



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Review No: 121/2019

In the matter between:

THE STATE

And

LEFASO MOLOI AND 2 OTHERS

CORAM: DAFFUE, J et MOENG, AJ

JUDGMENT BY: MOENG, AJ

DELIVERED ON: 28 JUNE 2019

[1] This matter came before me by way of special review in terms of section 304A of the Criminal Procedure Act 51 of 1977(CPA). In his request for review, the regional magistrate indicates that he

mistakenly pronounced in his verdict that accused 4 is convicted as an accessory after the fact to murder whereas he intended to convict him as a perpetrator, who committed the offence in the furtherance of a common purpose with other participants. He as a result requested the High Court to amend his judgment and to pronounce accused 4 guilty of murder on both counts as a perpetrator, in the furtherance of a common purpose, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

- [2] Accused 4 was charged in the regional court on two counts of murder together with four other accused persons. The state alleged that the accused persons killed the deceased in the furtherance of a common purpose. On 20 February 2019 accused 2 and 5 were acquitted on both counts and the following was recorded in respect of accused 1, 3 and 4:

“Accused 1, 3 and 4 are found GUILTY on the competent verdict as accessories after the fact;

Accused 4, Court is satisfied that he took part with common purpose with the other unknown people in murdering the first and second deceased person”.

- [3] The entry on the J15 charge sheet indicates as follows: “Accused 4 is guilty as charged on count 1 and 2. “Accused 1 and 3 guilty accessory after fact on count 1 and 2”. What was recorded on the J15 was therefore different from what was pronounced on record. What was pronounced will logically be regarded as the judgment of the court.

- [4] The matter was postponed to 10 April 2019 for sentence and on the latter date, the legal representative for the accused persons contended that the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were not applicable as his clients were not convicted on the main counts of murder but as accessories after the fact. The regional magistrate as a result sought to clarify his judgment but the legal representative alerted him to the provisions of section 176 of the CPA which in his view barred such clarification.
- [5] Accused 4 resultantly implored the regional magistrate to refer the matter to this Court for review. He submitted that the regional magistrate committed a gross irregularity in clarifying the judgment contrary to the provisions of section 176 of the CPA. This resultantly prompted the regional magistrate to refer the matter to this Court for review in terms of section 304A of the CPA.
- [6] In his letter requesting a review of the proceedings, the regional magistrate submits that he only became aware of the mistake when the legal representative failed to address him on whether there were substantial and compelling circumstances warranting a lesser sentence. He was as a result precluded from amending his judgment in terms of section 176 of the CPA due to the long passage of time. Relying on Hiemstra's Criminal Procedure at page 21-81, the regional magistrate submits that the mistake may be corrected on review.
- [7] Section 176 provides as follows:
- “When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment”.

The section can admittedly only be invoked where there is a mistake inherent in the judgment which does not relate to the merits. It was held in **S v Moabi** 1979 (2) SA 648 (B) that "by mistake" it is implied a misunderstanding or an inadvertency resulting in an order not intended. In practice, verdicts are normally amended when due to an oversight or slip of the tongue the presiding officer pronounces a verdict that he did not intend.

- [8] The key question is whether the verdict that was pronounced was the result of an inadvertent mistake by the regional magistrate or whether it was a result of the reasons of his judgment. It is therefore from the reasons of judgment that I will have to determine whether the verdict went against the grain of his *ratio decidendi* and therefore pronounced by mistake.
- [9] The following is reflected at page 452 of the record, at line 13 to 18 of the judgment:

“Accused 4 was seen to be assaulting, in the company of others, assaulting the deceased. So, the Court is satisfied with regard to the direct unopposed and unchallenged evidence of Kgatoane about accused 4’s role in the assault of the two deceased by accused 4 and other unknown people”.

- [10] He states in line 20 to 25 that:

“But to cap it all, he is also part of the accessory after the fact, also when he was with accused 1 and accused 3 and Miya. The Court is satisfied that accused 4 was part with the doctrine of common purpose with other people involved in the killing of the two deceased...”

[11] He lastly states at page 453 at line 8 to 11 that:

“With reference to the issues of the accessory after the fact as the Court has mentioned, accused 1, 3 and 4, they all acted with the common purpose and they all did the same in being accessories after the fact”.

The regional magistrate then proceeded to convict the accused persons as indicated in paragraph 2 above.

[12] It goes without saying that the verdict that the regional magistrate delivered was a culmination of the reasons for his judgment and was in line with his reasoning for having convicted the accused. He clearly intended to convict accused 4 as an accessory after the fact and as a perpetrator in the furtherance of a common purpose. The regional magistrate conflated the issues of participation and the accessory nature of the accused participation. I do not deem it necessary to make a finding on this aspect as I am not called upon to decide thereon.

[13] The verdict was in my view deliberately given and not by mistake as envisaged by section 176. An error on the principles of participation cannot translate into a mistake which may be corrected in terms of section 176. I am of the view that an order which was given after consideration of the merits of the case cannot be amended simply because it is exposed to criticism. The record reflects that the regional magistrate was unaware of his purported mistake until the legal representative brought this under his attention during the sentencing deliberations. The following exchange between the legal

representative and the regional magistrate demonstrates this: “Being an accessory after the fact is a supplementary offence, which means that someone can only be convicted of being an accessory to someone else’s crime, never in respect of the accessory’s own crime”, to this the regional magistrate responded “that is relevant for the appeal. It is not relevant for the sentencing”.

- [14] **S v Kaipa** 1993 (2) SACR 420 (Nm) is an example of an instance where the court was not prepared to exercise its powers under section 304(2)(c)(iv) of the CPA to make the order that the magistrate ‘ought to have made’ in amending its judgment. The magistrate was unaware of the error that he had committed until he reread the record more than a month after he had made the error. It can hardly be said that the magistrate ought to have exercised his power under section 176 to correct the error when in fact he was unaware of the need to exercise such power.
- [15] Even if he may timeously have become aware of such error, he could not have corrected same as it was not a mistake envisaged by section 176. In these circumstances, I do not regard the order that the magistrate had asked the High Court to make as an order that he ought to or could have made.
- [16] Hiemstra in my view succinctly sets out the legal position at page 22-81:
- “A judgment which is based on the evidence placed before the court may be wrong, but it cannot be given by mistake as contemplated here. Such judgment is final and the court has no competence to reconsider or amend it, either by virtue of its general inherent powers or in terms of section 176”

[17] I align myself with the view that High Courts should be slow to intervene in untermiated proceedings, and should, generally speaking, confine the exercise of its powers to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained'. See Wahlhaus and Others v Additional Magistrate, Johannesburg and Another, 1959 (3) S.A. 113 (A.D.) and Sebitloane v Regional Magistrate Sepato and Another Case 191/2014, an unreported judgment in the Free State High Court delivered on 26 January 2016.

[18] I do not believe that this is one of those rare cases that warrant interference. The regional magistrate has in my view, based on the evidence and the reasons for his judgment, given reasons why he was satisfied that accused 4 was a perpetrator. It will be for him to decide whether the provisions of section 51(1) of the Criminal Law Amendment Act are applicable.

[17] In the result I propose to make the following order:

1. The case is remitted to the Regional Court for further hearing and conclusion of the sentence proceedings

L.B.J. MOENG, AJ

I concur and it is so ordered.

J.P DAFFUE, J