A718/14

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/ NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
29/09/2014 DATE — SIGNATURE

REVIEW NO: 481/2014

DATE: 30/09/2014.

IN THE MATTER BETWEEN

THE STATE

AND

AUFANE AGES MOKGOTLANE

REVIEW JUDGMENT

KOLLAPEN J:

1. The accused was convicted in the Magistrate's Court, Klerksdorp, of housebreaking with intent to commit a crime unknown to the State. The case was subsequently transferred to the Regional Court for sentence in terms of Section 116(1)(b) of Act 51 of 1977 because the previous convictions of the accused were such that it merited punishment in excess of the jurisdiction of the Magistrate's Court.

2. Upon receipt of the record, the regional Magistrate was, however, of the view that the proceedings were fatally flawed and he requested the Magistrate to furnish reasons in terms of section 116(3)(a) of Act 51 of 1977. This the Magistrate failed to do so that the Regional Magistrate was compelled to submit the record for review without the said reasons.

3. The aspects raised by the regional Magistrate which caused him to doubt that the proceedings were in accordance with justice are procedural in nature and do not relate to the merits of the conviction. In fact, the State had a strong case against the accused and the conviction itself cannot be faulted.

4. The irregularities referred to by the Regional Magistrate are the following:

4.1 That the Magistrate had earlier presided in the bail application of the accused, where his previous conviction had been disclosed.

4.2 That the accused pleaded to the same charge on two separate occasions. On the first occasion he elected to remain silent, but on the second occasion he was questioned by the Magistrate in terms of section 115(2) of Act 51 of 1977.

4.3 The State called a witness to testify. He was sworn in and started to give evidence, but he was then stopped and excused when the accused terminated his attorney's mandate. When the matter resumed later, another witness took the stand.

4.4 Lastly, the Magistrate applied the cautionary rule relating to single witnesses to the evidence of the accused.

5. The matter was referred to the office of the National Director of Public Prosecutions who in a most useful memorandum, took the view that the various irregularities that occurred should have as their result the setting aside of the conviction and sentence, and a referral of the matter back to the Magistrate's Court for a trial *de novo* to start before a new Magistrate.

6. As a general rule a High Court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a lower Court. A superior Court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its powers to rare cases where grave injustice might otherwise result or where justice might not by other means be attained (see Ismail and Others v Additional Magistrate, Wynberg and Another 1963 (1) SA (AD); Wilhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119G).

7. In this matter however the proceedings relating to the merits were concluded and the alleged irregularities were identified when the matter came before the Regional Magistrate for sentencing. My view is that the circumstances that present themselves justify a departure from the general rule referred to in order to prevent an injustice from being committed. In addition and given the concerns of the Regional Magistrate, it is inconceivable how he would proceed with sentencing under circumstances where considerable doubt exists regarding the correctness of the conviction.

8. Our Courts have traditionally drawn a distinction between two types of irregularities. The first is of such a magnitude that an injustice *per se* results and would apply in instances where there was such a gross departure from the rules of elementary justice that it could be said that no proper trial took place. What is also required is that the irregularity must have resulted in real and not only potential prejudice (see ***S v GABA* 1985 (4) SA 734 (A)** at 750G). A failure of justice was defined in ***S v JAIPAL* 2005 (4) SA 581 (CC)** as an irregularity which violates the constitutional guaranteed right to a fair

trial. On the other hand, the irregularity may be of such a nature that it does not preclude a consideration of the merits of the case.
(see ***S v MOODIE* 1962(1) SA 587 (A)** and compare ***S v NAIDOO* 1962 (4) SA 348 (A)** at 354 D-F)

9. Some of the irregularities referred to by the Regional Magistrate clearly fall into the latter category. Moreover, given the strength of the State's case *in casu*, the accused can at most only complain of potential prejudice.

10. The same considerations also apply in relation to the witness Mr Petrus Lourens van Rensburg whose evidence was interrupted by the accused's conduct. He later gave evidence in full. If it is indeed an irregularity that he did not testify immediately after the resumption of the case on 12 February 2014 (which is debatable), at the very least the accused suffered no prejudice.

11. More problematic is the fact that the accused was required to plead a second time after the first plea had already been recorded. There is no doubt that this is an irregularity. On the other hand, it is difficult to see how he was prejudiced thereby. What is far more serious, however, is that although the accused had already on two separate occasions stated that he did not wish to disclose his defence at that stage, the Magistrate put pressure on him to do so when she asked him whether he was prepared to reply to questions put by the Court.

12. In our courts it has been long established that it constitutes an irregularity for a presiding officer to be informed of previous convictions of an accused person before he or she is convicted. Such an irregularity would have the effect of nullifying the proceedings as a whole (See ***S v MAVUSO* 1987 (3) SA 499 (A)**.

13. Section 35(3)(h) of the Constitution states in this regard that 'Every accused person has the right to a fair trial which includes the right...to remain silent...'. It has been held that although a court may question an accused in terms of section 115(2) of Act 51 of 1977, it may only do so if it also explains to him

that he is under no obligation to answer questions put to him by the Court. This, the Magistrate failed to do.
(see ***S v EVANS* 1981 (4) SA 52 (KPA)** at 55D and ***S v RAMOKONE* 1995 (1) SACR 634 (O) at 636g**)

14. The Magistrate also presided in the earlier bail application of the accused. That in itself is not an irregularity but there is an express provision in the Act to the effect that previous convictions shall not form part of the trial proceedings – S60 (11B)(c) of Act 51 of 1977.
In ***S v THUSI AND OTHERS* 2000 (4) BCLR 433 (N) at 437 G-H** the following was said:

> 'Prima facie*...there can be no objection to the Magistrate who hears an application for bail presiding at the trial of the accused who so applied. In my view, however, if in the course of a bail application an applicant for bail discloses, as he is obliged to do so, that he has relevant previous convictions or charges pending against him, there is every objection to the same Magistrate both hearing the bail application and presiding at the trial, for in that event the accused's right to a fair trial might well be compromised.*'

15. There are of course, a number of sections in the Criminal Procedure Act 51 of 1977 which are designed to prevent a presiding officer from learning of the accused's previous convictions before judgement. They are sections 89, 197(d), 211 and 271 of the Act. Where such knowledge is acquired by a presiding officer he or she should ordinarily recuse him or herself. (**See *S v KHAMBULE* 1991 (2) SACR 277(W)**. .
In ***S v BRUINDERS* 2012 (1) SACR 25 (WCC)** the conviction was set aside on appeal because of the Magistrate's failure to do so. The following was said:

> *'(I)t is inimical to an accused's constitutional right to a fair and impartial trial for him or her to be tried by the same presiding officer*

who has previously presided over a bail hearing at which the various factors and considerations outlined above have been traversed. This will especially (but not only) be the case in opposed bail applications. Even in the course of an informal application for the bail made by an accused without opposition from the State, it is not inconceivable that the court may become privy to information pertaining to the accused's person or character-such as information pertaining to his previous convictions or to his disposition to violence or to commit crime- or to other information, which may subconsciously prejudice an accused in the mind of the court... In my view, because of this, judicial officers who have presided over such bail applications should ordinarily recuse themselves from presiding over the subsequent trial of the accused, in the interests of the maintaining the integrity of the proceedings and upholding the accused's constitutional right to a fair trial.'

16. In ***BRUINDERS*** (*supra*) the precise knowledge that the presiding officer acquired during the bail hearing was not known. In this matter, though, it is known that the Magistrate was informed of the accused's background and the nature of evidence against him during the application for bail because she stated that the accused had 'many previous convictions just similar to this offence' and that 'the State case appears to be strong, because you were found red handed at the premises.' This provides clear evidence of the actual knowledge the Magistrate had acquired of the accused's previous convictions.

17. In the circumstances, the cumulative effect of the various irregularities must have the effect of rendering the trial of the accused before the Court *a quo* unfair in particular the failure by the learned Magistrate to recuse himself, given that he had presided over the bail hearing, had become privy to the accused's previous convictions and had expressed a view on the involvement of the accused in the crime in question.

18. In the circumstances an appropriate order would be to set aside the conviction and sentence of the accused and refer the matter back to the Office of the National Director of Public Prosecutions.

ORDER

19. I accordingly make the following order:

    i. The conviction of the accused is set aside;

    ii. The matter is referred back to the office of the National Director of Public Prosecutions for their further consideration.

N KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE,

N V KHUMALO
JUDGE OF THE HIGH COURT

IT IS SO ORDERED.