

REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

High Court Ref No: 127/13
Review Ref No: JHS 2013/016
Magistrate's Court Ref No: 3/2969/2012

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
	5.9.2013
	DATE
	SIGNATURE

In the matter between:

THE STATE

and

SIBANDA, MIRACULOUS

Accused

REVIEW JUDGMENT

LAMONT, J:

[1] This is a review application. The accused was charged in the magistrates Court Randburg with assault with intent to do grievous bodily harm. On 29th April 2013 the accused pleaded guilty before the Magistrate

Ms Gcawu. The Magistrate acting in terms of the provisions of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 (*“the Act”*) directed a number of questions to the accused to establish whether or not the elements comprising the offence were in fact admitted by the accused. She was not so satisfied and entered a plea of not guilty in terms of section 113 of the Act. The reason she was not satisfied appears from the record. Her questioning led her to the conclusion that there was an issue concerning whether or not the accused was defending himself. His response to her questioning was as follows:

“Q: *Do you understand that it is wrong to stab a person and you had no reason to stab that person?*
A: *I was defending myself.*”

[2] The documentation in respect of the hearing before Magistrate Ms Gcawu was lost. All the parties forgot what had happened. The matter came before a second Magistrate Ms Rughoo-Nandan on 20th May 2013. All the participants at the hearing including the accused proceeded as if what had already happened before the Magistrate Ms Gcawu had not taken place. The same charge was put to the accused who pleaded guilty in terms of section 112(2) of the Act. The accused who was represented handed in a statement of facts. The statement consists largely of a pre-typed form with certain handwriting insertions. The question of whether or not the accused was defending himself was only raised in the following form:

"7. *The reason I assaulted the complainant is because they were fighting with me for no good reason and I then entered a room and took a knife.*"

No particular questioning was directed towards the private defence issue which was obliquely raised as there was a statement that there was fighting between the accused and complainant. The representative of the accused did not raise this issue.

[3] The accused was thereafter found guilty as charged.

[4] Subsequently and prior to sentence being passed the fact that the accused had pleaded before Magistrate Ms Gcawu became known and the relevant documents relating to that hearing were found.

[5] The Magistrate Ms Rughoo-Nandan stopped the proceedings. The matter then came on review.

[6] It is not customary to review proceedings before they are completed. In the present circumstances there is no purpose in proceeding with the trial before the second Magistrate if the proceedings before her are a nullity.

[7] For this reason, although it is unusual it is my view that I should deal with the review.

[8] Section 118 of the Act provides for a matter to proceed before a different Magistrate if the first Magistrate is unavailable. The provisions of section 118 are not of application in the present matter.

[9] Two or more pleas are permissible however they are not permissible in respect of the same charge. See section 106(2) of the Act. If there was to be a change of plea from not guilty to guilty the proper procedure would have been to follow the provisions of section 113 and 220 of the Act.

[10] In order for the review to be successful it is necessary that I find that there has been a failure of justice. An accused is entitled to a fair trial. One of the fundamental principles of a fair trial is that the trial commence and conclude before the same presiding officer.

[11] In my view there is a failure of justice at least on the following grounds:-

11.1 For a fair trial to have taken place the same Magistrate should have heard the matter. Two different Magistrates heard the same matter.

11.2 Two different pleas were given in respect of the same charge. This is impermissible in terms of section 106(2) of the Act.

11.3 At the first hearing the question of whether or not the accused had acted in self-defence and so had, a defence was sufficiently

recognised to lead the Magistrate to enter a plea of not guilty. The accused's admissions made later were not in my view sufficiently canvassed with the result that that defence was not revealed to the second Magistrate. Had the first trial proceeded, the issue of whether not the accused acted in private defence would have been canvassed.

[12] In these circumstances it is appropriate that the proceedings before the second Magistrate be set aside and that the trial continues before the first Magistrate.

[13] The first Magistrate's position has not been contaminated by anything which happened before the second Magistrate. The facts placed before the second Magistrate were the same as those placed before the first Magistrate. No evidence has been led in the second hearing otherwise than by way of statement.

[14] I am indebted to the Director of Public Prosecutions and in particular Adv S.H. Rubin who provided me with an extremely useful opinion.

[15] I accordingly make the following orders:

1. The proceedings before the Magistrate Ms Rughoo-Nandan as well as the conviction are set aside in terms of section 304(2)(c)(iii) of the Criminal Procedure Act ("the Act")
2. In terms of section 304(2)(c)(v) of the Act the proceedings are remitted to the Magistrate Ms Gcawu sitting in the Magistrate's Court for the district Ranburg and are to continue to finalization as if the proceedings before the Magistrate Ms Rughoo-Nandan had never taken place.

I agree:



C LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG



R MATHOPO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG