IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Review number: 070150

Magistrate's Serial Number: 1/2007
Case No: 4/5645/2002

In the matter between:

THE STATE

and

MABUTI MAPEY Accused

REVIEW JUDGMENT : 11 MAY 2007

BLIGNAULT J:

[1] This matter was referred to this court by a senior magistrate at the Wynberg Magistrate's Court in the form of a special review. The senior magistrate, with justification, described the history of the matter as *'a most unfortunate series of events'.*

[2] The accused was originally indicted on a charge of malicious damage to property allegedly committed on 11 November 2002. It was alleged that he had broken a window at the Wynberg

Magistrate's Court with a hammer. He appeared in court on 12 November 2002. The full record of the proceedings on that day is no longer available but it appears from a warrant issued by the magistrate that an order was made in terms of the provisions of sections 77(1) and 78(2) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act"), addressed to the medical superintendent of *'Valkenburg/Pollsmoor'* psychiatric hospital and referring the accused for purposes of an enquiry and report as contemplated in section 79 of the Criminal Procedure Act.

[3] For ease of reference the provisions of sections 77(1) and 78(2) of the Criminal Procedure Act are quoted below:

> '*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.*
>
> *… … … …*
>
> *78.2 If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason 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 in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'*

[4] It appears from a medical report dated 20 February 2003 that Dr Panieri-Peter, a specialist psychiatrist (for the senior medical superintendent) at the forensic psychiatry unit at Valkenburg Hospital and a clinical psychologist had examined the accused and found that he suffered from a psychotic disorder, that he was not fit to stand trial and that he was not able to appreciate the wrongfulness of the alleged offence and act accordingly. The report concluded with the following recommendation:

> '*The disposition fairest to the defendant and safest to the community would be, if the court pleases to refer him to an acute psychiatric hospital for treatment UNDER SECTION 9 OF THE MENTAL HEALTH ACT.'*

[5] The matter came before the magistrate's court again on 19 March 2003. The full record of the proceedings on that day is also no longer available. It appears, however, that the magistrate made

an order on 19 March 2003 which purported to be an order in terms of sub-section 77(6)(a)(i) of the Criminal Procedure Act and in the public interest (*'in belang van gemeenskap'*), that the accused be referred to the hospital section of Pollsmoor Prison, pending a decision of a judge in chambers.

[6] The accused spent the following period of three years and seven months in detention in Pollsmoor Prison. On 8 November 2006 the Pollsmoor Admissions Centre brought the matter to the attention of the senior magistrate at Wynberg Magistrate's Court and this gave rise to further proceedings. The accused appeared in court again on 21 November 2006 and the case was then postponed a few times in order to have the earlier record of the proceedings reconstructed. Although the full record of the earlier proceedings could not be found a number of relevant documents were located.

[7] On 13 December 2006 the matter came before the same magistrate that had made the order on 19 March 2003. Her record of the proceedings on 13 December 2006 referred to the question of the reconstruction of the record of the earlier proceedings and then proceeded as follows:

> '*Accused was unable to understand or follow any explanations or procedure at the time of previous proceedings as well as on the later appearances – also not today.*
> *Accused is very aggressive and refers to the court as a "dog".*
> *It is my respectful submission that my previous finding – that Mr Mabuti Mapey committed the Act in question and that he should be referred as recommended by Dr Panieri – Peter should be*

upheld.

The dispositions fairest to the defendant and specifically to the safety of the community would be that Mr Mapey is referred to Valkenburg Psychiatric hospital for further treatment under section 9 of the Mental Health Act.

Due to an earlier amendment to the Act concerned, it no longer required a decision by a judge in chambers.'

[8] The order made on 13 December 2006 follows the standard form of an order in terms of section 77(6)(a)(i) of the Criminal Procedure Act and is directed to Valkenburg Psychiatric Hospital. The standard wording of the operative part of the order was, however, deleted and replaced by an order that the accused, Mr Mabuti Mapey, be detained *'for treatment under section 9 of the Mental Health Act'*.

[9] Valkenburg Hospital apparently refused to admit the accused pursuant to this order as section 9 of the Mental Health Act 18 of 1973 had been repealed on 15 December 2004 in terms of the Mental Health Care Act 17 of 2002. The senior magistrate at the Wynberg Magistrate's court then deleted the reference to section 9 of the Mental Health Act of 1973 in the order and the accused was detained at Valkenburg Hospital pursuant to such amended order.

[10] The senior magistrate at Wynberg thereafter reconstructed the history of the matter from the available documentation and submitted it to this court by way of a special review. The senior magistrate, I may add, provided helpful comments on the issues in question.

[11] The review was allocated in this court to a colleague who was an acting judge at the time. Upon the expiry of his acting appointment the review was taken over by me. The Director of Public Prosecutions ("DPP") had meanwhile been requested to comment on the issues raised in the review. Ms Theunissen, a senior advocate of the DPP's office, submitted a memorandum in which she suggested that the order made on 19 March 2003 should be amended to provide that the accused be detained at Valkenburg Hospital pending a decision of a judge in chambers. The order made on 13 December 2006, she submitted, was irregular as a valid order had been made on 19 March 2006.

Can this court review the orders in question?

[12] A preliminary question to be considered is whether this court has the power to deal with this matter on review. In the submission of the matter to this court the senior magistrate referred to section 304(4) of the Criminal Procedure Act but that section deals only with matters after sentence had been passed. It reads as follows:

> *(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.*

[13] A similar question was considered by a Full Bench of the Witwatersrand Local Division in *S v Ramokoka* 2006 (2) SACR 57 (W). See paras [12] to [17] of the judgment, at 60F-J:

> '*[12] In view of the potential for serious prejudice to an accused person where an order is made in terms of s 77(6), some kind of review mechanism therefore seems desirable.*
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> *[13] Section 302 of the Criminal Procedure Act - which relates to automatic reviews - refers to cases in which a sentence has been imposed. This does not occur where the Court acts in terms of s 77. Section 304 - which relates to special reviews - also refers to proceedings in which a person has been sentenced. Section 304A relates to the review of proceedings after conviction but before sentence has been imposed. A person detained in terms of s 77(6) is not, in any generally understood legal meaning of the term, 'convicted'.*
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> *[14] The Court does, however, have the power at common law to exercise review powers over the decisions of the lower courts in appropriate cases. (See, for example, R v Marais 1959 (1) SA 98 (T), in which various authorities were collated, and which was referred to with approval in Wahlhaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) at 120A which, in turn, has been applied in numerous cases subsequently.)*
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> *[15] On the other hand, in S v Blaauw 1980 (1) SA 536 (C), Grosskopf J, as he then was, with whom Friedman J, as he then was, concurred, having found that the Criminal Procedure Act did not make provision for the review of such orders, expressed the view that it 'nie die Hof veroorloof om 'n stelsel van outomatiese hersiening te skep waarvoor die Wetgewer geen voorsiening gemaak het nie'. Although I am not bound by this decision made in another Division, I am reluctant to disagree with a Bench consisting of one Judge who went on to serve in the Appellate Division and another who became Judge President.*

Nevertheless, in view of the potential for serious prejudice to an accused person, I feel compelled to do so.

[16] It seems to me that, as a matter of good practice, magistrates should refer their orders made in terms of s 77(6) to the High Court for review. In this regard, the decision of the learned magistrate to refer the case to the High Court for 'special review' is to be commended.'

[14] I respectfully agree with the conclusion in the *Ramokoka* case that this court has an inherent power to exercise review powers in this kind of matter. In *Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another* 1959 (3) SA 113 (A) at 119--20, Ogilvie-Thompson JA described it as the Supreme Court's *'inherent power to restrain illegalities in inferior courts*'. The particular facts of the present case indeed illustrate the need for and the desirability of the existence of such a power.

[15] I am mindful of the fact that the decision in *S v Blaauw* 1980 (1) SA 536 (C), referred to in para [15] of *Ramokoka,* was that of a Full Bench of this division. It seems to me, however, that the learned judges in that case were concerned with the question whether a new system of review should be created by the court. I agree, with respect, that the introduction of an entire system would be the responsibility of the legislature. The question in the present

case is whether this court has the power to deal with this particular matter on review. I am of the view that this court has such a power and I propose to exercise it in this case.

The order made on 19 March 2003

[16] The next question to be considered is whether the order made by the magistrate on 19 March 2003 was a competent order. This requires a consideration of the provisions of sub-section 77(6)(a) of the Criminal Procedure Act. These provisions, it should be noted, were amended by section 12 of Act 55 of 2002 with effect from 18 February 2005. At the time when the order was made (ie 19 March 2003) the provisions of section 77 (6) (a) read as follows:

> '*If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused-*
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> *(i) in the case of a charge of or culpable homicide or*

rape or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 29 (1) (a) of the Mental Health Act, 1973 (Act 18 of 1973); or

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence-

(aa) be admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act 18 of 1973); or

(bb) be treated as an outpatient in terms of section 7 of that Act,

pending discharge by a hospital board in terms of section 29 (4A) (a) of that Act or an order that he or she shall no longer be treated as an outpatient,… … …'

[17] It seems clear that the provisions that the two sub-paragraphs, numbered (i) and (ii), of sub-section 77(6)(a) provided

for two fundamentally different kinds of orders. The effect of an order in terms of sub-paragraph (i) was that the accused would be detained in a psychiatric hospital or prison pending a decision of a judge in chambers in terms of section 29 (1) (a) of the Mental Health Act 18 of 1973. (This section has been replaced by section 47 of the Mental Health Care Act 17 of 2002.) The reference to detention *'pending a decision of a judge in chambers',* I may point out, however, is something of a misnomer. Unless an application is brought in terms of that section by an applicant with standing to do so, there is nothing pending before a judge. Failing the bringing of such an application, the person concerned simply remains in detention. Cf *S v Ramokoka, supra,* para 11 at 60A-C.

[18] The second sub-paragraph of sub-section 77(6)(a) contemplated detention and or treatment in an *'institution*' in terms of the Mental Health Act 18 of 1973. Section 9 of the Mental Health Act 18 of 1973, I may point out, formed part of Chapter 3 thereof. It provided that a magistrate may, after due examination of a person alleged to be mentally ill, if he

'*... is satisfied that such person is mentally ill to such a degree that he should be detained as a patient, … … issue an order in the prescribed form authorizing the patient to be received, detained and treated at an institution specified in the order'.*

(This section, it may be noted, was repealed and replaced by section 73(1) of the Mental Health Care Act 17 of 2002 with effect from 15 December 2004.)

[19] The distinction between the two categories of cases dealt with in the two sub-paragraphs of sub-section 77(6)(a), also appears from the provisions of section 79(1) of the Criminal Procedure Act. That section read (and still reads) as follows:

'***79 Panel for purposes of enquiry and report under sections 77 and 78***

(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on-

(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or

(b) where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest, or where the court in any particular case so directs-

(i) by the medical superintendent of a psychiatric 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;

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.'

[20] If the provisions of section 79(1) of the Criminal Procedure Act are read with those of sub-section 77(6)(a), the intention clearly was that an order in terms of sub-section 77(6)(a)(i) for the detention of an accused pending a decision of a judge in chambers would be preceded by an examination by a panel as required by section 79(1)(b). An order in terms of sub-section 76(6)(a)(ii) for the detention and treatment of the accused in an institution as defined, on the other hand, would be preceded by an examination by a medical superintendent in compliance with section 79(1)(a).

[21] I revert then to the question whether the order made in respect of the accused on 19 March 2003 was a competent order. Although the full record of the proceedings before the magistrate on 19 March 2003 is not available, it seems clear that she must have been of the view that the words *'if the court considers it to be necessary in the public interest'* constituted an independent ground for the making of such an order. The magistrate appears to have been of the view that the detention of the accused was *'necessary*

in the public interest' and that such consideration was sufficient to justify the detention of the accused pending the decision of a judge in chambers.

[22] It seems to me, however, that upon a proper construction of that section the magistrate could only make such an order in a case where he found *'that the accused has committed the act in question, or any other offence involving serious violence'.* The act in question in this context means an act of *'murder or culpable homicide or rape or a charge involving serious violence'.* On the available information it does not appear that the accused committed any such act.

[23] A second, but related, defect in the order made on 19 March 2003 is that the provisions of section 79(1) of the Criminal Procedure Act were not complied with. The accused was not examined by a panel as required by section 79(1)(b). He was examined by a medical superintendent only as envisaged in section 79(1)(a).

[24] I am accordingly of the view that the magistrate erred in making an order on 18 March 2003 in terms of sub-section 77(6)(a)(i) of the Criminal Procedure Act that the accused be referred to the hospital section at Pollsmoor Prison, pending a decision of a

judge in chambers. It seems to me that the correct order would have been that the accused be referred to an acute psychiatric hospital for treatment *'under section 9 of the Mental Health Act',* as was recommended by the psychiatrist.

[25] Common law powers of review normally includes the power to set aside the decision under review. In terms of section 304(2)(c) of the Criminal Procedure Act, a court exercising powers of review under that Act also has the power, *inter alia,* to:

> '*(iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question;'*

Such a power corresponds to the common law power of a court on review to substitute or vary administrative action or correct a defect arising from such action in appropriate cases. See *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) para [28].

[26] In the present case it would serve little purpose to remit the

matter to the magistrate's court. In deciding upon the appropriate order to be made the amendments to the legislation in question must, however, be borne in mind.

[27] Section 77(6)(a) of the Criminal Procedure Act, as I pointed out above, has been amended. It now reads as follows:

> '*(6) (a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused-*
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> *(i) in the case of a charge of murder or culpable homicide or rape or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a*

judge in chambers in terms of section 47 of the Mental Health Care Act, 2002; or

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence-

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

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106 (4) to be acquitted or to be convicted in respect of the charge in question.'

[28] In the circumstances of this case I am of the view that the appropriate order would be that the accused be admitted to and detained in Valkenburg Hospital as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002. That section provides for the periodic review and annual reports on involuntary mental health care users. I propose to add an order directing the head of Valkenburg Hospital to cause the mental health status of the accused to be reviewed in terms of section 37 of the Mental Health Care Act 17 of 2002 within a period of 30 days after this order comes to his notice.

The order made on 13 December 2006

[29] The order made on 13 December 2006 can be dealt with briefly. When the magistrate dealt with the matter on 13 December 2006 there was an order in existence in respect of the accused which had not been set aside. In these circumstances it seems to me that the magistrate did not have the power to make the order which she made on 13 December 2006. The order was in any event defective insofar as it referred to the Mental Health Act of 1973 which had been repealed by then. The order made on 13 December 2006 thus also falls to be set aside.

Conclusion

[30] In the result, the orders made on 19 March 2003 and on 13 December 2006 in respect of the accused are set aside. They are replaced with the following orders:

(a) The accused, Mabuti Mapey, is to be detained in Valkenburg Hospital as if he were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002.

(b) The head of Valkenburg Hospital is directed to cause the mental health status of the accused to be reviewed in terms of section 37 of the Mental Health Care Act 17 of 2002 within a period of 30 days after this order comes to his notice.

A P BLIGNAULT

VELDHUIZEN J: I agree.

A H VELDHUIZEN