

SOUTH AFRICA / JUDGMENT

S v Vithi (CA&R5/09) [2009]

ZAECBHC 6 (13 July 2009)

[2009] ZAECBHC 6**COURT**

Eastern Cape High Court, Bhisho

BEFORE

LD Kemp, C T Sangoni

CASE / FILE NUMBER

CA&R5/09

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Source record**FORM****A****FILING****SHEET FOR EASTERN CAPE HIGH COURT, BHISHO JUDGMENT****PARTIES: THE STATE****AND****SHIYA****VITHI****[1].****Registrar:****[2].****Magistrate:****[3].**High Court: EASTERN CAPE HIGH COURT, BHISHO ,REVIEW CASE
DATE

HEARD: 04 November 2008

DATE

DELIVERED: 13 JULY 2009

JUDGE(S):

ACTING JUDGE KEMP AND JUDGE SANGONI

LEGAL

REPRESENTATIVES –

CASE

INFORMATION –

1

Nature of proceedings : This is a review case in which the Accused was detained to a mental institution in terms of section 77 of the Criminal Procedure Act 51 of 1977 pending a decision of the judge in chambers. The Magistrate's findings in terms of section 77(2) and (6) of the Criminal Procedure Act No 51 of 1977 were reviewed and set aside.

IN
THE HIGH COURT OF SOUTH AFRICA
EASTERN
CAPE: BHISHO
REVIEW
CASE NO A 4954/07
CASE
NO: CA&R 5/09
In

the matter between: THE
STATE
And
SHIYA
VITI
REVIEW

JUDGEMENT

KEMP AJ

- [1] This matter was referred to this court by the magistrate, Mdantsane, for special review, with the comment that the district court did not have jurisdiction to make the order that the accused be detained pending a decision of the Judge in Chambers. It should be noted that it was not the magistrate who made the impugned decision who referred the matter, as he was apparently away on a course when the matter came to the attention of one of his colleagues for consideration.
- [2] The accused had been charged with murder in the District court in Mdantsane. The magistrate, purporting to act in terms of Section 77 (6) of the CPA,[1] and after admitting and considering the evidence tendered by the prosecution, which was in the form of a written statement by an eye witnesses to the alleged murder, as well as statements of other witnesses, found that the accused had probably committed the offence and made an order detaining the accused at a mental institution pending the decision of a Judge in Chambers in terms of section 47 of the Mental Health Care Act.[2]
- [3] A district court does not have the necessary jurisdiction to hear a charge of murder.[3] Although Section 110 of the CPA provides that if the accused does not plead that the court has no jurisdiction, that the court may dispose of the matter, this relates mainly to territorial jurisdiction. It can not add to the jurisdiction of the court as far as offences are concerned.
- [4]

- [4] In the instant case, the finding of the panel of Psychiatrists who interviewed the accused was that he was unable to follow court proceedings. It appears then that he could in any event not have made an informed decision as to whether to raise the special plea relating to jurisdiction or not, and that the court should, in line with the provisions of s 110 (2) of the CPA, have referred the matter to the court that had jurisdiction to hear the matter, in this case, either the Regional Court or the High Court.
- [5] It appears that although the accused was initially unrepresented,
- that he had legal representation at the time that the psychiatric reports were handed in and when the prosecutor handed in the
- statements relating to the commission of the offences.
- [6] Section 77(1) of the CPA provides that if the accused is not capable of understanding the proceedings so as to make a proper defence, that the court shall direct that the matter shall be enquired into and be reported on in accordance with the provisions of section 79.
- [7] Section 77 (2) provides that if the finding contained in the report is unanimous and is not disputed by either the prosecutor or the accused, that the court may determine the matter on such report without hearing further evidence. Once the court makes a determination as to whether the accused is fit to stand trial or not, the court moves on to consider the provisions of subsection 6 which provides inter alia, that if the court is satisfied that it can determine that the accused committed the act in question on a balance of probabilities, it may order that the accused 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.
- [8] Purporting to act in terms of section 77(2), and after finding that the accused had probably committed the act in question, the magistrate then ordered that the accused 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.
- [9] It seems from a reading of the statements contained in the file that his finding that there was sufficient evidence to find that the accused committed the act in question cannot be faulted.
- [5]
- [10] It appears that the result that was achieved was just and but for the fact that the magistrates court lacked the necessary jurisdictional power to hear the matter, was the same result that would have been

achieved had the accused been referred to the correct court. It must also be borne in mind that the accused has by now probably been settled in an institution, is hopefully receiving appropriate treatment, and that to set aside the magistrate court's order and refer the matter back to the magistrates court so that it can be referred to either a Regional Court or a High Court would probably have the effect of disrupting whatever treatment the accused is receiving at the moment. This court has had the benefit of the same information that the magistrate had and is

therefore in as good a position as the magistrate was to make a final decision regarding the matter.

[11] In the event I am of the view that an appropriate order would be as follows:

- (a) The magistrate's findings in terms of section 77(2) and (6) of the Criminal Procedure Act No 51 of 1977 are hereby reviewed and set aside.
- (b) The accused is declared to be a person who is unable to follow court proceedings so as to make out a proper defence and was at the time of the alleged offence, although able to appreciate the wrongfulness of the act in question, unable to act in accordance with such appreciation of wrongfulness.
- (c) It is hereby ordered that the accused 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.

Dated at Bhisho this 13th day of July 2009

LD KEMP

ACTING JUDGE OF THE HIGH COURT

I agree

C T SANGONI

JUDGE OF THE HIGH COURT

[1] The Criminal Procedure Act No 51 of 1977

[2] No 17 of 2002.

[3] See s 89 of the Magistrates' Courts Act 32 of 1944.

[4] S v M 1979 (2) SA 959 (T)

[5] In S v Sithole 2005 (1) SACR 311 (at 315 h-i), the court found that it was satisfied that there was sufficient evidence to find that the accused had committed the actus reus, based solely on the submission of the prosecutor, which the accused's legal representative accepted, that the investigating officer had assured him that there was evidence that the accused had committed the acts in question and that there were witnesses available to confirm such evidence.

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Prepared on 10 October 2026 · Esheria