

THE STATE

Versus

TRUST NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 JUNE 2017

Criminal Review

MAKONESE J: In terms of section 26 of the Mental Health Act (Chapter 15:12) where a magistrate has reason to believe that an accused person is mentally disordered or intellectually handicapped, he may order that proceedings be stayed and may order the accused to be examined by a medical practitioner or psychiatrist for the purpose of inquiring into and reporting on his mental state. Once an accused has been committed to a mental institution it shall not be competent for the prosecution to proceed with the trial in terms of s31 (2) of the Mental Health Act, in the absence of a psychiatric report on the mental condition of the accused. Any purported trial in the absence of such a psychiatric report renders the proceedings fatally defective.

This matter has been referred to me by the scrutinizing regional magistrate for review. The accused person appeared before a resident magistrate at Lupane facing a charge of domestic violence as defined under section 4 as read with section 3 (1) (a) of the Domestic Violence Act (Chapter 15:16). Accused was convicted and sentenced to 12 months imprisonment, wholly suspended for 5 years on the usual condition of good behaviour.

The brief facts as contained in the outline of the state case are that the complainant is a female adult residing at Jotsholo in the Lupane area. The accused is the complainant's cousin and they resided together at the relevant time. On 23rd June 2016 at around 0900 hours the accused entered complainant's bedroom hut and took some sorghum seeds. The complainant asked accused why he was taking the seeds and what his intentions were. The accused was

infuriated by the complainant's protestations and started shouting at the complainant. Accused then struck the complainant once on the head with a wooden log. The complainant sustained a deep cut on the head and was referred to hospital for treatment. The matter was reported to the police leading to the arrest of the accused. On 13 January 2017 the Prosecutor General generated a letter addressed to the Commissioner of Prisons and copied to the Provincial Magistrate in the following terms:

"Re: Criminal Mental Patient: Trust Ndlovu CR 13/06/126 Lupane

This patient appeared before the magistrate at Lupane Magistrates' Court in connection with criminal proceedings on charges of domestic violence. The magistrate found that he was mentally disordered and on 25 October 20156 committed him to Mlondolozhi by an order in terms of section (26, 27 28) of the Mental Health Act (Chapter 15:12)

The patient has now recovered from his mental disorder, and the Prosecutor General has decided, in terms of section 31 (2) of the Mental Health Act (Chapter 15:12) to proceed with the prosecution which was pending at the time of his committed.

The attached warrant provides for the patients transfer from Mlondolozhi Mental Institution to Lupane Prison pending the re-opening of the proceedings against him.

May transfer be effected accordingly, please?

For: Prosecutor General" (emphasis mine)

It is common cause that the "mental patient" was subsequently brought before a magistrate on 24 January 2017 at Lupane on a charge of contravening section 4 as read with section 3 (1) (a) of the Domestic Violence Act. He was convicted on his own plea of guilty and sentenced to a wholly suspended prison term. In his reasons for sentence the learned magistrate reasoned as follows:

"In arriving at an appropriate sentence I considered the following factors; accused is a 25 year old unmarried man with no children as yet. He is a first offender who pleaded guilty to the charge and did not waste the court's time. Accused has episodes of mental illness and was dealt with in terms of the Mental Health Act on initial appearance.

Although it was ruled that accused is now fit to stand trial, accused could have committed the offence whilst he was mentally challenged ...

Despite the severity of the injuries I found that a prison term will not be ideal for an accused who could have committed the offence in a state of mental illness. In view of accused's condition I felt that a wholly suspended sentence on condition of good behaviour will be rehabilitative enough for the accused. It will monitor the accused's conduct for 5 years (sic)."

The learned scrutinizing regional magistrate has raised the red flag on the propriety of the proceedings in the court *a quo*. He has addressed a letter to this court in the following terms:-

"Kindly place this record before and Honourable Judge of the High Court with the following comments.

Accused appeared before a resident magistrate at Lupane facing a charge of domestic violence as defined by section 4 as read with section 3 (1) (a) of the Domestic Violence Act (Chapter 6:16). He was convicted and sentenced o 12 months imprisonment which was wholly suspended for 5 years on condition of good behaviour.

The record was then placed before me for scrutiny. Upon perusal of the record, I noted that before trial, the accused was first committed to Mlondolozhi mental unit for treatment in terms of the Mental Health Act. Upon his recovery from his mental disorder, the National Prosecuting Authority (NPA) decided in terms of section 31 (2) of the Mental Health Act (Chapter 15:12) to proceed with the prosecution which was still pending at the time of the accused's committal. This decision was reduced to writing by the Prosecutor General and was tendered into evidence during trial and is filed of record. Usually, the decision by the Prosecutor General is issued and attached to a psychiatric report which would assist the court in the determination of the accused's mental status at the time of the commission of the offence. In this case no psychiatric report was tendered before the trial court notwithstanding the trial magistrate's awareness that the accused had been committed to Mlondolozhi.

In the absence of a psychiatric report the trial magistrate erred to proceed with the mater. I wrote a query to the trial magistrate who conceded that the absence of the psychiatric report was fatal to the proceedings.

In my view and subject to the findings by the psychiatrist this was a case in which the trial magistrate was supposed to proceed in terms of section 29 (2) of the Mental Health Act (Chapter 15:12) and return a special verdict."

The scrutinizing magistrate was correct in his assessment of the manner in which the trial magistrate conducted himself. As soon as the accused was committed to Mlondolozzi for examination into his mental status, it was not competent for the prosecution to make a finding that the accused had recovered from his mental illness. The prosecution should and must be guided by the report by the psychiatrist. Firstly, a report would show whether the accused was fit to stand trial and secondly, the report was supposed to give a medical opinion on whether the accused had the requisite mental capacity to appreciate the consequences of his conduct at the time of the commission of the offence. When accused was brought from prison after committal a report ought to have been presented to the prosecution, to guide the court on how to proceed. In the event that the report by the psychiatrist concluded that the accused was at the time of the commission of the offence suffering from a mental disorder to such an extent that he did not appreciate the consequences of his conduct, the prosecution would, in that event propose to the court that a special verdict be returned in terms of s29 of the Mental Health Act.

In this case, the accused was not legally represented at the trial. It is an essential element of a fair criminal trial that the accused is made aware of his rights so that he does not make mistakes of a technical nature to his detriment. See the cases of *R v Muchena* 1986 RLR 731 at p 736; *S v Musindo* 1997 (1) ZLR 385 (H); *Gomera v S* HH-92-02 and *S v Mkandla* HB-127-05.

I make the further observation that the learned magistrate in the court *a quo* took into account the accused's mental condition in assessing an appropriate sentence. The magistrate's remarks were not based on any sound legal or medical foundation. He arrived at his opinion on the basis of the letter from the National Prosecuting Authority, which certified that the accused had recovered from his mental disorder. The trial magistrate ought to have requested a report from the psychiatrist before proceeding with the trial. The absence of such report rendered the proceedings fatally defective.

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In the circumstances I decline to certify the proceedings as being in accordance with real and substantial justice and withhold my certificate. I however, do not deem it appropriate to order a re-trial. The accused has already spent some time in prison and has been released. I accordingly make the following order:

- (a) The proceedings in the court a quo are hereby quashed and set aside.

Moyo J I agree