



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: 94/2020

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

17/6/21
DATE

A. G. Tolmay
SIGNATURE

In the matter between:

THE STATE

Vs

I ESSOP

A H LAMALIA

REVIEW JUDGMENT

TOLMAY, J:

- [1] This case came before me in terms of section 304A as a special review on 21 August 2020. On 28 August 2020 certain comments were sent to the learned magistrate. The record was voluminous and in a state of utter chaos and incomplete.
- [2] As a result of the state of the record I requested the magistrate to attend to the following:
- a) The record was incomplete. The evidence of the state witnesses was not contained in the record.
 - b) Mr Lamalia's evidence was followed by an address by the prosecutor.
 - c) The last page of the record referred to a postponement, apparently for judgment, but neither the proceedings of 2 December nor the judgment was contained in the record.
 - d) The transcript commenced with a second 174 judgment, there was apparently an appeal and judgment by the High Court. Should that judgment of the High Court not be included in the record?
 - e) There was mention of Rule 53 proceedings, which the Director of Public Prosecution seemed to want to oppose, the learned magistrate was requested to fully set out what happened with the Rule 53 proceedings.
 - f) The learned magistrate indicated in a document, stamped on 14/8/2020, in response to Rule 53 proceedings apparently that she agreed with the defence counsel that the convictions may

result in duplication of charges and that this prompted her to refer the matter for review. She was requested to consider the law applicable to section 304A and the authorities relating to the section.

- g) The learned magistrate was referred to the Rule 53 procedure and was asked to indicate whether apart from the 2014 review proceedings, another review was pending?
- h) The learned magistrate was asked to please set out:
 - i) the irregularities that occurred that would constitute grounds for review; and
 - ii) if she did not rely on section 304(A), on which constitutional or common law principles she relied for the review.
- i) She was asked whether, seeing that the accused was represented if section 304(A) could be invoked? She was referred to *S v Klaase* 1998(1) SACR 317 C, *S v Makhuble* 1987(2) SA 541 (T).
- j) She was asked on what basis did the learned magistrate contend that the proceedings were not in accordance with justice. (*S v Masiya & others* 2013(2) SACR 363 GNP)

[3] On 23 October 2020 the learned magistrate sent her comments to the Court. On 8 November 2020 I referred the matter to the DPP to obtain their opinion. On 12 February 2021 the DPP provided the Court with their opinion. It is unclear why such a long time lapsed before the

comments of the DPP were received by the Court. At the time I was on sick leave until 1 May 2021. The review was allocated to another judge, as is the custom, if the judge who initially dealt with a review is unavailable. I am not aware of the date of the allocation to the other judge, but on 21 April 2021 the judge to whom it was allocated refused to deal with the matter. In a letter she stated that a J4 had not been completed by the registrar and she further raised the complaint that the review should have been allocated to me, since I dealt with it initially. I do not know whether she was informed of the fact that I was on sick leave. She sent it back to the Registrar who finally sent it to me on 17 May 2021.

- [4] My registrar was informed by the DPP on 17 May 2021 that due to the delay of the review the case was postponed for three months. I requested the views of counsel for the accused. I obtained counsel for accused number two's heads of argument on 27 May 2021, I still have had no response from the representative of accused number one, but decided to proceed with the judgment in order to prevent any further delay.
- [5] In this instance two critical issues should be dealt with which are not related to the merits of the matter. Firstly, a judge is obliged to deal with a review, which was initially dealt with by another judge, if that judge is unavailable. Secondly, there is an obligation on the registrar dealing with the reviews not to merely accept a refusal of a judge to deal with a

review. The correct approach in my view is that the registrar should approach the ADJP for guidance and assistance. If reviews are not dealt with expeditiously the whole purpose of section 304A is jeopardised and accused persons are prejudiced.

- [7] The accused are currently tried in the Specialised Commercial Court Crime Court, Pretoria. They were charged with 2 counts, namely , count one, a count of theft – general deficiency; alternatively, 30 counts of theft against both accused (alternative counts 1 to 30). Accused no 2 was also charged with 23 additional alternative counts of theft (alternative counts 31 to 53). Count two constitutes of 1 count of contravening section 83(9) read with section 78(4) of the Attorneys Act, Act No 53 of 1979 (failure to keep proper accounting records).
- [8] Both accused pleaded not guilty to all charges on 6 September 2011 and both were legally represented during the trial. Before the accused presented their case, the presiding magistrate was requested to make a ruling on hearsay evidence that had been provisionally admitted during the State's case. It was argued by the defence that the court should state clearly what evidence the accused should answer. After the magistrate refused, because she was of the view that she was "*functus officio*", both accused informed the trial court that the matter would be taken on review. It was submitted that inadmissible hearsay evidence was considered by the magistrate, when the application for discharge was refused and as a result she committed an irregularity.

[9] A review application was then brought by the accused in terms of Rule 53 of the Uniform Rules of Court in which the following relief was sought:

- a) that the proceedings before the magistrate would be reviewed and set aside because of an irregularity committed.
- b) that an order should be issued to the effect that the prosecution of the accused should be permanently stayed.

[10] After hearing the review the Court ordered that:

- a) the magistrate's decision to dismiss the application in terms of section 174 of the Act be set aside;
- b) that the magistrate considers and pronounce her ruling on the admissibility of the provisionally admitted hearsay evidence;
- c) that the magistrate reconsiders her decision in terms of the application for discharge made by the accused in terms of section 174 of the Act.

[11] After reconsidering the abovementioned aspects, the presiding magistrate ruled:

- a) that the hearsay evidence in relation to the following alternative counts to count 1 is excluded: alternative counts 1, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30;
- b) that the accused are acquitted on abovementioned alternative counts;

- c) that the application in terms of section 174 of the Act was dismissed in relation to alternative counts 2, 3, 4, 5, 6, 10 and 20.

[12] The accused were thus facing the following remaining charges after closure of the State's case and the magistrate's (reviewed) decision of the section 174 application for discharge:

- a) COUNT 1: 1 count of theft – general deficiency; alternatively, 30 counts of theft against both accused (alternative counts 31 to 30). Accused no 2 was also charged with 23 additional alternative counts of theft (alternative counts 31 to 53)
- b) COUNT 2: 1 count of contravening section 83(9) read with section 78(4) of the Attorneys Act, Act No 53 of 1979 (failure to keep proper accounting records)

[13] On 2 December 2019 the magistrate delivered judgment and convicted the accused as follows:

- a) both accused are found guilty in respect of count 1 (the main count): Theft, general deficiency in the amount of R1 835 000. Accused no 2 is also found guilty of the alternative counts to count 1 (alternative counts 31 to 53)
- b) both accused are found guilty in respect of count 2: contravening section 83(9) read with section 78(4) of the Attorneys Act, 53 of 1979 (failure to keep proper accounting records).

[14] The matter was then postponed to 16 March 2020 for sentencing. On 16 March 2020, advocate Engelbrecht SC, on behalf of accused two

pointed out to the magistrate that she had erroneously convicted accused no 2 on the main count (Count 1) as well as the alternatives to the main count (alternative counts 31 to 53).

[15] Advocate Engelbrecht SC argued that there was a duplication of convictions and requested the court to refer the matter to the High Court “for a special review in terms of section 304A” of the Criminal Procedure Act, No 51 of 1977 (the CPA).

[16] In this matter section 83 of the CPA finds application, which provides that where it is doubtful which of several offences is constituted by the facts of a case, an accused may be charged with “the commission of all or any such offences” and such counts be tried together. The accused may also be charged with different counts in the alternative. In such a case, the accused cannot be convicted of all charges if more than one charge or conviction results from the same criminal act.

[17] The matter was then referred by the magistrate to the High Court for review.

[18] The learned magistrate provided her response and attended to the queries raised and the DPP’s comments were requested and received as set out above.

[19] Section 304A provides that a magistrate or regional magistrate, who is of the opinion that proceedings in which a person has been convicted

are contrary to the law, may submit the matter for review before sentence. It is however to be noted that this particular section only applies to undefended accused. In *S v Klaasse* 1998(1) SACR the court found that section 304(A) should not have been applied and referred it back to the magistrate to proceed with the sentencing. It was pointed out that the section should not be used by magistrate to address an uncertainty or hesitation by the magistrate.

- [20] It is common cause that both accused were legally represented throughout the proceedings. Therefore, section 304A of the CPA is ordinarily not applicable. In *S v Shamathla* 2004(2) SACR 570 the court however stated that if an irregularity occurred in proceedings, of so gross a nature that it eventually will be set aside, it would be a senseless exercise in futility to insist that the letter of the law be followed, and the matter be remitted to the magistrate to pass a sentence, which in due course will be set aside. It was stated that if it is in the interest of justice a court should intervene. In *S v Makhubele* 1987(2) SACR 541 on 545 it was further stated as follows:

"In particular it is to be noted that the test throughout is whether the relevant proceedings were or were not in accordance with justice. Trivial irregularities or procedural imperfections are immaterial, only where there has been a failure of justice, real and substantial prejudice to the accused, are the proceedings liable to interference. First and foremost, piecemeal litigation is inherently undesirable." (See also *S v Masiya & Others* 2013(2) SACR 363 (GNP) and *Gounden & another v Noncebu*

NO & others 2018(2) SACR 186 (KZP) at 14. Each case should be determined with due consideration of the facts.

- [21] In *S v Masiya & others, supra*, it was found that section 304(A) was not applicable, because there was nothing to suggest that the proceedings in the magistrate's court had not been in accordance with justice. The court held that it nevertheless had the power to intervene after conviction, but before sentence, if it was satisfied that a serious injustice would result if it did not intervene. Relying on section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996, the Court intervened and set aside the convictions of the accused.
- [22] The position is accordingly that even where a matter was incorrectly referred to the High Court, the Court would assume jurisdiction, if the irregularity which occurred in the lower court was of so gross a nature that the proceedings in that court will eventually have to be set aside.
- [23] In my view, despite the fact that section 304A of the CPA is not applicable the court should in the interest of justice intervene as there was an irregular duplication of convictions by the Court *a quo*, which will eventually have to be set aside. Following the principles set out above the Court has an obligation to intervene at this stage. To dismiss the current review application and require accused no 2 to follow the normal procedure by way of appeal or review after sentence would serve no purpose, other than to delay the inevitable, namely the setting aside of

the conviction and sentence.

[24] The following order is made:

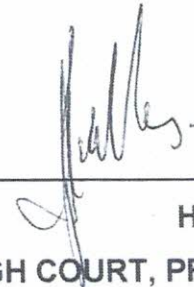
1. Accused no 2's convictions on the alternative charges 31 to 53 are set aside.
3. The matter is remitted to the magistrate for imposition of sentence on the remaining charges.



R G TOLMAY

JUDGE OF THE HIGH COURT, PRETORIA

I agree:



H DE VOS

JUDGE OF THE HIGH COURT, PRETORIA