

3/3/2009 A 257/09
IN THE HIGH COURT OF SOUTH AFRICA
NOT REPORTABLE
GAUTENG NORTH DIVISION

HIGH COURT REFERENCE NUMBER: 33

In the matter between:

GODFREY MALOPE

Accused

And

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED.	
DATE	SIGNATURE
10/2/09	[Signature]

REVIEW JUDGMENT

1. The accused was convicted in the magistrate's court for the district of Lulekani of robbery.
2. He had pleaded guilty and was convicted on the strength of that plea after questioning by the presiding officer in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977. ("the Act").
3. The trial magistrate sentenced the accused to a fine of R 4 000, 00 or 24 months' imprisonment, half of which was suspended on suitable conditions.
4. The accused was unable to pay the fine and was therefore incarcerated.
5. The record of the proceedings in the trial court was submitted for automatic review to the High Court in terms of section 302 of the Act, but not within seven days from date of sentencing, as provided for in section 303 of the Act, but after a period of six weeks had elapsed.

6. The matter was raised by the reviewing Judge and the magistrate replied that the delay was attributable to the transcribers and was regretted.
7. The provisions on section 303 are, in general, observed in the breach rather than in the observance thereof. It would appear that systemic problems beset the process of automatic reviews to such an extent that delays in placing the record of the proceedings before a Judge of the High Court appear to have become accepted as the norm rather than a failure to observe the fair trial rights of an undefended accused.
8. This Court has remarked before that a failure to strictly observe the rights of undefended accused to have their conviction and sentence reviewed within days of the latter being imposed, might lead to a trial being regarded as not having been fair, depending upon circumstances, see *S v Hlungwane* 2001 (1) SACR 137 (T) at 147 g – 148 b; *S v Ndou* 2006 (2) SACR 497 (T); *S v Maluleke* 2004 (2) SACR 577(T).
9. It is therefore not sufficient merely to express regret at the failure to observe the compulsory duty to respect the accused's fundamental right to a speedy review. Systemic failures redound to the detriment of the entire criminal justice system and it is the duty of every magistrate to ensure that these problems are eradicated.
10. Apart from addressing the delay in sending the matter on review, the reviewing Judge raised the manner in which the accused was questioned during plea proceedings, which might have created the impression that the accused was being cross-examined prior to being convicted. The accused was charged with having robbed two cell phones from the complainant. When the magistrate asked how the phones were taken, the accused replied that he pretended to be passing the complainant and, *"...as if (he) was passing, and (he) happened to choke her."*
11. The court then asked whether the cell phones were taken forcefully, which the accused denied, until he, after these further questions by the court *"No is it correct? Voluntarily? Do you mean that she*

voluntarily gave them to you? Answer this question, and you must interpret properly. Did she give you voluntarily those cellular phones?" he answered "Not voluntarily".

12. Although the court must through questioning establish the accused's guilt after the latter's plea of guilty, this questioning should not be in the nature of cross-examination, see *Mkhize v The State and Another, Nene and Others v The State and Another* 1981 (3) SA 585 (N) at 586 H – 587 G.
13. The above-quoted questions may verge on the inadmissible, apart from exhibiting a considerable measure of exasperation on the part of the presiding officer, (that should perhaps not have been allowed to manifest itself as forcefully as it was), but after studying the very comprehensive comments by Adv E Leonard SC, Deputy Director of Public Prosecutions and Senior State Advocate D W M Broughton, which is gratefully acknowledged to have been of significant assistance to the court, it must be accepted that the accused was not prejudiced, even if a somewhat less aggressive approach to the questioning process might have been preferred.
14. The accused was sentenced to pay a fine that he could not pay immediately, although he apparently earned an income from some temporary employment prior to the conviction.
15. The magistrate asked the accused during sentencing how much he could pay per month if the sentence was ordered to be paid in instalments, to which the accused replied that he could afford an instalment of R 250, 00 per month.
16. In spite of this information, the court did not consider allowing the accused to pay the fine in instalments, and did not specifically ask the accused whether he would request to pay the fine in that fashion.
17. As Cameron J (as he then was) said in *S v Dandiso* 1995 (2) SACR 573 (W) at 575 e:
"In a sentencing system committed to the twin ideals of consistency and individuality, a provision permitting the sentencer to fragment

the payment of a monetary fine is a most valuable and important power", which no presiding officer may disregard.

An accused has a right to be given this option if the circumstances are such that a reasonable prospect exists that the fine will be paid over time.

18. As the magistrate erred in this respect, the matter must be remitted to enable him to deal with a possible payment of the balance of the fine, taking into account the provisions of the Adjustment of Fines Act 101 of 1991.
19. The following order is made:
 1. The conviction is confirmed.
 2. The sentence is set aside and the matter is remitted to the trial court to impose sentence afresh along the lines set out in this judgment.

Signed at Pretoria on this *18* day of March 2009.03.18


E Bertelsmann
Judge of the High Court

I agree.


Judge of the High Court.

A A Louw 18/3/2009