

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: CC 8/2018

In the matter between:

THE STATE

v

JOSUA NANDJEMBO

ACCUSED

Neutral citation: *S v Nandjembo* (CC 8/2018) [2020] NAHCNLD 107 (17 August 2020)

Coram: DIERGAARDT, AJ

Heard: 9, 20 – 21 July 2020

Delivered: 17 August 2020

Flynote: Criminal procedure – Inquiry in terms of s 77 and 78 of the Criminal Procedure Act 51 of 1977 – Findings made by the psychiatrists disputed – Psychiatrists testified in terms of s 77(3) – Court found the testimonies of the witness as credible-No evidence before court that the accused cannot stand trial –Psychiatrists report upheld-Inquiry dismissed.

Summary: This is an enquiry into the accused's mental state, following the defence's challenge to the findings of the State psychiatrist report after observation.

The court is satisfied that the report dated 30 September 2017, covered and contained the essential details; it was a reflection of the unanimous decision of the constituted panel of professionals thus it is reliable and persuasive.

The court *held that*; the accused can stand trial as the disorder as indicated in the report does not impact his ability to follow the proceedings and thus at the time of the enquiry and acts committed in terms of section 78 he was mentally stable which makes him capable of appreciating the wrongfulness of his actions.

ORDER

1. The Psychiatry Evaluation Report dated 30 September 2017 is hereby accepted by this court;
2. The Accused is fit to stand trial, he is capable of understanding the court proceedings so far as to make a proper defence.

JUDGMENT

DIERGAARDT AJ:

Introduction

[1] The matter is before me in terms of section 78(4) of the Criminal Procedure Act, 51 of 1977 (herein the CPA). This is an enquiry into the accused's mental state, following the defence's challenge to the findings of the State's psychiatrist report.

[2] The accused a 32 year old male of Namibian nationality is represented by Ms Horn and The State is represented by Ms Nghiyoonanye.

[3] The accused stands charged on 16 counts namely:

1. 'Housebreaking with intent to steal and theft;
2. Murder read with the provisions of the Combating of Domestic Violence act, Act 4 of 2003;
3. Murder;
4. Attempted murder;
5. Attempted murder;
6. Attempted murder;
7. Attempted murder;
8. Attempted murder;
9. Attempted murder;
10. Housebreaking with intent to steal and theft;
11. Attempted murder;
12. Contravening section 38(1) (o) read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended - discharging a firearm in public place;
13. Contravening section 2(1) (a) read with sections 1, 2, 3, 4 and 7 of the animals protection Act, Act 71 of 1962: Cruelly overload, overdrive, override, beat, kick, goad, ill-treat, neglect, infuriate, terrify, torture or maim any animal;
14. Contravening section 2(1) (a) read with sections 1, 2, 3, 4 and 7 of the animals protection Act, Act 71 of 1962: Cruelly overload, overdrive, override, beat, kick, goad, ill-treat, neglect, infuriate, terrify, torture or maim any animal;
15. Contravening section 2 read with sections 1, 38(2) and 39 of the arms and ammunition Act, Act 7 of 1996 as amended – possession of a firearm without a licence;
16. Contravening section 33 read with sections 1, 38(2) (b) and 39 of the arms and ammunition Act, Act 7 of 1996 as amended – possession of ammunition'.

Background

[4] The allegation as per the summary in the indictment is that on 6 June 2014, whereby the accused allegedly bought some ammunition for a shotgun from a local shop. During the course of the day he broke and entered the cuca-shop of Lydia Nekongo stealing a shotgun as outlined in count one. In the evening going into the night of the same day accused went on a shooting spree starting with his ex-girlfriend

Elizabeth Tweshiningilwa Nghishilenapo whom he shot several times with a shotgun, when he met her on her way going home as outlined in count two.

[5] The accused proceeded to the cuca-shops where he shot several people who had sought refuge in the cuca-shops causing the death of Otto Namwenyo as outlined in count three and injuring others with intent to murder them as outlined in count four, five, six, seven and nine. During the same night accused proceeded to the bar of Miryam Halweendo where he broke and entered stealing some alcohol as outlined in count ten. He also went to Gerson Alfeus's yard where people were pounding mahangu and started shooting at random hitting and injuring Lucialia Vyuleinge with intent to murder her as outlined in count 11. Accused also went to the house of Vilho Tyako where he discharged the firearm damaging a wooden door as outlined in count 12.

[6] The accused again proceeded to Rakkal Salom's kraal where he shot three heads of cattle killing one and injuring two as outlined in count 13, he went to Fikameni Elias Nakale's kraal where he shot one head of cattle injuring it as outlined in count 14. At all relevant times the accused was in unlawful possession of the said firearm and ammunition as outlined in counts 15 and 16.

[7] In this matter the accused appeared in Outapi Magistrates Court on 15 September 2017. He was then referred for mental observation in terms of sections 77, 78 and 79 of the Criminal Procedure Act. He was subsequently admitted to the Windhoek psychiatric ward for such evaluation. A psychiatry evaluation report was presented to the court a quo. This report reflects that the accused was presented to a multi-professional panel on 12 October 2017. This panel consisted of a registered psychiatric nurse, one medical social worker, a clinical psychologist, two psychiatric interns, a psychologist, one occupational therapist and 4 psychiatrist

[8] The report 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 and that he was capable of understanding the court proceedings so as to make a proper defence and at the time of the commission of the offence in

terms of section 78 he was mentally stable which makes him capable of appreciating the wrongfulness of his actions.

[9] Ms Horn, legal counsel for the accused indicated that the defence disputes the findings in the report. She did not elaborate on the ground for disputing the report except that the accused is suffering from a mental illness which made him incapable of appreciating the wrongfulness of his actions. She invoked 78(4) and informed the court that she wishes to call all relevant parties that were involved in the observation of the accused leading the final report.

[10] As a result the court embarked on this inquiry where the evidence of six witnesses were heard as subpoenaed by the accused. The State called no witnesses.

[11] Naemi Bauleth testified that she is a registered psychiatric nurse at the mental health centre at Windhoek central hospital for a 16 years now. She testified that she knows the accused from when he was admitted at the mental health hospital. She indicated that she is aware of the charges that he is facing. She confirmed that she made observations on the accused while being admitted. Her opinion that was elicited by the defence was that the accused was not a problematic patient. He was calm and responsive most of the time. She confirmed an incident whereby the accused was aggressive and rated his behaviour as abnormal. In the same vein she could not attribute such behaviour to a mental illness.

[12] Killian Damaseb testified that he is a registered nurse employed by the Ministry of health and social service with 32 years' experience as a nurse. He confirmed that during the time of the accused observation he was working in the mental ward. He concluded that the accused was calm and not problematic at all except for an incident where he became violent and threatened to beat staff and throw them with faeces. He was asked to give his opinion regarding the above-mentioned incident and his reply was that the accused behaviour could have been a result of stress or frustration or he just had a bad day. He emphasized that the majority of the time the accused was calm and co-operative. He confirmed that he was part of the multi-disciplinary team that evaluated the accused and the report was a result of team work and he cannot express his opinion alone but maintained that the accused was not problematic during his admission.

[13] Olivia Sibebe testified that she is also a registered nurse employed by the Ministry of health and social services. She indicated that she was not involved in the accused's observation in the beginning but she however made not less than 12 observations on the accused. She also indicated that he was fine and normal all of the time. She was present when the incident occurred. She confirmed that she made the entry of the accused's outburst. She confirmed that his behaviour was not normal that day but she could not agree that his behaviour was attributed to a mental illness.

[14] Tinashe Mutambudzi an occupational therapist and Dr Lahija Hamunyela both testified on common observations. Both of them confirmed that they had sessions with the accused during his period of observation in the mental health department. They were also members of the panel who eventually made findings as contained in the psychiatric evaluation report now in dispute. Both emphasised that the accused does not deny committing the offences, he clearly remembers the incidents but sees nothing wrong in what he has done. They also confirmed that the accused lied and changed his version regarding the incident on various occasions during sessions. They concluded that he shows no remorse for what he has done but denies having a mental illness. Dr Hamunyela states that in her opinion as an expert the accused suffers from a condition known as anti-social personality disorder which is associated with the accused not being able to feel remorse or harbour guilty feelings. This disorder however does not affect his ability to recognise right from wrong.

[15] The issue the court is called upon to decide is whether the psychiatry evaluation report can be accepted by the court as being a true reflection of the accused mental health and whether the accused is fit to stand trial.

Applicable law

[16] In *S v Mika* (CR 14/2010) [2010] NAHC 57 (28 July 2010); the Court set out the provisions of section 78(2) to 78(6) as follows (at para 6)

‘ . . . 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.'

Submissions

[17] Ms Horn in her submissions stated that the antisocial personality disorder can be diagnosed with certain distinctive personality traits and cited the case of *In Beale v S* (A283/18) [2019] ZAWCHC 55 (3 May 2019) where it was held that:

'The courts have been advised and accept that this term (antisocial personality disorder) describes a personality disorder and that, as appears to be the case in this matter, people who suffer from this disorder show a longstanding pattern of disregard for and the violation of the rights of others and they fail to conform to social norms with respect to lawful behaviour.'

[18] Ms Horn further submitted that the accused person suffers from a mental illness where individuals with this disorder are characterized by a pattern of disregard for and the violation of the rights of others, disregarding the feelings of others and that they rationalize their behaviour and show little remorse and as a consequence the accused cannot be said to appreciate the wrongfulness of his act.

[19] She further submits that in the event that a re-evaluation is ordered, that the diagnosis will not change for the simple reason that Namibia does not have proper mental health facilities to accommodate mentally ill accused persons that suffer from untreatable mental illnesses or disorders. The court finds this an interesting point to take, because Dr Hamunjela stated the same point in that the type of disorder that the accused suffers from is not treatable and it forms part of the affected persons personality that will not change whether the person is institutionalized or not.

[20] Ms Nghiyoonanye in her submissions was adamant that the accused can stand trial and supports the findings in the Report as submitted. She states that the Antisocial Personality Disorder which this accused was diagnosed with is not treatable and that despite his Antisocial Personality Disorder, the accused was aware of what he was doing as he did not experience a loss of control during the commission of the offence as highlighted by Dr Hamunyela.

[21] She further submitted that, the logic behind Section 77 of the CPA is that no accused may escape criminal prosecution if he is capable of understanding criminal proceedings so as to be able to make a proper defence against the charges preferred against him/her by the State. A court is only entitled to divert from the provisions of Section 77 and 78, if the experts who observed the accused make such a recommendation. She rightfully submits that there is no such as recommendation in this case.¹

Analysis

[22] It is this court's view that all the witnesses displayed a very high degree of honesty and professionalism. They were very clear and concise as to their observations and conclusions in respect of the accused. Their diagnosis of the accused was unanimous that he suffers from an anti-social personality disorder. I accept the evidence of the witnesses as being reliable and trustworthy.

[23] I single out the evidence of Dr Hamunyela being a psychiatrist and called as an expert that maintained that the accused cannot be allowed to hide behind an Anti-social personality disorder and that he should stand his trial.

[24] I further took note of the evidence of Dr Hamunyela with the emphasis on the ability of an ASPD sufferer to make decisions. It is common cause that an antisocial personality disorder, sometimes called sociopathy, is a mental disorder in which a person consistently shows no regard for right and wrong and ignores the rights and feelings of others. People with antisocial personality disorder tend to antagonize,

¹ See *Nghivali v S* (CA 42-2016) [2017] NAHCNLD 55 (15 June 2017), par 12 -14.

manipulate or treat others harshly or with callous indifference. They show no guilt or remorse for their behaviour.² (own emphasis)

[25] I would like to emphasize on the fact that antisocial personality disorder often violates the law and merely chooses to disregard rights and feelings. It is also common cause *in casu* that the accused planned to kill his girlfriend because of issues between them. The accused killed the other victims because of anger and revenge.

[26] After taking into consideration the documentary and oral evidence the court can only conclude that the accused knew what he was doing was wrong and unlawful but disregarded the victims' rights and feelings. This is clear from the fact that he changed his version as he was interviewed by different people. This further convinces the court that he knew and accepted what he was doing was wrong and unlawful and he is trying to confuse people in order to escape prosecution.

[27] I am of the view the report meets the requirements in terms of s 79 (4) in that the report included:

- (a) a description of the nature of the enquiry;
- (b) a diagnosis of the mental condition of the accused;
- (c) a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence;
- (d) In terms of 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.

[28] I am thus satisfied that the report, covered and contained the essential details; it was a reflection of the unanimous decision of the constituted panel of professionals thus it is reliable and persuasive. I accept the findings in the psychiatric evaluation report dated 30 September 2017.

² *Beale v S* (A 283/18) [2019] ZAWCHC 55 (3 May 2019).

[29] I am not convinced that the accused capacity to appreciate the wrongfulness of his acts was diminished. I am also not convinced that the accused suffered from a mental illness that would cause such diminished capacity. I find the accused fit to stand trial and that he was capable of understanding the wrongfulness of his actions during the commission of the offences and that he will be able to follow and understand court proceedings.

[30] In the result I make the following order:

1. The Psychiatry Evaluation Report dated 30 September 2017 is hereby accepted by this court;
2. The Accused is fit to stand trial, he is capable of understanding the court proceedings so far as to make a proper defence.

A Diergaardt
Acting Judge

APPEARANCES

FOR THE STATE: Ms. M Nghiyoonanye
Office of the Prosecutor General,
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FOR THE ACCUSED: Ms W Horn
W Horn Attorneys,
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