



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A59/14

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED:YES

6 May 2016

In the matter between:

THE STATE

Appellant

and

MAITLAND, MARK

Respondent

JUDGMENT

MUDAU J:

[1] This is an appeal by the Director of Public Prosecutions (the DPP) brought in terms of s 310 of the Criminal Procedure Act 51 of 1977 (the CPA) against the

decision of a regional court magistrate, Germiston, to acquit the respondent at the end of a trial. On 23 January 2008 the accused was charged with, *inter alia*, being in possession of an unlicensed firearm in contravention of the provisions of s5, read in conjunction with other relevant provisions of the Firearms Control Act 60 of 2000 (two counts), possession of ammunition, possession of stolen property (two counts), theft as well as contravention of the relevant provisions of the Exchange Control Regulations read with certain provisions of the Currency and Exchanges Act 9 of 1933 as amended.

- [2] The DPP addressed a notice in which he suggested how the question of law should be framed in terms of s310 of the CPA requiring the magistrate to state a case for consideration by the High Court. The magistrate replied to the document by stating a case (“the First Stated Case”) which fell short of the legal requirements. It is common cause that the DPP was not satisfied with the First Stated Case and addressed a second notice to the magistrate. In response to this, the magistrate issued a further document (“the Second Stated Case”). The issue in this appeal is whether the concerns raised by the DPP as grounds of appeal are matters of law or factual findings that cannot be appealed against.

- [3] S 310 of the CPA relied upon relevant to this appeal provides as follows:

“(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has

been heard, his findings of fact, in so far as they are material to the question of law.

(2) When such case has been stated, the attorney-general or other prosecutor, as the case may be, may appeal from the decision to the provincial or local division having jurisdiction.”

[4] It is trite that it is not for the DPP to state the question of law which the Court of appeal is to consider; but that the question of law must be set forth in the case stated by the magistrate. It is necessary to restate the law in this regard. The procedure required to be followed by sub-sections (1) and (2) of s310 is clearly circumscribed, it is for the magistrate, upon the application of the DPP, ‘to state a case for the consideration of the Court of appeal, setting forth the question of law and his decision thereon, and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law’ (see *S v Saib*¹). However, for practical purposes, it is not improper for the DPP in his Notice in terms of s310 (1) to suggest how the question(s) of law should be framed. It is however, ultimately, the magistrate who must decide upon those questions of law which requires the application of his or her mind to the relevant facts and to frame the questions accordingly.

[5] In *S v Petro Louise Enterprises (Pty) Ltd and others*² Botha J aptly stated the position regarding s310 notices as follows:

“It is important that magistrates who are requested to state a case in terms of sec. 104 (1) (now s 310 of Act 51 of 1977) and Rule 67 should take great care in complying with the requirements of those provisions, especially in relation to the recital of the facts found and the formulation of the question of law involved. Lack of clarity and precision in drafting a stated case can very often

¹ *S v Saib* 1975 (3) SA 994 (N) at 995F-H.

² *S v Petro Louise Enterprises (Pty) Ltd and others* 1978 (1) SA 271 (T) at 276C.

lead to confusion as to the actual issues at stake and cause unnecessary trouble and inconvenience to the Court of appeal”.

[6] The salient facts, to the extent relevant, regarding this matter are as follows: A member of the South African Police Service, Superintendent Kemp, attended at the Johannesburg Magistrate’s Court on the strength of a suspicion, to obtain search warrants from the magistrate in terms of the relevant provisions of the CPA in respect of the respondent’s residential address, as well as the respondent’s safety deposit boxes held at Nedbank, Eastgate.

[7] In support of his application, not only was he in possession of his own affidavit, but also that of an informer. But since the given addresses fell outside the magisterial district of Johannesburg, he was referred to the Germiston Magistrate’s Court for authorisation of the warrants (exhibits “F” and “G”). Both search warrants are worded the same. The material parts thereof read as follows:

“
SEARCH WARRANT

[Sections 20, 21 and 25 Criminal Procedure Act, 1977 (Act 51 of 1977)
TO THE TASK TO COMMANDER: SUPT JA KEMP: ORGANISED
CRIME HEAD OFFICE PRETORIA: S.A POLICE SERVICES: GNL
PIET JOUBERT BUILDING SECOND FLOOR: 218 VISAGIE STR
PRETORIA.

(Complete I or II)

WHEREAS IT APPEARS TO ME FROM INFORMATION UNDER
OATH THAT THERE ARE REASONABLE GROUNDS TO BELIEVE

THAT, WITHIN THE MAGISTERIAL DISTRICT OF JOHANNESBURG
THERE IS AN ARTICLE TO WIT
DIAMONDS, JEWELLERY, COLLECTOR GOLD COINS, TANZANITE,
AS PER ATTACHED LISTS ACROSS RESPECTFULLY STOLEN
FROM UNITY DIAMONDS, ORO AFRICA, S A COIN, ERICSON
DIAMONDS, ROLEX WATCH COMPANY AND THAT COULD BE
HIDDEN ON THE PREMISES OF 9 BOWLING ROAD
BEDFORDVIEW AS WELL AS UNDER THE FLOOR PANELS OF A
COTTAGE ON THE SAID PREMISES”.

[8] S25 (1) of the CPA to the extent relevant reads as follows:

“(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing

(a)

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction, he may issue a warrant authorising a police official to enter the premises in question at any reasonable time for the purpose

(i)

(ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and

(iii) of seizing any such article.”

Each of the warrants, however, states, above the signature of the magistrate, the names of the respondent and the details of the respective addresses (except for the words Germiston instead of Johannesburg) where the warrants were to be executed as well as the items detailed above, which required to be

seized. Significantly, however, the warrants bore date stamps, indicating the office of issue (Germiston Magistrate), as well as the signature of the issuing magistrate.

[9] In a trial within a trial, the respondent subjected the validity of these warrants to multi-faceted challenges, chief amongst which was that the search warrants also reflected the magisterial district of Johannesburg instead of Germiston. The magistrate, Germiston, testified that it was nothing more than an error for having omitted to delete the words “Johannesburg” where it appeared on both warrants. She was, however, satisfied that the given address fell within the magisterial district of Germiston. As there was clearly a reasonable suspicion as envisaged under the relevant provisions of the CPA, she granted the search and seizure warrants.

[10] It is common cause that as a result of the warrants, items seized formed the basis of the charges proffered by the appellant. The trial court was, however, not satisfied that the warrants were properly issued and in the result, refused to admit the evidence obtained from the impugned warrants. An application to review the magistrate’s decision before the trial was concluded in that regard was dismissed by Claassen J, also on the basis that it is *“only in very exceptional circumstances should a High Court review a lower court’s decision prior to the completion of the trial”*. At the close of the state’s case, the respondent also closed his case without leading any evidence. Consequently, he was acquitted in respect of all the charges.

[11] The appellant was aggrieved by this acquittal. In the notice to the magistrate by the DPP referred to above in paragraph 2 of this judgment, of particular relevance in my view was the question that was phrased thus:

Question 1: was trial court not bound by the judgement of *S v Dos Santos*³?

In *Dos Santos*, the search and seizure warrant had suffered the technical defect that the regional magistrate who had issued it was not a magistrate as defined for the purposes of s 21 of the CPA. It was held on appeal, that to exclude the evidence simply because the wrong magistrate had inadvertently been approached would not conducive to a fair trial; and would not serve to advance the administration of justice. On the contrary, it would run counter to the spirit and purport of the Constitution. Accordingly, the SCA found that the trial court's decision to admit the evidence could not be faulted.

[12] The magistrate dealt with aspects of jurisdiction in the Second Stated Case (paginated page 999). He was of the view that the search and seizure warrants (exhibits F & G) “*conferred authority and jurisdiction to the magistrate of Johannesburg*”. Therefore, the magistrate who issued the warrants “*acted outside the scope of exhibits F & G... without both authority and jurisdiction*”. The argument whether the magistrate who issued the warrants acted within the ambit or scope of authority can be disposed of shortly as there is no merit in this argument. The respondent correctly conceded this issue in submissions before us.

³ *S v Dos Santos* 2010 (2) SACR 382 (SCA).

[13] To my mind therefore, the question whether a magistrate acts with authority and jurisdiction is a question of law. Magistrates perform their duties by authority of the enabling legislations, the Magistrates Act 90 of 1993 (appointments) read in conjunction with Magistrates' Courts Act 32 of 1944, which confer jurisdiction. Regarding the powers of judicial officers in the magistrates' court, s12 (1) (b) of the Magistrates' Courts Act provides that a magistrate:

“shall possess the powers and perform the duties conferred or imposed upon the magistrates by any law for the time being in force within the province wherein his district is situate;”

The overall purpose of a warrant issued in criminal proceedings is thus to find and seize evidence of a commission of a crime which may be preserved for use should a prosecution follow. This, as Mogoeng J (and as then was) stated in *Minister of Safety and Security v Van der Merwe*⁴, is an important weapon 'designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating and investigating crime'. [at para 35]

[14] The decision to issue a warrant is in no sense adjudication of any substantive issue, existing or potential, between the State and the respondent. Therefore, in obtaining the search and seizure warrants, and successes in the executions that followed, it brought the state no more than provisional physical possession of the relevant assets.

⁴ *Minister of Safety and Security v Van der Merwe* 2011 (2) SACR 301 (CC).

[15] In my view, the magistrate had no basis to find that the magistrate who issued both warrants acted without authority and jurisdiction. The trial court magistrate therefore, committed, under the circumstances, an irregularity or mistake of a serious nature in the proceedings, which is not capable of being corrected. In terms of s 35 (3) of our Constitution, every accused person has a right to a fair trial, which includes the right-

“(h) to be presumed innocent, to remain silent, and not to testify during the proceedings.”

In this matter, we were urged to substitute the finding of the trial court for a verdict of guilty based on the facts found proved by the trial court. In my view to do so, will manifestly be unjust and unfair to the respondent and shall certainly be in conflict with his rights to a fair trial. The respondent had no obligation to testify and implicate himself with regard to the alleged offending objects or assets subject to the criminal investigations.

[16] The error committed by the trial magistrate in refusing to admit the evidence on the basis that that the magistrate acted without authority, is in my respectful view, not only of such serious magnitude that it was unfair to the appellant (State) but, cannot be cured as it affected the fundamental fairness of the entire trial. As it was put in *S v Jaipal*⁵:

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil

⁵ *S v Jaipal* 2005 (1) SACR 215 (CC) at para 29.

confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

[17] Accordingly, the appeal by the DPP succeeds and the matter will have to be reopened after sufficient notice to the accused (see s 310(4)). In view, however, of the completely untenable finding of credibility by the trial magistrate, there is no assurance that a fair trial will take place if the same magistrate presides at the resumed trial. The trial before the trial court is declared a mistrial. Therefore, in terms of the powers conferred upon us by s 310(5), it is my view that it should be ordered that the reopened trial commence *de novo* before another magistrate.

[18] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court below is set aside and the trial is to start *de novo* before another magistrate.

TP MUDAU
JUDGE OF THE HIGH COURT

I agree

T V RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 18 April 2016

Date of Judgment: 6 May 2016

For the Appellant: Adv. JG Wasserman

Instructed by: Director of Public Prosecutions, Johannesburg

For the Respondent: Adv. M Hellens (SC)

Instructed by: BDK Attorneys