

SOUTH AFRICA / JUDGMENT

S v Ramokoka (94/06) [2006] ZAGPHC 37; 2006 (2) SACR 57 (W) (25 April 2006)

[2006] ZAGPHC 37

COURT

High Courts - Gauteng

BEFORE

N.P. Willis, M. Jajbhay

CASE / FILE NUMBER

94/06

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

IN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION)

REPORTABLE

REVIEW CASE: HIGH COURT REF NO:94/06

MAGISTRATE'S SERIAL NO 01/06

JOHANNESBURG CASE NO: 68/0677/2006

DATE:25/04/2006

In the matter between:

THE STATE

and

LAWRENCE RAMOKOKA

JUDGMENT:

SPECIAL REVIEW

WILLIS J:

[1] This matter was referred to me for “special review” on 15 February, 2006.

[2] The accused had been charged in the District Court held at Orlando with one count of assault with intent to commit grievous bodily harm. The offence had allegedly been committed on 18th March 2005.

- [3] The accused himself raised the fact that he had been “in Sterkfontein for a mental problem”. This was confirmed by his brother who was in court. The accused himself applied “to be of mental unsound mind.”
- [4] In terms of section 77 (1) read with sections 78 (2) and 79 (2) of the Criminal Procedure Act, No 51 of 1977, as amended (“the Criminal Procedure Act”), the accused was referred on 26 October 2005 for observation for 30 days at the Sterkfontein Psychiatric Clinic. At the conclusion of the 30 day observation period, Dr V Khanyile, the Senior State Psychiatrist at the Sterkfontein Hospital, duly appointed to do so, compiled a psychiatric report (annexure “C” to the charge sheet) in which he diagnosed that the accused was suffering from dementia and concluded that the accused was unable to appreciate the wrongfulness of his actions and unable to follow the proceedings.
- [5] On 10 January 2006, the learned magistrate directed that the accused be detained at the Sterkfontein Hospital “pending the decision of a judge in chambers” in terms of section 77 (6) of the Criminal Procedure Act).
- [7] I raised a number of queries which I referred to the learned magistrate as well as the Director of Public Prosecutions. Unfortunately, I have not received the benefit of the learned magistrate’s reasons or any further comment from her. I have, however, received very helpful comments and advice in an opinion prepared by Messrs P. Nengovhela, the Deputy Director of Public Prosecutions and P.J. Schutte of the same office.
- [8] Section 77 (1) of the Criminal Procedure Act reads as follows:
- “If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.”*
- [9] Section 78 (2) of the same Act reads as follows:
- “If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall, in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of s 79.”*
- [10] The relevant portion of section 77 (6) of the same Act reads as follows:
- “
- (a) If the court which has jurisdiction in terms of s 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 –

in the case of murder or culpable homicide or rape 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 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.”

As noted above, the reference to section 47 of the Mental Health Care Act, 2002 prior to 18 February 2005 read as “section 29(1) (a) of the Mental Health Act, 1973 (act 18 of 1973)”.

[11] Section 47 of the Mental Health Act Care Act, No 17 of 2002 relates to the application to a judge in chambers for the discharge of the State patient. Section 47(1) of that Act reads “Any of the following persons may apply to a judge in chambers for the discharge of a State patient” and then enumerates the various persons, including the State patient, who may do so. It therefore seems clear to me that in the absence of some review mechanism, a person detained in terms of section 77 (6) of the Criminal Procedure Act remains so detained unless (a) an application is made to a judge in chambers for his or her release and (b) the judge in chambers orders the release. In other words, an order made in terms of section 77(6) of the Criminal Procedure Act does not have the automatic consequence that it is put before a judge in chambers for confirmation. Not dissimilar views were expressed in *S v Morake* 1979 (1) SA 121 (B) at 123A. The reasons why this case went on review are not apparent from this judgment.

[12] In view of the potential for serious prejudice to an accused person where an order is made in terms of section 77 (6), some kind of review mechanism therefore seems desirable.

[13] Section 302 of the Criminal Procedure Act – which relates to automatic reviews – refers to cases in which a sentence has been imposed. This does not occur where the court acts in terms of section 77. Section 304 – which relates to special reviews – also refers to proceedings in which a person has been sentenced. Section 304A relates to the review of proceedings after conviction but before sentence. Has been imposed. A person detained in terms of section 77 (6) is not, in any generally understood legal meaning of the term “convicted”.

[14] The court does, however, have the power at common law to exercise review powers over the decisions of the lower courts in appropriate

cases. (See, for example, *R v Marais* 1959

(1) SA 98 (T), in which various authorities were collated, and which was referred to with approval in *Wahlhaus v Additional Magistrate, Johannesburg* 1959

(3) SA 113 (A) at 120A which, in turn, has been applied a numerous cases subsequently).

[15] On the other hand, in *S v Blaauw* 1980 (1) SA 536 (C), Grosskopf J, as he then was with whom Friedman J, as he then was, concurred, having found that the Criminal Procedure Act did not make provision for the review of such orders, expressed the view that it “nie die hof veroorloof om ’n stelsel van outomatiese hersiening te skep waarvoor die Wetgewer geen voorsiening gemaak het nie.” Although I am not bound by this

decision made in another division, I am reluctant to disagree with a bench consisting of one judge who went on to serve in the Appellate Division and another who became Judge President. Nevertheless, in view of the potential for serious prejudice to an accused person, I feel compelled to do so.

[16] It seems to me that, as a matter of good practice, magistrates should refer their orders made in terms of section 77(6) to the High Court for review. In this regard, the decision of the learned magistrate to refer the case to the High Court for “special review” is to be commended.

[17] Section 79 (1) read with 79(1)(b) of the Criminal Procedure Act reads as follows:

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

(b) where the accused is charged with murder or culpable homicide or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs –

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; by a psychiatrist appointed by the court and who is not in the full-time service of the State; by a psychiatrist appointed for the accused by the court; and by a clinical psychologist where the court so directs.”

[18] Pending the enquiry, the court may act in terms of section 79 (2) of the Criminal Procedure Act which reads as follows:

“(a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in lawful custody of the person or the authority in whose custody he was at the time of such committal.

(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.”

- [19] I accepted that there was sufficient before the learned magistrate, in terms of section 77(1) of Criminal Procedure Act, to conclude that the accused was “by reason of mental illness or defect not capable of understanding the proceedings so as to make a proper defence” and that therefore this leg of the enquiry in terms of section 77(6) was complied with.
- [20] Section 77(6), however, also refers to it being “proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question”. This appears to be a requirement before the detention pending a decision of the judge in chambers can be made. Furthermore, in terms of section 77(6) (i) it appears that the learned magistrate must also find (where the charge was not one of murder, culpable homicide or rape) that the offence was one “involving serious violence”.
- [21] From the record, it did not appear what “limited evidence” was available that “the accused committed the act in question”. The office of the Director of Public Prosecutions in its opinion remarked that “The Honourable Reviewing Judge correctly remarked that there is no indication from the record what ‘limited evidence’ was available to show, on a balance of probabilities, that the accused committed the act in question.”
- [22] There appeared to be the further question of whether, even if the accused was guilty of “assault with intent to commit grievous bodily harm”, the crime was one “involving serious violence”? It may seem tautological to distinguish between “assault with intent to commit grievous bodily harm” and a crime “involving serious violence” but as the different terminology appears in the same statute (see, for example section 266 of the Criminal Procedure Act), there may be some kind of difference.
- [23] The research and investigations of the office of the Director of Public Prosecutions established that the accused had hit his older brother, Thomas Ramokoka with an iron rod for no apparent reason. According to the Medical Report form (J88), the complainant sustained injuries in the form of swelling and bruising on the left shoulder.
- [24] I therefore accept the opinion of the office of the Director of Public Prosecutions that, in casu, nothing turns on whether there is a distinction between “assault with intent to commit grievous bodily harm” and a crime “involving serious violence”.
- [25] Before me there appeared to have been only one psychiatric report – that of Dr V. Khanyile. The research and investigations of the office of the Director of Public Prosecutions established that “having regard to the relevant and available documents presented in this matter, it appears that only one report, that of Dr V. Khanyile was obtained and that the magistrate’s order was based on this report only.”
- [26] In Commentary on the Criminal Procedure Act by Du Toit et al (13-5 Service 32, 2004), it is said that “the court is not empowered to act under s 77 unless a report as envisaged by s 79 has been received.”

- [27] The office of the Director of Public Prosecutions expressed the opinion that the learned magistrate “only has a discretion in respect of whether a clinical psychologist should be appointed or not” and that “in respect of the appointment and evaluation by other medical practitioners” there must be at least two, one of whom is a psychiatrist not in the full-time service of the State. In the opinion of office of the Director of Public Prosecutions this requirement is prescriptive and binding on the magistrate. I agree that in terms of section 79, at least two reports by the medical practitioners specifically referred to must be obtained.
- [28] The office of the Director of Public Prosecutions went on to express the further opinion that “the magistrate misdirected herself and committed a fatal irregularity in issuing the relevant order in the absence of the further reports as required by the Act.” It was recommended that I set aside the order and refer the matter back to the magistrate to deal with in accordance with the provisions of section 77(1) and 79 (1) (b) of the Criminal Procedure Act. In all the circumstances of the matter, I can see no other suitable alternative.
- [29] On the other hand, it is in my opinion desirable to avoid a situation where potentially dangerous member of society is released. I shall attempt to address this issue in the order which I shall make.
- [30] The following order is made:

The order of the learned magistrate detaining Lawrence Ramokoka at the Sterkfontein Psychiatric Hospital in terms of section 77 (6) of the Criminal Procedure Act, No 51 of 19777, as amended, is hereby reviewed and set aside; Immediately upon his release from detention Lawrence Ramokoka is to be handed over to the police and forthwith to be brought by them to appear before the learned magistrate; The learned magistrate is thereupon to deal with the matter in terms of the provisions of the Criminal Procedure Act, more particularly sections 77 (1), 78 (2) and 79 (1) (b) thereof.

DATED AT JOHANNESBURG THIS 25th DAY OF APRIL, 2006

N.P.WILLIS

JUDGE OF THE HIGH COURT

I agree.

M. JAJBHAY

Source & reproduction note

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

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2006/37.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-ramokoka-unknown-topic-agphc-2006>

Prepared on 9 October 2026 · Esheria