

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A277/16
Date: 5/5/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
26/4/2016
DATE SIGNATURE

THE STATE V GEORGE CHAUKE

HIGH COURT REF. NO. :128/2016
MAGISTRATE'S SERIAL NO. :
MAGISTRATE'S CASE NO. :14/227/16

REVIEW JUDGMENT

PRETORIUS J.

- (1) This matter came before me in chambers as a special urgent review.
- (2) The accused, who was legally represented, was charged in the

Pretoria Magistrate's Court on 18 February 2016 on one count of theft. It is alleged that he stole thirteen padlocks and one packet of mince on 15 November 2015 from Shoprite, Sunnyside.

- (3) He pleaded not guilty and declined to provide a plea explanation in terms of section 115 of the **Criminal Procedure Act**¹. He was convicted on 18 February 2016 by the Magistrate. Upon conviction the presiding officer transferred the case of the accused to the Regional Court for sentence in terms of section 116(1)(a) of the **Criminal Procedure Act**. This section provides that, if the presiding Magistrate, after conviction on a plea of not guilty, but before sentence, is of the opinion that the crime the accused had been convicted of, is such that it merits punishment in excess of the jurisdiction of the Magistrate's Court, the court must stop proceedings and commit the accused to the Regional Court having jurisdiction.
- (4) It is thus clear that the Magistrate used the incorrect section of the **Criminal Procedure Act** when referring the case to the Regional Court for sentence. It should have been referred to the Regional Court in terms of section 116(1)(b), after the previous convictions of the accused was taken into account.
- (5) The Regional Court Magistrate who dealt with the matter submitted it

¹ Act 51 of 1977

to the High Court for review due to the fact that she was of the opinion that the proceedings in the Magistrate's Court was not in accordance with justice.

- (6) The Regional Court Magistrate made certain comments regarding whether the proceedings were in a accordance with justice in the court *a quo*. She mentioned that, in the ordinary course of events, she would enquire from the Magistrate to provide reasons for her convicting the accused. The Regional Court Magistrate however decided in this instance that the record of proceedings speaks for itself and that it would only delay proceedings to request reasons from the Magistrate, before sending it to a Judge in chambers.
- (7) I requested the Director of Public Prosecutions ("DPP") to consider the record and to provide me with an opinion on an urgent basis. The court is indebted to the DPP for submitting an opinion overnight.
- (8) The DPP confirmed that, in his opinion, the proceedings were not in accordance with justice. The State relied on the evidence of a single witness, a security guard at Shoprite in Sunnyside. He testified that he had seen the accused taking three master locks from the shelf and put it into his pocket.
- (9) Contrary to this evidence he had stated in his affidavit that he had

seen the accused taking thirteen master locks and mince from the shelf and that he had seen him put it in his pocket.

- (10) In his evidence he did not state that he had seen the accused taking the mince from the shelf, but only that the mince had fallen from somewhere when the accused was apprehended. In the written statement he did not mention that the mince had fallen from the accused's clothing or body. The witness failed to give conclusive evidence as to the ownership of the mince. It is evident that there were discrepancies in his evidence. The accused applied for his discharge in terms of section 174 of the **Criminal Procedure Act** and when this application was refused the accused closed his case without giving evidence.

- (11) In **S v Sauls and Others**², Diemont JA dealt with the evidence of a single witness:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPF JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the

² 1981(3) SA 172 (A) at page 180 E-G

testimony, he is satisfied that the truth has been told."

- (12) The evidence of a single witness must be approached with caution. In this case there are material discrepancies and contradictions by the single witness, the security guard. It is eminently clear that the witness' evidence and his prior affidavit differ in material respects. It is also important to note that, according to the witness, two other security guards saw him apprehending the accused, but the State failed to call these witnesses. It cannot be said that the witness' evidence is clear and satisfactory in all material respects. The *dictum* of **S v Webber**³ set out that the evidence of a single witness must be approached with caution. In this instance it is clear from the record that the single witness' evidence cannot be relied on.
- (13) Section 35(3) of the **Constitution**⁴ provides that "*every accused person has a right to a fair trial*" which includes the right "*to be presumed innocent, to remain silent, and not to testify during the proceedings*" in terms of section 35(3)(h). There can be no adverse conclusion reached due to the accused's choice to not give evidence and to remain silent at the close of the State's case.
- (14) The prosecution has to prove the guilt of an accused beyond a reasonable doubt. The DPP agreed with the Regional Magistrate that

³ 1971(3) SA 754 (A)

⁴ Act 108 of 1996

the State has not proved the case against the accused beyond reasonable doubt and that the proceedings should be set aside.

- (15) The question is whether this court has the inherent power to set aside the conviction.
- (16) In **Magistrate Stutterheim v Mashiya**⁵ Cameron JA emphasised that higher Courts should only intervene in unconcluded proceedings in lower courts in exceptional circumstances “*where grave injustice threatens, and where intervention is necessary to attain justice*”. In **Wild and Another v Hoffert NO and Others**⁶ Kriegler J held that “*presiding officers are duty bound to counteract all manifestations of unnecessary delay in bringing criminal cases to finality*”.
- (17) This is exactly what the Regional Court Magistrate had in mind when referring the review to this court on an urgent basis. I find that this case is of such a nature that a grave injustice will result if this court does not deal with the matter in this fashion, as the accused is in custody.
- (18) This is an exceptional case where it will be in the interest of justice to accede to the Regional Court Magistrate’s request to set aside the proceedings by the inherent power which the court has and applying

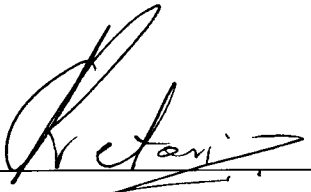
⁵ 2003(2) SACR 106 (SCA) at paragraph 14

⁶ 1998(3) SA 695 at paragraph 29

the principles as set out in the authorities. An order was sent for the immediate release of the accused, before judgment was delivered.

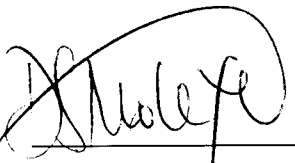
(19) In the result, the following order is made:

1. The proceedings to date in the court *a quo* in case number 14/227/2016 are reviewed and set aside.



Judge C Pretorius

I agree.



Judge D S Molefe