CRI\T\27\94

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

NKHAHLE MOTHOBI

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the
4th day of September, 1996

I must first all express my gratitude to the witness Dr Shafiuddin Shaikh who has given evidence in this Court.

In brief he has indicated that this is not the first time he has appeared before Court to give evidence concerning the accused.

He stated that he is a consultant specialist; that is a psychiatrist holding an MB Degree from Gujarat University in India. He is also possessed of a two year

Diploma in Psychological Medicine. All in all this entailed a total of seven years' training. He is presently stationed at Mohlomi Hospital - a facility taking care of those suffering from the disease of the mind; and he does examination of out-patients at Queen Elizabeth II Hospital too. He has had considerable practice examining mentally defective patients both in the High Court and even once in the Court of Appeal.

At the request of this Court, the witness was asked to examine the accused. He in his own words said he reassessed him on the 23rd and 24th August, 1996. Prior thereto he had furnished this Court with reports dated 5th October, 1995 and 20th December, 1995.

He personally interviewed the accused using services of an interpreter. The interpreter was a psychiatric nurse. He kept a record of the interview and prepared a report. The report was handed in and marked Exhibit "C" dated 28th August, 1996 and it bears the witness's signature. The witness referred extensively during the cause of his evidence to this report and it reads as follows :

"That's the Medical Report.

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> I referred to Medical Reports on above accused person on dates 5th October and 20th December, 1995.
>
> I reassessed him on 23rd and 24th August, 1996. During the interview, he was irritable and later became angry and did not co-operate well".

The conclusion the witness came to is that there is no change in the patient's mental condition. This latter aspect of the witness's statement relates to the findings of the 5th October, and 20th December, 1995.

At this latest stage of the report dated 28.08.96, the witness had benefit of scientific method based on what is called "a rating scale for fitness to stand trial". This is what he administered and the witness referred to page 734 of these wonderful works dated June 1996.

The entire document consists of hardly 5 pages and I have asked that the Registrar should photocopy it and have it incorporated into this Judgment.

The Examiner indicated the accused as having scored 51. The break-off point in the scoring scale is 31. The witness made the Court to understand that at 31 - at score 31 an accused person is reckoned to be incapable of standing trial. It stands to reason then that at score 51 he is a lot much worse than at the break-off point.

The witness conducted this test in an endeavour to determine whether the accused could stand trial. He relied on the rating scale published in South Africa by a team of Experts;

(1) F.J.W. CALITZ DP.PHIL

(2) P.H.JJ. VAN RENSBERG MD

(3) H. WOSTHUIZEN LLD

(4) VERSCHOOR LLD

all of the University of Orange Free State attached to the department of Psychiatry and Criminal Law relating to the subject "Criteria to use to determine ability to stand a criminal trial".

I fully endorse the witness's view that theirs is a valid and accepted test. On the basis of the questionnaire appearing on this document the Court was made to understand that the work is divided into four sections :

The first is legal item

the next is psychiatric item

followed by special item

and finally psycho-social item

ranging from 0-3 in each item. The examiner was reading, during the conduct of this examination, these items to a nurse who in turn translated the same to the accused

and the answers obtained were rated in terms of degree of impairment. The fact that from the way the thing is graduated or calibrated the patient scored 51 when 31 itself put him in rather dim light satisfies me that he definitely couldn't stand trial. The witness testified that the patient consistently in all occasions that he was interviewed and treated complained of insects in his head making funny sounds.

The rating scale test was administered first on 24th August 1996 and the accused or the patient was not on medication as he is still not on any today. Thus he was fully conscious and well orientated in terms of time and surroundings. It is the opinion of the witness that it is highly unlikely that the accused or the patient could have been given any drugs before the examination the witness administered.

The conclusions reached and the opinion formed by the witness were that the accused is suffering from delusional (persistent persecutory type of) disorder. Indeed I also bear witness to the fact that accused actually charged me with persecuting him even though I had always gone out of my way to be particularly gentle with him bearing in mind that I had benefit of perusing the preparatory record before meeting him in Court. The witness went further to express his wish to add something on what he had stated before Court; and what he told the Court I found very spell-binding and very revealing indeed. He said that after the 24th after

examining the accused he administered what is called abreaction treatment through the veins of the accused. In this process the patient is made drowsy but not fully asleep. The whole point for doing this was to ensure that if he had consciously tried to evade answering questions or was cagey about telling the examiner anything or was trying to suppress his knowledge of things, this way his resistance to the questions is removed and his resistance gets loosened up. While the patient was in this state the examiner asked him to remember what occurred on the 22nd December, 1991; that is the day of the events. The patient started at the same point that he had indicated on previous occasions, viz, that he departed from the place of work after slaughtering a sheep and left for home. He had some few drinks. A friend had asked to take him home but he declined. When he reached home he saw people who were enjoying some drinks. They offered him some but he declined to take any. Then they started taunting him that he had had so much drink that he couldn't take any more. He also, according to the witness remembers talking to a lady related to the deceased and he left for home.

What the witness found significant was that before the abreaction treatment the patient was not able to remember any of the things which he now remembered or referred to while under the induced state of drowsiness. He couldn't remember these things while he was in a conscious state. I underline this aspect of the matter

as really revealing indeed and pay particular heed to the importance of the pamphlet that I referred to before.

The witness went further to indicate and emphasise that the patient couldn't recollect anything related to the offence and that he was completely blank regarding the offence. The witness further, in a general way, stated that in view of the past medical history of the patient and especially his version of having had drink - he was alerted to the fact that some people in this sort of condition i.e. people who take drink for a long time, go into a blackout, but others recover from it, while in the case of the accused it appeared that he was completely blank.

For purposes of the ruling I am going to make I am indeed pleased to learn that the accused, if he undergoes medication, can recover and that during treatment he wouldn't be exposed to any of the factors which precipitated his abnormal behaviour. That's as far as the evidence that I have heard goes.

In the addresses, I have been asked by the Director of Public Prosecutions - and Counsel for the accused sharing the same view - that the condition of the accused falls within the ambit of Section 166 read with Section 172.

S.166(I) reads as follows :

"If, when the accused is called upon to plead to a charge, it appears to be uncertain for any reason whether he is capable of understanding the proceedings at the trial. So as to be able to make a proper defence, the procedure prescribed by s.172 shall be observed".

S.172 subsection 2 reads as follows :

"If the Court finds the person charged with an offence insane or mentally incapacitated pursuant to subsection 1, the judicial officer presiding at the trial shall record such verdict or finding, and shall issue an order committing such person to some prison pending the signification of the King's Pleasure".

In brief this is what in fact I intend doing.

I accordingly make record of the fact that the accused at the time of commission of the offence was mentally incapacitated to the extent that he would not be able to understand the proceeding and in turn make a proper defence.

I order therefore that he be committed to some prison pending the signification of the King's Pleasure.

It should be plain here that in fact even in the words of the Court of Appeal in ***Tšitso Matšaba vs Rex*** C. Of A.(CRI) 5\90 (unreported) this is not a conviction, the accused is not being said to be guilty of anything.

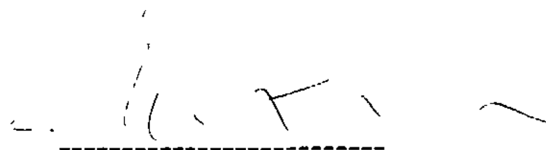
The words in that case by Kotzė J.A. concurred in by Browde J.A. and Leon

J.A. at pages 4 and 5 are -

Thus expounded, the concluding portion of the special verdict reads

> 'But (he) was mentally disordered or defective so as not to be responsible according to law for the act or omission charged at the time when he did the act or make the omission' ".

I may only add for emphasis that the accused was not made to plead before the above conclusion was reached.



JUDGE
4th September, 1996

For Crown : Mr Mdhluli
For Defence: Mr Lesuthu

Criteria for fitness to stand criminal trial

F.J.W. Calitz, P.H.J.J. van Rensburg, H. Oosthuizen, T. Verschoor

Objective. To identify criteria whereby triability can be determined.

Design. Questionnaire survey. The final rating was decided on the basis of a structured psychiatric interview.

Setting. Oranje Hospital, Bloemfontein.

Participants. A total of 736 questionnaires was sent to 176 judges of the Supreme Court, 480 magistrates and 32 attorneys-general and state advocates in South Africa and Namibia, and 33 psychiatrists and 15 clinical psychologists working in forensic psychiatric units in South Africa. With the information from the completed questionnaires, rating criteria were compiled. The rating criteria were applied by means of a structured interview to 100 persons referred in terms of section 77(1) of the Criminal Procedure Act 51 of 1977. A multiprofessional psychiatric team was requested to evaluate the same 100 observandi independently.

Results. A total of 298(40.5%) of the questionnaires were returned. From the data of the completed questionnaires, 19 legal items, 17 psychiatric items, 2 special laboratory tests and 2 psychosocial items were identified as the most important and clear diagnostic indications for the evaluation of triability. The similarity between the findings of the researchers and those of the multiprofessional psychiatric team was meaningful to 1% of significance. For the proper application of the criteria a cut-off point of 31 was determined. A score of 31 of higher therefore indicates that a patient is unfit to stand trial, while a score of less than 31 indicates triability

Conclusions. The application of the proposed final rating criteria as a single method of rating is at the very least just as reliable as the multiprofessional team in evaluating fitness to stand trial. The proposed criteria, used as a single rating instrument, are cost-effective in terms of time and staff, avoid unnecessary hospitalisation and ensure that mentally ill accused will have a fair trial.

The law demands that, to receive a fair trial, an individual must possess sufficient mental capacity to comprehend the nature and object of the proceedings and his own position in relation to those proceedings; he must also be able to advise counsel rationally in the preparation and implementation his own defence. If he is unable to do one or more of these, he is 'incompetent to stand trial' and usually transferred as a state patient. It has always been a problem to determine the triability of accused persons, mainly because of costly evaluation methods, cumbersome procedures, unnecessary hospitalisation and inadequate vague criteria. While the final decision on competency is a legal one, the courts often call upon psychiatrists and, in some cases, psychologists for an advisory opinion.

In many jurisdictions, however, the court has consistently failed to inform the examining psychiatrist or psychologist what questions it wishes answered. Even if a specific request for an evaluation of competency to stand trial is made, it appears that the vast majority of psychiatrists and psychologists have no awareness of what legal test or criteria to apply. If they deal with the

question at all, many seem to feel that the accused must be free from any symptoms of mental illness before he is triable.

Conclusion

The conclusion of this study is that the application of the proposed final rating criteria as a single method of rating is, at the very least, just as reliable as the multiprofessional team in evaluating whether someone is fit to stand trial.

The proposed criteria, used as a single rating instrument for determining triability, have the following advantages, viz.:

(I) They are cost-effective in terms of time, staff and finances;

(ii) they avoid unnecessary hospitalisation,

(iii) they could act as a screening method;

(iv) they will prevent a mentally ill accused from inappropriately being declared a state patient,

(v) they ensure that mentally ill accused will have a fair trial, and

(vi) they could be used in training other disciplines to evaluate triability.