REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 110/12

DATE:22/08/2012

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

STATE Claimant

and

KHUMALO Accused

J U D G M E N T

Summary

Review - failure to complete cross-examination of a witness in a criminal trial – infringement of constitutional right. Review permissible even where accused person represented in a lower court – Requirement is that magistrate must form the opinion that the proceedings might not be in accordance with justice.

WEPENER, J:

[1] This matter comes on review pursuant to s 304A of the Criminal Procedure Act 51 of 1977 (the CPA). The accused was charged with a count of robbery and pleaded not guilty. The regional magistrate in the court below (Germiston Regional Court) advised that the magistrate of the district court, Germiston, commenced the trial on 25 April 2012 and concluded it on 11 June 2012 when the accused was found guilty and referred to the regional court pursuant to the terms of s 116 of the CPA, for sentence.

[2] Prior to imposing a sentence the regional magistrate noticed that after the complainant had given her evidence in chief, the witness was cross-examined by the defence attorney. The matter was postponed to a subsequent date for further cross-examination of the complainant by the accused's legal representative. On the subsequent trial date the complainant failed to attend court and the State's case was closed. The accused's legal representative applied for the discharge of the accused in the district court pursuant to the provisions of s 174 of the CPA by virtue of the fact that the accused's right to cross-examine was infringed and that such an infringement was fatal to the State's case. The district magistrate, however, refused such a discharge and the accused thereafter closed his case without leading any evidence. The defence attorney again applied for the accused to be acquitted on the basis that there had been an infringement of his fundamental rights and in particular an infringement of the rights enshrined in s 35(3) of the Constitution which provides:

> "*35. Arrested, detained and accused persons.*
> *(3) Every accused person has a right to a fair trial, which includes the right—*

> *(a) to be informed of the charge with sufficient detail to answer it;*
> *(b) to have adequate time and facilities to prepare a defence;*
> *(c) to a public trial before an ordinary court;*
> *(d) to have their trial begin and conclude without unreasonable delay;*
> *(e) to be present when being tried;*
> *(f)to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;*
> *(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
> *(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;*
> *(i) to adduce and challenge evidence;*
> *(j) not to be compelled to give self-incriminating evidence;*
> *(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;*
> *(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;*
> *(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;*
> *(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*
> *(o)of appeal to, or review by, a higher court*."

S 35(3)(i) provides for the right of an accused person to challenge evidence lead at a trial. The attorney appearing for the accused argued that the evidence of the complainant was not fully tested since cross-examination had not been completed, which, it was argued, lead to and irregularity infringing upon the accused's constitutional right to challenge evidence lead at a trial.

[3] During judgment the magistrate nevertheless summarised the evidence of the complainant, referred to the fact that the evidence of a single witness should be approached with caution and found that the complainant was a credible witness and accepted her evidence. The magistrate found that the identity of the accused had been proven and that he committed the crime of robbery. The accused was found guilty as charged and, because of his record of previous convictions, referred to the regional court for purpose of sentence.

[4] The first question to be determined is whether the right to cross-examination is so fundamental that a failure to complete cross-examination of a witness leads to a failure of justice, resulting in the setting aside of the conviction. The second question is whether the matter is reviewable having regard to the fact that the accused enjoyed legal representation.

[5] S 304A(1)(a) of the CPA provides:

"*Review of proceedings before sentence.*

(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303."

Although the section, on face value, provides for a magistrate who has doubts, prior to sentence, about the correctness of the conviction which he or she brought in, it has been held that review proceedings pursuant to s 304A of the CPA may be submitted to a judge for review by a magistrate who first becomes aware of the proceedings at the sentencing stage. Where a case comes before a magistrate for purposes of sentence in terms of s 275 of the CPA (where another magistrate has entered the conviction) the procedure in s 304A of the CPA is available to him or her so that he or she may refer the case for review before imposition of sentence, where he or she is of the opinion that the conviction was not in accordance with justice (*S v Hlongwane* 1990 (1) SACR 310 (NC); *S v Abrahams* 1991 (1) SACR 633 (O) at 636a - b; *S v Klaase* 1998 (1) SACR 317 (C) at 321i - 322a).

[6] The accused was legally represented during his trial. It has been said that it is doubtful whether the review proceedings pursuant to s 304A of the CPA will avail an accused in such circumstances. See *S v Klaase*, supra at 322a - c. S 304A of the CPA provides that the powers of a review court are the same "*as if the record thereof had been laid before him in terms of section 303*". S 303 of the CPA provides:

"***Transmission of record.***

The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302 (1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as

possible, lay the same in chambers before a judge of that division for his consideration."

The reference in s 303 is limited to paragraph (a) of s 302(1). There is no reference or incorporation of the whole of s 302 or specifically of s 302 (3) of the CPA. The latter section provides that:

"*(3) The provisions of subsection (1) shall only apply—*

(a) *with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser;…"*

I am of the view that s 302(3) does not find application in a case such as this where the matter has been referred for review pursuant to s 304A. The result is that the matters which fall within the ambit of s 304A are not limited to matters in which an accused did not enjoy legal representation. Rose-Innes J referred to *S v Ferreira* 1978 (4) SA (T) and to *S v Smith* 1965 (2) SA 121 (O) as support for his view that the accused who is legally represented could not utilise the right to review pursuant to s 304A.

[7] Both the *Ferreira* and *Smith* cases concern the rights to appeal and review, but neither of them interpreted s 304A to be limited by the provisions of s 302(3) the latter which I find do not qualify the provisions of s 304A. In Du Toit *et al*, *Commentary on the Criminal Procedure Act*, p30 – 16, the authors are of the view that "*In S v Klaase 1998 (1) SACR 317 (C) the court , with reference to S v Makhubele 1987 (2) SA 541 (T) held that s 304A was not applicable when an accused was represented during his trial*." This statement is erroneous. *Makhubele* does not hold that the section is unavailable to an accused if such accused was represented. Nor did Rose-Innes J base his view on *Makhubele*. Rose-Innes J expressed the view that an accused who is represented cannot utilise the provisions of s 304A on the learned judge's own interpretation that s 302(3) of the CPA finds application. I respectfully differ from this view. In *S v Shamatla* 2004 (2) SACR 570 (E) at 573b-c it was said: '*I agree, with respect, with the view expressed in S v Klaase (supra) that it is doubtful that the procedure provided by s 304A was intended to apply to matters where accused persons were legally represented.*' The learned judge did not say what the basis was for his doubt other than for his reliance on *Klaase.* As both the judges in *Klaase* and *Shamatla* expressed a doubt and no

definitive findings were made, I do not intend following either of the cases for the reasons already given by me i.e. that the reviewing judge's powers pursuant to s 304A are not limited in any manner by the provisions of s302(3) of the CPA. S 302(3) has not been made applicable to the provisions of s 304A

[8] Nevertheless, and despite the doubt expressed by Pickering J in *Shamatla* as to the reviewability of a matter when an accused enjoys legal representation, the matter was indeed reviewed '*…in the interests of justice*'. (*Shamatla* at 573c). This accords with what was said in *Makhubele*. Also see *S v Breakfast* 1970 (2) SA 611 (E); *S v Eli* 1978 (1) SA 451 (E); *S v Taylor* 1976 (4) SA 185 (T). Pickering J said at 573h - i:

> *'Accordingly, even if the matter was incorrectly referred to this Court on special review, the fact remains that this Court is now aware thereof and of the fact that a serious irregularity occurred in the proceedings. If the irregularity which occurred in those proceedings is of so gross a nature that the proceedings will eventually have to be set aside, then it would be a senseless exercise in futility to insist that the letter of the law be followed and that the matter be remitted to the magistrate to enable him to pass a sentence which in due course would be set aside.'*

[9] What s 304A does require is for a magistrate or regional magistrate to form the requisite opinion before a matter is submitted for review.

> '*Subsection (1)(a) obliges a magistrate or regional magistrate to act as directed if - and, I would venture to add, only if - he is of the opinion that (a) the proceedings in which he has recorded a conviction are not in accordance with justice, or (b) doubt exists whether they are. I am in agreement with the above-quoted observation by the Attorney-General's representatives that the presiding officer, before he acts in terms of the section, must have formed the requisite opinion. He is not given a licence to vacillate. He must apply his mind to the question whether there has been, or reasonably possibly might have been, a failure of justice. If his conclusion is in the affirmative he must then record the reasons therefore and transmit the record and reasons for review*.' See *Makhubele* at 544G to H.

[10] It appears that the legal representative of the accused applied to the regional magistrate to submit the proceedings for review. The regional magistrate records, after summing up the history of the matter, that '*I am of the view that the Honourable Reviewing Judge (s) entertain this application's submitted in terms of s 304A Act 51/1977 before sentence is passed on the basis that the proceedings might not be in accordance with justice*'. The

learned regional magistrate consequently formed his own opinion that there was doubt whether the proceedings were in accordance with justice and he was enjoined to submit the matter for review.

[11] Although one is to guard against unnecessary and piecemeal litigation (*Makhubele* at 545C-D), it has been held that where there is a failure of justice and real and substantial prejudice to an accused, the proceedings are liable to interference on review. (*Makhubele* at 545A-B). Kriegler J (as he then was) said in *Makhubele* at 546B-D:

> '*I do not wish to be misunderstood. I am not suggesting that s 304A of the Act should be applied so sparingly that it is reduced to a dead letter. The intention of the lawgiver has been unequivocally expressed and it is the bounden duty of judicial officers to give effect to it. The mischief at which the new section is directed is well-known and the statutory weapon is to be used with full vigour to combat it. In those rare cases where continuation of a case to its conclusion will result in injustice the provisions of s 304A of the Act must certainly be used. Taylor's case supra is an illustration of what the Legislature had in mind. There evidence in mitigation established the accused's innocence and it would have been a pointless and cruel exercise to go through the motions of imposing sentence on an overwrought and blameless old man only for the conviction to be set aside later*.'

[12] The question in this matter is whether the failure to complete the cross-examination of the state witness falls into the category of matters which results in a pointless exercise of going through the motion of imposing sentence only for the conviction to be set aside later.

[13] This latter test has been applied in a number of cases although sometimes worded differently. The question to be answered is whether the irregularity which occurred was of so gross a nature as to vitiate the proceedings before the magistrate (see *Shamatla* at 375I).

[14] Examples of irregularities that vitiate proceedings are found in a number of cases but it would suffice to refer to those given in *Shamatla* at pp574-575. The failure to allow an accused to address a court prior to judgment leads to such an irregularity. This is so because of the provisions of ss 35(1) and (3) of the Constitution. In my view an accused who is not able to cross-examine a witness due to the absence of that witness at a continuation of the hearing, does not receive a fair trial in the event of the trial proceeding

in the absence of the witness whose cross-examination was not completed.

[15] The former chief justice of the Republic of South Africa, as a puisne judge, said in *S v McKenna* 1998 (1) SACR 106 (C) at 118G:

> *'The short answer to this submission is that the right to "adduce and challenge evidence" is not dependent upon the result. It is a right which is guaranteed by the Constitution which must be complied with in all criminal trials. There is no place for the so-called no-difference rule under our Constitution. The right to challenge evidence which is essential to a fair trial can never be dependent upon the result. Courts should not speculate on what would have been the effect of challenging the evidence.'*

This, effectively, puts paid to an argument that the courts should consider whether cross-examination had been substantially completed or whether the prosecution can show that accused has not been prejudiced.

[16] Although Khumalo J applied a different test in *S v Motlhabane & Others* 1995 (2) SACR 528 (B) he said at 532I:

> '*The death of a State witness during the process of cross-examination results in the failure of the accused to exercise his right to challenge sufficiently the evidence of that witness. Use of untested evidence against the accused will result in the infringement of that right. Applying the above in the present case, I am of the view that even though Jeannet Seoposengwe had been extensively cross-examined before she died, it is difficult to predict what would have happened if such cross-examination had continued. Moreover, the witness had not been cross-examined on the question of identification adequately. The accuseds' right to challenge her evidence has been adversely affected.'*

[17] The right to a fair trial encompasses fairness at every stage of the proceedings. That right includes the right to cross-examine witnesses. This right, in my view, includes the right to complete the cross-examination of a witness prior to such witness' evidence being considered and taken into account against an accused person. I consequently conclude that in cases where an accused's right to cross-examine a witness is curtailed for whatever reason other than the accused's refusal or failure to cross-examine a witness of his own volition, infringes on his right to a fair trial guaranteed by the Constitution. It would not be fair to expect of an accused to defend himself on charges tainted by such an irregularity.

[18] Where such an irregularity occurs, a magistrate must submit the matter for review pursuant to s 304A, whether the accused is legally represented or not.

[19] I am satisfied that the irregularity (failure to finalise the cross-examination of the witness) is of such a nature that the accused's right to a fair trial has been infringed. The evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair. There can be no purpose whatsoever in sending the matter back to the regional magistrate to complete the sentence, knowing that the proceedings are vitiated by an irregularity of such a nature that it will necessitate the conviction of the accused to be set aside.

[20] I find support for this view in the thorough judgment of Moshidi J in *S v Msimango and Another* [2009] 4 ALL SA 529 (GSJ); 2010 (1) SACR 544 (GSJ) where he said at para 26:

> '*I have come to the conclusion that no probative value should be attached to evidence where cross-examination of a witness was absent, for whatever reason, including illness or death.'*

When excluding the evidence of the complainant whose cross-examination was incomplete, there remains no case for the accused to answer as no other evidence was lead at the trial. It was an appropriate matter where he should have been discharged when the State case was closed.

[18] I requested the Deputy Director of Public Prosecutions South Gauteng to submit his views on the matter to me. Mr Brooderyk SC, together with Mr Mashiane, supplied me with helpful submissions for which I am thankful. They too submitted that the failure to fully cross-examine the complainant is against the spirit of a very basic right enshrined in our Constitution.

In the circumstances the following order is made.

1. The conviction of the accused is set aside.
2. The matter is remitted to the magistrates' court for a trial *de novo* before another magistrate.

W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree.

P A MEYER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG