REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 29/2012

In the matter between:

THE STATE

and

TEOFILIA MARKUS TASHIYA

High Court NLD Review Case Ref No.: 116/2012

Neutral citation: *The State v Tashiya* (CR 29/2012) [2012] NAHCNLD 13 (05 December 2012)

Coram: LIEBENBERG J and MILLER AJ

Delivered: **05 December 2012**

Flynote:

Criminal procedure – Trial – Mental state of accused – South African amendment to s 77(6) of Criminal Procedure Act 51 of 1977 not applicable to Namibia.

Criminal procedure – Review – Powers of court discussed and considered – Direction under s 78(6) of CPA not reviewable under ss 302 and 304 – High Court has review powers at common law – Direction accordingly reviewable under common law.

Criminal prosedure – Section 118 of the CPA – Non-availability of judicial officer after plea of not guilty – Section equally applies to case where plea of not guilty entered in terms of s 113 – Evidence adduced at the trial about accused person's mental condition – Trial cannot continue before different presiding officer.

Criminal procedure – The accused — Report on mental state of accused in terms of s 79 of Act 51 of 1977 — Court should follow guidelines and requirements set out in s 78.

Criminal procedure — The accused — Report in terms of s 79 of Act 51 of 1977 — Where accused unrepresented, not sufficient simply to furnish accused with copy of report — Court should make every effort to explain report to accused, especially where report needs to be interpreted into his own language. *S v Mika,* 2010(2) NR 611 (HC) applied.

Summary: After the accused pleaded guilty to the charge, a plea of not guilty was entered subsequent whereto evidence was heard regarding her mental condition. The court directed that the matter be enquired into and be reported on in accordance with the provisions of s 79 of Act 51 of 1977. When the report came to hand proceedings continued before a different magistrate who, acting on the conclusions stated in the report, discharged the accused [but directed in terms of s 78(6) that the accused be detained in a mental hospital or a prison pending the signification of the decision of the State President]. Whereas evidence had been adduced at the trial it was irregular to continue proceedings before a different magistrate, vitiating such proceedings. The conclusion as stated in the psychiatric report, and on which the court relied

when giving the direction, is contradicting and the court should not have relied thereon without hearing evidence, explaining the correctness of the findings noted in the report. A court required to give a direction under s 77 and 78 must give strict compliance to the provisions set out in the sections and follow the guidelines discussed in *S v Mika (supra)*.

ORDER

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1. The proceedings of court conducted on 14 October 2011, inclusive of the direction under s 78(6) of Act 51 of 1977, are set aside.
2. The matter is remitted to the trial court with the direction that the accused must be brought before magistrate Haihambo, who is to continue with the trial according to the guidelines set out herein.

JUDGMENT

LIEBENBERG J (MILLER AJ concurring):

[1] On the 20th of July 2011 the accused appeared before magistrate Haihambo in the Oshakati magistrate's court on a charge of housebreaking with intent to steal and theft to which she pleaded guilty. The court questioned the accused pursuant to the provisions of s 112 (1)(*b*) of the Criminal Procedure Act 51 of 1977 (hereinafter 'the Act'), but subsequently entered a plea of not guilty.

[2] The reason for the court *a quo* to follow this course is evident from the accused's answers when questioned by the court, in that she explained that

she ‘was pushed by the devil; did not know what she was doing; that she suffers from an illness and that she did not appreciate the wrongfulness of the act’.

[3] The matter was postponed until such time when an enquiry in terms of s 78 of the Act was held during which evidence was heard. The accused was subsequently referred for psychiatric evaluation. The case was thereafter postponed pending the finalisation of the report.

[4] When the psychiatric report came to hand the accused was again brought before the court on 14 October 2011, but this time before magistrate Mikiti. The record of the proceedings that followed reads as follows:

> ‘Matter was remanded to mental observation. Report before court. According to the psychiatric report, accused person was suffering from residual symptoms at this illness and was incapable of appreciating the wrongfulness of her action.
> State closes it(s) case against accused person. Does not dispute report from the doctor.
> Accused person does not dispute the doctor’s report.
> Court: Accused discharged, but declared a state prison’s (sic) patient in terms of Section 78 (3) Criminal Procedure Act 51/77.’

[5] The matter came before me by way of ‘Special Review’, though there is nothing on record explaining why this course was taken. It would appear that the magistrate when sending the proceedings on review, erroneously acted in terms of the amended version of s 78(6) of the Act as it currently reads in South Africa; which amendment was not enacted in this jurisdiction. In terms of the amended section (s 78(6)(*b*)(i)(*aa*)) in the South African context, the accused must ‘be detained in a psychiatric hospital or a prison *pending the decision of a judge in chambers* . . . .’. The magistrate erred when sending the proceedings for review.

[6] As mentioned, the amendment of s 78(6) in the South African context does not apply to this jurisdiction where *no* provision is made in the Act for

review procedure where a lower court, acting in terms of either ss 77(6) or 78(6) of the Criminal Procedure Act, directs that the accused must be detained in a mental hospital or a prison, pending the signification of the decision of the (State) President.

[7] The magistrate, when acting in terms of the Act – citing s 78(3) instead of s78(6) – relied on the findings of Dr. Alibusa, the consultant psychiatrist who compiled the evaluation report in terms of s 79 of the Act. The concluding paragraph of the report reads as follows:

'**Conclusions:**

1. THEOFILIA MARKUS TASHIYA suffers from epilepsy since childhood. This could be responsible for unpredictable changes in her behaviour.
2. At time of commission of the offence, she was suffering from residual symptoms of this illness and was in**capable of appreciating the wrongfulness of his actions** (sic), in accordance of which appreciation [she] could have acted.
3. [She] is fit to stand trial and has diminished criminal responsibility.'
   (My underlining)

[8] The conclusion reached and as set out in paras 2 and 3 of the report are clearly contradicting in that the accused was (simultaneously) found to have been incapable of appreciating the wrongfulness of her actions when committing the offence charged (par 2); opposed to her being fit to stand trial as she had only diminished criminal responsibility when she so acted (par 3).

[9] In view of the contradicting findings noted in the report and the manner in which proceedings were conducted, I on 19 July 2012 requested an opinion from the Prosecutor-General on the following legal issues arising from the review at hand:

'1. Is the matter reviewable?
2. If the matter to the afore-mentioned question is in the negative and notwithstanding, it appears from the record of proceedings that a gross

irregularity was committed during the trial, does the High Court have the power to review proceedings? See *S v Gawanab,* 1997 NR 61 (HC).

3. Whereas an irregularity committed has already come to the Reviewing Judge's attention, is a formal application as provided for by Rule 53 of the Rules of the High Court still required?
4. In the absence of an application brought under Rule 53 or an appeal lodged by either party, does the High Court have the power to review proceedings notwithstanding?
5. In the present case Magistrate Mikiti commenced proceedings after Magistrate Haihambo recorded the plea and heard evidence which culminated in an order to the effect that the accused was referred for psychiatric observation as provided for in the Criminal Procedure Act. In the absence of the record reflecting as to the availability of Magistrate Haihambo and in view of what is stated in *S v Wellington,* 1990 NR 20 (HC) at 24E-H, was an irregularity committed which, in the circumstances of the case, vitiate the entire proceedings?'

[10] A memorandum dated 23 November 2012 was received from the Prosecutor-General and I am indebted to Ms Verhoef for the assistance provided herein.

[11] As regards par 1 of my letter set out above, this court already decided that an order made in terms of the provisions of s 77(6) of Act 51 of 1977 is not a conviction, neither an acquittal and thus not subject to review in terms of the provisions of s 304 of the Act (*S v Narib; S v Nyambali* and *The State v Daniel Christoffel Grunschloss*[1]). This principle equally applies to s 78(6) of the Act (*S v Wills*[2] at 108). That settles the first question.

[12] Although the Legislature has not by statutory enactment conferred upon the High Court any review powers in criminal cases except where provided for by s 304 of Act 51 of 1977, the court, in appropriate cases, does have the power at common law to exercise review powers over the decisions of the

[1] *S v Narib; S v Nyambali* 2010 (1) NR 273 (HC); *The State v Daniel Christoffel Grunschloss* (unreported) Case No CR 120/1999 delivered on 19.09.1999.

[2] *S v Wills,* 1996(2) SACR 105 (T).

lower courts. See *R v Marais*[3]; *Wahlhaus v Additional Magistrate, Johannesburg*[4].

[13] In *The State v Daniel Christoffel Grunschloss* (*supra*) the court *a quo* wrongly declared the accused a President's patient whereafter the matter was sent on review to have the order set aside. The court found that the proceedings were not subject to automatic review in terms of s 302(1)(a) of Act 51 of 1977 (or special review under s 304(4)), and stated that, although proceedings of any lower court may be brought under review before the High Court in terms of s 20 of the High Court Act 16 of 1990 on the basis of one or more of the four grounds listed therein, the order of the magistrate does not fit in under any one of the grounds listed. Furthermore, referring with approval to *S v Payachee*[5] and *Ex Parte Millsite Investment Co. (Pty) Ltd*[6] the court concluded that in the circumstances of that case, it was entitled to exercise its inherent powers of review, and consequently ordered the substitution of the order made by the magistrate under s 77(6) of Act 51 of 1977 with another.

[14] In *The State v Kenny Misika Nasikambo*[7] proceedings in which the accused was wrongly declared a President's patient, were sent on special review. The court of review set aside the order without stating in its reasons whether it derived jurisdiction to review the matter under common law on any statutory provisions, for example s 304 of Act 51 of 1977 or s 20 of the High Court Act 16 of 1990. In the absence of any reference made in the judgment to statutory provisions, it would appear that the court derived its reviewing powers at common law.

[15] I am in respectful agreement with the *dictum* enunciated in the *Grunschloss* matter (*supra*) and equally find that the matter at hand requires

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[3] *R v Marais*, 1959 (1) SA 98 (T).

[4] *Wahlhaus v Additional Magistrate, Johannesburg,* 1959 (3) SA 113 (A) at 120A.

[5] *S v Payachee,* 1973(4) SA 534 (NC) at 536E-G.

[6] *Ex Parte Millsite Investment Co. (Pty) Ltd,* 1965(2) SA 582 TPD at 585F-H.

[7] *The State v Kenny Misika Nasikambo,* (unreported) Case No CR 205/1995 delivered on 02.11.1995.

the interference by this court by invoking its inherent powers of review at common law to set aside the court *a quo's* direction to have the accused detained pending the signification of the decision of the President. As a result of the order of detention a grave injustice resulted to the accused in that she was to be detained for an indefinite period; and the need to prevent any further injustice and prejudice suffered by the accused, is compelling. The circumstances of the case require immediate action to be taken by this court.

[16] In view of the conclusion reached above it has, for purposes of this judgment, become unnecessary to consider whether the correct procedure would have been to approach the court in terms of Rule 53 of the High Court Rules. Suffice it to say that no such application was considered by either of the parties and it can only be in the interest of justice to deal with this matter as one of urgency.

[17] I now turn to consider whether an irregularity was committed when a different magistrate commenced proceedings after the accused had pleaded before another magistrate, who, by then, had heard evidence pertaining to the accused's mental condition and subsequent referral in terms of s 78(2) of the Act. The record of the proceedings conducted on the 14th of October 2011by magistrate Mikiti does not reflect why the matter was not brought before magistrate Haihambo on the said date, and on what authority magistrate Mikiti acted when continuing with the trial. Section 118 of the Act makes plain that where a judicial officer is not available to continue with the trial *after the accused has pleaded and no evidence has been adduced yet,* the trial may be continued before another presiding officer. Although the accused *in casu* pleaded guilty to the charge, a plea of not guilty was entered. The legal position of the accused is as if he pleaded guilty from the beginning and the provisions of s 118 would only find application, provided that (a) no formal admissions constituting evidence were made up to that stage of the proceedings; and (b) no evidence has been adduced. Once formal admissions have been made or evidence had been adduced, the trial cannot continue before a different presiding officer.

[18] In this case magistrate Haihambo has heard evidence from the accused's mother pertaining to her mental condition. This was done in order to lay a basis from which the court would be entitled to direct an enquiry into the accused's state of mind when committing the offence, as provided for in s 79 of the Act. This in my view constituted evidence adduced at the trail and therefore proceedings could not be continued before magistrate Mikiti. This constituted an irregularity which vitiates the proceedings of 14 October 2011, inclusive of the direction given in terms of s 78 of the Act, which falls to be set aside.

[19] The matter must be remitted to magistrate Haihambo for continuation of the trial and in view thereof, her and the State's attention is drawn to the last paragraph of the psychiatric report which is clearly contradicting as the accused cannot at the same time be *incapable of appreciating the wrongfulness of her actions* and be fit to stand trial as she has *diminished criminal responsibility.* This is a flagrant mistake made by the psychiatrist on which an unobservant court acted by invoking the provisions of s 78(6), resulting in the detention of the accused for an indefinite period pending the signification of the decision of the President.

[20] In view of the contradicting conclusions reached in the psychiatric report prepared by Dr. Alibusa, the trial court cannot rely on the findings made therein and in the circumstances the doctor ought to be subpoenaed as a witness in order to give evidence on his findings. This would afford the unrepresented accused to be properly informed of the findings made during the observation period and give her the opportunity to dispute same where necessary.

[21] In *S v Mika*[8] it was said that when dealing with a report on the mental state of an accused in terms of s 79 of Act 51 of 1977 the court should give

[8] *S v Mika* 2010(2) NR 611 (HC).

strict compliance with the requirements set out in s 78 where it involves unrepresented accused and the following appears at 615 para 10:

'Where the accused is unrepresented (as in this case), then the court should assist the accused by explaining to him as clearly as possible the meaning and effect of legal terminology used in the report to afford him or her the opportunity to make an informed decision; whereafter the court must determine whether the accused disputes the finding or not and to provide reasonable assistance in the calling of witnesses. The accused in casu was unrepresented and in her reply the magistrate stated that the accused was provided with a copy of the report in court. It does not appear from the record of proceedings that the content of the report was interpreted to the accused at the time when it was handed in and even if it was done, it seems inconceivable that the accused would have understood the purview thereof; neither what options were open to him, ie that he could dispute the finding reached by the psychiatrist who compiled the report. The magistrate's omission to act accordingly, in my view, would amount to an irregularity vitiating the proceedings.' (My emphasis)

[22] Had the magistrate in the present case followed the guidelines set out in the *Mika* case, then he, in all probability, would have realised that the conclusions reached in the psychiatric report are contradicting and cannot be relied upon; and therefore, it has become necessary to hear the evidence of the psychiatrist and require from him to explain the findings reached in his report.

[23] Resultantly, the following order is made:

1. The proceedings of court conducted on 14 October 2011, inclusive of the direction under s 78(6) of Act 51 of 1977, are set aside.
2. The matter is remitted to the trial court with the direction that the accused must be brought before magistrate Haihambo, who is to continue with the trial according to the guidelines set out herein.

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JC LIEBENBERG

JUDGE

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PJ MILLER

ACTING JUDGE