Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

High Court ref: 395/21
Magistrate's serial No. 2/2021 (special review)
Case no. TS 19/2021 (Tulbagh)

In the matter between:

THE STATE

and

EMMANUEL MATIYA

JUDGMENT
dated 6 December 2021
(Special review under s 116(3) of the Criminal Procedure Act)

BINNS-WARD J:

[1] The accused was convicted on a charge of arson in the district court at Tulbagh. The district court magistrate, acting in terms of s 116(1)(a) of the Criminal Procedure Act 51 of 1977, committed the accused to the regional court for sentencing. It is apparent from the record that

the regional court magistrate had concerns about the manner in which the trial had proceeded in the district court. Having sought and received the district court magistrate's comments about her concerns, the regional magistrate sent the matter on special review in terms of the proviso to s 116(3)(a). Regrettably, the regional court magistrate did not motivate her reasons in a covering memorandum for the attention of the reviewing judge, as is the convention when matters are sent on special review.[1] I have been able to deduce the nature of the regional court magistrate's concerns only from her baldly stated opinion on the record and the request for comment she addressed to the district court magistrate.

[2] It would have been helpful if the regional court magistrate had motivated her opinion to indicate precisely why she regarded the identified areas of concern as sufficient to suggest that there had been a vitiating miscarriage of justice in the trial. That, after all, is the intention underpinning the requirement in the proviso to s 116(3) requiring the regional magistrate to '*record the reasons for his or her opinion*' why he or she considers that the proceedings were not in accordance with justice, or for his or her doubt that they were. Reasoning entails not only identifying the causes of concern, but also explaining why, in the peculiar circumstances of the case, those causes are regarded by the magistrate to have possibly vitiating consequences for the validity of the proceedings. It is trite that not every shortcoming or point of criticism in the conduct of a trial supports the conclusion that the proceedings were not conducted substantially in accordance with justice and the law.

[3] The regional magistrate's comments indicate the areas of concern, but they do not explain why she thought that they might be considered to be of a vitiating character. I would ordinarily

[1] If there was such a letter or memorandum, it was not included in the papers placed before me. It does sometimes happen that material that should have been included in the review papers transmitted from the lower courts is inadvertently omitted.

have remitted the matter for the magistrate to provide the reasons for her opinion, but decided against that course because the resultant additional delay would be prejudicial to the accused who has been in custody for two years already.

[4] The matter currently stands postponed in the regional court to 8 December 2021 awaiting judgment in the special review. The record was received by the registrar on 1 December and placed before me the next day, on the eve of the summer recess at a time when I was engaged in completing other matters before the end of term. I have attended to it with the utmost expedition possible in the circumstances. I would ordinarily have invited a fellow judge to join me in considering the review, but that was not practicable having regard to the time factor and the court being in recess.

[5] The identifiable concerns of the regional magistrate were (i) the manner in which the plea process was dealt with, (ii) the number of leading questions were put, unchecked by the district magistrate and (iii) the district magistrate's failure to address the abusive attitude of accused's legal representative towards the state witnesses and (iv) 'the lack of motivation in the trial court's judgment as regards the findings of credibility or lack thereof of all the witnesses'.

[6] It is apparent from the record of proceedings in the regional court that the accused has indicated an intention, obviously with the necessary leave, to lodge an appeal against his conviction. In the circumstances, and in view of my decision, for the reasons to be stated presently, to remit the matter to the regional magistrate for sentence to be imposed, I shall therefore say as little as possible, if anything, about my impressions on the merits of the case.

The plea process

[7] The charge put to the accused alleged that on 17 December 2019 he had set alight the shack of Nombulelo Majaja at 25 Blikkiesdorp, Gouda, in the district of Tulbagh, and thereby destroyed the structure and its contents. There was an alternative charge of malicious injury to property on the charge sheet.

[8] The main charge was put to the accused without any express mention of its character as one of arson. All the elements of the offence with which he was charged were however contained in what was put to him through an interpreter; it was only the label, 'arson' or '*brandstigting*', that was omitted. The record shows that the accused entered a plea of guilty to the main charge. The trial magistrate should in the circumstances have asked the prosecutor whether she accepted the plea and then proceeded, by appropriate questioning of the accused, to confirm the plea, as provided for in s 112(1)(b) of the Criminal Procedure Act. That did not happen. Instead, the alternative charge was also read to the accused, and he was called upon to plead to it. He tendered a plea of not guilty to the alternative charge. His actual words (through the interpreter) were '*It was not my intentions, Your Worship*'.

[9] Immediately after the accused had pleaded in the manner just described, the magistrate, apparently understanding the accused's response to the alternative charge to denote a denial of criminal intention altogether, stated '*Thank you. I assume that I will note a plea of not guilty to both charges*'. The transcript reflects the following recordal at that point: '*COURT CHANGES PLEA TO NOT GUILTY*'.

[10] The accused's Legal Aid Board-appointed legal representative thereupon confirmed that the accused's intention was to plead not guilty to both the main and the alternative charges, and

indicated that there would not be a plea explanation in terms of s 115 of the Criminal Procedure Act. The prosecutor was then invited to call the first state witness, and the trial proceeded.

[11] The purpose of an accused being required to plead is that it gives the basis upon which he or she joins issue with the prosecution and affords the foundation on which the trial can commence. In the absence of a plea, there cannot be a valid trial; the case is not triable until the accused has pleaded, cf. *S v Mamase and Others* 2010 (1) SACR 121 (SCA). Furthermore, and in any event, an accused person's fair trial rights would be vitiated if the hearing proceeded without him or her being informed of the charge(s) with sufficient detail to answer it (or them); s 35(3)(a) of the Constitution.

[12] Despite it being desirable that the relevant procedures with regard to recording the accused's plea be adhered to with punctilious compliance with the statutory prescripts, it is a well-documented fact that they frequently are not; see, for example, the discussion, with reference to various other cases, in *S v Moses* [2018] ZAWCHC 74 (14 June 2018), 2019 (1) SACR 75 at para 9-21. It was remarked in that matter that the application of s 105 of the Criminal Procedure Act '*should be approached pragmatically rather than formalistically*'.

[13] It is abundantly apparent when one reads the record that the accused was fully aware of the nature of the charges that he faced and that his recorded pleas of not guilty to both the main and the alternative charges were consistent with the basis on which he intended to join issue with the prosecution. It is relevant that he was legally represented and that his attorney was satisfied that the trial should proceed after pleas of not guilty to both charges had been recorded. I am satisfied in the circumstances that there was no vitiating irregularity in the plea process, no matter the ineptness that attended it. The accused was in no manner prejudiced by the way the plea stage of the trial proceeded.

Leading questions

[14] It goes without saying that judges and magistrates should take care to disallow prejudicial leading questions by legal practitioners or self-acting parties when leading witnesses during their evidence in chief or in re-examination. In cross-examination, of course, leading questions are not only permissible, but also often a very effective device for testing a witness's evidence or putting a party's case.

[15] Inexperienced practitioners, as many prosecutors in the district courts are, often find it difficult to avoid putting leading questions when they should not. It is a matter of judgment and experience to know when a leading question might be unobjectionable, and when it is impermissible. Judicial officers who too readily intervene to stop every leading question are just as likely to prejudice the effective conduct of proceedings as those who wrongly fail to disallow prejudicially leading questions are to cause the probative weight of any evidence adduced thereby to be adversely affected.

[16] Evidence-in-chief concerning contested issues that is put on record by means of leading questions will not in all cases be absolutely disregarded, and certainly not if there has been no objection to it. The effect of any such evidence has to be weighted contextually. It may, for example, be corroborated by evidence adduced by non-leading questions from other witnesses, or confirmed by objective or real evidence, or concessions made under cross-examination by witnesses from the opposing side in the litigation. It may even carry weight because of the way the answers adduced thereby fit in with the witness's other answers to appropriately framed questioning. It all depends.

[17] The prosecutor did indeed direct many leading questions to the state witnesses, much more so in re-examination that in leading them in chief. Many of the questions, especially those

of an introductory nature, were innocuous and uncontentious in the context of what was in issue. It is relevant to note in this regard that it soon became apparent from the cross-examination of the state witnesses by the accused's legal representative that he did not dispute having been present at the scene with a 5-litre container containing petrol when the fire started. He testified that the petrol was for his motor vehicle, which had run out of fuel near the Voëlvlei Dam on the road to Gouda from Hermon. His case was that the container had been upset by a dog that was on the premises and its flammable contents had caught alight because he was smoking at the time, and his burning cigarette had dropped accidentally onto the spilt petrol, which had leaked out of the container notwithstanding that he had screwed the cap closed. The question whether the accused had been smoking or not was one introduced in cross-examination by the accused's legal representative; it was not canvassed by the prosecutor in leading the state witnesses in chief.

[18] It is noteworthy that the prosecutor's modus operandi was to commence his examination-in-chief with a few questions of an uncontentious and introductory nature and then to ask the witness to tell the court in his or her own words what they knew about the shack fire incident. The essential content of each of the state witness's evidence concerning what they saw or experienced at the scene was not given in answer to leading questions by the prosecutor. The leading questions were directed in the main at obtaining elaborative detail in respect of evidence already adduced in response to non-leading questions.

[19] The accused's legal representative, who it has to be acknowledged seems to have been inexperienced, did not object to the prosecutor's questioning. I do not think, however, that there are good grounds for criticising her failure to do so.

[20] The putting of a number of objectionable leading questions by a prosecutor is no reason, of itself, in every case to conclude that there has been a failure of justice. The court has to make a qualitative assessment of the effect on the proceedings as a whole. The point is illustrated in the concluding remarks by Nestadt JA (Botha and Hefer JJA concurring) in the Appellate Division's judgment in *S v Sunduza* [1989] ZASCA 13 (17 March 1989): '*One final observation. As I have already indicated, the record discloses a number of examples of the prosecutor putting, and being allowed to put, leading questions of an important nature and involving obviously controversial aspects to the State witnesses. This is unfortunate, particularly because appellant was unrepresented. It cannot, however, affect the result of this particular matter*'.

[21] My overall impression on a reading of the record in its totality is that the accused was not prejudiced, certainly not materially, by the leading nature of any of the questions put by the prosecutor.

The district court magistrate's failure to address the abusive attitude of accused's legal representative towards the state witnesses

[22] As already remarked, the record suggests that the accused's legal representative was an inexperienced practitioner. Her cross-examination of the state witnesses was ham-fisted in many respects. Some of the propositions that she put to the witnesses were crassly formulated and, certainly in print, gave the impression of rudeness or bullying. Incisive cross-examination can be quite brutal and yet remain within permissible bounds, but a person does not suspend his or her right to dignity upon entering the witness box, and it is the duty of a presiding judge or magistrate to protect witnesses against unwarranted abuse. Discharging that duty involves the exercise of judgment and discretion. For a judge or magistrate to appear to be over-protective towards a witness can be just as bad as failing to come to a witness's protection when the

situation calls for it. The threshold for intervention will vary according to the judicial officer's assessment of the witness's vulnerability or robustness, as the case may be. Some attention will also be paid to whether or not the legal practitioner who called the witness sees fit to raise an objection to the manner in which the witness is being cross-examined.

[23] It has also to be borne in mind when considering matters like this on the written record that what might read on paper as if it was unacceptably bullying or oppressive might have come across somewhat differently in the real-life event. Tone and body language are more often than not something that cannot be ascertained from the written record, whereas they would obviously be quite evident to those present in the courtroom when the evidence is given. Courts other than the trial court that have to deal with the matter on the printed court should therefore be cautious before criticising the trial court for having failed to deal with what might appear on the record to be offensive questioning. They must be mindful that the judicial officer presiding at the trial is steeped in the atmosphere and enjoys the advantage of being able to see the interaction between witness and questioner; those being important benefits not available to the other courts to which the matter comes later only on paper. There are, of course, nevertheless cases where the trial court's failure to intervene when it should have done will be manifest on the written record. The extent of the deference to be accorded to the judgment of the trial court turns on a question of degree depending on the peculiarities of the given case.

[24] In the current case, whilst there are a number of passages in the accused's legal representative's cross-examination of the state's witnesses that might well have justified corrective intervention by the district court magistrate, there is no indication that the manner of questioning intimidated or overbore any of the witnesses. I am not persuaded that these aspects of the trial redounded in any way to the prejudice of the accused or the essential integrity of the

proceedings. In fairness to the trial magistrate, it should be recorded that she did intervene on occasion to correct the accused's legal representative when the latter addressed questions predicated on an incorrect understanding or misrepresentation of the evidence already given. The prosecutor also intervened at times to object to questions that she regarded as unfair or confusing.

[25] I am not persuaded that the regional court magistrate's concerns on this score sustain a conclusion that the proceedings should be vitiated as having not been conducted substantially in accordance with justice.

The lack of motivation in the district court's judgment as regards the findings of credibility or lack thereof of all the witnesses

[26] Notwithstanding a postponement for the purposes of judgment after the prosecutor and the accused's legal representative had addressed argument at the close of the defence case, the judgment subsequently delivered by the district court magistrate reads like one given extempore. It is barely coherent in places. The judgment does, however, reasonably comprehensibly, rehearse the evidence of all the witnesses and includes findings concerning their credibility.

[27] Some motivation is provided for the magistrate's credibility findings. For example, one of the disputatious issues in the trial was whether the eyewitnesses would have been able to see what the accused was doing at the complainant's premises from the spot where they said they had observed the events. It was common ground that there was another shack between that place and the complainant's property. The magistrate found that the eyewitnesses' evidence was credible because their description of what they had seen was confirmed by the accused's own evidence of what he had done at the complainant's property, such as putting down his green rucksack and untying the dog that was in the yard. These were things the state witnesses could

not have made up had they not seen them, and yet the accused steadfastly maintained that the witnesses were dishonest in their evidence concerning them.

[28] The magistrate convicted the accused because she found the evidence of the state witnesses to be truthful and reliable and that the accused had been a poor witness, whose evidence was inconsistent in certain respects and improbable in others. Those findings are not obviously unsupportable in my view. It remains open to the accused, however, to attack them on appeal if so advised. Nothing in this judgment derogates from the accused's opportunity to pursue an appeal if *he* thinks that the magistrate's judgment was wrong.

[29] An assessment on review in terms of s 303 of the Criminal Procedure Act of whether the proceedings were in accordance with justice is not concerned with the whether the magistrate's judgment was right or wrong, save where it is obvious that the conviction was wrong, or where there is an impelling reason for the reviewing judge *mero motu* to doubt its soundness. This is not one of those of such cases, nor is it a case in which the accused is unrepresented and there is reason to fear that a matter that may have some prospects on appeal will not be taken there on advice, with resultant injustice. In general, the question whether the magistrate's credibility findings and the conclusions based thereon are supportable or not is for an appellate court to decide if the matter goes on appeal. If the accused's prospects on appeal appear to be reasonable, he should be able, all other things being equal, to procure his release on bail pending such appeal.

[30] I have dealt with this issue at some length because I have inferred that this fourth area of concern raised by the regional court magistrate is predicated on her discomfort with the sustainability of the conviction, rather than the procedural integrity or fairness of the trial in the district court, which is a reviewing court's primary focus. I am mindful that my review powers

in terms of s 304 of the Criminal Procedure Act permit me to lay the matter before the Division for consideration as a court of appeal, and that a Bench consequently constituted for the purpose could have the matter argued before it as if it were an appeal being heard in the ordinary course.[2] I am not, however, in sufficient doubt about the correctness of the conviction in this case to take that course. I refrain from setting out the reasoning for my position in that regard in any greater particularity because, as mentioned earlier in this judgment, I do not wish to say anything in this review that might prejudice the openminded consideration of any appeal that the accused may bring of his own volition. I reiterate that this judgment does not, and is not intended to, derogate in any way from his right to pursue an appeal remedy in the ordinary course. All that I do hold in this respect is that if the matter does proceed on appeal, it must be at his instance, rather than that of the reviewing judge.

Conclusion

[31] In the circumstances I shall endorse the record with a certificate that it appears to me that the proceedings in the district court were in accordance with justice, and direct that the matter be remitted to the regional court to impose sentence upon the accused.

Order

[32] The matter is remitted to the regional court for the imposition of sentence upon the accused.

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[2] Section 304(3).

A.G. BINNS-WARD
Judge of the High Court