

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

Special Review Number : 36/2014

In the special review between:-

GLOBANI HAGILE

and

THE STATE

CORAM: VAN ZYL, J *et* POHL, AJ

JUDGMENT BY : VAN ZYL, J

DELIVERED ON: 10 SEPTEMBER 2014

[1] This matter was sent on special review in terms of Section 304(4) of the Criminal Procedure Act, 51 of 1977 (“the Act”) under cover of a letter from Mr MC Mokgobo, the Acting Senior Magistrate, Bloemfontein, and an accompanying letter from M Matshaya, the Control Magistrate, Bloemfontein.

[2] The matter initially served before my colleague Moloi J, who directed a written query indicating that the record of the

proceedings was not enclosed. The said record was then provided, after which the matter served before me. I then raised a written query regarding one of the issues that was raised in the initial accompanying letter of Magistrate Matshaya. In response to my enquiry Magistrate Matshaya conceded that the issue should not have been sent on review and withdrew the application for special review in that regard.

- [3] Magistrate Matshaya however, and correctly so, requested as follows in his last mentioned response:

“The record of proceedings is resubmitted herewith for appropriate orders to be made regarding the rest of the submissions.”

- [5] The remaining matters raised in the letter of Magistrate Matshaya are the following:

“4.4 The manner in which the sentence and the conditions of suspension are phrased, is vague;

4.5 The accused’s rights to appeal and review were not

explained to him.

5. It is submitted that in the light of the above cited irregularities the accused did not get a fair trial.

6. The Honourable Reviewing Judge is requested to set aside the conviction and sentence and order that the proceedings should start "*de novo*".

7. These irregularities have been brought to the attention of the Magistrate concerned and similar occurrences will be eliminated in the future."

[6] The accused appear before an Acting Magistrate on 6 January 2014 on a charge of contravening Section 59(1)(b), read together with other relevant sections, of the National Road Traffic Act, 93 of 1996, and also read with the relevant regulations of the National Road Traffic Regulations of 2000, being a charge of driving at a speed in excess of the general speed limit of 100 kilometres per hour which applied to the specific road, to wit at a speed of 142 kilometres per hour. After the accused's rights to legal representation were explained, he elected to conduct his own defence. He pleaded guilty to the said charge and was sentenced as

follows:

“R3 000-00 or two years imprisonment wholly suspended for a period of three years on condition that the accused does not being found guilty of a similar offence during the period of suspension. The license of the accused is not suspended.”

[sic]

CONDITIONS OF SUSPENSION OF SENTENCE:

[6] It is a pre-requisite for a valid condition of suspension that the condition be precisely formulated. The primary object is after all that the accused must understand what he or she has to do or avoid in order to ensure that the sentence is not put into operation. Secondly, the Court which later has to consider the possible putting into operation of the suspended sentence must be able to determine the ambit of the condition. See R v CLOETE 1950 (4) SA 191 (EDL).

[7] The reference to “a similar offence” is regarded as too vague. See S v NGCOBO 1966 (1) SA 605 (N); S v MOTHOLI 1972 (3) SA 841 (O).

- [8] I therefore would have amended the condition on which the sentence has been suspended in order for it to be clearly formulated, but due to my further findings in this matter this issue will become irrelevant.

EXPLANATION OF THE ACCUSED'S RIGHTS TO APPEAL AND REVIEW:

- [9] It is evident from the record that the presiding Magistrate failed to explain the accused's rights to review and appeal to him. That he failed to do so, is further confirmed by the remark in paragraph 7 of Magistrate Matshaya's letter, already quoted in paragraph 5 above.

- [10] Very similar facts and circumstances were present in the matter of S v KUMKANI 2013 (2) SACR 360 (WCC). In that matter the Court determined as follows:

“[8] Section 304 lays down the procedures to be followed in automatic reviews. Even where sentences are competent and regularly imposed, a reviewing court may intervene where, in subsequent events, if no interference occurs, it would lead to

a miscarriage of justice — see *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E) ([2004] 1 All SA 438).

[9] In the present matter, the magistrate, by her own admission, has failed to explain to the accused his rights of review and appeal after sentencing. This error infringes upon accused's rights as entrenched in the Constitution, ch 2 of the Bill of Rights, s 35(3)(o), which reads as follows:

'Every accused person has a right to a fair trial, which includes the right to appeal to, or review by a higher court'.

In my view, if these rights are not adhered to, that would amount to a travesty of justice.

[10] In my view, accused has been deprived of his constitutionally entrenched right by the magistrate. This was an unrepresented accused who knew nothing about the rule of law. It was therefore incumbent upon the magistrate to inform the accused of his rights, for him to make up his mind on both conviction and sentence. It is my judgment that the accused cannot be doubly penalised for the error committed by the magistrate. It would be unfair for this court to refer the matter to the magistrates' court for the proceedings to start de novo, through no fault of the accused.

[11] Consequently the proceedings in this case appear to be not in accordance with justice. In the interest of justice, therefore the conviction and sentence are set aside and the accused is entitled to a refund of his deferred fine already paid.”

[11] I respectfully agree with the aforesaid *dicta*. The competency of such intervention is consistent with the spirit, purport and objects of the Bill of Rights of the Constitution. It is also supported by the inherent jurisdiction of the superior courts to regulate their process and develop the common law in the interest of justice. See paras [24] – [27] of the S v Z AND 23 SIMILAR CASES, *supra*. I therefore agree with Magistrate Matshaya’s view and request that the conviction and sentence of the accused should be set aside as the proceedings were not in accordance with justice.

[12] Furthermore, in considering the question whether the matter should be referred back to the Magistrates’ Court in order for the trial to start *de novo*, it is the duty of the Court to see that justice is done both to the convicted person and to the State. See S v ZULU 1967 (4) SA 499 (TPD) at 501G. In this regard it is also in the interests of justice that that litigation should

come to finality. See S v ZULU, *supra*, at 502 F. In the circumstances of this case it is clear that considerable time, effort, inconvenience and expense to both the State and the accused would be involved in bringing the accused before Court again. In this regard I am mindful of the fact that the accused appears to be from Gauteng province. This will bring about a result which, in my view, will not serve the interests of any party. Moreover it is my view that in this particular case justice and fairness towards the accused in any event outweighs justice towards the State. The matter is therefore not to be heard *de novo*.

- [13] Consequently the conviction and sentence are set aside and the State is to refund the accused for the fine already paid.

C. VAN ZYL, J

I agree:

L. le R. POHL, AJ

