IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

High Court Ref No: 90/09
Magistrate's Serial No: 5/09
Review Case No: 124/09

4 November 2009

Magistrate
BOKSBURG

THE STATE

and

STELL CHAUKE Accused 1

RISIMATI BALOYI Accused 2

REVIEW JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] This matter was placed before me on special review. The crisp issue in this review is whether the Court, on review, can set aside an acquittal of an accused by a magistrate's court.

[2] The two accused persons were charged with theft, alternatively, possession of stolen property, in the Boksburg Magistrate's Court. They were legally represented, and pleaded not guilty.

[3] The State led the evidence of the complainant and the arresting officer, Const Herbert Brandt (Brandt). At the end of the State's case, both the accused closed their respective cases without testifying. Accused 1 (Stell Chauke), was convicted of the alternative count, while accused 2 (Risimati Baloyi), was acquitted. Accused 1 was duly sentenced to 3 years' imprisonment.

[4] It subsequently transpired, and it was brought to the attention of the magistrate, that he in fact convicted the incorrect accused, namely, accused 1, instead of accused 2. The magistrate, however, was unaware that during the trial, the accused persons were in fact transposed in the accused dock. In other words, the accused persons were not standing or seated in their correct numerical order. In articulating the confusion, the magistrate states:

> "*It has now been brought to my attention that right from the outset the accused did not stand in the right order right through the trial and the attorney and the court orderly and the prosecutor did not detect that and it was not brought to the court's attention. The position further is that the witness pointed out accused 1 as the person who was in possession of the bike while it now appears as if they were standing the wrong way around and its seems to be accused 2, Mr Baloyi.*"

[5] From the above factual disposition, it is more than apparent that the conviction and resultant sentence imposed on accused 1 were irregular, and a nullity from inception. The error, discovered subsequently, as stated above, was also of such a nature that it could not be corrected by the magistrate in terms of the provisions of s 176 of the Criminal Procedure Act 51 of 1977, which section provides:

> "*When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment.*"

See also *S v Wells* 1990 (1) SA 186 (A).

[6] In the present matter accused 1 was wrongly convicted and sentenced on 16 March 2009. The error was apparently discovered on 18 March 2009 when the decision was made by the magistrate to transmit the matter for review by this Court. There should be no barrier at all in setting aside the conviction and sentence in respect of accused 1.

[7] However, the position regarding accused 2, who was acquitted, is hugely different, and indeed problematic. It is the request of the magistrate that in setting aside the entire judgment, accused 2 ought to be charged afresh. This is also the view of the Director of Public Prosecutions whose opinion, which I solicited in May 2009, and received in October 2009 only. Regrettably, the memorandum of the Director of Public Prosecutions contained no authorities or case law, which may have been helpful in resolving this unusual matter. The matter is undoubtedly not as simple as

both the magistrate and the Director of Public Prosecutions seem to suggest. Re-charging accused 2 obviously implies rather serious consequences and implications for him. In essence, the Court is asked to simply set aside the acquittal of accused 2 in circumstances described above, without any representation from him, or hearing him, in other words, without the application of the *audi alteram partem* principle. What further compounds the issue of setting aside an acquittal on review, are the various conflicting decisions in the different High Courts countrywide. Section 304 of the Criminal Procedure Act does not expressly empower a Reviewing Court to set aside an acquittal.

[8] In *S v Aronstam* 1966 (3) SA 780 (T), where a company (accused 1) was charged with a statutory offence, the magistrate convicted the company representative (accused 2), and acquitted accused 1. The magistrate had actually intended the reverse. Accused 2 appealed. The magistrate and the State requested the Court to amend the record so as to reflect what the magistrate intended. At p 781E the Appeal Court said:

> "*The fact is that if we accede to the request of the magistrate we shall be convicting accused No. 1 who was five months ago acquitted in the court below and who – and this is the important point – is not represented here today at all. It would in effect mean not only that a discharged person, duly acquitted, is convicted five months later in respect of the very same proceeding, but that that is in the present case done in his absence. This is clearly an untenable proposition.*"

The appeal was upheld and the conviction and sentence were set aside. I must however, hasten to mention that the distinctionable factor in the present matter is that the magistrate is not requesting the Court to amend his

judgment. He is in fact asking the reviewing Judge to set aside the whole judgment.

[9] In *S v Lubisi* 1980 (1) SA 188 (T), the accused was tried for stock theft in the Soweto Magistrate's Court. He pleaded not guilty before magistrate, Mr Hawkins. The evidence of the complainant was led. After cross-examination by the accused, and the completion of the complainant's evidence, the State closed its case. After the accused had indicated that he wished not only to testify under oath, but also to call a witness, the matter became part-heard and was postponed. After several subsequent postponements, and for some inexplicable reason, the record of the evidence given previously was mislaid and became separated from the charge sheet. A new charge sheet was prepared and placed before another magistrate, Mr Van Rooijen, also in the Soweto Magistrate's Court, with a notation thereon that the accused had already pleaded "*not guilty*" to the charge. At the same time, a different prosecutor appeared who had no knowledge of the prior proceedings. The new prosecutor was apparently under the impression that no evidence had been led in that case. He requested that the charge against the accused be withdrawn as he had no witness available. The magistrate pointed out that the accused having pleaded not guilty was entitled to a verdict. The magistrate proceeded to find the accused not guilty. When the true position came to light, magistrate Van Rooijen who presided on the second occasion, requested the Supreme Court's assistance in setting aside the proceedings and verdict before him in order that the first proceedings before Mr Hawkins may be finalised. The reviewing Judge, Le Roux J, in setting aside the

acquittal of the accused, and ordering the part-heard case before Mr Hawkins be continued with, said:

> "*It seems obvious that the proceedings before Mr Van Rooijen on the 7th of November 1978 were abortive and a nullity, and could have been met with a plea of lis alibi pendens, which would have brought them to an immediate conclusion. It seems to me not in the interests of justice to allow the accused to escape the possible consequences of his conduct whether through guile or ignorance, and in my view, the original proceedings should follow their course to their normal conclusion.*"

[10] I must hasten to point out that although *S v Lubisi* concerned the setting aside of an acquittal on review, the circumstances and facts thereof were clearly distinguishable in several respects from the facts in the present matter. In addition, although *S v Lubisi* was subsequently approved in a Full Bench decision of the then Transvaal Provincial Division in *S v Masiya* 1983 (4) SA 242 (T), it was not followed in other provinces as indicated earlier. In fact, it was criticised in certain instances. For example, in *S v Makriel and Others* 1986 (3) SA 932 (C), the accused appeared in the magistrate's court on a charge of murder, alternatively culpable homicide. Due to an administrative error, the magistrate acquitted the accused in pursuance of a decision by the Attorney-General not to prosecute them. The magistrate then submitted the matter on review with the request that the acquittals be set aside. The Court declined to set aside the acquittals. At p 933E-H, Marais J said:

> "*This decision runs counter to what was decided in S v Lubisi 1980 (1) SA 187 (T) but with respect to the learned Judges who presided in that matter, they do not appear to have taken into account that the invocation and exercise of the Court's inherent powers of review without any notice whatsoever to a vitally interested party, namely the accused, was fundamentally irregular and a breach of the rules of natural justice. In fairness to the learned Judges, it should be said that the Attorney-General, to whom the matter had been referred because of the Court's doubt about the propriety of setting aside an acquittal, failed to alert them in this respect and recommended that the magistrate's request that the acquittal be set aside, be granted. In The Inherent Jurisdiction of the Supreme Court, Taitz describes Lubisi's case as an unusual one which "some may consider a dangerous precedent" but says "it would be difficult to question the correctness of the decision". (At 83.) He too failed to recognise the fundamental flaw in the decision and, in my respectful view, it is an erroneous decision which should not be followed.*"

[11] Similarly, in *S v Ntswayi en 'n Ander* 1991 (2) SASV 397 (K), criticism was levelled at the decision in *S v Lubisi*. In that case, the accused appeared in the magistrate's court on a charge of dealing in dagga. The State produced an affidavit in terms of s 212 of the Criminal Procedure Act 51 of 1977 to the effect that a sample which was analysed contained dagga. No evidence was led, however, that the sample was connected with the accused and at the end of the State's case, the accused were discharged because of the absence of such evidence. The failure to lead such evidence allegedly resulted from the fact that after a postponement of the case, a different prosecutor took over the prosecution and the latter was not aware that the defence had consented to make admissions regarding the affidavit. After the discharge of the accused these allegations came to the attention of the magistrate who sent the matter on review requesting that the decision be set aside and that the matter be remitted back to him so that the necessary evidence could be led. In refusing the request, and at p 401e Tebbutt J, said:

> "*Lubisi se beslissing het nie byval gevind nie in heelwat ander sake. (Kyk S Makriel and Others 1986 (3) SA 932 (K); S v Makopu 1989 (2) SA 577 (OK)) … Ek is die mening toegedaan dat daar nie op die beslissing in Lubisi se saak in die huidige geval gesteun kan word nie. Ek is ook van mening dat die inherente jurisdiksie wat die Hooggeregshof mag hê nie daarvoor gebruik kan word om foute wat enige partye tot 'n geding mag begaan het, reg te stel nie. Dit is in wese wat hierdie hof nou gevra word: om die Staat die kans te gee om 'n fout wat hy gemaak het reg te stel.*"

[12] Indeed *S v Lubisi (supra)* was also not followed in *S v Williams* 2005 (2) SACR 290 (C), but was referred to in *S v Engelbrecht and Others* 2005 (2) SACR 383 (C). In *S v Williams (supra)*, at p 298b-c, N C Erasmus J said:

> "*Similarly, in S v Bushebi 1996 (2) SACR 448 (NmS) at 451C, Leon AJA cautioned that, even if it is assumed that a Court does have the inherent power to intervene, such power 'should be exercised sparingly and only in the most exceptional circumstances'. The Court went on to point out that it would appear that there were, at that stage, only two cases where the South African Supreme Court had, in the exercise of its inherent power of review, set aside an acquittal. These were the unreported case of Hubbard v Regional Magistrate, the ratio of which was that the mistake in that instance deprived the party of the right to a fair trial, and S v Lubisi. The latter case, the facts of which were extremely unusual, has not found favour in subsequent cases (see S v Makriel and Others 1986 (3) SA 932 (C); S v Makopu (supra); Attorney-General, Eastern Cape v Linda 1989 (2) SA 578 (E) and S v Ntswayi en 'n Ander 1991 (2) SACR 397 (C). None of the unusual facts in Lubisi's case exist in the present case.*"

[13] In a most recent case, namely, *DPP KwaZulu-Natal v The Regional Magistrate, Vryheid and Others* 2009 (2) SACR 117 (KZP), an acquittal was set aside on review coupled with an order that any re-trial was to commence afresh before another judicial officer. The facts were briefly as follows. Seven accused were charged with one count of kidnapping and two counts of assault

with intent to do grievous bodily harm in the magistrate's court. During the evidence of the complainant, the case was adjourned and postponed on several occasions in order to allow the complainant to compose himself and to seek medical assistance. The complainant was emotionally traumatised. At some stage when the prosecutor sought a further postponement as the complainant was still traumatised, the magistrate refused the request and emphasised the accused's right to a speedy trial. The State refused to close its case. However, the magistrate ordered the State's case closed. The accused closed their cases and they were acquitted. The applicant sought to have the acquittal reviewed and set aside. The Court considered in great detail the issue whether it was competent to review proceedings of a lower Court wherein an accused had been acquitted. In addition, in coming to its decision, the Court found that s 304 of the Criminal Procedure Act 51 of 1977 would not be applicable in that review, and that the only basis upon which review proceedings can be instituted is in terms of s 24(1) of the Supreme Court Act 59 of 1959. The latter section provides:

> "*(1) The grounds upon which the proceedings of an inferior court may be brought under review before a provincial division or before a local division having review jurisdiction, are –*
>
> *(a) …*
>
> *(b) …*
>
> (c) *gross-irregularity in the proceedings; and*
>
> (d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or incompetent evidence.*"

It was on the basis of the latter section, coupled with considerations of other applicable legal principles, that the Court exercised its inherent powers to review and set aside the acquittal. I must also mention that with regard to principles of criminal law pertaining to *autrefois acquit*, the Court was of the view that an accused can only invoke such a plea if the acquittal was on the merits of the case. With regard to an accused person's right to a fair trial in terms of s 35(3)(m) of the Constitution of the Republic of South Africa, 1996, the Court said:

> "*(32) There is obviously a constitutional duty to ensure that accused persons receive a fair trial, and such trial should be concluded as expeditiously as possible. However, this must be weighed and balanced against the community's interest in ensuring that wrongdoers are prosecuted.*"

[14] The facts in all of the above cases, with the exception of *S v Aronstam (supra)*, are clearly distinguishable from those in the present matter in a number of respects. These cases mostly concerned either part-heard matters before one judicial officer which were inadvertently later placed before another judicial officer for continuation, or where a judicial officer acquitted the accused during the State's case, for whatever reason. Indeed *S v Lubisi* belongs to the former category, while *DPP, KwaZulu-Natal v The Regional Magistrate, Vryheid and Others*, falls into the latter classification. The facts of the present matter which are substantially unique, were sketched above. Accused 2 was in a proper trial. The State led all its evidence. The acquittal, at the end of the State's case, was on the merits of the case (see *DPP, KwaZulu-Natal v The Regional Magistrate, Vryheid and Others (supra)*, para

[27]. The irregularity had nothing at all to do with substantive law or procedure save that the accused persons were interposed in the accused dock.

[15] Indeed, s 35(3)(m) of the Constitution of the Republic of South Africa, 1996, provides:

> "'*(3) Every accused person has a right to a fair trial, which includes the right –*
>
> *(m) not to be tried for an offence in respect of an act or omission which that person was previously either acquitted or convicted'.*
>
> *In S v Basson 2005 (1) SA 171 (CC), the Constitutional Court had the opportunity to consider, inter alia, this right. At para [66] Ackerman J said: 'In McIntyre en Andere v Pietersen en 'n Ander it was held that the purpose of the right contained in s 35(3)(m) was to protect citizens against the possibility of repeated prosecutions for the same conduct. The Court held that such protection was necessary in the interests of fairness and also because of the public interest in the finality of judgments.'*"

[16] In the present matter, it may well be argued that once the conviction of accused 1 and the sentence imposed on him, are set aside on the grounds that the proceedings in the magistrate's court were irregular, and therefore, a nullity, as indeed they were, the acquittal of accused 2 should equally be set aside. This, however, is immaterial as the potential prejudice will be suffered by accused 2 should his acquittal be set aside by this Court without further ado, and without hearing him on review.

[17] I conclude that, based on the above constitutional imperatives of a fair trial, as well as the principle of *audi alteram partem*, it will not be fair and in the interests of justice to simply set aside the acquittal of accused 2 in the circumstances of this case. I could also not find any authority in which the fair approach in *S v Aronstam* (*supra*) was criticised or disapproved. Each case must, however, be adjudicated on its own merits. In the present matter it appears that to simply not make an order setting aside the acquittal of accused 2 would be appropriate.

[18] There is one more matter that requires mentioning. Whilst the decision of the magistrate in referring this matter for review, and releasing both accused persons pending such review is completely commendable, some caution is required in preventing confusions of this nature recurring. This will be so especially where not only multiple accused are involved, but also where serious charges, attracting severe penalties are in issue. After all, a judicial officer is supposed to be in complete control and in charge of the court. This is over and above the necessary duty to ensure that the proceedings in court are conducted in a proper manner. Issues such as ensuring the correct numerical standing or seating positions of accused persons in the accused dock, the swearing in of witnesses, etc, although appearing to be mundane, should be attended to meticulously. Compliance therewith all contribute to the ideal atmosphere of an accused person's right to a fair trial as enshrined in the Bill of Rights. It will also obviate the need to refer matters for review

unnecessarily. In *May v The State* [2005] 4 All SA 443 (SCA) at p 335f, although in a slightly different context, the Court said:

> "*Judicial officers are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become irregular.*"

The magistrate seems to ascribe the error to the court orderly, the prosecutor and the defence. There is no doubt, however, that the magistrate was ultimately responsible to prevent the error. I state this as kindly as I can.

In the present matter there is no real prejudice to the clearly innocent accused 1 except the possible anguish inherent in an incorrect conviction and sentence. He was in further custody briefly, apparently two days, after the purported conviction before the error was rectified pending the outcome of the review.

[19] I therefore make the following order:

(1) The verdict of guilty brought in by the Magistrate of Boksburg in respect of accused 1 (Mr Stell Chauke) on 16 March 2009, as

well as the concomitant sentence imposed, are hereby reviewed and set aside.

(2) In the event that accused 2 (Mr Risimati Baloyi) is re-charged, such prosecution is obviously to commence *de novo* before another judicial officer.

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D S S MOSHIDI

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

I agree:

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N PANDYA

ACTING JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG