

ERNST AMAMUB V THE STATE

CASE NO. CA 32/2000

2000/10/23 Maritz, J. *et*

Mainga, J.

CRIMINAL PROCEDURE

Sections 77 and 79(3) of CPA - accused entitled to receive a copy of the report concerning his or her mental health prior to the commencement of the proceedings, to prepare on the basis thereof and to dispute the contents and conclusions thereof -accused not afforded such an opportunity -findings of magistrate set aside and matter remitted for enquiry to be disposed of in terms of s. 77(4)-(6).

CASE NO. CA 32/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ERNST

AMAMUB

APPELLANT

versus

THE

STATE

RESPONDENT

CORAM: MARITZ, J. *et* MAINGA, J.

Heard on: 2000.10.23

Delivered on: 2000.10.23 (*ex tempore*)

APPEAL JUDGMENT

MARITZ. J.: The appellant was charged in the Magistrate's Court, Otjiwarongo with the crime of attempted assault with intent to do grievous bodily harm. Before the commencement of the trial against him on 22nd August 1977 the prosecutor informed the Court that a report by

Doctor Janusz Maslowski had come to hand. That report was tendered and allowed in evidence as Exhibit "A". According to the report, the appellant was diagnosed as suffering from chronic schizophrenia. A number of symptoms, which manifested themselves in the course of his examination, were listed. Doctor Maslowski concluded on account of his examination that the accused did not have the ability to understand court proceedings to the extent that he would be able to adequately conduct his own defence and that, according to the available particulars, the accused suffered from a mental disorder at the time of the commission of the alleged offence and was not capable to appreciate the wrongfulness of his act and to act in accordance with an appreciation of such wrongfulness.

The magistrate apparently only informed the appellant of the findings apparent from the report and thereafter recorded that the appellant was not able to follow the proceedings and thus "(could) not give any logic answer". He ruled that the accused was not capable of understanding the proceedings so as to make a proper defence and ordered that he be detained in a mental hospital or in a prison pending the signification of the decision of the "State President" (sic).

Section 77(3) of the Act reads as follows:

"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 do that and present evidence to the court including the evidence of any person who under Section 79 enquired into the mental condition of the accused."

On a proper interpretation of that subsection it is clear that the Legislature by necessary implication intended that both the prosecution and the accused should be afforded an opportunity to dispute the correctness of any or all of the findings in the Court. Moreover, in terms of Section 79(3), an accused is entitled to receive a copy of the report so as to inform himself about the contents thereof and, on the basis thereof, to prepare for his next appearance and, if he/she so wishes, to dispute the findings in that report. It is not apparent from the

record that the magistrate afforded the appellant such an opportunity. It is also not apparent from the record whether the magistrate inferred from the report that the appellant could "not give a logic answer" or that so concluded on the basis of the conduct of the appellant in the course of the proceedings. The magistrate was in any event required to record the answers given by the appellant in the course of the proceedings - however illogically they might have sounded to him. He did not do so.

Mr Walters, appearing *amicus curiae* on behalf of the appellant, contents that the proceedings before the magistrate should be set aside and the matter should be remitted to the magistrate.

Ms Verhoef, appearing on behalf of the State, in my view correctly conceded the appeal.

In the result the following order is made:

1. The appeal succeeds.

31 The finding of the Magistrate, Otjiwarongo purportedly made under Section 77 (6) (a) of the Criminal Procedure Act, 1977 in Case No. 876/97 to the effect that the appellant is not capable of understanding the proceedings so as to make a proper defence and the order directing the appellant's detention in a mental hospital or prison pending the signification of the decision of the President are set aside.

32 The case is remitted to the Magistrate, Otjiwarongo and the magistrate is instructed to:

33 ensure that a copy of the report of Doctor Maslowski (Exhibit "A") be made available by the clerk of the Court to the appellant prior to the resumption of the hearing;

34 cause the said report to be read into the record in the presence of the accused at the resumption of the hearing;

- 35 enquire from the prosecutor and the appellant whether either one or both of
 them dispute the findings evident from the report and to record their answers;
- 36 further deal with and dispose of the enquiry in terms of Section 77 (4)-(6) and
 the other provisions of Act 55 of 1977.

ON BEHALF OF THE APPELLANT:

ADV J WALTERS

Instructed by:

Amicus curiae

ON BEHALF OF THE RESPONDENT:

ADV A VERHOEF

Instructed by:

Office of the Prosecutor-General