REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

RULING ON APPLICATION FOR MENTAL OBSERVATION

CC no: 02/2023

In the matter between:

THE STATE

v

BENEDIKTUS AMAYULU NEGUMBO **ACCUSED**

Neutral citation*:* *S v Negumbo* (CC 02/2023) [2023] NAHCNLD 83 (15 August 2023)

Coram: SALIONGA J
Heard: **21 July and 27 July 2023**
Delivered: **15 August 2023**

Flynote: Criminal Procedure - Mental observation of accused - Accused charged with murder and attempted murder- Application for second referral in terms of provisions of sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977 – Disputed psychiatric reports - Basis for accused to be referred for mental observation - Court can order a second referral if interest of justice requires - Mere submissions from the bar not satisfactory - There must be circumstances compelling the court to exercise its do discretion. Application dismissed.

Summary: The accused is indicted for murder and attempted murder read with the provisions of the Combating of Domestic violence Act, Act 4 of 2003, alternatively

contravening section 38 (1)(i) read with sections 1, 10, 38 (1), 38 (2) and 39 of Act 7 of 1996 as amended-pointing of a fire-arm. At the pre-trial proceeding counsel for the defence applied for re-evaluation of the accused by a private psychiatrist. His contention was that the report did not comply with section 79 (1) (b) of the Act in that it was signed by one doctor and the diminished responsibility was not addressed in the report. The application is opposed by the State. Counsel for the State submits that the procedure is requested by counsel for the accused is wrong.

Held: that it does not matter whether an accused is charged with a serious offence and/or what type of referral is being sought, there must be circumstances compelling the court to exercise its discretion to invoke the provisions of s79 (1) *(b)* of the Act.

Held further: that the court can only make a finding on whether or not to accept a disputed report after evidence has been led.

Held further: that whether any issue was considered or not during evaluation and reporting can best be cleared up by evidence of the panelists or the psychiatrist who compiled the report.

Held further: that a second or subsequent referral cannot be used to cure defects alleged in a disputed report without first holding an enquiry.

Held finally: that there was no basis laid for this referral and the application is refused.

ORDER

The application for a second evaluation is dismissed.

RULING

SALIONGA J:

Introduction

[1] The accused stands indicted for murder and attempted murder, alternatively for contravening section 38 (1) (i) read with sections 1, 10, 38 (1), 38 (2) and 39 of Act 7 of 1996 as amended-pointing of a fire-arm, all counts read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

[2] Mr Shileka appears for the State and Mr Pieter Greyling who represented the accused in the district court during section 119 plea proceedings appears for him at these proceedings.

[3] This is a pre-trial matter, which was postponed to enable the defence to file a reply to the State pre-trial memorandum. On 17 May 2023, counsel for the accused records that the accused wants to make use of s78 of the Criminal Procedure Act[1] as amended. The matter was further postponed till 19 July 2023 and again to 21 July 2023 for the accused to be transferred to Windhoek for consultation with a private psychiatrist. The State objected to the accused's transfer and the matter was postponed for proper arguments on this issue.

[4] At the commencement of arguments on 21 July 2023, Mr Greyling, in making reference to *S v Uirab*[2] and two other South African cases[3] submitted that the report does not comply with s79 (1) (b) (i-iii) of the CPA. He further submitted that the report does not also address the issue of diminished responsibility in terms of s78 (7) of the

[1] Criminal Procedure Act 51 of 1977 as amended (CPA).
[2] *S v Uirab* 2016 (2) NR 543.
[3] *S v Mthimkhulu* - Review Judgment (12/16) [2016] ZAECBHC 4 (5 April 2016) and *S v Pedro* (B247/11) [2014] ZAWCHC 106; 2015 (1) SACR 41 (WCC); [2014] 4 All SA 114 (WCC) (9 July 2014).

CPA. His submission was based on the fact that the accused is charged with serious offences of murder and attempted murder to which he can be sentenced to life imprisonment. He went on submitting that, doctor Hamunyela is a full time employee of the state and on the face value the report is only signed by one instead of two doctors as required by law. He contended that an enquiry in terms of s77 (3) or s78 (4) cannot be held at this stage, until the report complies with s79 (1) (b) (i-iii) Act.

[5] Counsel prays the court to make an order directing the accused to be resend for mental observation. That the court should further direct Dr Gebhard Marc a private psychiatrist to be appointed in order to facilitate such observation and for that report to address the issue of diminished responsibility. That process according to Mr Greyling will alleviate the need to re-send the accused at a later stage for an evaluation in the event the court finds him guilty.

[6] Mr Shileka in opposing the application submitted that section 77(3) and 78(4) of the Act enjoins a court in peremptory language that 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. In this case Mr Shileka contended that because the findings in the report is disputed, it is peremptory for an enquiry to be held.

[7] With regard to diminished responsibility allegedly not having been considered or addressed in the report, it was Mr Shileka's submission that the two South African cases cited by the defence are not applicable. That was because Chapter 13 of the South African CPA was amended several times and whatever courts' pronouncements made there will not necessarily be applicable in Namibia. Mr. Shileka implored the court to adopt the correct procedure applied in *S v Hauulu*[4] as well as *S v Nandjembo*[5] and subpoena witnesses for an enquiry to be conducted.

[8] Section 79 (1) (b) of the Act reads as follows:

[4] S v Hauulu (06/2018) [2021] NANCNLD 14 (22 February2021).
[5] S v Nandjembo (CC8/222018) [2020] NACHNLD 107(17 August 2020).

'Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on (a)…
(b) Where the accused is charged with an offence for which the sentence of death may be imposed or where the court in any particular case so directs; (i) by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State and by a psychiatrist appointed by the accused if he so wishes.'

[9] In the present case it transpired during submissions that accused was referred for mental observation in terms of sections 77, 78 and 79 of the Act at Oshakati Magistrates Court. He was subsequently admitted to the Windhoek psychiatric ward for such evaluation and a report by Doctor Lahija E K Hamunjela was submitted before the court *a quo*. Her finding was to the effect that:

'At the time of writing the report, the accused is fit to stand trial; he is capable of understanding the court proceedings so as to make a proper defence. Also at the time of commission of the crime, in terms of section 78 he was mentally stable this makes him capable of appreciating the wrongfulness of his actions. Therefore the above in terms of section 79 is Triable and Accountable.'

[10] The court as per Strydom JP (as he then was), correctly considered the purview of s 79 (1) *(b)* after the abolishment of the death penalty by the Namibian Constitution in *S v Hansen*[6] and stated:

'… (T)here is no instance where this Court is obliged to follow this procedure and this procedure shall only be followed where this Court, for certain reasons, may direct that it be followed. It is therefore this Court which must decide whether to accept this report …., or on the application of the defence, to again refer the accused for further observation according to the provisions of s 79 (1) *(b)*.'

[6] *S v Hansen* 1994 NR 5 (HC) at 7 C-D.

[11] It is clear from the *Hansen* case above that although it might be infrequent to refer an accused twice for psychiatric observation, there may be circumstances compelling the court to exercise its discretion to invoke the provisions of s79 (1) *(b)* of the Act, by having the accused examined by two psychiatrists instead of one, even if the accused had already been examined and reported on by a single psychiatrist depending on the facts of each case.

[12] Notwithstanding the aforesaid and unlike the position in South Africa, the referral in terms of 79 (1) (b) of the Criminal Procedure Act in its present form in Namibia, is a matter of discretion that the presiding officer has to exercise[7]. In the present case the accused was sent according to counsel for evaluation in the district court, the report was made available and appears disputed by the accused for the reasons stated by counsel. I find it unfair for Mr. Greyling to argue that the provisions of s79 are peremptory to the extent of nullifying the report on mere face value. The court can only make a finding on whether or not to accept a disputed report after evidence has been led.

[13] With regard to the allegation that the diminished responsibility was not considered or was overlooked in the report, it is obvious that diminished responsibility is a psychological factor which may be taken into account when sentencing an accused. Whether or not it was considered or addressed in the report is a matter that would only in my view be cleared up by the evidence of the panelists or by the psychiatrist who compiled the available report.

[14] It is trite that the accused is charged with murder and attempted murder which are serious offences in which case section 79 (1) (b) finds application. It is also trite that accused is entitled to be evaluated by a private psychiatrist. However, the issue of a private psychiatrist's involvement was a non-issue in the lower court despite the fact that the accused was represented by the same counsel. In my view it does not matter whether an accused is charged with a serious offence and/or what type of referral being sought there must be circumstances compelling the court to exercise its discretion to

[7] *S v Hansen* 1994 NR 5 (HC) (Supra footnote 6).

invoke the provisions of s79 (1) *(b)* of the Act. I find it difficult to ignore the findings of the report for a mere asking.

[15] Liebenberg J, in *S v Uirab*[8] correctly after due consideration of the testimonies of witnesses and the somewhat contradicting evidence of Dr Ndjaba came to the conclusion that despite an earlier finding by a single doctor, it would be in the interest of justice to have the accused's criminal culpability re-evaluated by two independent psychiatrists as laid down in s79 (1) (b) of the Act. Equally Strydom J in *S v Hansen*[9], when referring the accused for re-evaluation before sentence, stated that it seemed to him that there were or might be indications that everything was not well with the accused. In the present case nothing was said nor is there any indication to that effect. I find the procedure that Mr. Greyling wants the court to adopt, of referring an accused for a second evaluation in an attempt to correct the alleged defective report unprocedural.

[16] In this application, not only did the court find that there was no proper basis laid down by Counsel for the accused at the initial referral of the accused during the section 119 proceedings in the lower court, the court is not satisfied that counsel for accused laid any basis in this application. As a result I am not prepared to make an order directing that accused be re-sent for mental observation in the absence of substantiated and firm basis laid and therefore this application stands to fail.

[17] Consequently, the following order is made:

The application for a second evaluation is dismissed.

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J T SALIONGA

JUDGE

[8] *S v Uirab* (CC07/2015) [2016] NAHCMD 96 (06 April 2016).
[9] *S v Hansen* 1994 NR 5 (HC).

APPEARANCES

For the State:	R Shileka
	Of Office of the Prosecutor-General, Oshakati

For the Accused:	Mr P Greyling
	Of Greyling and Associates, Oshakati