Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES /NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGHT COURT KIMBERLEY)

Case number: **CA & R 22 / 2013**
Date heard: **03 / 06 / 2013**
Date delivered: **28 / 06 / 2013**

In the review of:

THE STATE

and

ELROY RALPH APRIL Accused

Coram: Kgomo JP *et* Erasmus, AJ

JUDGMENT

ERASMUS, AJ

[1] The accused was convicted on three counts of assault with intent to do grievous bodily harm in the Magistrate's Court, Kimberley, on 31 May 2012. After conviction and before

the imposition of sentence, it was discovered that, in respect of charges 1 and 3, the accused had been diverted from the criminal justice system. He completed a diversion programme for juvenile offenders successfully and the charges against him were withdrawn. He was later prosecuted on the same charges. The presiding officer sent the case on special review in terms of section 304 (4) of the Criminal Procedure Act, No. 51 of 1977.

[2] The reviewing judge requested the office of the Director of Public Prosecutions to provide a legal opinion. After receipt thereof, the reviewing judge ordered that oral argument be heard as to whether there can and should be interfered with the prosecution of the accused on the charges that had previously been withdrawn, after successful completion of the diversion programme.

[3] The following facts are common cause between the State and the accused:

[3.1] The offences that are subject to review were allegedly committed on 07 February 2009. The accused was 17 years old at the time of the commission of these offenses. He turned 18 years on 20 December 2009.

[3.2] The accused initially appeared in court on 12 February 2009. The case was postponed and the accused attended the prescribed diversion programme. On 26 May 2009 the prosecutor withdrew the charges and informed the court that the accused had successfully completed the diversion programme. This is reflected in the record of the proceedings.

[3.3] The complainant in respect of charge 1 was dissatisfied with the prosecutor's decision to withdraw the case. She approached the senior prosecutor to convey her dissatisfaction with the outcome of the proceedings. From a report of the senior prosecutor it appears that she (the senior prosecutor) was in doubt as to whether the accused could be charged again. She sought guidance from her superiors whether the accused could be prosecuted, given the fact that the charges had been withdrawn after the accused successfully completed the diversion programme.

[3.4] The senior prosecutor decided to summons the accused. He appeared in court again on 14 August 2009. The case was referred to the Director of Public Prosecutions for a decision. The case was removed from the roll on 27 January 2010 because the Director of Public Prosecutions' decision was still outstanding. It does not appear from the record why the accused was summonsed to appear in court before the decision of the Director of Public Prosecutions was obtained.

[3.5] The prosecution against the accused was once again reinstated on written instructions of the Director of Public Prosecutions, dated 22 February 2010. According to a letter of another senior prosecutor in Kimberley dated 13 September 2012, addressed to the Chief Magistrate, Kimberley, this decision of the Director of Public Prosecutions was based on a recommendation from the senior prosecutor who initially referred the matter to the Director of Public Prosecutions. In the letter to the Senior Magistrate, the senior prosecutor is of the opinion that the accused should not have been prosecuted again.

[3.6] The factual background and recommendations of the senior prosecutor who initially referred the matter to the Director of Public Prosecutions, are contained in a report dated 30 November 2009. She was of the opinion that the case was not suitable for diversion from the outset. The decision of the prosecutor that diverted the accused had not been taken in consultation and with the permission of any of the senior prosecutors. The complainant in the case was also not consulted when the initial decision to divert was taken. The social worker who had initially assessed the accused and recommended also did not consult the victim, as it was not their policy and practice to do so.

[3.7] The accused appeared in court in April 2010 and was eventually convicted on 31 May 2012.

[4] The diversion of juvenile offenders is currently regulated by the Child Justice Act, No. 75 of 2008. In terms of section 59(1)(a), which specifically deals with the legal consequences of a decision to divert an accused, a prosecution based on the same facts may not be instituted against an accused that has completed a diversion programme successfully. However, the Child Justice Act first came into operation on 1 April 2010. In terms of section 98(1) thereof, all criminal proceedings instituted against children and which had not been completed before the commencement of the Act, must be continued and completed as if the act had not been passed. The Act has

no retrospective operation.

[5] Although juvenile offenders have been diverted on a regular basis prior to the commencement of the Child Justice Act, there was no legislation that regulated the process. There was no statutory prohibition on the reinstatement of a prosecution where the accused had successfully completed a diversion programme and the case against him was withdrawn.

[6] The discretion whether or not to institute or continue a prosecution rests with the National Prosecuting Authority. The exercise of the discretion whether to institute or continue a prosecution is not an administrative act and not reviewable in terms of the Promotion of Administrative Justice Act, No. 3 of 2000.[1]

[7] However, this discretion is not unlimited and a decision to prosecute is subject to interference by the courts[2] and therefore reviewable.[3] The courts will however only interfere with the exercise of the discretion of the National

---

[1] Section 1(i)(ff); See Kaunda and Others V President of South Africa and Others 2005(4) SA 235 (CC) at 263 par [84]

[2] Du Toit *et al:* Commentary on the Criminal Procedure Act p 1-4N-1; National Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA) at 294 par [36]-[39]

[3] Democratic Alliance v The Acting National Director of Public Prosecutions 2012 (3) SA 486 (SCA) at par [27] tot [31]; North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape 2000 (2) SA 78 (C) at 90E-F

Prosecuting Authority in exceptional cases.[4]

[8] The right to a fair trial was recognized before the Constitution of the Republic of South Africa[5] came into operation and operated as the foundation of our legal system. In appeal or review proceedings though, the question was simply whether there was an irregularity which resulted in a failure of justice.[6] The investigation is now wider and it must also be determined whether the prosecution, including the decision to prosecute, was in accordance with the basic principles of equity and justice, as per Kentridge AJ: [7]

"It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.

A Court of appeal, it was said (at 377)'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'

That was an authoritative statement of the law before 27 April 1994. H Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It

---

4 S v August and Others [2005] 2 All SA 605 (NK) at 611h
5 Act 108 of 1996
6 S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A) at 377
7 S v Zuma and Others1995 (1) SACR 568 (CC) par [16]

is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

[9] It should always be kept in mind that a prosecutor stands in a special relationship to the court and this required and still requires that an accused be treated fairly.[8] The National Prosecuting Authority, when deciding whether to institute or continue a prosecution, must consider and give effect to the provisions of the Constitution and the principles enshrined therein and any other applicable legal principles and legislation. Failure to comply with these principles will result in the decision being subject to review and intervention by the courts. In *Democratic Alliance v Acting National Director of Public Prosecutions and Others*[9] *Navsa JA* remarked as follows:

"...As recently as 1 December 2011, in Democratic Alliance v President of the Republic of South Africa and Others 2012(1) SA 417 (SCA) this court noted that the office of the NDPP was integral to the rule of law and to our success as a democracy. In that case this court stated emphatically that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution. The Constitutional Court has repeatedly emphasised this point."

[10] The Criminal Procedure Act, No. 51 of 1977, provides no guidance in *casu.* It does not prohibit the reinstatement of

[8] R v Steyn1954(1) SA 324 (A) at 337; North Western Dense Concrete CC *supra* op 91B; Democratic Alliance v President of the Republic of South Africa and Others 2012(1) SA 417 (SCA)
[9] 2012 (3) SA 486 (SCA) at 495 par [27]

the prosecution, as the case against the accused was previously withdrawn and the prosecution was not stopped in terms of section 6(b) thereof. The Child Justice Act does not apply. Before its commencement, there was no other legislation in place that regulated the diversion of juvenile offenders.

[11] At the time when the accused was diverted, February 2009 there appears to have been no guidelines or policy directives that provided guidance or directions to prosecutors. It was not required of prosecutors to consult the victim before an accused was diverted. Mr Barnard, in his heads of argument, referred to policy directives of the National Prosecuting Authority, issued in April 2012, that now require prosecutors to consult the victims before a criminal matter is dealt with by means of the diversion process. Prosecutors are required to adhere to these directives. The diversion process is also now regulated in the Child Justice Act.

[12] There was legally no prohibition against the reinstatement of the prosecution against the accused. In the present case there are no irregularities that constitute grounds for interference. There was no *mala fides* on the part of the prosecutors and / or the National Prosecuting Authority that influenced or motivated the decision to prosecute the

accused again. We deem it necessary to mention though that we find it disturbing that the accused was summonsed and brought before court in August 2009, before the decision of the Director of Public Prosecutions became known. The case was removed from the roll again in January 2010 because the instructions were not forthcoming. The instructions to prosecute the accused were only issued in February 2010, after which the accused was once again summonsed and brought before court.

[13] This brings me to the final question as to whether the decision to prosecute the accused again was in accordance with the basic principles of equity and justice and whether the accused was treated fairly.

[13.1] In *Van Eeden v Director of Public Prosecutions, Cape of Good Hope*[10], the Full Bench of the Western Cape High Court, held:[11]

> *"One of the elements of those 'notions of basic fairness and justice' is that the State is to be held to a plea bargain which it has made or is deemed to have made. This is an element of substantive fairness. As Uijs AJ held in North Western Dense Concrete, it would be 'palpably unfair' to allow the prosecution to enjoy the benefits of a plea agreement, but to be able to avoid doing what was clearly contemplated when that agreement was reached. (At 682j - 683a)"*

---

[10] 2005(2) SASV 22 (C) par [18] – [26]
[11] Par [23]

[13.2] In *National Director of Public Prosecutions v Zuma*[12] it was stated as follows:

> *"Courts have also interfered with decisions to prosecute in circumstances where the prosecuting authorities had given an undertaking not prosecute or had made a representation to that effect in exchange for a plea or for co-operation. The prosecuting authority has been kept to its bargain."*

[14] Here is, in the present case, no evidence of an express agreement between the State and the accused to the effect that the accused would not be prosecuted if he completed the diversion programme successfully. Here appears to be a tacit or implied agreement which might have created an expectation with the accused that he would not be prosecuted. In *National Director of Public Prosecutions v Zuma*[13] it was stated as follows:

> "*An expectation can be legitimate only if it is based on a practice of or a clear and unambiguous representation by the administrator…"*

[15] The issue that remains to be decided is whether the National Prosecuting Authority or the prosecutor created the expectation that the accused would not be prosecuted if he completed the diversion programme successfully, and if so,

---

[12] *Supra* par [39]
[13] *Supra* p 307 par [80]

[15.1] if this expectation was unqualified and reasonable,[14]

and

[15.2] whether the National Prosecuting Authority or the prosecutor was authorized to create such an expectation.[15]

[16] It is common cause that the accused was diverted and the case withdrawn after he completed the programme successfully. This was recorded by the magistrate when the case was with withdrawn. It can be safely assumed that the prosecutor informed the court accordingly when he withdrew the case. These facts suggest that an expectation was created that the accused will not be prosecuted again on the same facts. This must be accepted in his favour. There is no evidence that the representation by the prosecutor was not unqualified or that it was unreasonable. Had the prosecutor not informed the court of the reasons of the withdrawal in this matter, the accused could have been prejudiced in that there would not have been any record of the reason for the withdrawal of the case against the accused. It emphasizes the importance of a prosecutor to furnish reasons for withdrawal of cases and the proper

[14] National Director of Public Prosecutions v Zuma *supra* par [80]
[15] South African Veterinary Council and Another v Szymanski 2003(4) SA 42 (SCA) par 19

recording of such reasons.

[17] There is no evidence before us that the prosecutor who took the decision to divert the accused had acted beyond his powers and/or scope of authority. Diversion was and is a recognized practice that is often applied in respect of juvenile offenders.

[18] The accused was 17 at the time of the commission of the time of the commission of the offense. He completed the diversion programme successfully before he turned 18. The prosecution was instituted and reinstated when he was still a minor. The case was removed from the role, and he was later in 2010, when he had reached the age of majority, continued. The delay in the finalization of the case was more than three years.

[19] It was, in the circumstances of this case, unfair and not in accordance with the notions of basic fairness and to prosecute the accused again. We are therefore entitled to interfere in this matter. The National Prosecuting Authority should be kept to the expectation that the prosecutor created. Mr Barnard, on behalf of the State, rightly conceded that the convictions on count 1 and 3 should be set aside. This is also in accordance with the submissions by Mr Olivier, *amicus curiae,* on behalf of the accused.

I make the following order:

The conviction on counts 1 and 3 is set aside;

The case is referred back to the Magistrate, Kimberley for the imposition of sentence on count 4.

____

SL ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION

I agree.

____

FD KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

On behalf of the State:	Adv. TE Barnard
On behalf of the Accused:	Adv. AD Olivier (amicus curiae)