



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REVIEW NO: 56/23

In the matter between

THE STATE

V

MARTIN KING

JUDGMENT delivered 07 May 2024

THULARE J

[1] During a routine inspection of finalized criminal matters, through perusal of records of completed criminal cases as part of quality assurance and as an instrument of on-site practical continued judicial training of magistrates by a senior magistrate, the senior magistrate came across the record of proceedings against the accused. The face of the J15 indicated that the accused pleaded not guilty on 26 June 2018. There was no entry on judgment, and on sentence the entry was that the matter was removed from the roll on 12 November 2021. The J15 was signed off by the magistrate. On direction with regard to revision of the order, the entry was that the matter was not reviewable. And on directions with regard to filing of the case record the entry was that the record was

disposable after 1 year (D1 in court record language). The senior magistrate held the view that the magistrate erred in removing the matters from the roll as the matter was partly-heard before another judicial officer. The senior magistrate submitted the matters for review and requested that the Judge consider setting aside the decision to remove the matter from the roll and to refer the matter back to court for the partly-heard matters to continue. The senior magistrate indicated that the trial magistrate was available to continue with the partly-heard matter. The covering letter of the senior magistrate indicated that two such matters were submitted. Only one of them came before me in the review file. Amongst others, the quest to get the other matter, S v Adams case no: 14/540/2021 is leading to unacceptable delays.

[2] The issue is whether the proceedings were in accordance with justice.

[3] The accused made his first appearance on 26 March 2018. His right to legal representation was explained and he elected to conduct his own defence. He was charged with one count of theft of one 125ml bio-oil valued at about R135-99 and one Loreal night cream valued at about R179-95 allegedly stolen from Woolworths, Main Road in Sea Point. The State was opposed to accused being granted to bail as it alleged that he had 39 previous convictions and two pending cases, one for theft and another for unlawful possession of drugs. Although he had no outstanding warrants at the time, previously he had to be arrested on warrants 8 times for failing to appear. The accused indicated that he intended to plead guilty. The matter was postponed for his plea as well as his SAP 69. He was remanded in custody. At the next appearance on 30 April 2018 the accused asked for a copy of the docket and the accused was remanded in custody to 26 June 2018. The trial commenced on 26 June 2018 and the matter was postponed whilst a witness was still under cross-examination for further hearing on 03 July 2018. On 3 July 2018 the accused indicated that he now wanted legal representation. The matter was postponed to the next day for legal representation. On 04 July 2018 the accused indicated that he had another matter for robbery in Wynberg where he got Judicare, and wanted to write some correspondence to the Minister of Justice, as amongst others he wanted another magistrate to preside over the matter. Although this was strange, the

matter was nevertheless postponed to 16 August 2018 for the outcome of the letter to the Minister. On 16 August 2018 the accused indicated that he had engaged someone from Legal Aid South Africa in Pollsmoor prison, and that he had filled a new form for Judicare. The record reflected that the magistrate gave the accused a section 342A notice and the matter was postponed to 23 August 2018. On 23 August 2018 the section 342A notice was read to accused, and the matter was postponed to 27 September 2018 for further trial. On 27 September the witness was not timeously subpoenaed and the matter was postponed to 05 November 2018 for further trial. The accused indicated that he was still waiting for Judicare and the Minister's response. On 5 November 2018 the witness was still not subpoenaed from 27 September 2018. The matter was postponed finally for the State to subpoena the state witness to 3 December 2018. On 3 December the State explained the absence of the witness as that the witness had changed office and that the subpoena was sent to the previous office, in its application for s further postponement. The accused complained that it was 9 months that he was in custody and that he had a fixed address and could be released on warning. The matter was postponed to 21 January 2019 for further hearing and the accused was released on warning. On 21 January 2019 the witness was not available and the matter was postponed to 22 February 2019 for further hearing. The accused was warned to appear. On 22 February 2019 the matter was before another magistrate. The accused was absent and a warrant for his arrest was issued.

[4] The accused appeared before the trial magistrate on 25 May 2021 and was remanded in custody for the docket, legal aid and transcripts to 4 June 2021. On 4 June 2021 the matter was postponed to 22 June 2021 for docket and transcripts. He was represented by a legal representative from LASA. The matter was postponed despite the objection from the defence. On 22 June 2021 the accused was not brought to court. This was because the building was decontaminated for Covid-19. The parties agreed, before another magistrate, that the accused would be requisitioned and the trial date was arranged for 2 July 2021. The warrant of detention was authorized in the absence of the accused. On 2 July 2021 the accused was not brought from prison again due to covid-19 decontamination and the matter was postponed to 21 July 2021. The matter was

postponed in absentia by a different magistrate. On 21 July 2021 the matter appeared before another magistrate and the matter was postponed to 2 August 2021 provisionally for the arrangement for further trial. On 2 August 2021 the matter appeared before a different magistrate and could not proceed due to covid-19. At the request of the trial magistrate the matter was postponed to 13 August 2021. On 13 August 2021 the matter appeared before another magistrate and was postponed for docket and presiding officer to 17 August 2021. On 17 August the trial magistrate was still not available and the matter was postponed to 30 August 2021. It is not clear from the record as to what happened on 30 August 2021. The matter appeared again on 8 October 2021 and was postponed before another magistrate to 15 October 2021 for docket. The record reflects that the accused was at the time in custody also serving a sentence. On 15 October 2021 the matter appeared before another magistrate and was postponed to 4 November 2021 for further trial. On 4 November 2021 the matter appeared before the trial magistrate. The state requested a postponement for the docket. The defence objected to the postponement. The matter was postponed finally for the docket to 12 November 2021. On 12 November 2021 the matter appeared before another magistrate. The state applied for postponement for the docket and the state could not explain why the docket was not at court. The defence objected to the postponement. The magistrate removed the matter from the roll.

[5] Section 35 (3)(d) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution) provides:

“35 Arrested, detained and accused persons

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

(d) to have their trial begin and conclude without unreasonable delay;”

[6] Undue delays in the finalization of criminal trials are undesirable. The denial of an expeditious verdict, including those founded by a court order which has the prospect of delaying the verdict, is inconsistent with the right of the accused to have their trial conclude without unreasonable delay. This is especially so when the accused was in custody. Covid-19 and the failure of the accused to come to court for a period

notwithstanding, it is worrisome that a simple shoplifting matter was on the district court roll for over 3 years. The accused was arrested on 24 March 2018. By 3 December 2018, the accused had been in custody all the time and the trial was still far from over. The accused had, at the time, been in custody for almost 9 months. A shoplifting of two small items worth just over R300-00, which ordinarily has two or three state witnesses at most or often a single witness, is disproportionate to 9 months pre-verdict detention. In a city such as Cape Town transformation from a “fransman” (a newbie in detention and gangsterism) to a number gang (which is membership of a gang with a hierarchical command structure) is strengthened by pre-trial detention, which is where consecration into a gang generally happens. Magistrates in the Cape Town Metropolitan City must seriously reflect on their role, as they have inadvertently become a recruitment agency for the gang-culture of the Cape Flats through detention orders which may be avoidable and could be last options but are now first options. It is also worrying that a magistrate would find it proper to postpone a case in order for a Minister of Justice to consider the request of an accused to have a matter heard by another magistrate. A delay for such reason is not well founded in our democratic dispensation where there is a separation of powers. Similarly, magistrates and prosecutors must keep their own notes of a trial, separate from the record of proceedings. The ease with which matters are postponed for a trial magistrate or a prosecutor to have the record of a matter in which they are involved transcribed, in the district courts, is very worrying. It is not only delaying but also an unnecessary expense to the fiscus born by a lackadaisical attitude, which is avoidable and can be met by conscientiousness. The provision of a Z15 and P.21 as well as a black and red pen and a pencil for the bench of a magistrate must mean something, amongst others that a magistrate should take their own notes during a trial, and cannot simply fold their arms and request transcripts later as a reason why a partly heard matter cannot proceed or they cannot give judgment. Judicial Office simply has no room for laziness. Unfortunately it is in the nature of the office that you cannot sleep the same day you woke up, and serve the Republic in the manner expected. It is also worrying that another magistrate would attend to a partly-heard matter without recording why the matter is not before the trial magistrate, and that that should happen frequently without the other magistrate bringing the continued unavailability of the trial magistrate to a senior

magistrate for intervention. These kinds of indifference to the expeditious finalization of matters should be rebuked and should not be experienced by those accused and especially those in detention. A magistrate who postponed a partly-heard trial to a date for further hearing, has a responsibility to diarise that date and ensure that they are present to proceed with that trial on that date of set down, unless circumstances beyond their control dictate otherwise. To simply ignore responsibilities towards a partly-heard matter is dereliction of duty.

[7] The magistrate who decided that the continued delay in finalization of the matter should somehow come to an end cannot be faulted for holding that view. The question is whether his intervention, to refuse a postponement and to remove the matter from the roll, was an order in accordance with justice. Where a matter was removed from the roll, a party who placed that matter on the roll, generally, was naturally at liberty to enroll it in the future, if it so chose [*Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) at 140A]. A removal from the roll is appropriate where a court decides to decline to hear a matter [*Commissioner, SARS v Hawker Aviation Partnership and Others* 2006 (4) SA 292 (SCA) at para 9]. A removal from the roll leaves the issues between the parties definitively undecided. It is the equivalence of no order being made and with nothing that had been decided, leaving the party that is *dominus litis* with leave granted to proceed again with the same case on the same papers. The refusal to postpone was a decision in favour of the accused, but the removal amounted to nothing being decided for or against the accused on the charges to which he had already pleaded.

[8] Section 106 (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) provides:

“106 Pleas

(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as it otherwise expressly provided by this Act, or any other law, entitled to demand that he be acquitted or be convicted.”

[9] The accused pleaded not guilty as envisaged in section 106(1)(b) of the CPA. He was entitled to demand to be acquitted or convicted [*S v Basson* 2004 (1) SACR 285 (CC) at para 63]. The court seized with the trial of an accused cannot be deflected from its duty nor can it abandon or surrender its obligation to try the accused [*S v Mphetshwa* 1979 (1) SA 925 (Tk) at 926B. The accused was entitled to demand that he be acquitted or found guilty by the judicial officer who commenced the trial [*S v Gwala* 1969 (2) SA 227 (N) at 230E-F]. One of the purposes of section 106(4) of the CPA was to prevent trial proceedings from hanging over the head of an accused indefinitely after he has pleaded [*S v Delport* 2015 (1) SACR 620 (SCA) at para 34]. The concept of a removal of a criminal matter from the roll during trial appears to me to be directly in conflict with the accused's section 106(4) of the CPA entitlement as well as his constitutional fair trial right which includes the right to have his trial conclude without unreasonable delay as envisaged in section 35(3)(d) of the Constitution.

[10] I have considered *S v Sithole and Others* 1999 (1) SACR 227 at 229h and I am not persuaded that without more, a High Court should take the quantum leap into the Magistrates' Courts' proceedings. Although by 1998 when the Judge penned *Sithole*, *Gwala* was about 29 years on the law reports, *Sithole* did not discuss *Gwala* or give its reasons as to why it differed with *Gwala* and its reasons for the inherent conclusion that the accused was not entitled to demand that he be acquitted or found guilty by the judicial officer who commenced the trial. I am unable to discern, from the reading of section 106(4) of the CPA, the peremptory language in respect of the judge sitting in review. *S v Fongoqa* 2016 (1) SACR 88 (WCC) at para 67 to 68 is helpful only to the extent that it suggests that the conclusion in *Sithole* that where the accused pleaded to charges but no judgment was given in respect of such charges then the accused should be acquitted on such charges, should not be applicable in all circumstances. To that extent I agree with *Fongoqa*. I need not say much more than the appreciation that *Fongoqa* dealt with an appeal, whilst I am seized with a review. To that extent it is not necessary to engage deeply with the criticism of *Fongoqa* in favour of *Sithole* by Reddi M, *Recent Cases: Criminal Procedure*, SACJ (2016) 1, Volume 29, 65 at 72- 74. The author said:

“In other words, the issue should simply be whether an accused had pleaded to a charge and if so, then a failure by the court to hand down a verdict must entitle him or her to an acquittal.”

I did not find the author helpful on why the terminology employed in section 106(4) of the CPA would be peremptory for a judge sitting in review as well, as opposed to the trial presiding officer.

[11] In the circumstances of this case, where the decision which paused the proceedings in the magistrates’ court was made by a magistrate other than the magistrate who commenced the trial, one of the questions to be asked is if substantial injustice would result if the matter is remitted back to the magistrate who was seized with the trial, to enable the accused to exercise his entitlement to demand that he be acquitted or be convicted. The other is whether such remission would render the trial unfair or detrimental to the administration of justice. In my view, the interests of justice permit that the matter be remitted back to the trial magistrate. For these reasons I would make the following order:

- (a) The order of the Magistrate to remove the matter from the roll is set aside.
- (b) The matter is remitted back to the magistrate before whom the trial commenced to deal with it in accordance with justice.

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DM THULARE
JUDGE OF THE HIGH COURT

I agree

T DLAMINI - SMIT
ACTING JUDGE OF THE HIGH COURT