

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

Review number: 192/2014

In the matter of:

THE STATE

And

MOLAHLEHI ZACHARIA MOLETE

Accused

CORAM: RAMPAL, J *et* G.J.M. WRIGHT, AJ

JUDGMENT BY: G.J.M. WRIGHT, AJ

DELIVERED ON: 26 FEBRUARY 2015

CHRONOLOGY

- [1] The Accused stood trial in the district's court at Kroonstad on one count of assault with intent to do grievous bodily harm and one count of malicious damage to property.
- [2] The Accused pleaded not guilty. On 22 MAY 2014 the Accused was found guilty as charged. The prosecutor then proceeded to prove previous convictions against the Accused. At the time that the attorney representing the Accused was given the opportunity to

proceed in mitigation of sentence, the attorney requested that the case be postponed. The reasons given for this request was that

“the defence still needs to study the judgment and to decide on the next step as the defence is intending to draft a request for the reasons for judgment and . . . if possible, after studying the same to proceed with an application for leave to appeal in this matter . . .” [own emphasis]

- [3] The presiding magistrate postponed the matter for the proceedings to be transcribed and then *mero motu* placed on record that he was recusing himself as he did not feel comfortable proceeding with the sentencing proceedings and that he intends to send the matter on special review.
- [4] The matter served before LEKALE J as reviewing judge who proceeded to making the following enquiries from the magistrate:

- “• *Why did the magistrate not feel comfortable to impose sentence?*
- *Why did the magistrate recuse himself from the matter?*
- *Why does the magistrate feel that the matter is reviewable?”*

- [5] The following forms part of the response received from the magistrate:

“By informing the Court before sentence that the defence is considering to appeal against the conviction, the defence thereby indicated that there are reasonable grounds on the part of the litigant for apprehending that I was not or will not be impartial. . . . I nevertheless erroneously invoked section 304A to review the conviction and recusal that was not followed by a sentence . . .”

- [6] Section 304A of the Criminal Procedure Act is applicable to the review of criminal proceedings in the lower courts *before* the imposition of sentence. The pertinent portion of the section reads as follows:

“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 . . .”

- [7] In the present matter the magistrate may therefore have been entitled to invoke the provisions of section 304A in an appropriate situation. Unfortunately, the magistrate failed to properly apply and follow section 304A. He failed to set out the reasons for invoking section 304A before transmitting the matter for review. Also, from his response to enquiries, it is clear that he acted rashly and overly cautious.
- [8] The magistrate's response to the enquiries by LEKALE J does not explain that the proceedings were not in accordance with justice nor does the magistrate express a fear that the proceedings may not have been in accordance with justice. Instead the magistrate's response indicates nothing more than that he saw the defence attorney's intention to appeal against the conviction as an assault on his impartiality, without any such reasons placed on record by the defence attorney himself or without such reasons being evident from the record of proceedings itself. The magistrate inappropriately took offence at the intimation that he wrongly convicted the Accused.

- [9] Section 304A does not open the door for indecision. Before action can be taken in terms of this section, the magistrate must have formed the opinion that the proceedings are in fact not in accordance with the law or that there is substantial doubt about whether the proceedings are in accordance with justice. Trifling matters do not receive attention. The test is whether it would be unjust and lead to irreversible harm to the accused to allow the case to run to its conclusion before interfering. See: **S v Klaase1998 (1) SACR 317 (C)**.
- [10] Furthermore, it is doubtful whether the procedure provided by section 304A is intended to apply when an accused enjoyed legal representation. However, courts will not hesitate to act under this provision when the interests of justice demand intervention. See: **S v Shamatla 2004 (2) SACR 570 (EC)** at 573 b – d.
- [11] Appeals are frequently levelled at convictions and the misdirections committed by magistrates during trials. This is seldom an indication of bias or partiality by a presiding officer. The mere indication by an accused that he is dissatisfied with his conviction is not a ground for the recusal of a magistrate, especially if the accused person himself does not request the magistrate to recuse himself. It would be a sad

day for the justice system in this country if the mere dissatisfaction of an accused person with his or her conviction would result in presiding officers recusing themselves.

- [12] The test for a recusal was again restated in the case of **President Of The Republic Of South Africa And Others v South African Rugby Football Union And Others** 1999 (7) BCLR 725 (CC) at par [48]:

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel”.

- [13] As there was no application for the recusal of the magistrate and he himself did not indicate grounds on which he may be found to have been biased, it is not at this stage necessary to further investigate whether there were indeed grounds for recusal. The magistrate’s decision to *mero motu* recuse himself was not only unnecessary, but irregular and should be set aside.

- [14] The magistrate acted incorrectly in suspending the proceedings and sending it for review. One would have expected the magistrate to have indicated to the defence attorney that it would be inappropriate to appeal against the conviction before sentence has been imposed. The magistrate should have proceeded with the sentencing procedures and thereafter adjudicated the Accused's application for leave to appeal (if such an application was indeed brought).
- [15] There are no grounds on which the conviction of the Accused or the proceedings leading up to that conviction should be further investigated at this point in time. There are no grounds for setting the Accused's convictions aside at this stage. Any injustice that may have occurred as a result of the magistrate's actions in having the matter reviewed is in itself not such as to result in the setting aside of the convictions.
- [16] The matter stands to be remitted to the trial court for the completion of sentencing procedures. In the light thereof that the trial magistrate's decision to recuse himself is to be set aside, there is no reason why he should not proceed with the sentencing of the Accused.

[17] Lastly, the conduct of the defence attorney calls for comment. He acted improperly in requesting a postponement for purposes of preparing an application for leave to appeal before sentence was imposed on the Accused. This may have been due to inexperience or as a result of overzealousness. Whatever the reason, it was improper to indicate a desire to appeal against the convictions before the sentencing procedures have been concluded. Regardless of his instructions at the time, it was expected of the attorney, as an officer of the court, to proceed with the sentencing process in a proper and diligent manner. And against the background of this judgment, it is still so expected of him.

ORDER

[18] In the result the following orders are made:

1. The request for a review of the proceedings before the imposition of sentence is declined;
2. The convictions of the Accused stand;
3. The decision of the trial magistrate to recuse himself is set aside;

4. The trial magistrate is directed to continue with the sentencing proceedings up to and including the sentencing of the Accused.

G.J.M. WRIGHT, AJ

M.H. RAMPAL, J