

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

RULING ON APPLICATION FOR MENTAL OBSERVATION

CC No: 03/2020

In the matter between:

**THE STATE**

v

**HAMUKUSHI JOSEPH MAX SAMUEL**

**ACCUSED**

**Neutral citation:** *S v Samuel* (CC 3/2020) [2020] NAHCNLD 140 (28 September 2020)

**Coram:** JANUARY J

**Heard:** 16 September 2020

**Delivered:** 28 September 2020

**Flynote:** Mental state of accused- Application for referral in terms of provisions of sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977 – Factual or medical basis required before referral - Mere submissions from the bar not satisfactory – Epilepsy not a mental illness *per se*.

**Summary:** The accused is indicted for housebreaking with intent to murder and murder read with the provisions of the Combating of Domestic violence Act, Act 4 of 2003 and a second count of attempted murder. The pre-trial proceedings are finalized and the case was set down to fix a trial date. The accused however, applied to be referred for mental observation. No evidence was presented to lay a basis for such referral. It was submitted that the accused suffers from epilepsy as a result of being hit with a stick on the head. Counsel wants to establish the severity of the injury. This court found that the application is premature as there is no basis for a referral. Epilepsy is not a mental illness.

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**ORDER**

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The application to refer the accused in terms of section 77, 78 and 79 of the CPA is refused.

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**RULING**

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**JANUARY J:**

Introduction

[1] The accused stands indicted for: 1. Housebreaking with intent to murder and murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003; 2. Attempted murder.

[2] The summary of substantial facts reflects as follows: 'At the time of her death, Hambeleleni Ndahofa Absalom, the deceased in this matter, and the accused were in a domestic relationship as they were in an actual intimate or romantic relationship as girlfriend and boyfriend. During the evening hours on 16 June 2019 at Okasopashopa Village, Etayi in the district of Outapi the accused broke and entered into the room of the deceased and flagitiously

and inhumanely cut the deceased with a panga all over her body. After assaulting the deceased the accused turned on Lovisa Hamutenya as she was trying to stop him from assaulting the deceased. The accused then hacked her on her body as per count 2. Thereafter the accused fled the scene. The deceased died at the scene due to hypovolemic shock and head injury as a result of assault.'

[3] The State is represented by Ms Petrus and the accused by Mr Japhet instructed by the Directorate of Legal Aid.

#### Pre-trial proceedings

[4] The pre-trial proceedings are finalized. The State compiled and served the pre-trial memorandum. It was replied to with sensible answers. On a question of whether or not the accused intends to invoke the provisions of sections 77(1) and/or 78(2) of the Criminal Procedure Act, 51 of 1977 (the CPA), the answer was: 'The accused does not intend to invoke or utilize the said statutory provisions.' The pre-trial review conference was held wherein the minutes reflect sensible indications of what will be admitted and disputed. The matter was on 18 June 2020 remanded to 22 July 2020 for status hearing and fixing of a trial date.

[5] Surprisingly, on 22 July 2020, Mr Japhet informed the court that the matter should be set down for an application in terms of section 77 of the CPA. The matter was then postponed to 16 September 2020 for the application.

[6] On 16 September 2020, Mr Japhet brought the application on the strength of the case of *S v Thomas*<sup>1</sup> that he in the meantime discovered and perused. The application was brought only with submissions from the bar without any evidence or calling of the accused.

[7] In his contention, Mr Japhet referred to an entry in the medical passport of the accused. The passport was at the time not presented to the court. The court eventually at the end of the application requested for a copy of the passport in fairness to the accused. At the time of the application Mr Japhet was not in possession of a copy and

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<sup>1</sup> (CC 19/2013) [2015] NAHCMD 177 (3 August 2015); reported as *S v Thomas and Another* 2016 (4) NR 1154 (HC)

only provided my secretary with unidentified copies of what appears to be entries in a medical passport of someone after the court adjourned.

[8] I am referring to unidentified copies because the copies of entries do not mention anyone's name. In addition some of the entries are illegible and refer to medical terms and prescription medication that the court knows nothing about.

[9] The relevant entry relied upon reflects without a date as follows:

'11h40

'Temp 36.5

BP 102/71

Something illegible

c/o Beaten with a stick on scalp on Saturday

Beaten also on the back and behind the neck.

Patient said he fell down post beaten on Saturday

Didn't lost consciousness but felt dizzy. c/o both legs,

back pain, poor appetite, swallowing with difficulties.

Feels something blocking his throat.

No other complaints to Dr'

[10] Mr Japhet submitted that he could consult and that the accused currently understands the proceedings but that he has no medical report to indicate the severity of the injuries and no CT scan as in the case of *Thomas*. It is only the medical passport of the accused that is available. Mr Japhet implored this court to refer the accused for mental observation to establish the severity of the injuries that the accused sustained.

[11] The *Thomas* matter significantly is distinguishable from this matter at hand. In that case the accused was already sent for observation in terms of section 77(1) of the CPA. The constituted panel, although the report was compiled by one psychiatrist, found that the accused was unfit to stand trial in that he suffered from a neurocognitive disorder. There were indications that the accused might not have been criminally responsible in terms of section 78(2) of the CPA. The accused was however not examined to determine that. The court found that the conclusion reached was premature and exercised its discretion to invoke the provisions of section 79(1)(b) to have the accused re-examined by two psychiatrists.

[12] In the *Thomas* matter the accused was examined by a specialist medical practitioner and a CT scan was held, whereas in this matter it is not the case. Further the accused pleaded not guilty to the charges. In this case at hand the accused did not plead. On a subsequent appearance all of a sudden the accused in the *Thomas* matter wanted to change his plea to guilty. Counsel for the accused informed the court of his suspicion that it appeared that the accused did not comprehend what counsel conveyed to him. The accused was eventually re-sent for observation in terms of both sections 77(1) and section 78(2) of the CPA by agreement.

#### The case at hand

[13] In this case at hand, the accused did not plead. I closely observed the accused when Mr Japhet addressed the court. An interpreter was used and to my observation, the accused followed the proceedings and not once interrupted. It was only on one occasion that he corrected counsel in relation to the date when the relevant entry was made. Counsel submitted that the date was in April 2019. The accused corrected it to 03 May 2019.

[14] A further difference is that Ms Petrus is opposing the application. No evidence is presented in substantiation of the application. It is trite that a referral for mental observation is not just to be granted for the asking. It is in the first place a costly

procedure.<sup>2</sup> Secondly it may have far reaching consequences for the future of an accused in that he/she may end up in a mental institution without justification

[15] The court must be satisfied that there is some or other factual or medical basis for the allegation that an accused lacks criminal capacity. See *S v Mika* 2010 (2) NR 611 (HC) at 613J-614B where Liebenberg J referred with approval to *S v Makoka* 1979 (2) SA 933 (AD) where the headnote reads:

'A Court is not obliged to have an accused examined under the provisions of s 79 of Act 51 of 1977 when it is only alleged (without any indications of any ground) that the accused, because of mental illness, is not legally responsible. A court will always consider what grounds exist for such an allegation and whether there are grounds or not will depend upon the circumstances of each case.'

### Conclusion

[16] In my view, the application for referral is pre-mature. Counsel wants the court to refer the accused to determine the severity of the injury. There is no evidence to form the basis for referral. It was submitted that the accused suffers from epilepsy and is on medication for it according to entries in the medical passport. That may be so but there is no evidence that this ailment influences his mental state to understand the proceedings so as to make a proper defence or that he is not criminally responsible. Epilepsy is a symptom of a brain dysfunction and not in itself a mental illness. An epileptic is criminally responsible unless there is proof that he/she did not know, or could not reasonably foresee that it would be dangerous for others were he/she to adopt a certain course of conduct.<sup>3</sup> In the absence of such substantiated and firm basis for referral for mental observation the matter should proceed in its normal course.

[17] In the result:

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<sup>2</sup> See: Hiemstra's Criminal Procedure, Service Issue 2, 2009 by A Kruger at p13-17, Epilepsy

<sup>3</sup> See: Hiemstra's Criminal Procedure (supra) at p13-29, Compensation to psychiatrist and clinical psychologist.

The application to refer the accused in terms of section 77, 78 and 79 of the CPA is refused.

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H C JANUARY  
JUDGE

APPEARANCES

For the State:

Ms S Petrus

Office of the Prosecutor-General,

Oshakati

For the Accused:

Mr G Japhet

Kangumu Attorneys,

Outapi