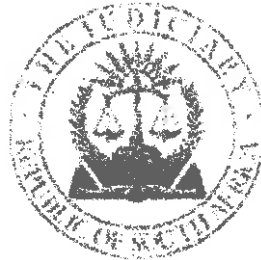


IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2016/20222

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

In the review application of:

THE DIRECTOR OF PUBLIC PROSECUTIONS

GAUTENG LOCAL DIVISION, JOHANNESBURG

Applicant

and

THE REGIONAL MAGISTRATE, KRUGERSDORP

UZENELIFA DANIEL FUKANDELA

First Respondent

Second Respondent

Coram: MAKUME ET WEPENER JJ

Heard: 11 May 2017

Delivered: 16 May 2017

Summary: Review pursuant to s 22(1)(c) of the Superior Courts Act. State entitled to bring review of decision of a magistrate in the event of a gross irregularity in a trial. An unwarranted discharge of an accused pursuant to s 174 of the Criminal Procedure Act may constitute such an irregularity.

JUDGMENT

WEPENER J:

[1] The applicant, the Director of Public Prosecutions (DPP), seeks to review a decision of the first respondent, a regional magistrate, which decision was to grant a discharge of the second respondent (the accused) in a criminal case pursuant to the provisions of s 174 of the Criminal Procedure Act (CPA).¹ Despite earlier decisions allowing the DPP to appeal such a decision of a magistrate² the representative of the DPP did not rely on an appeal procedure by it but on a review only. The DPP submitted and accepted that a court's finding in an application for discharge at the end of the State's case in terms of s 174 of the CPA is an interlocutory order and not appealable. Although the refusal to grant a discharge may not be appealable on this basis,³ it does not follow that the granting of a discharge is also of an interlocutory nature. Whether this position is correct in law need no consideration as the DPP's only lis with the accused is whether the decision of the magistrate to grant the discharge is reviewable.

[2] The DPP relied upon the provisions of s 22(1)(c) of the Superior Courts Act⁴ which provides:

'The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are -

(a) ...

¹ Act 51 of 1977.

² *Attorney General, Venda v Molepo* 1992 (2) SACR 534 (V).

³ *Ebrahim v Minister of Justice* 2000 (2) SACR 173 (W).

⁴ 10 of 2013.

(b) ...

(c) gross irregularity in the proceedings; and

(d) ...'

The DPP submitted that the magistrate's decision to discharge the accused in terms of s 174 of the CPA resulted in procedural and trial related prejudice to the State and thus the trial was not in accordance with justice.

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution.'⁵

It further submitted that the gross irregularity committed by the magistrate renders the trial subject to a review. This court must accordingly determine if the facts relied upon by the DPP indeed show a gross irregularity to have been committed by the magistrate.

[3] The facts, shortly, are that the accused was arraigned on a charge of murder. He pleaded not guilty and did not tender a plea explanation in terms of s 115 of the CPA and exercised his right to remain silent. He made certain admissions in terms of s 22 of the CPA relating to the handling of the body of a deceased and the chain of evidence relating thereto and admitted certain photographs that were taken of the body of the deceased. The magistrate accepted into evidence the post mortem report, the chain statements and the photo album taken of the body of the deceased.

[4] The State led evidence of a witness that he was in the company of the deceased and the accused when they were drinking. There was an argument between the accused and the deceased over money owed from a business that the deceased and the accused were involved in. The witness ordered them to leave his premises due to the noise which they made and they left. The accused and the deceased went to the

⁵ Per Harms DP in *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) para 5.

accused's home across the street from where the witness stayed. A short while later he observed the deceased running out of the accused's home and falling to the ground. The deceased then stood up whilst holding the left side of his chest and continued running. The accused followed the deceased with a knife in his hand. The witness did not see the actual stabbing of the deceased but noticed later that evening that there was blood on the pavement where the deceased fell. The witness ran towards the deceased and the accused and prevented the accused from pursuing the deceased. He then asked the accused what happened and the accused replied by saying that the deceased was swearing at him. During cross-examination of this witness the accused's legal representative put the following version to the witness:

'Yes because the accused is admitting that indeed, he chased the deceased with a knife, after he had stabbed him. As I said, he was defending himself. He chased him out of the yard so that he could make sure that he was completely out of his yard.'

[5] A second witness testified that he did not see the stabbing but spoke to the accused directly after the incident. The accused was crying and told him that he had stabbed the deceased but did not explain why. It was common cause that a knife was taken from the accused. The State closed its case after leading this evidence and the accused made an application for discharge in terms of s 174 of the CPA, which discharge was granted by the magistrate.

[6] It is clear that the magistrate was called upon to exercise discretion in considering whether to grant the discharge of the accused. It is so, as the DPP argued, that the killing of another human being is *prima facie* unlawful and the accused admitted that he was the person who caused the death of the deceased.

[7] The submissions of the DPP in this regard cannot be faulted. In *S v Manona*,⁶ Kruger AJ held:

'An assault and killing of a human being is an action which is *prima facie* unlawful. Once it becomes common cause that the accused has assaulted or killed the deceased or the victim in self-defence, an evidential burden is placed on the accused to rebut the *prima*

⁶ 2001 (1) SACR 426 (Tk) at 427f-g.

facie presumption of unlawfulness. In such cases a discharge under s 174 cannot be granted.'

The decision in *Manona* is also in accordance with *S v Ostilly*:⁷

'As will be seen, when I turn to consider the facts, the evidence tendered by the State on disputed issues is largely circumstantial. With reference to such evidence, one must consider at this stage whether a reasonable man might, not should, draw the inference sought to be drawn by the State. I respectfully agree with the reasoning and observations in the recent case of *S. v Cooper and Others*, 1976 (2) SA 875 (T) at pp. 888 - 890, on this question and with the concluding remark that:

"if there is more than one inference possible from the facts assumed to be uncontradicted at the close of the case for the prosecution, then that is just the sort of evidence that should be referred to the triers of fact for decision."

[8] The question remains whether the magistrate in the exercise of his discretion, even if he erred, committed a gross irregularity in the proceedings.⁸ In *S v Nabolisa*⁹ the Constitutional Court held:

'An irregularity is a wrongful or irregular deviation from the formalities and rules of procedure aimed at ensuring a fair trial. In *S v Jaipal* irregularities were described as deviations from: "what one would regularly expect in a properly conducted criminal trial".'

In *S v Bogaards*,¹⁰ Khampepe J, writing for the majority of the court, said:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

⁷ 1977 (2) SA 104 (D) at 107B-D.

⁸ Section 221(c) of the Superior Courts Act.

⁹ 2013 (2) SACR 221 para 24.

¹⁰ 2013 (1) SACR 1 (CC) para 41.

The question to be answered is therefore whether there was a failure of justice or whether the court misdirected itself to such an extent that the decision on the discharge of the accused is vitiated.

[9] A discretionary power must be exercised according to certain minimum standards or judicially and not arbitrarily or capriciously. In *Nathan Bros v Pietermaritzburg Corporation*,¹¹ Finnmore J referred with approval to what was said by Lord Halsbury in *Sharp v Wakefield*.¹²

"Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice not according to private opinion: . . . according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.'

[10] One such minimum standard which prescribes the exercise of a discretion is that referred to in *Manona*. A failure to comply with the rules results in a failure of justice and an unreasonable order which is a gross irregularity in the proceedings.

[11] In my view, the facts of the case are such that no reasonable presiding officer could have granted a discharge. The deviation from the norm is such that one would not have expected it in a properly conducted criminal trial.¹³

[12] The magistrate incorrectly concludes in his reasons for judgment that the State wanted the accused to give evidence in order to incriminate himself – something which the law will not countenance. The legal representative for the accused aligned himself with this argument. But that is not the aim of the State. The aim is to allow the accused the opportunity to discharge his evidential burden because without doing so, the only inference to be drawn from the facts is that the accused unlawfully killed the deceased¹⁴ and that he is guilty of murder. The giving of viva voce evidence by the accused is not the only manner in which an accused can discharge the evidential burden and the

¹¹ (1902) 23 NLR 108 at 128.

¹² [1891] AC 173 at 179.

¹³ *S v Jaipal* 2005 (1) SACR 215 (CC) para 44.

¹⁴ *Manona* ibid.

argument on behalf of the accused and the reasons furnished by the magistrate miss this fact.

[13] In these circumstances, the magistrate's decision to discharge the accused at the end of the State's case contrary to legal precedent, was such an error of law that it constituted a gross irregularity in the trial and it prejudiced the State and should be set aside.

[14] 'The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of *autrefois acquit* in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity.'¹⁵

This results in the right of the State to charge the accused again and the question of double jeopardy as stated in s 35(3)(m) of the Constitution does not arise.

[15] The Superior Courts Act is silent regarding the court's powers when reviewing a decision under s 24. However, s 173 of the Constitution allows this court to protect and regulate its own process and to develop the common law, taking into account the interests of justice. The usual orders by courts when proceedings are vitiated seek to allow for the same proceedings to be initiated again in the stead of the proceedings which have been set aside. Due to the untenable finding of the magistrate it is my view that the matter cannot proceed before the same magistrate and the entire proceedings should be set aside and the matter is to commence *de novo* before another magistrate.

[16] In these circumstances, the following order is issued:

1. The decision of the magistrate to discharge the accused in terms of s 174 of the Criminal Procedure Act 51 of 1977 is set aside.
2. The proceedings before the magistrate are set aside.

¹⁵ *S v Basson* 2007 (1) SACR 566 (CC) para 255.

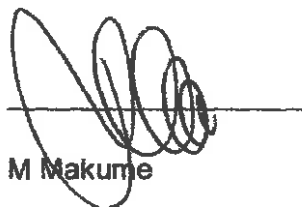
3. The trial is to commence de novo before another magistrate.

A handwritten signature in black ink, appearing to be 'W L Wepener', written over a horizontal line.

W L Wepener

Judge of the High Court

I agree.

A handwritten signature in black ink, appearing to be 'M Makume', written over a horizontal line.

M Makume

Judge of the High Court

Counsel for Applicant: N Muller

Attorney for the Second Respondent: Mr P Mokoena