CASE NO.: CC 32/2001

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 111 OTHERS

In the Application of:

ISAYA SHAFT KAMWANGA

APPLICANT

and

THE STATE

RESPONDENT

CORAM: **HOFF, J**

Heard on: 20 July 2011; 25 – 26 July 2011; 19 September 2011; 26 September 2011

Delivered on: 03 October 2011

JUDGMENT

Enquiry i.t.o. Sec 79(1) of the CPA

HOFF, J: [1] This is an enquiry in terms of section 79(1) of the Criminal Procedure Act, Act 51 of 1977. The accused person (accused no. 43) Mr Isaya Shaft Kamwanga was referred for observation to a mental hospital in terms of which a report by a psychiatrist, dealing with the provisions of section 77 as well as section 78 of Act 51 of 1977, had to be provided to this Court.

[2] Section 77 deals with the capacity of an accused person to understand court proceedings whereas section 78 deals with the ability of an accused person to appreciate the wrongfulness of his or her act (at the commission of the alleged offence) or his or her ability to act in accordance with an appreciation of the wrongfulness of his or her act.

[3] At the inception of a trial-within-a-trial Mr Samukange who appears on behalf of the accused person indicated that he was unable to formulate the response of the accused person to the allegation that the accused person had made certain pointings-out to a police officer, due to the fact that he could not take proper and meaningful instructions from the accused person. This Court was also informed that the accused was suffering from a mental illness and was unable to follow the court proceedings.

[4] This Court was subsequently provided with a report in terms of the provisions of section 79(1) by Dr N F Mthoko who is a psychiatrist employed by the Ministry of Health and Social Services and attached to the Windhoek Central State Hospital.

[5] It is common cause that the accused had also during the year 2002 been referred for observation and that Dr Mthoko had at that stage also signed a report in terms of the provisions of section 79(1).

[6] In both the 2002 and 2011 reports the clinical diagnosis was that the accused was not mentally ill, that he is fit to stand trial, and he was not affected by mental illness at the time of the alleged offence and had the ability to appreciate the wrongfulness of his act.

[7] Dr Mthoko was called by the State as a witness in this enquiry. Dr J T Mudzanapabwe a clinical psychologist who drafted a “psycho-legal” report was called to testify on behalf of the accused person.

[8] In his report the clinical psychologist concluded that the accused did not suffer from a mental condition which could have impaired his ability to appreciate the wrongfulness of the alleged offence. In addition he concluded that the accused is fit to stand trial “but with diminished capability”. One of his recommendations was that this Court should continue with its proceedings but with the provision that a mental health professional (psychologist) should assist the accused person as a vulnerable witness.

[9] It should be apparent that the psychiatrist and the clinical psychologist were of the view that at the time of the commission of the alleged offence(s) the accused was able to appreciate the wrongfulness of his actions.

[10] Furthermore, save for the qualification “but with diminished capability” both the clinical psychologist and the psychiatrist were of the view that the accused is fit to stand trial.

[11] An interesting fact, which is common cause, is that this clinical psychologist was part of the evaluating panel during the year 2002 and that he at that stage agreed with the clinical diagnosis.

[12] Mr July who appeared on behalf of the State in his heads of argument raised a point *in limine* to the effect that in terms of section 79 of Act 51 of 1977 only a report from a psychiatrist may be received by this Court in order to determine the mental status of a person suspected to be suffering from mental illness. It was submitted that since Dr Mudzanapabwe is a clinical psychologist his report and testimony in Court should be ignored.

[13] Before I deal with the point *in limine* I briefly need to refer to the provisions of sections 77(2) and 78(3) which provide that if the finding contained in the report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the Court may determine the matter on such report without hearing further evidence.

[14] In my view the conclusions reached by the psychiatrist in her two reports do not materially differ from the conclusions reached by the clinical psychologist. The only difference is the qualification (referred to *supra*) namely that the accused

person is fit to stand trial but with "diminished capability", and the recommendation that the accused needs to be assisted as a vulnerable accused person.

[15] Mr Samukange urged this Court "to make law" and to adopt the Zimbabwean position with reference to the provisions of section 319 of the Zimbabwean Criminal Procedure and Evidence Act which so it was submitted recognise the fact that in certain circumstances a witness may be regarded as a vulnerable witness. In terms of this Act certain measures are put in place to try and protect such vulnerable witness one of which is to appoint a support person for the vulnerable witness.

[16] In this regard this Court was referred to the case of *Zimnat Insurance Company Limited v Chawanda 1990 (2) ZLR 143 (SC) at 153* where Gubbay ACJ (as he then was) expressed himself as follows:

> "To the contention that if this Court were to so modify the law it would be interfering with the prerogative of Parliament, we would answer that an affirmative decision will not make new law, but simply have the effect of applying the modern understanding to the *Lex Aquilia* in a new specific situation.
>
> Even if confirmation of the appellant's liability to the respondent should not meet with disapproval as being an encroachment upon the discretion reposed in the law-giver to change the law, we would strongly defend the Judiciary's right to do so. Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values to altering views of justice. If it fails to respond to these needs and is not based on human necessities and

> experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose."

and continues as follows on p. 154:

> "It sometimes happen that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by Legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that Judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process."

[18] In the aforementioned case the sole issue on appeal was whether in terms of the provisions of the Customary Law and Primary Courts Act, 1981 a widow of an unregistered customary union whose husband had been killed by an act of negligence has a claim in law for damages for loss of support against the person who caused the death, or who employed the person who had caused it, or who had insured him against such contingency.

[19] The views of Gubbay ACJ (as he then was) must be seen in context, namely that those remarks were uttered during the course of the interpretation of local (Zimbabwean) legislation as well as the applicable common law principles.

[20] I may to a large extent agree with the views expressed (*supra*) but it is a different kettle of fish to expect of this Court to transplant and to apply statutory provisions of a foreign jurisdiction. There are no corresponding provisions contained

in the Namibian Criminal Procedure Act, Act 51 of 1977, and it would be rather unhelpful and irregular to adopt the approach suggested by Mr Samukange.

[21] Returning to the point *in limine* it was submitted by Mr July with reference to the provisions of section 79 that no mention is made of a report by a psychologist and that the operative word is "psychiatrist". Mr July referred in particular to section 79(12) which reads as follows:

> "For the purposes of this section a psychiatrist means a person registered as a psychiatrist under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974)."

[22] He referred this Court to the "Commentary on the Criminal Procedure Act" by Du Toit *et al* where on authority of the case *S v Loyens 1974 (1) SA 330 (CPA)* it was held that a court may only accept reports compiled by psychiatrists', not clinical psychologists even if they are registered.

[23] I have my doubts whether the considerations in the *Loyens* matter are on all fours with those in this enquiry.

In the *Loyens* matter the accused had been charged with theft. After evidence had been adduced, the magistrate made a finding in terms of section 29(1) of the Mental Disorders Act, 38 of 1916, that at the time of the commission of the offence, the accused was mentally disordered or defective.

[24] In arriving at his finding the magistrate had relied on the evidence of a clinical psychologist. On review it was held, on the evidence, that it could not be found that the clinical psychologist was competent to give *medical evidence*, as required by section 29(1) of Act 38 of 1916.

[25] In the case of *S v Ramokoka 2006 (2) SACR 57 WLD,* dealing specifically with the enquiry in terms of sections 77, 78 and 79 of Act 51 of 1977, it was held in terms of the applicable statutory provisions in South-Africa, that a report by a *psychiatrist* is compulsory in such an enquiry though a report by a clinical psychologist may be accepted as an additional report.
In terms of the provisions of the relevant legislation in South Africa (section 79(1) (b((iv)) a report by a clinical psychologist may be received "where the court so directs". There is no such corresponding provision in the applicable Namibian legislation (section 79 of Act 51 of 1977).

[26] In *S v Shivute 1991 (2) SACR 656 (Nm)* the criminal responsibility of the accused was in issue. The appellant, a nurse, alleged that she was not criminally responsible for her actions since at the time she had administered a fatal overdose of chloroquine to a patient she was "not consciously aware" that she was administering the wrong prescription "but only became so aware when the deceased child started reacting to the chloroquine".
The appellant made certain admissions but did not give evidence in the court *a quo*. A clinical psychologist was called to testify on her behalf.

[27] O'Linn J (as he then was) at p. 660 on the question of criminal responsibility stated that the law presumes that an accused is of sound mental health and is criminally responsible. Furthermore when the issue is whether the accused was not criminally responsible because of a mental illness or defect, the *onus* of proof rests on the accused and such *onus* must be discharged by proof on a balance of probabilities.

On p. 665 e – f the following appears:

> "… in the case of the so-called "statutory" pathological illness or defect referred to in s. 79 of Act 51 of 1977, the assistance of a panel of *psychiatrists* is compulsory and therefore indispensible.
> Dr Raath is not a psychiatrist but a clinical psychologist and in this case the allegation is at best that the accused was not criminally responsible by reason of a temporary non-pathological cause."

[28] My interpretation of the quoted passage is that a report by a psychiatrist, is prescriptive in terms of the provisions of section 79 by the emphasis of the word "*psychiatrists*".

[29] The view that in an enquiry in terms of section 79 a report by a psychiatrist is compulsory, is reinforced by the provisions of section 79(12).

[30] I am accordingly of the view that the point raised *in limine* should succeed.

[31] I need however to remark on the issue of "diminished capability".

[32] Section 78(7) of Act 51 of 1977 reads as follows:

> "If the Court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when *sentencing* the accused."
> (Emphasis provided).

[33] Burchell and Hunt in South African Criminal Law and Procedure Volume 1, 3rd edition (1997 edition) at p. 176 states that:

> "Diminished responsibility is usually the finding in cases of mental deficiency which do not amount to legal insanity. In deciding whether a finding of diminished responsibility is justified the court will be guided by the specialist medical evidence, but will also take all the other evidence into account."

[34] On p. 175 the authors remark that when at the time of the crime's commission, the accused's mental condition, although abnormal, does not warrant acquittal, he will be legally responsible but a lesser punishment may be imposed upon him.

[35] It was apparent during the testimony of the clinical psychologist that he was not familiar with this *legal concept* of diminished responsibility.
His recommendation (based on his concept of "diminished capability") that the Court will benefit from the services of a psychologist to assist the accused as a vulnerable witness was founded on the interviews he had with the accused person

during which the replies of the accused person were described as over inclusive, over elaborate and that accused had the tendency of drifting away from the subject.

[36] In the result the point *in limine* succeeds and the Court makes the following findings:

1. At the time of the commission of the alleged offences the accused was criminally responsible for his actions, was able to appreciate the wrongfulness of the alleged offences and to act in accordance with such appreciation.

2. The accused is capable of understanding the proceedings and is fit to stand trial.

_____

HOFF, J

ON BEHALF OF THE APPLICANT: **MR SAMUKANGE**

(Appl. i.t.o. 77, 78 & 79 of CPA - Accd No. 43 –

Mr Isaya Shaft Kamwanga)

Instructed by: **DIRECTORATE OF LEGAL AID**

ON BEHALF OF THE RESPONDENT: **MR JULY**

Instructed by: **OFFICE OF THE PROSECUTOR-GENERAL**