



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL JUDGMENT

Case no CA 10/2016

In the matter between:

MARTIN RUDOLF

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Rudolf v S* (CA 10/2016) [2017] NAHCNLD 25 (06 April 2017)

Coram: JANUARY, J and TOMMASI, J

Heard: 17 OCTOBER 2016

Delivered: 06 April 2017

Flynote: Appeal – Criminal Procedure Section 77 of CPA – State Presidents patient – Wrong Procedure.

Summary: The learned magistrate declared the appellant a State President's Patient without affording him the opportunity to dispute a psychiatric report or call his own expert. Further, he did not have a legal representative. The appeal succeeds.

ORDER

1. The appeal succeeds.
2. The order dated 01 October 2013, declaring the appellant a State President's Patient, is set aside.
3. The matter is remitted to the trial court with the direction to follow the guidelines set out herein and in the case referred to and bring the proceedings to conclusion.

APPEAL JUDGMENT

JANUARY, J (TOMMASI, J CONCURRING)

[1] This appeal is against an order declaring the appellant a State President's Patient after he (the appellant) was sent for mental observation in terms of section 77(1) of the Criminal Procedure Act, Act 51 of 1977 (hereinafter referred to as the CPA).

[2] The appellant was charged in the magistrate's court for two charges of murder. The allegations are that the appellant on 23 July 2012 at or near Okandjengedi in the district of Oshakati unlawfully and intentionally killed Frieda Ndinelago Alfeus by cutting her throat with a panga; and on 23 July 2012 at or near Okau-Kamasheshe in the district of Oshakati, the appellant did unlawfully and intentionally kill Basilia Ndilokelwa Shikesho by stabbing her with a knife.

[3] The rights to legal representation were explained to the appellant at his first appearance on 27 July 2012. The appellant indicated that he understood and opted to

conduct his own defence. He appeared again on 13 September 2012 on which date it was explained to him by the magistrate that it is required for him to plead in terms of section 119 of the CPA. He was again asked if he is requiring to have a lawyer or to plead in the presence of a lawyer. The appellant indicated that he will plead on his own and get a lawyer later.

[4] The charges were put to the appellant in terms of section 119 of the CPA. The appellant pleaded guilty. The court proceeded in terms of section 112(1)(b) of the CPA to question the appellant to determine if his pleas were indeed pleas of guilty. The appellant started to laugh uncontrollably and despite numerous attempts by the court for him to stop, he continued laughing and refused to stop. The court stood the matter down for some time. On resumption, the record reflects as follow:

'Court explains Section 112(1)(b) to accused and proceeds.

Count (1)

Q: Do you understand the charge very well?

A: Yes

Q: What is your plea?

A: Guilty

Q: Are you freely and voluntarily pleading guilty?

A: Yes freely.

Q: Are you satisfied to be on your sound and sober senses?

A: I just get this thing that comes to me and I just start laughing but I am sober.

Q: What did you do wrong to plead guilty?

A: I am applying that I be taken to hospital for mental observation at this stage. I will not answer any more questions posed to me in respect of any of the two counts. I will not answer any more questions posed to me. I do not want to

answer. I want to be examined at the hospital before the court may proceed with the proceedings.

Court: Stops proceedings. Enters a plea of not guilty in respect of both counts.

SP: May case be remanded till 01st October 2012 for mental observation.

Court: The court is unable to proceed with full proceedings of section 119 as accused indicates that he will not answer any questions posed to him at this junction on states application the court adjourns to 01/10/2012 for accused to be referred for mental observation. Accused remanded in custody and warned for court at 08h30.'

[5] Eventually the psychiatric report was received on 01 October 2013. I need to pose here and state that there are actually two reports filed on record. One from Intermediate Hospital Oshakati from Dr. M M Farahani and one from Windhoek Central Hospital from Dr Seddie Wilfred Alibusa. Both the reports state that the appellant is suffering from Schizophrenia and that the appellant is not fit to stand trial.

[6] The public prosecutor read the psychiatric report into record and it was interpreted to the appellant. The appellant showed no response and was only pointing fingers into the gallery. The public prosecutor agreed with the report. When the appellant was asked whether or not he agrees with the report, he continued playing with his fingers and looked into the gallery. On the request of the public prosecutor, the appellant was then declared a State Presidents patient.

[7] It does not appear from the record that the court explained to the appellant that he could dispute the psychiatric reports or call the expert or his own expert.

[8] The relevant law is as follows:

'77 Capacity of accused to understand proceedings (my emphasis)

(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.

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the 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.

(3) 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 section 79 enquired into the mental condition of the accused.

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

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.

(6) If the court finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the accused be detained in a mental hospital or a prison pending the signification of the decision of the State President, 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.

(7) Where a direction is issued under subsection (6) or (9) that the accused be detained in a mental hospital or a prison pending the signification of the decision of the State President, the accused may at any time thereafter, when he is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

(8)(a) An accused against whom a finding is made-

- (i) under subsection (5) and who is convicted;
- (ii) under subsection (6) and against whom the finding is not made in consequence of an allegation by the accused under subsection (1),

may appeal against such finding.'

[9] The record also does not reflect that the accused was provided with the psychiatric report and that the report was explained to the appellant.

[10] In my view there is another misdirection in that the learned magistrate simply relied on the word of the appellant to continue with the matter without legal representation despite the guidelines laid down in the case of *S v Josef Usinge* (CR27/2015) 2015 NACM 222 (18 September 2015).

[11] I reiterate that the Legal Aid Act, Act 29 of 1990 provides *inter alia* as follows for situations such as in this case:

'9 Legal aid in lower courts

(1) Whenever-

- (a) in a trial before a lower court an accused who is not legally represented, is charged-
 - (i) with an offence specified under subsection (2); or
 - (ii) with an offence which is not so specified and the lower court considers that, having regard to all the circumstances of the case, it is in the interest of justice that the accused should be represented;
- (b) at a preparatory examination held by a lower court under the Criminal Procedure Act, 1977 (Act 51 of 1977), the court considers that, having regard to all the circumstances of the case, it is in the interest of justice that the accused should be represented at the preparatory examination, the court shall, if, in

its opinion after inquiry, the accused has insufficient means to enable him or her to engage a practitioner to represent him or her, recommend to the Director that legal aid be granted to the accused for the purposes of such trial or preparatory examination.'

[12] In this matter, I find that the magistrate committed irregularities by firstly; not informing the appellant that he might have challenged the evidence of the expert and secondly might have called his own expert and, thirdly not having informed the Directorate of legal Aid to appoint counsel.

[13] The appellant in his notice for leave to appeal states that he is now in his sound and sober senses and he wants the trial to proceed. It appears from the notice of appeal that it might be the case that he may understand proceedings. The respondent in this matter conceded that the magistrate committed irregularities.

[14] In the result:

1. The appeal succeeds.
2. The order dated 01 October 2013, declaring the appellant a State President's Patient is set aside.
3. The matter is remitted to the trial court with the direction to follow the guidelines set out in herein and in the case referred to and bring the proceedings to conclusion.

H C JANUARY

JUDGE

M A TOMMASI

JUDGE

APPEARANCES:

For the Appellant:

Mr Jan Greyling Jnr.

Of Jan Greyling & Associates

For the Respondent:

Adv. Pienaar

Of Office of the Prosecutor-General