



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

02/2007

Criminal Review Case No:

In the matter between:

THOKOZANI VILAKATI

APPLICANT

VS

REX

RESPONDENT

Neutral citation: *Thokozani Vilakati v Rex (02/2007)[2016] SZSC 68 (30th June 2016)*

CORAM: **M.C.B. MAPHALALA CJ,
DR. B.J. ODOKI, JA,
S.P. DLAMINI, JA
C. MAPHANGA, AJA
M. LANGWENYA, AJA.**

Heard **11th May 2016**

Delivered **30th June 2016**

Summary

Criminal Law – review application in terms of section 148 (2) of the Constitution – applicant charged with murder – Trial Court invokes sections 165 (1) and (2) of the Criminal Procedure and Evidence Act 67/ 1938 as amended – appeal to the Court of Appeal subsequently dismissed and judgment of the Trial Court confirmed – application for review postponed sine die pending a medical report from National Psychiatric Centre on the current status of the applicant.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] The applicant was charged with murder, and, it was alleged that on the 1st July 1997, he unlawfully and intentionally killed Elijah Gobongo Vilakati by stabbing him ten times with a knife. The deceased was the applicant's biological father. The applicant was subsequently arrested by the police on the 11th February 1998 and thereafter indicted for the offence of murder.

[2] The applicant was arraigned before the High Court in May 2005 and pleaded not guilty to the charge against him. He was legally represented by a Senior Attorney. The Crown led evidence of four witnesses

including his stepbrother as PW1, his paternal grandmother as PW2, the investigating police officer as PW3 as well as the pathologist who conducted the post-mortem examination of the deceased. Psychiatric reports were admitted in evidence by consent, and, the purpose of placing the psychiatric reports before the court was to invite the court to consider making a finding in terms of sections 165 (1) and (2) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

- [3] On the 26th October, 1998 Dr Rogers Ndlangamandla, a Consultant Psychiatrist at the National Psychiatric Centre in Manzini, compiled a report after examining the applicant. This report was also admitted in evidence by consent. The report states the following:

**RE: PSYCHIATRIC ASSESSMENT OF THOKOZANI MACHAWE
VILAKATI CASE NO. 29/98**

The above named has been examined and assessed at our centre on the 9th July 1998 and on 21st October 1998. The report of his assessment is as follows:

Thokozani Machawe Vilakati is an adult male, approximately 22 years of age. He is single, unemployed and lives at his

parental home. He is a known psychiatric patient who has had several admissions into the mental hospital since 1994. With all his admissions he presented with a history of aggression and violence, destructive behaviour, isolating himself and feeling persecuted by family members. All his admissions were also associated with a history of cannabis abuse.

Presently, he is fully alert, gives a fair account of himself and he admits committing the crime he is charged with. He says he killed his father because he was always against his plans which include taking over the National Airways and Lubombo Ranches. He says he has been feeling unsafe ever since he disclosed his plans to people as he feels they might try to harm him. Even while he was in custody he feels unsafe and says he needs maximum security as the people who know his plans might harm him.

At one time he quarrelled with his brother because he believed that he was having an affair with his girlfriend. He has always believed that his family is bewitching him, including his mother and father. At times he would refuse food from his mother because he suspected she wanted to poison him.

According to history from his mother, since the onset of his illness he would lock himself in his room most of the time. He would not talk to members of the family, especially his father whom he had not communicated with for almost three years.

On the day of committing the crime he is charged with, he went into his father's bedroom, found him lying on the bed and started stabbing him with no apparent provocation. He says he killed his father because of all the things he had done against him, bewitching him, sabotaging his business plans and being against him buying a car. All this was part of his delusional system.

On mental status evaluation, he is fully alert and oriented in all spheres. He lacks insight into his illness and is thought disordered as shown by his speech being circumstantial and tangential. He has delusions of persecution which has been going on since the onset of his illness in 1994. It seems his whole life has been controlled by these delusions which are associated with paranoia. He also experienced auditory hallucinations. His mental illness has been complicated by

cannabis abuse. When he committed the crime, he acted on his delusional beliefs as he falsely believed that his father was responsible for his failures.

He cannot be held criminally responsible for his actions as he laboured under delusions when he committed the offence. He most likely suffers from schizophrenia, complicated by cannabis abuse.

He is currently psychotic and deluded. He is therefore not fit to stand trial. He needs care, control and treatment in an appropriate institution as he remains a danger to society.

Rogers Ndlangamandla.

- [4] Dr Hillary Dennis, a Consultant Psychiatrist examined the applicant and compiled a report on the 28th October, 2002. The report which was admitted in evidence by consent states the following:

The above named inmate was referred to me for 'psychiatric examination'. It is alleged he killed his father, and this is the reason why he was remanded. The inmate was examined on 20th August 2002, in the presence of Raphael Bene, the prison nurse, who also was the interpreter. An aunt relative was interviewed separately for history and other pertinent information. According to the inmate's aunt, he started showing strange behaviour about one year prior to the incident surrounding his father's death. She also mentioned that the inmate has a history of drug abuse, and has been treated at the National Psychiatric Centre.

The mental status exam revealed circumstantial and tangential thought process. There was evidence of paranoid delusion. He denied auditory and visual perceptual distortion. He was oriented to time, person and place. There was some impairment in his insight and judgment regarding his illness. The psychiatric examination revealed a psychotic disorder.

DR. J. HILLARY DENNIS"

[5] On the 16th October 2003 Dr Hillary Dennis re-examined the applicant and compiled another report which was also admitted in evidence. The report states the following:

RE: PSYCHIATRIC EVALUATION OF THOKOZANI VILAKATI CASE NO. 29/98

The court requested that the above named inmate be evaluated to determine whether his condition is curable or permanent, comment on treatment issues, and indicate whether he is fit to stand trial.

Mr. Thokozani Vilakati was first seen and evaluated in August 2002, during which time, his aunt gave pertinent historical information regarding his behaviour prior to the alleged killing of his father. Again, the inmate's aunt reported that he started showing strange behaviour about a year prior to the murder incident. The aunt also mentioned that the inmate has a history of drug abuse and was treated at the National Psychiatric Centre. The inmate confirmed being treated at the Centre in 1994. He said he was accused of smoking cannabis and this is why he was admitted. The examiner personally went to the Psychiatric Centre to review his record; unfortunately, no treatment record was found. However, his name was seen written in a log book of having been admitted both in 1994 and 1996.

His present mental status exam reveals the following pertinent findings: he was alert, oriented and co-operative. His thought process revealed some circumstantial thinking, while his thought content revealed some vagueness and poverty of content of speech. There was grandiose behaviour exhibited during the evaluation. His mood was occasionally labile, but not low. While he seems to express himself relatively well, his insight is judged to be somewhat impaired.

The history and mental status exams do indicate psychotic disorder. The relationship between the disorder and the history of cannabis abuse is complex. The disorder may be variously described as a comorbid psychotic disorder, although it appears he is not presently abusing cannabis, or a primary psychotic disorder. He apparently does not take any medication while in prison. It is likely that his condition is permanent.

The issue of competence to stand trial is quite complex, not static, and may be legally or medically determined. I would suggest that the inmate be given the opportunity to have treatment for a least two months, and be re-examined with a view to determine his competence or fitness to stand trial.

DR J. HILARY DENNIS

[6] Dr Rogers Ndlangamandla further examined the applicant and compiled a report on the 22nd October 2004. This report was also admitted in evidence by consent, and, it reads as follows:

“National Psychiatric Hospital

22nd January 2004

RE: THOKOZANI VILAKATI: PSYCHIATRIC ASSESSMENT

The above named has been seen and assessed at the Centre. He is an adult male who shows good contact and gives a coherent account of himself. He shows no features of any mental illness. On mental status evaluation he is a psychotic and euthymic. He is fit to stand trial in Court.”

[7] The defence counsel was able to cross-examine the four Crown witnesses. The applicant was also given an opportunity to give evidence and was accordingly cross-examined by the prosecution; however, the applicant did not call witnesses to give evidence on his behalf.

[8] His Lordship Justice Annandale ACJ, found that the applicant had killed the deceased. However, his Lordship further found that the applicant was insane at the time he committed the offence. Accordingly, His Lordship

entered a special finding in terms of section 165 (1) of the Act that the applicant did the act with which he was charged but that he was insane when he did it. Consequently, His Lordship made an order on the 7th September 2005 in terms of section 165 (2) of the Act as follows:

“It is ordered that the accused person be kept in custody at Matsapha Central Prison pending a directive by His Majesty. The Attorney General shall receive an appropriate report for the information of His Majesty.”

[9] Section 165 of the Criminal Procedure and Evidence Act 67/1938 as amended provides the following:

“165. (1) If an act either of commission or omission is charged against any person as an offence and it is given in evidence on the trial of such person for such offence that he was insane so as not to be responsible according to law for his act at the time when it was done, and if it appears to the court before which such a person is tried that he did the act but was insane as aforesaid at the time when he did it, the court shall return a special finding to the effect that the accused did the act charged, but was insane as aforesaid when he did it.

(2) If a special finding is returned the court shall report to the Attorney-General for the information of His Majesty and shall meanwhile order the accused to be kept in custody as a criminal lunatic in such place and in such manner as it directs.

- (3) His Majesty may order such person to be confined during His pleasure in a place of safe custody. (Amended P.49/1964; L.N. 38/1967.)**
- (4) Notwithstanding anything in this section, in the case of such special finding by a magistrate, his finding shall be subject in the ordinary course to review by the High Court and the provisions of section 89 of the Magistrate’s Court Act, No. 67 of 1938, shall *mutatis mutandis* apply thereto. (Added K.O-I-C. 34/1976.)**
- (5) Any person in respect of whom a special finding has been made under this section shall have the same right of appeal or review as if he had been convicted of the offence with which he has been charged. (Added K.O-I-C. 34/1976.)”**

[10] The applicant subsequently lodged an appeal to the Court of Appeal on the 17th October 2006 against both conviction and sentence. In particular he challenged the evidence of Dr Rogers Ndlangamandla and argued that he was not insane as reflected in the doctor’s report. However, the appeal was dismissed by the Court of Appeal.

[11] Tebbutt JA who delivered the unanimous judgment of the Court of Appeal considered and accepted the evidence of the psychiatric reports which were admitted in evidence by consent. The reports were compiled by Dr Rogers Ndlangamandla of the National Psychiatric hospital as well as Dr Hillary Dennis; the two medical doctors conducted the examination and psychiatric evaluation of the applicant. His Lordship further referred

to the psychiatric report compiled by Dr Rogers Ndlangamandla on the 26th October 1998 which states that the applicant was “a known psychiatric patient who had several admissions at the hospital since 1994, and, that he presented with a history of aggression and violence, destructive behaviour, isolating himself and feeling persecuted by family members.” The doctor further observed that the applicant’s admissions into the hospital was also associated with a history of cannabis abuse.

His Lordship continued:

“[3] The report goes on thus:

Presently he is fully alert, gives a fair account of himself and he admits committing the crime he is charged with. He says he killed his father because he was always against his plans, which include taking over the National Airways and Ubombo Ranches.

[4] The appellant, so the report continues, said he had been feeling unsafe ever since he disclosed his plans to people as he felt they may try to harm him. Even while he was in custody he felt unsafe. He has always believed that his family was bewitching him, including his mother and father.

[5] According to his mother, said Dr Ndlangamandla, since the onset of the appellant’s illness, he would lock himself in his room most of the time. He would not talk to members of the family, especially his father whom he had not communicated with for almost three years.”

[12] The Court of Appeal observed that the applicant was refusing to take the medication prescribed for him by the medical practitioners at the hospital allegedly because he denied that he was mentally ill. The Court further observed that taking the medication was to “applicant’s advantage on the basis that his discharge from detention depended on the evaluation of his mental condition”. The Court accordingly dismissed the appeal and confirmed the finding and order of the High Court in terms of sections 165 (1) and (2) of the Criminal Procedure and Evidence Act 67/1938 as amended. The judgment was delivered on the 9th May, 2007.

[13] On the 18th July, 2015 the applicant lodged review proceedings in terms of section 148 (2) of the Constitution of Swaziland. The ground for review is that he did not receive a fair trial as required by the Constitution on the basis that the record of proceedings on appeal was incomplete, and, he was not able to prepare adequately for his defence. He further denied having instructed the defence counsel, who was a *pro deo* counsel, to consent to the admission of the medical reports and further argued that such consent was prejudicial to his defence. With regard to his failure to bring the application for review timeously, he argued that he was not aware of his right of review until recently. During the appeal the applicant was not legally represented.

[14] On the day of hearing the application, a consent order was made postponing the matter sine die pending the medical evaluation of the applicant as well as the submission of the psychiatric report on the current status of the applicant.

[15] Accordingly, the following order is made:

1. The application is postponed sine die pending a medical examination by the National Psychiatric hospital on the current status of the applicant.

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree:

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree:

S.P. DLAMINI
JUSTICE OF APPEAL

I agree:

C. MAPHANGA
ACTING JUSTICE OF APPEAL

I agree:

M. LANGWENYA

ACTING JUSTICE OF APPEAL

For Applicant

Attorney Leo Gama

For Respondent:

Senior Crown Counsel Macebo Nxumalo

DELIVERED IN OPEN COURT ON 30th JUNE 2016