

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
JUDGMENT

Case no: CC 10/2016

THE STATE

v

BESTER MATENGU LULATELO
ACCUSED

Neutral citation: *S v Lulatelo* (CC 10/2016) [2020] NAHCNLD 63 (5 June 2020)

Coram: SALIONGA, J

Heard: 18-27 July 2018, 26 November 2018, 27--30 August 2019, 4 and 6
September 2019, 21 November 2019, 27 January 2020

Delivered: 5 June 2020

Flynote: Criminal Law: Arson—Alternative charge of Malicious damage to property read with the provisions of Combating of Domestic Violence Act 4 of 2003,-- Arson—Alternative charge of Malicious damage to Property-- Kidnapping and Murder—Assault read with the provisions of Combating of Domestic Violence Act 4 of 2003.

Criminal Procedure: Mental condition--Report in terms of s 78 of the Criminal Procedure Act 51 of 1977-Procedure ensued not in accordance with - Accused found not guilty due to mental illness -- was incapable of appreciating the wrongfulness of his action and of acting in accordance with an appreciation of his wrongfulness of his act - Accused detained in a psychiatric hospital or prison pending the signification of the State President in terms of section 78 of the Act.

Summary: The accused pleaded not guilty to all six charges preferred against him and gave a statement in terms of section 115 of Act 51 of 1977. In his plea explanation he stated that he was suffering from a mental illness that rendered him incapable of appreciating the wrongfulness of his actions and to act in accordance of his appreciation. The plea explanation was supported by the psychiatric report compiled in terms of section 79 of the Criminal Procedure Act 51 of 1977. It was not expressly disputed or accepted by the parties. The State called ten witnesses and accused exercised his rights to remain silent and called no witness. No evidence to the contrary was produced .The Court despites having satisfied that accused committed all the acts levelled against him in all counts, found no cogent reasons why it should reject the final opinion of the psychiatrist as indicated in exhibit "G" thereof. The accused is ordered to be detained in a psychiatric hospital or prison pending the signification of the president in terms of section 78(6) of the Act.

ORDER

In accordance with section 78 (6) of the Act, the accused is found not guilty on all counts as per indictments by reason of mental illness and the court directs that the accused be detained in a mental hospital or prison pending the signification of the decision of the State President.

JUDGMENT

SALIONGA J:

Introduction

[1] A 43 year old male accused stood arraigned in the High Court of Oshakati on two counts of arson, with alternative count of malicious damage to property, the first count to be read with the provisions of the Combating of Violence Act 4 of 2003, a count of kidnapping, a count of murder, a count of common assault read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and one count of assault by threat.

[2] Mr Gaweseb appears for the State and accused was legally represented by Mr Grusshaber on instruction from the directorate of legal aid replacing Mr Nsundano who had since left the Ministry of Justice.

[3] At the commencement of the trial, counsel for the State raised a point in limine in that the defence had filed two replies to the State's pre-trial memorandum. The first reply filed on 22 February 2017 whereas the second reply was filed on 21 September 2017. Counsel was asking Mr Nsundano counsel for the defence to withdraw from the case due to conflicting instructions. From the later reply filed, the defence disputed the following; the identity of the body of the deceased, the PM 812/2012, the admissibility and contents of the government mortuary certificate, the affidavit in terms of section 212 (7) of Act 51 of 1977 by Liboni Simasiku, the identification of the body of the deceased by Kukubulwa Hamady, affidavit in terms of section 212 (4) of Act 51 of 1977 by Dr Amisi and the admissibility of the photo plan compiled by sergeant Marungu which documents were not disputed in the first reply.

[4] Mr Nsundano the erstwhile counsel for the accused in his response explained that on 15 September 2017 the defence received a disclosure of seven further witness statements after he had already filed the first reply on the state pre-trial memorandum and the trial date was already set. He then filed an application to amend which was granted. He explained that because Mr Gaweseb was not the prosecutor at the time he was unable to assist the court in that regard. The matter stood down for Mr Gaweseb to consult and on resumption, Mr Gaweseb withdrew his point in limine on the amendment. He however maintained that the filing of two

replies amounted to conflicting instructions and counsel was required by law to withdraw. Mr Gaweseb made reference to *S v Gope and others* 1932 SACR 92 (CK); *State v Ndilinawa Gabriel* unreported case CC 11/ 2015 as authorities for his submissions.

[5] The court after hearing submissions from both counsel ruled that whether the instructions were conflicting or not, it is a factual issue that could still be addressed in the cause of the trial either in cross-examination or in submissions.

[6] On 23 July 2018 the matter proceeded run the normal course of a criminal trial and accused pleaded not guilty to all charges preferred against him. In terms of section 115 of Act 51 of 1977 accused stated that in 1991 he has been suffering from a mental illness up to date. The illness affected his thought process and perception. The mental illness according to the psychiatric diagnosis is Schizophrenia, thus requiring him being on constant medication. He could recall that he once received medication which got finish, he then went to Katima Mulilo State Hospital in order to get medication however he was informed that the medication was out of stock. That resulting the accused not receiving the medications for some time prior to the alleged committed offences. He puts the State to the proof of each and every allegations against him.

[7] The summary of substantial facts in terms of section 144 (3) (a) of the Act are that Bester Matengu Lulatelo was at all relevant times at/or near Sikwekwe village. The accused and Kalimukwa Sabrina Mpambo were in a domestic relationship as they were married in terms of their customary laws. He had come in the night to where his wife was asleep in another room in their common house and grabbed her on the neck. A day there after he set their house on fire as well as the house of Lota Anna Kuzimbuka in the same village. When he set the house of Lotta Anna Kuzimbuka on fire, he kept the door closed while she was inside the house. He prevented her from living her house which was on fire. She burned to death inside the house. The house hold items in both house were destroyed by the inferno. When Sifu Obrien Nchindo came to the house where the deceased was held, it was found the accused threatened to stab him with a spear and while he was still holding the door of the house closed.

[8] Accused was rightly referred to a psychiatric hospital for observation in terms of section 77 and 78 of the Criminal Procedure Act by the Magistrate of Katima Mulilo Magistrate's Court during the plea proceedings in terms of section 119 of the Act. Doctor Hileni Ndjamba a psychiatrist in the employment of the State compiled a report. Although it did not indicate whether it was a unanimous report same was clarified by doctor Ndjamba in her evidence and the court is satisfied with the explanation. The accused was diagnosed as suffering from schizophrenia. However he could understand and follow court proceedings. He is not accountable for the alleged crime committed as he could not appreciate the wrongfulness of his action at that time of the commission of the offences due to impairment in his thought process and perception.

[9] The issue before this Court was whether the accused suffered from a mental illness or defect at the time of the commission of the offence which makes him incapable of (a) appreciating the wrongfulness of his actions, or (b) of acting in accordance with an appreciation of the wrongfulness of his actions.

Background of the case

[10] The prosecution called several witnesses in proving that the accused committed an unlawful act by setting his house and that of the deceased on fire, by holding the door of the house of Anna Lotta causing her to burn beyond recognition, by assaulting his wife and threatening Sifu Nchindo while trying to salvage Anna from a burning house. According to his wife supported by several witnesses, accused seemed not normal on the day of the incident. His wife testified that accused suffered from a mental illness stating that if he was not on medication he gets an attack. She attributed his refusal to take up a job and the touching of her neck to the mental sickness accused suffered. She recalled taking him to the hospital for medication but was out of stock. She conceded that she did not know how the fire started as she was not present.

[11] During cross-examination of the State witnesses the accused did not dispute the evidence about his appearance and condition. However, he disputed the identity, the cause of death and the chain of custody of the body of the deceased despite the plea explanation that he was mentally ill, and that he had no intention to commit the alleged offences.

[12] From the evidence led, it seems to me that the prosecution was out to show that the accused was not mentally ill during the commission of the crime. This effectively means that the prosecutor retracted from its earlier position when they initially accepted the psychiatric report, although he never expressly said that. This impression was confirmed by the submissions made by the prosecutor before judgment.

[13] The State had closed its case and accused exercised his rights to remain silent and call no witnesses.

[14] This is a unique case in that it was not expressly stated whether the parties were disputing the report throughout the trial. Mr Pienaar the initial prosecutor in the pre-trial proceedings when asked if he opposes the report, indicated that he could not oppose because he got instructions from his supervisor to lead all the facts so that the court should decide on the issue. When my sister Tommasi, the managing judge insisted, Mr Pienaar indicated "no" he was not opposing the psychiatric report. Notwithstanding the above the State led all evidence before this court.

[15] The disputed facts prompted the Court to call the psychiatrist, Doctor Hileni Mekondjo Ndjamba in terms of Section 186 of the Criminal Procedure Act 51 of 1977 to testify and clarify the psychiatric report.

[16] It was doctor Ndjamba's testimony that she was in the full-time employment with the Ministry of Health and Social Services. She heads the Psychiatry and Forensic Unit at the Windhoek Central Hospital in Windhoek and also teaches the medical students at the University of Namibia. She compiled a report dated 11 November 2015 which was received in court and marked exhibit G. She testified that the accused was admitted for observation for a period of 30 days in the psychiatric hospital, and was diagnosed with Schizophrenia. She could not remember if accused was on medication or not as the file was in storage in Windhoek.

[17] She further testified that, the accused was observed by a panel, which consisted of a medical social worker, the occupational therapist, nursing staff, clinical psychologist, and the Psychiatrist who came together after the evaluations and observations to give a report that could assist the Psychiatrist in compiling a report for court. She explained that at a time of compiling the report she was not aware

that, they had to indicate unanimous in the report. She however does not recall anyone on the panel disagreeing with the report and in her opinion the report was unanimous though not indicated on the report.

[18] In cross examination the doctor maintained that, when the panel sat, despite the omission to expressly state that fact, a report compiled is unanimous. She testified that when a person has been taking medication and some time passes without taking such medication, that the person relapses and the symptoms that were exhibited before, will come back, sometimes even more severe than before.

[19] The court in conducting an enquiry into the mental capacity of the accused at the time of the commission of the alleged offence, has to make its own findings. That could be done after considering all the evidence led. On the other hand the court which is not an expert in the field of medicine could lightly reject the opinion of the expert witness although the court is not bound by the psychiatrist opinion. See *S v McBride* 1979 (4) SA 313 (W) at 317G-H:

The legal principles

[20] The provisions of section 78 (2) to 78 (6) of the Act was set out in *S v Mika* (CR 14-2010) [2010] NAHC 57 (28 July 2010) (at 613D-I): as follows:

[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:

“(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.' I agree and endorse the aforesaid criteria set.'"*

Application of the law to the facts

[21] In the instant case, accused pleaded not guilty by reason of "mental illness" aligning himself with the panel's findings that he was not criminally responsible at the time he committed the offences. The plea was supported by a psychiatric report which was not challenged by either party. In my view if the prosecutor wanted to challenge the report they were to lead evidence contradicting the evidence of the psychiatrist. There was not such evidence led in casu. No reason why a second evaluation was not called for and the prosecutor, who is a lay person on the subject of mental illness and mental defects, failed to call expert(s) in challenging the evidence before court. On the other hand accused disputed the identity, cause of death and chain of custody at the plea stage. These issues were firstly admitted in their first reply to the State pre-trial memorandum and disputed at a plea stage. Even if the defence's explanation was to be accepted surely the accused could have explained that under oath but opted to remain silent. Whatever accused stated in a plea explanation was not evidence under oath and carries no weight. In any event these issues could equally have been addressed and resolved in the pre-trial proceedings and the matter could have been promptly finalised without unnecessary delays.

[22] As mentioned earlier in this judgement, the matter proceeded as if the report was disputed. This court could hardly imagine how the prosecution which failed to discredit or upset the finding of the panel of experts or to call for independent evidence could be successfully in disputing the outcome of the enquiry. In my view the procedure the State followed in the instant case was not in accordance with section 78 (6) regard being had that the psychiatric report was not disputed and should be discouraged.

[23] Having considered the evidence of witnesses who observed the accused prior to and after the incidents, the psychiatric reports and the evidence of Doctor Ndjamba, the Court is satisfied that the accused committed the acts in question. However actions of grabbing the wife's neck which he had never done before, the act of holding the deceased house's door closed, while there was a person screaming from the burning house, the act of chasing the person with a spear who was trying to help the victim inside the burning house and the action of walking about a kilometres in the middle of the night with a small child were found not actions of a sane person. For the aforesaid reasons the State's submission that the accused be found guilty with diminishing responsibility is rejected. The court found no cogent reason why it should reject the final opinion of the psychiatrist as evidenced in exhibit "G" and accepted the contents of the report.

Conclusion

[24] Accordingly in accordance with section 78 (6) of the Act, the accused is found not guilty on all counts by reason of mental illness and the court directs that the accused be detained in a mental hospital or prison pending the signification of the decision of the State President.

SALIONGA

J T

Judge

