REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

REV32/2022

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

In the matter between:

THE STATE

And

ROUTLY MATOME SEEMA **1ST ACCUSED**
SAMMYSON MAPESA SEKWALA **2ND ACCUSED**

JUDGEMENT

KGANYAGO J

[1] The two accused appeared before A Swanepoel the regional magistrate Seshego on one count of murder read with the provisions of section 51(2) Schedule 2 Part II of the Criminal Law Amendment Act 105 of 1997, and one count of assault with intend to do grievous bodily harm. Both accused were legally represented throughout the trial. Both accused were made to plead only on count 1, and

thereafter the State proceeded to call its first witness who was sworn in, and commenced giving evidence. During the course of the evidence in chief by the State's first witness, the State realized that the two accused have not pleaded on count 2. The parties agreed to refer the matter to this court on special review.

[2] When this matter was laid before me as a special review, I requested the comments of the Deputy Director of Public Prosecutions (DDPP). The comments of the DDPP were helpful and I am indebted to them. According to the DDPP the wording of section 105 of the *Criminal Procedure Act*[1] (the Act) is peremptory and that it require the accused to plead to the charge put to him before evidence is led, and that the magistrate cannot rectify an oversight for failure to comply with that section. The DDPP is of the view that the proceedings be set aside, and the matter be tried *de novo* before a different magistrate.

[3] Section 105 of the Act provides as follows:

> "The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85, and 105A, be required by the court forthwith to plead thereto in accordance with section 106."

[4] In *S v Gumbi*[2] Ponnan JA said:

> "In terms of s 105 the charge must be put to an accused by the prosecutor before the trial is commenced. As soon as the charge is put to an accused he or she must plead to it. The plea determines the ambit of the dispute between the accused and the prosecution. It is only after the accused has pleaded to the charge that the *lis* is established between the accused and the prosecution. It is the function of the prosecuting authority, not the court, to decide the charges upon which an accused should be brought to trial and the function in that regard extends up to the time when a plea is tendered and the decision has to be made whether the plea is to be accepted or not.

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[1] 51 of 1977
[2] 2018 (2) SACR 676 (SCA) at 682j-683d

The acceptance of the plea by the prosecutor at the commencement of the trial is –

'a sui generis act by the prosecutor by which he limits the ambit of the lis between the State and the accused in accordance with the accused's plea…. That the lis is restricted by the acceptance of the plea appears from ss 112 and 113. The proceedings under the former are restricted to the offence "to which he has pleaded guilty" and the latter must be read within that frame.'"

[5] In *S v Moses*[3] Binns-Ward J said:

"Paragraph 7 of the judgment of the Supreme Court of Appeal in S v Mamase and Others (1) SACR 121 (SCA), to which reference was made in ZW in the passage quoted earlier, does not hold that s 105 is peremptory in the sense that it is essential that it be complied to the letter. The judgment holds that a plea process in criminal proceedings is peremptory in terms of s 105, which is something different. The appeal court made that observation in the context of determining when a trial commences. Its determination was that the effect of s 105 (and s 106, which prescribes the nature of the various types of plea that an accused may plead) is that a criminal trial does not commence until the accused pleads to the charge(s). To use an analogy from the civil procedure, *litis contestatio* is not obtained, and the case is not triable, until the accused has pleaded."

[6] The accused plea will give the prosecution direction of what evidence to lead in order to secure its intended conviction. The court will not be in a position to pronounce whether the accused is guilty or not without the accused having pleaded to the charge. In the case at hand, even though both charges were put to the accused, the accused pleaded only to count 1 and the magistrate also noted the plea on count 1. Thereafter the State started leading evidence by calling its first witness. It was only during the middle of the evidence of the first State witness that the prosecutor realised that the accused have not pleaded on count 2. It seems the

[3] 2019 (1) SACR 75 (WCC) at para 14

same witness who was busy testifying about count 1, will also have to cover count 2 in his testimony.

[7] Since the accused have not pleaded on count 2, the easy route to follow will be for the State to proceed on count 1 to finality, and later separately proceed with count 2. However, that route will be undesirable, prejudicial to both parties and costly as the same witnesses will have to come back and relate the same evidence that they have already tendered. The magistrate who had already dealt with count 1 will have to recuse herself as she would have already made a pronouncement on count 1. Even though the trial is still at its early stages, the magistrate will not be able to set aside the proceedings for it to start *de novo*, or to simply record a not guilty plea for the trial to proceed on both counts.

[8] The trial against both accused has not commenced on count 2, and it will not just commence in the middle of the trial on count 1 whilst the same evidence necessary for count 1, is also necessary for count 2. It is peremptory that an accused plead before the evidence is lead, and I agree with the DDPP that the magistrate will not be in a position to rectify such kind of an oversight. In my view, the proceedings were not in accordance with justice, and stands to be reviewed and set aside.

[8] In the result I make the following order:

8.1 The proceedings in this matter are reviewed and set aside.

8.2 The matter is remitted back to the regional court for a trial *de novo* before another magistrate should the prosecution still wish to pursue the matter.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION

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