OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Gamble, J et Henney, J)

[*Reportable*]

CASE NO: 141278

In the matter between:

XOLILE MAGWACA	**Applicant**
E VAN ZYL (In her capacity as the Presiding Officer)	**First Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Second Respondent**
XOLISILE NDINISA (In his capacity as the Applicant's Legal Representative in the employ of Legal Aid in the court a quo)	**Third Respondent**

Date of hearing: 26 February 2021

Date of Judgment: 25 March 2021 (delivered via email to the parties' legal representatives)

JUDGMENT: 25 MARCH 2021

HENNEY, J

Introduction:

[1] The applicant was arraigned before the Regional Court Parow on charges of theft, unlawful possession of a firearm and ammunition. He was legally represented by

the third respondent during the trial. On 25 October 2013 he was found guilty on all charges,

and on 9 December 2013 was sentenced to an effective period of eight years' imprisonment. He filed a number of applications for leave to appeal between 9 December and 20 December 2013, all of which were ultimately abandoned.

[2] During the appeal process, he was represented by a different legal representative than the one that assisted him during the proceedings before the Regional Court. His erstwhile legal representatives (Hass & Associates) were of the view that the matter must be considered on review, and the record reflects that Gamble J, on 9 December 2014, directed that it be heard by two judges in terms of s 22 of the Superior Courts Act 10 of 2013, and s 306 of the Criminal Procedure Act 51 of 1977 ("the CPA"). This matter was subsequently dealt with as a review, as contemplated in terms of the above mentioned provisions.

[3] The presiding Regional Magistrate was cited as the first respondent, the Director of Public Prosecutions, Western Cape, as the second respondent, and the legal representative that represented the applicant before the Magistrate in the Regional Court was cited as the third respondent. The application, as would be customary in matters like these, was not opposed by the first respondent. The second respondent opposed this application, while the third respondent filed an answering affidavit in

respect of the issues raised by the applicant in his founding affidavit which have a bearing on him.

[4] In the notice of motion, the applicant requests this court to review and set aside his convictions and sentence, imposed by the first respondent. His grounds of review are the following:

1) That during the trial his fair trial rights, especially his right to effective legal representation, were undermined. More particularly, that he gave his attorney a list of questions which he instructed him to ask of the witnesses, which the attorney failed to do and which list was ignored.
2) That prior to him being taken for a confession, he mentioned to the investigating officer that he wished to consult with a lawyer, but that was similarly ignored. The confession should therefore not have been admitted into evidence.
3) That the search of his property and the seizure of the firearm and ammunition was unlawful, and not in compliance provisions of s 22 of the CPA.
4) That the investigating officer failed to ascertain whether his fingerprints were found on the firearm.

<u>The nature and scope of these proceedings:</u>

[5] In my view, if regard is to be had to the provisions of s 306 of the CPA, it would seem that this review is not one of those that can be dealt with in terms of the provisions of this section. The simple reason for this, is that it was not a review that was sent to the High Court in the ordinary course, in terms of s 302 of the CPA, that may be set down for argument as contemplated in s 306.

This section states that: '(1) A Magistrates' Court imposing sentence which under section 302 is subject to review, shall forthwith inform the person convicted that the record of the proceedings will be transmitted within one week, and such person may then inspect and make a copy of such record before transmission or whilst in the possession of the provincial or local division, and may set down the case for argument before the provincial or local division having jurisdiction in like manner as if the record had been returned or transmitted to such provincial or local division in compliance with any order made by it for the purpose of bringing in review the proceedings of a magistrate's court.'

This section creates a procedure for an accused person whose case is subject to automatic review, as an alternative to the possibility of having the matter dealt with in terms of the provisions of s 303, in terms of which such review matters are dealt with by the judge in chambers. It creates the possibility to have the matter enrolled for consideration, instead of submitting a written statement to the review court.

[6] In Hiemstra's *Criminal Procedure* the following is however stated: 'The ambit and use of this section are unclear. Apparently it creates a form of review for convicted

persons in automatic-review cases that is simpler than review in terms of section 22 of the Superior Courts Act 10 of 2013. . . . It is not clear, however, whether what is intended in section 306 is a “genuine” review or the mixed review-appeal of section 304. Whether an argued review under section 306 ever occurs in practice – and whether it really has a right of existence – is doubtful. There is only one reported decision in which this section (actually, its predecessor) was discussed, namely R v Simelane 1958 (2) SA 302 (N). In

that case the court held that the procedure can only be used with regard to an irregularity and that the accused cannot set the matter down for argument as though it were an appeal.’

[7] In the only reported case on this issue, referred to above, *R v Simelane*, at 303G-304D, Broome JP said the following:

‘Before I deal with these submissions I ought to say something about the scope of sec. 99 which, so far as I am aware, has not previously been considered by any Court. It is clear from secs. 96 and 97 that any convicted person whose sentence is subject to automatic review may submit a written statement or argument for the consideration of the reviewing Judge. It looks at first sight as though sec. 99 (1) conferred upon such convicted person the right to set the case down for argument before the Court of appeal. If this were so, the procedure under sec. 99 would cover much the same field as the ordinary procedure of appeal. It would be surprising to find that the Legislature had that intention. But on a careful examination of the section it will be seen that the right of the accused to set the case down for argument is not an absolute right but is qualified by the words which follow, that is by the words from “in like

manner" to the end of the sub-section. The extent of the qualification is not very clear, but it would seem that the word "review" towards the end of the sub-section does not mean "review as of course" but "review on the ground of irregularity". In modern practice, of course, an aggrieved person desiring to review the proceedings of an inferior court on the ground of irregularity would usually approach this Court by way of motion, on notice to the judicial officer and annexing to his affidavit a certified copy of the record. But in times past there was a procedure by way of writ of review, sued out of this Court, calling upon the judicial officer to transmit his record. Sec. 99 (1) probably refers to this old procedure. If that is so, the extent of the qualification upon the right of a convicted person to set the case down for argument becomes clear. He can only do so in circumstances which would entitle him to institute review proceedings on the ground of irregularity. It follows that he cannot, by so setting the case down, require the Court to deal with the matter as though it were an appeal.'

[8] The question, therefore, is whether this review falls to be determined in terms of the provisions of s 22 of the Superior Courts Act, and more specifically ss (c) and (d) thereof. In terms of s 22(1) the grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a division are:

'(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[9] It is common cause that none of the applicant's complaints fall to be considered in terms of ss (1)(a) and (b), but rather in terms of ss (1)(c) and (d). There is also no doubt in my mind that the second and third complaints fall to be decided in terms of ss (d), which deals with the question of the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence. It is well established that a complaint about the conviction or sentence should be appealed to the High Court, or other appropriate court of appeal. Where, however, a complaint is about the methods of the trial, or about an irregularity involved in arriving at a decision, the best procedure to bring forward this complaint is by way of review.[1] Whether an issue involves an error of law or of procedure is not always clear.

[10] A further question to consider regarding the applicant's first complaint is whether there was a gross irregularity in the proceedings before the Regional Magistrate. Du Toit's Commentary of the Criminal Procedure Act[2] describes a gross irregularity in the proceedings as an irregular act or omission by the presiding officer.

[11] In this particular case, however, the complaint is not that the Regional Magistrate committed a gross irregularity in the proceedings, but rather that the applicant's legal representative failed to properly and effectively represent him during the proceedings, because he failed to ask certain questions as he was instructed to.

[1] Stow v Regional Magistrate, Port Elizabeth NO & Others 2019 (1) SACR 487 at [25].
[2] Ch 30-p6 Revision Service 61, 2018.

[12] I agree, however, with the decision in *S v Sibeko & Others* 2017 (2) SACR 457 (FB) where the court concluded that under s 22(1)(c) the gross irregularity need not only relate to the conduct of the presiding officer. In this particular case the Court was of the view that, once a gross irregularity had occurred in the proceedings, it is not necessary to establish that it caused prejudice to the applicant, being the accused. It is sufficient that the irregularity is such that it is likely to cause prejudice to the accused. Furthermore, the provisions of s 35(3)(f) of the Constitution require that an accused is entitled to a fair

trial, which includes his right to legal representation. If an accused is represented by a person who, unbeknown to him, does not have the necessary qualifications to practice as a practitioner, such an accused's right as contained in s 35(3) had been infringed, which happened in the *Sibeko* case. Such an infringement constitutes a gross irregularity that was likely to be cause prejudice to the accused.

[13] In my view, an accused person, like the applicant, has a right in terms of s 35(3)(f) to approach the court on review in a case like this, where he alleges that his or her right to a fair trial was infringed because of improper, ineffective or incompetent legal representation. The content of this right is well established and recognized by our courts, as set out in *S v Halgryn* 2002 (2) SACR 211 (SCA). I conclude therefore that it would be competent to deal with the first complaint in terms of the provisions of s 22(1)(c). I will deal with this complaint in more detail further in this judgment.

[14] It should be noted further that s 22(2) states that the section does not affect the provisions of any other law relating to the review of proceedings in the Magistrates' Court. In my view, this refers to the review provisions in terms of Chapter 30 of the CPA. Before dealing with the grounds of review as set out above, and which were argued before us during the hearing of the matter, it would be appropriate to firstly deal with the evidence that was presented before the Magistrate in the Regional Court.

Evidence:

[15] The applicant was a police reservist at Claremont police station from 2007 until his arrest on 4 October 2010. During this period, the firearm that is the subject of the charges on which the applicant was convicted, disappeared from police safekeeping at Claremont police station. On 4 October 2010 two police officials (De Goede and Van Rensburg), who were both at that stage stationed at Langa police station, received information about the presence of an illegal firearm at a shack at Zone 22, no. 70, Langa.

[16] On their arrival at that location, they identified themselves, entered the shack and found the applicant lying on the bed. The reason for their visit was explained to the applicant and they also sought his permission to search the premises, although they were not in possession of a search warrant. I will deal with the evidence regarding this aspect more fully later in this judgment.

[17] On the version of the police he had no objection. One of the police officials, in the presence of the applicant, found a 9mm pistol with 11 rounds of 9mm ammunition, in a shopping bag under some blankets in the wardrobe. The ammunition consisted of seven rounds of ammunition which were exclusively issued and used by the police, plus four other rounds marked “Lugar”, which can be obtained by any other licensed firearm holder. The applicant lived in that shack with his girlfriend and their two young children. Neither of the two police officials knew the applicant, and only realised that he was a reservist at the Claremont police station after they found a police uniform in his home. At that stage, the applicant did not have a permit to lawfully possess a firearm and he was arrested. The firearm was a 9mm Arabella Z 88 semi-automatic pistol, which was in working order and was designed to discharge centre fire ammunition. It was also one of five firearms that had been stolen from the Claremont police station.

[18] Upon further investigation by the Investigating Officer, Constable Wilson (“Wilson”), it emerged that according to the firearms register of Claremont police station, this firearm, with serial number Q018649, had been booked out, with its magazine containing 15 rounds of ammunition, on 31 July 2009 by a Constable Millward (“Millward”). Wilson made this discovery during June 2010, prior to the applicant’s arrest, when he started to investigate the theft of firearms at Claremont police station. Millward, according to him, explained that he had returned the firearm, although there is no such entry in the register. He had been a suspect, but the Director of Public Prosecutions had declined to prosecute him.

[19] During the proceedings before the Regional Court, the Magistrate admitted an extra-curial statement made by the applicant, after a trial-within-a trial was held. This court is also asked to review the correctness of the decision regarding the admissibility of the statement, and to set it aside. I will also deal with this aspect later in this judgment.

[20] In this statement, made to a commissioned officer, Colonel Adonis ("Adonis"), on 5 October 2010, the applicant admitted that he had booked out this firearm, together with 10 live rounds of ammunition, during October 2009 in his official capacity. He had recorded this in the Occurrence Book at Claremont police station. He thereafter forgot to return it after his shift and had only discovered this fact on the train, on his way home. Worried that he would be in trouble at work, he hid the firearm in his wardrobe. When the time came to return to work, he did not return the firearm, as he thought he would be arrested. He left the firearm in the wardrobe and never used it. He further stated he actually forgot about it until the day he was arrested, when the police found the firearm under the blanket in the wardrobe.

[21] He denied that he made the statement freely and voluntarily, and his version in court differed from his statement. This was that on 4 October 2010 he was woken up by De Goede, who told him that he had information that he (the applicant) had pointed a firearm at his brother. At that stage, he denied that he was in possession of a firearm. De Goede noticed his police uniform, and he told him that he was a reservist at

Claremont police station. De Goede then told him that he was going to search the property and he went straight to the wardrobe, started to take the clothes out and he was then arrested. He only saw the firearm at the police station and he did not steal a firearm. He denies that any firearm, or ammunition, was found at his house.

Evaluation:

[22] While this is a review, not an appeal, I am of the view that the Magistrate in her judgment gave a proper evaluation and assessment of the evidence presented before her. I agree with her finding that the evidence against the applicant was overwhelming, and that the state witnesses appeared to be credible and convincing, in that they corroborated each other in all material respects and that there are no obvious improbabilities in their versions. Especially in respect of the fact that they found the firearm hidden in a wardrobe at the applicant's residence, when the applicant was not known to him.

[23] I also agree with her finding that the applicant was a poor and unconvincing witness, and his eventual denial of any knowledge of the firearm and ammunition is highly improbable. Further, I agree with her finding that there is no reasonable possibility that the applicant's version can be true. She correctly rejected his evidence as false and untruthful.

[24] Regarding the applicant's allegation that he was not effectively represented by the third respondent during the trial, I find that this allegation is not borne out by the record. The record clearly shows that the applicant actively took part in the proceedings in that he, in respect of most if not all of the witnesses, had given his legal representative some written questions to ask. The third respondent, even though he had already asked those questions, steadfastly and without question or reservation, followed the applicant's instructions. At one stage, the impression is gained that the applicant wanted to take charge of the proceedings, and played an active and dominant role in the cross-examination of the state witnesses.

[25] During the proceedings he even, with the assistance of the Regional Magistrate, during the cross-examination of almost all the witnesses, on more than one occasion, drew the third respondent's attention to the fact that he wanted to give the third respondent further instructions in order to proceed with the cross-examination of the witnesses. On a conspectus of the evidence and the record, I am more than convinced that the third respondent conducted the defence in a most thorough and professional manner, not to the prejudice of the applicant, and not in a manner that would have resulted in him not getting a fair trial.

[26] The applicant's second complaint was that the Regional Magistrate should have revisited her earlier decision to admit his confession, after Wilson intimated during the

main trial that he saw the applicant for the first time on 4 October 2010 at 17:27 at the Langa police station, after he was arrested, and that the applicant had not wanted to talk to him, but to his lawyer.

[27] The applicant says that at that stage already, he had indicated that he wanted to consult his lawyer, before he made the statement to either Wilson or Adonis. I do not think that this evidence of Wilson, during the main trial, would have been sufficient justification for the Regional Magistrate to revisit her earlier decision to admit the applicant's statement.

[28] This is entirely based on the evidence of Wilson, who testified that he had attempted to talk to the applicant, when he was first introduced to him, and that the applicant had indicated that he did not want to speak to him, but rather to his lawyer. At that stage Wilson did not pursue any further discussion with the applicant, and had not dealt with him, because he did not have a proper grasp of the case against the applicant, or of the investigation of the case, and it had been his plan only to speak to him on the following day.

[29] According to Wilson, he merely took the applicant from the Langa Police cells to the Bellville South police cells, where he himself was stationed. Wilson, in this regard, was questioned by the Regional Magistrate about why the applicant then changed his

mind and indeed spoke at a later stage. In answer to this, he stated that after he had gone home, he was called by an advocate from the office of the Director of Public Prosecutions, who wanted to speak to him about the matter. He was also instructed to charge the applicant and have him arraigned the next day. Because of this, he had gone back to the police cells to prepare the applicant for arraignment.

[30] He went ahead to take the applicant's warning statement, as the applicant had indicated that he wanted to talk to him, because he had nothing to hide. However, he warned him before taking down the statement that he had the right to speak to his lawyer, to which the applicant replied that he did not want to speak to his lawyer anymore because he had nothing to hide. At that point, he realised that the statement would amount to a confession, and he stopped the applicant. He tried to get hold of Adonis, who was not available. The next day, the applicant was taken to Adonis for the confession.

[31] The Regional Magistrate, in my view, was clearly alive to this apparent incongruity in the evidence given by Wilson during the trial-within-a-trial, and the evidence which he gave during the main trial. That would be why she took it upon herself, as can be observed from the record, to question him in a rather stern manner about this issue. She must have realized that if it was the case that the applicant had informed Wilson, prior to him making his statement, that he wanted to have legal representation, she would have had to revisit the decision to admit the statement.

[32] The Regional Magistrate accepted Wilson's explanation in this regard, and cannot be faulted for her decision. There was therefore no reason for her to revisit her decision to admit the statement that the applicant made before Adonis. In my view, she was correct in coming to such a conclusion, and her admission of the confession, and her decision not to revisit her admission thereof, was sound.

[33] The applicant's third complaint raised in these proceedings, is that the evidence with regards to the search and seizure of the firearm and ammunition should not have been admitted. This for the reason that no warrant had been applied for by the police officials to search the premises, and because the applicant had not given his permission for such a search.

[34] It is clear that the police officers who conducted the search of the applicant's premises did so without a search warrant. The circumstances under which a search and seizure can be conducted without a warrant, are set out in s 22 of the CPA. This section makes search and seizure without a warrant lawful under the circumstances where the person concerned consents to the search for and seizure of an article, or where the official who conducts the search on reasonable grounds believes that a warrant would have been issued to him if he applied for one under s 21.

[35] De Goede was the person in charge of the search and seizure operation at the applicant's premises. He stated in his evidence that after he received information about

the presence of a firearm at the specific address, he reacted immediately. He acknowledged that he had not been in possession of a search warrant, but he knew if he should apply for such a warrant that it would be granted to him. His explanation was that, in that specific area, there were a lot of unlawful firearms in circulation and he was of the view that, if he had gone to court first to apply for such a warrant, the firearm might have been removed from the premises. It was for that reason that he acted immediately. He further testified that when he arrived at the premises he explained to the applicant that he had information concerning an unlawful firearm on the premises and that he wished to search the premises.

[36] The applicant had not objected to him searching the premises. Van Rensburg, the police official that accompanied De Goede, confirmed his evidence in all material respects and further stated that the applicant had not indicated that they could not search the premises. The Regional Magistrate, as I said earlier on, found the evidence of these two witnesses to be credible and convincing, and I have no reason to disagree with that finding. Based on this evidence, I find that there had been compliance with the provisions of s 22, and that the search and seizure of the firearm at the applicant's premises was lawful. The evidence admitted subsequent to the search and seizure was therefore admissible.

[37] The applicant's fourth complaint was that the firearm was not tested for fingerprints, to prove that he had handled it. This, in my view, falls within the purview of the assessment of the evidence when a court is confronted with an appeal on the merits

in a criminal matter; to test whether, on the assessment of the evidence presented to the court a quo, the state has proven its case beyond reasonable doubt. In any event, however, absent any evidence of fingerprints and given the circumstances of the case, where the firearm was found wrapped in a piece of cloth on the applicant's premises, the absence of such evidence would not assist an accused in his quest to show that the State has not proven its case beyond reasonable doubt. The other evidence is overwhelming.

[38] In the result therefore the applicant, in my view, has failed to show on the grounds as alleged that the decision given by the Regional Magistrate, which resulted in him being found guilty, should be set aside on review. I would therefore make the following order:

1. That the application to review and set aside the applicant's convictions and sentence, is dismissed.

2. None of the parties, for obvious reasons, incurred any costs. I would therefore make no such order.

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R.C.A. Henney

Judge of the High Court

I agree.

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P.A.L. Gamble

Judge of the High Court