

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 8/2019

In the matter between:

THE STATE

v

VENOSIUS HAMUTENYA

ACCUSED

Neutral citation: *S v Hamutenya* (CC 08/2019) [2021] NAHCNLD 27 (15 March 2021)

Coram: SMALL AJ

Heard: 2, 3, 4, 5, 6, 9, 10, 11, 12, 13 November 2020, 1 and 7 December 2020

Delivered: 15 March 2021

Flynote: Criminal Procedure — s 78 of the Criminal Procedure Act 1977 (Act 51 of 1977) (CPA) — Accused found not guilty because of mental illness or mental defect and detained in terms of the provisions of s 78 — Orders the accused be detained in a psychiatric hospital or prison pending the signification of the President.

Summary: The accused pleaded not guilty to murder, two charges of assault by threat and on one of common assault. In accused's plea explanation he indicated through counsel that he was unaware of his actions in respect of all charges and at the time suffered from a mental illness that prevented him from distinguishing between right and wrong. The accused was however fit to stand trial.

The State disputed a report by psychiatrists in terms of section 79 of the Criminal Procedure Act, 1977. Evidence was led which satisfied the court that the accused committed the acts alleged in the charges. The Court in terms of section 186 of the Criminal Procedure Act, 1977 called one of the psychiatrists who provided the report to give evidence. The accused was found not guilty of all charges because of his mental illness or mental defect. The court ordered him to be detained in a psychiatric hospital or correction facility pending the signification of the President in terms of s78 (6) of the CPA.

ORDER

1. The accused is found not guilty on count 1, 2, 3 and 4 by reason of mental illness or mental defect in terms of section 78(6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) as amended.
2. It is ordered that the accused be detained in a mental hospital or a prison pending the signification of the decision of the President.
3. The bail of the accused is hereby withdrawn

JUDGMENT

SMALL AJ:

Introduction

[1] The accused is charged with murder, two counts of assault by threat and one count of common assault. All four counts are read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[2] In count one, one of assault by threat, as read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 the State alleged:

'In that upon or about the 18th day of August 2017 and at or near Rupara Village in the district of Rundu the accused did unlawfully and intentionally assault Justina Haisindi Naimbondi by threatening then and there to hit or threw the said Justina Haisindi Naimbondi with a stone, thereby causing the said Justina Haisindi Naimbondi to believe that the said accused intent [intended] and had the means forthwith to carry out his threat, while there was a domestic relationship as defined in sections 1 and 3 of the Combating of Domestic Violence Act, Act 4 of 2003 in that the accused was the uncle of the complainant.'

[3] In count two, one of murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 the State alleged:

'In that upon or about the 18th day of August 2017 and at or near Rupara Village in the district of Rundu the accused hereinafter called the perpetrator did unlawfully and intentionally kill Alberth Prince Hausiku by pick [picking] him up on his legs and hit [hitting] him on the ground, while there was a domestic relationship as defined in sections 1 and 3 of the Combating of Domestic Violence Act, Act 4 of 2003 in that the accused was the uncle of the deceased.'

[4] In count three, one of common assault read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 the State alleged:

'In that upon or about the 18th day of August 2017 and at or near Rupara Village in the district of Rundu the accused did wrongfully, unlawfully and maliciously assault Paulus Lolo Hamutenya by hit [hitting] him with a fist and giving him then and there certain wounds, bruises or injuries, while there was a domestic relationship as defined in sections 1 and 3 of the Combating of Domestic Violence Act, Act 4 of 2003 in that the accused was the uncle of the complainant.'

[5] In count four, one of assault by threat, as read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 the State alleged:

'In that upon or about the 18th day of August 2017 and at or near Rupara Village in the district of Rundu the accused did unlawfully and intentionally assault Justina Haisindi Naimbondi by threatening then and there to stab the said Justina Haisindi Naimbondi with a knife, thereby causing the said Justina Haisindi Naimbondi to believe that the said accused intent [intended] and had the means forthwith to carry out his threat, while there was a domestic relationship as defined in sections 1 and 3 of the Combating of Domestic Violence Act, Act 4 of 2003 in that the accused was the uncle of the complainant.'

[6] The State was represented by Ms. Nghiyoonanye and the accused was represented by Mr. Mukonda.

[7] When charges were put to him, accused tendered a plea of not guilty on all charges. In accused's plea explanation Mr Mukonda indicated that the accused was unaware of his actions in respect of all charges and at the time suffered from a mental illness that prevented him from distinguishing between right and wrong. The accused was however fit to stand trial.

[8] The following admissions were made on behalf of accused during his plea explanation:

1. Accused admits in respect of all four counts that he was at or near Rupara Village on 18 August 2017.
2. In respect of Count 1 accused admits that Justina Hausindi Niambondi is his niece and that there is thus a domestic relationship in terms of the Combating of Domestic Violence Act, Act 4 of 2003 between them.
3. In respect of Count 2 the accused admits that the deceased Alberth Prince Hausiku passed away on 18 August 2017.
4. In respect of Count 2 the accused admits that the deceased Alberth Prince Hausiku was the son of his niece and that there is thus a domestic relationship in terms of the Combating of Domestic Violence Act, Act 4 of 2003 between them.

5. In respect of Count 3 accused admits that Paulus Lolo Hamutenya is his nephew and that there is thus a domestic relationship in terms of the Combating of Domestic Violence Act, Act 4 of 2003 between them.
 6. In respect of Count 4 accused admits that Justina Hausindi Niambondi is his niece and that there is thus a domestic relationship in terms of the Combating of Domestic Violence Act, Act 4 of 2003 between them.
- [9] After the plea explanation and these admissions were confirmed by the accused the aforesaid admissions were finally noted in terms of section 220 of the Criminal Procedure Act 51 of 1977.
- [10] The following documents were handed and marked as exhibits:
1. The Report on a Medico-Legal Post-Mortem Examination No. PM 170/2017 done and completed on 22 August 2017 at Rundu by Dr. Mulunda Christian Luboya on the body of Alberth Prince Hausiku with a confirmatory affidavit by Dr. Luboya in terms of section 212(4) of the Criminal Procedure Act, 1977 and marked as Exhibit A.
 2. The Authority for the institution of a Post Mortem Examination on the body of Alberth Prince Hausiku by the Magistrate Rundu dated 22 August 2017 and marked as Exhibit B.
 3. An Affidavit dated 18 August 2017 by Haisindi Justina Naimbondi identifying the body of the two-year-old Alberth Hausiku in terms of section 213 of the Criminal Procedure Act, 1977 and marked as Exhibit C.
 4. An Affidavit by Haisindi Justina Naimbondi dated 18 August 2017 identifying the body of Hausiku Alberth Prince to Detective Sergeant Mbala in terms of section 213 of the Criminal Procedure Act, 1977 and marked as Exhibit D.
 5. A transportation affidavit Kahonzo Evalistus Kakwena, a Namibian Police Officer, who under oath stated that he on 18 August 2017 transported the body of Hausiku Albert Prince from Rupara Village to Nankundu State Hospital in Rundu and there handed the body over to the nurses. During the transit the

deceased body suffered no further injuries was admitted in terms of section 213 of the Criminal Procedure Act, 1977 and marked as Exhibit E.

6. A sworn statement by Sergeant Martin Ndara Martin in terms of section 212(4) of Act 51 of 1977 indicating that he on 21 August 2017 received a body from Detective Constable Kuduna and allocated the Mortuary Post Mortem number of PM 170/2017 to it. On the same date Detective Constable Kuduna identified the body to him as that of Alberth Prince Hausiku to him and he identified it as such to Doctor Mulunda Christian Luboya. This statement was admitted in evidence as Exhibit F.

Summary of the viva voce evidence

[11] It is not necessary to deal in detail with the evidence of some of the witnesses. Constable M Paulus compiled a photo plan and key to it of the scene where the incident happened and showed several photographs taken during the post-mortem examination of the deceased. The photo plan and key were admitted as Exhibit G.

[12] Dr Christian Luboya Mulinda conducted the post-mortem examination on the body of the deceased. His chief post-mortem findings indicated on Exhibit A were severe head injury, intracranial bleeding, and multiple skull fractures. The cause of death was severe head injury with intracranial bleeding (haemorrhage). He stated that the deceased's injuries had the appearance of being caused by the head hitting a flat surface like the ground or a flat part of a rock. The fractures on the deceased's head would have been different if it hit rough parts or points on a rock. Children bumping heads or having their heads smashed together would not have caused these fractures and injuries.

[13] Constable Daniel Jackson Musupo was part of a group of police officers who were called out after the incident. On their way there they saw a lady next to the road holding a baby. The mother and her baby were taken to Rupara Clinic because the child was injured. He and inter alia Constable Ndara walked to the house of the accused. Constable Ndara handcuffed the accused. The accused could not give an

explanation according to the witness. The accused appeared drunk, and, according to the witness who knew him from before, not himself.

[14] Sergeant Ngepata Laurentius Kupembona stated that after this matter was reported he and other officers went to the scene. He saw a lady next to the road holding a baby. The other members jumped out of the car. He was with the vehicle that then took the mother and the child to the hospital.

[15] Lucas Mutjoko is a male nurse who was working at Rupara Health Centre in Kavango West when the mother brought the deceased in on 18 August 2017. He confirmed the external injuries on the deceased. He confirmed that notwithstanding attempts to resuscitate him the deceased passed away in the health centre.

[16] Detective Mbala Deluxe Mushabati was the one who transported the deceased to the mortuary. He also obtained statements of witnesses and visited the scene with a scene of crime officers. He took a big stone broken in two from near the fireplace and booked it in as an exhibit. On 20 August 2017 he obtained the accused's warning statement, which indicated that he wishes to remain silent. Accused also wanted to consult a legal representative from Legal Aid. The warning statement was handed in as Exhibit K. The broken stone was handed in as Exhibit 1. The witness indicated that there was no blood or other matter apparent on the exhibit. It was the only stone that was broken.

[17] Only two State witnesses gave evidence as to what transpired on the scene on 18 August 2017. They were Justina Naimbondi and Paulus Lolo Hamutenya. I believe their evidence can be dealt with together. Naimbodi was the deceased's mother, and Lolo was still a child at the time.

[18] The accused was sitting near his hut in the sun. The son of the accused and the deceased struggled as both wanted a dry palm fruit. According to Lolo, on hearing the noise, the accused went to the two children, grabbed the fruit, and threw it away. Naimbondi said the son of the accused went to complain before the accused came to grasp the deceased's hand and push the deceased, who fell on his buttocks. According to her, the accused then said: 'Today I will kill someone.' Lolo said he

slapped the deceased on the cheek before the latter fell. The accused then went back to his sitting place.

[19] Justina Naimbondi told the accused that he would take the deceased to the hospital if injured. The accused stood up and chased her with a big rock in his hand. He threw the stone at her but missed. The accused once again returned to his sitting place, and Naimbondi also returned to the premises.

[20] Naimbondi fed the children and told them that they should go to the neighbour's house after eating. This apparently angered the accused, and he again chased her. At this occasion he punched her as well. This assault was not averred in the charge in the indictment and was not mentioned in her statement.

[21] After chasing her, he returned to the fireplace where Paulus Lolo Hamutenya and the deceased were standing. Without saying anything to Lolo, the accused punched him against the head. As a result of the blow, Lolo fell against the deceased, and they both fell to the ground. Lolo stood up and ran away. The accused picked up the deceased by his legs, each hand holding a leg and hit the deceased's head on the ground twice. Lolo did not see the head of the deceased touching the ground. Only that accused was holding the deceased by the legs.

[22] Naimbondi ran away to report the incident. When she returned, the accused had a knife and said he would stab and kill the witness. When she begged to get to her child, the accused laughed and just went to sit down again. The witnesses differ, but according to them, the accused had uttered sentences like: 'Today I will kill someone; I will kill you; and you ran away, I will now kill your child.' The accused was a peaceful person until the day of the incident, and they were not afraid of him.

[23] The Police statement by Haisindi Justine Naimbondi was admitted as Exhibit H and that of Lolo as Exhibit J.

[24] The accused essentially did not challenge the version of the State. In his evidence, he was not sure enough of himself and extremely vague in his evidence. He remembers separating the children and throwing away the palm fruit but nothing else.

He stated that he was told afterwards as to what happened. He commented on several occasions that he could not remember what happened. He disputed in his evidence what the other witnesses said but could not provide his version as to what happened on the day. I gained the distinct impression that he was unsure as to what happened on the fateful day. His version that he picked up the deceased from near the fireplace and putting him on his mother's bed sounds strange. According to him, the police asked him where the deceased was, and he went to fetch the deceased from his mother's bed and handed him over. This is contradicted by Naimbondi who said she took the deceased to hospital after she picked him up at the scene.

[25] Photocopies of the accused's medical passports were handed in as Exhibits O and M. According to the accused, he has been treated since 2014 and was receiving pills for his condition. He handed his prescriptions to the court to inspect, and it was identified as Haloperidol and Biperiden.

[26] His mother, Helene Kasiku Katanga, also gave evidence for the defence. She confirmed that she was not at home at the time of the incident as she went to a funeral and left the accused with the children at home. She was only informed of what transpired in her absence later. She also explained how the accused's conduct changed from before 2014 till August 2017. He changed from a productive person who fished, ploughed, and built houses to someone not doing much. She confirmed that he received medication and had what she called attacks. She also said that the accused's wife left him because he was mad and did nothing productive.

[27] For purposes of this case, I therefore essentially have the version of the State witnesses Naimbondi and Lolo about what happened on the scene of this fatal day. Their evidence was not substantially challenged in evidence by the defence. However, my acceptance of the State witnesses' version does not include the alleged punching of Naimbondi by the accused. As I mentioned before, this assault was not averred in the indictment and was not mentioned in her statement. Suffice to say, there is at least a reasonable possibility that this did not happen.

[28] After both the State and the defence closed their cases the Court called Dr. Hileni Mekondja Ndjaba, one of the psychiatrists who compiled the report in terms of

section 79 of the Criminal Procedure Act, 1977 to give evidence in the matter. She is registered with the Health Professional Council as such and in charge of both civil psychiatry and forensic psychiatry as head of the Department of Psychiatry at Windhoek Central Hospital since October 2015. She is employed by the state at the Forensic Psychiatry Unit Windhoek Central Hospital where Venosius Hamutenya was admitted for observation ordered by the High Court Northern Local Division. He was admitted on the 23rd of March 2020 for the purpose of, mental observation in terms of the provisions of sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977.

[29] She explained how the accused was evaluated and that he was diagnosed as suffering from schizophrenia with remitted recourse. She further stated that schizophrenia is a mental disorder. She also stated that she was informed that the accused has been using medication for his schizophrenia from 2014.

[30] She was asked to report in terms of Section 77, 78 and 79 and under the heading "Triable and Accountability" she summarised the report. She indicated that at the time of writing this report in terms of section 77 the accused was fit to stand trial as he can understand the court proceedings as to make a proper defence. In terms of section 78 at the time of the commission of the alleged crimes the accused was suffering from a mental defect which could have made him incapable of appreciating the wrongfulness of his act and he did act without the realisation of the unlawfulness of his action. And in terms of section 79 they found the accused fit to stand trial but not accountable. This was a unanimous decision by the constituted panel.

[31] On questions by the Court she said the accused did not appreciate the wrongfulness of his act and was incapable of acting in accordance with an appreciation of the wrongfulness. On a question whether it was due to a mental illness or a mental defect the doctor said it was more of a mental defect. The mental defect was due to schizophrenia.

[32] The medication that the accused had been using to wit Haloperidol she identified as an anti-psychotic for treatment of schizophrenia. The other pills accused used being Biperiden is not specifically for treatment of mental illness but to counteract side effects that result from Haloperidol.

[33] The psychiatric report of the accused was formally handed in and marked Exhibit O.

Submissions by the State and Defence Prior to Judgment

[34] Ms Nghiyoonanye, on behalf of the State, submitted that the State had presented evidence proving beyond a reasonable doubt that the accused has committed all four crimes set out in the indictment. She further submitted that the accused was criminally responsible for the acts that constituted the crimes charged and should be convicted on all charges. In the alternative, she submitted the Court should then find that he is criminally responsible for his acts but that his capacity to appreciate the act's wrongfulness or act under an appreciation of the act's wrongfulness of a mental illness or mental defect diminished his responsibility. An essential part of her argument was that this should be the Court's finding as the accused specifically targeted the cause of his anger regarding counts one, two and four. In essence, she submitted accused's conduct was not, objectively seen, nonsensical on the fateful day.

[35] Mr. Mukonda, on behalf of the accused, submitted that the accused discharged the burden of proof on a preponderance of probabilities that at the relevant time when the crimes were committed, he suffered from a mental illness or defect that rendered him not criminally responsible for his conduct. He further submitted that the accused should be found not guilty because of mental illness and defect. He submitted that the Court should order the accused's detention in a psychiatric hospital or prison pending certification by the President.

[36] The evidence in respect of count two proves that the accused held the deceased by both legs, forcefully striking his head on the ground twice. The impact of blows caused a severe head injury, intracranial bleeding, and multiple skull fractures. The cause of death was severe head injury with intracranial bleeding (hemorrhage). In a recent decision,¹ the High Court found that striking a child's head on the ground forcefully once warranted a finding of direct intent to kill.

¹ *S v Nowaseb* (CC 14/2020) [2021] NAHCMD 65 (23 February 2021) paragraph 35 and 38

Evaluation of Evidence and Applicable Legal Principles

[37] The evidence on count one that the accused on the same day threatened Justina Haisindi Naimbondi with a stone and throwing a stone at her, prima facie, constitutes the criminal act for the crime of assault by threat. The accused's beating of Paulus Lolo Hamutenya with a fist against the head also form the criminal act for assault common alleged in count three. Similarly, the accused's threat to stab Justina Haisindi Naimbondi with a knife alleged also constitutes the criminal act required for assault by threat alleged in count four.

[38] The actus reus, sometimes called the visible element, or the objective component of a crime is the guilty act, which, if proved beyond a reasonable doubt with the required mens rea, constitutes the crime. The criminal offences alleged in the indictment require a criminal act and a criminal intention expressed as mens rea. Mens rea is the mental element in a crime. The State might prove the act in evidence, but this does not imply that the criminal intention and appreciation of wrongfulness is proven.

[39] Before his trial, the Court referred the accused in terms of section 77(1)² and section 78(2)³ of the Criminal Procedure Act 51 of 1977 to enable two psychiatrists⁴ to enquire and establish whether the accused can understand the proceedings to make a proper defence. Or whether he, because of mental illness or mental defect, is incapable of doing so. The psychiatrists also had to enquire and establish if the accused at the time of the alleged crime was criminally responsible for the offence

² 77(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

³ 78(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

⁴ Section 79(1)(b) of the Criminal Procedure Act 51 of 1977

charged or was due to a mental illness or mental defect not criminally responsible for the offence allegedly committed.

[40] Section 77 deals with the capacity of an accused person to understand court proceedings. Section 78 deals with an accused person's ability to appreciate the wrongfulness of his or her actions at the commission of the alleged offence or his or her ability to act with an appreciation of the wrongfulness of such act.⁵

[41] In terms of section 78(1) of the Criminal Procedure Act, 1977 a person is criminally responsible for an offence if he or she appreciates the wrongfulness of his act or can act in accordance with an appreciation of the wrongfulness of his action. If not, he or she shall not be criminally responsible for that act.⁶

[42] After the enquiry as set out hereinbefore, the psychiatrists submitted a unanimous report to Court in terms of section 79 of the Criminal Procedure Act, 1977. This report was made available to this Court prior to the trial and was admitted into evidence as Exhibit O.

[43] The report, in terms of section 79 (4), included what was required. It had a unanimous finding that the accused will understand the proceedings in question to make a proper defence; and further included a conclusion that the accused did not appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act, was at the time of the commission thereof, affected by mental illness or mental defect.

[44] As the unanimous finding in the report was that the accused can understand the proceedings to make a proper defence, and the finding was not disputed by the prosecutor or the accused, the court commenced with the trial.⁷

⁵ *S v Amutenya* (CR 26/2020) [2020] NAHCNLD 67 (9 June 2020) paragraph 10

⁶ 78(1) A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable-

- (a) of appreciating the wrongfulness of his act; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act.

⁷ Section 77(2) of the Criminal Procedure Act, 1977

[45] As the unanimous finding was that the accused was at the time of the commission of the crimes by reason of mental illness or mental defect not criminally responsible for such acts was disputed by the prosecutor, the court was compelled to determine the matter after hearing evidence.⁸

[46] In all circumstances provided for in section 78 relating to the finding contained in the report, the State and the accused have a right to dispute such findings and may present evidence to the court to substantiate their objection and position. When the panel's determination is unanimous but disputed or not unanimous, the section compels the court to determine the matter after hearing evidence. Such evidence would include the evidence of any person who under s 79 enquired into the accused's mental condition. After hearing such evidence, the court must make a finding on (i) whether the accused committed the act in question; and (ii) that he at the time of such commission was because of mental illness or mental defect not criminally responsible for such action.⁹

[47] When neither the State, nor the defence, called any member of the expert panel to testify about the report, the Court must ensure the attendance of such witness in terms of section 186 of the Criminal Procedure Act, 1977. A just decision of the case requires this.¹⁰

[48] Mouton J describes mental illness as 'a pathological disturbance of the accused's mental capacity and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.'¹¹ Both mental illness and mental defect refer to a pathological disturbance of the mental faculties, not to a temporary clouding of the mental faculties as described before.¹²

⁸ Section 78(4) of the Criminal Procedure Act, 1977; *S v Mika* 2010 (2) NR 611 (HC) paragraph 6; *S v Ndengu* 2014 (1) NR 42 (HC) paragraph 18

⁹ *S v Mika* 2010 (2) NR 611 (HC) paragraph 9; *S v Ndengu* 2014 (1) NR 42 (HC) paragraph 9; *S v McBride* 1979 (4) SA 313 (W)

¹⁰ *S v Ndengu* 2014 (1) NR 42 (HC) paragraph 22

¹¹ *S v Stellmacher* 1983 (2) SA 181 (SWA) at 187H

¹² C R Snyman *Criminal Law* 5 ed (2008) p171-172

[49] Mens rea is the guilt on the perpetrator's part, the blameworthy state of mind with which the perpetrator acts. Mens rea presupposes the presence of mental faculties which enable the person not to have willed his crime. The law believes that a person who is not responsible due to some morbid mental disorder or defective mental state is not punishable.¹³

[50] The mental illness or defect must have a particular effect on the person's abilities to warrant a finding that he is not criminally responsible. The person must lack the capacity to appreciate the wrongfulness of his actions or act according to an appreciation of the wrongfulness of his act. These two psychological criteria apply in the alternative: even if a person can appreciate the wrongfulness of his actions, he will still escape liability if he is not capable of acting in accordance with such appreciation.¹⁴

[51] It is important to note that the psychologist, in providing a diagnosis, is not required or able to offer an opinion on the accused's criminal responsibility. This is a matter to be decided by the courts.¹⁵ The quoted dictum highlights that the issue of determining criminal responsibility is a legal question while the diagnosis of mental illness is medical of nature.

[52] In Namibian law, guilt, or criminal liability, is dependent on proof that the accused has committed a voluntary and unlawful act accompanied by criminal capacity and fault. The State must prove each of these requirements beyond a reasonable doubt and any factor negating one of these elements.¹⁶

¹³ Visser & Vorster *General Principles of Criminal Law Through the Cases* (1982) p 214

¹⁴ C R Snyman *Criminal Law* 5 ed (2008) p172

¹⁵ *R v Harris* 1965 (2) SA 340 (A) at 365 B-C: '...the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court - initially, the trial Court; and, on appeal, this Court - must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.'

¹⁶ PJ Schwikkard *Presumption of Innocence* (1999) p41

[53] Section 78(7)¹⁷ of the Criminal Procedure Act, 1977 deals with diminished responsibility in cases where the degree of mental deficiency does not amount to legal insanity. Specialist medical and other evidence are necessary to decide whether such a conclusion is justified.¹⁸ In *S v Shapiro*,¹⁹ the Court also considered State counsel's argument that the Court should consider the unchallenged evidence of independent by-standers, that accused's actions at the time appeared to be cool, calm and calculated, outwardly giving no sign of emotional confusion. The Court concluded that the assumption underlying this argument is that the conduct of a person with diminished criminal responsibility is to be measured by the same yardstick as the conduct of a person with undiminished criminal responsibility is fallacious. It is similarly fallacious to measure the outward acts of a person who cannot appreciate the wrongfulness of his actions or is not capable of acting under such appreciation, with that of a person who does not suffer from the aforesaid mental disabilities.

[54] Furthermore, in *S v Ndengu*²⁰ the Court on appeal dealt with a matter that bears many similarities to the present one. In that case the prosecution also called several witnesses and proved that the accused committed an unlawful act by hitting or cutting the complainant on the head with a panga. The State witnesses also stated that the accused seemed normal. The Court however concluded that the evidence of laypersons who observed the accused at the time of the incident cannot effectively contradict an official report by a panel of experts who concluded unanimously that the accused is not criminally responsible because of a mental illness or defect.²¹ I agree with this decision. Although the Court in the *Ndengu* matter did not go this far, I would add that to sensibly dispute such a report, would require another expert psychiatric

¹⁷ '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.'

¹⁸ Burchell *Principles of Criminal Law* (2006) p 401

¹⁹ 1994 (1) SACR 112 (A) at 123c-f.

²⁰ 2014 (1) NR 42 (HC) paragraph 7

²¹ *S v Ndengu* 2014 (1) NR 42 (HC) paragraph 19

report coming to a different conclusion. Such negating report was not obtained in this case.

[55] Section 79(7)²² of the Criminal Procedure Act 51 of 1977 provides that statements by accused persons whilst he is under observation are only admissible insofar that they are relevant for determining their mental condition. The Courts must interpret this subsection restrictively so that the exception operates insofar as the statements are relevant to the mental condition for which the accused was referred for observation. Referrals are to ensure the availability of expert evidence regarding the general mental state of accused persons. It is not to be used to uncover evidence that the police must collect and use it to contradict evidence presented at trial.²³

[56] On the evidence presented by the State the accused's conduct, like in the *Shapiro* matter can be similarly be described as bizarre. In full view, indifferent to the presence of eyewitnesses, he took the deceased a 2-year-old boy and hit his head on the ground twice. Then he went to sit down again in his normal chair as if nothing had happened. All this time, he acted with deliberation. There was nothing in his behavior to suggest that he appreciated that what he was doing was wrong. He appeared to be quite unconscious of the enormity of his act or its probable consequences for himself. He just went to sit down and either left the deceased where he was or placed the body in his mother's hut and on her bed. He remained in the vicinity of the scene until the police arrived and arrested him.

[57] Under cross-examination by the State the psychiatrist confirmed that there was diminished capability. The State clearly attempted to establish whether the accused during the commission of the acts 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 to establish whether

²² 'A statement made by an accused at the relevant enquiry shall not be admissible in evidence against the accused at criminal proceedings, 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.'

²³ *S v de Beer* 1995(1) SACR 128 (SE); *S v Forbes and Another* 1970 (2) SA 594 (C) at 598H-600E; *S v Webb* (1) 1971 (2) SA 340 (T)

this matter may fall under section 78(7)²⁴ of the Criminal Procedure Act, 1977. Hence her alternative argument prior to judgement.

[58] The doctor and the State misunderstood each other here. The doctor stated that the mental illness caused the diminished capability. She said: 'But a person with a mental illness, yes they can also be provoked. They can be angry. They can act like what he acted but does he acted with knowingly that he will be responsible for his action that he is doing.' And later she said: 'But then by that time we, that is why we indicated that during the time of the incident this person had schizophrenia what, which was in a limited cause. It is not fully blown symptoms of the disease but still with such a person will not fully make the difference between the right and wrong.' What became clear when one evaluates her evidence is that she never conceded that he is "criminally responsible"²⁵ which is a prerequisite for him falling under section 78(7) of the Criminal Procedure Act, 1977. Capability should not be confused with responsibility. This is where this case differs from the *Shapiro* matter.

[59] After careful consideration of the law and the facts of this matter I find that the accused committed the criminal acts averred in the four counts set out hereinbefore but that he, at the time of such commission, was by reason of mental illness or mental defect not criminally responsible for those acts as was confirmed by the panel that observed him and provided the report hereinbefore.

[60] I hereby find the accused not guilty on counts one, two, three and four by reason of mental illness or mental defect, and direct that the accused be detained in a mental hospital or a prison pending the signification of the decision of the President.²⁶

[61] In the result the following order is made:

²⁴ (7) 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.

²⁵ See underlined part in the previous footnote.

²⁶ Section 78(6) of the Criminal Procedure Act, 1977; *S v Mika* 2010 (2) NR 611 (HC) paragraph 6; *S v Ndengu* 2014 (1) NR 42 (HC) paragraph 7

1. The accused is found not guilty on count 1, 2, 3 and 4 by reason of mental illness or mental defect in terms of section 78(6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) as amended.
2. It is ordered that the accused be detained in a mental hospital or a prison pending the signification of the decision of the President.
3. The bail of the accused is hereby withdrawn.

D. F. SMALL
Acting Judge

Appearances

For the State:

Ms. M. Nghiyoonanye
Prosecutor General Office, Oshakati

For the Accused:

Mr. R. Mukonda
Mukonda & Co. Inc., Rundu