REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 19/2013

In the matter between:

THE STATE

and

MARCUS KEVIN THOMAS **ACCUSED NO 1**
KEVAN DONNELL TOWNSEND **ACCUSED NO 2**

Neutral citation: *The State v Thomas* (CC 19/2013) [2016] NAHCMD 320 (19 October 2016)

Coram: LIEBENBERG J
Heard: 28 – 29 July; 29 August; 03 October 2016
Delivered: 19 October 2016

Flynote: Criminal procedure – Inquiry in terms of s 77 and 78 of the Criminal Procedure Act 51 of 1977 – Findings made by two psychiatrists disputed – Psychiatrists testified in terms of s 77(3) – Objections to admissibility of psychologist report – Report not issued under s 79 – Report

must be that of psychiatrist, not psychologist – Purpose of psychiatric report to assist psychiatrist and not the court – Order of court on referral not complied with – Period of psychiatric observation – Adequacy of reports challenged – Approach to expert evidence restated.

Summary: This is a second enquiry into the accused's mental state, following the State's challenge to the findings of the State psychiatrist in the first enquiry that accused could not stand trial due to a neurocognitive disorder. The court invoked the provisions of s 79 (1)*(b)* of the Criminal Procedure Act 51 of 1977, and ordered that the accused be re-examined by two psychiatrists of which one in full employment of the State and the other in private practice to enquire into the accused's reported memory loss.

Accused was re-examined by two psychiatrists. Subject to one of the psychiatrist's report, a psychologist was instructed to examine the accused's neurological status. Counsel for accused person argued that the reports of the psychiatrists and that on the psychologists should not be admitted into evidence on the following grounds: (a) The report of the psychologists was inadmissible in that s 79(1)*(b)* provides that only psychiatrists can conduct the enquiry. (b) The court order was not properly complied with in that the accused was assessed by psychiatrists instead of at least one neuropsychiatrists. (c) The reports were not issued by neuropsychiatrists. (d) The psychiatric reports were inadequate in that the accused was observed within a short period of time.

The court acknowledged that s 79 requires that the mental status of the accused be reported on by a psychiatrist and not a psychologist. However, the psychologist's report is not before court in terms of s 79 (1)*(b)* of the Act.

Held, the psychologist's report is admissible in that it was relevant to one of the psychiatrist's report who gave evidence in terms of s 77 (4).

Held further, though the court order was not properly adhered to, the irregularity is not severe enough to render the entire procedure void. There is no evidence before court that the accused suffered prejudice in any way.

Held further, in the absence of evidence, there is no basis under which the court can find that the psychiatrists were not qualified to conduct the assessment.

Held further, the Criminal Procedure Act does not prescribe the maximum or minimum time period to assess an accused, it is in the discretion of the psychiatrist. What is regulated is the time period for which the enquiry may be postponed at a time. There is no basis in law to render the reports inadmissible.

ORDER

It is the finding of this court that:

1. Mr Marcus Thomas does not suffer from any mental illness or mental defect and is accordingly capable of understanding the proceedings so as to make a proper defence.

2. Mr Marcus Thomas is capable of appreciating the wrongfulness of his acts in respect of the offences charged, and acted in accordance with an appreciation of the wrongfulness of his actions.

RULING IN TERMS OF SECTION 77(3) OF ACT 51 OF 1977

LIEBENBERG J:

Introduction

[1] On 03 August 2015, and after evidence was heard pertaining to the mental state of Mr Marcus Thomas, accused no 1 (hereinafter 'the accused'), the court ordered that he be re-examined and directed in terms of sections 77(1) and 78(2) of the Criminal Procedure Act 51 of 1977 (the Act) that the accused's capacity to understand proceedings so as to make a proper defence and his criminal responsibility be enquired into, to be reported on in terms of s 79(1)*(b)* of the Act.

[2] Consequential to the order, the mental condition of the accused was enquired into by Dr Sieberhagen, a psychiatrist in private practice, and Professor Zabow, Emeritus Professor of the Department of Psychiatry at the University of Cape Town. Each of these persons conducted clinical interviews with the accused and recorded their respective findings in reports admitted into evidence which now form the subject matter of the present proceedings. Subsequent to the court order and at the request of Dr Sieberhagen that a comprehensive clinical neuropsychological evaluation of the accused be done by a psychologist, Dr Shalongo, the Medical Superintendent of Windhoek Central Hospital, contracted Mr Annandale, a clinical psychologist to do the necessary evaluation. These tests were deemed necessary due to determine the extent of an alleged traumatic head injury suffered by the accused during an unsuccessful attempt to escape from prison in November 2014.

[3] The reasons for ordering a re-evaluation of the accused's mental condition, are set out in the court's earlier ruling.[1] For a proper understanding of the present proceedings it seems apposite to briefly mention the circumstances and evidence that necessitated a reassessment.

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[1] Delivered on 03 August 2015.

[4] It is common cause that the accused during an unsuccessful attempt to escape from the facility where he was detained pending trial, sustained some injuries in the process. Besides multiple minor lacerations to the body, he reportedly suffered a brief episode of loss of consciousness after bumping his head during a fall. A CT-Scan of the brain taken two days later did not reveal any traumatic changes or abnormalities. With the commencement of trial proceedings about two weeks later, application was made by the accused's counsel to have the mental state of the accused assessed. After submissions were heard pertaining to behavioural changes observed on the accused, the application was granted and the appropriate order in terms of s 77(1) and s 78(2) of the Act made.

[5] Dr Mthoko, a registered psychiatrist in full-time employment of the State at the Psychiatric Department of the Windhoek Central Hospital examined the accused and on 30 April 2015 issued a report which was received into evidence. It was found that the accused suffers from a neurocognitive disorder and, accordingly, found not fit to stand trial. The State challenged these findings and subpoenaed Dr Mthoko as well as two other officials involved in the assessment and on whose evaluation she relied in coming to the aforesaid conclusion namely, Ms Nangolo a clinical psychologist, and Ms Balzer, an occupational therapist. From the testimony of Ms Nangolo it was evident that in order to know the extent to which the accused's memory is impaired, a comprehensive neurological examination was required. On this aspect of her evidence Dr Mthoko commented that a 'neuro-psychological or neuro-psychiatric assessment' was required, but at the same time was of the view that she deemed it unnecessary as the accused did not suffer from any neurological deficit. Notwithstanding, the court in the end concluded that the finding about the accused not being fit to stand trial due to a neurocognitive disorder, was prematurely made. This prompted the court to order a reassessment, this time to be conducted by two psychiatrists of which one is

not in the full-time service of the State.[2] In view of evidence presented during the first enquiry about the accused's long-term memory loss, the court deemed it appropriate to extend the psychiatric evaluation to also include the time period during which the offences for which the accused stand charged, was committed. Accordingly, an enquiry provided for in s 77(1) and 78(2) of the Act was directed.

Psychiatric reports disputed by the defence

[6] Subsequent to the filing of reports issued by Professor Zabow, Dr Sieberhagen and Mr Annandale, Mr *Diedericks*, representing accused no 1 and Mr *Siyomunji* for accused no 2, intimated that the findings reached in the respective reports are disputed. The grounds on which the challenge is based are fourfold and amount to the following:

a) The report of the psychologist, Mr Annandale does not satisfy the requirements of s 79(1)*(b)* of the Act and is therefore inadmissible.

b) Compliance was not given to this court's order that a neuropsychiatrist be appointed to conduct the assessment;

c) Neither Dr Sieberhagen nor Prof Zabow, whose reports have been received, qualify as neuropsychiatrists; and lastly,

d) The assessments done on the accused by both psychiatrists are inadequate to establish the absence of any neurocognitive disorder.

[7] A challenge to the psychiatric reports obtained in terms of s 79 of the Act by either the State or the accused, is permitted both in terms of s 77(4) and 78(4) of the Act. Section 77(4) in such instance provides that the party disputing the findings may subpoena and cross-examine '<u>any person</u> who under section 79 enquired into the mental condition of the accused' while section 78(4) provides that 'the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present

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[2] See s 79(1)*(b)* of Act 51 of 1977.

evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused' (emphasis provided). Counsel intimated to the court that the attendance of Dr Sieberhagen and Prof Zabow was required at the proceedings in order for them to be cross-examined on their respective reports. Although the presence of Mr Annandale was not specifically requested by the defence, Ms *Verhoef*, representing the State, was of the opinion that he should also be subpoenaed and cross-examined in respect of a clinical-neuropsychological report he had filed. He was accordingly called to give evidence on his report.

[8] The court, in respect of all three witnesses informed them beforehand that they were neither witnesses testifying for the State or the defence, as the court had directed an enquiry to be held into the mental capacity of the accused in respect whereof they would be required to give evidence as provided for in the Act. No further evidence in support of the challenge, or otherwise, was presented by either the State or the defence.

[9] Mr *Diedericks* argued that if the court were to uphold the point raised *in limine* about the inadmissibility of Mr Annandale's Clinical-Neuropsycological Report, then Dr Sieberhagen would be precluded from relying on the assessments done by Mr Annandale, the psychologist. It would however not affect Prof Zabow's findings in any manner as he did not have access to Mr Annandale's report. It therefore seems prudent to first consider the point *in limine* namely, the admissibility of the psychologist's report.

(a) Admissibility of Mr Annandale's report

[10] In support of counsel's contention that the psychologist's report is inadmissible for purposes of the present enquiry, it was argued that s 79(1)*(b),* read with subsection (12) of the same section, in peremptory terms

states that the enquiry *shall* be conducted by those persons identified in the section. The relevant subsections of section 79 provides thus:

'**79 Panel for purposes of enquiry and report under sections 77 and 78**

(1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on-

(a) where the accused is charged with an offence for which the sentence of death may not be imposed, by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or

(b) where the accused is charged with an offence for which the sentence of death may be imposed or where the court in any particular case so directs-

(i) by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State; and

(iii) by a psychiatrist appointed by the accused if he so wishes.'

[12] This section makes plain that the responsible reporting officers must be psychiatrists and, read with subsection (12), a psychiatrist means a person registered as such with the Health Professions Counsel of Namibia. It was accordingly argued that the section excludes all other reports falling outside the ambit of s 79 and, whereas Mr Annandale is not registered as a psychiatrist, his report is inadmissible. In support of the latter contention, counsel relied on *S v Malumo and 111 Others in Re: Kamwanga*[3] where the court upheld a point *in limine* by the State that a report from a psychologist did not satisfy the requirements of an enquiry in terms of s 79 of the Act into the mental capacity of an accused. The court's finding is sound in law and I fully endorse the conclusion reached in *Malumo*. However, for reasons to follow, I am unable to see how that decision can be of any assistance to counsel in support of a contention that the psychologist's report in the present instance is inadmissible, as the facts are clearly distinguishable from the present instance.

[3] 2012(1) NR 104 (HC).

[13] One of the accused in *Malumo,* one Mr Isaya Kamwanga, was in terms of s 77 and s 78 of the Act referred for psychiatric observation by a single psychiatrist, who upon examination found the accused not mentally ill, and therefore fit to stand trial. Evidence to that effect was given at the enquiry by Dr Mthoko, the examining psychiatrist. The defence in turn decided to call a clinical psychologist who compiled a report on the mental status of the accused. It is against this background that the prosecution objected to the admissibility of the clinical psychologist's report as it did not meet the requirement of s 79, in that the enquiry must be reported on by a psychiatrist and not a psychologist. The court in its ruling referred to the South African case of *S v Ramokoka*[4] which equally dealt with an enquiry in terms of ss 77, 78 and 79 of the Act, where it was held that in the enquiry a report of a psychiatrist is compulsory, though a report by a clinical psychologist *may be* accepted in addition thereto. Contrary to the position in South Africa where s 79(1)*(b)*(iv) specifically provides for a report by a clinical psychologist if the court so directs, there is no corresponding provision in applicable Namibian legislation.

[14] The court in *Malumo* was faced with a report of a clinical psychologist which, from the judgment, does not appear to have been obtained pursuant to the enquiry ordered by the court in terms of s 77 and 78 of the Act. Where the enquiry was conducted and reported on by only one psychiatrist, Dr Mthoko, it must be assumed that the enquiry was conducted in terms of s 79(1)*(a).* Unless the court specifically directed an enquiry under s 79(1)*(a)*, which is not mentioned in the judgement, it was open to Mr Kamwanga at the stage of referral to apply to court for the appointment of a psychiatrist by him in terms of s 79(1)*(b)*(iii), as the court has a discretion to give such direction. This he did not do and instead called a clinical psychologist who testified on a report recorded by himself, despite not being a registered psychiatrist. That was an independent or private report and, although aimed at reporting on an

[4] 2006(2) SACR 57 (W).

assessment conducted on the mental status of Mr Kamwanga, it was not obtained pursuant to the court's directive or subject to the psychiatric report of Dr Mthoko. It would therefore not constitute a report in terms of s 79(1) of the Act and for that reason alone, was ruled inadmissible. The psychologist was an independent witness who testified for the defence and there is nothing showing that Dr Mthoko relied on the psychologist's assessment when coming to her findings recorded in her report. In these circumstances the report by a psychologist will obviously not satisfy the requirements of s 79(1) of the Act.

[15] I also do not find the *Ramokoka* decision referred to of any assistance when deciding the issue at hand. What the court in that case *inter alia* decided is that the order made by a magistrate under s 77(6), did not meet the requirements provided for in the South African context of s 79(1) where the enquiry has to be conducted by *two* psychiatrists in cases where the accused is charged with murder, culpable homicide, rape or another charge involving serious violence. In that case the magistrate's court giving the order acted on the report of only one psychiatrist and not two, as was required by law. On review, the matter was accordingly remitted to the trial court with a directive to give effect to the provisions of s 79(1) and to obtain a second report from a psychiatrist. The facts of that case is equally distinguishable and, in my view, find no application to the present facts.

[16] What both cases though have in common, is that a report, either by one or two psychiatrist, depending on the nature of the offence in the South African context, or the discretion exercised by the presiding officer in the Namibian context,[5] is prescriptive to meet the requirements set out in s 79(1) of the Act. I find myself in respectful agreement with the *dicta* enunciated in both cases.

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[5] *S v Hansen* 1994 NR 5 (HC).

[17] As regards the psychiatric reports filed in the instant matter, it had from my understanding not been argued that the psychiatric reports are *per se* inadmissible. I am accordingly satisfied that, at face value, both reports satisfy the requirement that an enquiry was conducted and reported on by two qualified psychiatrists. The adequacy of the reports has however come under attack and will be scrutinised later. The point raised *in limine* is whether the report of Mr Annandale should be admitted into evidence or not.

[18] As mentioned, unlike the position in South Africa, s 79 in its present form in Namibia does not provide for any additional reporting by a clinical psychologist at the court's behest over and above the psychiatric report(s). In the absence of a similar provision, it was contended that Mr Annandale's report is therefore inadmissible. The gist of Mr *Diederick's* argument pertaining to this report is that under no circumstances should the report be admitted into evidence, as the Act makes no provision for such procedure.

[19] In the present instance the report by Mr Annandale for purposes of the enquiry only became relevant once the findings reached by the two psychiatrists were disputed. As shown above, s 77(4) provides for cross-examination by any person who under s 79 has enquired into the mental condition of the accused which, from a reading of s 79, makes plain that reference is made to the psychiatrists directed by the court at the stage of referral. Whereas Mr Annandale has not so been directed by the court to conduct the enquiry and report on the findings, it then begs the question whether his report is admissible?

[20] It would appear to me that there is a clear distinction to be made between a psychiatric report called for by the court under s 79 and the clinical report of a psychologist, requested by the psychiatrist (appointed to do the enquiry), in order to assist in the accused's mental evaluation. The report of

Mr Annandale is not before this court under any provision of s 79; its significance only goes so far as to provide, at the request of the psychiatrist, results of psychometric tests done on the accused and the interpretation thereof by the psychiatrist, as part of *his* examination. The interpretation of scores achieved in the different fields tested is to assist the psychiatrist in his assessment of the accused and, as such, not aimed at guiding the court in reaching any conclusion on the accused's mental status. For that, the court solely relies on the findings made by the psychiatrist, not the psychologist. Neither would the psychiatrist be bound by any finding made by the psychologist regarding the accused's triability, as it is not for him to determine whether or not the accused is fit to stand trial. It is for the psychiatrist, in this instance Dr Sieberhagen, to have come to a final conclusion and report to court. This much is evident from Dr Sieberhagen's evidence.

[21] Section 79 does not prescribe as to how the enquiry is to be conducted. Defence counsel's submission that it is for the psychiatrist alone to conduct the enquiry, appears to me over ambitious as it is generally accepted that in most instances during the enquiry, it would also involve observation by other supporting staff who report to the psychiatrist. This was indeed the case during the 5 week observation period conducted at the psychiatric hospital and reported on by Dr Mthoko, who is in full-time service of the State. In that instance and when making her findings, she considered and relied on reports made by the nursing or general staff, Ms Nangolo a clinical psychologist, and Ms Balzer, an occupational therapist. It would therefore be incorrect to say that the opinion of the psychiatrist must solely be based on his or her own observations and interviews with the accused. During the observation period the patient is observed continuously by various people and reported on regarding behaviour, for example, as to how the patient interacts with others or how he conducts himself in specific situations. Where possible, contact will be made with family members to obtain collateral information. This would

obviously be relevant and valuable information for consideration and evaluation before a final opinion is given on the person's mental capacity.[6]

[22] By the same token the psychiatrist in private practice would equally be entitled to employ the services of a psychologist – as Dr Sieberhagen did in this instance – to do a neuropsychological assessment of the patient. Information gathered during the assessment would obviously not only be relevant, but of real significance, if not crucial, to the psychiatrist when interviewing the patient. Sight should also not be lost of this being an enquiry and not the trial itself. During an enquiry the court must strive to be best positioned to make a finding, and in order to get into this position, as much as possible relevant and reliable information must be gathered. In this instance where a neuropsychological assessment was essential and Dr Sieberhagen's evidence being that he does not personally do these tests, I am unable to fault the psychiatrist's request for an independent neuropsychological evaluation of the accused. Whereas the defence has brought into dispute the findings of Dr Sieberhagen, it was unavoidable for him to also have regard to the report of Mr Annandale when giving evidence, simply because his own opinion is partly based on findings made by the psychologist.

[23] In conclusion, I am satisfied that the neuropsychological evaluation report of Mr Annandale is not before this court in terms of s 79(1)*(b)* of the Act, and is therefore found admissible into evidence in that it is relevant to Dr Sieberhagen's psychiatric report, who was called upon to give evidence in terms of s 77(4) of the Act. Accordingly, I find the point raised *in limine* without merit.

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[6] *S v Dobson* 1993 (2) SACR 86 (E) at 88.

[24] The Clinical-Neuropsychological Report compiled by Mr Annandale which was provisionally admitted, is accordingly received into evidence and marked Exhibit 'K'.

[25] Next I turn to consider the remaining grounds raised against the psychiatric reports reported on by Dr Sieberhagen and Prof Zabow.

(b) The court's order not properly complied with

[26] Although both counsel initially took issue with the fact that neither of the two psychiatrists who submitted their reports are neuropsychiatrists as stated in the court's order, the contention seemed to have lost momentum towards the end of the current proceedings as no further submissions to this end was presented to court. The reason for this probably lies in the court's intervention during the enquiry when it was pointed out to counsel that the court, in making the said order, acted on the evidence of a psychiatrist, Dr Mthoko, who said that the only suitable person to examine the accused, reportedly having sustained a head injury, would be either a neuropsychologist or neuropsychiatrist. Bearing in mind that s 79 requires the reporting to be done by a registered psychiatrist, the latter proposal was the only option and in accordance with which the order was made.

[27] During the evidence of both psychiatrists, the defence posed questions to the effect that they are not registered neuropsychiatrists, both witnesses conceding. Prof Zabow then explained that he has a special interest in neuropsychiatry and when he specialised, he had to do both neurology and psychiatry exams, where after the curriculum changed and one had to choose between neurology and psychiatry as you cannot register for both specialities, neither in South Africa nor Namibia. Registration must either be in neurology or psychiatry, but not both. This much was confirmed by Dr Sieberhagen in evidence and there is no reason to doubt their integrity in this regard. This evidence set the record straight as it would virtually have been impossible for the Superintendent of the Windhoek Central Hospital, to whom the court's order was directed, to give effect to the order as it reads. Other than contending that the court's order was not complied with, no argument was

advanced that the accused suffered prejudice as a result thereof, and what impact it had on the enquiry conducted in order to determine the mental status of the accused. In these circumstances, I do not consider the appointment of two psychiatrists, constituting an irregularity that requires the whole procedure to be conducted *de novo.*

[28] The question however remains whether, as psychiatrists, they have the necessary expertise in the science of neurology required for a proper assessment of the accused. This question leads to the remaining grounds of objections raised by the defence.

(c) The reports have not been issued by neuropsychiatrists

[29] This objection has mainly been dealt with in the preceding paragraphs as it ties in with the objection raised pertaining to the court's order. Prof Zabow and Dr Sieberhagen have both given evidence on their qualifications and expertise, evidence that was not challenged in cross-examination. It had not been argued on behalf of the accused that the psychiatrists are not suitably qualified to have conducted the enquiry. Besides being psychiatrists they also have experience in neurology. In the absence of evidence to the contrary, there is no basis for this court to find that either one of them is not qualified to have conducted the examination they were called upon to do. When dealing with expert evidence the court is guided by the expert witness when deciding issues falling outside the knowledge of the court but within the expert's field of expertise; information the court otherwise does not have access to. It is however of great importance that the value of the expert opinion should be capable of being tested. This would only be possible when the grounds on which the opinion is based is stated.[7] It remains ultimately the decision of the court and, although it would pay high regard to the views and opinion of the expert, the court must, by considering all the evidence and circumstances in the particular case, still decide whether the expert opinion is correct and reliable. Therefore, in its assessment of the evidence of the expert

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[7] *R v Jacobs* 1940 TPD 142 at 143.

witnesses in the present instance, the court will endeavour to follow the aforesaid principles.

(d) Alleged inadequacy of the psychiatric reports

[30] Counsel for the defence during cross-examination of the witnesses made reference to the period of 30 days indicated in s 79, in respect of which Mr *Diedericks* submitted that he does not suggest this period to be compulsory for purposes of observation. I am in agreement with counsel's contention as s 79(2) does not prescribe any time period during which the enquiry must be conducted and only stipulates that such period, or further periods determined by the court, may not *exceed* a thirty day period at a time. In practice this means that upon referral the court does not stipulate the enquiry period and will adjourn proceedings to a date not exceeding 30 days at a time, until the accused is back in court and the report is made available. The Legislature, for obvious reasons, I think, did not intend to prescribe the procedure in which the enquiry had to be conducted, or for what period, as it was clearly within the discretion of the psychiatrist. The court would therefore only order an enquiry either under s 77(1) or 78(2), or both, without giving any direction as to how the enquiry should be conducted or for what period.

[31] In the matter of *S v Chauke*[8] the examination was conducted in one day which did not attract specific criticism from the Court of Appeal when the matter went on appeal. However, the appeal was upheld because the trial court failed to refer the accused for psychiatric observation in terms of s 78(2) and merely relied on a report which did not meet the requirements set out in s 79(4), in that it was silent on the nature of the tests conducted and the basis on which the conclusion was reached. It was further said that the report should be based on a holistic assessment of all the relevant facts and circumstances.

[8] 2016 (1) SACR 408 (SCA).

[32] The court in *Chauke,* pertaining to the nature of the enquiry to be conducted, referred to the matter of *S v Dobson (supra)* where 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.'

[33] Criticism levelled against the adequacy of the psychiatric reports filed in the present instance is exclusively based on the duration of the respective clinical interviews conducted with the accused. In respect of Dr Sieberhagen it amounted to two sessions of not more than one hour per session, while Prof Zabow's assessment was finalised within one day. The nature and the extent of the respective interviews were comprehensively discussed in their reports and expanded on in cross-examination. At no stage was it suggested to either of the psychiatrists in evidence that they would not have been able to properly assess the accused during the actual time allowed for the clinical interviews. As for Dr Sieberhagen, in addition to the case docket and previous medical reports provided to him, he also had the benefit of a psychologist report on psychometric tests conducted on the accused, from which certain observations and findings could be made. As for Prof Zabow, he was provided with court documents and conducted interviews with officials where the accused is detained. Both psychiatrists in evidence remarked that the accused did not voluntarily tender past personal information, and appeared to have been avoidant.

[34] Being an American national and the accused's inability or unwillingness to disclose the contact details of someone back home, be it family or friends, who could be approached to verify information provided by him, the only background information available thus came from the accused himself. Though additional information of his past behaviour would obviously have been helpful, it does not in my view render the enquiry inadequate. As was pointed out by both psychiatrists, the purpose of the clinical interview was not to rehabilitate the accused, but to determine whether he suffers from any mental illness or mental defect that renders him incapable of understanding court proceedings. Based on as to how the accused presented himself during the clinical interviews, considered together with external information obtained from documents provided, they were able to diagnose the accused and make corresponding findings, as recorded in the reports.

[35] Subsection (4) of s 79 provides that:

> 'The report shall-
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> (a) include a description of the nature of the enquiry; and
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> (b) include a diagnosis of the mental condition of the accused; and
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> (c) if the enquiry is under section 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; or
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> (d) if the enquiry is under section 78(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect.'

Both the reports satisfy all the above requirements and in my view there is no basis in law to disqualify the reports or disregard same for purposes of this enquiry.

[36] Therefore, in the absence of any evidence or authority to the contrary, I am unable to support counsel's contention that the psychiatric reports of Dr Sieberhagen and Prof Zabow are inadequate to disprove the earlier finding of Dr Mthoko that the accused suffers from a neurocognitive disorder.

[37] I turn next to consider the respective reports and will start off with the report of Mr Annandale. I wish to emphasise that it is only dealt with as supporting evidence for the psychiatric report issued by Dr Sieberhagan and which will be discussed later.

Clinical-Neuropsychological Report: Mr Annandale

[38] As mentioned, Mr Annandale is a practicing clinical psychologist, registered with the relevant authorities and has a special interest in neurology. He was approached by Dr Shalongo, the Medical Superintendent of the Windhoek Central Hospital, to assist Dr Sieberhagen by conducting a comprehensive clinical neuropsychological assessment of the accused regarding a possible head injury, and to report on the matter. It was a blind assessment in the sense that the only information available at the time was provided by the accused himself during a six hour contact assessment. Subsequent thereto a comprehensive case file was received from Dr Ndjaba, a psychiatrist in full-time service of the State and attached to the Windhoek Central Hospital. This comprised a sworn statement of Detective Warrant Officer Ndikoma; a medical report issued by Dr Amagulu; a social worker's report compiled by one Dipura; the Occupational Therapy Observation Report of Ms Balzer; a Clinical Psychologist Report prepared by Ms Nangolo; and lastly, the Psychiatrist's Report issued by Dr Mthoko. It is common ground that the last three reports were testified on during the earlier enquiry in August 2015. Other than the mentioned documentation Mr Annandale had no other source of information.

[39] The method of evaluation conducted on the accused at the consulting rooms of Mr Annandale on 25 February 2016 included psychodiagnostic interviews and a comprehensive neuropsychological test battery administered, scored and interpreted by himself.

[40] During the interview the accused remarked that he completed 14 years of formal education of which the last two years were undergraduate training, majoring in Mathematics and Business Studies. He personally regards himself to be of average or better intellectual potential as he did not struggle academically. His recall of the incident when he tried to escape from prison is patchy, but remembers falling after the rope broke (used in the escape) when he fell to the ground. He reportedly sustained a head injury and has no memory as to what happened thereafter. His claim of a head injury is based on personal experiences regarding memory loss; the impact of the fall; occasional tunnel vision; occasional hearing loss; and severe headaches suffered for a few months after the incident. He personally is of the view that his brain functioning has not been adversely affected as a result of the head injury. It seems significant at this stage to remark that a CT-Scan of the brain conducted on 05 November 2014, two days after the incident and reported on by Dr Amagulu, did not reveal any brain abnormalities.

[41] An assessment of the severity of the accused's head trauma (as discussed in the report) revealed that he had what is called 'a closed head injury' in which he possibly sustained a traumatic brain injury classified as Mild Traumatic Brain Injury (mTBI). This is based on the reported brief loss of consciousness, post-concussional vomiting and diffuse headaches. It is also not unusual that an injury of this nature will show no abnormalities on a CT-Scan of the brain. It is common cause that the accused was subjected to a CT-Scan two days after the reported fall, which showed no fracture to the skull or intracranial haematoma (bleeding). It was also observed that it is not typically expected that injuries of uncomplicated mild traumatic brain injury (as in this instance), should have severe or permanent neurocognitive consequences.

[42] Psychometric tests conducted *inter alia* revealed the following:

The cognitive performance measured falls low in the borderline category (for retardation) with an IQ of 72 and because his performance on this test was found to be unusual, it was cause for concern and appeared suspicious. His scores on Perceptual Reasoning and Working Memory were inconsistent with scores achieved about eight months before. It was assumed that the accused had a premorbid IQ in the High Average to Superior range (110 – 129) and, whereas his IQ now tested 72, it implied a regression of roughly 40 – 50 points which would more readily be associated with severe trauma injury of the head. The same trend was observed on his global cognitive performance which is inconsistent with mild trauma injury. Contrary to the accused describing himself as previously excelling in mathematics, he achieved a well below par score and failed on some relatively simple items while getting the more difficult ones correct. His lowest subtest score was on Coding and his unusual pencil grip was observed that appeared uncomfortable and incompetent. There is no logical explanation for this change in his writing style, although the accused claims to be ambidextrous.

[43] The test results showed that the accused's memory was so severely affected that it could only be the result of a very significant dementia, consistent with severe brain injury. His visual memory equally tested well below what is expected from a person with mild trauma brain injury. Automatisms compare to recognition by the brain which are regarded as amongst the simplest memory tasks, like the alphabet and days of the week, and considered the least perishable habits. The accused though made a significant 18 errors in that regard. This implies either a very advanced stage of dementia or a clear case of malingering. The accused's executive functioning was extensively tested and extremely low scores were registered, associated with extensive prefrontal cortex pathology. This is considered impossible without clear real-time manifestations of prefrontal cortex pathology which is absent with the accused.

[44] The report further states that it is standard procedure in a well-constructed neuropsychological test battery to vigorously control for malingering particularly in criminal matters. Malingering is described as the 'conscious, deliberate feigning of symptoms for an obvious, external goal'.[9] In the respective tests conducted the accused scored so poorly that it raises very serious suspicion, a conclusion exacerbated by numerous mistakes made on the easy items while managing the more difficult ones. Mr Annandale, when looking at the tests results in the end, concluded that there was unequivocal evidence of malingering by the accused.

[45] In the interpretation of the assessment results, Mr Annandale reported that the accused tested as being so comprehensively functionally impaired that his neurocognitive impairments should be evident even to the untrained observer. Not only is such severe and wide-ranging pathology of the brain inconsistent with an uncomplicated mild trauma brain injury, it would also have shown up during a relatively unsophisticated radiological procedure such as a CT-Scan. It should be noted that such injury did not show up on the CT-brain scan two days after the incident. Furthermore, it would amongst others have manifested itself in physical symptoms such as a strange gait and speech disturbances, clearly not observed on the accused.

[46] It was found that there is no concrete evidence to support the symptoms complained of and neither is there concrete clinical evidence to that effect. Mr Annandale strongly disagrees with the diagnoses of the panel of experts headed by Dr Mthoko that the accused suffers from a neurocognitive disorder, and is therefore not fit to stand trial, simply because no neuropsychological assessment was conducted on the accused, and neither were mechanisms employed to control for the risk of malingering. I consider these remarks to have been made *obiter dictum.*

[9] Boone, 2013, p. 23.

[47] The report in the final analysis reads thus:

'A thorough Neuropsycological evaluation was now conducted, which clearly found that the seriousness of the cognitive symptoms displayed by Mr Thomas is not remotely in accordance with the perceived seriousness of his possible traumatic brain injury. A pattern of inconsistencies became apparent once the results of the tests were analysed. It became apparent that the seriousness of the apparent neurocognitive impairments was not remotely in accordance with the expected impairments associated with an mTBI [mild trauma brain injury]. Utilising a sophisticated protocol it became abundantly clear that this is a clear case of malingering.'

In Mr Annandale's opinion, from a neuropsycological perspective, the accused is fit to stand trial. Again, this is his personal opinion.

Psychiatric Report: Dr Sieberhagen

[48] Dr Sieberhagen examined the accused at the Windhoek Correctional Facility on the 2nd and 9th of March 2016 and, apart from the clinical interviews conducted with the accused during the two sessions, he also received a set of documents as additional information. From these he was able to study the case and the reports of other professionals who examined him. Dr Sieberhagen during his testimony made it clear that despite having had access to these documents, the conclusion he had come to is based on his own examination. Documents he consulted as part of his assessment included the psychiatric reports compiled by Drs Mthoko and Prof Zabo, Mr Annandale's report, medical reports of the accused, the case docket and the testimony of witnesses who gave evidence in the first enquiry.

[49] The two interviews with the accused lasted approximately two hours in total and, as pointed out by Dr Sieberhagen, the purpose of his contract was not therapeutic but to establish something very specific namely, whether the

accused had the mental capacity to appreciate the wrongfulness of his actions when committing the alleged offences, and to act in accordance with such appreciation; also to determine whether he was fit to stand trial.

[50] The observations made and the conclusions reached are contained in the report which were extensively elaborated on during the testimony and cross-examination of Dr Sieberhagen. In my view there is for purposes of this judgment no need to deal with each observation or conclusion reached, in any detail. Suffice it to refer to, and consider, only those aspects of the report considered informative and enabling the court to reach a conclusion as to whether or not the accused is triable.

[51] Interviews with the accused were in the form of questions put to him and judging from the answers provided, certain observations could be made. One such observation is that the accused's response to questioning was avoidant with no voluntary information tendered. His response to questions were mostly with monosyllabic words in one or two sentences. His manner of speech also simulated an abnormality which does not conform to a known clinical symptom. On this aspect of the interviews conducted it was concluded that the accused intentionally withheld information under the pretence of amnesia, following a minor injury.

[52] Counsel for the defence in cross-examination took issue with the manner in which these interviews were conducted and from which it was concluded that the accused was evasive. Dr Sieberhagen conceded that the accused's behaviour could better be described as 'resistant' opposed to 'avoidant'. He equally in the absence of evidence in support thereof (at this stage) withdrew a statement reflected in the report to the effect that the accused concocted and executed an elaborate plan to commit murder without being apprehended.

[53] When asked to comment on the psychometric assessment done by Mr Annandale, as regards verbal index scores achieved during his examination of the accused, which stand in sharp contrast to Dr Sieberhagen's own observations, he explained that that was exactly the point he is making in the report, namely, the inconsistencies displayed by the accused during the respective evaluations, for which there is no scientific explanation. For example, the IQ test done by the first examiners[10] differs markedly from later tests results. Where it previously tested fairly high, there is no justification for the response received on questions put to him by Dr Sieberhagen. From this the only conclusion reached is that it was intentional, and not because of any deficit or mental inability.

[54] On instruction of the accused, his counsel in cross-examination contended that during the clinical interviews with the accused, Dr Sieberhagen was confrontational and more directed at establishing what had happened in the case, than to conduct a clinical assessment. In response, Dr Sieberhagen explained that if the accused has the ability to constitute an abstract statement like that as an instruction to his counsel, then there is absolutely no way that he can suffer from any mental deficit, as it would take at least a person of average or above average IQ to put together an abstract statement like that. In the latest psychometric evaluation the accused's full scale IQ scope was 72, whilst the cut off point for border line retardation is 74. Whereas the inconsistencies displayed by the accused during the respective evaluations cannot be scientifically explained, the only conclusion Dr Sieberhagen could come to is that it was intentionally manipulated.

[55] Commenting on the Glascow Coma Scale Assessment of 15/15 upon the accused's admission for treatment shortly after the fall, Dr Sieberhagen

[10] Dr Mthoko and assisting panel.

said it is indicative of the accused at the time being fully alert and that it was unlikely that he could have been unconscious for many hours. Extended unconsciousness is typified by delirious episodes or mental clouding, none of which is evident from the medical records available. In his opinion retrograde amnesia presents itself only in severe brain injuries and never in mild concussion injuries. He concluded that the accused's claimed amnesia and recent onset writing disability retrograde to the falling incident, are 'grossly abnormal and cannot be explained on any scientific grounds'. These findings, he remarked, are also consistent with the report of Prof Zabow that none of the symptoms portrayed by the accused can be explained from known organic psychiatric or neurological principals.

[56] Pertaining to the Bender Gestalt test done by Ms Nangolo, the psychologist who examined the accused during March to April 2015, Dr Sieberhagen remarked that the test is very sensitive to organic brain damage and whereas the test result was normal, this test in itself negates any claim to brain damage the accused might have suffered, particularly concerning global amnesia, both retrograde and ante-retrograde. This finding is consistent with that of Mr Annandale.

[57] Noteworthy observations made as part of the psychiatric examination are the following: No clouding of consciousness present and the accused is alert and responsive to his environment. Cognitive functioning is clinically within the normal IQ range, with no signs or symptoms of psychosis and a perception that is normal. The claimed loss of memory function is inconsistent and patchy in areas which may be incriminating. The overall impression of the accused is that of a person with no mental disability and no psychiatric illness.

[58] It was further stated that it is difficult to maintain malingering or simulated symptoms consistently over time and requires excellent memory. It

is for that reason that a psychometric evaluation of the accused was requested. From the tests conducted by Mr Annandale it is evident that the results of the last IQ test differs vastly from the same test done by Ms Nangolo in the beginning. A similar discrepancy is seen in the outcome of the Bender Gestalt test, which on the last occasion showed gross dysfunction, while the first test indicated no organic damage to the brain.

[59] Remarks regarding the accused's communication abilities and regression in writing skills are noted at p 7 of the report in the following terms:

> 'Mr Thomas' seemingly indifferent demeanour, followed by regression to the point where he communicates only in single word sentences and his bizarre pencil grip and virtual inability to write may be argued to fit hysterical type symptoms, but clinically it is felt that his feigned symptoms are very conscious and not dissociative. It was noted that he previously wrote with his left hand. Currently he writes with his right hand, but also with a bizarre grip.
>
> In summary, Mr Thomas' symptoms do not conform to any known organic, psychiatric or physical illness. His symptoms are fabricated according to his own understanding of the sequelae of his reported head injury typical of malingering.'

[60] Dr Sieberhagen in conclusion found the accused able to understand the legal procedures with the ability to give instructions to his legal counsel without reserve.[11] Further, that in his opinion the accused at the time of the alleged criminal act, had the capacity to understand the wrongfulness of his actions, and also had the capacity to act upon such understanding.[12]

Forensic Psychiatric Report: Professor Zabow

[61] Psychiatric consultation and examination by Prof Zabow on the accused was done at the Windhoek Correctional Facility on the 3rd of December 2015. The assessment also included the review of court documentation provided, and discussions with prison personnel on the accused's behaviour and interaction.

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[11] Section 77(1) of the Act.

[12] Section 78(2) of the Act.

[62] In par 4 of the report dealing with the accused's personal history is reflected that there is no available background as collateral for the accused's own account which means that none of the information he provided could be verified during the enquiry. There was no past psychiatric history available on what the accused himself reported. Part of the brief information about his psychosocial circumstances he was willing to share, is that he had been working in real estate whilst being a student in California. The latter information about his earlier employment stands in sharp contrast with what he told Dr Sieberhagen on the same point. He did not give any account of relationships, social support or contacts and no past psychiatric history was reported. Prior to a botched attempt to escape from custody when he was caught in the fence and found hanging upside down, the accused reportedly related normally in trial preparation.

[63] I pause here to observe that at no stage during pre-trial proceedings and at any stage thereafter up until 30 November 2014 was it brought to the court's attention that the accused displayed any problematic behavioural issues. In his reply to the State's Pre-trial Memorandum at par 9 on a question as to whether the provisions of sections 77(1) and/or 78(2) of the Criminal Procedure Act 51 of 1977 will be utilized, the accused answered in the negative. This tends to support the view that the accused was fit to stand trial up until the time of the incident.

[64] Since his attempt at escaping and return from hospital, the accused was detained in isolation and closely observed. It was reported that he is cooperative and observant of instructions and regulations, whilst displaying no disciplinary or behavioural problems. During the clinical examination the accused was neurologically intact with no localising or focal signs i.e. damage to the structure or functions. On the mental side there was a conscious initial interaction with good communication and understanding. In cross-examination Prof Zabow elaborated on this point and said, although the accused volunteered information, he was cautious and clearly held back information by responding in a simplistic manner which was not because of a low IQ or poor intelligence. The impression was gained that, despite being cooperative,

details relating to the offence period were actively blocked. An important feature observed was that throughout the interview there was no significant change in the accused's mental state or signs present of fatigue. Contrary to what somebody who is mentally ill would be capable of doing, the accused maintained his ability to consistently interact without evidence of change or disturbance. During the discussion he abstracted well and his intelligence was in keeping with the background he had given. Testing of clinical neurocognitive status and possible focal deficits showed nothing of significance and there was no brain impairment, neurologically or from investigations done. The accused's visual spatial function and right-left orientation was found to be intact.

[65] Another important indicator is language and speech and with the accused there was no presence of aphasia[13] in conversational speech. I pause to observe that the latter observation stands in sharp contrast with the findings of the first panel who reported that the accused had noticeable word-finding difficulty which was attributed to the reported head injury.

[66] Though the accused had good comprehension of the spoken language with adequate repetition indicative of memory and conversation, he continued intermittently stating that he could not remember names of persons or places. It was however observed that this appeared selectively, as the information he could not remember would have assisted with the investigation of the allegations made against him, had that been the purpose of the questioning. He could not recall names, but strangely, was aware of his inability to do so. According to Prof Zabow this did not fit any syndrome or collection of symptoms.

[67] The accused's reading ability was intact but presented a bizarre writing pattern and abnormal holding of the pen, though no dysfunction of movements is present. The inexplicable handwriting is considered non-pathological.

[13] Loss of speech or being unable to find the right word..

[68] In summary, the following additional observations on accused were made: His presentation of lack of recall (memory) was clinically tested and it was significant to note that new information was learnt and represented over the period of 8 months. Clinical interviews remained consistent with the lack of brain abnormality on tests, normal neurological findings and negative brain imaging tests. The reported retrograde amnesia and selective recall is not compatible with the reports and clinical findings. There is inconsistency with his intellect with the ability to retain new events. His intellectual capacity has been retained with good interaction and discussion of general information. It was unlikely that there was a causative relationship between the alleged disability and the preceding injury.

[69] In conclusion when reporting on the psychiatric status and mental capacity of the accused, the following findings are made: The accused is not mentally ill or defective. No organic brain damage or neurocognitive dysfunction observed. As regards the capacity of the accused to understand court proceedings[14] he is fit to stand trial. Prof Zabow found that on the available information, the accused has the ability to appreciate the wrongfulness of the act in question and to have acted in accordance with such appreciation at the time of the alleged offence.[15]

[70] In cross-examination by Mr *Diedericks,* Prof Zabow agreed with counsel's contention that in the absence of any documentation on the accused's personality and psychiatric history, it would make a finding under s 78(2) of the Act impossible. He explained that it is for this reason that he, when reporting on the accused's psychiatric status and mental capacity in terms of s 79(4) when he found the accused able to act in accordance with an appreciation of the wrongfulness of the act at the relevant time, inserted the words 'according to the information at present available'. This was done simply because of the lack of any collateral. Notwithstanding, he was satisfied

[14] Section 77(1).
[15] Section 78(2).

that the accused does not suffer from any mental illness or defect as required by s 78(2) of the Act.

[71] That in essence sums up the evidence in respect of the two psychiatric reports received into evidence.

<u>Conclusion</u>

[72] I already alluded to both the psychiatric reports, satisfying the requirements set by s 79(4) of the Act; also that the extent and nature of the psychiatric enquiry is not by law prescribed and therefore falls within the discretion of the appointed psychiatrist(s). The court has had the benefit of hearing comprehensive evidence in respect of each of the reports, inclusive of the neuro-psychological report of Mr Annandale, from which I am unable to come to the same conclusion reached by the defence i.e. that the reports are inadequate. The witnesses have been thoroughly examined and the findings contained in the respective reports are unanimous. The accused's symptoms were found not to conform to any known organic, psychiatric or physical illness and were feigned, typical of malingering. These findings had been explained in evidence and tested in cross-examination as regards the grounds on which the opinions are based. In no manner was it shown that the opinions are unsubstantiated and therefore unreliable. Accordingly, there is no basis on which this court could find otherwise.

[73] There is no history or reporting of the accused suffering from any mental illness or mental defect prior to November 2014. It is settled that the law presumes that an accused is of sound mental health and is criminally responsible, and the onus is on the accused to show otherwise.[16] No such evidence was adduced and neither did the accused invoke the provisions of 79(1)*(b)*(iii) during either of the two referrals to appoint a psychiatrist of his choice. The accused further chose not to lead evidence in support of allegations about him not being fit to stand trial.

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[16] *S v Shivute* 1991 NR 123 (HC).

[74] After due consideration of the psychiatric reports filed, the evidence adduced and submissions made by counsel, the court is satisfied that the objections raised in respect of the psychiatric reports issued by Dr Sieberhagen and Prof Zabow are unmeritorious.

[75] In the result, it is the finding of this court that:

1. Mr Marcus Thomas does not suffer from any mental illness or mental defect and is accordingly capable of understanding the proceedings so as to make a proper defence.

2. Mr Marcus Thomas was capable of appreciating the wrongfulness of his acts in respect of the offences charged, and acted in accordance with an appreciation of the wrongfulness of his actions.

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JC LIEBENBERG

JUDGE

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