



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case no: 578/2015

Reportable

In the matter between:

FREDDY CHAUKE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Chauke v The State* (578/2015) [2015] ZASCA 181 (30 November 2015)

Coram: Maya DP, Mhlantla and Theron JJA, Van Der Merwe and Baartman AJJA

Heard: 11 November 2015

Delivered 30 November 2015

Summary: Criminal trial - Mental state of accused - Enquiry in terms of ss 77, 78 and 79 of Criminal Procedure Act 51 of 1977 - The trial court was not placed in possession of all relevant facts regarding the appellant's mental condition - Irregular to conduct an enquiry into the mental state of appellant without the assistance of an expert – Resulting in a fundamental irregularity.

ORDER

On appeal from: Limpopo Local Division of the High Court, Thohoyandou (Hetisani J sitting as court of first instance):

The appeal is upheld and the convictions and sentences are set aside.

JUDGMENT

Theron JA (Maya DP and Mhlantla JJA, Van Der Merwe and Baartman AJJA concurring):

[1] The appellant was charged with two counts of murder in the Limpopo Local Division of the High Court (Hetisani J) (the trial court). Despite his plea of not guilty, he was convicted and sentenced to life imprisonment in respect of each count. He appeals against both conviction and sentence with the leave of the trial court.

[2] On appeal, it was not in dispute that the appellant had stabbed and killed the two deceased, Ms Shalati Sivhula and her granddaughter, Ms Konetani Maluleke, at their home during the early hours of 22 January 1999. The evidence led at the trial established that the appellant was known to the deceased and their family. The state witnesses, family of the deceased and who had resided with the deceased, testified that the appellant had regularly, and without permission entered their home while they were asleep at night in order to steal food. He did the same on the day of the incident and when they awoke to find him in their home, he attacked the deceased.

[3] At the hearing of this appeal, the main issue argued was whether the state had proved that the appellant had the requisite mental capacity at the time he committed the offences. It was contended that the trial court had failed to direct that this issue be enquired into and reported on in accordance with the provisions of the Criminal Procedure Act 51 of 1977 (the Act).

[4] I turn to consider what had transpired in the trial court. At the hearing on 24 July 2000 counsel for the state advised the court that the defence had requested that the appellant be examined by a psychiatrist in order to determine his mental accountability at the time when the offences were committed. The court was also informed that arrangements had been made for the examination to be conducted on 26 July 2000. The matter was adjourned to 28 July 2000 and the court advised the appellant that he would be taken to 'Groothoek Hospital where you will be tested by a doctor whose main duty is to test people who are suspected or being doubted to be sane'.

[5] On 1 August 2000, the resumed date of the hearing, the charges were put to the appellant, who was legally represented, and various documents, including the psychiatric evaluation conducted by the principal psychiatrist Dr E Weiss, were handed in to court, by consent. The report reads:

'I have today examined above-mentioned. He has a history of one admission at Tshilidzini and he has periodically received Largactil medication. He was not on medication at the time of the alleged offence. There is no history or incidence of epilepsy. Collateral information has been scanty due to unavailability of a relative who is close to him. His mother is currently seriously ill. During extensive interviewing in the presence of 4 colleagues, we have not been able to elicit acute or residual symptoms of a mental illness. We cannot shed light on the motive for the alleged offence. He is fit to stand trial. There is no evidence that he was mentally ill at the time of the alleged offence.

[6] After the appellant had testified the court questioned him and what follows is an extract of this questioning:

'Mr Chauke you said at one time here that you were getting treatment at hospital, did I hear you well? --- Yes.

And you went on to mention that you were being treated for some mental disorder is that correct? --- Correct.

Are you still receiving some treatment? --- I am still taking tablets.

Now when you say at one time you were asked why did you not deny a certain statement and you said it is because my mind lets me down from time to time is that correct? --- Yes.

Right now which means you are not always under attack, there are certain times when you have got an attack of that disorder of yours? --- Yes.

Now when you have an attack do you then thereafter remember what happened during the time that you were under attack? --- Some of them.

For example what I mean is, say you had an attack this morning throughout the whole morning and you were in court here and now all of [a] sudden we ask you whether you saw this, you heard that in other words when you are under attack are you thereafter in a position to remember each and every little thing which happened during the time you were under attack? --- No.

During the attack, do you understand what you are doing? --- No.

When you were at Groothoek they asked you questions? --- Yes.

And you answered? --- I answered some of the questions, some I did not know them.

But you told those people there that you were receiving treatment at hospital? --- Yes.'

[7] The defence closed its case and the respective legal representatives addressed the court. It is apparent from the record that the judge, at that stage, had concerns about the appellant's mental capacity and called the investigating officer, Inspector Ganyani Sono, to testify about his observations of the appellant. Inspector Sono testified that he had had no indication or reason to suspect that the appellant was 'mentally incapacitated'. Inspector Sono was also questioned by counsel for the state as follows:

'Can you remember what he said in his warning statement? --- If I am not making a mistake he said that he knows nothing about what happened.

Did he at any stage indicate to you, that is during all your investigations, that he does not remember because he is on medication or he has a certain illness? --- No.

So the first time you heard about this was last week when he applied for a psychiatric evaluation? --- Yes.

All the other times you were under the impression that there is nothing wrong with him? --- Yes

So all that he ever said to you is that he did not do it --- Correct.'

[8] In his judgment on the merits the judge referred to and relied on the report filed by Dr Weiss and in particular the conclusion that the appellant was fit to stand trial and that there was no evidence that the appellant was mentally ill at the time he committed these offences. The judge reasoned:

‘The court comes to the conclusion that your defence that you do not know anything, you were told by the police, you spend the whole year at the cell including the investigating officer, not receiving any complaints either from you or from fellow cell mates that your behaviour was unbecoming shows that you were at all times mentally sound’.

The judge concluded that the appellant’s defence that he did not know or remember anything about these offences was a fabrication.

[9] As stated above, it is apparent from the record that after the appellant had testified that the trial court entertained doubt about his mental capacity. It was argued, on behalf of the appellant, that the trial court had failed to comply with the provisions of ss 77 and 79 of the Criminal Procedure Act 51 of 1977 (the Act).¹ In terms of s 77(1), a court is obliged, if during any stage of the proceedings, it appears to the court that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, to direct that the matter be enquired into and be reported on in accordance with the provisions of s 79 of the Act. In the event that the finding contained in such report is the unanimous finding of the persons who enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.² If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings continue in the ordinary course.³

[10] A court must be satisfied that a sufficient basis has been laid for the allegation of mental illness before it can direct that an enquiry be held under s 79.⁴ The person requesting referral for observation is required to lay a basis for such a request.⁵ The standard of the test for referral is low, mainly because the issue is important and a . .

¹ I deal with the provisions of the Act as at the time that the appellant was tried and sentenced in the trial court.

² Section 77(2) of the Criminal Procedure Act.

³ Section 77(5) of the Criminal Procedure Act.

⁴ *S v Mogorosi* 1979 (2) SA 938 (A) at 941H–942A; See also generally *S v Mabena & another* [2006] ZASCA 178; 2007 (1) SACR 482 (SCA).

⁵ *S v Ndengu* 2014 (1) NR 42 (HC).

. judge or magistrate . . . is a lay person in the field of psychiatry and psychology.’⁶ In *S v Tom*⁷ it was decided that once there is a reasonable possibility that the accused is not able to follow the proceedings or might not have been criminally responsible for her actions, the court is obliged to direct that an enquiry under ss 77 or 78 and 79 is conducted.

[11] A reading of the record reveals that the concern in this matter was that the appellant may, at the time of the commission of these offences, have been suffering from a mental illness or defect. If he was, s 78 (1), which provides that an accused shall not be criminally responsible for the commission of an act if at the time of the commission of such act, she suffered from a mental illness or mental defect, applies. The court ought to have acted in terms of s 78(2) which reads:

‘If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of s 79.’

[12] The relevance of the enquiry in terms of s 78(2) in this matter, is that if the appellant committed the offences while suffering from a mental illness or mental defect that made him incapable of appreciating the wrongfulness of his acts, or acting in accordance with such an appreciation, he would not be criminally responsible for such acts.⁸ In such a case a court must find him not guilty and direct that he be detained in a psychiatric hospital or institution, ‘pending the signification of a decision of a judge in chambers’.⁹

⁶ Du Toit, De Jager, Paizes and van der Merwe *Commentary on the Criminal Procedure Act*, Vol 1, Issue 54 at13-8.

⁷ *S v Tom & others* 1991 (2) SACR 249 (B) at 251A-C.

⁸ Section 78(1).

⁹ Section 78(6) of the Criminal Procedure Act. Prior to its amendment by the Criminal Matters Amendment Act 68 of 1998 which commenced on 28 February 2002, s 78(6) of the Criminal Procedure Act 51 of 1977 read as follows:

‘(6) If the court finds that the accused committed the act in question and that he at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act –
(a) the court shall find the accused not guilty; or
(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or mental defect, as the case may be, and direct that the accused be detained in a psychiatric hospital or prison pending the signification of the decision of a judge in chambers.’

[13] It is appropriate to consider the provisions of s 79 of the Act.¹⁰ Prior to its amendment s 79 provided, inter alia, that where a court issues a direction under s 77(1), the enquiry shall be conducted and reported on by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court. Section 79(3) read with s 79(4) provided that the report must be in writing and include a description of the nature of the enquiry; a diagnosis of the mental condition of the accused; and if the enquiry is under s 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence. If the enquiry was under s 78(2), the report include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of his actions or to act in accordance with such appreciation, at the time of commission thereof, was affected by mental illness or mental defect.¹¹

[14] The report compiled by Dr Weiss did not meet the requirements set out in ss 79(3) and (4)¹² and was of no assistance for the purposes of an enquiry into the mental state of the appellant. This court has held that in such an enquiry, an accused's previous psychiatric reports should be placed before court:

'Sedert die inwerkingtreding van die Strafwysigingswet is die bewyslas met betrekking tot sowel strafverswarende as strafversagende faktore nou op die staat. Na my oordeel het die staat nie hierdie bewyslas met betrekking tot die appellant se moontlike verminderde toerekeningsvatbaarheid gekwyt nie. Die appellant se psigiatriese geskiedenis, vir sover bekend, en sy vreemde optrede soos dit in hierdie saak na vore gekom het, laat in ieder geval 'n groot vraag by my of hy volkome toerekeningsvatbaar was of is.'¹³

[15] The report prepared by Dr Weiss recorded that the appellant had previously been admitted to Tshilidzini Hospital and suggested that the appellant had also been on medication. The appellant testified that he had been treated for a mental disorder

¹⁰ S 79 was amended by the s 6 of the Criminal Matters Amendment Act 68 of 1998 which came into effect on 28 February 2002.

¹¹ Sections 79(3) and (4) of the Criminal Procedure Act.

¹² Set out in para 13 above.

¹³ *S v Motshkgwa* 1993 (2) SACR 247 (A). 'Since the commencement of the Criminal Law Amendment Act the burden of proof with regard to both aggravating and mitigating factors lies on the State. In my view, the State failed to prove this burden of proof with respect to the appellant's possible reduced accountability. The appellant's psychiatric history, to the extent known, and his strange behavior as it has emerged in this case, raises certainly a big question to me whether he was or is completely accountable.' (Own translation.)

and was, at the time of the trial, receiving medication for this disorder, which according to a report from the hospital, was for psychotic disorder and schizophrenia. It was common cause that the examination was conducted in one day. It was recorded in the report that Dr Weiss examined the appellant and conducted 'extensive interviewing' of him in the presence of four colleagues. The report stated that 'we have not been able to elicit acute or residual symptoms of a mental illness' and concludes that 'there is no evidence that he was mentally ill at the time of the alleged offence'. The report was silent on the nature of the tests conducted on the appellant and the basis upon which the conclusion was reached that the appellant did not suffer from any mental illness or mental defect at the time of the commission of the offences.

[16] The trial court was not in possession of all relevant facts regarding the appellant's mental condition. The report should be based on a holistic assessment of all relevant facts and circumstances and should include interviews with persons other than merely the medical personnel conducting the assessment.¹⁴ In *S v Dobson*, Zietsman JP put the matter thus:

'For the purpose of their enquiry they obtain information from various sources. They want to know what the State's allegations are against the accused and they obtain background information from various sources concerning his past behaviour and any past incidents which may throw light upon his present mental condition and what his mental condition might have been at the time when the offence was allegedly committed. Dr Kaliski made it clear in his evidence that the psychiatrists do not necessarily accept the correctness of the information they obtain. They confront the accused with such information and assess his reactions thereto. Their purpose is not to try to determine whether the information they have received is correct or not, but to determine the accused's mental state, and in particular to see whether he can understand and appreciate the concept of wrongfulness.'¹⁵

[17] The court, by calling the investigating officer to testify, *mero motu* embarked on an enquiry into the appellant's mental state, in an attempt to seek assistance from the investigating officer who was not an expert in the field. In an inquiry into the mental state of an accused in terms of ss 77, 78 and 79, a court must be assisted

¹⁴ *S v Dobson* 1993 (4) SA 55 (E).

¹⁵ *S v Dobson* at 88H – 89B.

and guided by expert evidence. This court, in *S v Mabena*,¹⁶ stated that ‘mental illness’ and ‘mental defect’ are ‘morbid disorders that are not capable of being diagnosed by a lay court without the guidance of expert psychiatric evidence. An enquiry into the mental state of an accused person that is embarked upon without such guidance is bound to be directionless and futile.’ (Footnote omitted.) Section 1 of the Mental Health Act 18 of 1973 (applicable at the time) defines ‘mental illness’ as ‘a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such a diagnosis’. It is very difficult to envisage how a police officer, who is not trained in mental health related illnesses, can assist a court in diagnosing the presence or absence of a mental illness. This is bizarre and constitutes an irregularity.

[18] The question which arises is the effect, if any, that this irregularity had on the appellant’s right to a fair trial? The constitutionally enshrined right to a fair trial, as captured in s 35(3) of the Constitution, embraces a broad ‘concept of substantive fairness’.¹⁷ It is a comprehensive and integrated right, the content of which is to ‘be established on a case by case basis’.¹⁸ In my view, the irregularity is fundamental. The proper administration of justice and the dictates of public policy require that it be regarded as fatal to the proceedings in the trial court.¹⁹ This accords with the approach postulated by Mahomed CJ in *S v Shikunga & another*:

‘It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside.

...

Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity.²⁰

[19] I pause to note, in passing, that it was irregular for the trial judge to question the appellant after he, the appellant, had closed his case. There is no provision in the

¹⁶ *S v Mabena & another* [2006] ZASCA 178; 2007 (1) SACR 482 (SCA) para 16.

¹⁷ Per Kentridge AJ in *S v Zuma & others* [1995] ZACC 1; 1995 (2) SA 642 (CC) at 652H-J and 653A-C. In that case the court had considered s 25(3) of the Interim Constitution, the predecessor to the current s 35(3) of the Constitution.

¹⁸ *S v Dzukuda & others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC) para 9.

¹⁹ *S v Tuge* 1966 (4) SA 565 (A) at 568B.

²⁰ *S v Shikunga & another* [1997] NASC 2; 1997 (2) SACR 470 (NmS) at 484 C-D.

Criminal Procedure Act or any other legislation, authorising such conduct by a judicial officer.

[20] The irregularities in the conduct of the trial have resulted in a grave miscarriage of justice and the appellant's convictions must be set aside. At the hearing of this appeal, counsel for the state faintly suggested that this court should direct that the appellant be retried. This suggestion was later withdrawn. In any event, the State is entitled, under s 324(c) of the Act, to institute the charges again and it does not require an order from this court to do so.

[21] Order:

The appeal is upheld and the convictions and sentences are set aside.

L V Theron
Judge of Appeal

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