

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: A3970/14

High Court Case No: 21/15

In the matter between:

THE STATE

and

LUYANDA DINISO

REVIEW JUDGMENT

MBENENGE J:

[1] The accused appeared before the Magistrate, Mdantsane, facing a charge of contravening a protection order, issued on 5 February 2014, in terms whereof he had been prohibited from, *inter alia* insulting, stalking and emotionally abusing N. D. (the complainant). It was alleged that on or about 4 December 2014, the accused wrongfully and unlawfully contravened the order by assaulting and insulting the complainant, and kicking her with booted feet.

[2] When, initially, the matter served before the Magistrate, it was postponed to a further date for a formal bail application, with the accused having been directed to remain in custody.

[3] On the date to which it was postponed, the prosecutor informed the Court that *“it transpires that accused has been referred for mental evaluation.”* Resulting from that revelation, the matter was postponed *“for section 77 proceedings”*, with an order that the accused remain in custody.

[4] The record further reveals that, on a subsequent occasion, the prosecutor informed the Court that the accused appeared to be mentally unsound as he was *“insisting on being refunded his lobola.”*

[5] After several bouts of postponements, the mental status of the accused was eventually enquired into, on 6 January 2015. According to the complainant, the accused had, since they got married to one another, been violent towards her. The couple became estranged. On the fateful day the accused hit the complainant with fists causing her face to be swollen. It emerged that this conduct had been meted out on several other previous occasions. At some stage during the proceedings, the accused also addressed the Court, but his remarks appear to have been unintelligible. The Magistrate became satisfied that the accused might be suffering from a mental illness, and thereupon directed, *“in terms of section 79(1)(a)”* that the matter be *“enquired into and reported on in terms of section[s] 77(2) and 78(1).”*

[6] By order dated 27 March 2015 the Magistrate, *inter alia*, directed that the accused be removed from Fort Glamogan Prison to Fort England Hospital for examination. That order resulted in a recommendation being made, by two psychiatrists, that the accused be admitted to Fort England Hospital as a State patient as he posed a significant risk to his wife and other individuals due to the nature of his psychotic symptoms.

[7] Subsequent thereto, after the accused had been to Fort England Hospital, and following an order previously made, recorded as having been *“in accordance with the provisions of section 79(2) of Act 51 of 1977”*, a further inquiry (in terms of *“section 78”*) was conducted. The complainant in effect repeated the testimony she had

initially tendered, save that on this occasion she also mentioned a protection order that the assault complained of had violated.

[8] After pointing to a correction and mentioning that the enquiry was in fact in terms of “*section 77*”, the Magistrate found that the accused was not capable of understanding the proceedings so as to make a proper defence, and directed that the accused be detained in a psychiatric hospital or prison pending the decision of a Judge in chambers in terms of section 47 of the Mental Health Care Act 17 of 2000.

[9] The procedure followed by the Magistrate was fraught with shortcomings, hence this judgment which, to a great extent, is informed by the views expressed by the Director of Public Prosecutions, Bhisho, for which this Court is grateful.

[10] In the first place, at no stage did the Court make a finding that the accused had in fact committed the act complained of. Such finding is a jurisdictional factor for the invocation of either section 77(6)(a)(i) or section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977 (the CPA).

[11] It is further clear, from a perusal of the transcript, that the matter was dealt with in terms of section 77(6)(a)(i)¹ of the CPA, although the accused had been charged with an offence other than one contemplated in that section. No reasons were given for following this procedure. Without the reasons, it was not possible for the Court to properly exercise its discretion in relation to whether the case warranted the invocation of section 79(1)(a) or 79(1)(b) of the CPA. These subsections differ in material respects, and posit different scenarios.

[12] On the authority of *S v Booï Pedro*,² and indeed upon a proper construction of section 79(1)(b), three psychiatrists, including a private psychiatrist, must be appointed when the case falls within the subsection, unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed, in which

¹ Section 77(6)(a)(i) is applicable “*in the case of a charge of murder or culpable homicide or rape ...or a charge involving serious violence...*”

² Unreported decision of the Western Cape Division, Cape Town by Binns- Ward *et* Rogers JJ delivered under High Court Ref no:14228 Oudtshoorn Case No:B247/11 on 9 July 2014

case there must be two psychiatrists.³ In the event that section 79(1)(a) is of application, it is not necessary to have three psychiatrists constituting a panel.

[13] In all these circumstances, the proceedings conducted by the Magistrate, Mdantsane, on and after 6 February 2015 are set aside. The matter is remitted to the Magistrate to –

- (a) consider the evidence placed before him and make a finding on whether the accused committed the act in question ;and
- (b) proffer a reason why the accused should be declared a State patient and not an involuntary mental health care user.

S M MBENENGE

JUDGE OF THE HIGH COURT

11 September 2015

I agree

I T STRETCH

JUDGE OF THE HIGH COURT

³ Para [68] of the *Booi Pedro* judgement