



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 34/2015

In the matter between:

THOMAS SHIHEPO

APPELLANT

And

**THE
RESPONDENT**

STATE

Neutral citation: Shihepo v State (CA 34/2015) [2016] NAHCMD 128 (25 April 2016)

Coram: SIBOLEKA J and USIKU J

Heard: 22 March 2016

Delivered: 25 April 2016

Flynote: Mental state of accused- provisions of section 79 (1) B of the Criminal Procedure Act 51 of 1977 – Trial court obliged to have at least two psychiatric reports as required by law.

Summary: The appellant was convicted on a charge of murder read with the provisions of the Domestic Violence Act 4 of 2003 and sentenced to 18 years imprisonment. He claimed to have been suffering from mental illness or defect.

Held: The trial court ought to have made an order for psychiatric observation in respect of the appellant.

ORDER

In the result the conviction and sentence are set aside

APPEAL JUDGMENT

USIKU J, (SIBOLEKA J CONCURRING)

[1] This is an appeal against conviction and sentence. At the hearing the appellant appeared in person whilst Mr Lutibezi appeared for the respondent. The court appreciates counsel's arguments in this regard

[2] In his notice of appeal the appellant stated that he was convicted and sentenced by the court *aquo* while he was in a state of mental illness or defect invoking the provisions of section 78 (a) which reads as follows:-

“Mental illness or mental defect and Criminal responsibility – (1) Any person who commits an act which constitutes an offence and who at the time of such commission suffers from mental illness or mental defect which makes him incapable-
(a) of appreciating the wrongfulness of his act;
(b) of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act.”

[3] At the start of the hearing in the court *aquo* the appellant's attorney made an application for the appellant to be referred for observation on the basis that he was on treatment for psychosis and could not furnish proper instructions during consultations. It was also indicated that the appellant had been on treatment since 2007 and that a report had been compiled before in terms of section 79 of the Criminal Procedure Act 51 of 1977 as amended. The report was only handed in after the state had closed its case. In that report it was indicated that the appellant should be regarded as fit to stand trial. The report is dated 3rd July 2007. The psychiatrist

who had compiled the report did not testify in order for the defence to cross examine him on the appellant's mental state. Neither did the defence call any other witness.

[4] The respondent conceded that there was sufficient evidence placed before court concerning the appellant's mental illness at the time of the trial which would have persuaded the court to make an order for the appellant to be committed for observation in terms of the act. The court had also made its own observation of the appellant's gesture which it found to be strange. The trial court was therefore obliged to determine the matter after hearing evidence from the respondent and the appellant, including the evidence of any person as required by section 79 of the act.

[5] In my view the court *aquo* had the duty to hold the enquiry in respect of the appellant's triability at the stage when the issue of mental illness was raised, taking into account the fact that he was under treatment for psychosis at the time.

[6] In the light of the above, the conviction and sentence cannot be allowed to stand because it was not proved beyond reasonable doubt that the appellant appreciated the wrongfulness of his actions at the time.

[7] In the result, the appeal is allowed the conviction and sentence are set aside

DN USIKU

Judge

A SIBOLEKA

Judge

APPEARANCES

APPELLANT: Mr Thomas Shipepo
Windhoek Central Prison: Inmate

RESPONDENT: Mr Lutibezi
Of the Office of the Prosecutor-General, Windhoek