in view of my order below as that would be to usurp the function of the trial court. I however, wish to point to what the court said in *S v Ramokoka*[5] where the following was said:

“There appeared to be the further question of whether, even if the accused was guilty of ‘assault with intent to commit grievous bodily harm’ the crime was one ‘involving serious violence’. It may seem tautological to distinguish between ‘assault with intent to commit grievous bodily harm’ and a crime ‘involving serious violence’ but as the different terminology appears in the same statute (see for example, s 266 of the Criminal Procedure Act), there may be some kind of difference.”

In my view assault with intent to cause grievous bodily harm is not always accompanied by violence. One of the elements of the offence of assault with intent to do grievous bodily harm is proof of ‘intent.’ Jonathan Burchell in Principles of Criminal Law[6] says the following in the discussion of this element of the offence of assault with intent to do grievous bodily harm:

“It is not necessary that X should actually cause grievous bodily harm: It is enough that he intends to cause it, for the crime is not ‘causing grievous bodily harm’. If X intends a grievous injury, but causes a slight injury or none at all, he may nevertheless be guilty of assault with intent to do grievous bodily harm. Conversely, of course, if X inflicts a serious injury without intending to cause grievous body harm, this crime is not committed (my emphasis).”

On the other hand s77(6)(a)(i) envisages a situation where the charge involves as a matter of fact serious violence.

[10] I agree with the Acting Senior Magistrate that the non-availability of a bed in a psychiatrist hospital does not necessarily imply that the accused should be referred to the correctional facility holding. The court must be satisfied that the accused poses a serious danger to himself and to members of the public. The state bears the onus of discharging this burden.

[11] In view of the number of irregularities herein it is my considered view that the proceedings herein were not in accordance with justice and ought to be set aside. I make the following orders:

[12] ORDER:

1. The order of the learned Magistrate detaining Simon Monamotsane at the Grootvlei Correctional Facility or Free State Psychiatrist Hospital in terms of s77(6) of the Criminal Procedure Act 51 of 1977 is hereby reviewed and set aside.
2. Immediately upon his release from detention Simon Monamotsane is to be handed over to the police and forthwith to be brought before the learned Magistrate.
3. The learned Magistrate is thereupon to deal with the matter in terms of sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977.

P.E. MOLITSOANE, J

I agree.

S. CHESIWE, J

[1] Hiemstrar’s Criminal Procedure Lexis Nexis by A Kruger 13-13.

- [2] 2015(1) SACR 41 WCC.
- [3] Hiemstra (supra) at 13-14.
- [4] “s77(6)(a)(i)(bb) of the CPA.
- [5] 2006(2) SACR 57 at 61 par [22].
- [6] 3rd ed Juta at 690.
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