

IN THE HIGH COURT OF NAMIBIA

CASE NO.: CC 17/2008

In the matter between:

THE STATE

and

ROMEO MANELITTO SCHIEFER

CORAM: SHIVUTE, J

Heard on: 2012 June 15

Delivered on: 2011 June 21

RULING

SHIVUTE, J: [1] The accused person is charged with two counts of murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, (Act 51 of 1977).

[2] Before the beginning of the trial the accused was, at the request of the defence referred to Forensic Psychiatric Unit, Windhoek Central Hospital, by the Judge who initially handled the matter for observation in terms of section 77 (1) and 78 (2) of the Criminal Procedure Act. Two reports by two psychiatrists in the employment of the state were made in terms of section

79 of the Act.

[3] Before the accused pleaded to the charges counsel for the accused indicated as follows:

“With regard to the psychiatrist reports, while we are at this point regarding the exhibits, we do not have any objections to the handing of the psychiatric report as well as the contents and the findings of Doctor Mthoko. We do not have a problem with the findings of Doctor Jafet but there are certain remarks that he made in his report that we have a problem with which we would like him to come and explain which we do not agree with in doctor Jafet’s report. That is with regard to exhibit F and G”.

It is not apparent from the record why the accused was referred to psychiatrists.

[4] The matter proceeded until the state had closed its case. Counsel for the accused submitted that before the accused goes to the witness stand he would like him to be evaluated by the psychologist because he had visited the psychologist prior to the alleged commission of these offences. The application for the accused to be referred to a psychologist was granted. After the accused consulted with the psychologist counsel for the accused submitted that the psychologist was not in a position to evaluate the accused; it must be done by a psychiatrist.

[5] Counsel for the accused proceeded to make an application for the accused to be referred for mental observation preferably by a private psychiatrist. He argued that the court may make such an order in terms of section 79 (1) b (iii) of the Criminal Procedure Act. Counsel for the accused submitted further that the report of Dr Jafet, one of the psychiatrists who examined the accused, does not cover all possible problems that could have affected the accused at the time of the commission of offences. The court was referred to section 78 (7) which 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."

[6] Counsel for the accused in an endeavour to persuade the court referred the court to several passages in the Commentary on the Criminal Procedure Act by Du Toit *et al*, namely to section 79 (4) (c) (d) and the matter of *S v Mphela* 1994 (1) SACR 488 (A) discussed at page 13/7 of the commentary. He continued to refer the court to the case of *S v Gesualdo* 1997 (2) SACR (T) discussed at page 13/12A; as well as to hysterical dissociation discussed at page 13/12B. He argued further that the court cannot make a finding under section 78 (6) without receiving reports from psychiatrists under section 79 following the procedure prescribed in section 78 (2) of the Criminal Procedure Act. He again referred the court to the contents of the report discussed at page 13/15 which states that:

"The report should be such as to give the court and counsel guidelines to detect possible psychological reasons for the acts of the accused. Emotional factors are of the utmost importance."

[7] Counsel for the defence again referred the court to a passage at page 13/15 of the Commentary which states:

"The questions posed in sections 79 (4) (c) and (d) are not without difficulty. Moving from medical concepts (about mental illness) to legal concepts of criminal responsibility, requires a 'leap in logic and takes witnesses beyond their expertise'... The court should decide upon responsibility, relying on the expert evidence about the

accused's motivation and mental state."

Although the accused did not raise mental defect or insanity as a defence when he pleaded or during his trial it is trite law that an alibi and mental defect may be raised or may be used jointly as a defence.

[8] It has not come out clearly why the defence would like the accused to be referred for psychiatric observation. If I understand the submission correctly, the accused should be referred to a psychiatrist because he was in the past seen by a psychologist; there is a remark made by Dr Jafet the defence is not happy with; there is a possibility that the accused suffered from reduced criminal responsibility caused by emotional factors or external stimuli.

[9] On the other hand counsel for the state opposed the application by arguing that the application was brought without any basis and it was not sound in law. Counsel for the state continued to argue that the defence has not laid any basis why the court should allow such an application taking into consideration the two psychiatrists reports made in terms of section 79 which included the aspects of diminished responsibility counsel for the accused is referring to. According to counsel for the state, the report by Dr Mthoko covered the nature of the inquiry made. Concerning the comments included in Dr Japhet's report counsel for the state referred the court to section 79 (7) of the Act, which states:

"A statement made by an accused at the relevant inquiry shall not be admissible evidence against the accused at criminal proceeding, except to the extent to which it may be relevant to the determination of the mental condition of the accused in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible."

It is worth to mention that Exhibit "G" the report by Doctor Jafet is admitted in evidence to the extent it is allowed by the provisions of section 79 (7).

[1] Continuing with submissions, counsel for the state identified the requisites to be met for the accused's mental position to be inquired into, namely:

(a) If it is alleged that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged.

(b) If it appears to the court that the accused might not be criminally responsible for such a reason for the offence charged. The court was referred to the case of *S v Mogorosi* 1979 (2) SACR at 938 (head notes).

The emotional factors and personality mentioned by counsel for the accused sounds more of non-pathological criminal incapacity, therefore they do not need a psychiatric report so, counsel for the state argued.

[11] The court having listened to arguments from both counsel, it is now called upon to decide whether there is a need for the accused to be referred for evaluation by a psychiatrist. The legal principles referred to me by counsel for the accused are not in dispute. What has not been brought to the fore is the extent, if any, to which those principles are applicable to the matter before me. Referral to a psychiatric observation cannot be granted for the mere asking. There must be a basis laid for that. The passage in the *Mphela* case *supra* cited by counsel for the defence went further than what counsel read to the court.

"Where it appeared from the accused's answers and general demeanour, from the fact that his counsel had difficulty to consult with him and counsel for the state found it difficult to get through to him, that the accused possibly lacked criminal imputability, the court ought to have proceeded in terms of section 78 (2).

No allegation relating to factors mentioned in the passage above was made in this case. It is therefore difficult to comprehend how the case could be of the assistance to the application. Section 78 (2) enjoins a court in a peremptory language to direct that the accused's mental condition be inquired into when either of the following requisite is present as rightly pointed out by counsel for the state -

“firstly, if it is alleged that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged, or secondly if it appears to the court that the accused might for such a reason not be so responsible .”

There should be a reasonable possibility emerging from an objective consideration of all the information placed before the court, for the court to direct an inquiry. See *S v Mogorosi supra*.

[12] I am not satisfied from the information placed before me from the Bar that any such reasonable possibility exists. There is no basis laid for the application to refer the accused for observation or investigation. The emotional factors as well as external stimuli referred to by counsel for the accused are not covered by section 78 (2).

[13] In the result the following order is made.

The application is refused.

SHIVUTE, J

ON BEHALF OF THE STATE

Ms Wantenaar

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF DEFENCE

Mr Christiaans

Instructed by:

Directorate: Legal Aid