

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 456/09

In the review between:-

THE STATE

and

BENNET MOFOKENG AND ANOTHER

CORAM: MOLEMELA, J *et* LEKALE, AJ

JUDGMENT BY: LEKALE, AJ

DELIVERED ON: 29 OCTOBER 2009

[1] The matter served before me by way of automatic review in terms of section 302 read with section 304 of the Criminal Procedure Act, No. 51 of 1977, (the CPA). The two accused male persons were convicted and sentenced to twelve months imprisonment each for robbery by the Magistrate's Court at Theunissen on 18 June 2009.

- [2] On going through the record I noted that the accused were not allowed to testify in their respective defences although they had expressly elected to do so and, further, insisted that they still had something to say and were not finished with their cases. Their witnesses were, however, allowed to testify.
- [3] I found the foregoing *prima facie* irregular and strange at the very least and directed a query to the presiding magistrate to that effect, among others. The magistrate has since responded and I am immensely grateful to him therefor.
- [4] In his response the magistrate hastens to point out that the fact that the accused were not afforded an opportunity to testify is regretted and, effectively, attributes the same to the fact that usually the accused testify first and the case, thereafter, gets postponed in order for their witnesses to testify as follows:

“Die feit dat beskuldigdes nie geleentheid gegun was, word betreur. Gewoonlik getuig beskuldigdes en dan word die saak uitgestel vir die aan hoor van hulle getuienis en op 26/05/2009, het Staatsaanklaer vir hof meegedeel dat die beskuldigdes se

getuies beskikbaar is om hulle getuienis te lewer en het hof met dit voort gegaan. Die feit dat [die] beskuldigdes nie getuig het, was sameloop van omstandighede dat dit gebeur het. Dit word betreur en word... versoek om die uitspraak en vonnis tersyde te stel om beskuldigdes die geleentheid te gun om hulle getuienis te lewer.”

- [5] The accused had the right to adduce and challenge evidence as part of their right to a fair trial insofar as the Constitution of the Republic of South Africa Act provides as follows in section 35(3):

“(3) Every accused person has a right to a fair trial, which includes the right-

(i) to adduce and challenge evidence;”

- [6] The right to adduce evidence includes the right to testify and to call witnesses according to **S v YOUNAS** 1996 (2) SACR 272 (C). Section 151(1)(b)(i) of the CPA, on the other hand, requires the trial court to cause the accused to testify before any other defence witness where he elects to testify in person.

- [7] As the magistrate has effectively and correctly conceded, the accused's constitutional rights to a fair trial were encroached upon insofar as they were not allowed to testify and the proceedings, further, appear not to be in accordance with the CPA in that regard. The convictions and sentences, therefore, *prima facie* fall to be set aside on this ground alone.
- [8] The accused were not represented and it was, as such, incumbent on the magistrate, as the presiding officer, to assist them in, *inter alia*, exercising their rights to adduce and challenge the evidence. (See **S v SIMXADI** 1997 (1) SACR 169 (C) and **S v DYANI** 2004 (2) SACR 365 (E) at p. 368 f – h.)
- [9] It is clear from the record that the magistrate did not only forget to afford the accused the opportunity to testify, but also did not assist them in adducing the evidence of their witnesses. He left it solely to them to lead the witnesses without, at any stage, intervening to elicit any relevant information from the witnesses in line with what he understood their respective cases to be from the statements put by them to state witnesses.

[10] Where the accused were apparently trying to make the magistrate aware that they had not yet testified the following transpires:

HOF: Is dit dan julle saak?

BESKULDIGDE 1: Nee ons is nog nie klaar nie.

HOF: Wat is dit dan meneer?"

(See p. 23, lines 1, to and including 3 of the record.)

HOF: ... Julle het niks meer getuienis wat julle wil aanbied nie, of het julle?

BESKULDIGDE 1: Nee.

HOF: Is dit hulle saak.

BESKULDIGDE 1: Nee dit is nie ons saak nie. Ons is nog nie klaar nie.

HOF: Wat is nog meneer? Roep die getuies dan nog wat julle wil roep? Ek sal nou met hulle praat. Hulle kan nou betoog meneer.

BESKULDIGDE 1: As die geval so is dan sal ek stil bly."

(See p. 23, lines 8 – 17 of the record.)

- [11] The foregoing, in my view, reflects a disturbing attitude and/or approach on the part of the magistrate and does very little, if any good, to improve the image of the administration of justice in the eyes of the public. Such a display of intolerance, in my humble opinion, does untold damage to the already dented image of the administration of justice.
- [12] The question, however, is whether or not the convictions and sentences may be set aside as requested by the magistrate.
- [13] In the determination of the foregoing question the court, generally, has to decide whether or not the convictions and sentences fall to be set aside on the sole ground of the irregularity involved. In the event of this question being decided in the affirmative, the next enquiry is whether or not the accused may, in law and/or fairness, be tried *de novo*. Whether or not the convictions and sentences fall to be set aside depends on the nature of the irregularity in question. If the irregularity is of such a nature that it *per se* vitiates the proceedings, then and only in that event, do the convictions and

sentences fall to be set aside on the sole reason of such an irregularity with the result that the accused may be re-tried on the same charges. (See generally **S v MOODIE** 1962 (1) SA 587 (A).) When the conviction and sentence are set aside as a result of a decision made on merits, the accused cannot be tried *de novo* because, in law, they are entitled to make a plea of *autrefois acquit*. (See **S v NAIDOO** 1962 (4) SA 348 (A) at 354 D – F.)

- [14] Section 313 of the CPA provides for institution of proceedings *de novo* when a conviction is set aside on appeal or review as follows:

“The provisions of section 324 shall *mutatis mutandis* apply with reference to any conviction and sentence of a lower court that are set aside on appeal or review on any ground referred to in that section.”

- [15] On its part, section 324 of CPA which relates to convictions and sentences of provincial or local divisions of the High Court which are set aside by the Supreme Court of Appeal effectively

provides for the accused to be re-tried in such circumstances where the setting aside is by reason of any technical irregularity or defect in the procedure, among others.

[16] An automatic review is in the nature of an informal appeal than review *strictu sensu* according to A. Kruger in Hiemstra's **Criminal Procedure**, (2009) at p. 30-20. (See further **S v G** 1990 (2) SA 22 (T) at p. 26 H.)

[17] Section 304 of the CPA requires, in effect, the reviewing judge to act in accordance with his impressions with regard to whether or not the proceedings are in accordance with justice insofar as it provides that:

“(1) ... it appears to the judge that the proceedings are in accordance with justice...”

and

“(2) (a) ... it appears to the judge that the proceedings are not in accordance with justice...”

[18] The foregoing, in my view, indicates that what is required of the reviewing judge is to look at the proceedings before the magistrate's court in the broad perspective in order to form an opinion on whether or not they are in accordance with justice. (See generally **S v NGUBENI** (OPD) case number 196/2002 delivered on 5 September 2002 by Cillié J.)

[19] When the proceedings before the magistrate are looked at in the broad perceptive, the following becomes clear:

19.1 the accused's respective defences were not pertinently put to state witnesses;

19.2 the defence witnesses were not asked pertinent questions relating to the relevant date *viz* the date of the alleged commission by the accused of the crime involved;

19.3 the accused's respective cases were not before the court as at the time when the magistrate analysed the evidence.

[20] The irregularities involved are such that they vitiate the proceedings with the result that the convictions and sentences fall to be set aside by reason of the technical irregularity or defect in the proceedings.

ORDER

[21] In the result the convictions and sentences are set aside.

[22] The matter is remitted to the Magistrate's Court for re-hearing by another magistrate.

L.J. LEKALE, AJ

I concur.

M.B. MOLEMELA, J

/sp