

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 257/08

In the special review between:-

THE STATE

versus

MOSES PHIRE

CORAM: VAN ZYL J *et* MOCUMIE, J

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 26 MAY 2008

SPECIAL REVIEW

[1] The matter was sent to this Court on special review in terms of section 304 of the Criminal Procedure Act, 51 of 1972, (“the CPA”) by the Regional Court Magistrate, Welkom. The matter was initially referred to the Regional Court for sentence in terms of section 116 of the CPA, apparently as the Magistrate was of the view that it warranted a sentence above the jurisdiction of the Magistrate Court on the basis of

the accused's previous convictions.

[2] The Regional Court was not satisfied that the proceedings were in accordance with justice and requested reasons for the conviction on counts of contravention of section 1(1)(a), Act 6 of 1959 (trespassing) and contravention of section 143(3), Act 20 of 1967 (possession of unwrought metal).

[3] In short the accused was arrested by a police officer, one Dawid de Villiers, who alleged that he has been a member of the South African Police Services for 17 years dealing with cases of theft of unwrought gold and metal. He arrested the accused after he had received information from some source. When he arrested the accused, he found him inside the premises of Beatrix Mine. He took him to a toilet to search him and found a plastic containing unwrought gold on his person in his underwear. This evidence, although not disputed categorically and on every allegation by the accused's legal representative on his behalf, was denied by the accused when he testified. In his plea explanation too the accused denied all the allegations, putting the State to the prove thereof.

[4] The Regional Magistrate's views with regard to the

correctness of these proceedings are set out in a helpful memorandum which accompanied the original record when it was sent for special review. The crux of his memorandum is that for an accused to be convicted of contravention of section 1 of Act 6 of 1956 (s)he must have been unlawfully on the premises of a lawful owner or occupant with the intent to remain thereon. He also contended that for the accused to be convicted of contravention of section 143(3), Act 20 of 1967 the State must prove beyond reasonable doubt that the metal found in possession of the accused was indeed unwrought gold.

- [5] In respect of count 1, there is no evidence from any Beatrix Mine personnel to the effect that the accused was not an employee of the said mine or had no right to be on the premises. Moreso because the accused denied being on the premises when he was arrested. De Villiers was purportedly with other personnel when he arrested the accused, searched him and found the particular substance on his person. Yet no other State witness was called. No basis is

given by the trial Magistrate why he believed De Villiers and not the accused. On this basis alone the conviction on this charge ought not to stand.

[6] In respect of count 2 the trial Magistrate had to deal with unwrought metal. No sufficient evidence was placed before the trial Court that De Villiers apart from working for the SAPS for 17 years and attached to the unit for an undisclosed period investigating theft of unwrought metal, was an expert in that field or at least had the expertise to analyse unwrought metal and that he indeed analysed the metal in question. No evidence was placed before the Court to prove that the same metal that was supposedly found in the accused's possession was the same that was sent for analysis and found to be gold.

[7] As the Regional Magistrate correctly pointed out, the chain of events was not proven. The Magistrate relied for his or her conviction on a section 212 (of the CPA) affidavit which was not admitted in terms of the rules of evidence. The

Magistrate furthermore relied on photographs that are attached to the record but were also not admitted in terms of the evidentiary rules nor was there any basis laid for such admission. See **CWH Schmidt & H Rademeyer: Law of Evidence. Issue 4** at 11-6; **S v Mvulha** 1965 (2) SA 113 (O)

This conviction also ought not to stand.

- [8] The test in a criminal trial is not whether the Court believes the accused or not. But whether the Court looking at the evidence in total taking into consideration the probabilities and improbabilities on both sides is satisfied that the accused is guilty. This has been repeated in numerous cases including recently by the Supreme Court of Appeal in **S v V** 2000 (1) SACR 453 SCA at 455b-c; **S v Chabalala** 2003 (1) SACR 134 (SCA) at 139i-j.

- [9] The State bears the onus, strenuous as it may sound to prove its case beyond reasonable doubt. The accused on the other hand needs only give a reasonably possibly true story. In my view, the State failed to prove its case in

respect of both counts beyond reasonable doubt. It is trite that where there is doubt based on all factors considered the accused is entitled to the benefit of the doubt.

[10] In the circumstances I make the following order:
The convictions in respect of both counts are set aside.

B.C. MOCUMIE, J

I concur.

C VAN ZYL, J

/sp