

SOUTH AFRICA / JUDGMENT

S v Ndou (CC02/2023) [2024]

ZALMPTHC 20 (2 February 2024)

[2024] ZALMPTHC 20

COURT

Limpopo High Court, Thohoyandou

BEFORE

Tshidada

CASE / FILE NUMBER

CC02/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, THOHOYANDOU

CASE NO: CC02/2023

DATE: 2024-02-02

REPORTABLE: YES / NO.

OF INTEREST TO OTHER JUDGES: YES / NO.

REVISED.

In the matter between

STATE

v/s

NDOU ENOCK AZWIDOWI

Accused

JUDGEMENT ON ACCUSED'S FITNESS TO STAND TRIAL

TSHIDADA (J): The accused is an adult male who is a qualified professional nurse whom, prior to his arrest was employed at Mahikeng Provincial Hospital, attached to the hospital's Intensive Care Unit, commonly known, or referred to as the ICU. He also possesses a Bachelor's degree in teaching from one of the local universities. He appeared before this court arraigned on seven counts of murder, read with the provisions of section 51(2) part 1 and schedule 2 of the Criminal Law Amendment Act 105 of 1997. All the counts the accused is facing, each one of them attracts a sentence of life imprisonment in terms of the provisions of the above act. However, if the

accused at the relevant stage is able to present substantial and compelling circumstances justifying the court to deviate from imposing the prescribed minimum sentence, the court may impose a lesser sentence than the one prescribed by the act.

The summary of substantial facts are as follows:

The state alleges that on 25 December 2021 at Jimmy Jones Village, Giyani, Limpopo Province, the accused and his family members,

including the deceased herein, attended and held a meeting at their homestead to discuss their family related issues. Shortly after the meeting the deceased in count 1, contacted one of the family members who was earlier at that meeting, requesting her to return to the family homestead because the accused was said to be shooting at members of the family who remained, or were still at the homestead. Upon arrival, bodies of the shot deceased were found scattered around the yard, and others discovered inside the family home.

Amongst the deceased were four minor children, including one family member who is said to have been heavily pregnant at the time. All seven deceased died from gunshot wounds. The accused is said to have later on handed himself over to the police with his firearm and some live ammunition.

At the commencement of the trial, and shortly after charges were read out to the accused, and prior to him tendering his plea, the accused started screaming hysterically, sobbing and crying inconsolably and appeared severely emotionally distressed in the dock.

Upon court's enquiry on what could have triggered the unexpected gestures, the accused gave an incomprehensible response which led to his legal counsel, Mr Muthivhithivhi rising to inform the court that during his consultation with the accused's sister, it was brought to his attention that the accused had a history of annual admissions at a psychiatric ward at Donald Fraser Hospital for mental related challenges and treatment.

As a result, the defence counsel applied that the court invokes the provisions of section 77, 78 and 79 of the Criminal Procedure Act 51 of 1977. This court then ordered the hospital to provide it with the accused's hospital records to confirm the allegations made from

the bar. The provided records indicated and confirmed that the accused had as far back as the year 1995 been diagnosed with schizoid

disorder, or schizophrenic disorder which would usually and often manifest on a yearly basis between the month August and September.

Such disorder was characterised by accused's sleeplessness, accused roaming around aimlessly, laughing and talking alone in isolation.

However, for the balance of the year, the accused maintained and retained gainful professional employment as a nurse and led a relatively normal life.

Due to the fact that the accused had not pleaded to the charges yet, his defence was not entirely clear. The presumption per his counsel's application was that the accused possibly suffered from a mental illness on the day the offences were allegedly committed, and by reason of such mental illness, he lacked criminal capacity, or criminal responsibility to be held criminally liable.

Inadvertently the accused, through his counsel, sought to raise a defence now referred to as pathological incapacity.

Section 78(1)A of the Criminal Procedure Act provides thus:

“Every person is presumed not to suffer from a mental illness, or mental defect so as not to be criminally responsible in terms of section 78(1) until the contrary is proved on a balance of probabilities.”

This court subsequently granted an order for the accused's psychiatric evaluation in terms of section 77, 78 and 79 of the Criminal Procedure Act.

“If it appears to the court at any stage of the criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be inquired into, and be reported on in accordance with the provisions of section 79.”

Yet, section 78 of the same act provides the following:

“A person who commits an act or makes an omission which constitutes an offence, and who, at the time of such commission or omission suffers from a mental illness, or mental defect which makes him or her incapable :

- (a) of appreciating the wrongfulness of his or her act or omission;
- (b) of acting in accordance with an appreciation of the wrongfulness of his act or her act or omission, shall not be criminally responsible for such an act or omission.”

Section 35(3) of the Constitution of the Republic avails protection to the accused person's right to a fair trial which, amongst others, right to be present at one's own trial. This entails that the accused person need not only be physically present at his trial, but also required to be mentally present in order to meaningfully participate in the trial and be able to put up a substantial defence to the charges preferred against him, and also be in a position to provide their legal representative with meaningful instructions where necessary.

Consequent to the accused's evaluation the court was furnished and received a copy of a report of the majority opinion, finding and recommendations of the evaluating psychiatrist penned by Dr Luphuwana and Dr Setjie respectively.

Section 78(1)B of the Criminal Procedure Act provides that:

“The burden of proof with reference to criminal responsibility of the accused shall be on the party who raises it.”

Undoubtedly, that onus in casu clearly rests with the defence or the accused himself to prove that on the day of the commission of the alleged offence, he suffered from a mental illness, or mental defect which impaired his ability to act in accordance with the knowledge and appreciation of the wrongfulness of his conduct. The conduct which resulted in his lack of criminal capacity to the extent that he would not be held criminally responsible.

After perusing the psychiatric report, the state counsel raised a dispute over the expert's opinion and finding in terms of section 77(3) of the Criminal Procedure Act which provides as follows:

"If the expert finding is not unanimous, or if unanimous or is disputed by the prosecutor or the accused himself, the court shall determine the matter after hearing evidence. The prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who, under section 79 of the act, inquired into the mental condition of the accused."

Pursuant thereto, I was therefore inclined to invoke the provisions of section 77(3) and directed that the expert who authored the impugned report, appear before court for a formal inquiry to be held.

The prosecutor's objection was premised on the fact that, there appeared to be no factual basis on the expert's report that supported the conclusion reached by the respective experts, in that the said report lacked the details of the information and the sources consulted.

The court also found same to be dire that no investigations and consultations seem to have been conducted with the possible reliable

and crucial sources or witnesses who were reported to have interacted with the accused on the day in question.

That, in my view would have assisted to confirm and support the finding that the accused was indeed mentally ill and/or unable to act in accordance with the appreciation of the wrongfulness of his conduct on that particular day.

The Supreme Court of Appeal in the matter of PriceWaterhouseCoopers Incorporated and Others v The National Potato Cooperative Limited and Others 2015,SCA(2), [4 March 2015] sets out the following experts' duties and responsibilities for their expert opinions to be admissible in court.

"1. An expert opinion must be seen to be, and actually be an independent product of an unbiased assessment of the information uninfluenced by the litigation."

2. That an expert witness must present objective unbiased conclusions in relation to matters within their expertise. An expert cannot advocate for a party outright, but rather illuminate what their conclusions are, and why. Neutrality, for that matter, is paramount.
3. An expert witness must demonstrate the premise of their reasoning and the conclusion. Experts may not omit to consider material facts from their opinion. An expert witness must be clear in stating when a particular issue is outside their knowledge.

Lastly, that they must be credible, intellectually honest, neutral and intellectually sound reasoning as regards their stated area of expertise.”

It was further held in the matter of Michael v Linksfield Park Clinic (Pty) Ltd 2002

(1) All SA 384 (A) handed down on 13 March 2001 that:

“An expert’s evidence must demonstrate itself to have been a product of logical reasoning.”

Essentially an expert report must not contain hearsay evidence lest conclusion based on hearsay and second-hand information.

Expert opinion must disclose the underlying premise which informed the expert reasoning. The opinion should not be an uninformed foregone

conclusion.

The evidence of one Dr Nandipha Joyce Luphuwana on behalf of the majority psychiatrist expert report was as follows:

She started by placing her qualifications and credentials on record to be the following:

She stated that she possesses an MBChB undergraduate medical qualification and that she has a Masters Degree in psychiatry. She

stated that she is a specialist psychiatrist heading the Hayani Psychiatric Hospital clinical unit since the year 1999. Her daily

duties entailed assessment of psychiatric patients and compiling reports. She also, at times, assist local doctors with outreach

programmes and provides training to local medical officers at Tshilidzini Hospital. She testified that to date, on average, she

might have compiled almost 240 psychiatric reports per annum. She confirmed that when conducting psychiatric assessment, amongst others she would interview the referred patient, collect collateral information from all crucial and vital reliable sources to the case at hand. She would also observe the patient’s mental status during the duration of the assessment.

She then commenced her evidence into the inquiry by reading their report into the record, wherein she listed as an introductory part, the nature of what was included in her inquiry, or what is purported to be the sources of information to her report. The stated sources were the following:

1. The psychiatric interviews.
2. Physical examination.
3. Collateral information from the accused’s sister.

4. Collateral history from his colleagues from Mahikeng Hospital.
5. The hospital medical records from Donald Fraser Hospital.
6. The assessment by clinical psychologist and social worker, and lastly;
7. the case docket that was provided to her by the National Director of Public Prosecutions.

She indicated that from the report the accused has a history of suffering from an undisclosed mental illness since 1994, whilst he was still a teenager. The report recorded that the accused would run away from home and stay in the streets for days or months as he was afraid of people who wanted to harm him.

The report further recorded that the accused had multiple admissions at Donald Fraser Hospital from the year 1990 until 2003 when he started defaulting on his treatment, a period almost 15 years prior to the commission of the alleged offences.

After the accused obtained his nursing tertiary qualification, he relocated to the North West Province where he secured himself a nursing employment at Mahikeng Provincial Hospital from the year 2007 to the year 2021.

While so gainfully employed, at times his colleagues are reported to have noticed his strange behaviour as he would become isolated, sleep on the floor in a storeroom, eat baby food allegedly to treat dizziness and loss of appetite. He would become talkative and laugh alone, pace up and down the whole night. He would allege that sleeping on the storeroom floor was meant to avoid snakes which were hidden in his mattress and he would sometimes present with depressed mood and feeling of worthlessness.

Accused further reported to the experts that some time ago he developed extreme anger towards his deceased nephew who constantly insulted him with derogatory words and breaking into his house in his absence to steal his belongings.

In contrast, the expert informed the court that the accused could not give an account of what transpired at the time of the alleged

offence, however, the accused according to the expert, still maintained that he did not kill anyone because on the day in question

he had left his firearm behind when he went to visit a friend at a nearby village.

The significant and the crucial part of the expert's report is the statement recording that:

"There was a history of a psychotic episode at the time the alleged offence took place."

The expert clinical diagnosis found that the accused/patient suffered from a Schizoaffective disorder bipolar subtype. After admission, treatment was initiated and resulted into significant improvement of the accused condition whilst still at their facility.

Both experts concluded that accused s fit to stand trial, in that he could follow court proceedings and would also be in a position to instruct his legal counsel.

This court pauses to confirm and agree with the above conclusion for it has always during the proceedings observed the accused seek

permission from the court by raising his hand to be granted an opportunity to consult with his counsel and also to give counsel

further instructions, indicative of an accused who was aware, listening and following what was taking place in his matter before

court. That on its own in my view demonstrated an accused of significant and remarkable level of mental intelligence.

Experts concluded that on the day in question the accused did have the capacity to appreciate the wrongfulness of the alleged offence, however, his ability to act in accordance with that knowledge was impaired by his mental illness.

However the expert agreed in court, when it was put to her by the state counsel, that her report, or their report lacked the source and the details on the statement that she recorded therein .

According to her nobody reported to her that the accused had a history of psychotic episode on the day and in what form, albeit, she conceded that she consulted no-one, neither did any of her consulted sources report to her of such an episode.

Therefore the statement in her report regarding the psychotic episode suffered by the accused on that particular day was nothing but a mere unreported and unverified assumption which clearly does not assist the court, nor the parties in establishing the accused's actual state of mind, or mental status on that day.

As a result, the experts could not even tell exactly when such an assumed episode could have started and/or ended in relation to the time the offences were committed. There was literally no information or any shred of evidence at the expert's disposal to opine that the accused suffered a psychotic episode at any given time that day.

Therefore, her opinion in my view is unreliable, not credible and unfounded for her to draw a conclusion and make recommendations from.

In essence, their finding that the accused was not criminally responsible for the offences committed on that particular day due to his mental illness emanating from a presumed psychotic episode that impaired his ability to act in accordance with the appreciation of the wrongfulness of his conduct was meritless. The report lacked factual support, lacked expert reasoning to link it to the conclusion reached because it was baseless and improbable. There was also no nexus or connection established between the accused's usual symptoms on his mental problems and the offences committed on that day.

The expert agreed with the state counsel that the accused's mental problems did not occur in his everyday life, but were residual in nature, hence he was able to work in a very sensitive hospital unit to the extent that he was able to retain his job, let alone to lead a normal ordinary life for such a long period of his life.

The expert confirmed that the National Director of Public Prosecutions also furnished her with a docket that contained the statement of potential witnesses who, some of them, interacted, conversed and/or were in the company of the accused on the day in question. Ostensibly some of those witnesses, in my view, would have provided first-hand information on the accused's mental state of mind on that particular day. Strangely, the expert shamedly confirmed that she did not consult or interview any of those witnesses but merely perused their statements and took the matter no further. She was at pains to admit that she did not investigate the matter properly, and also failed to interview possible witnesses leaving her to omit possible crucial information for the purposes of her report on the accused. She literally knew nothing about the occurrences of that day involving the accused. Simply put, she did not have any information regarding the accused's mental state of mind on that particular day.

Confronted with her omission of failing to obtain relevant information from the witnesses whose statements were contained within the docket which she was provided with by the state, she attempted to redeem herself by stating that it was not within her scope of work to interview state witnesses. That assertion left much to desire, and wonder how so and why not if, in the first place, the state had availed those witnesses to assist her in her investigations. She could not explain the criteria used to identify the sources to be consulted in her investigations, simply because it was clear from her evidence that she was selective on which sources to be consulted, and which information she needed in her report. That on its own, to this court, was a clear unacceptable irregularity she committed on her duties, omitting to procure information relevant for her investigations.

This court has further taken a judicial notice that no attempts were made by the expert to interview the police whom it is alleged the accused handed himself over to after the commission of the alleged offences. That would have enabled the expert to establish the police's knowledge of the accused's mental state at the time he handed himself to them.

The experts who evaluated the accused's psychological condition clearly failed to make use of the sources and information at their disposal, or to decide if the information at hand was insufficient. It is apparent that their source of information and evidence was selectively assessed, as such, failing to meet the required standards of an expert's opinion to be admissible before court.

At the end of the inquiry neither of the parties led evidence in support of their contentions. The accused also elected not to avail himself an opportunity to adduce or present evidence to the court. The evidence that would have amplified accused's allegations that, as at the time he allegedly committed the offences in this matter, he was mentally ill and unable to act in accordance and in appreciation of the wrongfulness of his conduct in order for him to be exonerated from criminal responsibility.

At this stage, the determination to be made by this court is not whether the accused is guilty or innocent of the charges preferred against him, but of whether he had successfully discharged the onus resting upon him to establish that at the time of the commission of the offences he lacked criminal capacity by virtue of his mental illness.

As the adage and principle goes, "actori incumbit probatio" which in simple terms means that, he who alleges, must prove, and in this instance on a balance of probabilities as envisaged in section 78(1)B of the Criminal Procedure Act. >

Before this court the only available evidence upon which to decide whether the accused has discharged the onus regarding his mental capacity on the day, is that of the psychiatrist expert.

The conduct of the accused before and after the commission of the offence paints an unreconcilable and inconsistent picture of the accused's mental state on the day. A picture completely different to the conclusion reached by the expert.

It is undisputed that the accused was able to travel a considerable distance unhindered from Mafikeng in the North West Province, back to his home town in Jimmy Jones Village, Giyani, Limpopo. He thereafter managed to attend a family meeting, and later on in the afternoon recalled that he had a firearm which he decided to go retrieve and later used when committing the offences under consideration.

Moments after the shooting he was still able to acknowledge and appreciate the wrongfulness of his conduct and decided to hand himself over to the law enforcement authority (The South African Police Services).

The sequence of events clearly demonstrates a conduct of a person who was conscious and in his full mental senses with full knowledge and appreciation of what he was doing. Therefore, the only inference to be drawn by this court closer to the proven facts, concludes that the accused was mentally sane when the offences were committed. Absent the accused's version, there was no evidence on record regarding his state of mind at the time of the commission of the offences, neither is there anything on record to support his alleged memory or mental capacity loss, save to conclude that it was contrived or deliberately created rather than arising naturally.

The approach taken by the accused which led to this inquiry, in my view, it is nothing other than an afterthought. Even his hospital admissions psychological reports which objectively reflected that he previously suffered from residual mental illness, were of little if no assistance to this court to establishing whether the accused could have lacked criminal capacity at the time of committing the offences in this matter. In any event, the fact that the accused sometimes suffers

from mental illness was never at issue. The only issue related to the onus the accused had to discharge to prove to the court that he was mentally ill on the day and time under consideration.

Therefore, there are no facts or expert evidence that supports the accused's contention that his actions on the day were influenced or diminished by a mental illness he suffered at that moment.

This court is not satisfied that the accused successfully discharged the onus that rested with him as envisaged in section 78(1)B. Such failure calls for his version to be dismissed for that it is found improbable.

The state strongly argued that even the experts' opinion and conclusions could not come to the accused's rescue on the basis that it lacked the necessary information and details regarding the investigations that were to be conducted and reported on the accused's state of mind on that day. The experts' statement on accused's psychotic episode on that day, which formed the basis of their conclusion, was without a source of origin but a mere presumption by the experts themselves. An expert report which does not serve the purpose it is intended must be ruled inadmissible by the court. I therefore find that the expert report is not credible, objective, and reliable but biased and falls to be rejected.

In view of the totality of the evidence before me, there is no basis in fact or in law on which I can conclude that the accused lacked criminal capacity, or acted with diminished responsibility as envisaged in section 78(7) of the Criminal Procedure Act. >

It is therefore my considered finding that the accused could fully appreciate what he did on the day and acted in accordance with an uncompromised knowledge and appreciation. Absent any evidence to the contrary, I find the accused to have been mentally sane and able to appreciate and act in accordance with the wrongfulness of his conduct when the alleged offences were committed. I am thus constrained to order that the trial should proceed in the ordinary course.

In the result, I find the accused fit to stand trial, capable of understanding the proceedings so as to make a proper defence, and also in a position to instruct his defence counsel, or legal representative meaningfully.

In the circumstances I order that the accused's criminal trial continues in the ordinary course of criminal trials before court.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALMPTHC/2024/20.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-ndou-unknown-topic-almpthc-2024>

Prepared on 9 October 2026 · Esheria