



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

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number: CA&R50/2021
Heard: 19 February 2024
Delivered: 24 May 2024

In the matter between:

THEMBA DIPHEKO

APPLICANT

and

M.S. DITSE REGIONAL MAGISTRATE

FIRST RESPONDENT

THE STATE

SECOND RESPONDENT

Coram: Lever J & Tyuthuza AJ

JUDGMENT ON REVIEW

Tyuthuza AJ

INTRODUCTION

1. On 29 October 2021, the applicant launched this application to review the decision of the Honourable Magistrate Ms Ditse (the first respondent) handed down on 2 July 2019 in the Regional Court.
2. The applicant on review seeks the following relief:

"The conviction of applicant in case number, RCZ/96/2017 on count one (1) delivered on 2 July 2019 should be reviewed, declared invalid and set-aside."
3. The State (the second respondent) opposed the application and filed its Answering Affidavit in support thereof. The first respondent delivered the record in terms of Rule 53 of the Uniform Rules on 24 January 2022.
4. On 24 July 2023, the applicant lodged an interlocutory application wherein he sought a declaratory order to compel the first respondent to comply with its obligations in terms of rule 53(1) (b). After much debate with Adv Moeti regarding what aspects of the records are still missing, the applicant abandoned the application to compel and sought to proceed with the review application.
5. The issue this Court was to determine is the following:
 - 5.1. Whether the proceedings of the court *a quo* is subject to review?
6. In terms of section 22 of the Superior Courts Act 10 of 2013, the grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are:
 - (a) *absence of jurisdiction on the part of the court;*
 - (b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
 - (c) *gross irregularity in the proceedings; and*
 - (d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

7. The application for review is premised on section 35 of the Constitution. The applicant asserts that he was denied the right to a fair trial in that the proceedings were conducted in an irregular and improper manner.
8. The applicant, Mr Dipheko, stood trial in the Regional Court on charges of rape (count 1), contravention of a domestic violence order (count 2) and assault (count 3). He tendered a not guilty plea in respect of the charge of rape, and in terms of a section 115 plea he put all the elements of the offence in dispute. On 2 July 2019 the court *a quo* found that the State had proved its case beyond reasonable doubt on counts 1, 2 and 3 and consequently found the applicant guilty on all counts. Aggrieved by the conviction on count 1, the applicant launched this application, as he was of the opinion that he should be afforded relief to ascertain whether the proceedings that resulted in his convictions were in accordance with justice before he would be sentenced.
9. In his Founding Affidavit, the applicant avers that the conviction obtained must be reviewed, invalidated and set aside, in that he had pleaded not guilty; put in dispute every element of the charge; and challenged the chain of custody. Despite this, the applicant avers that the Court did not order that a trial within a trial be held.
10. The DNA results were handed up and accepted as exhibit B by the court *a quo*. Counsel for the applicant in the court *a quo* indicated that certain of the reports would be put in dispute but had no objection to the DNA results being tendered as evidence. The defence went further to indicate that the chain of custody of the DNA evidence would be in dispute and not the results. It is common cause that the defence did not request for a trial within a trial to be held to determine the admissibility of the evidence.
11. The transcript recorded the following exchange between the counsel for the accused, the prosecutor and the court:

PROSECUTOR: *As the honourable Court pleases Your Worship. Your Worship the state is in possession of the DNA results of the accused person, the DNA results. The state would like to*

hand it up as Exhibit B Your Worship confirming the DNA of the accused.

COURT: *Any objection defence?*

MR SCHREUDER: *I have an objection Your Worship only to indicate that further on, certain of those reports we will put into dispute. But it can be at this stage already be handed up.*

COURT: *I did not hear you.*

MR SCHREUDER: *Ja. Your Worship I have no problem with it can be handed up, that is the result of the DNA reports. It can be handed up, but the way it has it obtained... [intervenes]*

COURT: *The chain, you are putting the chain in dispute?*

MR SCHREUDER: *The chain will be in dispute.*

COURT: *Are you putting it into dispute? The chain.*

MR SCHREUDER: *The chain. As the Court pleases.*

PROSECUTOR: *As the Court pleases Your Worship. Your Worship if I may just get clarity from the defence. I think they are disputing the results, not actually the chain.*

COURT: *Are you disputing the results or the chain?*

MR SCHREUDER: *The chain.*

PROSECUTOR: *The chain. As the Court pleases.*

COURT: *So, what is contained in here you are not putting it into dispute. If I follow you?*

MR SCHREUDER: *Ja, that is correct.*

COURT: *And the chain evidence.*

MR SCHREUDER: *Not in dispute.*

COURT: *And the chain evidence.*

MR SCHREUDER: *The chain. As the Court pleases.*

COURT: *Per consent between the state and the defence the DNA result is EXHIBIT B. The defence alludes to the fact; however the chain is put in dispute. Do you follow sir?*

12. The applicant alleges that the second respondent called a series of witnesses in order to prove the chain of custody, but none of these witnesses had testified to breaking the seal or to have extracted the DNA. The applicant further avers that since there was a missing link in the chain of custody evidence in relation to the DNA analysis, the Court ought to have ordered for a separation of the trial within a trial from the main trial.

13. The applicant submits that as a result of the way in which the proceedings were conducted, the conviction was obtained in a manner which is irregular, improper and thereby denied him of a fair trial.
14. The second respondent in its Heads of Argument submitted that the applicant had disputed the chain of evidence in regard to the DNA and, therefore, that constituted the issue of credibility and not admissibility. Adv Barnard submitted that the question before the court is the following: "*whether a trial within a trial must have been held where there is a factual dispute.*" He submitted that a trial within a trial is not to be held, as counsel for the applicant in the main trial merely placed it on record that the chain of evidence is in dispute. This was done just for the State to call the necessary witnesses to prove specific facts. It was contented that the court *a quo* did not make a gross irregularity and will not be doing so in ordering the trial to continue.
15. The second respondent further submitted that the applicant's counsel in the court *a quo* never asked for a trial within a trial to be held, never raised the issue of irregularity and thus he must have been of the view that there was no need for a trial within a trial.
16. In the court *a quo* the second respondent presented the following evidence to establish the chain of custody, namely: Dr Gonzales who testified that he examined the complainant on 28 February 2010, had taken swabs from the complainant's private parts and handed the swabs to Constable Gumede. Constable Gumede testified that he was on standby on 28 February 2010 and took the complainant to the Kimberley Hospital for the crime kit examination, whereafter the crime kit was sealed before him and handed over to him. He signed for receipt thereof and took it from the hospital to his office where he locked the kit in a steel cabinet for safekeeping. He further testified that the kit was not tampered with and was properly sealed and had a unique serial number. He testified that he handed the kit to Mr Khutwane the next day. Mr Khutwane testified that he received the well-sealed kit from Constable Gumede on 1 March 2010 and handed it to Colonel Duvenhage on 15 April

2011. He stated that whilst the kit was in his care it had not been tampered with or damaged. Mr Duvenhage testified that he received the kit on 15 April 2011 and he took the kit to the forensic laboratory in Cape Town on 18 April 2011. He testified that when he took the kit to the laboratory, the forensic bag, the exhibit and the seal number was not damaged. Mr Moamogwe testified that he took the accused's buccal sample on 13 April 2017 and handed it to the late Mr Alec and further that there was no tampering with the kit and exhibit bag. The adult sexual assault evidence collection kit was received by Ms Heynes on 24 July 2017 who did the final DNA interpretation by analysing the specimens and established the connectivity with the applicant.

17. In her judgment the learned Magistrate stated with regard to the DNA analysis:

"The Court will thus find in this instance that the chain of evidence in our case is intact. There is no evidence of tampering or damage to the exhibits before they were analysed at the forensic lab in Cape Town. That the Court notes that evidence was adduced who handled them and as at the time they reached Cape Town."

18. In the matter of *S v Matshaba*¹ the court held as follows:

"The importance of proving the chain of evidence is to indicate the absence of alteration or substitution of the exhibits. If no admissions are made by the defence, the State bears the onus to prove the chain of evidence. The State must establish the name of each person who handled the evidence, the date on which it was handled and the duration. Failure by the state to establish the chain of evidence affects the integrity of such evidence and thus renders it inadmissible".

19. In *S v Van Tonder*², Myburgh J held that, if the chain of custody is disputed, the State has to prove that the sample was properly sealed, that it had reached the laboratory in the same condition as when dispatched, and that it could not be opened without breaking the seal. If necessary, it will then be incumbent upon the State to subpoena the persons who had sealed, transported and received the sample to give evidence as to the correctness of the procedure.

¹ 2016 (2) SACR 651 (NWM) at para 14

² 1976 (3) SA 391 (T)

20. The record reveals that the chain of evidence was put in dispute. The second respondent led evidence to establish the chain of custody. The evidence was also scrutinised under cross examination. At no point during the proceedings did the defence request that a trial within a trial be held to determine the admissibility of the DNA evidence. The State adduced sufficient evidence in this respect.
21. Section 35(3) of the Constitution³ affords everyone a right to a fair trial which includes the right to adduce and challenge evidence at trial. The Constitution further excludes evidence obtained in a manner that violates any right in the Bill of Rights if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. This Court finds no evidence of the violation of the applicant's right to a fair trial or that the first respondent's actions amounted to a gross irregularity that would render the conviction against the applicant to be set aside.
22. In the matter *Wahlhaus and others v Additional Magistrate, Johannesburg and Another*⁴, the court stated that the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the preliminary point decided against the accused by a magistrate is fundamental to the accused's guilt.
23. It has been stressed that underlying the reluctance of the Courts to interfere in untruncated proceedings in a lower court is the undesirability of hearing appeals or reviews piecemeal.⁵
24. In applying the appropriate test to the facts and circumstances of the present matter, this Court is persuaded that the first respondent did not commit a gross irregularity in the proceedings. The first respondent correctly found the evidence to be admissible in relation to the conviction. The applicant has

³ The Constitution of the Republic of South Africa, 1996

⁴ 1959 (3) SA 113 (A) at 119G

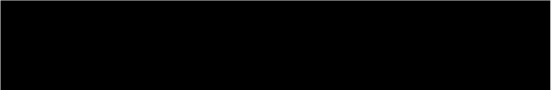
⁵ *S v The Attorney-General of the Western Cape ; S v Regional Magistrate Wynberg and another* 1999 (2) SACR 13 (C) at 22 e–f

failed to persuade this Court that the grounds referred to in section 22 of the Superior Courts Act for interfering in proceedings exist.

25. This application for review comes 14 years after the offence was committed, and five years after the applicant was convicted. The continued delay in the finalisation of the trial is unreasonable and has the effect of substantial prejudice not only on the accused but the victim of the accused actions and such delay must be eliminated. In *Zanner v Director of Public Prosecutions, Johannesburg*⁶ the court stressed that: “. . . [T]he right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime”.

[1] Wherefore the following order is made:

- (i) The application for review is dismissed.
- (ii) The accused's conviction is confirmed.
- (iii) The matter is remitted to the court *a quo* for continuation of the proceedings on sentence.


T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION


L LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

⁶ (2006 (2) SACR 45 (SCA) at para 21

APPEARANCES:

On behalf of the applicant:
On the instruction of:

Adv Moeti.
Legal Aid SA

On behalf of the second respondent:
On the instruction of:

Adv Barnard
The NDPP