A136/2008 /ES

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 19/2/2008

REPORTABLE

Magistrate
WONDERBOOM

Case no: D610/05
Supreme court ref no: 47

THE STATE v ANTONI GOUWS

REVIEW JUDGMENT

POSWA, J

[1] This matter was submitted to me as a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The reasons given by the senior magistrate, in paragraph 1 of his letter, read as follows:

> "*1.1 The accused person was charged in the magistrate's court, Pretoria North with defeating the ends of Justice. Accused was legally represented by Advocate Combrinck from the Legal Aid Board. Mr P Voster was appearing on behalf of the State. When the charge was put to the accused, he pleaded Not Guilty. After*

the basis of defence was disclosed, the matter was postponed for State witnesses.

*1.2 0n 6 0ctober 2006 Mr T Buchling was then appearing on behalf of the state. He then decided to close **(sic)** state case without calling any witness, indicating that accused pleaded to the wrong charge.*

1.3 The Presiding magistrate then found the accused Not Guilty and Discharged.

1.4 The Senior Prosecutor wrote a letter to the Senior Magistrate requesting him to send the matter on special Review. The letter is also attached for your attention."

In paragraphs 2 and 3 of the letter the following is stated:

"*2. In her letter, she indicated that the conduct of the prosecutor of not calling state witnesses amounted to stopping of the prosecution. She indicated that this can only be done with the requisite consent of the Director of Public Prosecutions.*

3. In the light of the above stated facts I humbly request that the acquittal of the accused be set aside and the matter be remitted

back to the magistrate to continue with the trial."

[2] The letter referred to in paragraph 1.4 of the magistrate, from the Senior Prosecutor: Court Utilization, Pretoria North, reads:

"*REQUEST FOR SPECIAL REVIEW*

The accused was charged with defeating the ends of justice. 0n 23 July 2005 he made a statement at the Sinoville Police Station that his car was hijacked on 21/7/2005. 0n 11/8/2005 the investigating officer received information that the complainant was driving his car on 22/7/05. He was later asked if he knows where his car is and he said yes. He was then arrested and charged.

0n 21/4/2006 he appeared in our court and pleaded not guilty to the charge of defeating the ends of justice. The case was then remanded until 6/10/2006. 0n 6/10/2006 he appeared again in court. The prosecutor informed the court that he is not calling witnesses because the charge preferred against the accused IS wrong he was supposed to be charged with perjury. State case was closed and accused was acquitted.

The conduct of the prosecutor of not calling state witness (sic) after accused pleaded not guilty amounts to stopping of prosecutions (sic). The charge of perjury would be preferred where an accused has made two conflicting sworn statements under oath. In this case accused only made

one statement under oath referring to the hijacking.

The prosecutor made a mistake by stopping prosecutions (sic) without the Director of Public Prosecution's authority. The unauthorised stopping of prosecutions (sic) without the Director of Public Prosecution's authority amount (sic) to nullity S v Tengo 2003(1) SACR 162 (ECD).

There will not be any prejudice on behalf of the accused.

We request that the matter be sent on special review so that the honorable judge can set aside the acquittal and give an order that the matter start ***de novo****."*

[3] It would appear that the presiding magistrate, Mr M A Ramahanelo, whose name is wrongly spelt in the transcript as "Romahonelo", was called upon by his seniors to explain his judgment. I glean that from his letter of 5 December 2006, which reads as follows:

"*RE: REVIEW: THE STATE VERSUS ANTONI GOUWS.*

I would humbly submit that after the accused had pleaded and the state having not tot call (sic) witnesses and closing the state's case, the accused was entitled to judgment.

Since the state indicated that a wrong charge was read to the accused, the state should have applied for the amendment of the charge sheet."

According to the charge-sheet, Mr Gouws was arrested on 15 August 2005 and appeared in court the next day. The case was postponed to 30 August 2005 whereafter it was postponed on several further occasions to which it had been postponed. The trial ultimately commenced on 21 April 2006.

[4] In putting the charge to accused person the prosecutor stated the following, on p1 of the transcribed record:

"*The charge is one of regsverydeling deurdat op en omtrent 23 Julie 2005 tot naby Sinville (sic) in die distrik van Wonderboom, die beskuldigde doen reg met die opset om die verloop van die gereg te dwars kom (sic) of om te belemmer. 'n Handeling verrig het te weet 'n valse verklaring af te lê dat hy met vuurwapens geroof is van sy motor voertuig Ford Batum (sic) met registrasie nommer PWL 379GP en sellulêre foon en gereedskap dalk 'n die regspleging gedwarsboom of belemmer het."*

A loose rendition of the above, in English, is that, on 23 July 2005, at or near Sinoville, in the district of Wonderboom, Mr Gouws unlawfully and with the intent to defeat or obstruct the cause of justice, made a false statement that he was robbed with a firearm/at gunpoint and deprived of his motor vehicle as described

as well as his cell phone. Mr Gouws made that false statement with the intention of defeating or obstructing the administration of justice, which he succeeded in doing.

[5] The following then happened during his plea:

> "*COURT: Do you understand the charge against you?*
>
> *ACCUSED: Yes sir.*
>
> *COURT: How do you plead to the charge?*
>
> *ACCUSED: Excuse me.*
>
> *COURT: How do you plead to the charge?*
>
> *ACCUSED: Yes.*
>
> *COURT: What is your plea to the charge?*
>
> *ACCUSED: Guilty, guilty or not guilty.*
>
> *COURT: Yes it cannot be both either one, either you plead guilty (intervenes)*
>
> *ACCUSED: Is not guilty, onskuldig.*
>
> *ADV COMBRINK: As the court pleases your worship, the plea of not guilty in accordance with in my instruction* (sic) *after thorough consultation with the accused. The reason for this is that he only admits that he laid a false charge at the South African Police Services on the 23rd of July 2005 and that is how far the defense* (sic) *admissions is concern* (sic). *As far as the result of this your worship I wish to say with respect the state will have to prove and that is not admitted by the defense* (sic) *at*

this stage.

COURT: Do you confirm what your legal councilor said?

ACCUSED: Yes.

COURT: Yes Public Prosecutor.

PROSECUTOR: As the court pleases your worship the state (intervenes)

ADV COMBRINK: Can I just approach the prosecutor please?

PROSECUTOR: May we request that the matter be remanded as a part heard matter (sic) *for the evidence of the investigating officer. The date has been arrange* (sic) *for the 12th day of June your worship."* (pp1-2)

[6] When the case resumed on 6 0ctober 2007, the public prosecutor addressed the court as follows:

"*Your worship this case was postponed for state to produce evidence at this state [presumably meant to be stage] the state is not going to call any witnesses. My view [is that] the wrong charge has been put to the accused, he had pleaded to the wrong charge I am closing my case."*

[7] Mr Combrink, on behalf of the accused person, stated the following:

"*As the court pleases your worship at this stage the defence wants to apply for contravening subsection 174 [presumably to apply for a discharge in terms of section 174 of the CPA] and deeply with respect agree with the state that the charge is one of defeating the ends of justice. Although the accused admitted laying a false charge I want to submit with*

respect that there is no evidence that he did it with the intention to defeat the ends of justice, and therefore I asked for the acquittal of the accused in terms of section 174 as the court pleases your worship." (p3)

Asked if there was any reply, the prosecutor said there was none.

[8] In his short judgment the magistrate said the following:

"*The accused is entitled to a judgment after the state has closed his case. There is no evidence before court so the accused is found not guilty and discharge (sic).*" (p4)

Stopping of a Prosecution

[9] Section 6 of the CPA authorises a Director of Public Prosecutions to stop proceedings. It reads as follows:

"*6.* ***Power to withdraw charge or stop prosecution****. - An attorney-general [now Director of Public Prosecutions] or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may-*

(a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;

> *(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general [Director of Public Prosecutions] or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general [the Director of Public Prosecutions] or any person authorised thereto by the attorney-general [the Director of Public Prosecutions], whether in general or in any particular case, has consented thereto."* (Emphasis added.)

The section does not state what is meant by the phrase "stop the prosecution" in subparagraph (b).

[10] In *S v Van Niekerk* 1985 4 SA 550 (B GD) at 551E-F, THEAL STEWART, JP said the following in that regard, interpreting the facts of that case:

> "*To accept a plea of not guilty is to stop the prosecution, and the prosecutor in the present case should not have accepted that plea without the consent of the Attorney-General.*"

In what is, in my view, a well-reasoned judgment, PICKARD, ACJ, as he then

was, disagrees with THEAL STEWART, JP in *Attorney-General v Additional Magistrate, Middledrift and 0thers* 1987(4) SA 914 (CGD). PICKARD, ACJ discusses, in great detail and with reference to authorities, some of which were also relied on by THEAL STEWART, JP, why he so disagrees (pp917-920). THEAL STEWART, JP relies on, amongst others, Hiemstra *Suid-Afrikaanse Strafproses* 3rd ed at 14-15 in arriving at the conclusion that:

> "*the words '… the prosecution shall not be stopped …' are a direction to the court as well as to the prosecutor and it is suggested that, when the prosecutor stops a prosecution, the court should enquire whether he has the consent of the Attorney-General.*" (p551F-G)

[11] PICKARD, ACJ expresses the view that, for the Judge-President to categorically state the above, "seems … to be an over-simplistic approach". (p917F)

[12] PICKARD, ACJ also disagrees with the following passage from the judgment of THEAL STEWART, JP at 553C-F:

> "*The clear purpose of the proviso to para (b) of s 6 of the Code [the CPA] is to obviate the risk of prosecutions foundering through the ineptitude and inexperience of prosecutors. The purpose of the provision would be defeated were it not possible to renew the prosecution of an accused person after a charge against him had been withdrawn contrary to the provisions of the proviso and after he had been acquitted by a trusting but*

unenquiring court for the sole reason that the trial had been stopped by the prosecutor. So far as the court is concerned, I would agree with ***Hiemstra****'s views at 14* ***supra*** *that:*

'Die nuwe bewoording, nl "die vervolging nie gestaak word" is 'n voorskrif aan die hof sowel as aan die aanklaer.' [Which, simply translated, states that the wording of the subsection is a direction to both the prosecutor and the court.]

In my view the prosecutor in the present case clearly acted beyond his powers and, as a matter of fact, so did the court, albeit perhaps in trusting ignorance."

PICKARD, ACJ proceeds as follows in expressing his disagreement:

"*Firstly, I express some doubt about the suggestion that the Court should see as one of its functions a duty to protect the State or the Attorney-General against foundering or ineptitude and inexperience of prosecutors. I, myself, would be loathe to accept such a function in my criminal Court. Surely the Attorney-General should not and probably does not appoint persons to prosecute unless he has satisfied himself that they are sufficiently experienced and competent to do so, having regard to the nature of the cases entrusted to them.*

Secondly, if I accept that responsibility of so protecting the Attorney-

General in one respect I would be somewhat at a loss to decide where and at what point that duty ceases and when I should or should not interfere with the conduct of the prosecution in order to ensure that the interests of the Attorney-General are best or adequately served.

I do not hesitate to state that Judges, for as long as I can recall, have taken the attitude that in criminal matters they do not readily interfere with the prosecution in any fashion that could be detrimental to the accused. 0nly when a complete miscarriage of justice becomes imminent and due regard is had to the risk of irreparably prejudicing the accused, do Judges risk any action on their part which would favour the interests of the prosecution.

Thirdly, the premise of the learned Judge President that stopping of a prosecution by a prosecutor without the necessary consent would be due to floundering through ineptitude and inexperience is not necessarily correct. It may very conceivably be done in a blatant disregard of instructions or for various other reasons, eg because he has a secret interest in the outcome of the matter or has been coerced into assisting the accused by some means or other.

In my view the Attorney-General should, in the normal course of proceedings, be in no better or more favourable position vis-à-vis the

court than any attorney or client who employs counsel and is faced with a ***fait accompli*** *with regard to the competence or incompetence of the person of his choice.*

What I have stated hereinbefore in this respect I consider to be the general approach and the traditional attitude of the courts. 0f course, the Legislature is at liberty to enact special provisions to alter that approach albeit to make it encumbent upon the court to act as the watchdog of the Attorney-General's interests. In doing so it would have to consider whether or not it was prepared to face criticism that the courts would then possibly appear not to be fully independent and unbiased. In my view any enactment which purported to do so, even in the slightest degree, is highly unlikely and would have to be expressed in such clear and unambiguous terms as to leave no doubt about its intention and direction.

The proviso to s 6(b) does not appear to be in such clear terms and I accordingly would be hesitant to hold that it contains 'a direction to the court as well as to the prosecutor' and that it places on the court a duty to enquire about the prosecutor's authority. More so do I hesitate to hold that it places upon the court a duty to take steps to continue with a prosecution (by what method also seems difficult to imagine) when the duly appointed representative of the Attorney-General has refused to do

so. (It must be remembered that the prosecutor's action may be intentional and not as a result of foundering or ineptitude.)

Accordingly, I find myself unable to concur in the views of either Hiemstra or the learned Judge President of Bophuthatswana in regard to the duty of the court either to enquire about the consent of the Attorney-General or to take steps to have the prosecution continued after it has been stopped as envisaged by s 6(b)." (p917I-918J)

[13] After a further discussion, PICKARD, ACJ expressed agreement with the conclusion of the Court in *S v Van Wyk* 1981 3 SA 228 (C), at 230E-G that the withdrawal by the prosecutor of a charge, after a plea of "not guilty", has been recorded in terms of section 113 of the CPA, do not amount to a stopping of the prosecution. PICKARD, ACJ then state the following at 921C-E:

"*Unless the action of the **prosecutor** is intended to amount to a stopping of the prosecution as envisaged by s 6(b) with the consequences thereof as prescribed therein … it cannot be considered to be a stopping of a prosecution as envisaged by the section. It seems advisable to suggest that prosecutors who do wish to stop the prosecution in terms of s 6(b) do so in unambiguous terms with specific reference to the section in order to avoid misunderstanding.*

> *That the proviso to s 6(b) appears to be worded in such a fashion that it should be interpreted to be peremptory in that a prosecution 'shall not be stopped' if the necessary consent is absent, I find to be a perfectly correct interpretation. The words are clear and unambiguous and any attempt by a prosecutor in the sense envisaged by the section without such consent is necessarily followed by the sanction of invalidity*." (Emphasis added.)

[14] In concurring with PICKARD, ACJ's judgment, CLAASSENS, AJ found that, on the facts of the case before them, the provisions of section 6(b) did not apply. Firstly, he doubted if the words used by the Magistrate that the Public prosecutor abandoned the prosecution were correct. In that regard he stated:

> "*The magistrate has recorded at the end of the proceedings that 'witnesses not present in court and therefore the State abandoned the prosecution'. Is this a record of the exact words used by the prosecutor or the magistrate's interpretation of what was conveyed by the prosecutor to the magistrate? Without a verbatim recording of what was said in court uncertainty prevails.*" (pp924J-925A)

0n the assumption that the public prosecutor actually stated that he was abandoning the prosecution, CLAASSENS, AJ went on to state the following:

> "*Even if the word 'abandonment' was used by the prosecutor, this, in my view, adds to the confusion because of a likely meaning of that word in the*

> *context under consideration. It is clear from the record that* ***there had been repeated postponements of the trial*** *which led the magistrate finally to warn respective legal representatives that further remand sought would be final. After such a final warning the prosecutor once again without his witnesses was constrained to 'abandon' his prosecution, thereby,* ***not with stopping of the prosecution in terms of s 6(b) in mind****, but placing the case fairly and squarely* ***in the hands of the court which then had to decide whether to finalise the matter in terms of s 106 or to grant yet a further remand.***" (Emphasis added, p925A-C.)

Having come to the conclusion that the prosecutor did not intend to stop the proceedings, the learned judge was "of the view that the magistrate acted correctly in invoking the provisions of s 106 in the circumstances he did. No irregularity in the proceedings has then been established by applicant." (p925D) (It is not clear to me why the learned Judge refers to the provisions of s 106, which merely set out the various types of pleas available to an accused person on being charged.)

[15] In his conclusion, CLAASSENS AJ says the following:

> "*Although what has already been stated disposes of the application, it is relevant to consider* ***the functions of the trial court*** *in the context of s 6(b). This section empowers the Attorney-General to stop the prosecution at any time after plea and prior to conviction. The section*

does not differentiate between the prosecution being stopped prior to any evidence being led or subsequent thereto. The section also makes no provision for ***formal proof of the Attorney-General's consent*** *being placed before the trial court in a situation where the prosecution is being conducted by a person delegated by the Attorney-General. Where there is no direct indication by the prosecutor that he is stopping the prosecution (at whatever stage of the proceedings allowed by s 6(b)) or proof of the Attorney-General's consent if he gives such indication, then can it be regarded a function of the trial court in the former instance to investigate the intention of the prosecutor when closing his case or bringing the prosecution to an end at any stage of the proceedings? In my view this would constitute an inroad by the Courts into the functions and responsibilities of the prosecutor. It would be impractical and an embarrassment to the prosecutor. In the latter instance an enquiry into the authenticity of the consent of the Attorney-General, in the context of a trial action, could well prove inconclusive, time wasting and once again an embarrassment to the prosecution. In regard to the functions of a judicial officer, in the above context I agree with the views of PICKARD ACJ with due deference to the views of the author Hiemstra* and THEAL STEWART JP in the case of *R v Van Niekerk (supra*)." (Emphasis added, p925E-I.)

[16] It will be observed that, in *Attorney-General v Additional Magistrate, Middledrift and 0thers (supra)* the Attorney-General had applied for the setting aside of the magistrate's verdict of "not guilty and discharged" in respect of all the twelve accused persons who had been charged. 0nly the first accused person had pleaded guilty when the case was postponed for another date. The case had been postponed several times thereafter, before the remaining accused persons had pleaded guilty. When the public prosecutor eventually "abandoned" the proceedings, as the magistrate stated, only one of the accused persons had pleaded guilty. It is on account of these facts that PICKARD, ACJ said the following:

> "*In my view this distinction [between the accused person who had pleaded not guilty and his co-accused persons, who had not pleaded at all] is a justifiable one … and that, to that extent, the magistrate erred in entering a judgment of 'not guilty and discharged'. Nor can it be argued that s 6(b) applied to them since that section deals with procedure 'after plea' only. Accordingly, no room exists for a finding that the prosecutor's action in 'abandoning the prosecution' can be construed as a 'stopping' of the prosecution as envisaged by that section or that it required consent from the Attorney-General.*
>
> *Clearly it amounted to no more than a withdrawal of the charges prior to plea with retention by the State of the right to charge them afresh.*" (p916E-G.)

Consequently, the only accused person in respect of whom the question arose as to the application of the provisions of s 6(b) was the first one, the second respondent in the application.

[17] In *S vTengo (supra)*, on which the Senior Prosecutor: Court Utilization and the senior magistrate relied in forwarding this matter to this court, on special review, the accused person had been charged with theft. He pleaded guilty. 0nce, however, he was questioned in terms of s 112(1)(b) of the CPA, he denied that he had stolen the items specified in the charge-sheet, resulting in the magistrate entering a plea of not guilty in terms of s 113 of the CPA. The case was then postponed for trial on a future date. 0n resumption of the proceedings, the public prosecutor advised the magistrate that she was accepting the plea of not guilty and Mr Tengo was, accordingly, acquitted.

The case was thereafter placed before the High Court, Eastern Cape Division, on special review.

> "*inasmuch as it appeared that the proceedings had been stopped without the requisite consent of the Director of Public Prosecutions thereto first having been obtained.*" (Emphasis added, p162j.)

After quoting the text of s 6(a) of the CPA, PICKERING, J stated the following at

163b-c:

> "*The prosecutor's acceptance of the plea of not guilty which was entered on behalf of the accused in terms of s 113 of the Act, amounted to a stopping of the prosecution and it was incumbent upon the magistrate in those circumstances to enquire of the prosecutor whether she had the requisite consent of the Director of Public Prosecutions. See S v Van Niekerk 1985 4 SA 550 (B); Du Toit et al Commentary on the Criminal Procedure Act* at 1-5."

It would seem that the Court was not referred to the decision in *Attorney-General v Additional Magistrate, Middledrift and 0thers (supra)*. I say so because there is no mention of that decision in the judgment.

[18] The Court referred the matter to the Director of Public Prosecutions' office for comment and it received "a helpful opinion by Mr Bursey of that office" (p163d). The learned judge then proceeds as follows:

> "*Mr Bursey states that the prosecutor was newly appointed and inexperienced and that she was not in fact authorised to stop the prosecution. It is unfortunate that the magistrate did not enquire from her as to whether she had the necessary consent to do so as this would have obviated a considerable degree of inconvenience for all concerned.*" (Emphasis added, p163e.)

[19] Dealing with the question as to "the correct order to be made in the circumstances", PICKERING, J agreed with STEWART, J's statement, at 553B-E, in *S v Van Niekerk (supra)*: "that an unauthorised stopping of the prosecution by the prosecutor would amount to a nullity." He proceeded to state the following:

> "*So, too, would the subsequent acquittal by the court, because the lodging of a new charge would be in order. In the light of this statement of the law the concluding paragraph of the judgment of STEWART J is, with respect, somewhat surprising. At 553F-G he stated as follows:*
>
> *'The accused stands acquitted of the charges. The decision whether he should be re-charged is one for the Attorney-General to make in the light of what the interests of the community demand.*
>
> *The proceedings are confirmed.'*" (p163e-g)

[20] PICKERING, J then raised what appears to me to be a valid criticism of STEWART, J's decision as being "illogical, bearing in mind that the acceptance of the plea by the prosecutor and the subsequent acquittal of the accused were held to have amounted to nullities". He went on to say:

> "*In such circumstances the acquittal of an accused cannot stand, in my view, nor is it possible to confirm such proceedings as being substantially in accordance with justice.*" (p163h.)

[21] To a submission made on behalf of the accused person, that the proceedings, as a whole, be set aside and that the decision be left to the Director of Public Prosecutions as to whether to prosecute anew or not, PICKERING, J disagreed saying:

> "*It does not follow from the fact that the unauthorised stopping of the prosecution and the subsequent acquittal amounted to nullities that the entire proceedings are thereby vitiated. Indeed, they are not. The accused has pleaded and is entitled to a verdict on that plea. If the Director of Public Prosecutions, for whatever reason, does not wish to continue with the prosecution or is of the view that to continue therewith would operate unfairly upon the accused, then he will no doubt* ***formally stop the prosecution*** *and the accused will be duly acquitted.*" (Emphasis added, p164b-c.)

He then made the following order:

> "*1. The acceptance by the prosecutor of the plea of not guilty as well as the subsequent acquittal of the accused are hereby set aside.*
>
> *2. The matter is remitted to the magistrate to continue with the trial.*"

LEACH, J concurred.

[22] Let me mention, from the outset, that I am in full agreement with the reasoning of

PICKARD, ACJ and CLAASSENS, AJ and their conclusions in *Attorney-General v Additional Magistrate, Middledrift and 0thers (supra)*. Whilst I agree with PICKERING, J that it is odd that, having found that the acceptance of a plea by a prosecutor amounts to a nullity and that the subsequent acquittal is also a nullity, the accused person can, as held by STEWART, J, remain acquitted. I do, for reasons eminently stated by both PICKARD, ACJ and CLAASSENS, J, respectfully disagree with both STEWART, J and PICKERING, J in the following respects:

(1) A mere acceptance of a plea cannot, in my view, amount to a stoppage of the proceedings, in the manner contemplated in s 6(b) of the CPA, for reasons stated in *Attorney-General v Additional Magistrate, Middledrift and 0thers (supra)*. A prosecutor who accepts a plea is, in my view, doing no more than taking "the day-to-day decisions which prosecutors are called upon to make in the course of their duties" mentioned by PICKARD, ACJ and CLAASSENS, J.

(2) Like PICKARD, ACJ and CLAASSENS, J, I do not agree that there is a duty on a court to enquire whether or not a prosecutor who accepts an accused person's plea or decides not to call witnesses or further witnesses is, thereby, stopping the proceedings. All that the prosecutor does is to leave before the court whatever has been placed before it up to that stage, including admissions by the accused person, if any, in the hands of the

court for decision. If there is either no evidence or inadequate evidence, the court will, surely not, acquit the accused person. If there is some evidence, the court will weigh that evidence to determine whether or not the accused person's guilt has been proved beyond reasonable doubt. In addition to what is said in *Attorney-General v Additional Magistrate, Middledrift and 0thers (supra)*, with regard to why it is inappropriate of a court to question the prosecutor's authority to accept a plea, I find that it could cause an accused person great concern if he or she heard a magistrate questioning whether or not it is appropriate for the state to call no further evidence. He or she might, understandably, believe that the court wants him or her convicted and is unhappy that the prosecutor is not calling more evidence or evidence at all. I equally agree that it is the task of the Director of Public Prosecutions to ensure that he or she appoints public prosecutors who are adequately qualified for the task. I also have difficulty with the High Court having to take into account an aspect that is not part of the record, viz what is stated by the public prosecutor or someone on behalf of the state as to why the public prosecutor acted the way he or she did. That, in my view, is extraneous information.

[23] All the authorities referred to herein are in agreement, for different reasons, that an accused person who was acquitted in consequence of the public prosecutor having stopped the proceedings, in the sense contemplated in s 6(b) of the CPA,

without the necessary authority to do so cannot successfully plead *autretois acquit* if subsequently charged. From the point of view of how STEWART, J in *S v Van Niekerk (supra)* and PICKERING J in *S v Tengo (supra)* it is understandable that such an acquittal should not have a sense of …… I do not understand why PICKARD, ACJ and CLAASSENS, AJ in the light of their approach in *Attorney-General v Additional Magistrate, Middledrift and 0thers, supra*, also are of the view that a plea of *autretois acquit* is not available to an accused person who is convicted in consequence of a public prosecutor who stopped the trial without necessary authority. For no wrong-doing on his/her part, an accused person in those circumstances is acquitted by a court acting, in my view and on the basis of the approach adopted by PICKARD, ACJ and CLAASSENS, AJ, appropriately, in consequence of a patently appropriate decision on the part of the prosecutor of the day. It will be borne in mind that there is no procedure laid out for the formal stopping of a proceeding by a public prosecutor acting on authority to do so. There is, therefore, no basis on which an accused person, even if legally represented, will suspect that a prosecutor who stops proceedings does so without authority. It is, in my view, against all sense of fairness that an accused person in those circumstances should be denied what would ordinarily be available to him or her, a plea of *autrefois acquit* for no fault on his part.

[24] It seems clear to me that the legislature, when enacting the two subsections of s 6

of the CPA, was mindful of the different consequences of the respective subsections. In the case of s 6(a), it is clearly stated that "the accused shall not be entitled to a right of acquittal in respect of that charge". That, of course, is where the public prosecutor has withdrawn the charge before the accused person pleads. There is no reference to "a verdict of acquittal" in s 6(b). A successful application by the state to have an acquittal obtained on account of the failure of the public prosecutor to obtain necessary authority before having the proceedings stopped is tantamount, in my view, to giving the state a second bite on account of internal errors within the State's system. That, in my view, is eminently unfair. It is not, after all, about ensuring that guilty persons are always convicted. That is an ideal that is not always achieved. There are many situations in which an accused person is acquitted, on account of certain technical flaws in the proceedings, where it is evident that he or she would, but for both flaws, have been found guilty. A very pertinent example is in respect of statements unconstitutionally obtained from accused persons resulting in such persons being acquitted on account of such unconstitutionality (s 35(5) of the Constitution).

[25] Coming to the facts of the case before me, I find that when the prosecutor closed her case, she was, in all probability, taking a decision based on the facts or the problems before her. The case had been adjourned a few times (for the evidence of the investigating officer). Strange as it may seem, and there was no explanation therefor, the investigating officer was still not at court on 6 0ctober

2006, the first postponement for that purpose having been on 21 April 2006. The case was postponed initially to 12 June 2006 and was further postponed, on that date, to 7 August 2006, on the latter date it was further postponed to 26 September 2006. 0n this date it was postponed to 6 0ctober 2006. Although the magistrate did not express a view regarding these constant postponements, the fact of the matter is that the case had been postponed too many times, to accommodate the state. It should also be borne in mind that Mr Gouws first appeared in court on 16 August 2005 and had had several appearances before 6 0ctober 2006. It had been postponed on sixteen occasions between 16 August 2005 and 6 0ctober 2006. In the circumstances, it is understandable that the public prosecutor would have felt constrained to close her case without asking for a further postponement. In so doing, she was exercising part of her day to day decision in criminal cases. What, one may ask, would the Director of Public Prosecutions have advised her to do in those circumstances? To ask for a further postponement? That is unthinkable. It was, after all, no ordinary witness that was failing to attend court but the investigating officer. Even if, in failing to attend court, the investigating officer was deliberately saving Mr Gouws from facing a possible conviction, this is something beyond the control of both the Director of Public Prosecutions and the Court.

[26] It follows that I find that the public prosecutor did not act inappropriately in closing her case as she did. She did not purport to be acting in terms of s 6(b).

Similarly, the magistrate did not commit any irregularity in his judgment. I find nothing wrong in his remarks, when passing judgment, which reads:

> "*The accused is entitled to a judgment after the state has closed his case. There is no evidence before court so the accused is found* ***not guilty and discharge*** (*sic*)." (p4)

[27] Even if the prosecutor had, in fact and in law, stopped the proceedings without the authority of the Director of Public Prosecutions, I would still have found, for reasons discussed herein, nothing improper in the magistrate's decision. That would be the case even if the public prosecutor was, in fact, as inexperienced as it is stated in the Senior Magistrate's letter. It is the Director of Public Prosecution's task to ensure that prosecutors are properly trained and that only competent prosecutors are let loose to conduct trials and to make discretionary decisions in the case of those who knowingly purport to act in terms of s 6(b), when not so authorised, they should, in my view, be dealt with by way of disciplinary action, internally.

[28] Consequently, I make the following order:

1. There is nothing irregular in the finding of the accused person, Mr Antoni Gouws, "not guilty and discharged".
2. The proceedings are in accordance with justice.
3. The judgment is confirmed.

J N M POSWA
JUDGE OF THE HIGH COURT

I agree

N M MAVUNDLA
JUDGE OF THE HIGH COURT

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IN THE ORDINARY COURSE OF EVENTS