

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
REVIEW JUDGMENT

Case No.: 36/2020

In the matter between:

**THE STATE**

**v**

**HELVI NGAMINE TAMUHOLOKO**

**ACCUSED**

(HIGH COURT NLD REVIEW CASE REF NO: (96/2020))

**Neutral citation:** *S v Tamuholoko* (CR 36/2020) [2020] NAHCNLD 73 (22 June 2020)

**Coram:** JANUARY J *et* DIERGAARDT AJ

**Delivered:** 22 June 2020

**Flynote:** Review – Criminal procedure – Inquiry in terms of s 77 and 78 of the Criminal Procedure Act 51 of 1977 – Order made in terms of s 77(6) for appellant to be detained in a mental hospital pending the signification of the State President – Failure of the magistrate to follow the correct procedure in terms of section 77(1) of Act no 51 of 1977.

**Summary:** The magistrate admitted that an irregular procedure was adopted during the referral of the accused by another magistrate and that the accused was unrepresented and not heard at the time she was referred.

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### ORDER

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1. The direction under s 77(6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) is that the accused be detained in a mental hospital or a correctional facility pending the signification of the decision of the State President is confirmed;
  2. The Registrar is directed to send the case record to the Magistrate's Commission to draw special attention to paragraph 24.
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### REVIEW JUDGMENT

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DIERGAARDT AJ (JANUARY J concurring):

[1] The matter came before me on special review. In *S v Tashiya* 2013(3) NR 637 (HC) Liebenberg J (Miller AJ concurring) at page 640, paragraph 12 stated as follow:

'Although the legislature has not by statutory enactment conferred upon the High Court any review powers in criminal cases except where provided for by s 304 of Act 51 of 1977, the court, in appropriate cases, does have the power at common law to exercise review powers over the decisions of the lower courts<sup>1</sup>.'

#### *Introduction*

[2] The record reflects that the accused was charged with murder .She only pleaded in terms of section 119 of the Criminal Procedure Act, whilst being legally represented.

[3] On the first appearance of the accused in the district court on 8 December 2017, the magistrate observed that the accused was talking to herself and without

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<sup>1</sup> See *R v Marais* 1959(1) SA 98(T).

any inquiry and indication as to the objective for the referral, being stated on the record referred the accused for mental observation.

[4] The accused was thereafter remanded in custody on several subsequent dates for mental observation. The record is not clear as to when the psychiatric report became available to the court, but it was presented. At some stage Mr Grushaber was appointed on a legal aid instruction. On 21 October 2019 the accused pleaded in terms of section 119 of Act No. 51 of 1977 with the assistance of Mr Grushaber and thereafter the matter was postponed for Prosecutor general's decision.

[5] After several postponements the psychiatric report was available. It is not evident from the record whether the report was read into the record. The report is however, attached to the record. It is compiled by Dr Kishi Mwabene a psychiatrist in the full-time employment of the State. She recorded that the accused is mentally ill and suffers from schizophrenia. She also recorded that the unanimous view of the panel of experts tasked with the accused's observation and evaluation was that the accused is unfit to stand her trial .That she is not capable of understanding the court proceedings as to make a proper defence. Also at the time of the commission of the crime, in terms of section 78 she was not mentally stable, hence she was not capable of appreciating the wrongfulness of her actions.

[6] On 5 March 2020 the state made an application in terms of section 77(6) for the accused to be declared a state president's patient .The record reflects that both state and defence did not dispute the report.

[7] Despite the acceptance of the findings in the report the defence raised an issue of procedural error in that on 8 December 2017 the court *mero muto* ordered the accused to be referred for mental observation without an application by the state or the accused. He submitted that the basis on which the court did the referral was that the accused was talking to herself and it appeared that she did not understand what was going on. He further mentioned that the court should have asked the state to lead either medical evidence or the evidence of a relative. In the same vein he concedes that the 'failure' does not vitiate the report for the reason that the report came back and the accused indeed suffers from a mental defect.

[8] The court then proceeded to declare the accused a state president's patient and only after such declaration send the case on special review.

[9] I am of the view that a referral in itself holds serious consequences for an accused. It follows in my view that it should be transparent that a proper and relevant reason exist and to be recorded by a magistrate to invoke the provisions of section 77(1) or section 78(2), or both, in the particular circumstances of the matter especially where there is no proper application by either the state or defence before court.

[10] The magistrate's attention is drawn to instances where sections 77 and 78 is to be invoked.

[11] Section 77 deals with the capacity of an accused person to understand court proceedings whereas section 78 deals with the ability of an accused person to appreciate the wrongfulness of his or her act (at the commission of the alleged offence) or his or her ability to act in accordance with an appreciation of the wrongfulness of his or her act.

[12] It is not sufficient for a party to merely allege non-triability or non-responsibility allegation.

[13] Some foundation (factual or medical) must be laid and the court must be satisfied that some factual or medical basis has been laid for the allegation<sup>2</sup>.

[14] I am of the view that if the basis is laid the court must order an inquiry into the mental state of the accused and the accused must be afforded the opportunity to be heard on a possible referral.

[15] Only after such inquiry which lays the necessary jurisdictional basis for the relevant enquiry in terms of section 79 (1) to be conducted and reported the court then make its direction, either in terms of section 77 (1) or 78 (2), or both.

[16] In *S v Mika* 2010 (2) NR 611 HC at 613J-614B) Liebenberg J stated in a similar case:

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<sup>2</sup> (See *R v Linda* 1959(1) SA 103 N).

[7] Before the accused is referred for observation the court must be satisfied that there is some or other factual or medical basis for the allegation that he or she lacks criminal capacity. He also referred to the South African case of *S v Makoka* 1979 (2) SA 933 (A) where the headnote reads:

“A court is not obliged to have an accused examined under the provisions of s 79 of Act 51 of 1977 when it is only alleged (without any indications of any ground) that the accused, because of mental illness, is not legally responsible. A court will always consider what grounds exist for such an allegation and whether there are grounds or not will depend upon the circumstances of each case.”

Liebenberg J stated further that: ‘the court considered such a referral to be irregular, but nevertheless found on the facts that the accused was not unduly prejudiced thereby (at 614D) and found that the accused in the case was not prejudiced by the referral, because it led to a unanimous finding by the expert panel that provided corroboration for his defence.’

[17] In *casu* after such presentation of the psychiatric report the lawyer indicated that he indeed consulted with the accused and her sister. He further submitted that they conceded that the accused indeed suffers from a mental illness and had no objection to the accused to be declared a state’s president patient.

[18] It is evident that the procedural error was raised by the defense after agreeing to the report. The defense subsequently remedied the ‘failure’ by stating that the report is not vitiated by such ‘failure’.

[19] I find that the accused in this case was not prejudiced by the referral because it led to a unanimous finding by the expert panel that the accused is unfit to stand her trial. That she is not capable of understanding the court proceedings as to make a proper defence. Also at the time of the commission of the crime, in terms of section 78 she was not mentally stable, hence she was not capable of appreciating the wrongfulness of her actions.

[20] What further moves the court to believe that the accused was not prejudiced is the fact that the accused was legally represented when the report was presented to the court.

[21] I doubt that a second referral will produce a different result. To remit the case back to the magistrate to do an inquiry and to invoke the provisions of section 77(1)

would not only interfere with the rehabilitation of the accused and not be in the interest of justice. It will only be prejudicial to the accused as she already waited almost two years in custody to be examined.

[22] The magistrates is urged to apply the requisite procedure in future cases of this nature. This procedure must include a proper inquiry in instances where he or she *mero muto* intends to refer the accused for mental observation or in instances where there is an application from either the defense or accused.

[23] The magistrate is further obliged to record proper reasons for such referral.

[24] I am of the opinion that when a magistrate is in need of training and lacks the necessary knowledge of the law the magistrate must either acquaint him or herself with the law and procedure or consult the Divisional Magistrate before sending a case on special review. The High Court is not mandated to give legal advice.

[25] In result the following order is made:

1. The direction under s 7 7(6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) that the accused be detained in a mental hospital or a correctional facility pending the signification of the decision of the State President is confirmed;
2. The Registrar is directed to send the case record to the Magistrate's Commission to draw special attention to paragraph 24.

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A DIERGAARDT  
ACTING JUDGE

I agree,

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HC JANUARY

JUDGE