

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 19/2013

In the matter between:

THE STATE

and

MARCUS KEVIN THOMAS

ACCUSED NO 1

KEVAN DONNELL TOWNSEND

ACCUSED NO 2

Neutral citation: *S v Thomas* (CC 19-2013) [2015] NAHCMD 177 (3 August 2015)

Coram: LIEBENBERG J

Heard: 20; 23; 28 – 29 July 2015

Delivered: 03 August 2015

Flynote: Criminal procedure - Trial - Mental state of accused - Provision in s 79(1)(b) of Criminal Procedure Act 51 of 1977 that Court obliged to have at least two psychiatrists appointed where death sentence a possibility no longer obligatory - Court holding, however, that present case serious enough to warrant such order.

Summary: The accused had been referred for psychiatric observation in terms of s 77 (1) of the Criminal Procedure Act 51 of 1977 and reported on in terms of s 79 of the Act. The conclusion reached by the constituted panel was that the accused is unfit to stand trial in that he suffers from a neurocognitive disorder. In view of dissenting findings in the reports issues and relied upon when making the finding, the evidence of three members of the panel was heard from which the court concluded that without neuropsychological tests the conclusion reached by the panel was premature. There were furthermore indications that the accused might not have been criminally responsible for his actions and it would be prudent to also have him examined in terms of s 78 (2) of the Act. Whereas the accused had been examined by only one psychiatrist the court now has a discretion to invoke the provisions of s 79(1) (b) of the Act. This will depend mainly on the seriousness of the case and where the consequences for the accused are serious. The court found the present circumstances to be such that it warranted an order that the accused be re-examined by a panel of two psychiatrists.

ORDER

1. It is directed in terms of ss 77 (1) and 78 (2) of Act 51 of 1977 that in respect of Marcus Kevin Thomas his capacity to understand court proceedings so as to make a proper defence **and** his criminal responsibility be enquired into and reported on in accordance with s 79 (1)(b) of the Act.
2. The Medical Superintendent of the Windhoek Central Hospital is directed to constitute a different panel to conduct the enquiry and to be reported on by a psychiatrist appointed by him and to identify and contract the services of a neuropsychiatrist not in full-time service of the State as provided for in s 79 (1)(b)(ii) of the Act.

3. A copy of the evidence given by Dr Mthoko, Ms Nangolo and Ms Balzer, together with a copy of this judgment, to be submitted to the Medical Superintendent of the Windhoek Central Hospital.

RULING IN TERMS OF SECTION 77 (3) OF ACT 51 OF 1977

LIEBENBERG J:

[1] The accused were indicted on charges of murder; robbery with aggravating circumstances; several contraventions under the Arms and Ammunition Act 7 of 1996; and defeating or obstructing, or attempting to defeat or obstruct the course of justice. They pleaded not guilty on all counts. With the commencement of the trial on 03 November 2014 the accused persons were not in attendance and it was brought to the court's attention that accused no 1 attempted to escape from the Windhoek Central Correctional Facility, where they had been detained pending finalisation of the trial. It was further reported that accused no 1 sustained injuries and was under medical observation, also that he was being examined by a specialist medical practitioner.

[2] On 07 November 2014 a letter addressed to the Office of the Prosecutor-General, purporting to be a medical report compiled by Dr Hasheela Toivo in respect of Thomas Marcus (hereinafter the accused unless stated otherwise), was received into evidence by agreement (Exh 'A'). The past medical history of the accused in this report reflects that on 03 November 2014 he was treated at the Katutura State Hospital for mild head injury which was sustained when he fell from a wall while trying to escape, where after he reportedly suffered a brief episode of loss of consciousness. He had further sustained multiple minor lacerations over the plantar aspects of both hands

which were stitched up under local anaesthesia. Upon his return to the hospital two days later he was complaining that he could not stand or sit for long periods; that he had a severe headache and him paining over his whole body. He further complained of tunnel vision.

[3] Based on the history of loss of consciousness a CT-Scan of the brain was done which did not demonstrate any traumatic changes or abnormalities. With regard to the accused's central nervous system no abnormalities were detected and he was assessed to have sustained a mild head injury. It was recommended that if the symptoms persisted the accused had to be referred to a neurologist. Besides given painkillers for the headache, he received no other medical treatment.

[4] On 07 November 2014 the accused persons were asked to plead and after informing the court that they understood the charges preferred against them, they pleaded not guilty on all counts. When the trial commenced on the 11th of November 2014 and during the testimony of the third witness for the State, Mr *van Rensburg*, the erstwhile legal representative of the accused sought an adjournment and upon their return to court the following day, informed the court that he had received instructions to plead guilty on all charges. However, counsel further stated that during consultation it appeared to him that the accused did not comprehend what counsel conveyed to him and that the facts forming the basis on which he was willing to plead guilty, differed substantially from his earlier instructions. Although the State initially opposed the application to have the accused referred for psychiatric observation, it changed course and was of the view that in the circumstances it would be best to have the accused referred for examination.

[5] In the light of facts presented to court from the Bar by the accused's legal representative pertaining to the accused's state of mind, considered together

with findings set out in the medical report, the court was satisfied that a basis had been laid from which it would appear that the accused is by reason of mental defect not capable of understanding the proceedings so as to make a proper defence and accordingly, directed in terms of s 77 (1) of the Criminal Procedure Act , 51 of 1977 (hereinafter the Act) that the matter be enquired into and reported on in accordance with the provisions of s 79 of the Act.

[6] A report issued by Dr Mthoko, a registered psychiatrist in full-time employment of the State at the Psychiatric Department of the Windhoek Central Hospital, was handed into evidence and reflects that the period of observation was from 10 March to 16 April 2015. The report further reads that during the enquiry, psychiatric interviews were conducted with the accused; a physical examination and computerised tomography (CT-scan) was done; he was interviewed by a medical social worker and observed by ward psychiatric nursing staff. Assessment by an occupational therapist, Ms Balzer and a clinical psychologist, Ms Nangolo, also formed part of the examination.

[7] For a proper understanding of the clinical reports obtained during the examination, it seems necessary to quote the following from the report of Dr Mthoko:

‘During observation period, Markus Kevin Thomas had impairment in cognitive performances. He knew who he is, but did not know the day or year. He struggled to recall events in his life that took place prior to the crime. He struggled to recall information that was given to him; only after a long period of time, after much repetition did he remember something. He did not recognise that he has memory problems. During assessment he kept on repeating “I am not stupid, I am smart”.

Memory problems was accompanied by slowed information processing as identified by slowed response time. He had problems initiating problem-solving strategies. He

struggled with abstract reasoning. He had noticeable word-finding difficulty, and had problem following instructions.

CT brain is within normal limits.'

In conclusion the constituted panel unanimously found that the accused suffers from a neurocognitive disorder and that he, at the time of writing the report, was not fit to stand trial.

[8] Ms *Verhoef*, appearing for the State, intimated that it would appear from reports filed by the clinical psychologist and the occupational therapist, which reports were relied upon when coming to the above conclusion, that the examination in certain aspects was lacking. In view thereof the court ordered in terms of s 77 (3) of the Act that Dr Mthoko, Ms Nangolo and Ms Balzer, who have enquired into the mental condition of the accused and prepared reports thereanent, be called to give oral evidence and elucidate their respective findings.

[9] During her testimony Dr Mthoko explained that a neurocognitive disorder is not a mental illness, but a mental defect which, in the present instance, was caused by a suspected head injury. The history of a head injury was provided by the accused himself and confirmed from medical records relating to the medical examination performed on the accused on 05 November 2014. Dr Mthoko explained that, with a history of falling and the findings from the assessment, she had come to the conclusion that the accused is suffering from a neurocognitive disorder. She was further of the opinion that this was a consequence of the fall and not something the accused had suffered from prior thereto. The findings from the assessment, in her view, were consistent with findings of a head injury and added that, although the CT-scan was within normal limits and did not show any brain injury as such, there are certain injuries which can affect the cognitive functions which cannot be detected by the CT-scan; therefore, it does not exclude the possibility of injury to the brain.

With regard as to whether or not the injury would only be temporary or permanent, Dr Mthoko said that the prognosis would depend on several future assessments and in order to say whether there is any improvement in the condition, he should be re-assessed one year after the injury. During this period no treatment or medication is required as only time will tell whether or not there has been any improvement in the accused's mental condition.

[10] In cross-examination by the State, Dr Mthoko was probed on the report of the clinical psychologist, Ms Nangolo, who in conclusion of her assessment stated the following:

'In conclusion, Marcus' personality is within the normal reactionary range. The evaluations conducted on Marcus, however indicated **significant levels of anxiety** which he may be experiencing. There was no indication of brain impairment noted from **the test results**. The only significant correlations between the tests was with regards to his **high level of anxiety**.

The standardized testing indicated that his intelligence and level of reasoning fell within a normal range. However, the **clinical interviews, patient observations and clinical impression** indicated some level of deficits with regards to both patient's short-term and long-term memory of events. Based on the aforementioned it is recommended that a comprehensive neurological exam be conducted in order to establish the extent to which the patient's memory may be impaired.' (My emphasis)

[11] When asked whether any consideration was given to the clinical psychologist's recommendation to have a neurological examination done on the accused to establish the extent of his memory impairment, Dr Mthoko explained that 'He needs a neuropsychological assessment or neuropsychiatric assessment' but, notwithstanding, expressed the opinion that she was unable to see what a neurologist would be able to detect as there was no neurological deficit. As for the availability of a neuropsychologist in

Namibia she was uncertain as to whether there is any registered neuropsychologist in Namibia. What is evident from Dr Mthoko's testimony is that, had a neuropsychologist been available, she would have referred the accused but, because such services are not available in Namibia (according to her knowledge) the panel's findings are based only on what they got from their assessments. It seems to me that this was a material shortcoming in the enquiry, particularly where both Ms Nangolo and Dr Mthoko were of the opinion that a neuropsychological assessment was required, though such test, according to the latter, would only have been supplementary.

[12] Had these tests been done, it would have established whether there was any brain damage and if so, the extent thereof. Without these tests, as testified by Dr Mthoko, they (she and the panel) were obliged to conclude only from the symptoms, that the manner in which the accused presented himself during the observation period was due to a brain injury. The accused was assessed and found to have poor memory; a short attention span and experienced difficulties in the comprehension and following of instructions. When asked whether the accused, according to her observations, was genuine in his presentation, she excluded the possibility of malingering and said interviews with the accused covered general issues, and not only matters relating to the charges he is facing. The sincerity thereof, with respect, seems to me to lie in the eyes of the beholder. According to Dr Mthoko the accused's memory of incidents which happened in the past is still intact, but it takes time for him to trace that information from his memory. In other words, he has difficulty in recalling the events. With regard to events before the injury, Dr Mthoko further expressed the opinion that his memory 'is supposed to be there'.

[13] Bearing in mind the little information about the accused's past which could be elicited from him during several interviews conducted by members of the panel, this seems to militate against a finding that the accused's memory

of events before the injury is still intact. There is also evidence about the accused having given different versions about his background which could possibly be explained by either him consciously giving contradicting information in which instance he malingers, alternatively, an unwillingness to disclose the information, or that it is indeed due to a mental defect. He was unable to narrate the level at school he had progress up to or the name of the school he had been attending. Though Dr Mthoko was of the view that the accused was not malingering, she however could not completely rule out such possibility. In her view the accused is currently unable to give a clear history of things that had happened i.e. there is no flowing of information.

[14] In the light of the criminal proceedings instituted against the accused and the seriousness of the charges he is currently facing, it might become necessary (when found fit to follow court proceedings), to decide whether the accused was also criminally liable at the time he allegedly committed the said crimes. Though the psychiatric report under consideration was only prepared in respect of the accused's capacity to understand court proceedings and to make a proper defence as provided for in s 77 (1) of the Act, it seems to me that evidence about some level of deficits with regard to both the accused's short-term and long-term memory of events, as was testified by the clinical psychologist, cannot simply be ignored and the full extent thereof must be determined in order to decide as to whether or not the accused is fit to stand trial. In my view, this in itself, would be sufficient reason to have the accused re-evaluated.

[15] Despite the scant information about the accused's past as furnished by himself, one factor that was given considerable weight in the assessment of Ms Blazer, the clinical psychologist, is the comparison drawn between the accused having progressed up to university level, opposed to the way he presented himself and was functioning during the observation period. According to her it was not matching as he is currently functioning at a much

lower level. Because of the disparity between the two levels, considered together with a history of falling and the accused not showing classic symptoms of mental illness, Ms Balzer concluded that the only explanation could be that brain damage occurred during the fall. She further reasoned that because the injury ('accident') only occurred after the crime, the accused would be rendered accountable for his actions.

[16] What is evident from the conclusion reached in the end by the panel is that, in the absence of any mental illness, considerable weight was given to the manner in which the accused now presented himself and, when compared to the accused having had the mental capacity to attend university, it was concluded that he must have sustained brain injury during the fall. Without any physiological proof supporting the inference drawn, it would appear to me that there was insufficient facts available from which such conclusion could be drawn and, objectively viewed, that more weight was accorded to the history of falling than what it deserved. In my view the circumstances of the case are such that it necessitated testing by a neuropsychologist or neuropsychiatrist to determine the extent of a brain injury, or whether it indeed presented itself. The need to have further tests done, in my view, should not readily have been disposed of simply because such specialised services are not available in Namibia. When it became necessary to draw on professional expertise outside the borders of this country, more should have been done to obtain same from elsewhere.

[17] The importance to determine whether or not the accused is fit to stand trial cannot be over-emphasised and more so when regard is had to the seriousness of the crimes for which the accused is charged. The delivery of justice should not be ham shackled by financial constraints and, given the circumstances which presented itself during the psychiatric evaluation of the accused, this seems to me to be an instance where more effort should have been made to obtain the required specialised neurological services to assist in

the determination of the mental capacity of the accused, and whether or not he is fit to stand trial.

[18] I have for the aforesaid reasons come to the conclusion that the unanimous finding reached by the constituted panel that the accused is not fit to stand trial was premature, and that this conclusion could not have been reached without the proper assessment of the accused by either a neuropsychologist or neuropsychiatrist. In addition, whereas according to the evidence presented, the neurocognitive disorder the accused is alleged to suffer from is not likely to be permanent, it would not, against this background, be in the accused's best interest if this court resorts to the provisions of s 77 (6) of Act 51 of 1977 and direct that he be detained in a mental hospital or prison pending the signification of the decision of the State President, without the assurance that he, at present or in the near future, is indeed unfit to stand trial.

[19] In his address Mr *Karuaihe* strenuously argued that the finding was unanimous and without any evidence to the contrary having been presented to court, there was no basis on which the court could order a re-evaluation of the accused. For the reasons already stated herein, I find no merit in counsel's contention and nothing further needs to be said in this regard.

[20] Whatever the outcome of these proceedings, it will have some bearing on the position of accused no 2. It is for that reason that Mr *Kaumbi* submitted that if a re-evaluation of the accused is ordered, then this should be finalised within a definite period of time. Though mindful that under Article 12 (1)(b) of the Namibian Constitution the accused are entitled, as of right, to a fair trial which must take place within a reasonable time, the circumstances in this case, unfortunately, are such that there could be no fair trial to either of the accused without a proper and reliable finding as to whether or not accused no

1 is fit to stand trial, or is found liable for the crimes alleged to have been committed by him and his co-accused. This, despite the accused persons having been in detention since their arrest in 2011.

[21] Section 79 (1)(b) of the Act provides for instances where the accused is charged with an offence for which the sentence of death may be imposed, or where the court in a particular case so directs, that the enquiry directed by the court under s 77 (1) or 78 (2) be reported on –

- (i) by the medical superintendent of a mental 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; and
- (iii) by a psychiatrist appointed by the accused if he so wishes.

[22] In *S v Hansen* 1994 NR 5 (HC) at 7 C-D the court as per Strydom JP (as he then was), considered the purview of s 79 (1)(b) after the abolishment of the death penalty by the Namibian Constitution and stated:

‘... (T)here is no instance where this Court is obliged to follow this procedure and this procedure shall only be followed where this Court, for certain reasons, may direct that it be followed. It is therefore this Court which must decide whether to accept this report, or on the application of the defence, to again refer the accused for further observation according to the provisions of s 79 (1)(b).’

And further at 7E-F:

'(I)t seems to me that cases where the Court will direct this procedure to be followed, will invariably be cases where the case itself is serious and where the consequences are serious for a particular accused.'

I respectfully endorse these sentiments.

[23] What is clear from the *Hansen* case is that though it might be unusual to refer an accused twice for psychiatric observation, there may be circumstances compelling the court to exercise its discretion to invoke the provisions of s 79 (1)(b) of the Act, by having the accused examined by two psychiatrists instead of one, even if the accused had already been examined and reported on by a single psychiatrist. Obviously, this would mainly depend on the facts of each case.

[24] After due consideration of the evidence adduced relating to the psychiatric report submitted in respect of accused no 1, as well as the unfortunate position accused no 2 finds himself in as a co-accused, I have come to the conclusion that this is an instance where the court should exercise its discretion in favour of a directive that the provisions of s 79 (1)(b) of Act 51 of 1977 must be followed. In view of evidence that the accused is required to undergo neuropsychological tests, there seems to be a particular need for a psychiatrist who has specialised in that field of science. The court will then make an order to that effect.

[25] I have already alluded to the possibility that from the evidence presented about the accused's long-term memory loss, there seems to be strong indications that the accused might also have suffered from a mental defect rendering him incapable of appreciating the wrongfulness of his actions, or acting in accordance with an appreciation of the wrongfulness thereof. This would justify an expansion of the enquiry to also include an examination in terms of s 78 (2) whereby the criminal responsibility of the accused is

assessed. The court in this regard should follow a cautious approach and rather found to have erred on the side of caution, if nothing material arises from the examination.

[26] In the result, the court makes the following order:

1. It is directed in terms of ss 77 (1) and 78 (2) of Act 51 of 1977 that in respect of Marcus Kevin Thomas his capacity to understand court proceedings so as to make a proper defence **and** his criminal responsibility be enquired into and reported on in accordance with s 79 (1)(b) of the Act.
2. The Medical Superintendent of the Windhoek Central Hospital is directed to constitute a different panel to conduct the enquiry and to be reported on by a psychiatrist appointed by him and to identify and contract the services of a neuropsychiatrist not in full-time service of the State as provided for in s 79 (1)(b)(ii) of the Act.
3. A copy of the evidence given by Dr Mthoko, Ms Nangolo and Ms Balzer, together with a copy of this judgment, to be submitted to the Medical Superintendent of the Windhoek Central Hospital.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE	A Verhoef Of the Office of the Prosecutor-General, Windhoek.
ACCUSED NO 1	M Karuaihe Instructed by Karuaihe Legal Practitioners, Windhoek.
ACCUSED NO 2	JR Kaumbi Instructed by Kaumbi Inc. Windhoek.