



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

High Court Ref No: 14519

Khayelitsha Case No: RCA 151/10

In the matter between:

STATE

And

SINTHEMBA VIKA

Per: BINNS-WARD & ROGERS JJ

Delivered: 14 OCTOBER 2014

JUDGMENT

ROGERS J:

[1] This matter was referred to the High Court by the Regional Magistrate, Khayelitsha, following queries raised by the Office of the Director of Public Prosecutions Cape Town ('DPP') as to the procedure followed by the presiding magistrate pursuant to ss 77 to 79 of the Criminal Procedure Act 51 of 1977.

[2] On 26 May 2014 I notified the magistrate and the DPP that the matter would be held in abeyance pending delivery of this court's judgment in the matter of *S v Pedro*, a similar review which had been referred to open court for argument. Judgment in *Pedro* was handed down on 9 July 2014 ([2014] ZAWCHC 106).

[3] On 23 July 2014 I invited the DPP's comments on various matters. Those comments have now been received.

[4] The record in this matter reflects the following. The accused was charged with having raped a woman with the penis (Part III of Schedule 2 of Act 105 of 1997). The rape was allegedly committed on 2 May 2010. The accused was released on bail.

[5] On 6 July 2011 the defence attorney requested that the accused 'be sent to a District Surgeon for psychiatric examination'. No order appears to have been made at that stage. The magistrate's note indicates that on 5 August 2011 the accused was remanded on warning pending availability of a bed at Valkenberg Hospital ('VBH').

[6] On 9 September 2011 the accused was not in attendance but his attorney was. The magistrate's note states that the accused was to be referred to VBH in terms of ss 77-79 of the Criminal Procedure Act and that he was 'to be examined by three psychiatrists'. There were a number of remands thereafter while a bed at VBH was awaited.

[7] By 6 August 2012 a bed was available at VBH. The magistrate's note of the appearance on that date stated that in terms of ss 77-79 the accused was transferred to VBH for observation.

[8] On 12 October 2012 the accused was absent but his attorney was again present. The prosecutor stated that the report of the psychiatrists was available, though it was apparently not handed in at that stage. The accused was said to be 'not ready to stand trial' (presumably meaning not fit to stand trial). The prosecutor stated that there needed to be an enquiry and that the accused would be detained 'depending on the evidence'. The defence attorney said that he had no instructions.

[9] After several further postponements the matter served before the magistrate again on 13 May 2013. The accused was legally represented. The prosecutor informed the magistrate that the matter was on the roll 'for an enquiry into the mental capacity of the accused'. The recorded hearing does not indicate that the psychiatric report was handed in though it appears from the magistrate's letters of 10 March 2014 that he had received it. There was no discussion in open court regarding the report. Instead, the magistrate, after the announcement of the appearances, called the accused and asked him certain questions, apparently directed at ascertaining his mental capacity and ability to follow proceedings. The answers indicate that the accused was delusional.

[10] After the magistrate had completed his questions and after the prosecutor indicated that she did not wish to ask any questions, the magistrate made the following ruling:

'The accused is released on condition that he stays with his parents and submits to therapy, and takes medication as prescribed by that doctor. It is section 78(6)(b)(i)(dd). Okay, you can go home. He must take his medication every day, it must always be with you at home.'

[11] The psychiatric report is dated 8 October 2012. It is signed by Dr M Roffey ('Specialist Psychiatrist for Hospital CEO'), Prof S Kaliski ('Specialist Psychiatrist') and Ms T Swart ('Clinical Psychologist'). The conclusion of the panel was that the accused was suffering from dementia and personality changes secondary to a head injury. He was not fit to stand trial nor was he able, at the time of the alleged offence, to appreciate the wrongfulness of his conduct and act accordingly. The panel recommended that, if the court confirmed the accused's role in the alleged offence, the fairest course for the accused and for the safety of the community would be to send him to VBH as a State patient.

[12] In a letter to the Chief Magistrate dated 23 December 2013, the office of the DPP raised several queries regarding the procedure followed by the magistrate. The Regional Magistrate responded in letters dated 10 March 2014 addressed to the DPP and to the Registrar of this court.

[13] It is apparent, having regard to the judgment in *Pedro*, that there were a number of material irregularities in this case.

[14] Firstly, the magistrate ordered the accused to be examined by three psychiatrists whereas he was examined by two psychiatrists and a clinical psychologist.

[15] Second, no private psychiatrist (as that term is explained in *Pedro*) was appointed nor does there appear to have been any request by the prosecutor to dispense with the appointment of a private psychiatrist.

[16] Third, it does not appear from the record that the court identified the psychiatrist to be appointed for the accused or the clinical psychologist. (The J138 form, which is used to authorise detention for psychiatric observation, was not in the review record. However, two J138 forms were attached to the DPP's response to this court's queries. The one, dated 6 August 2012, which seems to have been signed by someone other than the magistrate who presided at the proceedings, stated that the accused was to be examined by three persons, namely by the medical superintendent of VBH, by Dr Kaliski of VBH and by Dr Roffey (erroneously described as being in private practice). The other form, which is dated 6 September 2012 but unsigned, stated that the accused was to be examined by the medical superintendent of VBH, by Dr Kaliski as a private psychiatrist (Dr Kaliski is in truth in the full-time employ of the State) and by Dr Roffey as the psychiatrist for the accused.)

[17] Fourth, the proceedings in open court did not deal at all with the psychiatric report. It appears from the magistrate's letter to the Registrar dated 10 March 2014 that the psychiatric report was received and discussed in chambers. The magistrate says that he 'conducted an informal enquiry' with the accused's mother. She

reported that he was a quiet and humble person but that problems arose when he did not take his medication. It was thereafter that the matter was called in court and the accused was questioned by the magistrate.

[18] Fifth, on the assumption that both the prosecutor and the defence attorney accepted the psychiatric report (and this might be a reasonable inference), the accused should have been found unfit to stand trial in terms of s 77. His case should not have been dealt with in terms of s 78. To the extent that the magistrate's ruling, with its reference to s 78(6), implied a verdict of not guilty, this was impermissible as the accused had not been asked to plead and was not fit to stand trial.

[19] Sixth, there was no information or evidence before the court as to whether or not the accused had committed the *actus reus* element of rape or of any other offence. Such an enquiry would have been necessary before the appropriate order could be made in terms of s 77(6)(a).

[20] Despite the irregularities in the procedure followed by the magistrate in appointing the psychiatric panel, I am not inclined at this stage to set aside the proceedings by which the panel was appointed. The accused was examined by two psychiatrists and a clinical psychologist. They were unanimous in their assessment. It is not apparent that any injustice was suffered by the accused in consequence of the irregularities. One knows that it can take many months before an accused person can be committed to a psychiatric facility for observation in terms of s 77. I would be reluctant, in the absence of obvious prejudice, to require the entire process of psychiatric observation to commence afresh.

[21] However, the procedure followed by the magistrate upon receipt of the psychiatric report cannot be allowed to stand. Upon finding that the accused was mentally unfit to stand trial, the magistrate should have acted in accordance with s 77(6)(a), not s 78(6). And importantly, before he could make a direction in accordance with s 77(6)(a), the magistrate was required to determine whether, on a balance of probabilities, the accused committed the alleged act of sexual penetration.

[22] It would not be right for this court to prescribe the procedure to be followed by a magistrate pursuant to s 77(6)(a) in determining whether, on a balance of probabilities, the accused committed the relevant act. Depending on the circumstances, it may be permissible for the magistrate to act on the basis of written statements contained in the docket. In other circumstances, the magistrate may consider it necessary to satisfy himself by evidence from one or more of those witnesses and/or from the investigating officer.

[23] Of course, before a magistrate can proceed in terms of s 77(6)(a), he or she must first determine whether the accused is in truth mentally unfit to stand trial. In the present case, and because the psychiatric report was unanimous, the magistrate was entitled to make such a finding without further evidence regarding the accused's mental condition, provided the psychiatric report was not disputed either by the prosecutor or by the accused. I have pointed out that this aspect was not dealt with satisfactorily in the court *a quo*. There is no clear statement on the record that the accused's legal representative accepted the psychiatric report; that is a matter of inference.

[24] This matter will inevitably need to be remitted to the magistrate, at least for purposes of enquiry and direction in accordance with s 77(6)(a). More than two years have already elapsed since the psychiatric panel made its report. An accused person who is mentally unfit to stand trial at an earlier time may become fit to stand trial at a later time and will then be entitled and obliged to plead to the charge and to have his guilt or innocence determined in the usual way. The psychiatric assessment in the present case probably does not hold out much hope for the accused's mental recovery. Nevertheless, and in view of the lapse of time, I think the remitted proceedings should include the question whether the psychiatric report of 8 October 2012 is accepted by the prosecutor and by the accused's legal representative. In other words, the court *a quo* will, when it resumes proceedings, be in the same position as it was when it convened after receipt of the psychiatric report. The prosecutor and the accused's legal representative may wish to make their own enquiries as to the accused's current mental condition. If there is reason to think his condition has improved, the prosecutor or the accused's legal representative may wish to dispute that the psychiatric assessment is now correct

(even though it may have been correct in October 2012). There would then need to be evidence concerning the accused's current mental fitness to stand trial.

[25] If, pursuant to the remitted proceedings, the accused is found mentally unfit to stand trial and if the court *a quo* is satisfied that the accused committed the alleged act of sexual penetration, the further question will arise as to the appropriate order to be made pursuant to s 77(6)(a). On that section's current wording the accused would, in the posited circumstances, have to be detained as a State patient in terms of s 77(6)(a)(i). However, this non-discretionary detention regime was found to be constitutionally invalid in the recent judgment of this court *De Vos NO & Another v Minister of Justice and Constitutional Development & Others; in re Snyders & Another v Minister of Justice and Constitutional Development & Others* [2014] ZAWCHC 135. The finding of constitutional invalidity and resultant reading-in contained in this court's order will only take effect if confirmed by the Constitutional Court. If the present case resumes in the court *a quo* before the Constitutional Court has delivered judgment, the magistrate will need to consider and hear the parties on the question as to the appropriate course to follow pending the Constitutional Court's decision. It would not be appropriate in this judgment to dictate what should be done, given that we have not heard submissions on the point.

[26] I would thus make the following order:

- (a) The proceedings in the court *a quo* on 13 May 2013 are reviewed and set aside.
- (b) The matter is remitted to the court *a quo* to determine, in accordance with ss 77(2) to 77(5) of the Criminal Procedure Act 51 of 1977, whether the accused is or is not capable of understanding the proceedings by reason of mental illness or mental defect. For that purpose, the court *a quo* will be entitled to receive and act upon the psychiatric report of 8 October 2012, save that the prosecutor and/or the accused will be entitled to dispute the finding of that report, in which event the court must proceed in accordance with s 77(3).
- (c) If the court *a quo* determines that the accused is not capable of understanding the proceedings, that court must determine, in accordance with s 77(6)(a), whether the accused on a balance of probabilities committed the act forming the subject of the charge against him and must make the appropriate direction in accordance with

s 77(6)(a)(i) or (ii), subject to any submissions by the parties arising from the finding of constitutional invalidity in *De Vos & Another v Minister of Justice and Constitutional Development & Others; In re Snyders & Another v Minister of Justice and Constitutional Development & Others* [2014] ZAWCHC 135.

BINNS-WARD J:

[27] I concur and it is so ordered.

BINNS-WARD J

ROGERS J