

SOUTH AFRICA / JUDGMENT

## **S v Pedro (B247/11) [2014] ZAWCHC 106; 2015 (1) SACR 41 (WCC); [2014] 4 All SA 114 (WCC) (9 July 2014)**

**[2014] ZAWCHC 106**

**COURT**

Western Cape High Court, Cape Town

**BEFORE**

Binns-Ward, Rogers

**CASE / FILE NUMBER**

B247/11

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### **Source record**

**THE HIGH COURT OF  
SOUTH AFRICA  
(WESTERN CAPE  
DIVISION, CAPE TOWN)  
High  
Court Ref No: 14228  
Oudtshoorn  
Case No: B247/11**

**DATE:** 09 JULY 2014  
In the matter

**between:** STATE  
And  
BOOI PEDRO  
ACCUSED  
Coram: BINNS-WARD  
& ROGERS JJ  
Heard: 23 JUNE  
2014  
Delivered: 9 JULY  
2014

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**JUDGMENT**

ROGERS J:

**Introduction**

- [1] This matter was referred to this court by senior magistrate of Oudtshoorn, Mr JS Lambrechts, because he doubted the correctness of the procedure followed by the trial magistrate, Mr JA Steynberg, in relation to the accused in terms of Chapter 13 of the Criminal Procedure Act 51 of 1977.
- [2] The accused was charged with one count of culpable homicide. The State's case was that the accused's negligent driving of a vehicle caused the death of a young child. The incident occurred on 28 September
2009. On 5 August 2011 the accused, who was represented by a legal aid attorney, was referred to Valkenberg Hospital ('VBH') for assessment and report in terms of s 79(1)(b) of the Act. There was a delay of many months before space at VBH became available for the accused.
- [3] The report, of two State psychiatrists at VBH, was issued during June 2012. The report recorded that the accused was one of 13 children who had grown up in impoverished circumstances. His highest level of education was standard 5. He had worked for most of his life as a car mechanic. He was married with four children. He suffered a head injury in 2008 following an assault by his son. He had developed epilepsy and during December 2009 had been admitted to George Hospital in a coma caused by extensive intra-cerebral bleeding. At that time he had lost the ability to speak or walk, though these faculties he regained over time.
- [4] On assessment by the psychiatrists he was found unable to give a coherent account and was unable to name common objects. He was disorientated. In the ward he had to be supervised in his self-care and needed assistance to dress. The clinical diagnosis was that he suffered from dementia and was certifiable in terms of the Mental Health Care Act 17 of 2002. The psychiatrists concluded that the accused did not have the capacity to understand the proceedings as contemplated in s 77 of the Criminal Procedure Act and that at the time of committing the alleged offence he was incapable of appreciating the wrongfulness of the alleged offence and of acting accordingly. The recommendation was that the accused be detained at VBH as a State patient.
- [5] On 12 June 2012, on which occasion the accused was again represented by a legal aid attorney, the presiding magistrate found the accused not guilty in terms of s 78(6)(a) and ordered, in terms of s 77(6)(a)(ii), that the accused be admitted to and detained in VBH as if he were an involuntary mental health care user contemplated in s 37 of the Mental Health Care Act. In so doing, the magistrate departed from the recommendation in the psychiatric report that the accused be detained as a State patient (ie in terms of s 77(6)(a)(i)).

- [6] On 21 January 2014 the office of the Western Cape Director of Public Prosecutions ('the DPP') wrote to the Oudtshoorn Magistrate's Court, indicating, with reference to authority, that the trial magistrate had erred in entering a finding of not guilty in terms of s 78(6)(a). The senior magistrate referred the matter to this court on 28 January 2014. He said that the accused had never pleaded to the charge of culpable homicide and that a finding of not guilty should not have been made in terms of s 78(6)(a). The review judge was requested to set aside the acquittal but to confirm the order made in terms of s 77(6)(a)(ii).
- [7] On 19 March 2014 the trial magistrate replied to a query I had sent on for March 2014:
- [a] In regard to the acquittal, he expressed the opinion that s 78(6) could find application prior to plea. He referred in that regard to the opening words of s 78(1), quoting them with emphasis: '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...'.
- [b] In regard to the making of an order in terms of sub-para (ii) rather than (i) of s 77(6)(a), he acknowledged that culpable homicide was one of the crimes specified in sub-para (i). He observed, however, that one could distinguish between culpable homicide where dolus was present (ie an intention to assault, even if there was no intention to kill) and culpable homicide where only culpa was present. Having regard to the other crimes specified in sub-para (i) and the *eiusdem generis* principle of construction, his view was that sub-para (i) applied only when there was violence inflicted with dolus.
- [8] I also sought the view of the DPP. In the memorandum submitted on behalf of the DPP, Mr Stephen SC expressed the view that an acquittal should not have been entered and submitted, further, that the detention order should have been in terms of sub-para (i) of s 77(6)(a), not sub-para (ii). He disputed the distinction drawn by the magistrate between different forms of culpable homicide.
- [9] On further consideration of the matter, I invited the DPP's view on another question, namely the composition of the psychiatric panel. During the hearing on 5 August 2011, pursuant to which the accused had been referred for observation, there was no discussion concerning the composition of the panel. The court did not (at least expressly) appoint a psychiatrist specifically for the accused (see sub-para (iii) of s 79(1)(b)); nor was a third (private) psychiatrist appointed (see sub-para (ii) of s 79(1)(b)). The two psychiatrists who provided the assessment were both State-employed doctors at VBH. The response from the DPP was that there was an irreconcilable difference of opinion within the Western Cape office regarding the composition of psychiatric panels and that guidance was being sought from the National Director of Public Prosecutions.
- [10] Following this development, my colleague Binns-Ward J and I decided that oral argument should be addressed to us on the various issues. We gave directions for the preparation of the record and the filing of submissions. Notice of the hearing was given to the DPP and to the Legal Aid Board, with a request that the latter notify the accused of the hearing and of

his right to be present in person. At the hearing the DPP was represented by Ms Teunissen and the accused by Mr Klopper of the Legal Aid Board. The Legal Aid Board took steps, in accordance with our directions, to notify the accused of the hearing and to advise him of his right to be present. The Minister of Justice and Constitutional Development was permitted to intervene to make submissions in view of the cost implications relating to the composition of psychiatric panels in terms of s 79 of the Criminal Procedure Act. The Minister was represented by Mr la Grange SC leading Mr O'Brien. We thank all the representatives for their able assistance.

[11] The questions on which we directed oral argument to be addressed were the following:

[a] whether the second psychiatrist on the panel should have been a psychiatrist expressly appointed by the court for the accused;

[b] whether, in the absence of any request and direction to the contrary, the magistrate was required to appoint a private psychiatrist as a third psychiatrist on the panel;

[c] whether, in view of the finding of the psychiatrists that the accused was not fit to stand trial, the entering of a not guilty verdict was correct;

[d] whether, given that the accused was charged with culpable homicide, the detention order should have been in terms of sub-para

(i) rather than sub-para (ii) of s 77(6)(a);

[e] if the answer to one or more of the above questions were to indicate that the proceedings in the lower court were irregular, what course we should follow; and in particular, whether we should exercise our review jurisdiction to set aside and correct or remit the matter or whether we should decline to intervene, leaving it to the State or the accused to launch such review or appeal proceedings as they consider appropriate.

Composition of assessment panel – the statutory provisions

[12] Before considering the first two questions, it is necessary to set out the relevant statutory provisions. Because their interpretation is not free from difficulty, it is desirable also to refer to earlier forms of the provisions in question.

[13] In terms of ss 164 and 182 of the Criminal Procedure Act 56 of 1955, lack of fitness to stand trial and lack of criminal responsibility were to be determined in accordance with ss 28 and 29 respectively of the Mental Disorders Act 38 of 1916. In essence, the latter Act required these matters to be determined by the judicial officer (together with the jury, if he was sitting with one) after hearing evidence. There was no procedure for a pre-trial psychiatric assessment. (For a convenient summary of the provisions, see *S v Ebrahim* 1973 (1) SA 868 (A).)

[14] The aforesaid provisions were repealed with effect from 22 July 1977, when the Criminal Procedure Act 51 of 1977 came into force. Sections 77 and 78 deal, respectively, with fitness to stand trial and criminal responsibility where one or other of these capacities is said to be

lacking on account of mental illness or mental defect. In either instance, the accused person must be referred for psychiatric

assessment, which is governed by s 79. From the outset a distinction has been drawn between more and less serious offences. It has always been the case, in respect of less serious offences, that the assessment is undertaken by the medical superintendent of a mental/psychiatric hospital designated by the court or by a psychiatrist appointed by the medical superintendent at the court's request. In regard to more serious cases, s 79(1)(b) in its original form applied where the accused was charged with an offence for which the death sentence might be imposed or where the court in any particular case so directed. In the latter instance, the enquiry was to be conducted and reported on:

‘(i) by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State; and

(iii) by a psychiatrist appointed by the accused if he so wishes.’

[15] In the questions framed by the court and in the submissions of counsel, the psychiatrist contemplated in sub-para (ii) above was referred to as the ‘third psychiatrist’. On reflection this might be confusing and misleading, because in the evolution of s 79(1)(b) the expression ‘third psychiatrist’ has variously been used with reference to the psychiatrist contemplated in sub-para (iii) or the psychiatrist contemplated in sub-para (ii). I shall thus refer to the psychiatrists contemplated in sub-paras (i), (ii) and (iii) as psychiatrists A, B and C.

[16] It will be seen that, in its original form, s 79(1)(b) made the appointment of psychiatrists A and B mandatory, with psychiatrist B being, as is commonly said, a ‘private’ psychiatrist. (In this judgment, I use the expression ‘private psychiatrist’ as referring to a psychiatrist who is not in the full-time service of the State and the expression ‘State psychiatrist’ as a psychiatrist in the full-time service of the State.) The appointment of psychiatrist A came about through the court's designation of a particular mental hospital; upon such designation, that hospital's medical superintendent would be psychiatrist A, unless the court requested the medical superintendent to appoint the psychiatrist, in which case the appointment would be made by the medical superintendent of the designated hospital. The medical superintendent would invariably be a State employee. Notionally a psychiatrist appointed by the medical superintendent (if so requested by the court) could be a private psychiatrist. In practice, we understand, psychiatrist A is always a State psychiatrist

- [17] In its original form, the appointment of psychiatrist C (a psychiatrist for the accused) was optional, the matter being in the hands of the accused. If he wanted a psychiatrist appointed, he himself appointed the psychiatrist.
- [18] Section 79(8) provided that a psychiatrist appointed in terms of s 79(1), 'other than a psychiatrist appointed for the accused', was to be appointed from a list of psychiatrists ('a listed psychiatrist') compiled and maintained by a specified public official in terms of s 79(9). In terms of s 79(10), the requirement that the psychiatrist be a listed psychiatrist could be relaxed where the list did not include a sufficient number of psychiatrists who could conveniently be appointed. Section 79(11) provided that any appointed or designated psychiatrist who was not a State psychiatrist would be compensated from public funds in accordance with a tariff determined by the Minister. Although not expressly so stated, it is clear that all these provisions related to private psychiatrists only. Notionally, psychiatrist A could be a private psychiatrist if the medical superintendent was requested by the court to appoint a psychiatrist and chose to appoint a private psychiatrist, though in practice this does not occur. Psychiatrist B had to be a private psychiatrist and thus had to be listed unless s 79(10) applied. Psychiatrist C, being an optional appointment made by the accused himself, could be a State or private psychiatrist. If the accused chose to appoint a private psychiatrist, the private psychiatrist would not need to be listed but his or her publicly-funded

remuneration would still be restricted in accordance with s 79(11).

- [19] This was the regime which applied in all material respects until the Criminal Matters Amendment Act 68 of 1998 was brought into force on 28 February 2002. Prior to the commencement of the latter amendments, there were alterations to s 79 by way of Act 129 of 1993 and Act 105 of 1997. The 1993 Act substituted 'psychiatric hospital' for 'mental hospital'. The 1997 amendment was in response to the finding by the Constitutional Court that the death sentence was unconstitutional. In terms of the 1997 amendment the trial court was given a broad discretion to determine whether in any particular case the panel should be constituted in accordance with s 79(1)(b) rather than s 79(1)(a).
- [20] The amendments introduced by Act 68 of 1998 followed the report and recommendations of the South African Law Commission ('SALC') dated August 1995 and submitted to the Minister of Justice on 15 April 1996 in relation to Project 89.1 Insofar as s 79 is concerned, the SALC received submissions inter alia as to (i) the desirability of making the appointment of a psychiatrist for the accused (psychiatrist C) mandatory and entrusting the appointment to the court rather than the accused; 2 (ii) the desirability or otherwise of involving psychologists in the assessment process. 3 The SALC also made recommendations regarding the types of offences in regard to which the psychiatric assessment should be undertaken by a panel rather than a single State psychiatrist.

[21] Act 68 of 1998 followed the wording of the amendment bill proposed by the SALC 4. The amended s 79(1)(b) – a full panel enquiry – was to apply where the accused was charged ‘with murder or culpable

homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or whether court in any particular case so directs’. In these cases the enquiry and report were to be conducted and made by the following persons (my underlining indicates the changes):

‘(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State;

(iii) by a psychiatrist appointed for the accused by the court;

(iv) by a clinical psychologist where the court so directs.’

[22] It will be seen that the appointment of psychiatrists A and B remained mandatory, and the appointment of psychiatrist C also became mandatory. The appointment of a fourth panellist, a clinical psychologist, was left in the hands of the court. The ‘default’ position, if one can put it that way, was thus that the panel would comprise three psychiatrists and no departure from that requirement was permissible.

[23] With effect from 16 December 2007, s 79(1)(b) was amended to include, within the more serious crimes, rape and compelled rape as contemplated in ss 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The composition of the panel for the more serious cases was not altered.

[24] The further amendments, which have given rise to controversy in the present case, were those introduced with effect from 10 September 2010 by s 10 of the Judicial Matters Amendment Act 66 of 2008. The range of serious offences covered by s 79(1)(b) remained unchanged. In regard to the composition of the panel, the only alteration was in respect of psychiatrist B (the private psychiatrist). Sub-para (ii) was amended to read as follows (my underlining indicates the words inserted):

‘(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives is issued under subsection (13) by the National Director of Public Prosecutions;’

[25] Sub-section 79(13) was introduced at the same time, and reads:

‘(13)(a) The National Director of Public Prosecutions must, in consultation with the Minister, issue directives regarding the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as provided for in subsection (1)(b)(ii) and any directive so issued must be observed in the application of this section.

- (b) The directives referred to in paragraph (a) must ensure that adequate disciplinary steps will be taken against a prosecutor who fails to comply with any directive.
- (c) The Minister must submit any directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this subsection.
- (d) Any directive issued under this subsection may be amended or withdrawn in like manner.'

[26] The provisions of s 79(8), (9), (10) and (11) regarding the list of panellists and their remuneration have remained largely unchanged since 1977 save that

- (i) with, effect from 28 February 2002, references were added to psychologists (consistently with the coming into force of Act 68 of 1998); (ii) the identity of the official who was to compile and maintain the list was altered. Harking back to the original

formulation in 1977, s 79(8) states that the requirement that the psychiatrist or psychologist be listed does not apply to 'a

psychiatrist and a clinical psychologist appointed for the accused'. The reference to a clinical psychologist in this exclusion does not make sense, because s 79(1)(b)(iv) does not state that a psychologist, where appointed, is appointed 'for the accused'.

I suspect that the lawmaker simply added references to a psychologist wherever there were existing references to a psychiatrist, even though that was not appropriate in this particular instance. Although psychiatrist C is now a mandatory appointment made by the court, it is perhaps understandable that the psychiatrist need not be a listed psychiatrist. Of course, psychiatrist C is often a State psychiatrist but the court could, in the light of a request made by the accused, appoint a specified private psychiatrist whose name is not on the list.

[27] There have been no further amendments to the relevant provisions of the Criminal Procedure Act. The form of the legislation relevant to the adjudication of this special review is the form it took after the amendments introduced by Act 66 of 2008.

The problem

[28] Clearly the amendment of s 79(1)(b)(ii) and the introduction of s 79(13) were intended to provide some scope for a departure from the hitherto mandatory appointment of psychiatrist B (the private psychiatrist), a state of affairs which had prevailed for about 33 years since the enactment of the Criminal Procedure Act. The scope of the intended departure is the problematic issue. The long title of the Act 66 of 2008 indicated, accurately but not very helpfully, that one of the purposes of the Act was 'to further regulate the appointment of psychiatrists in cases involving the mental capacity of an accused person'. This sheds no light on the problem.

[29] It is convenient here to summarise three interpretations mooted in argument:

- (a) Unless the court, on application by the prosecutor, directs otherwise, the panel must include psychiatrist B. In deciding whether or not to make an application to dispense with the appointment of psychiatrist B, the prosecutor must be guided by directives issued in accordance with s 79(13). (This was the interpretation espoused by Mr Klopper on behalf of the accused.)
- (b) The court may, if the prosecutor applies to the court for the appointment of psychiatrist B, appoint the said psychiatrist and he or she must be a private psychiatrist unless the court directs that he or she may be a State psychiatrist. In deciding whether to apply for the appointment of psychiatrist B (regardless of whether the proposed psychiatrist is a private or State psychiatrist), the prosecutor must be guided by directives issued in accordance with s 79(13). (This was the interpretation espoused by Mr la Grange for the Minister, supported by Ms Teunissen for the DPP.)
- (c) The court must always appoint a psychiatrist as psychiatrist B but, if the prosecutor applies for a direction that psychiatrist B need not be a private psychiatrist, the court may appoint a State psychiatrist as psychiatrist B.

[30] I shall refer to these as the first, second and third interpretations.

#### Material in aid of interpretation

[31] Apart from such guidance as is to be found in the wording of the relevant legislative provisions, viewed in the broader statutory context and history of the legislation, we were referred, as possibly relevant background material, to the judgment of Bertelsmann J in *S v Lubisi* [2003] 3 All SA 586 (T). We also referred to the explanatory memorandum which accompanied the Judicial Matters Amendment Bill of 2008 and to the directives issued by the National Director of Public Prosecutions ('NDPP') pursuant to s 79(13).

#### The Lubisi case

[32] In the Lubisi case the accused was facing a charge of murder. On 22 August 2002 the court ordered that he be psychiatrically assessed at Weskoppies Hospital to determine whether he was fit to stand trial. The judge appointed a named psychologist as a member of the panel (ie presumably as a fourth member). About six months later, on 21 February 2003, the prosecutor brought a substantive application for an order that, despite the provisions of s 79(1)(b) (as they then read), the court direct the accused to be examined by a single State psychiatrist. In support of this application, the State furnished evidence of the practical difficulties in arranging for the psychiatric assessment of accused persons. In the court's area of jurisdiction, the list of psychiatrists contemplated in s 79(9) had last been updated during April 1997 and there was not a single psychiatrist on that list, still in private practice, who was prepared to assist. The reason for this unwillingness was allegedly the low tariff set by the Minister for private psychiatrists in terms of s 79(11)(a). The court was informed that in several instances criminal cases had been struck from the roll because of the inability to constitute a panel and the resultant delay. The State alleged that this 'highly unsatisfactory

state of affairs' pertained throughout the country with the exception of the Western Cape.

- [33] Bertelsmann J had grave doubt as to whether a court could deviate from the apparently peremptory requirements of s 79(1)(b), particularly since the case did not appear to be one of objective impossibility (592e-f). However, and in an attempt to resolve matters, he issued an order calling upon the Ministers of Justice and Health, the Directors-General of those departments and on three professional bodies to provide information and argument on certain questions (592f-h). These questions included whether the court was empowered to order a psychiatrist to become a member of the panel at the prescribed remuneration and, alternatively, whether the court could order the State to pay remuneration to a private psychiatrist in line with the standards of the relevant professional body (ie higher than the remuneration prescribed by the Minister of Justice).
- [34] On the extended return day (29 April 2003) it was recorded that the Ministers had reached agreement with the professional bodies in terms whereof 'realistic professional fees' would now be paid to psychiatrists in private practice assisting in observations in terms of s 79(1)(b). A new list of private psychiatrists was to be compiled. Bertelsmann J observed that this was a satisfactory outcome (592i-j). He thus did not decide whether he could have made the contemplated orders regarding the payment of remuneration or finally determine the question whether the provisions of s 79(1)(b) 'could ever be disregarded if no psychiatrist could be found to be appointed on behalf of the accused' (598f).
- [35] Although Lubisi reflects that as at 2002-2003 the implementation of s 79(1)(b) was giving rise to grave practical difficulties in most of the country in view of the low remuneration offered to private psychiatrists, the eventual outcome was an agreement, to which both the Ministers of Justice and Health were parties, which, so it was envisaged, would resolve the problem by offering more realistic remuneration. We were not referred to any subsequent decisions of the courts indicating that the agreement did not have the desired effect, though the explanatory memorandum mentioned below tends to show that problems persisted. There is nothing to indicate that the solution at which officialdom and the professional bodies arrived in Lubisi was aimed at dispensing with the appointment of a private psychiatrist.
- [36] I would add the following with reference to Lubisi. It appears that the trial judge designated Weskoppies Hospital as the psychiatric hospital for purposes of s 79(1)(b)(i). While that may have sufficed for purposes of determining psychiatrist A, it was for the court to appoint psychiatrists B and C. It is unclear whether this happened. Reference is made at 591b-c to a named psychologist (who would have been a fourth panellist) but not to any named psychiatrists. The prosecutor reported to the judge on 21 January 2003 that 'it had been impossible to find a psychiatrist to assist the accused in the enquiry into his mental condition'. With respect, it was not for the prosecutor or the defence to appoint a psychiatrist for the accused; that was the court's function, even though in practice this might be by way of endorsing a selection made by the prosecution or the defence. Furthermore, if the difficulty in the case was to find a private psychiatrist, that would have been a difficulty

relating to the appointment of psychiatrist B, not the psychiatrist for the accused (psychiatrist C), who could permissibly have been a State psychiatrist (even though it was for the court to appoint him or her).

- [37] It is necessary to comment on another aspect of Lubisi. In the substantive application brought by the State, it was said that the amended sections 77, 78 and 79 had come into operation on 28 February 2002 and that ‘endless problems’ had been experienced since then in constituting panels (at 591g). As will be apparent from the legislative history I have summarised, there has since 1977 been a mandatory requirement that a private psychiatrist (psychiatrist B) be part of the panel. The ‘endless problems’, insofar as they were concerned with finding private psychiatrists, could not have been caused by the amendments which came into operation on 28 February 2002. What changed with effect from 28 February 2002 was that the appointment of a psychiatrist for the accused (psychiatrist C) became mandatory and the responsibility for appointment passed from the accused to the court. However, there has never been a requirement that the psychiatrist for the accused be a private psychiatrist.

#### The explanatory memorandum

- [38] The Judicial Matters Amendment Bill of 2008, which was accompanied by the explanatory memorandum previously mentioned, was adopted in relevant respects without alteration as Act 66 of 2008. In regard to the proposed amendments to s 79, the explanatory memorandum said the following (my emphasis):

‘(i) Section 79 of the Criminal Procedure Act, 1977, in the case of serious offences (murder, culpable homicide, rape or another charge involving serious violence), or where the court considers it to be necessary in the public interest, or where the court, in any particular case so directs, requires a panel of three psychiatrists to be appointed for purposes of inquiring into the capacity of an accused person to understand criminal proceedings pending against him or her or into the criminal capacity of an accused person, where mental capacity is an issue. In the case of lesser offences, only one person is required to undertake the investigation.

(ii) The section is almost impossible to apply in some parts of the country (mainly Gauteng) due to the non-availability of private psychiatrists willing to do observations. As a result of the problems experienced serious cases have been struck off the roll because proper observations could not be done. The amendments allow the courts to do away with the third psychiatrist, at the request of the prosecutor, who may only so request in accordance with directives issued by the National Director of Public Prosecutions. The NDPP must, in terms of the proposed amendments, issue such directives, setting out the cases and circumstances in which a prosecutor may make such a request.’

- [39] The words I have underlined, if they are admissible material in construing s 79(10)(b), provide strong support for what I have styled the first interpretation.

#### The directives

- [40] We were furnished with the directives issued by the NDPP in terms of s 79(13). We were told that these were duly made in consultation with the Minister and were duly submitted to Parliament.
- [41] Paragraph 1 of the directives records that the amended s 79 'provides for the appointment of a panel of only two psychiatrists, unless the prosecutor applies for the appointment of a third psychiatrist'. Paragraph 2 states that prosecutors may only apply for the appointment of a 'third psychiatrist', in accordance with s 79(1)(b)(ii), in terms of the written authority or directive from the relevant DPP. Paragraph 3 states that where prosecutors identify matters that may require the appointment of a third psychiatrist, this should be brought to the attention of the relevant DPP for consideration. Paragraphs 4 and 5 read thus:
- '4. Factors that may be considered by a DPP in using his/her discretion to authorise or direct a prosecutor to apply for the appointment of a third psychiatrist for observation purposes include –
- (a) the seriousness of the offence;
  - (b) the complexity of the evidence;
  - (c) whether the accused person wishes the court to appoint a psychiatrist of his or her choice; and
  - (d) the history of the particular accused person (e.g. previous observations of the accused person).
5. Where an application is brought for the appointment of a third psychiatrist and the accused person is not legally represented, the prosecutor must request the court to consider the appointment of a legal representative for the accused person in terms of section 77(1A) of the Criminal Procedure Act, 1977.'
- [42] Paragraph 6 states that the directives only take effect after submission to Parliament.
- [43] Paragraph 7 warns that prosecutors who fail to comply with the directives 'will be dealt with according to the disciplinary codes of the National Prosecuting Authority'.
- [44] The 'third psychiatrist' contemplated in these directives is the private psychiatrist, ie psychiatrist B.
- [45] If the directives are admissible as an aid to construing s 79(1)(b), they clearly support what I have styled the second interpretation. The NDPP quite obviously framed the directions in the belief that the amended s 79 had the effect that there would only be two psychiatrists unless the prosecutor applied for a third.
- [46] The first two factors mentioned in para 4 of the directives do not require explanation though they are very general in nature. The third factor (whether the accused wishes the court to appoint a psychiatrist 'of his or her choice') is somewhat puzzling though the NDPP may have had in mind that, if psychiatrist C (the psychiatrist appointed for the accused) was a person appointed by the court with the specific approval of the accused, it might then be

less critical to have (in addition to psychiatrist A) a further private psychiatrist (psychiatrist B).

- [47] The fourth factor (the accused's history, in particular his or her history of mental observation) presumably implies that, if the accused has already been examined and been found in the past to be suffering from a mental illness, it might be less critical to have three as opposed to two psychiatrists on the panel.

The interpretation of ss 79(1)(b)(ii) and 79(13)

- [48] I must say that, when I first read s 79 in the context of its legislative history, my view was that the correct interpretation was the one I have styled as the first interpretation. Nothing I have heard in argument has led me to a different conclusion. I appreciate that this conclusion requires one to find that something went wrong in the formulation of s 79(13) but this is not sufficient, in my view, to compel one to adopt either of the other two interpretations, since neither of the other interpretations could in my opinion plausibly represent the intention of the lawmaker.
- [49] As I shall explain presently, I consider that the explanatory memorandum may be consulted as an aid to interpretation. On the other hand, I do not think that Lubisi provides much assistance. It explains the general nature of the problem as at 2002/2003 (the shortage of private psychiatrists in most provinces willing to work at the prescribed tariff) but, on the plausible assumption that those problems continued, the evidence summarised in the case and the views of the learned judge do not shed much light on which of the potential solutions to the problem was the one the lawmaker intended to adopt. I do not consider that the NDPP's directives can be used in the interpretation of s 79.
- [50] However, and even without the support provided by the explanatory memorandum, the first interpretation is the one to be preferred. The most natural meaning of the words used in s 79(1)(b)(ii) is that the 'unless' phrase follows the whole of what precedes it. The preceding words had stood in the statute for about 33 years. If the lawmaker had intended to do anything other than insert a general qualification to the general requirement, a different formulation would have been used. If the second interpretation were correct, it would have been more natural to insert the 'unless' phrase after the words 'appointed by the court'. Mr la Grange submitted that the placement of the commas in sub-para (ii) favoured the second interpretation. I disagree. The matching commas were used to provide a natural and easy-reading parenthesis in respect of the person on whose application a contrary direction of the court might be made (the prosecutor).
- [51] Apart from the ordinary meaning of the words, there are weighty considerations militating against the second interpretation. For many years the lawmaker made the appointment of a private psychiatrist mandatory (psychiatrist B). There were no doubt good reasons of policy to do so. Initially the appointment of an additional psychiatrist for the accused (psychiatrist C) was not mandatory; and, even though the appointment of a psychiatrist for the accused later became an indispensable requirement, there has never been a requirement that the

psychiatrist for the accused be a private psychiatrist, and in most cases he or she is a State psychiatrist.

- [52] While State psychiatrists undoubtedly attempt to assist the court with what they regard as their independent expert views, the legislative requirement for a private psychiatrist must have been premised on the notion that the presence of such a psychiatrist on the panel would provide greater protection for the rights of the accused. In a broad sense, there is an institutional connection between the prosecution and the State psychiatrists, all being public servants. Where two State psychiatrists are on the panel, they will often be employed at the same psychiatric hospital. Considerations of collegiality might tend, subconsciously, towards consensus; or differences in seniority might result in one psychiatrist displaying some deference to the other. There is even danger that, due to the great pressure on State psychiatric resources, the primary assessment in respect of a particular accused will be left to one of the State psychiatrists, with the other providing more of a supporting role.
- [53] There is nothing to indicate that the policy considerations in favour of appointing a private psychiatrist have disappeared. What can be accepted, though, is that the appointment of a private psychiatrist will always entail expense for the State; and that it may not always be easy to find a private psychiatrist willing to accept appointment. I can well understand that, in the circumstances, the judicial officer should be vested with a discretion to dispense with the appointment of a private psychiatrist if such a request were properly motivated. However, the effect of the interpretation advanced on behalf of the Minister and DPP is that the court does not have the power to appoint a private psychiatrist unless the prosecutor makes application for such appointment. I cannot conceive that the lawmaker intended to place it in within the power of the prosecutor to determine, unilaterally, that there should be no private psychiatrist. Yet on the second interpretation that is precisely the position.
- [54] This objection to the second interpretation is not ameliorated by the consideration that prosecutors, in determining whether to apply for the appointment of a private psychiatrist, were intended to be bound by directives issued in terms of s 79(13). If anything, that consideration militates against the second interpretation. If the default position is that there are only two psychiatrists unless the prosecutor applies for a third (private) psychiatrist, and if (as would flow from this interpretation) prosecutors would in terms of s 79(13)(b) face internal disciplinary action if they unnecessarily applied for a third psychiatrist, there would be every incentive for prosecutors not to make application for the appointment of a private psychiatrist, out of fear of disciplinary action. That is, in the context of fair-trial rights, a perverse incentive.
- [55] It is far more consistent with the sound and fair administration of criminal justice that a prosecutors should be authorised to apply to the court to dispense with the appointment of a private psychiatrist. The decision as to whether a private psychiatrist should be appointed would ultimately be in the hands of the court. If a prosecutor brought an application to dispense with the appointment of a private psychiatrist because the circumstances of the

case did not, in the prosecutor's view, warrant the appointment of a private psychiatrist, the prosecutor could not be subjected to disciplinary action if, despite such application, the court decided that a private psychiatrist should be appointed. I can perfectly understand, though, that a prosecutor might be subjected to internal discipline if he or she failed to ask the court to dispense with the appointment of a private psychiatrist if, in accordance with directives issued in terms of s 79(13), the case were one in which dispensing with the private psychiatrist was appropriate.

[56] The Minister's counsel submitted, in a supplementary note filed after the hearing, that it was not truly objectionable to leave it to the prosecutor to determine whether to apply for the appointment of a private psychiatrist (psychiatrist B) because the court would in those circumstances have a discretion to appoint, as the psychiatrist for the accused (psychiatrist C), a private psychiatrist. I accept that the court may appoint a private psychiatrist as psychiatrist C. In practice, however, we understand this seldom happens. Furthermore, if the main reason for the amendment of sub-para (ii) was to dispense with the appointment of a private psychiatrist in appropriate cases because of considerations of cost and the difficulty in finding available private psychiatrists, it would be self-defeating if the court were routinely to appoint a private psychiatrist as psychiatrist C whenever the prosecutor failed to apply for the appointment of psychiatrist B.

[57] The third interpretation would require there always to be three psychiatrists but would permit psychiatrist B to be a State psychiatrist if the court so directed on the application of the prosecutor. While this might go even further than the first interpretation in safeguarding the rights of the accused, I think it is an unduly strained construction. If the lawmaker had intended the 'unless'

phrase to be anything other than a general qualification on the whole of what precedes it, different language would have been expected.

Furthermore, on this interpretation, the directives envisaged by sub-para (ii) would be limited to directives as to whether prosecutors should ask the court to appoint a State psychiatrist rather than a private psychiatrist as psychiatrist B. However, s 79(13)(a) refers to directives 'regarding the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as provided for in' s 79(1)(b)(ii). The psychiatrist provided for in sub-para (ii) is a private psychiatrist. Sub-para (ii) makes no reference to a psychiatrist in the full-time employ of the State.

[58] There is also nothing in the history of the legislation to suggest that the third interpretation is likely to have represented the lawmaker's intention. Prior to the coming into force of Act 66 of 2008, s 79(1)(b) made provision for the mandatory appointment of three psychiatrists, of whom two (psychiatrists A and C) would typically have been State psychiatrists. The appointment of a private psychiatrist is a counter-balance to the (usual) presence on the panel of State psychiatrists. I can see no reason why the lawmaker would have insisted on a third State psychiatrist in circumstances where, for any reason, it was appropriate to

dispense with the requirement of a private psychiatrist. I mean no disrespect to State psychiatrists when I say that the presence of three as opposed to two State psychiatrists on a panel is unlikely to provide any material additional safeguard to the accused.

[59] I accept that, on my preferred interpretation of s 79(1)(b)(ii), s 79(13)(a) reads uncomfortably. Consistently with my interpretation of s 79(1)(b)(ii), s 79(13)(a) should have empowered the NDPP to issued directives regarding the cases and circumstances in which a prosecutor must apply to court 'to dispense with', not 'for', the appointment of a psychiatrist as provided for in s 79(1)(b)(ii). It is a general principle in construing a statute that one prefers an interpretation by which its several provisions are reconciled. Underlying this principle, however, is the notion that the intention of the lawmaker is most likely to be found in an interpretation which reconciles the ordinary meaning of the words of different parts of the statute. I think one must allow, though, for the possibility that sometimes the wording of a statute 'goes wrong' and that, despite an apparent conflict, the true intention of the lawmaker is not reached by forcing the language of one provision to fit that of

another. This is such a case. Section 79(1)(b)(ii) is the dominant provision in so far as the appointment of psychiatrist B is

concerned. Section 79(13) is ancillary. Both the ordinary language and considerations of policy favour the first interpretation in so far as s 79(1)(b)(ii) is concerned. If one alters that meaning so that, semantically, s 79(13) still notionally makes sense by referring to an application to appoint rather than an application to dispense, one will, in my view, end up giving both provisions a meaning which was not intended.

[60] I thus consider that s 79(13)(a) must be construed as empowering the NDPP to issue directives regarding the circumstances in which prosecutors must apply to court to dispense with the appointment of a private psychiatrist. In a general sense, s 79(13)(a), and thus the directives issued thereunder, are concerned with the circumstances in which a private psychiatrist is and is not to be appointed. It is clear, on my preferred interpretation of s 79 as a whole, that the NDPP issued the directives under a misapprehension as to the default position. However, the difficulties created by the poor drafting of s 79(13), and the error to which it appears to have given rise in the mind of the NDPP, ought not to be exaggerated. In the nature of things, directives issued on the supposition that they set out the cases and circumstances in which a prosecutor should apply to the court for the appointment of a private psychiatrist would, *ex contrariis*, define the cases and circumstances in which, on a true construction of s 79(1)(b)(ii), a prosecutor should apply to court to dispense with the appointment of a private psychiatrist. The directives actually issued by the NDPP are perfectly capable of being applied in this way.

[61] I return now to the explanatory memorandum. The memorandum makes it perfectly clear that the promoters of the bill, which was adopted unchanged, intended the amendments to have the effect of empowering the prosecutor to request the court to do away with psychiatrist B and empowering the NDPP to issued directives setting out the circumstances

in which prosecutors should make such requests. The memorandum envisaged a default position of three psychiatrists not two; and it envisaged that, where the court acceded to a request by the prosecutor, there would only be two psychiatrists (namely psychiatrists A and C). There is no support in the memorandum for the view that the promoters of the bill had in mind that there would still need to be a third psychiatrist, but that such psychiatrist could, on application by the prosecutor, be a State rather than a private psychiatrist.

[62] If the explanatory memorandum is admissible as an aid in construing s 79, it might be regarded as dispositive in favour of the first interpretation. Even without the memorandum, I would adopt the first interpretation for reasons already given. But in my opinion, it is permissible to have regard to the explanatory memorandum. Of course, the primary material for construing a statute is the legislation itself. But this starting point, which can be regarded as a fundamental feature of the rule of law, does not mean that no regard may be had to other considerations, particularly where the interpretation of the legislation is a matter of difficulty. In such circumstances, the notional reader of the statute will, like the court, appreciate the difficulty of interpretation. If light can be cast on the true meaning by having regard to other material which is as accessible to the notional reader as to the court, there is no reason to exclude such material.

[63] It has long been accepted in our law that, where the words of the statute are not clear and unambiguous, the court may have regard to the report of any commission of enquiry which preceded the enactment of the legislation. It has been said that a report of this kind may be considered not to determine the meaning attached by the commission to any draft bill proposed but to ascertain the mischief aimed at and the state of the law as it was then understood to be (*Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986

(2) SA 555 (A) at 562E-563A). A similar view has more recently been adopted by the Constitutional Court in regard to explanatory memoranda (*S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391 (CC) paras 14-15 in respect of the interpretation of the interim Constitution; and *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 201 more generally). There are a number of cases where courts in this country have considered explanatory memoranda (see, for example, *Amgold/Harmony Freegold Joint Venture (Pty) Ltd v CSARS* 2013 (1) SA 353 (SCA) para 13; *Master Currency (Pty) Ltd v CSARS* [2013] 3 All SA 135 (SCA) para 18; *Metropolitan Life Ltd v CSARS* 2009 (3) SA 484 (C) para 30 (full bench)).

[64] The leading English case on the use of parliamentary materials in the interpretation of statutes is *Pepper (Inspector of Taxes) v Hart*

[1993] 1 All ER 42 (HL), to which reference was made in *Makwanyane* supra. Lord Browne-Wilkinson said the following in his speech (at 64d-e):

‘My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases reference in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot see that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.’

And later (at 67e-f):

‘In sum, I do not think that the practical difficulties arising from a limited relaxation of the rule are sufficient to outweigh the basic need for the courts to give effect to the words in enacted by Parliament in the sense that they were intended by Parliament to bear. Courts are frequently criticised for their failure to do that. This failure is not due to cussedness but to ignorance of what Parliament intended by the obscure words of the legislation. The court should not deny themselves the light which parliamentary materials may shed on the meaning of the words Parliament has used and thereby risk subjecting the individual to a law which Parliament never intended to enact.’<sup>5</sup>

[65] It may be said that, under our law at any rate, an explanatory memorandum can only be used to identify the ‘mischief’ aimed at by the legislation and that commentary on the meaning of the provisions of the bill cannot be allowed to influence the interpretation. It may be argued, further, that in the present case the ‘mischief’ was the expense and inconvenience of appointing private psychiatrists and that identifying this ‘mischief’ does not assist one in determining which of the three potential solutions (the first, second or third interpretation) was the one intended by the lawmaker. I doubt, however, that there is a ‘bright line’ between a statement of the mischief and a statement of the intended effect of remedial legislation or that there is even good reason to accept the one but exclude the other as an aid to interpretation. The question

must ultimately be the reliability of the assistance afforded by the explanatory memorandum. It may be that generally stated purposes are more reliable than micro-commentary on the provisions of the bill.

[66] In the present case, the bill explicitly stated that, because of the practical difficulties encountered, the lawmaker wished to make provision for the court to do away with the appointment of a third psychiatrist (psychiatrist B) on the application of the prosecutor and for the NDPP to issued directives regarding the circumstances in which the prosecutor should make a dispensing application. In the language of Lord Browne-Wilkinson in *Pepper*, to ignore this clear intention would display ‘cussedness’ on the part of the court.

- [67] The directives, by contrast, post-date the enactment of the legislation. Even if, as Mr la Grange submitted, the directives can be equated with regulations promulgated under a statute, it has been held on a number of occasions, on grounds of principle and logic which are hard to refute, that a statute cannot be interpreted with reference to regulations promulgated thereunder (*Clinch v Lieb* 1939 TPD 118 at 125; *Benoni Town Council v Minister of Justice* 1963 (3) SA 811 (W) at 813E-G; *Moodley & Others v Minister of Education and Culture, House of Representatives, & Another* 1989 (3) SA 221 (A) at 233E-F; *National Lotteries Board v Bruss & Others* 2009 (4) SA 362 (SCA) para 37; *Rossouw & Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) para 24).
- [68] For all these reasons, I consider that three psychiatrists, including a private psychiatrist, must be appointed when the case falls within s 79(1)(b) unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed, in which case there must be two psychiatrists. In either event, the court may appoint a clinical psychologist. The directives contemplated in s 79(13) are directives setting out the cases and circumstances in which prosecutors must request the court to dispense with the appointment of a private psychiatrist.
- [69] In the present case, the prosecutor did not request the trial court to dispense with the appointment of a private psychiatrist. A private psychiatrist should thus have been appointed by the court.

#### Appointment of psychiatrist for the accused

- [70] Quite apart from this finding, it is common ground that, in cases falling within s 79(1)(b), the accused must be assessed at least by two psychiatrists, namely (i) the medical superintendent of a psychiatric hospital designated by the court, or a psychiatrist appointed by such superintendent at the court's request (psychiatrist A); and a psychiatrist appointed for the accused by the court (psychiatrist C).
- [71] When a magistrate orders an accused person to be psychiatrically assessed in terms of s 79, the magistrate issues a warrant to transfer the accused to the relevant psychiatric hospital. We were told that the standard form of warrant is Form J138A. The form requires the judicial officer to insert the name of the psychiatric hospital whose medical superintendent will be psychiatrist A or who will appoint psychiatrist A at the court's request. Provision is then made for two further names to be inserted. In the case of the second name, the form contains a footnote with reference to s 79(1)(b). (Form J138A, like all the other 'J' forms one encounters in criminal records, appears not to be a form prescribed by regulation under legislation. The J forms have apparently been developed by the Department of Justice over the years with a view to ensuring that any particular step in the criminal justice process accords with statutory prescripts.)
- [72] The J138A was not part of the criminal record received in the present case from the lower court. However, Ms Teunissen through her industry was able to locate a copy in the records of VBH. She placed the document before us. The document identifies VBH as the relevant

psychiatric hospital. The form does not incorporate a request to the medical superintendent of VBH to appoint a psychiatrist. In the space provided for the two named psychiatrists, the name of Dr BE Boon was inserted in the first space. Ms Teunissen informed us that Dr Boon is (or was then) a psychiatrist at George Psychiatric Hospital. No name was inserted in the second space. The form was signed not by the magistrate but by the clerk of the court. Since a third psychiatrist was not appointed, one must assume that Dr Boon was intended to be the psychiatrist for the accused, ie psychiatrist C.

- [73] Ms Teunissen said that Dr Boon should not have been named in the warrant, because it was not practical for a psychiatrist based in George to assess a patient detained at VBH in Cape Town. She submitted that the correct course is for the magistrate to determine the name of the psychiatrist to be appointed for the accused (psychiatrist C). She said that while this was not, as a matter of practice, done as part of the proceedings in open court, it was the norm for magistrates to specify the relevant psychiatrist in the Form J138A.
- [74] In the event, the accused was examined by two State psychiatrists at VBH, namely Prof S Kaliski and Dr HG de Clercq. Dr Boon was not involved. On the assumption that Dr Kaliski, who signed the report 'For Hospital CEO', was properly to be regarded as psychiatrist A, Dr de Clercq may have seen herself as being psychiatrist C (the psychiatrist appointed for the accused), though she did not say so. The objective fact is that she was not so appointed. The magistrate himself did not identify the psychiatrist to be appointed for the accused. To the extent that the J138A signed by the clerk of the court embodied a decision of the magistrate, the latter's decision was not complied with, given that Dr Boon did not assess the accused.
- [75] Ms Teunissen acknowledged that, on these facts alone, the psychiatric assessment of the accused was irregular and that the matter should be remitted to the lower court so that a fresh psychiatric assessment may be ordered in due form. I agree. In respect of psychiatrist A, the court's function is to designate the psychiatric hospital and, if appropriate, to request the hospital's medical superintendent to appoint psychiatrist A. In respect of psychiatrist C, the court's function is actually to appoint the psychiatrist, which means to appoint an identified person. This task cannot be delegated. Although both psychiatrists A and C would be expected to provide an impartial expert assessment, the lawmaker specifically requires one of them to be appointed 'for the accused'. A psychiatrist appointed for the accused might regard it as proper to make more extensive enquiries into the accused's history and family circumstances and to ensure that nothing which might be favourable to the accused is overlooked.

#### The medical superintendent or designee

- [76] What I have said regarding the non-appointment in this case of a private psychiatrist (psychiatrist B) and the defect in the appointment of the psychiatrist for the accused (psychiatrist C) suffices to vitiate the psychiatric assessment. I nevertheless need to mention certain issues relating to Dr Kaliski's participation as the panellist I have styled as psychiatrist A. He did not sign as being the 'medical superintendent'. The terminology in s

79(1)(b)(i) has not kept pace with changes of nomenclature in the health system. The post of ‘medical superintendent’ no longer exists in psychiatric hospitals. A public hospital has a ‘Chief Medical Officer’. A psychiatric hospital, such as VBH, used to have a ‘medical superintendent’, who would be a psychiatrist. Nowadays, however, a psychiatric hospital has a ‘Chief Executive Officer’, who may be, but is not required to be, a medical doctor. We understand that the current Chief Executive Officer at VBH is not a psychiatrist.

[77] We need not decide whether the phrase ‘medical superintendent’ in s 79(1)(b)(i) is to be construed as a reference to the Chief Executive Officer or to the most senior psychiatric position at the hospital. If the word ‘medical’ is interpreted as a reference to the most senior psychiatrist at the hospital, which seems the most plausible view, the answer in any given case might depend on whether or not the Chief Executive Officer happens to be a psychiatrist. If the Chief Executive Officer is not a psychiatrist, our enquiries suggest that it may be difficult to determine which senior psychiatrist is contemplated by the phrase ‘medical superintendent’, because we gather there may be several senior psychiatrists of equal rank in the clinical and forensic departments of the hospital.

[78] Dr Kaliski no doubt undertook the assessment in good faith, believing himself either to be the relevant ‘medical superintendent’ or to be the valid designee of the ‘medical superintendent’. Whether he was designated by the Chief Executive Officer (as the manner in which Dr Kaliski signed might indicate) or by someone else, or whether he understood that he was himself the ‘medical superintendent’, does not clearly appear. If Dr Kaliski was not himself the relevant ‘medical superintendent’, he was not strictly a duly appointed member of the panel, because the magistrate did not direct a request to the ‘medical superintendent’ to appoint a psychiatrist.

The verdict of not guilty

[79] If, as I consider, the proceedings in the court below should be set aside because of the irregularities in the composition of the psychiatric panel, one does not reach the question as to the appropriate order following upon a finding that the accused is not fit to stand trial. However, since we were addressed on these matters, I think we should state our opinion. What follows assumes that the accused was correctly found not to be fit to stand trial.

[80] As to the question of a verdict, this was a matter on which counsel were agreed. I have no difficulty with the referring magistrate’s

view that the finding of not guilty in terms of s 78(6)(a) was irregular and incompetent. Section 78(6) applies where an accused,

who has the mental capacity to understand the proceedings against him as contemplated in s 77, has entered a plea of not guilty. In terms of ss 78(1A) and (1B) a person is presumed to have been criminally responsible at the time he perpetrated the alleged offence, and an accused who puts his criminal responsibility in issue bears the burden of proving the lack of criminal responsibility. Section 78(6) applies where, pursuant to criminal responsibility having been

raised as an issue, the court finds that the accused lacked criminal responsibility at the relevant time. (Throughout this judgment I refer to lack of criminal responsibility only where it is brought about by mental illness or mental defect.)

[81] Where, by contrast, an accused is not capable of understanding proceedings as contemplated in s 77, he cannot in the nature of things enter a plea and the question of his criminal responsibility at the time of the alleged offence cannot be judicially determined in accordance with s

78. An accused who by reason of mental illness or mental defect is not capable of understanding the proceedings may or may not also have lacked criminal responsibility at the time he perpetrated the alleged offence; either way, he must be dealt with in accordance with s 77, not s 78. This means that he can be found neither guilty nor not guilty; no verdict is entered, and instead a direction must be made in accordance with either sub-para (i) or (ii) of s 77(6)(a). There are several cases in which erroneous verdicts in terms of s 78(6) have on this basis been set aside on review (see, for example, S v

Matumbela Case 104/02/2012 WCHC Reference 2/13; S v Hendricks Case B690 WCHC Ref No 13195).

[82] Unlike the trial magistrate, I find nothing in the words he has underlined in s 78(1) to support the view he took on this question.

The detention order

[83] The main reason for my initial enquiry to the magistrate and to the DPP was my doubt as to the correctness of the detention order made by the presiding magistrate in terms of sub-para (ii) of s 77(6)(a)(ii), an order supported by the referring magistrate. In the event, counsel were agreed that the order should have been made in terms of sub-para (i), not sub-para (ii).

[84] Section 77(6)(a) reads as follows (my underlining):

‘(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 shall direct that the accused –

(i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 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 detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; or

(ii) where the court finds that the accused has committed an offence other than the one contemplated in subparagraph (i) or that he or she has not committed any offence –

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002,

(bb) ...

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.’

[85] 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 who is detained as a State patient remains in detention indefinitely until, on application made to a judge in chambers in terms of s 47 of the Mental Health Care Act, he or she is discharged. Such an application may be brought by the patient or by various other officials identified in s 47(1). The application must be accompanied by reasons for the application; by a report from a psychologist, if the patient has been assessed by such a person; and by the further information specified in s 47(2). Unless the application is made by an official curator ad litem, the application must be referred to such a curator to make the report specified in s 47(3). An application for discharge cannot be made within a period of 12 months from the dismissal of any prior application (s 47(4)(a)).

[86] 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 a 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 in terms of s 33. This is not a criminal proceeding. Sections 33 to 37 contain procedures to ensure that this inroad on the user’s freedom is not abused and endures only for as long as necessary. In terms of s 37, the health care status of such a user must be reviewed six months after the initial admission and every 12 months thereafter, and a report thereon must be submitted to the relevant statutory Review Board. The Review Board may decide that the user should be discharged or may approve further involuntary care. It is this discharge regime which applies to a person who has been ordered to be admitted and detained pursuant to sub-para (ii) of s 77(6)(a) of the Crim

inal Procedure Act. (It is unnecessary to decide whether an accused who has been admitted and detained pursuant to s 77(6)(a)(ii) can be discharged by the head of a health establishment in terms of s 38 of the Mental Health Care Act, or whether the accused can only be discharged on the decision of the Review Board in terms of s 37.)

[87] The accused in the present case was charged with culpable homicide. Without objection by the accused's attorney, the presiding magistrate received information concerning the alleged offence in the form of the witness statements taken by the police. These statements indicated that the accused had, on the day of the alleged offence, driven a vehicle at high speed without proper regard to the presence of children playing in the street and that this led to the death of a young boy, Godfrey Hano.

[88] It occurred to me that the presiding magistrate may, notwithstanding this evidence, have made an order in terms of sub-para (ii) rather than sub-para (i) for the reason that, because the accused probably lacked criminal responsibility at the time of the alleged offence, he had 'not committed any offence' (see the words I have underlined in sub-para (ii) of s 77(6)(a)(ii)). This was the focus of my first query to the magistrate and to the Director of Public Prosecutions. The question of law can be framed as follows: If the psychiatric evaluation performed in terms of s 79 concludes that the accused, by reason of mental illness or mental defect, lacks capacity to understand the proceedings and probably lacked criminal responsibility at the time of the alleged offence, and if the information or evidence before the court shows that the accused, who is charged with an offence falling within sub-para (i) of s 77(6)(a), probably committed the act forming the basis of the charge, is the accused to be detained pursuant to sub-para (i); or must the court conclude that, by virtue of the lack of criminal responsibility, the accused probably 'has not committed any offence' and must thus be admitted and detained pursuant to sub-para (ii)? To the best of my research, this is not a question which has pertinently received attention in our courts.

[89] Where the psychiatric evaluation concludes that the person lacks capacity to understand the proceedings, the enquiry mandated by s 77(6)(a) is not into the question whether the accused committed the offence with which he is charged (ie whether on a balance of probability he could be convicted of the offence) but rather whether the accused 'committed the act in question'. In context, the

expression 'the act in question' has reference to the actus reus elements 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.

[90] This is confirmed when one has regard to the provisions of s 78. That section operates where the accused has the capacity to understand the proceedings but the psychiatric evaluation concludes that he or she lacked criminal responsibility at the time of the alleged offence. Prior to the introduction of the provisions of Chapter 13 as part of the Criminal Procedure

Act 51 of 1977, our common law held that a person who was incapable of appreciating the wrongfulness of his or her act or omission or of acting in accordance with an appreciation of the wrongfulness of his or her act or omission lacked criminal responsibility and thus had to be acquitted. Chapter 13 now regulates this matter where the lack of criminal responsibility is attributable to mental illness or mental defect. The capacity to be held criminally responsible is not an aspect bearing on the *actus reus*. Rather, it is a prerequisite for *mens rea* (culpability), in that a court will not attribute to a person lacking criminal responsibility the guilty state of mind required for a conviction, whether in the form of *dolus* or *culpa* (see Snyman Criminal Law 5th ed at 149, 159-160). Section 78(1) refers to a person 'who commits an act or makes an omission which constitutes an offence' at a time when he or she lacks criminal responsibility by virtue of mental illness or mental defect. Section 78(6) provides that where the accused is found to have lacked criminal responsibility and the court finds that the accused 'committed the act in question', he or she is entitled to an acquittal but must then be dealt with in accordance with sub-para (i) or (ii) of s 78(6) as the case may be.

[91] The reference in s 78(1) to an accused who 'commits an act or makes an omission which constitutes an offence' and the reference in s 78(6) to an accused who 'committed the act in question' is only to the *actus reus* elements of the offence, because the lawmaker must be taken to have appreciated that a person who lacked criminal responsibility could not be found to have *mens rea* and would

be entitled to an acquittal. Indeed, s 78(6) expressly states that such a person must be found not guilty.

[92] There is a presumption that words in a statute bear the same meaning unless there is a clear indication to the contrary (*Minister of the Interior v Machadodorp Investments Pty Ltd & Another* 1957 (2) SA 395 (A) at 404C-E; *Pantanowitz v Sekretaris van Binnelandse Inkomste* 1968 (4) SA 872 (A) at 879C-E). There is every reason to apply this presumption in the case of the related provisions of ss 77 and 78 of the Act.

[93] It is true that sub-para (i) of s 77(6)(a) refers to specific offences and that those offences cannot be said to have been committed unless both the *actus reus* and the *mens rea* elements are present. It is also true that a person who lacks criminal capacity to understand proceedings, but who was criminally responsible at the time of the alleged offence, could be found on the probabilities to be guilty of the offence, including the element of *mens rea*. Nevertheless, this does not alter the fact that the evidential enquiry which s 77(6)(a) requires the court to undertake is limited to whether the accused 'committed the act in question', the same inquiry contemplated in s 78(6). Sub-para (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'.

- [94] It is unfortunate that sub-para (ii) introduces terminology which appears to equate a finding that the accused probably 'committed the act in question' with a finding that the accused probably 'committed an offence'. However, the introductory part of s 77(6)(a), and the distinction drawn in sub-para (i) to the offence charged on the one hand and the question whether the accused 'committed the act in question' on the other, convince me that sub-para (ii) was not intended to require a court to investigate whether the accused probably committed the 'offence' in the sense of probably being guilty by virtue of having committed the actus reus with the required mens rea. The word 'offence' in sub-para (ii) was intended to refer, in my view, to the actus reus element of the offence. In other words, if the act or omission committed by the accused constitutes the actus reus element of an offence other than one of the offences specified in sub-para (i), the accused must be dealt with in accordance with sub-para (ii). This was also the view expressed by Du Toit AJ in *S v Sithole* 2005 (1) SACR 311 (W) at 314h-315a.
- [95] The word 'offence' in the phrase 'or that he or she has not committed any offence' in sub-para (ii) must be interpreted in the same way. If the accused has not committed an act or omission constituting the actus reus element of any offence, he must be dealt with in accordance with sub-para (ii). The fact that on the probabilities the accused lacked criminal responsibility at the relevant time and would thus probably in due course be entitled to an acquittal in terms of s 78(6) if he or she became capable of understanding the proceedings and entering a plea does not entitle the accused in the meanwhile to be treated as a person who has probably 'not committed any offence' as contemplated in sub-para (ii) of s 77(6)(a).
- [96] This interpretation of s 77(6)(a) is supported not only by the ordinary meaning of the words in question, when interpreted in the context of the other provisions of Chapter 13 and in particular the provisions of s 78, but also by a consideration of the purpose of the distinction drawn in sub-paras (i) and (ii) of s 77(6)(a) and the broader legislative scheme in Chapter 13. The lawmaker evidently intended that an accused who lacked criminal capacity to understand proceedings should be dealt with under a stricter mental health care regime if he or she has committed more serious acts or omissions. This provides the public with a greater measure of protection. Section 79(1) thus requires a more rigorous process of assessment where the accused has been charged with one of the more serious specified offences.
- [97] One finds a similar distinction in s 78(6): If an accused who lacked criminal responsibility is found to have perpetrated the actus reus element of one of the more serious specified offences, the court has the power to order him or her to be detained as a State patient pending a decision in terms of s 47 of the Mental Health Care Act. Since the accused contemplated in s 78 is, unlike the person contemplated in s 77, a person who has the mental capacity to understand the proceedings (and who thus may have had only a temporary lack of criminal responsibility), it is understandable that, even in respect of the

more serious offences, the court is not obliged to make an order that the accused be detained as a State patient pending a decision in terms of s 47 of the Mental Health Care Act, but has the discretion instead to order that the accused be detained as an involuntary health care user in terms of s 37 of the Mental Health Care Act, or that he or she be released conditionally or unconditionally.

- [98] By contrast, it is understandable that a person who has committed one of the more serious acts or omissions and who by virtue of mental illness or mental defect has a current incapacity to understand the proceedings should be compulsorily subject to an order of detention in accordance with s 47 of the Mental Health Care Act. (I use the word 'understandable' without expressing a view as to whether it is constitutionally justifiable for the trial court not to be afforded a discretion. I add this qualification, because there is an application pending in this court in which the constitutionality of the detention regime laid down in s 77(6)(a) is being challenged. That application is due to be heard in mid-August 2014.)
- [99] If s 77(6)(a) were interpreted to mean that a person who currently lacks capacity to understand the proceedings and who probably also lacked criminal responsibility at the time of the alleged offence had to be dealt with in terms of sub-para (ii) of s 77(6)(a) (on the basis that, by virtue of his or her lack of criminal responsibility, he or she could not be found to have 'committed any offence'), one would have the absurdity that the court would not have the power, even in its discretion, to order the accused's detention in terms of s 47 of the Mental Health Care Act. Such a person poses at least as much risk to the public, and probably more, than the person contemplated in s 78(6)(i), ie a person who lacked criminal responsibility at the time of the alleged offence but has sufficiently recovered so as to be able to understand the proceedings, yet, in terms of s 78(6)(i), such a person may in the court's discretion be ordered to be detained in terms of s 47 of the Mental Health Care Act.
- [101] I thus consider that where an accused, who by virtue of mental illness or mental defect is currently unable to understand the proceedings, is shown on the probabilities to have committed the actus reus element of an offence specified in sub-para (i) of s 77(6)(a), the court is obliged to order his or her detention as a State patient pending a decision in terms of s 47 of the Mental Health Care Act, whether or not the person lacked criminal responsibility at the time of the alleged offence.
- [102] In the case both of murder and of culpable homicide, the actus reus is the unlawful causing of the victim's death. The distinction between the two crimes lies in the form of mens rea. However, in the case of a person who by virtue of mental illness or mental defect is unable to understand the proceedings, this difference in mens rea is irrelevant because the court is not concerned with the question whether the accused had the necessary mens rea. This does not detract from the fact that the prosecution may have chosen to frame the charge as one of murder or as one of culpable homicide. In either case, however, the case falls within sub-para (i).

[103] The trial magistrate considered that the term ‘culpable homicide’ in sub-para (i) of s 77(6)(a) should be interpreted as applying only to cases where violence was inflicted with *dolus*. I do not agree with this interpretation and do not consider that the *eiusdem generis* principle finds application. The trial magistrate’s view was not supported by any of the counsel before us. The term ‘culpable homicide’ is one with a clear legal meaning. There is no basis for limiting its meaning by reference to the *eiusdem generis* principle. Furthermore, and for the reasons I have already given, the enquiry mandated by s 77(6)(a) is not concerned with *mens rea*. And apart from the fact that in this case the causing of fatal injuries resulting in the boy’s death involved physical violence through the instrumentality of a motor vehicle, sub-para (i) does not draw distinctions between the presence or absence or degree of violence. If the accused is charged with culpable homicide, and if the court is satisfied on the probabilities that the accused’s unlawful conduct caused the victim’s death, the case falls under sub-para (i).

[104] In the present case, therefore, the magistrate erred in law by finding the accused not guilty. Furthermore, the magistrate should have made an order in terms of s 77(6)(a)(i) that the accused be detained in a psychiatric hospital or prison pending the decision of a judge in chambers in terms of s 47 of the Mental Health Care Act.

What should we do?

[106] The question then arises whether this court can and should substitute, for the magistrate’s erroneous finding and order, the order he should have made. The matter is not serving before us as a review in terms of s 304 or 304A of the Criminal Procedure Act. The accused was not convicted of an offence in the court *a quo*, and the order made by the magistrate in terms of s 77(6)(a)(ii) was not a ‘sentence’ as contemplated in s 302(1)(a). Furthermore, the accused was legally represented in the lower court. Section 77 itself does not make provision for an automatic review. What s 77(8) says is that an accused against whom a finding is made under s 77(6)(a) may appeal against such finding and that such appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence. There is no such appeal in this case.

[107] That does not mean that the High Court has no jurisdiction to review and set aside the proceedings of the lower court. In terms of s 22(1) of the Superior Courts Act 10 of 2013 the proceedings of a lower court may be brought under review in the High Court by virtue *inter alia* of a ‘gross irregularity in the proceedings’. An error of law might in some circumstances amount to a gross irregularity (see *Jordan & Another v Penmill Investments CC & Another* 1991 (2) SA 430 (E) at 441B-C; *Qozeleni v Minister of Law and Order & Another* 1994 (3) SA 625 (E) at 638D-H). The High Court also has an inherent power to review the proceedings of lower courts on the basis of the constitutional principle of legality (cf *S v Mapey* [2007] ZAWCHC 22 paras 12-15). The High Court’s rules of procedure would ordinarily require that the aggrieved party institute a civil application for review on notice of motion in terms of rule 53. In due course, and after the filing of the record and affidavits, the High Court would hear oral argument on the application. There are occasions where, in the interests of

justice, a less formal process

is followed. Thus a court might set aside irregular proceedings upon referral by the magistrate (for a recent example in this court, see *S v Xameni* [2014] ZAWCHC 36 paras 6 and 9 and cases there cited). The referring magistrate in the present matter presumably assumed that an informal process of review and correction could be followed here.

[108] In the event, the matter has been fully argued before us in open court. The accused had notice of the hearing and was represented by a legal aid lawyer. Mr Klopper's submission was that the proceedings in the court a quo should be set aside on the basis that the magistrate should consider afresh the appointment of a psychiatric panel to assess the accused. He said, correctly in my view, that the justice of the case cannot be determined by trying to guess what the outcome of a fresh psychiatric evaluation will be and whether, if the accused were now found fit to stand trial, he would be convicted or acquitted. Detention pursuant to s 77(6)(a), whether under sub-para (i) or (ii), is an inroad on the liberty of the 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 s 79.

[109] I did not understand counsel for the Minister and DPP to dispute that we should intervene if we found the panel to have been improperly constituted.

## Conclusion

[110] I need to say something about the way in which the accused was dealt with by the mental health care authorities after the court a quo's decision. Albeit erroneously, the accused was ordered to be admitted and detained at VBH as if he were an involuntary mental health care user contemplated in s 37 of the Mental Health Care Act. I directed enquiries concerning the accused's case to the Western Cape Review Board (one of the boards established in terms of s 18 of the Mental Health Care Act). I am most grateful to the chairperson of the Review Board, Dr T Sutcliffe, for his prompt and full response to my enquiries. From the information supplied by the Review Board, it appears that the accused was under observation at VBH over the period 20 April to 7 June 2012. After the court a quo's order of 12 June 2012 the accused was re-admitted to VBH as an involuntary health

care user contemplated in s 37 of the Mental Health Care Act but was discharged on 19 July 2012. The discharge form said that the accused would 'be transferred to Oudtshoorn/George to follow up at CHC there'. The provincial database indicates that the accused was discharged from Oudtshoorn Hospital on 4 September 2012 and was subsequently seen there sporadically on eight occasions as an outpatient, the last such visit being on 28 January 2014.

[111] It thus appears that, barely a month after the detention order, the accused was discharged from VBH. This was presumably done in terms of s 38 of the Mental Health Care Act. From the information supplied by Dr Sutcliffe, the discharge does not seem to have followed upon a decision by the Review Board in terms of s 37.

- [112] Since we have not heard argument on the matter, I prefer to express no opinion as to whether an accused who has been ordered to be detained pursuant to s 77(6)(a)(ii) of the Criminal Procedure Act can be discharged by the head of the health establishment in terms of s 38 or whether s 37 is the exclusive provision under which such a person can be discharged. I can see arguments both ways.
- [113] However, and on the assumption that s 38 can in principle be invoked in such cases, a discharge under that section could only have been made in the present case if the head of VBH decided that the accused was 'capable of making informed decisions', ie informed decisions about his own care. Although there may be a difference between the capacity to make informed decisions about one's own care and the capacity to understand criminal proceedings, I am surprised that VBH, within less than two months of having found that the accused lacked the capacity to understand criminal proceedings and that he had already lacked criminal responsibility at the time of the incident in September 2009, was able to conclude that he was capable of making informed decisions. A rapid recovery in the accused's mental condition does not appear consistent with the diagnosis in the psychiatric report of June 2012.
- [114] It is also a matter of concern that there does not appear to be any legislative procedure which ensures that the DPP receives periodic reports as to the mental health status of a person who has been referred for detention in terms of sub-para (ii) of s 77(6)(a) of the Criminal Procedure Act. The prosecution of such a person should ordinarily proceed if the accused recovers sufficiently to be able to understand the proceedings. Even if there is a psychiatric evaluation indicating that the accused lacked criminal responsibility at the time of the alleged offence, it would usually be appropriate for the person (if he or she recovers) to be prosecuted so that an appropriate verdict
- and order for detention can be made in terms of s 78(6).
- [115] In the absence of legislative machinery, it would be desirable for the DPP and the mental health care authorities to establish a protocol which ensures that the prosecution service is timeously informed of relevant developments in the accused's mental health status.
- [116] To summarise my conclusions regarding s 79(1)(b):
- (i) It would be desirable for the term 'medical superintendent' in sub-para (i) to be amended to conform with current nomenclature at psychiatric hospitals. It is currently unclear whether the said expression is now to be interpreted as a reference to the chief executive officer of the psychiatric hospital or to a senior psychiatric position at the hospital (and if so, which position). Probably, though, the expression should be interpreted as referring to the most senior forensic psychiatric position at the hospital.

(ii) The court's first function in relation to sub-para (i) is to designate the relevant psychiatric hospital. If the court does no more than designate a psychiatric hospital, the first psychiatrist (psychiatrist A in the language of this judgment) is the 'medical superintendent' himself or herself.

(iii) If the court intends anyone other than the medical superintendent himself or herself to be psychiatrist A, the court's direction in terms of s 79(1)(b) should incorporate a request to the medical superintendent to appoint a psychiatrist as psychiatrist A. The latter psychiatrist may be a State or a private psychiatrist.

(iv) Given the uncertainty as to the meaning of 'medical superintendent' in relation to the nomenclature currently in use at psychiatric hospitals, the safest course, pending any statutory amendment, would probably be for the trial court always to request the 'medical superintendent' to appoint psychiatrist A and for such appointment to be made jointly by the Chief Executive Officer and the most senior psychiatrist (or psychiatrists) at the designated psychiatric hospital.

(v) In regard to s 79(1)(b)(ii), the appointment of a private psychiatrist (psychiatrist B) is mandatory unless the court, upon application from the prosecutor, directs that the appointment of a private psychiatrist may be dispensed with. If the court dispenses with the appointment of a private psychiatrist, there will be no psychiatrist B on the panel at all; the court does not in that event appoint a State psychiatrist

as psychiatrist B.

(vi) The directives contemplated in s 79(1)(b)(ii) read with s 79(13) are directives regarding the cases and circumstances in which the prosecutor must apply to the court to dispense with the appointment of a private psychiatrist.

(vii) Pending the revision of the directives already issued by the NDPP pursuant to s 79(13), the directives currently in existence should be construed as determining the circumstances in which there should be a private psychiatrist and thus as defining by necessary implication the reverse cases and circumstances in which the prosecutor should apply

to the court to dispense with the appointment of a private psychiatrist. It is, however, desirable, to avoid confusion, that the

directives issued by the NDPP be revised to conform with the declared meaning of s 79(1)(b)(ii) as soon as may be expedient.

(viii) With regard to s 79(1)(b)(iii), the appointment of a psychiatrist for the accused (psychiatrist C) is mandatory. This psychiatrist may be a State or private psychiatrist. The psychiatrist must be identified in the court's s 79(1)(b) direction.

(ix) The court may in its discretion appoint a clinical psychologist to the panel. This is so whether or not a private psychiatrist has been appointed.

(x) If, pursuant to the psychiatry evaluation and report, the accused is found unfit to stand trial as contemplated in s 77, no verdict of guilty or not guilty should be made. The court should proceed directly to consider the appropriate detention order in terms of s 77(6)(a).

(xi) In determining the appropriate detention order in terms of s 77(6)(a), the court must consider whether the accused committed the actus reus elements of the charge. If the actus reus elements in the case of a charge as contemplated in s 77(6)(a)(i) are present, a detention order in terms of that sub-paragraph must be made. In the case of a charge of culpable homicide, no distinctions are drawn between degrees of violence.

Binns-Ward J:

[117] I concur. The proceedings conducted in the court a quo on and after 5 August 2011 are set aside. The matter is remitted to the court a quo to be dealt with in accordance with the legal principles set out in this

## judgment.

BINNS-WARD J

ROGERS J

1Project 89's full title was: 'The declaration and detention of persons as State patients under the Criminal Procedure Act, Act 51 of 1997, and the discharge of such persons under the Mental Health Act, Act 18 of 1973, including the burden of proof with regard to the mental state of an accused or convicted person.'

2See recommendations at paras 8.55-8.58 under the heading, 'Mandatory appointment of the third psychiatrist under section 79(1)(b) of the Criminal Procedure Act'.

4See p 162 of the report.

5The use of parliamentary materials in accordance with Pepper has been followed in Canada (see, for example, *Bristol-Myers Squibb Canada Inc v Canada (Attorney-General)* 2001 CanLII 22128 (FC) para 20 and footnote 10. In Australia, it appears that the use of such materials has long been sanctioned by statute: see s 15BA of the Acts Interpretation Act of 1901 (Cth), referred to in *Bryers v Kendle* [2011] HCA 26 para 97 and footnote 128.

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