REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 33/2013

In the matter between:

THE STATE

and

LIKIUS NDENGU

(HIGH COURT MAIN DIVISION REVIEW REF NO 485/2012)

Neutral citation: *S v Ndengu* (CR 33-2013) [2013] NAHCMD 141 (29 May 2013)

Coram: HOFF, J and VAN NIEKERK, J

Delivered: 29 May 2013

Flynote: Criminal procedure – The accused – Report in terms of s 79 of Act 51 of 1977 – Court should follow provisions of s 78 – This includes a determination whether any of the parties dispute the report – Where prosecution disputes report which contains finding that accused is not criminally responsible for the crime because at the time of the commission of the offence he suffered from a mental illness court should explain to accused that he may subpoena and call any member of panel who enquired into his mental state to testify – where it becomes clear that prosecution and accused do not intend calling such witness the court should act in terms of s 186 by calling witness.

ORDER

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1. The conviction and sentence are set aside and the matter is remitted to the trial magistrate.

2. The accused shall be brought before the trial magistrate, who is directed to subpoena Dr Mthoko, or any other available member of the panel who enquired into the mental condition of the accused in terms of section 79 of the Criminal Procedure Act, 1977 (Act 51 of 1977), to testify about the enquiry and the report.

3. The magistrate is directed to grant the prosecutor and the accused leave to examine or cross-examine the witness in terms of section 166(2) of the Criminal Procedure Act.

4. After the proceedings have been concluded according to law, the magistrate shall either convict and sentence the accused or find the accused not guilty and detain him in terms of section 78(6) of the Criminal Procedure Act.

REVIEW JUDGMENT

VAN NIEKERK, J (HOFF, J concurring):

[1] In this matter the accused was charged in the magistrate's court of Ondangwa with a count of attempted murder in that he allegedly assaulted the complainant by cutting him on the head with a panga with intent to kill. Before the trial the prosecutor applied for the accused to be referred for psychiatric observation as the accused allegedly was mentally ill. This application was granted.

[2] After several postponements the magistrate recorded that the psychiatric report was available. It is not evident from the record whether the report was read into the record. The report is however, attached to the record. It is compiled by DR N F Mthoko, a psychiatrist in the full-time employment of the State. She recorded that the accused had been under observation for about a month at the

Psychiatry Department of the Windhoek Central Hospital. She further wrote that the accused is mentally ill and suffers from schizophrenia, but that he was in remission. She further recorded that the accused receives treatment at the Onandjokwe and Oshakati hospitals, but failed to go for certain follow up treatment shortly before the assault was committed and that that could be the reason for the relapse of his illness. She stated that he was put back on treatment some time after the assault on the complainant.

[3] The report further states that in terms of section 79(4)(c) (of the CPA) the unanimous view of the panel of experts tasked with the accused's observation and evaluation was that he was fit to stand trial, but in terms of section 79(4)(d) the finding was:

> 'At the time of commission of the alleged crime, the accused was *suffering from a mental illness*, because he failed to go for his medical follow up, and as a result was *not* able to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation.'

[4] After the report was presumably handed in the magistrate recorded the following:

> 'Court: Accused doctor's report state (*sic)* that at the time of the commission of the offence you suffered mental illness but you are fit to stand trial, what do you say?
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> Accused: I am mentally disturbed, but I can follow when people talk and I can question them.'

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[5] The prosecutor then applied for a postponement for plea and trial, but the court suggested that the postponement should rather be for 'family members to come and testify with respect to mental illness and/or in whose care accused can be released for treatment.' Thereupon the prosecution applied for a remand in custody for further investigation, which was granted.

[6] Thereafter the matter was again postponed on a few occasions until the accused eventually appeared before a different magistrate. It was also a different prosecutor who represented the State. The prosecutor then noted that the State was ready for plea and trial and that the accused was also ready to conduct his own defence. The charge was put, to which the accused pleaded not guilty. In terms of section 115 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the CPA'), he offered the following plea explanation:

> 'I am pleading not guilty because on that day I was sick. I did not know what I was doing. I did not commit the offence purposely because I was sick that day.'

[7] The matter then continued to run the normal course of a criminal trial. The prosecution called several witnesses and proved that the accused committed an unlawful act by hitting or cutting the complainant on the head with a panga. The State witnesses stated that the accused seemed normal. Some of them only heard after the event that the accused was allegedly mentally ill. The police officer who testified stated that he knew the accused for about 2 – 3 years, that the accused used to take tablets, but that he was 'always normal'. On the day in question he seemed normal and healthy with no illness about him.

[8] During cross-examination of the State witnesses the accused did not dispute the evidence about his appearance and condition. However, when he testified, he stated in evidence in chief that he did not know what he was doing when he used the panga against the complainant; that he was ill that day because his medicine had run out; and that he had no intention to commit the offence.

[9] From the evidence led about the accused's condition, it seems to me that the prosecution was out to show that the accused was not mentally ill during the commission of the crime or, if he had a mental illness, that it did not affect him in any way. This effectively means that the State did not accept the psychiatric report, although the prosecutor never expressly said so. This impression is confirmed by the cross-examination of the accused and the submissions made by the prosecutor before judgment.

[10] In his judgment the trial magistrate *inter alia* refers to the unanimous findings in the psychiatric report, but rejected the finding that 'the mental illness was caused by failure of the accused to go for his medical follow up'. He found that '[A]lthough the accused was suffering from a mental illness, it cannot be concluded that the accused was incapable of appreciating the wrongfulness of his act or incapable of acting in accordance with appreciation of wrongfulness during the commission of the offence. The accused knew exactly what he was [doing] during [the commission of the offence] therefore he is criminally liable.' (the insertions are mine). He concluded that the accused had direct intention to kill, convicted him of attempted murder and sentenced the accused to three years imprisonment of which two years were conditionally suspended for five years.

[11] The first issue to be dealt with is the initial referral for observation. The prosecutor laid no basis for the application, except to state that the accused is mentally ill. Thereupon the court asked the accused whether he has a 'mental problem', to which he responded in the affirmative. In *S v Mika* 2010 (2) NR 611 HC at 613J-614B) Liebenberg J stated in a similar case:

> "[7] Before the accused is referred for observation the court must be satisfied that there is some or other factual or medical basis for the allegation that he or she lacks criminal capacity. See *S v Makoka* 1979 (2) SA 933 (A) where the headnote reads:
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> > 'A court is not obliged to have an accused examined under the provisions of s 79 of Act 51 of 1977 when it is only alleged (without any indications of any ground) that the accused, because of mental illness, is not legally responsible. A court will always consider what grounds exist for such an allegation and whether there are grounds or not will depend upon the circumstances of each case.'
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> In the present case, at the mere request of the State prosecutor, the court postponed the case and referred the accused to Windhoek for psychiatric 'observation' without any medical basis, justifying such an order."

[12] The Court considered such a referral to be irregular, but nevertheless found on the facts that the accused was not unduly prejudiced thereby (at 614D). Similarly in the present case, I find that the accused in this case was not prejudiced by the referral, because it led to a unanimous finding by the expert panel that provided corroboration for his defence.

[13] When the matter was submitted for review, I posed the following questions to the magistrate:

‘1. Should the prosecutor and the accused not have been asked before any evidence was led whether they dispute the psychiatric report?

2. Should the magistrate not have explained to the accused that he had the right to call Dr Mthoko to testify in support of his defence?

3. Should the magistrate not have called Dr Mthoko to testify and to motivate her report?’

[14] The magistrate replied, *inter alia*, that he was not the presiding magistrate when the report was originally received. He referred to the record and stated that when the report was read to the accused and to the court, the accused stated that he is mentally disturbed; but that he can follow when people talk and he can question them. From this the magistrate concluded that the accused did not dispute the report.

[15] The magistrate further replied as follows:

‘4. Neither the Prosecutor who handed in the psychiatric report nor the accused did not (*sic*) raise any objection to the outcome of the report. That implies that although they were not asked, they both accepted the report.

5. The right of the accused to call the expert witness was explained to him, but he indicated that he will only call his aunt to assist him in his defense. The accused was also informed that he has the right to call his own doctor to come testify in his defense, but he declined.

6. Dr Mthoko was not called by the Magistrate to motivate her report because neither the Prosecutor not the Accused did not (*sic*) requested him to come

> testify as the psychiatric report was not in dispute and it was not challenged by either party.'

[16] I agree with the magistrate that it can be inferred that the accused did not dispute the report. Perhaps it can be inferred that the first prosecutor did not dispute the report. However, it certainly cannot be said that the second prosecutor who conducted the trial accepted the report. This much is clear from, as I have said before, the evidence he led, the cross-examination and the submissions he made. If the prosecutor had accepted the report he would not have asked for a conviction, but would have asked the magistrate to act in terms of section 78(6) by finding the accused not guilty and by ordering that the accused be detained in a mental hospital or prison pending the signification of the decision of the President. Be that as it may, it should not be left to inference whether the report is accepted or not. Unless the parties clearly indicate of their own accord what their stance is on the report, the court should pertinently ask each of them whether they dispute the report or not.

[17] In the *Mika* case the Court set out the provisions of section 78(2) to 78(6) as follows (at 613D-I):

> '[6] The criteria the court needs to follow when dealing with an accused who has committed an act which constitutes an offence and who allegedly suffers from mental illness or mental defect which makes him or her incapable of (i) appreciating the wrongfulness of his or her act; or (ii) acting in accordance with an appreciation of the wrongfulness of such act, are laid down in s 78(2) et seq in the following terms:

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"(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect 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 direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, *and the finding is not disputed by* the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) *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 s 79 enquired into the mental condition of the accused.

(5) *Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under s 79 enquired into the mental condition of the accused.*

(6) *If the court finds* that the accused committed the act in question and that he at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act, *the court shall find* the accused not guilty by reason of mental illness or mental defect, as the case may be, and direct that the accused be detained in a mental hospital or

> a prison pending the signification of the decision of the State President." [Emphasis provided.] '

[18] I am in respectful agreement with the following later statement of the Court (at p614H-615A):

> '[9] From a reading of ss (3), (4), and (5) of s 78 of Act 51 of 1977 it is clear that in all circumstances provided for in the section relating to the finding contained in the report, either party to the proceedings, being the State and the accused, has a right to dispute such finding(s) and may present evidence to the court. Should the finding not be unanimous or unanimous but disputed by either the State or the accused (or both), then the court has to determine the matter after hearing evidence, which includes the evidence of any person who under s 79 enquired into the mental condition of the accused (ss (4)). After hearing such evidence, the court is required to make a finding on (i) whether the accused committed the act in question; and (ii) that he at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act (s(6)). (See S *v McBride* 1979 (4) SA 313 (W).) However, if the finding is unanimous and not disputed by the parties, then the court may determine the matter on the report without hearing any evidence. Even then the State and the accused must be given the opportunity to express themselves on the finding contained in the report by informing the court whether they accept the finding or wish to prove otherwise by leading evidence.'

[19] In the *Mika* case the Court found that the failure of the magistrate to explain to the accused, *inter alia*, that he could dispute the report was an irregularity that vitiated the proceedings (at 615D). This must be seen in the context of the report

which did not conclude that he lacked criminal responsibility because of a mental illness or mental defect, but because of the effects of a psychoactive substance and recommended rehabilitation. On the facts of the present case I am of the view that any failure to explain to the accused that he could dispute the report did not vitiate the proceedings because the accused was clearly throughout in agreement with the report.

[20] The trial magistrate says he explained to the accused that he had the right to call 'the expert witness' and his own doctor, but that he declined to do so. The record does not reflect that he was given such an explanation. It only states that the accused indicated that he has no expert witness to call. In the judgment the magistrate stated: 'The accused was advised by the court to call his expert witness in support of his defence but he declined thereto.' Even if it is accepted that the accused was informed that he could call his doctor or an expert witness, I think it should have been pertinently explained, and the explanation recorded, that the accused was at liberty to call Dr Mthoko or any member of the panel who enquired into his mental state. It should also be noted that these witnesses are not the accused's expert witnesses, as the magistrate appears to think. It is not a case of an accused raising some or other defence requiring the testimony of an expert and for whose services the accused is responsible. These are experts who are ordered by the court in terms of the CPA to enquire into the accused's mental condition. The process is statutory and clothed with authority. While it does not mean that the outcome of the process must necessarily be accepted by the parties, it certainly does mean that the outcome cannot simply be ignored or argued away. An official report by a panel of experts who conclude that the

accused is not criminally responsible because of a mental illness or defect cannot simply be overthrown by the evidence of lay persons who observed the accused at the time and rejected by the prosecutor and the magistrate, who are also lay persons on the subject of mental illness and mental defects, without the expert(s) being heard on the matter.

[20] In fact, when it became clear to the magistrate that the State was not accepting Dr Mthoko's report, the magistrate should have asked the prosecutor whether he intended to act in terms of section 79(5) by issuing a subpoena for her or another member of the panel and cross-examining her. Although the subsection states that the party 'may' subpoena and cross-examine any person who under section 79 enquired into the accused's mental condition, I can hardly imagine a situation where the prosecution can successfully dispute the outcome of the enquiry if it does not include in its attack the weapon of cross-examination to discredit or upset the finding of the panel of experts. I would go so far as to suggest that, even if the prosecution disputes the report, it may very well be the prosecution's duty in the interests of justice, at least in the case of an unrepresented accused, to call the expert to enable him or her to defend the report. It should always be borne in mind that the inquiry is an official process which takes place under the authority of the CPA upon the order by the particular court that refers the accused for mental observation and that the prosecution is required to be objective.

[21] Ultimately though, when it became clear in this case that neither the State nor the unrepresented accused is calling any member of the expert panel to testify about the report, the magistrate should have realised that without the

testimony of a member of the expert panel, he could not make a just decision as to the guilt or innocence of the accused. He should have acted in terms of section 186 of the CPA, which provides as follows (the emphasis is mine):

> '**186 Court may subpoena witness**
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> The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and *the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.*'

[22] It is clear that the conviction and sentence cannot be allowed to stand. These should be set aside and the magistrate should be directed to subpoena Dr Mthoko or any available member of the panel to testify about the enquiry and the report and to grant the prosecutor and the accused leave to examine or cross-examine the witness in terms of section 166(2) of the CPA. The magistrate should then determine whether the accused should be found guilty of the crime charged, or whether he should be found not guilty and detained in terms of section 78(6).

[23] The following order is therefore made:

1. The conviction and sentence are set aside and the matter is remitted to the trial magistrate.

2. The accused shall be brought before the trial magistrate, who is directed to subpoena Dr Mthoko, or any other available member of the panel who enquired into the mental condition of the accused in terms of

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section 79 of the Criminal Procedure Act, 1977 (Act 51 of 1977), to testify about the enquiry and the report.

3. The magistrate is directed to grant the prosecutor and the accused leave to examine or cross-examine the witness in terms of section 166(2) of the Criminal Procedure Act.

4. After the proceedings have been concluded according to law, the magistrate shall either convict and sentence the accused or find the accused not guilty and detain him in terms of section 78(6) of the Criminal Procedure Act.

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K van Niekerk

Judge

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E P B Hoff

Judge