



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

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

Review Nr: R113/2016

In the matter between:

THE STATE

And

FRANS ALEXANDER GREEN

CORAM: MOLOI, J et MD HINXA, AJ

JUDGMENT BY: HINXA, AJ

DELIVERED ON: 18 AUGUST 2016

[1] When this matter (from Boshof) served before the reviewing judge, the latter raised the following query on 6 June 2016:

“The record of proceedings is hereby returned to the Magistrate to comply with the provisions of section 304(4) of Act 51 of 1977.”

[2] It admits of no doubt that the aforesaid query was sparked by the fact that, according to the review cover (J4), the matter was sent as an ordinary, yet it was a special, review.

[3] The Magistrate duly responded as follows:

“3.1 This matter was submitted to the High Court for Special Review in terms of the above cited provisions.

3.2 The record was referred back to me by the Honourable Review Judge with the following query.

“The record of the proceedings is hereby return to the Magistrate to comply with the Provisions of Section 304(4) of Act 51 of 1997.”

3.3 The back ground to the case is as follows:

3.3.1 The accused appeared before me on 04/04/2016 on a charge of Contravention of the Provisions of Section 65(1)(a) of National Road Traffic Act 93 of 1996 – Driving under the influence of Liquor or Drugs.

3.3.2 He was legal (sic) represented by Mr Lemmertjies from Legal Aid South Africa (Kimberley).

3.3.3 The trial proceeded and evidence was led by both the State and Defence.

3.3.4 The State then proceeded to address the court on the merits, thereafter I then delivered Judgment and convicted the accused as charged without affording Mr Lemmertjies the opportunity to address me in terms of Section 175(1) of Criminal Procedure Act 51 of 1977.

3.3.5 This was a bona fide error on my part and same is regretted. This error was brought to my attention only after conviction.

3.4 I am of the view that the proceedings were not in accordance with Justice due to the above irregularity.

3.5 *I therein request the Honourable Reviewing Judge to set aside the conviction and order that the proceedings be started de novo before another Presiding Officer.*

3.6 *The record of the proceedings is submitted therewith."*

[4] In the context aforesaid and *ex facie* the record, it is significant, for the reasons that will unfold hereunder, to highlight that the accused had just been convicted but not yet sentenced. Consequently, reference to, and reliance on, section 304(4) instead of section 304A, in the circumstances obtaining *in casu* were misplaced. To lend credence hereto I deem it meet to hereunder advert to both sections.

[5] (a) Section 304(4) reads as follows:

"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."
(underlining is mine)

(b) Section 304A on the other hand provides as follows:

"(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that

doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof has been laid before him in terms of section 303.

(b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.”
(my underlinings)

- [6] One may do well to keep in mind that the two sections, as I see them, bear material differences. Section 304A expressly enjoins the magistrate to effect some transitional remedial steps to the accused pending review. The section encapsulates as peremptory “shall”, which excludes any discretion on the part of the magistrate. Section 304(4), on the other hand, does not encompass any similar provision and that resonates well with the existence of a discretion.
- [7] Reverting to the facts of the present case, it is common cause that the accused was legally represented during the proceedings which are a sequel to this review. Ordinarily, section 304A is not applicable in such circumstances (see **S v Klaase** 1998 (1) SACR 317 (C)). The exception to this rule is where the irregularity plaguing the proceedings is so gross that the proceedings will

eventually have to be set aside (see **S v Shamatla** 2004 (2) SACR 570 (E) at 573h, 575g-h).

[8] It is not open to doubt that the proceedings under consideration resort under the latter category. The proceedings can thus not prevail.

[9] Consequently, the following order shall issue:

“The conviction is set aside and the matter must start de novo before another magistrate.”

M. D. HINXA, AJ

I concur.

K. J. MOLOI, J