REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION
JOHANNESBURG

Ref No: 109/13
Mag. Serial No: 3/13
Case No: DH 10/07

In the matter between:

THE STATE

and

MBIJANA LUPHUWANA Accused

REVIEW JUDGMENT

COPPIN, J:

[1] This matter was sent for review to this Court by the Additional Magistrate, Roodepoort. The magistrate made an order in terms of section

78(6)(ii)(aa) of the Criminal Procedure Act 51 of 1977 ("*the Act*") and, enclosing the record, requested that the said order be confirmed by this court.

[2] It appears from the record that the accused, a man of about 34 years, was charged with assault and threats of violence in terms of the Domestic Violence Act, 116 of 1998, in respect of a family member. After being arrested on the strength of a warrant, the accused, who was legally represented, was brought before the magistrate on the 11th January 2013. The charges were never put to the accused and he was never asked to plead. The prosecutor informed the court that the accused's mother had told him that the accused was not well mentally, and requested that the court proceed in terms of section 78(2) of the Act and hold an enquiry into the mental state of the accused. The accused's representative did not object and magistrate allowed the prosecutor to call the accused's mother who gave evidence that the accused had a mental problem which caused him to act aggressively. She testified that he was her eldest son; that he took drugs, such as dagga and mandrax; that he had been admitted to Sterkfontein Hospital previously and that she had brought charges against him before. She testified that she would like him to go to hospital for treatment. The accused's legal representative did not cross- examine the accused's mother and the state indicated that it was closing its case.

[3] The magistrate informed the State that the mother's evidence was sufficient and proceeded to make a finding in terms of s78(2) of the Act that "*it appears to the court that due to mental illness or mental defect the accused*

may not be responsible" and directed that the matter be enquired into as contemplated in section 78(2), read with section 79, of the Act. The accused appears to have complained to the magistrate about his arrest. The magistrate assured the accused that they were trying to help him, postponed the matter to the 14th January 2013 and ordered that the accused remain in custody.

[4] After several postponements the accused was eventually admitted to a facility for observation. A joint, unanimous, psychiatric report, by the State psychiatrist and a psychiatrist representing the accused, was submitted. In the report the medical specialists, *inter alia*, state their diagnosis of the accused's condition, namely, cannabis induced psychotic disorder, but also note that it was in remission. They also state that at the time of the alleged offence the accused was unable to appreciate the wrongfulness of his actions and act in accordance with such appreciation. They recommend that the accused be made an involuntary mental health care user as contemplated in the Mental Health Care Act, 17 of 2002, in order to allow for his treatment, care and rehabilitation. Their report is dated the 28th May 2013.

[5] It appears from the record that on or about the 26th June 2013 the Director of Public Prosecutions informed the Senior Public Prosecutor in the Roodepoort Magistrate's Court of the opinion of the psychiatrists and further directed, *inter alia*, that:

"It ought to be recommended to the court that it proceed in terms of section 78(6)(a)(ii)(aa) of the Act and make an order that the accused be admitted to and detained in an institution stated in the Act and treated as if he was an involuntary mental health care user

contemplated in section 37 (read with sections 32 and 33) of the Mental Health Care Act, 2002."

[6] On 27 June 2013 the hearing resumed. The purpose was to receive the psychiatric report and consider the matter in the light of the decision of the Director of Public Prosecutions ('DPP'). The record indicates that the accused had legal representation on this occasion. The prosecutor informed the court of the recommendation of the DPP and indicated that the investigating officer was present to testify 'about whether the accused committed an offence or not'. The court allowed the investigating officer to testify. Her evidence was essentially hearsay. The investigating officer testified, inter alia, that an assault charge had been laid and that, according to the accused's mother's statement, the accused was threatening to kill her and his younger brother.

[7] The officer testified that she had not seen the report of the psychiatrists, but the prosecutor, nevertheless, put their recommendation to her and asked whether the investigating officer was there to take the accused to hospital. The officer testified that a case of domestic violence was opened against the accused before his arrest and that a protection order was granted. The officer further testified concerning the incident that led to the accused's arrest. She testified that on 30 December 2006 the accused threatened to kill his mother and younger brother; that the accused also threw stones at the younger brother and 'apparently' assaulted the mother, but that the mother was not injured, because she was taken to a place of safety as she was afraid of the

accused. The officer was finally asked by the prosecutor whether she was satisfied that the accused committed the offence that led to his arrest and the officer answered in the affirmative. The legal representative of the accused did not object to the evidence that was led and did not cross-examine the investigating officer. The record shows that the State again closed its case and that the defence case was also closed.

[8] The prosecutor requested the court to proceed in terms of s78(6), as recommended by the DPP, and that the accused be referred to Sterkfontein Hospital for treatment as an involuntary mental health care user. The accused's legal representative indicated that he supported the State's application. The magistrate then proceeded to give judgment, in which findings are made that are also repeated in the written order which he wants the reviewing court to confirm. The order, which appears to be a standard form, is addressed to the Sterkfontein Hospital and it is titled:

> "*Order in terms of section 78(6)(ii)(aa) of the Criminal Procedure Act 51 of 1977. [Accused unable to appreciate wrongfulness and unable to act in accordance with such appreciation of wrongfulness.]*"

The relevant part of the order reads as follows:

> "*WHEREAS the court found that*
> *Mbijana Luphuwana*
> *(insert name of patient)*
>
> *who is awaiting trial on a charge of contravening section 17(a) read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act 116 of 1998*
>
> *[x]Committed an offence other than one contemplated in section 76(6)(i) of the Criminal Procedure Act 51 of 1977.*
>
> *Is unable to appreciate the wrongfulness of his actions and unable to act in accordance with such an appreciation of wrongfulness and was at the time of*

the commission of the offence by reason of mental illness or intellectual disability not criminally responsible for such act.

Therefore a court order is hereby granted to admit and detain the said

Mbijana Luphuwana

(insert name of patient)

as if he was an involuntary mental health care user in terms of Section 37 of the Mental Health Care Act No 17 of 2002 until a further lawful order is given for his disposal."

The order is dated the 27th June 2013.

[9] Section 78(1) of the Act provides:

"*A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable – (a) of appreciating the wrongfulness of his or her act or omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.*"

[10] Section 78(6)(a)(ii)(aa) provides:

"*If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act – (a) the court shall find the accused not guilty by reason of mental illness or intellectual disability, as the case may be, and direct (ii) in any other case than a case contemplated in subparagraph (i), that the accused –*

(aa) be admitted to and detained in an institution stated in the order and treated as if he or she or an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002."

[11] It is apparent from a reading of the magistrate's order, which I have referred to above, that there has not been compliance with section 78(6)(a) of

the Act. More particularly, the magistrate did not find the accused 'not guilty', as is contemplated in and required by that section. Accordingly, this Court brought the matter to the attention of the magistrate and requested the magistrate to furnish reasons, if any, why the order should not be set aside and the matter remitted back to the Magistrate's Court for compliance with section 78(6)(a).

[12] In response to the request of this Court, the magistrate furnished a memorandum. In it reference is made to case authority dealing, *inter alia*, with the situation where an accused is held to be unfit to plead. The magistrate, in an effort to justify the order that was made, *inter alia,* states the following:

> "*I must agree that the use of the word 'shall' in section 78(6) of the Act, makes the application of the provisions peremptory. However, in all the decided cases referred to above, the 'accused' pleaded to the charge, and in the case in point, there was no plea taken from the accused. Prior to the charge being put to the accused, and after having received the joint psychiatric report, marked 'A', and the prosecution acting upon the instructions of the Director of Public Prosecutions, the said order was made.*
>
> *I am of the view, that the legislature's clear intention, was to cater for and/or provide for the situation where a plea was recorded or where the accused was convicted of the offence charged but before sentence was passed and then, in that event, to set aside the conviction and find the accused not guilty.*
>
> *The Honourable Judge is referred to section 106(4) of Act 51 of 1977, which is set out hereunder for ease of reference.*
>
> > *'An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court (see section 109), shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.'*
>
> *Again my argument is highlighted that there was no plea tendered by the accused and he is not entitled to demand an acquittal.*
>
> *Nonetheless, despite the arguments, submissions and case law set out above, I will abide by the decision of the Honourable Justices.*"

[13] I should state at the outset that the cases, which the learned magistrate referred to in the memorandum, do not address the issue which had been brought to his attention. They are clearly distinguishable. The Office of the Deputy Director of Public Prosecutions (South Gauteng)('DDPP') was requested to provide an opinion on the matter. In this opinion the following view is expressed by the DDPP:

> *"It is respectfully submitted that the order made by the court a quo be set aside and that the matter be remitted to the Magistrate's Court. The accused must be asked to plead on the charge and the witness will have to testify again. Thereafter the magistrate can find the accused not guilty by reason of mental illness as contemplated in section 78(6)(a) or (b) of the Mental Health Act 17 of 2002 and issue an order in terms of section 77(6)(a)(ii)(aa) of Act 51 of 1977 for the accused to be admitted and detained at Sterkfontein Hospital as an involuntary mental care health user in terms of section 37 (read with sections 32 and 33) of the Mental Health Act 17 of 2002."*

[14] It is apparent from the record that the charges were never put to the accused and that he was never called upon to plead. What is more disturbing is that the magistrate nevertheless allowed the state to adduce evidence, including evidence that the accused did commit the offence, which he was charged with, then found that the accused had committed the offence, but was unable to appreciate the wrongfulness of his actions and act in accordance with such appreciation due to mental illness, or intellectual disability, and that he was, therefore, not criminally responsible.

[15] The question that arises for decision is whether the magistrate was correct in proceeding as he did, by not requiring the accused to plead; by allowing evidence, including inadmissible evidence, to be produced to prove the commission, by the accused, of the act(s) he was charged with; by finding that the accused committed the act(s) charged with; and by not finding the accused 'not guilty' as required by s 78(6) of the Act?

[16] There is nothing on the record to suggest that, at the time when the accused appeared before the magistrate, he was not capable of understanding the proceedings, or that he was unfit to plead (i.e. not capable of understanding the proceedings so as to make a proper defence). On 11January 2013, before charges were put and before the accused could plead and in response to an application by the State, the magistrate noted that it appears as if though the accused suffered from a mental illness, or defect and directed that the matter be enquired into and reported on in accordance with the provisions of section 79 of the Act.

[17] Section 78 does not regulate, or lay down the procedure for pleading to a charge. It does, however, state when and in what circumstances a magistrate may find that the accused, even though he committed the act in question, is not criminally responsible for the act, because of mental illness, or intellectual disability. If the persons who did the s 79 enquiry into the question posed by the magistrate, submitted an unanimous finding to that effect and the finding is not disputed by the prosecutor, or the accused, the court may determine the question of whether the accused was capable of appreciating

the wrongfulness of his conduct and to conduct himself in accordance with such an appreciation, i.e. whether he is criminally responsible for such act or omission, on the basis of such report without hearing further evidence. If the finding is not unanimous, or if it is disputed by the prosecutor, or by the accused, the court will have to hear evidence on the question and determine the matter on the basis of such evidence[1]. However, s78 does not provide that, in respect of an accused who has not pleaded to a charge, the court may, dispense with the requirement that the charge must be put to an accused, proceed to hear evidence on the merits of the charge and conclude that the accused committed the act or omission in question, but find, on the basis of the psychiatric report that he is not criminally responsible for the conduct he was charged with.

[18] Section 78(6) of the Act clearly assumes that, in respect of an accused who has the requisite capacity to understand the proceedings so as to make a proper defence, the charge, detailing the act or omission of the accused, had been put to the accused and that he had pleaded to it. It also assumes that the finding, that the accused committed the act, or omission, in question, would be based on admissible evidence. Unless that has occurred, evidence, in support of the charge, cannot be led and the accused cannot, lawfully, be found to have committed the act, or omission. Where the procedures laid down in the Act and in the law relating, particularly, to the putting of the charge, the pleading to it and to the production of evidence) have not been complied with, the accused cannot, lawfully, be found not guilty by reason of

[1] See further *S v Mcbride* 1979 (4) SA 313 (W) at 317G; *S v Ramokoka* 2006 (2) SACR 57 (W) and *S v Magongo* 1987 (3) SA 519 (A) at 521G-J.

mental illness, or intellectual disability. Before a court, applying s 78(6) of the Act, may find that an accused has committed the act, or omission, in question, but is not guilty due to mental illness, or intellectual defect, the accused must have pleaded to a charge that was put to him, and the finding must be based on admissible evidence that establishes his commission of the act, or omission, in question, beyond a reasonable doubt.

[19] Unless charges are put to the accused and he (or she) pleads thereto no *lis* is established between the accused and the State[2]. Section 105 of the Act is peremptory. It requires that the charge be put to an accused person to enable him, or her, to plead thereto. That section further requires that once the charge has been put, the accused shall, subject to sections 77, 85 and 105A (all of which are not relevant for present purposes), be required by the court, forthwith, to plead thereto in accordance with s106. The section refers to the different pleas that may be raised by an accused. They include a plea of guilty, or not guilty.

[20] The magistrate omitted material, procedural steps when making the order which he requests this court to confirm. As the charges were not put to the accused and he was not required to plead thereto and did not plead thereto, no *lis* between the accused and the state had been established. In those circumstances, evidence, to prove the acts alleged to have been committed by the accused, could not be led and the magistrate did not have

[2] See *S v Zuma and others* 2006 (2) SACR 69 (D&CLD) par[6] at 74.

the power to make the order which was sent for review[3]. The State is not exonerated by s78 of its onus of proving, beyond a reasonable doubt, that the accused committed the act, or omission in question, nor is it exempted from doing so in terms of the procedure laid down by the Act and by means of admissible evidence[4].

[21] Due to the material irregularity the order which was made on 27 June 2013 cannot stand. The report of the psychiatrists should stand. There is no reason, in principle, why this matter should not be referred back to the Magistrate's Court in order for the Act to be complied with. The charge(s) must be put to the accused; the accused must be given an opportunity to plead; and, depending on the plea, it will have to be proved beyond a reasonable doubt that the accused committed the conduct he was charged with, before he can be dealt with as contemplated in s78(6) of the Act.

[22] In the result:

1. The proceedings, commencing on 27 June 2013, and culminating in the judgment and the order of the magistrate made on the 27 June 2013, as well as the said judgment and order for the admission and detention of Mbijana Luphuwana ('the accused') as an involuntary mental health care user, are reviewed and set aside.

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[3] See *S v Zuma and others* (supra) paras [6] and [7].
[4] Compare the facts in the present case to the facts in *S v Dewhurst* 2012 (1) SACR 627 (ECP).

2. The matter is remitted to the Magistrate's Court;

3. The accused shall be caused, by lawful means and procedures, to appear before the magistrate, who shall deal with the matter and finalise it in accordance with s 78 and the other relevant provisions of the Criminal Procedure Act, and in the light of this judgment.

P COPPIN
JUDGE OF THE GAUTENG HIGH COURT
(SOUTH GAUTENG LOCAL DIVISION)
JOHANNESBURG

I agree:

B VALLY
JUDGE OF THE GAUTENG HIGH COURT
(SOUTH GAUTENG LOCAL DIVISION)
JOHANNESBURG

CRIMINAL PROCEDURE-CULPABILITY- MENTAL ILLNESS OR INTELLECTUAL DEFECT- Making an order purportedly in terms of section 78(6)(a)(ii)(aa) of the Criminal Procedure Act ,51 of 1977, without finding the accused 'not guilty', as required by that section, is a material irregularity--making such an order before the accused has pleaded to the charge is , similarly irregular--the section requires the court to find the accused 'not guilty', implying that the charge must first have been put and pleaded to by the accused--allowing the state to adduce evidence to prove that the accused committed the act in question without the accused having pleaded to the charge is a material irregularity-- due to material irregularities the order purportedly made in terms of s78(6) and the relevant portion of the proceedings were set aside and the matter was remitted to the Magistrates' Court in order for it to comply with the law and the applicable procedures.