



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: CA&R 4/2022
DATE: 21-01-2022
DATE DELIVERED: 31-01-2022

In the Review Judgment of:

The State

VS

Horracious Gema and 1 Other

CORAM: Williams J et Lever J

J U D G M E N T

Williams J:

1. This matter has been referred for special review by the Chief Magistrate, Kimberley, with the request that the part-heard proceedings before retired magistrate Mr Prinsloo be set aside and that the proceedings against the two accused be ordered to commence *de novo* before a different magistrate.

2. The accused, Horracious Gema and Godfrey Setlogelo, appeared before Magistrate Prinsloo on a charge of assault with intent to do grievous bodily harm. The charge sheet states that the complainant was stabbed with a knife and thrown with stones. A plea of not guilty was entered on behalf of the first accused after claiming self-defence and the second accused pleaded not guilty.
3. After the first witness (the complainant) had testified the trial was postponed on various occasions for reasons of unavailability of counsel or witnesses of the absence of the accused. Mr Prinsloo, who had since retired, still presided over one such postponement on 17 January 2020 when the matter was postponed to 6 April 2020. From 6 April 2020 many similar further postponements ensued before different magistrates until 26 January 2021 when an e-mail from Mr Prinsloo to Chief Magistrate Krieling dated 20 January 2021 was read out in court by the presiding officer which states in effect that he (Mr Prinsloo) will not be finalising the current part-heard matter since he has relocated to Wildernes, some 750 km away and due to the risks involved in travelling brought about by the Corona virus.
4. It appears from the correspondence of the Chief Magistrate that the matter was sent on special review during April 2021 already. Upon his enquiry as to the progress of the review it was discovered that the original covering letter, charge sheet and transcribed record had never reached the office of the

Registrar, hence the undue delay in this review being brought before us.

5. The issue before us is whether this is a case where the interests of justice would warrant the setting aside of the part-heard proceedings so that the trial can commence *de novo* before another presiding officer.
6. It needs no restatement that where a magistrate, before conviction, has become unavailable due to death, retirement, discharge, resignation or other incapacity, the trial may proceed *de novo* before another magistrate, should the interests of justice so demand (see *inter alia* *S v Bireke* 2003(2) SACR 225 (WLD); *S v Lapping* 1998 (1) SACR 409 (W); *S v Polelo* 2000 (2) SACR 734 (NC)).
7. At the heart of this matter, in my view, is whether the delay in getting the review before us has infringed on the accused's constitutionally entrenched right to a fair and speedy trial.
8. In *S v Thobela* 2008 (1) SACR 605 (WLD), the accused during the course of the trial, absconded and was eventually arrested and brought before another magistrate after a period in excess of 5 years. The trial magistrate had in the meantime resigned. The matter was referred to the High Court for review but only reached the Registrar after a delay of a further 6 months. The court on review found in the circumstances, where *inter alia*, there was a concession by the referring magistrates and the Director of Public

Prosecutions that there may be difficulty in tracing witnesses in the event of a trial *de novo*, the obligatory inquiry into the default of the accused was never held in order to determine whether his absence from court was intentional or whether there was some plausible explanation for default and the additional delay in referring the review, that the accused had suffered substantial prejudice and that a trial *de novo* would result in further prejudice for him. In the event it was held that the interests of justice required that the accused be acquitted.

9. *In casu*, though there has been an inordinate delay before the matter was finally brought before us on review, there is no indication that witnesses would be untraceable. Whilst it cannot be gainsaid that any accused whose trial, for whatever reason, is set aside and who is tried *de novo* will suffer some prejudice, the interests of justice do not only serve accused persons, but also the victims of crime and the broader community. The record of the proceedings, which has been retyped from the digital recordings and provided to us, furthermore reveals that the 1st accused was serving a sentence of imprisonment on a different matter since the commencement of the trial *in casu* and that the 2nd accused had been out on warning throughout.
10. In these circumstances it seems to me that the interests of justice would be served should the part-heard proceedings be set aside and the trial commence *de novo*, before a different magistrate.

The following order is therefore made.

- a) The part-heard trial before retired magistrate Mr Prinsloo is set aside.**
- b) The proceedings are to commence *de novo* before a different Magistrate should the Prosecuting Authority so determine.**

CC WILLIAMS
JUDGE

I concur

L G LEVER
JUDGE