

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 1458/2008

Magistrate's Serial No. 2/2009

High Court Ref. No. 62/2009

In the matter between:

VUYISANE NYEMBEZI

Accused

and

THE STATE

REVIEW JUDGMENT

MEYER, J

[1] This is a review matter. The charge against the accused, Mr. Vuyisane Nyembezi, was that he contravened certain provisions of the Firearms Control Act 60 of 2000. It was alleged that he, on 22 November 2008, and at or near Somalia Park, Boksburg, unlawfully pointed a firearm at another person, Mzwandile Gabriel, without good reason

to do so. The accused was tried in the Magistrates' Court, Boksburg on 20 January 2009. On 3 February 2009, he was found guilty as charged and sentenced to eighteen months imprisonment. He was also declared unfit to possess a firearm.

[2] The record of the proceedings was originally laid before Coetzee, AJ, who, in terms of the provisions of ss 304(2)(a) of the Criminal Procedure Act 51 of 1977, required from the judicial officer who presided at the trial, Mr. JVZ Vivier, a statement setting forth his reasons for convicting the accused, and he directed the following questions at the learned magistrate:

- ‘[1] Whether Mr Nyembezi knew and understood his rights in regard to legal representation. If so, how that can be found in the face of his ineffective cross examination. If not, why that did not result in a failure of justice.
- [2] Whether it can be found that Mr Nyembezi was sufficiently competent to conduct his defence in person without causing a failure of justice.’

The learned magistrate responded as follows:

‘The case record reflects inaudible parts which I could not rectify. I apologize for the lacuna. Steps have been taken by the Office Manager of the Boksburg Magistrates' Court to have the recording machines improved, repaired and replaced where necessary. I agree with the Honourable Judge's concern and queries regarding the clumsy way in which the accused had conducted his cross examination. The court should have explained in more detail the benefit of legal representation and the availability of a legal aid attorney. From the case record it appears as if there was a failure of justice.’

[3] I am of the view that the learned magistrate's concessions were correctly made. The record of the proceedings does not reflect that the accused was informed of his right to legal representation and the availability of legal aid. The record further shows that the accused was a lay person and undeniably incapable

of representing himself. Even if the accused had declined legal representation, which does not appear from the record, this matter would serve as a classroom example of one where it would have been incumbent upon the presiding magistrate to have encouraged him to exercise his right to legal representation [see: *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T), at 196 F-I], and if he nevertheless declined, to have gone ‘the extra mile’ by ascertaining from him what motivates his decision to act in person [see: *S v Cornelius & Another* 2008 (1) SACR 96 (C), at [14]]. Substantial injustice within the meaning of s 35(3)(f) and (g) of the Constitution of the Republic of South Africa, 1996 resulted. Direct imprisonment was the likely punishment to be imposed and it was indeed imposed.

[4] The failure to have provided the accused with an explanation of his constitutional rights in regard to legal representation had the effect of depriving him of legal representation at his trial. See: *S v Ndlovu; S v Sibisi* 2005 (2) SACR 645 (W), at p 654b – c. He was not competent to conduct his own defence. He was prejudiced. His trial was not fair. There was a fundamental irregularity in the proceedings and a complete failure of justice. The accused’s conviction and sentence, in my view, must accordingly be set aside.

[5] In the result:

The accused's conviction in the Magistrates' Court, Boksburg, on 3 February 2009, of the statutory offence of unlawfully pointing a firearm, the sentence of eighteen months imprisonment imposed upon him pursuant to such conviction, and the declaration that he is unfit to possess a firearm, are hereby set aside.

SALDULKER, J

[6] I agree with the judgment of my brother Meyer J.

P.A. MEYER
JUDGE OF THE HIGH COURT

H.K. SALDULKER
JUDGE OF THE HIGH COURT

9 June 2009