REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

High Court Review Ref: **061684**

Magistrate's Court Ref No: **302/2005**

Magistrate's Case No: **28/47/04**

In the matter between:

THE STATE

vs

FAIZEL SALIE

Coram: YEKISO J

Delivered: 23 August 2006

Summary:

Accused convicted of robbery with aggravating circumstances – accomplices tried separately and similarly convicted of robbery with aggravating circumstances – on appeal found aggravating circumstances not proved resulting in reduction of sentences – whether such finding on appeal constitutes ground for review of conviction on robbery with aggravating circumstances arising from same facts. Held – a finding of presence or otherwise of aggravating circumstances dependant on evidence tendered in a trial in which such finding made.

Locus standi – magistrate initiating review arising from proceedings held before another magistrate – in as much as the conduct of the magistrate initiating review could have been prompted by fairness of trial in the sense of disparity in sentence, a much more broader approach to standing for purposes of enforcement of the fundamental rights infringed in the Bill of Rights ought to be adopted. Held – magistrate initiating review proceedings does have *locus standi.*

REVIEW JUDGMENT DELIVERED: 23 AUGUST 2006

YEKISO, J

[1] The accused in this matter of a proposed review, Faizel Salie, together with three other persons, one of whom was a female, was charged with robbery with aggravating circumstances allegedly committed at Bothasig, in the regional division of the Cape. The offence was alleged to have been committed on Monday, 11 March 2002. Once arrested and

charged, the accused engaged the service of a legal representative in the person of John Riley, a senior attorney practicing as such at Wynberg, Cape. On basis of a plea and sentence agreement concluded between the accused and the Director of Public Prosecutions, the accused tendered a guilty plea and thus pleaded guilty to the charge of robbery with aggravating circumstances. The magistrate, upon being satisfied that the plea and sentencing agreement was concluded in accordance with the law, and that the sentence proposed was just, proceeded to convict the accused of robbery with aggravating circumstances and sentenced him to four (4) years imprisonment as proposed in the plea and sentence agreement. Because of the conclusion of the plea and sentence agreement, the accused was tried separately and, as one of the terms and conditions of the plea and sentence agreement, agreed to testify against his three accomplices. Mr JEA Van Zyl (Van Zyl), Regional Magistrate, Cape Town, presided over the accused's trial.

[2] In a separate trial which ensued, his three accomplices were also tried on a charge of robbery with aggravating circumstances before a different magistrate in the person of Ms Naidoo. After the conclusion of evidence in that separate trial, his accomplices were convicted of robbery

with aggravating circumstances as charged and, subsequently, each one of them was sentenced to eight (8) years imprisonment. After his accomplices were convicted and sentenced, two of such accomplices noted an appeal against both their convictions and sentences. Judgment in the matter of that appeal was delivered in this court on 23 September 2005 and subsequently reported in the Butterworths Law Reports under the citation *Isaacs & Another v S* [2006] 2 All SA 163(C). In that appeal, the convictions of and the sentences imposed on the accused accomplices were set aside, including that of the accomplice who did not note an appeal. The convictions of his accomplices on a charge of robbery with aggravating circumstances was substituted with one of robbery, whilst sentences of eight (8) years imprisonment in respect of each one of them was substituted with the one of four (4) years imprisonment. In that appeal the Court found that there was doubt if aggravating circumstances were present on the occasion of the commission of the robbery hence the setting aside of the convictions and the sentences imposed and the substitution thereof with convictions on robbery and a sentence of four (4) years imprisonment in respect of each one of his accomplices.

[3] Once judgment in the matter of that appeal became known, Ms

Naidoo, also a Regional Magistrate, Cape Town, who had presided over the matter at trial, and per a letter dated 11 November 2005, purported to initiate what can only be construed as review proceedings for the review and setting aside of the conviction of the accused on a charge of robbery with aggravating circumstances and the sentences imposed and for the substitution thereof with a conviction on robbery and possibly with a lesser sentence to the one of four (4) years imprisonment initially imposed. Ms Naidoo was obviously of the view that what she had proposed in her letter is the appropriate remedy available to the accused since the latter's conviction and sentence arises out of the same facts and circumstances considered in the matter of an appeal of his accomplices and, ostensibly, that the accused is also entitled to the benefit of a conviction on a less serious charge and possibly to a lesser sentence. Ms Naidoo's letter was specifically marked for my personal attention hence the referral thereof, together with the enclosures thereto, to me once same was received by the Registrar.

[4] On receipt of Ms Naidoo's letter, I addressed a letter to Mr Van Zyl, who presided over the matter of the accused at trial, enclosing a copy of a letter from Ms Naidoo and I elicited a comment from him as regards the

proposed review. Mr Van Zyl presided over the trial of the accused which, as set out in paragraph [1] above, was disposed of and finalized on the basis of the sentence and plea agreement concluded between the accused and the Director of Public Prosecutions.

[5] Mr Van Zyl, in his response to my letter, in the first instance, raises the issue of Ms Naidoo's *locus standi* to initiate the proposed review. As regards the accused's conviction on the plea and sentence agreement his response, in broad terms, amounts thereto that the accused, in his plea and sentence agreement admitted to facts justifying a conviction on robbery with aggravating circumstances, that he admitted those facts in circumstances where he was properly advised, by a senior attorney, as regards a guilty plea to a charge of robbery with aggravating circumstances; that on perusal of the plea and sentence agreement, he was satisfied that the accused admitted to facts justifying a conviction to the charge of robbery with aggravating circumstances and, once satisfied that the plea and sentence agreement was in accordance with the law, he proceeded to convict and sentenced the accused the accused in accordance with the terms of the plea and sentence agreement.

[6] Once I had received a response from Mr Van Zyl, I addressed a letter dated 20 January 2006 to the Director of Public Prosecutions, enclosing all relevant documentation and requesting a comment from that organization as regards whether the proceedings are reviewable as proposed and, in particular, whether Ms Naidoo does have *locus standi* to initiate the proposed review on behalf of the accused.

[7] The Director of Public Prosecutions responded by way of a letter dated 8 June 2006, which I received shortly before the end of the second term, under cover whereof was enclosed an opinion by *Ms Johnson*, a state advocate in that organization, with which opinion the Director of Public Prosecutions agrees. I am grateful for *Ms Johnson's* incisive treatment of the issues involved and I wish to take this opportunity of placing it on record that her opinion and comment has made my task much easier.

[8] My task, in the circumstances of this matter, is to determine, in the first instance, whether Ms Naidoo does have capacity to initiate these review proceedings in the manner she did and, if so, whether the

proceedings themselves are reviewable in terms of the law.

LOCUS STANDI

[9] Ms Naidoo was a presiding judicial officer in a matter involving the accused's accomplices who, as has already been pointed out, were charged with robbery with aggravating circumstances. The charge against the accused's accomplices arose out of the same set of facts and circumstances on basis of which he concluded a plea and sentence agreement and on basis of which the accused was convicted and sentenced on the crime of robbery with aggravating circumstances. The accused accomplices were tried separately before Ms Naidoo. The accused testified in his accomplices' trial as he had undertaken to do in terms of the plea and sentence agreement. It was during the course of the trial of the accused's accomplices that Ms Naidoo became aware that the accused, in turn, was an accomplice witness, that he had been convicted on the same set of facts and circumstances and that he had since been sentenced to four (4) years imprisonment. At the conclusion of that trial, the accused's accomplices were each convicted of robbery with aggravating circumstances as charged and were each sentenced to eight (8) years imprisonment. On appeal the conviction of his accomplices of

robbery with aggravating circumstances was set aside and substituted with a conviction of robbery. The sentences of eight (8) years imprisonment in respect of each one of his accomplices was similarly set aside and substituted with sentences of four (4) years imprisonment in respect of each one of them.

[10] Once Ms Naidoo became aware of the outcome of the appeal she similarly became aware of what in her view was, ostensibly, a disparity in sentences arising from the setting aside of sentences of eight (8) years imprisonment in respect of each one of the accused's accomplices and the substitution thereof with one of four (4) years imprisonment. In her view the accused ought to be entitled to the benefit of a conviction on a lesser offence and, possibly, to a lesser sentence since these arise from the same set of facts and circumstances on basis of which the convictions of his accomplices were set aside and substituted with a conviction on a lesser offence. Based on what appears to have been Ms Naidoo's view at the time she initiated the review proceedings, two fundamental rights were at play, namely, the right to equality before the law in terms of section 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the right to have the proceedings reviewed by a higher court as contemplated

in section 35(3)(o) of the Constitution. Ms Naidoo was probably of the view that the fact that the accused remains a convict on a more serious offence, arising from the same set of circumstances probably constitutes an unequal treatment of a substantial degree in respect of the accused.

[11] In terms of the common law an applicant who sought a remedy for judicial review had to prove that he or she had a sufficient legally protected interest to justify his application, generally either a personal or direct interest in the matter. The example that come to mind is a proprietary or pecuniary interest or a substantial and peculiar interest in the matter proposed to be reviewed. However, since the advent of the democratic order the scope of *locus standi* of individuals and groups to seek relief in matters involving fundamental rights, which invariably includes a right to have proceedings reviewed by a higher court, has since been broadened to include anyone acting on behalf of another person who cannot act in their own name. (See section 38(b) of the Constitution). Because of considerations of such fundamental rights relating to equality before the law, the right to have proceedings reviewed by a higher court and because of the broadened standing in terms of section 38 of the Constitution I am inclined to hold the view that Ms Naidoo does have *locus standi* to initiate

this review on behalf of the accused who clearly is unable to do so, if not only because of his current incarceration. Now the next question to determine is whether the proceedings sought to be reviewed are in themselves reviewable.

THE QUESTION OF WHETHER THE PROCEEDINGS ARE REVIEWABLE

[12] In *S v Taylor* 2006(1) SACR 51 I examined various grounds of review to ascertain if the proceedings in that matter, which were also pursuant to a plea and sentence agreement, were reviewable on basis of various complaints advanced by the accused in that matter. In that matter, I held that those proceedings were not reviewable in terms of section 302 of the Criminal Procedure Act, as the accused in that matter was represented by a legal representative at trial. Similarly, in this matter, the proceedings are not reviewable in terms of the ground set out in section 302 of the Criminal Procedure Act as the accused was legally represented at trial.

[13] In *S v Taylor,* supra, paragraph [14] at p57 of that review judgment I explored other possible statutory basis for review and I ultimately came to

the conclusion that those proceedings were not reviewable in terms of any one of the grounds set out therein nor were those proceedings reviewable in terms of section 24 of the Supreme Court Act, 59 of 1959. The same position holds in the instance of this matter. The only possible statutory basis on basis of which this matter could possibly be reviewed could be in terms of section 173 of the Constitution which provides as follows under the heading "Inherent power":

> "The Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

In that matter, *S v Taylor,* supra, I proceeded to review those proceedings taking advantage of the comprehensive approach contemplated in section 173 of the Constitution without the hurdle of being subjected to some form of statutory constraint.

[14] The basis for the referral of this matter for review is in the light of a finding in *Isaacs & Another,* supra, that no aggravating circumstances on the occasion of the commission of robbery in those proceedings were proved. In *Isaacs & Another,* supra, I made that finding in the light of the

evidence tendered at the trial of the accused accomplices. In that judgment I held that the state had chosen to make the accused in this matter under review its star witness, and that its case would have had to rise and fall on basis of his evidence. In that matter I held that I could not, on basis of the accused's evidence, find that aggravating circumstances were proved. This then leads to the question of what evidence was there before Mr Van Zyl on basis of which he was satisfied that the accused was indeed guilty of robbery with aggravating circumstances.

[15] In paragraph [5] of this judgment I referred, in broad terms, to a response from Mr Van Zyl in which it is implicit that he found the plea and sentence agreement concluded by the accused to have been concluded in accordance with the law and that the accused, on proper legal advice, had intended to, and did indeed plead guilty to robbery with aggravating circumstances. Over and above the comment made by Mr Van Zyl I must reiterate that the accused was, at all material times during the course of those proceedings, legally represented by a senior attorney in the person of Mr Riley who, in no doubt, assisted the accused in the negotiation of a plea and sentence agreement. Mr Riley would, in no doubt, have given the accused legal advice on basis of facts given to him by the accused. It was

on basis of the facts admitted by the accused that a plea and sentence agreement was concluded. Mr Van Zyl was satisfied that the plea and sentence agreement was concluded in accordance with the law and, thus, proceeded to convict and sentenced the accused on that basis.

[16] This is what Mr Riley had to say, amongst other admissions made by the accused,when reading the plea and sentence agreement into the record:

> "… and the said robbery was accompanied by aggravating circumstances within the meaning of section 1 of Act 51 of 1977 in that the accused wielded a knife on the occasion when the offence was committed and so threatened to cause grievous bodily harm to Maria Neethling."

This was the body of evidence before Mr Van Zyl on basis of which he convicted the accused on robbery with aggravating circumstances.

The fact that there was uncertainty as regards the presence or otherwise of aggravating circumstances in a matter of a trial of his accomplices is not a basis to fault the proceedings concluded on basis of the plea and sentence agreement concluded by the accused and on basis of sound legal advice.

[17] It therefore follows in my view that there is no basis to interfere with the manner in which the accused's trial was handled by Mr Van Zyl

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N J Yekiso, J

I agree.

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N Goso, AJ

It is so ordered.