A583/14

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

14/8/2014

High Court Case No: 14/227/2012
Magistrate Case No: H48/2012

In the matter between:

The State

and

Poppy Unisi Dladla

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

6/8/2014
DATE

SIGNATURE

REVIEW JUDGMENT

Maumela J.

1. This matter came before court as a Special Review in terms of section 304A of the Criminal Procedure Act 1977: (Act No 51 of 1977), "Criminal Procedure Act". The said section shall hereinafter be referred to as "section 304A". The accused, Poppy Unisi Dladla, an adult female, was aged 20, and was legally represented, when she appeared before the Regional court Mamelodi in the Regional division of Gauteng.

2. She was charged with Attempted Murder. The allegations are that upon or about the 5th March 2011, at or near Pretoria, in the Regional Division of Northern Gauteng, the accused did unlawfully and intentionally attempt to kill Jonas

Makanye, a male person by stabbing him with a knife.

3. Protracted delays necessitated a full enquiry, held in terms of section 342 (A) of the "Criminal Procedure Act", on the 11th July 2012. The state was found to have caused unreasonable delays. Captain Makhoto told court that an enquiry is to be held into the conduct of Warrant Officer Mdobe as a possible cause of the delays. The accused pleaded not guilty. She opted not to disclose the basis of her defence in terms of Section 115 (1) of the "Criminal Procedure Act". The state started leading evidence.

4. Still on the 11th of September 2012, while the trial was underway, the state raised a point *in limine*. The state raised issue with the failure on the part of the court to inform the accused before she pleaded that she may opt for assessors to be included in the constitution of the court that would try her. It moved that the case be referred to the High Court for purposes of an order for proceedings to start *de novo*.

5. In referring the case for review, both the state and the magistrate took into consideration the provisions of section 93*ter* of the Magistrates' Courts Act[1], hereinafter referred to as "section 93*ter*". It provides as follows:
"The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-
(a). before any evidence has been led; or
(b). in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the

[1]. Act No 32 of 1944.

trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in any regional court on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.

6. Review is a procedure designed to ensure that those who appear before lower courts are not subjected to judicial decisions which bring injustice to bear, which are preceded by procedure that are flawed, or which are a result of irregularities. "Section 304A" provides as follows:

(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303[2].

[2] . Of the "Criminal Procedure Act" supra.

7. Section "304A (b)" provides further as follows:

(b) When a magistrate or a regional magistrate acts in terms of paragraph *(a)*, he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.

8. *In casu*, section 304A (b) was complied with. Note should be taken that in couching "section 93*ter*" specifically in section 93*ter (1) (b)*, the legislature employed peremptory language in providing for assessors to be appointed where an accused is charged with murder before the regional court. As a result, where the magistrate fails to comply with the section, the regularity or otherwise of the procedure of the proceedings comes into question, hence this special review.

9. The magistrate cited the case of S v Naicker[3], to substantiate his contention. This case deals with the two well-known types of irregularity that one finds in criminal proceedings, as set out by Holmes JA. In that case, the court came to the conclusion that failure to appoint assessors in terms of section 93*ter*[4] does not constitute such an irregularity as would render the proceedings *per se* failure of justice. The court held that *"such failure fell into the first category, and that the irregularity was not so fundamental that it in fact amounted to a per se failure of justice".* The court stated the following in paragraph 61*h*: *"Having regard to the purpose and the history of the system of trial by assessors in the lower courts as briefly stated above, it is my considered*

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[3]. 2008 (2) SACR 54 (N).
[4]. Of the Magistrates Court Act.

opinion that despite the peremptory manner whereby the proviso to section 93ter (1) (a) has been couched, failure to comply therewith is not so serious and fundamental as per se to vitiate the proceedings. To borrow from the American nomenclature, such an irregularity may be subjected to a harmless error analysis".

10. Another decision which also deals with the provisions of "section 93*ter* (1) (a)" is S v Du Plessis[5]. That decision is in direct contrast with the one in S v Naicker above. In the Du Plessis decision, the court held that *"a trial court has no discretion whether or not to do with or without assessors in a murder trial, unless the communication with the accused or his legal representative indicates that the court is relieved of the duty to appoint assessors.* It was held that failure to comply with section 93*ter* (1) (a)[6] results in an irregularity *per se,* which cannot be waved or condoned by the accused or his legal representative. Consequently, it held that such an irregularity constitutes a failure of justice.

11. The magistrate in the court *a quo* aligns himself with the decision in S v Naicker[7]. On that basis, he contends that despite his failure to appoint assessors, no irregularity *per se* has occurred which constitutes a failure of justice. He views that this case should be ordered to proceed further before the court *a quo*. He views that this court should consider that several witnesses have already testified in this case. According to him, in this case no considerable prejudice could be caused by the continuation of proceedings without any assessors. The court shall seek to address questions

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[5]. 2012 (2) SACR 247 (GSC).
[6]. Of the Magistrates Court Act Supra.
[7]. Supra.

raised by the magistrate in his submissions. He raised the following questions:

10.1. Can this court entertain this mater as a review in terms of section 304A of the "Criminal Procedure Act", despite the fact that the accused had not yet been convicted?

10.2. The verdicts in the cases of S v Naicker and S v Du Plessis above are diametrically in contrast with one another. S v Naicker is a decision of the Natal Provincial Division. S v Du Plessis is a decision of the Gauteng provincial Division. Is it correct for the magistrate Mamelodi to align himself with the decision in S v Naicker and not with that in S v Du Plessis? and,

10.3. Does the request of the magistrate in Mamelodi, for the proceedings in this case to be set aside, stand to be granted or to be refused?

A. CAN THIS COURT ENTERTAIN THIS MATER AS A REVIEW IN TERMS OF SECTION 304A OF THE "CRIMINAL PROCEDURE ACT", DESPITE THE FACT THAT THE ACCUSED HAD NOT YET BEEN CONVICTED?

12. According to section 304A[8] proceedings of the Magistrates Court may, after conviction, albeit before sentence, be referred to the High Court for review if the magistrate is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice. In this case, conviction had not happened. The magistrate had not even informed the accused of his right to exercise an option regarding whether or not she wants assessors

[8] . Of the "Criminal Procedure Act".

included in the constitution of the court trying her.

13. In Magistrate, Stutterheim v Mashiya[9], the court stated as follows:

"That the higher courts have supervisory power over the conduct of proceedings in the magistrates' courts in both civil and criminal matters is beyond doubt. This includes the power to intervene in unconcluded proceedings. This Court confirmed more than four decades ago that the jurisdiction exists at common law[10]. It subsists under the Constitution, which creates a hierarchical court structure[11] that distinguishes between superior and inferior courts by giving the former but not the latter jurisdiction to rule on the constitutionality of legislation and presidential conduct as well as inherent powers[12]. The Constitutional Court has emphasised the role of the higher courts in ensuring 'quality control' in the magistrates' courts, and the importance of the High Court's judicial supervision of the lower courts in reviewing and correcting mistakes[13]. This entails, as Chaskalson CJ has observed, that the higher courts can 'supervise the manner in which' the lower courts discharge their functions[14]. His general formulation echoes the provisions of the Criminal Procedure Act, which provides that in criminal proceedings subject to review in the ordinary course the High Court may, amongst many ample powers, 'remit the case to the magistrate's court with instructions to

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[9]. 2004 (5) SA 209 (SCA), at Para [13], at 214 F – 215 C.
[10]. Walhaus & others v Additional Magistrate, Johannesburg & Another 1959 (3) 113 (A) 119 – 120.
[11]. Section 116 of the Constitution.
[12]. Section 173.
[13]. S v Steyn 2001 (1) SA 1146 (CC) at para [17] [19] Madlenga AJ.
[14]. Van Rooyen & Another v State & Another 2002 (5) SA 246 (CC), at para 19.

deal with any matter in such manner as' it may think fit"[15].

14. The magistrate in Mamelodi holds the view that proceedings in this case should be ordered to continue before the magistrates court. He concedes that his failure to observe "section 93*ter*" amounts to an irregularity. He states that the irregularity was due to an oversight on his part. But he points out that it was also incumbent upon the state and the defence counsel to ensure the appointment of assessors. However, he does not state that he engaged the accused, whose responses rendered it no longer imperative for him to appoint assessors. He points out further that "section 304A" creates a procedure which becomes applicable only after conviction.

15. In ***S v Msitshama*** *and Another*[16], the accused's conviction was set aside on two procedural grounds within the trial. The first was that the accused were unrepresented, and secondly the problem was that the trial had taken place without assessors. It was held that the magistrate apparently misconceived the role of assessors in his failure to have any appointed. The magistrate in that case believed that the purpose of lay assessors is to assist the court inter-alia, in the issue of different cultures. This was clearly held by the court to be a wrong perception. It was held that assessors help the court in forming the quasi-traditional role played by members of the community in the trial of persons accused of criminal offences. This object is pursued in other jurisdictions by the institution of the jury. The court went on to explain the advantages of assessors. To that end the court stated that a single judge sitting in a criminal trial may benefit from the

[15]. Section 303 of the CPA.
[16]. [2000] JOL 7074 (W).

ability to discuss difficulties which arise during the course of the trial. Hence in the High Court, in matters where a life sentence or long sentence of imprisonment may follow a conviction, judges invariably have assessors to assist them. The court held that the failure by the magistrate to give consideration constitutes a serious irregularity.

16. The decision in Stutterheim v Mashiya[17] supports the view that irregularities which visit criminal proceedings can be dealt with through review in terms of "section 304A" even in instances where conviction has not yet happened. In that case it was also common cause between the state and the defence that the appellant was convicted and sentenced without assessors being appointed, notwithstanding the fact that the appellant was arraigned on a charge of murder. Neither was the accused approached by the magistrate to enquire whether or not he wishes assessors to be appointed. It was conceded by counsel for the state that the failure constituted an irregularity. The court held at paragraph 57 (i) as follows: *"There can be no doubt that the provisions of the proviso to section 93ter (1) (a) are couched in peremptory terms and therefore failure by the court a quo to apply the said provisions in the situation in which the requisite jurisdictional facts were present amounted to an irregularity.*

17. This court views that it would not be correct for irregularity or injustice to be visited on the accused in this case merely because proceedings in the case were referred to the High Court for review in terms of section 304A before conviction. At the same time, no useful purpose shall be served if the case reverts back to the court *a quo,* just to have it proceed

[17] . Supra.

beyond conviction before it is referred to the High Court again for review. This court holds therefore that it may review this case in terms of "section 304A", despite the fact that he accused had not yet been convicted.

B. WAS THE REGIONAL MAGISTRATE CORRECT IN OPTING TO FOLLOW THE PRECEDENCE IN S v NAICKER, AND NOT THE ONE IN S v DU PLESSIS?

18. In S v Malindi and Others[18], the court emphasised the importance of the appointment of assessors in terms of s 145 of the "Criminal Procedure Act". The court further stated that such assessors are for all intents and purposes officers of the court. South African case law adheres to the doctrine of *stare decisis*. This doctrine is named in *Latin*. Loosely translated into English, it means: *"stand by a decision"*, or *"Let the decision stand"*. It entails that where facts are similar, in making decisions, courts are bound by previous decisions. In this case a magistrate in Mamelodi, within the Gauteng Provincial Division, contends that he is entitled to abide by a decision of the Natal Provincial Division, to the exclusion of a decision by the Gauteng Provincial Division, under whose jurisdiction his court is. The magistrate concedes that the doctrine of stare decisis applies in South Africa.

19. In line with the doctrine of *stare decisis*, a decision by the Appellate Division is binding upon all subordinate courts in South Africa[19], A provincial division of the High Court is bound by its own decisions[20], unless clearly a mistake was

[18]. 1990 (SA962 (A), at page 970G.
[19]. See Collet v Priest 1931 AD 298 AD 298.
[20]. R v Manasewitz 1933 AD 170.

made[21]. Such decisions are also binding upon a local division of the High Court[22], and on a single judge in the same province[23]. A single judge in a province is bound by a decision of a single judge in the same province unless he is completely satisfied that the former decision was incorrect[24]. A provincial division is not bound by the decision of another provincial division[25] and a single judge in one province is not bound by the decision of a division in another province[26].

20. Inferior courts, such as Magistrate's Courts, have limited jurisdiction and are bound by decisions of any division of the High Court. A magistrate's court must therefore adhere to decisions made by the High Court for the province in which the particular magistrate's court is situated. If no relevant decision exists as regards a specific circumstance, and a decision regarding such a circumstance was made by a High Court in another province, the magistrate will then follow that decision. The *stare decisis* doctrine thus implies that the decision made by a court is binding upon the court which actually pronounced the judgement as well as on all courts subordinate to that court.

21. This court views that the regional magistrate in Mamelodi, who presided in this case failed to comply with the *stare dicisis* doctrine in failing to comply with s 93*ter* (1)(a). Considering that the regional court in Mamelodi is bound by the decisions of the Gauteng Provincial Division, it means therefore that the decision in S v Du Plessis[27] is binding on

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[21]. R v Phillips Dairy (Pty) Ltd 1955 (4) SA 122 (T).
[22]. Hughes v Savvas 1931 WLD 237.
[23]. Farmers Representatives v Bonthuys 1930 CPD 135.
[24]. Ex Parte Hansman 1938 WLD 90.
[25]. Lobley v Lobley 1940 CPD 434 47.
[26]. Levitt v Schwartz 1938 CPD 47.
[27]. Supra.

that regional court. This court finds that the magistrate in the regional court in Mamelodi misdirected himself in failing to follow the precedence in S v Du Plessis[28] and adhering to that in S v Naicker[29].

C. DOES THE REQUEST OF THE MAGISTRATE IN MAMELODI, FOR THE PROCEEDINGS IN THIS CASE TO BE SET ASIDE, STAND TO BE GRANTED OR TO BE REFUSED?

22. Relevant to this review, *"section 93ter" (1) (b)* which is quoted under paragraph 5 provides as follows: (b) *"In considering a community-based punishment.....: Provided that if an accused is standing trial in any regional court on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.*

23. Also relevant to this review, "section 304A", sub-section (a), which is cited under paragraph 6 above provides that where *"a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the*

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[28]. Supra.
[29]. Supra.

proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303[30]".

24. In this case the accused was charged with "Attempted Murder", and not "Murder". In peremptory terms, *"Section 93ter" (1) (b),* provides for the appointment of assessors where an accused is charged with Murder before the regional court. With regard to the Law of Interpretation of statutes, South African Law recognizes the expression: *"Expressio unius est axclusio alterius"*. The essence of this expression entails that where there are two possible interpretations of a phrase or a word in a statute, the express mention of one of the possibilities excludes the use of the other. This maxim of construction was applied in the case of *South African Estates and Finance Corporation Ltd v Commissioner For Inland Revenue*[31]. The court, approved the application thereof in relation to s 45(*f*) of the Income Tax Act 41 of 1917.

25. *In "section 93ter" (1) (b),* the appointment of assessors is prescribed only for instances involving the charge of Murder, and not "Attempted Murder". No prospects of injustice being visited on the accused loomed since *"section 93ter" (1) (b) only prescribes for the appointment of assessors where* the appointment of assessors is rendered compulsory where the charge preferred is "Murder". It was therefore not even necessary to refer this matter for review. The court makes

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[30]. Of the "Criminal Procedure Act" supra.
[31]. 1927 AD 230.

the following order:

ORDER.

1. Proceedings in Mamelodi Regional Court case number: H48/2012 can be reviewed in terms of section 304A of the "Criminal Procedure Act" despite the fact that the accused has not yet been convicted.

2. The application for proceedings in the above case to be set aside is refused.

3. Case number: H48/2012 is ordered to be remitted back to the Mamelodi Regional Court for the proceedings to continue before the same magistrate.

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Maumela J.
Judge of the High Court of South Africa.

I agree.

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Raulinga J.
Judge of the High Court of South Africa.

IN THE ORDINARY COURSE OF EVENTS.