



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 42 /2016

In the matter between:

LUCAS LAZARUS NGHIVALI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nghivali v S* (CA 42-2016) [2017] NAHCNLD 55 (15 June 2017)

Coram: TOMMASI J and JANUARY J

Heard on: 13 June 2017

Delivered: 15 June 2017

Flynote: Appeal – Criminal Procedure – Order made in terms of s 77(6) for appellant to be detained in a mental hospital pending the signification of the State President – The recommendation was that the appellant can receive psychiatric treatment, as a civil patient, in terms of s 9 of the Mental Health Act – Court *a quo* failing to allow the State the opportunity to investigate options available – Resulted in a

miscarriage of justice - Proceedings set aside and remitted to the court that issued the direction in terms of s 77 (10).

ORDER

1. The direction issued by the district court in terms of section 77 (6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) that the accused be detained in a mental hospital pending the signification of the State President, is hereby set aside; and
 2. The matter is remitted to the district court of Omungwelume in the district of Oshakati in terms of section 77 (10) with the direction that the relevant proceedings shall be continued in the ordinary way having due regard to the findings of this court.
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JUDGEMENT

TOMMASI J (JANUARY J concurring)

[1] This is an appeal against the order by the learned magistrate that the appellant be detained in a mental hospital pending the signification of the State President in terms of section 78 (6) of the Criminal Procedure Act 51 of 1977 on 8 May 2015.

[2] The charge sheet reflects that the appellant faced two counts namely contravening s 38 (1) (o) of the Arms and Ammunition Act, 7 of 1996 i.e discharge of a fire-arm and assault through threat read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. He however never pleaded to these charges but was referred for mental observation. The accused was not represented at the time.

[3] On 8 May 2015 the appellant appeared before the court and what follows is verbatim what was recorded:

“PP: The accused was subjected to psychiatric evaluation in terms of section 79 of the CPA. A report was completed by the Forensic psychiatric unit in Windhoek. May the report’s contents be conveyed to the accused?”

Mr Dawid (interpreter): Reads out the report to the accused.

CRT: Sir did you understand the contents of the report?

ACC: Understands

CRT: Sir Do you agree with the findings of the specialists who examined you?

Acc: I don’t agree with the results. I even informed the detective, how did they determine?

CRT: Mr Jacobs the accused disputes the findings.

PP: I wanted to peruse the section 9 of the Mental Health Act and at this stage I don’t have proper understand and I would want to conduct research in this matter and to also contact my seniors. May matter be remanded to 13/05/2015 to consider whether the accused can be released as per collective legal position? State is in possession of a fire-arm of the accused perhaps the fitness thereof has to be enquired. Seeing the accused is responding in a way that he does not understand the proceedings here today after numerous explanations given to him today.

CRT: Section 78 (4) lays down the procedure to be followed where the findings of a report are disputed.

CRT: Sir what exactly in the report are you disputing?

Acc: I thought the result said because I was found to have such a problem then I should be taken back to Windhoek.

CRT: That is correct Sir those are the concluding recommendations.

Acc: I’m in agreement with the findings

CRT: In that case since the findings of the psychiatrists is unanimous and are also not disputed by both parties. The court will decide this matter based on the report. The court hereby applies section 78(6) of Act 51 of 1977, and the court hereby orders that the accused be detained in a Mental Hospital pending the signification of the state's president."

[4] The report finds that he appellant had abnormal believes and thought disturbances. He had no insight into his mental state. The conclusion was that the appellant was suffering from a delusional disorder and he was not fit to stand trial (s79 (4) (c) and at the time of the commission of the alleged crime, he was mentally ill and was not able to appreciate the wrongfulness of the alleged offence and to act in accordance with such appreciation. It was recommended that the appellant can receive psychiatric treatment, as a civil patient, in terms of section 9 of the Mental Health Act, Act 18 of 1973. This was the unanimous opinion of the constituted panel.

[5] The appellant on his is own or with the assistance of an inmate, drafted a notice of appeal on 28 April 2016. The appellant at that time was detained at Oluno Prison and in his notice of appeal stated that he had not received medication for his mental condition since his arrest which was almost 11 months. He wanted to know why he was not tried if he is not treated as a mentally ill patient and if he is not receiving medication he averred that he was fit to stand trial. He stated that he did not know what it means to be a President's patient and he now wants court dates. A concern was further raised as to who would be responsible to stand trial on behalf of the appellant if he is declared a president's patient. He requested that the doctor come to court who will testify on his behalf.

[6] Mr Nyambe was appointed counsel *amicus curiae* and he filed an amended notice of appeal. Mr Gaweseb, counsel for the respondent, did not oppose the late noting of the appeal as he held the view that there were reasonable prospects of success. The grounds are briefly that:

- (a) the magistrate erred when he relied on the report by the psychiatrist in terms of section 79 of the Criminal Procedure Act;

- (b) that the court was too hasty to conclude that the appellant does not dispute the findings of the report; and
- (c) that the magistrate erred when he concluded that the appellant agreed with the findings of the psychiatric report.

[7] The learned magistrate's response to the grounds is as follows:

- (a) the report, although abridged, covered and contained the essential details; it was a reflection of the unanimous decision of the constituted panel of professional thus it was reliable and persuasive; and he did not misdirect himself when he relied on the report;
- (b) He applied the *audi alterem partem* rule; and
- (c) He probed the appellant with regards to what he was disputing and the record explicitly reveals that the appellant explicitly agreed to the findings.

The magistrate held the view that the grounds were devoid of merit and that the appeal should be dismissed.

[8] Mr Nyambe submitted in argument that it could not be assumed that the appellant understood the report due to complexity thereof and particularly for an accused who has been diagnosed as being mentally disturbed. He submitted that the reports should explain the nature of the inquiries held in terms of section 79 in detail and it should be illustrated in the reports. It appears that the first issue is the lack of information in the report and secondly the fact that the appellant could not have been expected to understand the report.

[9] In terms of s 79 (4) the report shall-

- “(a) include a description of the nature of the enquiry; and
- (b) include a diagnosis of the mental condition of the accused; and

- (c) if the enquiry is under section 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defense; or
- (d) if the enquiry is under section 78(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect.”

The magistrate in this regard certainly makes the point that, despite the brevity of the report that it indeed included the essentials as outlined above.

[10] The second issue is whether the court sufficiently explained the report to the appellant who was due to his mental condition found to be unable to follow the proceedings, given his mental state, was able to understand the proceedings or the contents of the report. The report was read to the appellant and he indicated that he understood. The court has to accept his response as recorded.

[11] The next question is whether the learned magistrate was too hasty to conclude that the appellant accepted the findings of the report. The appellant explicitly stated that he understood the report and that he agreed with the findings. This was however after he in no uncertain terms indicated to the court that he does not agree with the findings. The reason why the appellant later agreed with the report is to be found in the reassurance by the learned magistrate that he would be taken back to Windhoek as those were the recommendation by the Psychiatrist. The learned magistrate clearly issued a direction that the appellant must be detained in a mental hospital.

[12] I am not sure how the appellant ended up at Oluno Prison when the court directed that he be placed in a mental hospital. What is more disconcerting is that the appellant is still detained at Oluno Prison. On the face of the documents before us there is nothing authorizing the appellant's detention at the prison. The Prosecutor-General who is the official *curator-ad-litem* of persons who are declared president's patients in

term of the provision of the Mental Health Act, 1973 (Act 18 of 1973) ought to investigate the detention of the appellant in a prison.

[13] The error by the learned magistrate is that he did not correctly interpret the recommendation by the Psychiatrist and furthermore failed to consider the application by the State Prosecutor properly. The recommendation was that the appellant can receive psychiatric treatment, as a civil patient, in terms of s 9 of the Mental Health Act. This section empowers a magistrate to issue a reception order and s 9 (3) stipulates as follow:

“If the magistrate, upon consideration of all the evidence relating to the mental condition of the person concerned, including his own observations with regard to such condition, is satisfied that such person is mentally ill to such a degree that he should be detained as a patient, he may issue an order in the prescribed form authorizing the patient to be received, detained and treated at an institution specified in the order, or directing that the patient be received and detained as a single patient under section 10(1).”

[14] It is regrettable that the learned magistrate failed to grant the prosecutor the opportunity to acquaint himself with the provisions of section 9 of the Mental Health Act and to properly perform his duty. It was furthermore not recorded whether or not the prosecutor disputed the findings in the report. The provisions of s 76 (2) were not complied with in that the State was not properly heard. In *S v M* 1989 (3) SA 887 (W) the review dealt with a similar matter. In that case the court *a quo* received a report of a psychiatrist indicating that the accused (a juvenile offender) was not legally responsible at the time of the commission of the offence and also that she, because of her mental illness, could not sufficiently understand the court proceedings so as to be able to make a proper defense. The psychiatrist recommended that she be admitted to a certain institution for treatment in terms of s 9 of the Mental Health Act 18 of 1973. The headnote reads as follow:

“By means of the intervention of the Attorney-General in terms of s 6 of the Criminal Procedure Act 51 of 1977 (whereby provision is made for the withdrawal of a charge or the stopping of a prosecution) an order as intended in s 77(6)(a) of the Act (whereby an

accused is detained in a mental hospital or a prison pending the decision of the State President) can be forestalled.

A duty rests on the Attorney-General to act as aforesaid in order to obviate the serious consequences of an order in terms of s 77(6) of the Criminal Procedure Act where:

- (a) the accused is a juvenile without a history of conduct which constitutes a threat to the community;
- (b) the alleged offence is not a violent one and is of a less serious nature;
- (c) the psychiatrist has advised the Attorney-General that the accused can be admitted to a certain institution, which has the facilities for his care and treatment at its disposal, in a different and less drastic manner; and
- (d) where he has been informed that the institution where State President's patients are detained does not have the necessary facilities for the care and treatment of the accused at its disposal. “

The court in that case held that the trial court had erred in thinking that the peremptory provisions of s 77(6) excluded the power of the Attorney-General under s 6 of the Act.

[15] In this matter the learned magistrate erred by not affording the Prosecutor – General the opportunity to do its duty and applied s 76 (6) without further ado. The learned magistrate indeed acted somewhat hasty. The failure of the magistrate to have allowed the State Prosecutor the opportunity to consider other options particularly in view of the fact that the institution where State President's patients are supposed to be detained, may not have the necessary facilities, resulted in a miscarriage of justice. This court therefore is empowered in terms of section 76 (10) to set aside the direction issued under subsection 77(6).

[16] In the result the following order is made:

1. The direction issued by the district court in terms of section 77 (6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) that the accused be detained in a mental hospital pending the signification of the State President, is hereby set aside; and

2. The matter is remitted to the district court of Omungwelume in the district of Oshakati in terms of section 77 (10) with the direction that the relevant proceedings shall be continued in the ordinary way having due regard to the findings of this court.

MA Tommasi

Judge

H C January

Judge

APPEARANCE

FOR THE APPELLANT:

**MR NYAMBE (AMICUS CURIAE)
OF SHIKONGO LAW CHAMBER**

FOR THE RESPONDENT:

**MR GAWESEB
PROSECUTOR GENERAL
OSHAKATI**