



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

REVIEW NO: 172/24

In the matter between

THE STATE

V

ROYDEN CHRISTOPHER WILLEMSE

JUDGMENT delivered on 14 May 2024

THULARE J

[1] The accused pleaded not guilty to culpable homicide and to the alternative of reckless driving as well as to a count of driving under the influence of liquor or drugs. The accused made a plea explanation and also made admissions in terms of section 220 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA). Both the plea explanation and the admissions set out that the accused was a driver of a Honda Ballade on 3 April 2016 on Chavonnes Road in Caledon. The ballade, travelling at a high speed, drove into pedestrians who were walking on the side of the road. One of the pedestrians sustained

multiple injuries which caused his death. The accused had consumed drinks, rum, with friends first at a braai hosted by the friends and later at a pub in Bergsig which is in Caledon, before he left the pub. The accused was arrested on the scene and taken to hospital where his blood was drawn and taken for tests. The accused admitted the clinical reports of his arrest and of the deceased. He also admitted what is commonly known as the chain evidence, which was the attention given to the deceased as well as the custody of the body and including and up to its post-mortem more specifically that no further injuries were sustained and that the deceased succumbed to the injuries sustained at the collision. The accused also admitted the analysis of his blood including that the concentration of alcohol in his blood was 0.25 gram per 100 millilitres. He admitted the proper calibration of the instruments used in respect of his blood specimen.

[2] The accused raised necessity as a defence. His plea explanation included that at the pub at some point he went outside and mingled with people. He was approached by a group of young men aggressively, calling on him to come to them in a challenging manner. He thought they wanted a fight or to rob him. He moved away towards his car to avoid the situation. The group moved closer in an aggressive manner and the accused drove away as they were a threat to his safety. As he pulled away from the parking onto the road someone smashed the back window of his vehicle. He assumed it was someone from that group. He sped away from the pub. He noticed a speeding car from behind and increased his own speed as he was sure that those people were chasing him. He made a few turns in Bergsig with the vehicle still chasing him, including into the bigger road which he assumed was Chavoness Road. He increased his speed to get away from that vehicle. The next moment that he could recall was when he was at the hospital being assessed and having blood drawn from his body. Under the circumstances, according to his plea, he was not acting outside the standard set for the reasonable person when negligence was a requirement for an offence to be established.

[3] After the plea proceedings incorporating the admissions, the matter was postponed for trial. The magistrate who took the plea was not a permanently appointed magistrate.

She was on contract and in between her contract was not renewed. She wrote an email to the Head of the Magistrates' Court in Caledon, which reads:

"Dear Ms Lambert, hope you well.

As I'm no longer acting as a additional magistrate in Caledon court as my career in Justice has come to an end on 31 August 2023 I am no longer available to finalise the abovementioned case.

The accused is represented by Mr Kroukamp (jnr).

The case will have to be allocated to another magistrate via the correct procedure.

Kind regards."

The Head of the Magistrates' Court in turn directed the clerk of the court to submit to the Registrar of this court the record of proceedings as well as the email from the former magistrate under a covering letter which read:

"Kindly provide the Honorable Reviewing Judge with the following:

"The attached email correspondence has been received from Magistrate Pretorius.

I attach hereto a part-heard matter of Magistrate Pretorius for Special Review and direction from the Honorable Reviewing Judge."

The original charge sheet will accompany this correspondence and the next appearance date is 17 May 2024."

[4] The simplistic attitude taken by the contract magistrate causes serious concern. It suffices to restate some of the provisions of section 9 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (the MCA). Subsection 3, in terms of which she was appointed, reads:

"(3) Subject to subsections (4) and (5), the Minister, after consultation with the head of the court concerned, may appoint any appropriately qualified and fit and proper person to act-

(a) in the place of any magistrate, additional magistrate or assistant magistrate who is not available; or

(b) in any vacant office of magistrate; or

(c) as a magistrate in addition to any magistrate of a regional division or a district."

Subsection 6, which is applicable to her, reads:

"(6) Any person appointed in terms of subsection (3) or (4) is also deemed to have been so appointed in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceedings-

- (a) in which he or she has participated as such a magistrate, including an application for leave to appeal in respect of such proceedings; and
- (b) which have not yet been disposed of at the expiry of the period for which he or she was appointed.”

Subsection 7 reads:

“(7) (a) A magistrate appointed in terms of subsection (1) who presided in criminal proceedings in which a plea was recorded in accordance with section 106 of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall, notwithstanding his or her subsequent vacation of the office of magistrate at any stage, dispose of those proceedings and, for such purpose, shall continue to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of those proceedings-

- (i) in which he or she participated, including an application for leave to appeal in respect of such proceedings; and

- (ii) which were not disposed of when he or she vacated the office of magistrate.

(b) The proceedings contemplated in paragraph (a) shall be disposed of at the court where the proceedings were commenced, unless all parties to the proceedings agree unconditionally in writing to the proceedings being resumed in another court mentioned in the agreement.

(c) If the magistrate contemplated in paragraph (a) has subsequently been appointed as a Constitutional Court judge or judge as defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001)-

- (i) he or she shall only be entitled to the benefits to which such a Constitutional Court judge or judge is entitled as contemplated in the Judges' Remuneration and Conditions of Employment Act, 2001, in respect of any period taken to dispose of the proceedings as contemplated in paragraph (a); and

- (ii) the period taken to dispose of the proceedings as contemplated in paragraph (a) is deemed to be active service for purposes of the Judges' Remuneration and Conditions of Employment Act, 2001.”

Most importantly, subsection 2 read:

“(2) (a) A person appointed as judicial officer under this section shall, before commencing with his or her functions in terms of this Act for the first time, take an oath or make an affirmation subscribed by him or her, in the form set out below:

'I,

(full name)

do hereby swear/solemnly affirm that in my capacity as a judicial officer I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.'

[Para. (a) substituted by s. 4 of Act 53 of 1970 (wef 1 December 1970) and by s. 1 of Act 62 of 2000 (wef 23 March 2001).]

(b) Any such oath or affirmation shall be taken or made in open court before the most senior available magistrate of the district concerned or a justice of the peace who shall at the foot thereof endorse a statement of the fact that it was taken or made before him and of the date on which it was so taken or made and append his signature thereto."

Without more, the posture of the contract magistrate to her responsibilities as a magistrate raises serious questions about her being fit and proper to be ordained with the powers of a public office bearer who is part of the three arms of the State to exercise judicial authority on behalf of the Republic, despite her having taken an oath to be faithful to the Republic of South Africa. Her email is inconsistent with appreciation of the gravitas of the oath. Chief Magistrates, Senior Magistrates and Heads of Magistrates Courts should engage in serious induction of those they recommend to the Minister for appointment, irrespective of the period, including driving the message home that Judicial Authority is unlike protective clothing of a shift worker at a factory floor at the end of the shift. It is not removed by the end of a shift. The responsibility to uphold and protect the Constitution and the human rights entrenched in it includes the rights set out in Chapter 2 of the Constitution, the bill of rights of accused persons and victims of crime, and extends beyond the fixed term, to the disposal of the matter one is seized with. Although the elephant is not yet visible in the attitude of the contract magistrate, its smell can't be missed in the air. This mindset and behaviour by a contract magistrate whose term comes to an end called for serious expression of not only criticism but sharp disapproval.

[5] Section 118 of the CPA reads as follows:

"Non-availability of judicial officer after plea of not guilty

118 If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence

has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.”

[6] In *S v Hanekom* 2004 (1) SACR 490 (CPD) at para 16 to 18 the following was said:

“[16] In the instance of this matter the contract of the presiding judicial officer, who was appointed temporarily, was summarily terminated. From the moment his contract was terminated he no longer had jurisdiction to proceed with the trial of the matter to its finality. This is a matter of certainty, so that in that sense his unavailability is absolute. Following the reasoning in *Hiemstra*, *S v De Koker* and *S v Polelo* (supra) the unterminated proceedings became a nullity on the summary termination of the contract of the trial magistrate.

[17] It therefore follows in the instance of this matter that the unterminated proceedings became a nullity on summary termination of the employment contract of the trial magistrate. Such proceedings, being a nullity, do not need to be preceded by any formal declaration of nullity before fresh proceedings can be instituted against the accused before another magistrate.

[18] In the result the accused in this matter can be tried before another magistrate without an order setting aside the unterminated proceedings which, in any event, became a nullity on summary termination of the employment contract of the trial magistrate. Consequently there is no need for an order for the unterminated proceedings to be set aside.”

Whilst this is authority from this Division, it is clear that one needs to consider other authorities on this point. Section 9 (6) and 9(7) of the **MCA** should also be considered. *Ex Parte Department of Correctional Services: In Re S v Mtshabe* 2012 (1) SACR 526 (ECM) at para 24 makes the point that the question whether a presiding officer seized with a matter was ‘not available’ was to be approached with flexibility and was to be decided in consideration of all relevant facts. The simplicity or complexity of the matter, the nature of the evidential material already placed before the court and the state where the proceedings were, including the reasons that the presiding officer was not at court were some relevant considerations. There may be matters where it may be necessary, at the close of plea proceedings, for the court to hold that the presiding officer who dealt with the plea was not ‘not available’. In my view, this is not such a matter.

[7] Admissions made in the course of proceedings under section 115 of the CPA, at a plea of not guilty at summary trial during the plea of not guilty and the procedure with regard to the issues between the parties, whether they are deemed admissions under

section 220 of the CPA or not, do not constitute evidence as envisaged in section 118 of the CPA [S v Mjoli 1981 (3) SA 1233 (AD) at 1243C].

The admission of a fact made by or on behalf of an accused person is in terms of section 220 sufficient proof of that fact in criminal proceedings. It is not evidence adduced in such proceedings [S v Mokgeledi 1968 (4) SA 335 (A) at 337H-338A]. Witnesses are to give evidence *viva voce* [section 161 of the CPA], under oath [section 162 read with sections 163, 164 and 165 of the CPA], in open court [section 152 read with 153 of the CPA], in the presence of the accused [section 158 read with 159 of the CPA]. Where there are no witnesses called at the trial, *prima facie*, there was no evidence adduced before the trial court [S v Nzuza 1963 (3) SA 631 (AD) at 635]. The prosecutor leads the witnesses through questions and place the necessary evidence before the court [Section 150(2) of the CPA] and the accused may cross-examine state witnesses [section 166 of the CPA]. This is how the evidence is adduced or brought forward before court. In *R v V* 1958 (3) SA 474 (G.W.L.D) at 479 it was said:

“In all criminal cases the Crown must prove the facts which are required to be established beyond reasonable doubt. Facts in issue are proved or established by means of admissible evidence (i.e. testimony, either on oath or after affirmation, or by means of affidavit), formal admissions tendered as such during the hearing of the matter and by presumptions. In my view it is not correct to state that an admission of a fact made during the hearing is evidence thereof unless one disregards the distinction between evidence of a fact and proof thereof and uses the former word as a synonym of the latter. This distinction was sometimes (but not always) present to the mind of the draftsman. See, e.g., sec. 284 (1) where it is provided in the Afrikaans text that an admission shall be 'sufficient proof' ('voldoende bewys'), whereas the English text states that an admission shall be 'sufficient evidence' of the fact admitted. An admission of a fact in issue results in that fact being considered proved or established without receiving evidence in regard thereto. In appropriate circumstances a presumption has the same effect.

In my view the Legislature, in enacting sec. 258 (1) (b) had present to its mind the distinction between proof and evidence of a fact and was, moreover, aware of the various means by which facts in issue may be proved. It therefore, in my view, used the word 'evidence' in the sense suggested above.

It seems to me that the problem may also be approached from a different angle. A plea is an essential procedural step in the course of a criminal trial. A plea, other than a plea of guilty or a plea to the jurisdiction of the court, is deemed to be a demand by the accused that the issues

raised by such plea should be tried by the court. (See sec. 173 of the Act.) A plea of guilty is in my view to be considered as an election by the accused to submit to the punishment applicable to the particular offence without proof of the averments in the charge. A plea of guilty is not necessarily a deliberate admission of the truth of those averments. There seems to be as little justification for deeming a plea of guilty to be the equivalent of a deliberate admission of all the averments in the charge as there was held to be for regarding it as a confession. (See *R v Mazibuko*, 1947 (4) SA 821 (N); *R v Matumba*, 1949 (2) SA 545 (O), and *R v Mutimba*, 1944 AD 23.)

Thus, although it might conceivably be said that admissions made by an accused after plea constitute 'evidence' for the purposes of sec. 258 (1) (b), a plea of guilty as such can never in my view become 'evidence' in the matter by first being equated to an admission."

A plea is not evidence of the accused [*R v Kula* 1958 (4) SA 675 (C) at 679D-E]. The admissions made by an accused during plea proceedings are not made under oath. It is not evidence but is probative material [*S v Slabber ten andere* 1985 (4) SA 248 (C) at 250A-251B].

[8] The simplicity of the matter, the nature of the evidential material already placed before the court, the state where the proceedings were, including the reasons that the presiding officer was not at court, in the matter under review, led me to conclude that the contract magistrate was not available to continue with the trial. The flexibility called for in these matters call for considerations such as the core values of responsiveness to the public. Those who lost their loved-ones in this matter should not have their grief unnecessarily extended by 'judicial lot-casting" as to who should take responsibility for the finalization of the matter. Another value worth consideration is diligence, including optimal use of available judicial resources and time as well as the norms especially efficient, effective and expeditious disposal of cases at courthouses. The accused pleaded not guilty at a summary trial. Formal admission were made as envisaged in section 220 of the CPA. It was only points in respect of which there were admissions that, without more, no longer needed to be ventilated through evidence. The points in issue were identifiable. No evidence had been adduced yet. In my view the matter may proceed before another magistrate of the same court, as envisaged in section 118 of the CPA. For these reasons I would make the following order:

(a) The matter is remitted back to the magistrate for the district of Caledon, to be continued before any other magistrate of the same court.

DM THULARE
JUDGE OF THE HIGH COURT

I agree

CN NZIWENI
JUDGE OF THE HIGH COURT