Reportable

IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: M 1/2003
REVIEW CASE NO: 9/2003
HIGH COURT NO: 0035372

In the matter between:

THE STATE

and

KHABANJANI NTANTISO

CASE NO: 3/404/03

REVIEW CASE NO: 6/2003
HIGH COURT CASE NO: 0035373

THE STATE

and

NOPINKI PAPAZAYO

JUDGMENT DELIVERED ON 12 DECEMBER 2003

HJ ERASMUS, J

Where a magistrate's court imposes a sentence which is subject to automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 ("the Act"), section 303 enjoins the clerk of the court to forward a copy of the record of the proceedings to the registrar of the High Court

having jurisdiction within one week of the determination of the case.

This was not done in two matters which were placed before me under the provisions of section 302 of the Act. Both matters emanate from the magistrate's court at Mitchells Plain which is situated in the Cape Town metropolitan area.

In the matter of *The State v Nopinki Papazayo*(hereafter "Papazayo") the accused was sentenced on 26 June 2003, and in *The State v Khbanjani Ntantiso*(hereafter "Ntantiso") the accused was sentenced on 29 July 2003. The record of both matters reached the registrar on 21 November 2003. This means that in Papazayo the record reached the registrar about five months after the accused was sentenced, and in Ntantiso about four months after the accused was sentenced.

I requested the magistrate to furnish an explanation for the delay in forwarding the record of the two matters. The magistrate explains that in Papazayo the mechanically recorded case record was dispatched by courier to the transcribers on 1 July 2003. The transcribed record was returned to the magistrate's court at Mitchells Plain on 10 November 2003 and signed by the presiding magistrate on 19 November 2003. In Ntantiso the mechanically recorded case record was dispatched by courier to the transcribers on 8 August 2003. The transcribed record was returned to the magistrate's court at Mitchells Plain on 10 November 2003 and signed by the presiding magistrate on 19 November 2003.

The magistrate then states as follows:

> The contract for the transcription of case records in respect of certain courts in the Western Cape, including this office, was allocated by the Tender Board to Infotech, a firm from Durban. In terms of the provisions of the contract all appeal and review case records must be forwarded to Durban for transcription.

From the outset this court and other courts experienced major problems with transcriptions not being transcribed within the prescribed time limits. The matter was taken up with the contractors and also reported to the National Office, the Cluster Head (Chief Magistrate of Wynberg) and to the Judge President of the High Court. The problem was also raised and discussed with representatives of the National Office at the Provincial Case Flow Management Meeting in the High Court under the chairmanship of the Judge President.

The situation is that this court and other courts experience the same problems and despite our representations the position did not really improve.

Unfortunately there is nothing that can be done by the courts without the intervention of the National Office. The matter has been reported for urgent attention. Attached correspondence regarding this for your attention.

Although this office is not at fault, I apologise for the delay in forwarding the record.

Despite the fact that the matter has been taken up with the contractors, with the Director-General of the Department of Justice and Constitutional Development and with the Judge President, and despite the discussion of the problem at the Provincial Case Flow Management Meeting, there has been no improvement. In fact, in a letter dated 6 November 2003 addressed to the Director-General, the magistrate of Wynberg states that "the situation has worsened".

I have, of course, no idea why it was thought necessary to award the contract for the transcription of records of courts in the Western Cape to a firm situated in Durban. What I do know, is that there has previously in this Division been no delay in the transcription of records of cases to be submitted for review, and that the transcriptions were of high quality.

Moreover, the delay is clearly not only due to the fact that the transcriptions are done in Durban – the mechanical record and the completed transcription can be moved between Cape Town and Durban within less than the four and five months it took in the two cases before me! There seems to be an inability, for whatever reason, on the part of the contractor to produce the transcriptions promptly and timeously. The question does, however, arise whether a firm in Durban, even if supported by a highly efficient postal service and competent staff, can deliver the transcriptions of records within the time limit laid down in section 303 of the Act?

The provision in section 303 that the clerk of the magistrate's court must forward the record to the registrar of the High Court within one week after the determination of the case has been held to be imperative (*S v Lewies, supra,*at 103h; in *S v Mofokeng en 'n Ander*1974 (1) SA 271 (O) a predecessor of section 303 was also held to be imperative). Hiemstra *Suid-Afrikaanse Strafproses*6th ed by Kriegler and Kruger (2002) states the position in this regard as follows (at 801):

> Gesien die herkoms van outomatiese hersiening (*S v Mafikokoane; S v Mokhuane*1991 (1) SASV 597 (O) op 598j—600c) en die belang daarvan (*S v*

> *Letsin*1963 (1) SA 60 (O) op 61A—H), die oënskynlik gebiedende taal van die artikel en, veral, dat vertraging onherroeplike benadeling kan veroorsaak, moet gekonkludeer word dat die betrokke voorskrif inderdaad gebiedend is. En ofskoon die Strafproseswet geen gevolg aan nie-nakoming daarvan koppel nie, mag dit wel deeglik privaatregtelike konsekwensies hê.

The expeditious dispatch of records on review intimately concerns the fundamental rights of an accused person. For that reason, the High Courts have often expressed great concern at delay in submitting matters on review. In *S v Raphatle*1995 (2) SACR (T) at 435h, *S v Manyonyo*1996 (11) BCLR 1463 (E) at 1465J—1466C and in *S v Lewies*1998 (1) SACR 101 (C) at 104b the following passage from *S v Letsin*1963 (1) SA 60 (O)at 61E—H was cited or referred to with approval:

> Uit die aard van die saak val die klem deurgaans op die spoedige voorlegging van die landdros se vonnis aan ‘n Regter vir hersiening, en dit is so omdat dit een van die hoogste roepinge van die howe is om toe te sien dat die vryheid van die individu, binne die perke van die reg, gewaarborg sal word. Dit is ‘n ingrypende aantasting van individuele vryheid om ‘n persoon in die gevangenis te laat aanhou, en dit is die dure plig van die howe en van elke geregtelike amptenaar om toe te sien dat dit slegs sal gebeur by die volle gesag van ‘n behoorlike regsproses … Die landdros is dus verplig om in die uitvoering van hierdie hoë roeping van ons howe toe te sien dat die regsproses waarvolgens iemand van sy persoonlike vryheid ontneem word so spoedig moontlik die volle imprimatuur van die resgspraak verkry, en die indruk moet nooit geskep word dat ons howe onverskillig staan teenoor die vryheid van die individu nie.

In endorsing these remarks, Erasmus J in *S v Manyonyo, supra,* 1466C said:

The reason for the statutory insistence on the expeditious despatch of records on review is

generally to promote the speedy and efficient administration of justice, but in particular to insure that an accused is not detained unnecessarily in cases where the court of review sets aside the conviction or reduces the sentence.

In *S v Lewies, supra,*at 104b —c Traverso J (as she then was) said:

> Die hele doel van die bepalings van art 303 van die Wet is om te verseker dat ‘n beskuldigde ‘n regverdige verhoor kry. Een van die essensiële elemente daarvan is om so gou as wat doenlik is, finaliteit daaraan te gee. ‘n Vertraging van hierdie aard sal ‘n ernstige regskending tot gevolg hê. Dat die beskuldigde se regte as gevolg van vertraging ernstig benadeel is spreek vanself. Ek wil my sterkste afkeur daaroor uitspreek. Daar kan nooit reverdig(ing) daarvoor bestaan nie.

In *S v Manyonyo, supra,* 1466D--F the question is raised, but not decided, whether long delay in the submission of the record does not *per se*constitute a failure of justice which would preclude the reviewing Judge from certifying in terms of the section 304(1) of the Act that the proceedings were in accordance with justice. In that case, the Attorney-General was of the view that the proceedings which are the subject of section 304(1) are those which constitute the trial in the magistrate’s court, and do not include subsequent administrative action. On the other hand, it may be argued that judicial proceedings which are subject to review in terms of sections 302 are only completed by certification under the provisions of section 304(1), and that any administrative action which precludes the judicial process from running its proper course according to law may vitiate the entire process. Due to time constraints, the matter has not been argued before me and I shall in the two cases before me accept that the delay is not sufficient ground for setting aside the conviction of the accused.

In *S v Letsin, supra,*at 61B the following is quoted with approval from a report submitted by two members of the Bench to the Judge President of the Transvaal Provincial Division and published in the *South African Law Journal*("On the System of Automatic Review and the Punishment of Crime" (1962) 79 *SALJ*267—281 at 267):

> One of the important contributions made by South African law to the administration of justice is the system of review as of course, or, as it is more commonly known, of automatic review … When it is borne in mind that at least 90 per cent of the accused persons are either wholly or partially illiterate and that the great majority of them are undefended, the vital importance of the system in the administration of justice in this country becomes apparent.

Though literacy levels have improved and legal aid is more readily available, the statement remains as essentially true as it was forty years ago.

If we cherish the system of review as of course, or automatic review, then it is unacceptable that this form of protection of the fundamental rights of certain accused should be eroded by administrative bungling.

The case of Papazayao illustrates the irreparable prejudice that delayed submission of a record on review may cause an accused person. The accused, an eighteen year old girl with no previous convictions, was convicted on a charge of assault with the intent to do grievous bodily harm. She was sentenced to six months imprisonment. It was a vicious and brutal assault with the broken top of a bottle – known to be a razor sharp and highly dangerous weapon. In the transcription it is referred to as a "bottle corp" which makes no sense to me. I am sure that the witnesses used the Afrikaans term bottle "kop" which is generally used to describe the instrument in question. (I may add, in passing, that "Paulsma" in the transcription is probably a reference to the Pollsmoor Prison in Cape Town.) It was a "crime of passion" in that it arose from a fight between the complainant and the accused about gossip about a boy friend. The conviction of assault is based upon a finding that the accused had exceeded the bounds of self defence.

The sentence is a heavy one for a young first offender, but may be justified in view of the seriousness of the assault and the injuries that were inflicted. Had I received the record in time, I may have been tempted to ask the magistrate his reasons for not imposing a suspended sentence. By the time the record of the proceedings reached me, the accused had served five months of her sentence of six months and might already have been released. Altering the sentence at this stage

will make no sense.

The accused in Ntantiso was rightly convicted on a charge of failing to comply with a maintenance order and was given a sentence of imprisonment suspended on appropriate conditions. The proceedings, in my view, were in accordance with justice and can be certified accordingly.

I would make the following order:

1. In The *State v Ntantiso*the proceedings are in terms of section 304(1) of the Criminal Procedure Act 51 of 1977 certified to have been in accordance with justice.
2. In The *State v Papazayo*the proceedings are in terms of section 304(1) of the Criminal Procedure Act 51 of 1977 certified to have been in accordance with justice.
3. The Registrar is directed to forward a copy of this judgment to the Director-General of the Department of Justice and Constitutional Development.

HJ ERASMUS, J

I agree and it is so ordered

TRAVERSO, DJP