

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
APPEAL JUDGMENT

CASE NO. HC-NLD-CRI-APP-CAL- 2020/00061

In the matter between

ABIATAR KANANA THOMAS

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *S v Thomas* (HC-NLD-CRI-APP-CAL-2020/00061) [2021] NAHCNLD 30 (25 March 2021)

Coram: SALIONGA J *et* SMALL AJ

Heard: 18 February 2021

Delivered: 25 March 2021

Flynote: 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 77 and 78.

Criminal Procedure – The accused – Report in terms of s 79 of Act 51 of 1977 – Where accused unrepresented, not sufficient for court to inform accused of the finding – Court should furnish a copy of report – Make every effort to explain report in clear and comprehensive terms and language to accused.

Criminal Procedure – The accused – When mentally retarded likely not able to comprehend s 77 and 78 proceedings – Incapable of exercising rights availed by these sections to challenge report – Imperative that court directs Legal Aid assistance-- Court failed in its duties—Misdirected itself.

Summary: The appellant was charged with the offence rape r/w Act 8 of 2000. He was then referred for mental observation to enquire into his criminal responsibility and establish if he is able to understand proceedings in order to make a proper defence. A report in terms of section 79 of the Criminal Procedure Act, 51 of 1977 was prepared. He was not represented at the time and despite the report not being unanimous and properly explained to the appellant the magistrate ordered that he be detained in a mental hospital pending the signification of the State President.

Held; that the magistrate erred in making an order in terms of s 77(6) in view of the fact that the report was not unanimous.

Held further; that it was the duty of the judicial officer to ensure that unrepresented accused who is mentally challenged fully understands the psychiatric report.

Also held; that magistrate should have directed that the unrepresented mentally retarded accused be assisted by a legal practitioner instructed by Legal Aid.

Finally held; that the magistrates order is set aside and matter remitted to the trial court to follow the guidelines set out.

ORDER

1. The late filing of the notice of appeal is condoned.
2. The court order dated 13 July 2015 declaring the accused a State President's patient is set aside.
3. The matter is remitted to the trial court with the direction to follow the guidelines set out in the judgment and to bring the proceedings to its finality.
4. The appellant is to be kept in custody and should be brought before Oshakati Regional Court on or before 02 April 2021.

JUDGMENT

SALIONGA J (SMALL AJ concurring):

[1] The appellant was referred for mental observation in terms of section 77 and 78 of the Criminal Procedure Act, 51 of 1977 in the magistrate's court sitting in Oshakati to enquire into his criminal responsibility and establish if the accused can understand the proceedings in order to make a proper defence. After the enquiry was done the psychiatrist compiled and submitted the report in terms of section 79 of the Act. He was found to be not triable to the extent of not being able to follow court proceedings and not accountable for the alleged crime that he was alleged to have committed.

[2] The appellant appeared in person during the proceedings in the court a quo and at the appeal hearing. Mr Matota appears for the State.

[3] In brief, the appellant was charged with rape and was due to plea in terms of section 119 of the CPA. However before he could plea the allegations of his mental

state was brought up. A witness was called to testify on his mental state of mind and the court was satisfied that the appellant was not well to follow the proceedings.

[4] He was ordered to undergo psychiatric observation in terms of section 77 (1) and 78 (2) of the CPA. The psychiatric report compiled by Dr Njamba was received and indicates that: '(Name) is not triable as he will not be able to follow court proceedings at this time of evaluation. He is not accountable for the alleged crime committed because during the time of committing the alleged crime he could not appreciate the wrongfulness of his action.'

[5] The report was submitted in court and was admitted as evidence. The court found that these findings were not unanimous and invited the parties to indicate their attitudes towards the report. Both parties did not dispute the findings of the doctor. On 13 January 2015 the magistrate then ordered that seeing the parties are not disputing the findings of the doctor as per section 77(6), that the accused be detained in a mental hospital pending the signification of the President.

[6] The appellant dissatisfied with the order, appealed to this court. He filed the notice of appeal dated 21 January 2020 a period of about five years after the order was made together with an application for condonation for the late filing of his appeal which I find very difficult to follow and which most likely be due to a mental disability. Appellant alleges amongst others that he lacked information about the appeal process and that he sought the help of the doctors to no avail.

[7] It undisputed that the appeal was filed out of time. The application for condonation was attached together with an affidavit in which appellant gave explanation for the late filling of a notice of appeal. However taking into account the time lapsed, the type of psychiatric order made, the explanation given in the affidavit, the findings of the doctor and the manner in which the proceedings were conducted, could in my view have been the cause of the late filling of the documents as it become apparent later. In light of the above, the State did not take an issue with the late filling of the notice of appeal as the explanation given thereof is reasonable. I am however grateful for the detailed heads of

argument filed and oral submissions made by the respondent in this appeal. There are prospects of success and parties were allowed to argue the appeal on merits.

[8] The notice of appeal contains two grounds of appeal; that 'I am dispute to be declared as President's state patient on ground the doctor's reports were positive the act never happen and on reason of the period I have been in the rehabilitation as my mental status is okay, I can make good judgment and I am not a threat to the community. (sic) and that the time I was declared I was not unstable, only the lack of court law that I were not reasoning well on proper law of the defendant.'(sic)

[9] Mr. Matota appearing on behalf of the respondent, concession that the proceedings before the magistrate should be set aside and for the matter to be remitted to the magistrate, in my view were correctly made.

[10] The learned magistrate in his reasons rightly accepted that he erred in making an order in terms of s 77 (6) of the Act. He states that 'the report not having been unanimous, the provisions of section 77 (3) should have been applied, allowing for evidence to be presented and thereafter determine the matter....This being the case it is my humble view that the court erred in declaring the accused a state president's patient. And as such the order stands to be set aside.'

[11] The approach to be adopted by the court after the receipt of a psychiatrist's report is clearly outlined in section 77 (3) of the Act. Section 77 (3) provides that; if the said finding is not unanimous or if unanimous is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence and the prosecutor and the accused may to that end present evidence to the court including the evidence of any person who under section 79 enquired into the mental condition of the accused.

[12] It was a duty of the judicial officer to ensure that unrepresented accused who is mentally challenged fully understands the psychiatric report. The court was also required to explain s 78 (3) and (4) in clear and all-inclusive terms and language used to

the accused. It is further required to assist him/her in making an informed decision. In this regard the court had the following to say in *S v Mika*¹:

'[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; where after 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, i.e. 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.'

[13] It is apparent from the record that the provisions of s 77 (3) and (4) were not explained in clear and all-inclusive terms to the unrepresented accused to enable him to challenge any of the findings made in the s 79 report nor was he informed of how he should go about challenging the report. There is also nothing on record showing that a copy of the psychiatric report was made available to the accused. All that appears on record was the magistrate's mention that the findings appear not to be unanimous, invited the parties to indicate their attitudes towards the report to which both have not disputed the findings.

[14] The court in this instance was dealing with unrepresented mental retarded accused who was unable to follow the proceedings. In cases such as these the magistrate should have directed that the unrepresented mental retarded accused be assisted by a legal practitioner instructed by the Directorate: Legal Aid.

¹ *S v Mika* 2010 (2) NR 611 at 615B-D

[15] The Legal Aid Act 29 of 1990 specifically makes provision for instances as the present where a magistrate is obliged to recommend to the Director that legal aid be provided to the unrepresented accused. The relevant section provides as follows:

'9 **Legal aid in lower courts**

(1) Whenever-

- (a) in a trial before a lower court an accused who is not legally represented, is charged-
- (i) with an offence specified under subsection (2); or
 - (ii) with an offence which is not so specified and the lower court considers that, having regard to all the circumstances of the case, it is in the interest of justice that the accused should be represented;
- (b) ...,
- the court shall, if, in its opinion after inquiry, the accused has insufficient means to enable him or her to engage a practitioner to represent him or her, recommend to the Director that legal aid be granted to the accused for the purposes of such trial or preparatory examination.' (My emphasis)

[16] Finally Section 79 (1) (b) of the Act provides for instances where the accused is charged with an offence for which the sentence of death may be imposed, or where the court in a particular case so directs, that the enquiry directed by the court under s 77 (1) or 78 (2) be reported on –

- (i) by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;
- (ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State; and
- (iii) by a psychiatrist appointed by the accused if he so wishes.

[17] In *S v Hansen* 1994 NR 5 (HC) at 7 C-D the court as per Strydom JP (as he then was), considered the purview of s 79 (1)(b) after the abolishment of the death penalty by the Namibian Constitution and stated:

'... (T)here is no instance where this Court is obliged to follow this procedure and this procedure shall only be followed where this Court, for certain reasons, may direct that it be followed. It is therefore this Court which must decide whether to accept this report, or on the application of the defence, to again refer the accused for further observation according to the provisions of s 79 (1)(b).'

And further at 7E-F:

'(I)t seems to me that cases where the Court will direct this procedure to be followed, will invariably be cases where the case itself is serious and where the consequences are serious for a particular accused.'

I found the above good principles worth applying in the instant matter.

[18] What is clear from the *Hansen* case is that though it might be unusual to refer an accused twice for psychiatric observation, there may be circumstances compelling the court to exercise its discretion to invoke the provisions of s 79 (1)(b) of the Act, by having the accused examined by two psychiatrists instead of one, even if the accused had already been examined and reported on by a single psychiatrist. Obviously, this would mainly depend on the facts of each case.

[19] Considering the time lapsed from the period the psychiatric report was submitted to the hearing of this appeal, it is my humble opinion that this is an instance where the court should exercise its discretion in favour of a directive that the provisions of s 79 (1) (b) of Act 51 of 1977 must be followed. The court will then direct that an order to that effect be considered.

[20] In the instant matter, the magistrate adopted an irregular procedure for the reasons stated in this judgment before directing the accused to be detained in a mental hospital or a prison pending the signification of the decision of the President. He misdirected himself and the order made stands to be set aside.

[21] Consequently, it is ordered that:

1. The late filing of the notice of appeal is condoned.
2. The court order dated 13 July 2015 declaring the accused a State President's patient is set aside.
3. The matter is remitted to the trial court with the direction to follow the guidelines set out in the judgment and to bring the proceedings to its finality.
4. The appellant is to be kept in custody and should be brought before Oshakati Regional Court on or before 02 April 2021.

J. T. SALIONGA
JUDGE

D. F. SMALL
ACTING JUDGE

APPEARANCES

For the Appellant

Mr A. K. Thomas (In person)
Oluno Correctional Facility, Ondangwa

For the Respondent

Mr L. S. Matota
Office of the Prosecutor General, Oshakati