

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Review No. : 344/2010

In the review between:-

**THE STATE**

and

**ABEL GEORGE RAHLAU**

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**CORAM:** RAMPAL, J *et* KRUGER, J

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**JUDGMENT BY:** RAMPAL, J

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**DELIVERED ON:** 5 AUGUST 2010

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[1] This is a review of proceedings in the magistrate's court before the completion of the case. The accused is on trial in the Kroonstad District Court on a charge of contravening a protection order issued against him in terms of section 17(a) Domestic Violence Act, No.116 of 1998.

[2] The particulars of the charge are that, in contravention of the protection order, previously imposed on him on 16 August 2007, he subsequently stabbed the complainant, Ms Malifu Elsi Rahlau, with a broken bottle and verbally abused her at

Kroonstad on the 23<sup>rd</sup> of December 2009, while the protection order was still in force.

- [3] The trial commenced on the 28<sup>th</sup> May 2010 before Mr. I. Redelinghuys. Ms Tunzi appeared for the state and Mr. Swanepoel for the accused. He pleaded not guilty and gave no explanation of his plea.
- [4] On behalf of the accused, Mr. Swanepoel requested the trial magistrate to explain the provisions of section 195 of the Criminal Procedure Act, No. 51 of 1977. His contention was that the complainant, as the accused's wife, was not a competent and a compellable witness for the prosecution in this type of proceedings. He raised the *point in limine*.
- [5] Ms Tunzi was afforded no opportunity to respond on behalf of the state. It seems that she passively remained seated and did not demand, as she was entitled to, to be heard.
- [6] The court *a quo* instantly considered the *point in limine* and summarily ruled against the defence. It found that the complainant, the spouse of the accused, was a competent and compellable witness for the prosecution.

[7] The ruling did not, as one would have expected, put the matter to rest. Ms Tunzi was about to call the complainant, as the prosecution witness, when the defence attorney again rose up. He obviously reckoned that the court *a quo* had prematurely made the ruling. The basis of this was that the provisions of section 195 Criminal Procedure Act, No. 51 of 1977 had not been explained to the complainant prior to the making of the ruling. By so-doing, so the argument went, the court *a quo* denied the complainant an opportunity of exercising the choice to testify or not to testify against her husband. On account of all this it was contended, on behalf of the accused, that the court *a quo* acted unprocedurally. As a result of the perceived irregularity the defence lawyer requested that the proceedings be stayed, then and there, and that the court ruling be instantly taken on review. The court obliged.

[8] The court *a quo* was persuaded to accede to the course of action as proposed by the defence lawyer. In a memorandum dated 25 June 2010, it stated three reasons which prompted it to take the matter up on special review in terms of section 304(4) Criminal Procedure Act, No. 51 of 1977. I deem it unnecessary to restate such reasons here.

For the purposes of this judicial opinion, it seems sufficient to state that the final remark by the magistrate accurately encapsulates the collective thrust of his reasons. He concludes:

“In geheel gesien is die hof egter van mening dat dit in belang van geregtigheid sal wees indien Sy Edele die Regter belas met Hersienings hierdie verrigtinge tersyde sal stel (die beredenering en uitspraak ten opsigte van die bevoegdheid en verpligbaarheid van die getuie) sodat die staat die getuie kan roep en die aangeleentheid vandaar hanteer kan word.”

- [9] The mechanically taped record was transcribed in order to send the matter on review. It turned out that the proceedings were not completely recorded. The magistrate did his best to reconstruct the record. I am indebted to him for the trouble he took. It is regrettable, though, that the defence attorney made no written input, say by way of a brief, to motivate his preliminary objection. Some form of an application, even if it were by way of written heads of argument, would have gone a long way in clarifying his argument instead of leaving everything in the merciful recollections of the magistrate alone.

[10] A brief exposition of the applicable legal principles is necessary. The general rule of law is that a high court generally reviews certain terminated proceedings of district magistrate courts. Such ordinary reviews come to the high courts by way of section 302. In certain circumstances a high court may be specifically requested to review certain terminated proceedings of a district magistrate's court which are not ordinarily reviewable. Such special reviews come to the high court by way of section 304. Section 304A deals with errors or irregularities detected after conviction, but before sentence.

[11] However, there exists another extraordinary rule of procedure. A high court has jurisdiction to interfere, by way of review, in any untermiated proceedings pending in a lower court. Such exceptional reviews can be brought to the high courts by way of section 24(1)(c) of the Supreme Court Act, No. 59 of 1959 where there has been a gross irregularity in the proceedings. The high courts do not readily interfere midstream in the untermiated proceedings in the lower courts.

[12] Almost half a century ago, Steyn CJ stressed that the distinction between interfering in terminated proceedings, on the one hand, and unterminated proceedings, on the other hand, was a real one and that it should be maintained. As regards unterminated proceedings in a lower court, a high court should be slow to interfere and should confine the exercise of its powers of intervention to rare cases where grave injustice might otherwise result if proceedings were allowed to run continuously to their logical conclusion in an ordinary way – ISMAIL AND OTHERS v ADDITIONAL MAGISTRATE, WYNBERG AND ANOTHER 1963 (1) SA 1 (AD) at 5G – 6A.

[13] In S v BURNS AND ANOTHER 1988 (3) SA 366 (CPD) at 367H Conradie J said the following about the unusual power of the high court to interfere in unterminated proceedings in a lower court:

“It will only exercise this power in rare instances where grave injustice might otherwise result or where justice might not be attained by other means.”

[14] Section 195(1) provides, firstly, that the wife of an accused person shall be competent to give evidence in support of the prosecution in a criminal case against her husband, but that she cannot be compelled to do so. Secondly, the section enumerates a number of exceptions to this rule of evidence. The circumstances itemised from subsection (1)(a) to subsection (1)(i) are exceptional instances where a wife, who is, first and foremost, a competent prosecution witness against her husband, is also a compellable prosecution witness against him. See Du Toit *et al* **Commentary on the Criminal Procedure Act**, pages 23-27 to 23-28.

[15] The contention of the accused was apparently that the magistrate in failing to explain the provisions of the foregoing section 195(1) to the complainant exercised his discretion in an irregular and improper manner. The contention was based on two grounds. The first ground was that the magistrate, in making a ruling without the evidence of the complainant's first been had and obtained, paid no attention to the possibility that the complainant might have elected to give no evidence for the prosecution against her accused husband. The second ground was that the provisions of section 17 Domestic Violence Act, No. 116 of

1998 were not covered by or reconcilable with those of section 195(1) Criminal Procedure Act, No. 51 of 1977.

[16] Where, as in the instant case, a protection order, which was imposed on the husband, is still operative and the wife in favour of whom such protection order was issued, apparently complains that she has been assaulted by her husband, then the exception as embodied in subsection (1)(a) applies. She becomes a compellable witness for the prosecution. She can be compelled to testify against him even if she prefers not to do so. The first leg of subsection 195(1) gives her a choice where she is not a victim, but the second leg does not in certain specified circumstances, including but not limited to cases, where she herself is the victim of her husband's violent or abusive actions.

[17] Sometimes prosecutors do withdraw criminal charges laid by abused wives against their accused husbands. They often do so solely in the interest of marriage in order to promote domestic peace and possible reconciliation between the feuding spouses. They do so in their free and unfettered discretion. An abused spouse cannot, in terms of the applicable section, dictate to the prosecutor to drop the

charges against her husband. On the contrary, the law empowers the prosecutor to compel an abused spouse to testify for the prosecution even if she is unwilling to do so. The attitude of the complainant, in such proceedings, is an irrelevant consideration. In any case, where a wife is a victim of an alleged criminal conduct by her husband, she becomes an absolutely compellable witness for the prosecution. It seems no useful purpose would have been served by calling her before the ruling was made.

[18] The defence was well aware that the complainant was the only prosecution witness (p. 1, line 19 of the record). This alone, apart from the protection order, justified the assumption that, on her own accord, she volunteered to lay a criminal charge against her husband; to have him prosecuted and to attend his trial in order to testify for the prosecution. There was no insinuation by the defence at the stage of pleading or during the course of argument that the complainant did not want to testify against the accused.

[19] Initially the defence requested the magistrate to explain the provisions of section 195 to the accused's wife (p. 1, line 22 of the record). However, the same defence lawyer later

informed the magistrate that it was not even necessary to do so (p. 3, line 1 – 2 of the record). The magistrate is now criticised for doing just that.

- [20] Mr. Swanepoel argued that once it was ascertained that the complainant was the wife to the accused and that she did not want to testify for the prosecution against him, she became incompetent so to testify.

“Sodra so ‘n situasie ontstaan dan is sy nie bevoeg om te getuig nie.”

(p. 3, line 2 – 3 of the record.)

- [21] Such a construction of the section is fundamentally flawed. In my view, the first ground of the accused’s contention fails to establish any irregularity, let alone, gross irregularity to warrant an instant intervention in the unterminated proceedings below.

- [22] The second ground of the defence contention was formulated as follows:

**“Ek is van oordeel dat die uitsonderings wat vervat word in artikel 195 van die Strafproseswet nie die Wet op Gesinsgeweld dek nie**, sover dit my kennis strek, en is dit haar keuse om te getuig teen die beskuldigde.”

(p. 2, line 2 – 5.)

- [23] Besides section 17 Domestic Violence Act, No. 116 of 1998, the prosecution also invoked sections 1, 5, 6 and 7 in support of the charge the accused is alleged to have committed. To argue that, because no specific reference to these provisions of the domestic violence legislation was made in section 195 of the Criminal Procedure Act, No. 51 of 1977, the spouse cannot be compelled to testify against another spouse, notwithstanding the various exceptions expressly mentioned in section 195 is fundamentally misguided. In dealing with the charge the magistrate was constitutionally bound to assume and to accept the validity of section 17 of the Domestic Violence Act, No. 116 of 1998 and the validity as well as the applicability of section 195(1) of the Criminal Procedure Act, No. 51 of 1977, to the current proceedings. See ISMAIL AND OTHERS v ADDITIONAL MAGISTRATE, WYNBERG AND ANOTHER, *supra*, at p. 4D.

The second ground of the accused's contention was, in my view, a dead issue right from the onset.

[24] At par. 5G ISMAIL AND OTHERS v ADDITIONAL MAGISTRATE, WYNBERG AND ANOTHER, *supra*, Steyn CJ said:

“... I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another*, [1959 \(3\) SA 113 \(AD\)](#) at p. 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained.”

The criminal justice system might grind to a complete standstill if it were permissible to take every irregularity on review in the middle of the trial. Post trial remedies are

always available to redress any procedural errors or irregularities which crop up during the course of trial.

[25] I do not consider that this is one of those rare matters which should have come on extraordinary review at all. No case whatsoever has been made out for such an extraordinary remedial procedure. I am of the firm view that these unterminated proceedings were not reviewable in terms of section 304(4) Criminal Procedure Act, No. 51 of 1977. This is so because the proceedings had not been terminated and there was no danger of irreversible miscarriage of justice. The case must be allowed to proceed to its logical conclusion in the ordinary course of events without midstream interruption.

[26] In my view there has been no irregularity and certainly no gross irregularity either on the first or second grounds of the contention.

[27] In the result the following order is made:

28.1 The matter is remitted to the district court.

28.2 The complainant, Malifu Elsi Rahlau, is a competent and compellable witness.

28.3 The magistrate is directed to continue with the trial.

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**M.H. RAMPAL, J**

I concur.

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**A. KRUGER, J**

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