

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 338/12

THE STATE

versus

NGAKA MAROELI

Accused 2

LILIO SEPOLO

Accused 3

CORAM:

RAMPAL, J *et* LEKALE, J

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

17 JANUARY 2013

- [1] The matter came to court by way of an automatic review in terms of section 302 Criminal Procedure Act 51 of 1977. The two accused appeared as accused 2 and accused 3 in the district court together with another person, accused 1. Their co-accused was not before us on review. The charge(s) against him were withdrawn.
- [2] There were two charges preferred against accused 2. The first was contravention of section 5(b) Drugs and Drug Trafficking Act 140 of 1992 - dealing in cannabis. However he was not convicted as charged. Instead he was convicted on the alternative charge of possession of such an undesirable drug in contravention of section 4(b) and sentenced to six months imprisonment.

The second was contravention of section 49(1) Immigration Act 13 of 2002 - illegal immigrant. He was convicted as charged and sentenced to R1000,00 fine or thirty days imprisonment.

[3] As regards accused 3, he faced one charge only, to wit, contravention of section 49(1) Immigration Act 13 of 2002. He was accordingly convicted and sentenced to a fine of R1000,00 or 30 days imprisonment.

[4] I perused the record. After I had done so, I caused the following query to be sent to the trial magistrate:

“Will you kindly convey the following remarks to the Magistrate in this matter and return the record to him for his comments:

1. **The charge(s) against accused 1 were withdrawn. After the withdrawal and contrary to the numerical sequence according to the charge-sheet, the court referred to accused nr (sic) 2 as accused nr (sic) 1 and accused nr (sic) 3 nr (sic) 2. Why was this done?**
2. **Did the court not exceed the permissible purposive boundaries of the judicial questioning in terms of section 112(1) of the Criminal Procedure Act 51 of 1977 as regards accused nr (sic) 2?**
3. **Is it not customarily the function of a public prosecutor to put the charge to the accused?**
4. **Did the public prosecutor accept the plea of accused nr (sic) 2 in respect of the first charge of dealing in cannabis?**
5. **The second question (vide paragraph 2 *supra*) applies to accused nr (sic) 3 as well.**

I look forward to receive the response of the trial magistrate as soon as possible.”

[5] The learned magistrate responded as follows:

“The matter above refers.

1. The court refers to the accused in the correct numerical sequence after the charges have been withdrawn against accused nr 1. However the typist typed the sequence of the accused incorrectly. I also wish to admit to the Honourable Judge that it is fault on my part not to have rectified the said mistake before appending my signature.
2. **I agree with the Honourable Judge that my questions have exceeded the purposive boundaries of judicial questioning in terms of Section 112(1) of the Criminal Procedure Act 51 of 19077 in that they were leading and impermissible. This applies to both accused nr 2 and 3.**
3. I agree with the Honourable Judge that it is customarily the function of the public prosecutor to put the charge to the accused. I also wish to refer the Honourable Judge to page 2 of the transcribed record which reflects that the public prosecutor put the charge to both accused nr 2 and 3 respectively. The prosecutor put the main count of dealing in cannabis and alternatively of possession of cannabis to accused nr 2 only, and put the second count of Contravening section 49(1) of the Immigration Act 13 of 2002, to both accused nr 2 and 3.
4. **No, the prosecutor did not accept the plea of accused nr (sic) 2 in respect of the charge of dealing in cannabis and wish to admit to the Honourable Judge that it was a mistake done on my part.**

I await further directions and instructions.”

- [6] As regards accused 2, he was unwilling to plead guilty to the main charge, in other words, dealing in cannabis. He clearly wanted to plead guilty to the alternative charge, in other words, possession of cannabis.
- [7] From page 3:01 to page 11:17 the trial magistrate questioned accused 2 at length about his plea relative to the first charge. The thrust of the magistrate's line of questioning was geared at eliciting an admission from accused 2 that, he was a cannabis dealer and not just a mere cannabis possessor, or to use his preferred word, smoker, as he persistently averred he was. Section 112 Act No 51 of 1977 was certainly not enacted for such a purpose.
- [8] The dual purpose of the judicial questioning in terms of the section is to make doubly sure: firstly, that the accused admits all the elements of the crime and secondly, that the accused has no valid defence to the charge. (**S v KHOLOANE** 2012 (1) SACR 8 (FB) par. 5.)

The procedure was not designed to ensnare an unrepresented accused. The underlying purpose of the procedure is to ensure that such an accused receives a fair trial. When a judicial officer descends into the arena and puts too many questions, as was done in this instance, he or she oversteps the mark.

- [9] The broad guiding principles pertaining to judicial questioning in general, were laid down in **S v RALL** 1982 (1) SA 828 (AD) per Trollip AJA, as he then was. I quote from the

flynote only since the trial magistrate has, in a responsible and admirable manner, frankly acknowledged that her judicial questioning of the two accused persons was rather impermissible and excessive:

“While it is difficult and undesirable to attempt to define precisely the limits within which judicial questioning should be confined, the following broad, wellknown limitations should generally be observed: (1) The trial Judge should so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused. The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression. (2) A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. (3) A Judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility.

Any serious transgression of these limitations will in general constitute an irregularity in the proceedings.”

- [10] The question in this matter is whether the irregularity has resulted in a failure of justice (see section 322(4) Act No 51 of 1977). If it has, we, as a court of review, have to intervene in order to grant an appropriate relief. That in turn gives rise to two possible scenarios. The one critical consideration is whether or not the irregularity so prejudiced the accused as

to warrant higher judicial intervention. This is an inquiry with a narrow ambit. The other significant consideration is whether or not higher judicial intervention is required in the interests of public policy. The scope of such an inquiry is comparatively wide – **S v Rall**, *supra*.

- [11] At long last and after an offensively lengthy questioning, the trial magistrate delivered a verdict in the following words:

“Regarding the main and alternative, I am satisfied that the accused admitted to (sic) all the elements of the offence with regard to the alternative count and the accused similarly **CONVICTED** of being in possession of cannabis and **NOT GUILTY** of dealing in cannabis.”

- [12] Seeing that accused 2 was acquitted in respect of the main charge of dealing in cannabis and convicted in respect of the less serious statutory crime of mere possession of such a drug, it may be argued that the irregularity did not prejudice accused 2. In a narrow sense, such an argument may be correct. I have my own reservation about the apparent lack of prejudice to the accused. However, for the purpose of this review I am prepared to accept, without deciding, that we need not let the narrow avenue of prejudice to the accused detain us any longer.

- [13] It now remains to determine whether judicial intervention is required by virtue of the interests of public policy. As a result of the disturbingly excessive questioning accused 2 ended up disclosing, to his detriment, that he cultivated the prohibited and dependence-producing plant in his rural

village; that he lived in a foreign country; that he harvested the crops; that he imported the drug from Lesotho into this country; that he shipped the load of cannabis drug from the border to Welkom; that he usually supplied his fellow workmen with the imported drug and that they all smoke it.

[14] Notwithstanding his firm denial that he had carried 45,3kg of cannabis for unlawful commercial purposes, the aforesaid admissions concerning the cultivation, harvesting, importation, transportation and distribution – brought him squarely within the ambit of section 5(b). Those deadly admissions made pursuant to excessive questioning, depicted and legally portrayed him as a person who was much more than the mere smoker he professed he was – a foreign drug trafficker.

[15] Section 1 Drugs and Drug Trafficking Act 140 of 1992 defines the words “deal in” as follows:

“**deal in**’, in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug;”

[16] It follows, on the facts, that a strong case was made out, through improper, excessive and offending questioning by the trial magistrate for the conviction of accused 2 on the main charge of unlawful dealing in drugs (section 5) and not alternative charge of unlawful possession (section 4). In the peculiar circumstances of this particular review, I am of the

firm view that an incorrect verdict was given. Justice was not seen to have been done.

There was no rational connection between the proven or admitted facts and the verdict returned. The excessive questioning unduly exposed the unwary accused 2 to the peril of a conviction in respect of a more serious charge in respect of which he had clearly and very early indicated that his plea was one of not guilty.

[17] As I see it, it is not in the general interest of public policy to let such a verdict stand. The fact that the incorrect verdict given entailed less hardship to the accused than the verdict which accorded with the admitted facts does not provide a reason to let it stand. The ends do not justify the means. The bottom-line was that the questioning of the accused was a serious transgression of the legitimate bounds of section 112 judicial powers and constituted an irregularity in the process. There was potential prejudice to the accused. Moreover, and this was very important consideration, there was actual prejudice to the interests of public policy.

[18] The interests of public policy certainly demand that there be a solid bond between the facts and the conviction. *In casu*, there was simply no match. Moreover, the prosecutor did not accept the plea of the accused on the alternative charge of unlawful possession of cannabis. On that score alone the soft conviction was also tarnished by procedural irregularity. This calls for intervention. The magistrate conceded that she

did not defer to the public prosecutor before she gave the verdict.

- [19] There was a great likelihood that if the prosecutor was invited to address the court as the norms of custom and procedure dictate – the prosecutor would probably have rejected the alternative plea. In which event the prosecutor would have led evidence in an endeavour to prove the main charge of dealing in an undesirable dependence-producing drug in contravention of section 5(b). This clearly demonstrates just how the interests of public policy were undermined as a result of excessive questioning. It had an enormous impact on the substantive as well as the procedural dimensions of the trial. Had it not been for the excessive questioning, the outcome might have been different.
- [20] The salient principle is, of course, that if the offending questioning of an accused by a magistrate sustains the inference that the magistrate was not open-minded, impartial or fair it is expected of a higher court to interfere in order to grant an appropriate relief – **S v RALL**, *supra*.
- [21] In the circumstances and regard being had to the failure of justice as alluded to I am inclined to conclude that the conviction and the sentence should be set aside in respect of the first charge against accused 2.
- [22] As regards the questioning of both accused in respect of the charge that they were illegal immigrants – I am of the view

that their questioning, excessive though it was in respect of accused 3 in particular, did not constitute a drastic transgression of the limitations on judicial questioning. Since no miscarriage of justice resulted, we have no reason to intervene.

[23] Accordingly I make the following order:

23.1 The conviction and sentence of accused 2 in respect of the first charge, to wit, contravention of section 4(b) Drugs and Drug Trafficking Act, No 41 of 1992 – possession of cannabis, are set aside;

23.2 The convictions and sentences of both of the accused as illegal immigrants – contravention of section 49(1) Immigration Act No 13 of 2002 are confirmed.

M. H.RAMPAI, J

I concur.

L. J. LEKALE, J