REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A136/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

25/10/2016
DATE

SIGNATURE

In the matter between:

SEBOFI , MOTSAGKI

V

Appellant

THE STATE

Respondent

JUDGMENT

KEIGHTLEY, J:

[1] On 26 June 2013 the appellant was charged and convicted in the Regional Court, Roodepoort, on two counts of rape. He was sentenced to life imprisonment on 31 October of the same year. This was the first occasion on which the appellant was convicted of the offences. The appellant appealed to this court against that conviction and sentence. The appeal was

heard on 15 September 2014 before the Honourable Judge Sutherland and the Honourable Acting Judge Opperman. Their judgment was reported as *S v Sebofi* 2015 (2) SACR 179 (GJ).

[2] In its judgment the court dealt in detail with shortcomings from both the State and the defence in their presentation and testing of evidence led at the trial. It concluded as follows in this regard:

> "[79] *A weighing-up of the evidence justifies a conclusion that the appellant's evidence cannot be relied on. Mokoena's allegation of rape can be relied on, even if it might be thought that aspects of her account could be exaggerated. The nub is a reliable identification. Can the conclusion that her identification of the appellant is indeed reliable be reached without adducing the specimen test or the cellphone records which potentially could exonerate the appellant? The ostensible ineptitude throughout the trial does not afford a reasonable basis upon which to express confidence that this evidence was responsibly omitted.*
>
> *[80] We disagree with the verdict given because on this body of evidence we cannot be satisfied that a fair trial took place. We express no view on the guilt or innocence of the appellant.*
>
> *[81] The duty of ensuring, as far as humanly possible, that a fair trial does take place is that of the presiding judicial officer. From the remarks already made it is plain that the magistrate was not well served by those who appeared before her. She did endeavour to clarify some matters but there seems to have been no grasp of the significance of many dimensions of the case.*
>
> ...
>
> *[87] In our view the matter should be remitted in the interests of justice to allow evidence on two points to be adduced: the specimen test results, and the cellphone records.*" (my emphasis)

[3] The court made an order in the following terms:

> "*[95] The verdict of guilty and the sentence are set aside, subject to the further orders made herein.*
> *[96] The case is remitted in terms of s 304(2)(c)(v) of the Criminal Procedure Act 51 of 1977 to the trial magistrate.*
> *[97] The trial is to be reopened and the trial magistrate shall in terms of*

ss 167 and 186 of the Criminal Procedure Act 51 of 1977 call for evidence about:

[97.1] The specimens taken at the medical examination and the laboratory test results.

[97.2] The alleged cellphone communications and such records thereof that may exist.

[98] The trial magistrate is directed, as contemplated by s 304(2)(c)(v) of the Criminal Procedure Act 51 of 1977, that after such evidence has been adduced to adjudicate afresh on the charges, and, if necessary, on the sentence to be imposed." (my emphasis)

[4] Section 304(2)(c)(v) of the Criminal Procedure Act 51 of 1977 ("the Act") reads as follows:

"**304 Procedure on review**

(2) . . .

(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312 —

. . .(v) *remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit."* (my emphasis)

[5] The trial was re-opened in the magistrate's court before the same magistrate. After hearing evidence (the nature of which I will deal with shortly) she again concluded that the appellant was guilty on the two rape charges and imposed the same sentence as previously. It is this second conviction and sentence by the trial court that is now before this court on appeal.

[6] The appellant raises an important point *in limine*. He contends that the magistrate committed a fatal irregularity in that she did not follow the prescripts of the High Court order. The relevant record shows that the magistrate commenced proceedings as follows:

"COURT: *Just for record purposes, for clarity's sake, [indistinct] has been referred back to this court by High Court (sic) for the order to the*

extent that this trial to be reopened. … For the trial to be reopened and the trial magistrate, I quote from the order: … (The magistrate then records paragraphs 97 and 98 of the order). … We then now intend to proceed with the proceedings as directed by the High Court and I think an appropriate starting point to call (sic) or recall the complainant in this matter. …" (my emphasis)

[7] The complainant was duly re-called and the magistrate proceeded to elicit further evidence from her on, *inter alia*, the following aspects of the case:

[7.1] How far from the complainant's house the scene was where she had first met the appellant prior to the incident.

[7.2] What the reason had been for the complainant's mother sending her to her aunt's house at night.

[7.3] The amount of time it took to travel from the complainant's house to her aunt's house.

[7.4] The visibility at the scene.

[7.5] The complainant's ability to observe the appellant.

[7.6] The complainant's prior knowledge of the appellant.

[7.7] The complainant's consumption of alcohol and whether she had consumed any alcohol on the night of the incident.

[7.8] The exact location where the rapes had taken place.

[8] The magistrate also called the appellant's domestic partner, Ms Diamond, as a witness. She faced questions from the magistrate on a number of issues relevant to the veracity of the appellant's version. These included:

[8.1] The nature of the relationship between the appellant and Ms Diamond.

[8.2] Whether the appellant had told Ms Diamond of his alleged affair with the complainant.

[8.3] Ms Diamond's recollection of events on the night in question and, in particular, the appellant's movements.

[8.4] The number of friends who had watched the soccer on TV with the appellant on the night in question and the names of these friends.

[8.5] The periods of time for which the appellant went outside the house while he was watching the soccer.

The prosecutor also questioned Ms Diamond on a number of issues, including questions relating to contradictions between her evidence and that of the appellant regarding the events on the night of the incident.

[9] While the trial court called witnesses who testified on the two issues identified in the court order, the record demonstrates quite clearly that the evidence called for by the magistrate went well beyond this. Consequently, the appellant submits that in conducting herself in this manner the magistrate failed to act in accordance with the High Court order. The order was specific in limiting the new evidence to only two aspects, viz. the DNA evidence and cell phone records. The appellant submits that instead of doing so, the

magistrate embarked on a holus bolus retrial of the matter. This was in direct contradiction with what the High Court order required.

[10] Further, he submits that much of the evidence elicited by the magistrate was focused on issues that the High Court had identified in its judgment as being unsatisfactory aspects of the State's case. The appellant submits that in these circumstances he cannot objectively be regarded as being satisfied that he received a fair trial. Accordingly, the appellant seeks an order setting aside the conviction and sentence and ordering a trial *de novo* before a different magistrate.

[11] In *S v Le Grange* 2009 (1) SACR 125 (SCA) the Supreme Court of Appeal referred to the right of an accused person not be tried for an offence in respect of any act or omission for which she has previously been convicted or acquitted. The court then went on to discuss this protection in the context of circumstances where there has been an irregularity by the original trial court, raising the possibility of a retrail. In this regard, the court said as follows:

> *"Section 35(3)(m) of the Constitution provides that an accused person has the right not to be tried for an offence in respect of any act or omission for which that person has previously been acquitted or convicted - a right that entrenches the common-law right expressed in the maxim nemo debet bis vexari pro una et eadem causa. This is the right against double jeopardy which gives rise to the defences of autrefois convict or autrefois acquit. Irregularities vary in nature and degree. As it was put by Holmes JA, in S v Naidoo:*[1]
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> > *Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as per se to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits, and the accused can be re-tried. . . . .*

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1 1962 (4) 348 (A)

On the other hand there are irregularities of a lesser nature ... in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses. If in the result it comes to the conclusion that a reasonable trial Court, properly directing itself, would inevitably have convicted, it dismisses the appeal, and the conviction stands as one on the merits. But if, on the merits, it cannot come to that conclusion, it sets aside the conviction, and this amounts to an acquittal on the merits."

[12] In the present case, the primary question to be determined is whether there was an irregularity by the magistrate. If so, the next question is whether the irregularity was of such a nature as to fall into the first or second category of irregularities identified by the principles laid down in *Naidoo* and confirmed in *Le Grange*. This will be determinative of the nature of the order this court should grant.

[13] The State contends that there was no irregularity on the part of the magistrate. It submits that the order of the High Court did not limit the magistrate to hearing evidence only on the two issues identified. Counsel for the State points to the fact that the High Court order directed the magistrate to call for evidence in terms of section 167 of the Criminal Procedure Act 51 of 1977 ("the Act"). That section provides that:

> "*The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.*"

[14] The State submits that the effect of this aspect of the order is that the magistrate was entitled to exercise her full discretion under section 167 and

to call for any evidence she considered to be necessary to reach a just outcome in the case. The argument proceeds that while the order referred specifically to evidence relating to DNA (medical specimens) and cellphone records, this was not intended to exclude the magistrate's broader discretion under section 167 to call for additional evidence, including the evidence of witnesses who, like the complainant, had already given evidence at trial.

[15] My difficulty with this submission is that it does not take account of the full text of the High Court order nor of important aspects of its judgment. The terms of the order are indeed clear: it directs the magistrate "*in terms of ss167 and 186 (of the Act) (to) call for evidence about*" (my emphasis) and then it makes reference to the DNA and cellphone evidence. The reference to the magistrate's section 167 powers is expressly linked to the identified evidence only. It was not a direction to the magistrate that she should exercise *carte blanche* in recalling evidence going beyond the identified issues. This is made clearer in the final paragraph of the order, which states that: "*... after such evidence has been adduced (the trial magistrate is directed) to adjudicate afresh on the charges ... .*". Plainly, the fresh adjudication was to be based on the evidence already led at the trial, together with any additional evidence adduced in relation to the two issues identified in the order. Thus, while the order directed the magistrate to adjudicate afresh, this direction was not open-ended.

[16] My conclusion is not only based on the terms of the order. It is plain from the court's judgment that what it had in mind was the hearing of new evidence on these restricted issues only. It was not intended that the magistrate should

conduct a re-trial in *toto*, or follow a procedure approximating one. The court deals with this expressly in paras 90-92 of the judgment:

> *"An invitation was made to us by counsel for the state to consider ss 313 and 324 and, pursuant thereto, set the conviction aside and direct a trial de novo. This is not an option open to us, as the scope of those sections is limited to matters in which no valid decision could be reached. There is no question of invalidity present in this matter in the sense contemplated by those sections, which are confined to technical failures.*
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> *This matter differs from that illustrated in S v Somciza 1990 (1) SA 361 (A). In that matter a trial magistrate's decision to refuse a separation of trials was overturned by the High Court and remitted to the trial magistrate to resume the trial. On appeal against that decision the Appellate Division concluded that the matter should not have been remitted to the same magistrate because of the credibility finding he had already made, and it was appropriate simply that the conviction be set aside and left to the discretion of the prosecution to retry the accused. The concern in that matter was a holus bolus retrial.*
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> *In the present matter the process contemplated is limited to admitting evidence on two points that have the potential to exonerate the appellant, and does not involve a complete retrial; and indeed, in the case of the specimen requires no evidence by him, and in the case of the cellphone record requires no more than the identification of the cell number."* (my emphasis)

[17] The underlined portion of the judgment can mean nothing more than what it says. The High Court did not contemplate the calling of evidence falling outside the scope of the two issues expressly identified in the order. The court made a conscious decision not to refer the matter for a re-hearing *de novo*, or "holus bolus" as the court termed it. The court expressly distinguished the situation before it from that arising in the *Somciza* case in which a re-hearing before a different magistrate was held to be appropriate. Against this background, the only reasonable interpretation of the High Court

is that which accords with the appellant's submissions rather than those of the State.

[18] As a matter of principle in my view it would be quite wrong for a court in the position of the trial court to exercise its powers under section 167 by re-calling witnesses to cover ground that had already been covered in the first trial. The trial had already been completed and the court had made its decision on conviction and sentence. The trial court was *functus officio*, subject to directions to the contrary from the High Court on appeal. The trial court derived its powers to re-open and re-adjudicate the matter from the High Court order, made in terms of section 304(2)(v) of the Act. The directions of the High Court circumscribed these powers. The trial court had no power to go outside the directions and to purport to use its general discretion under section 167 to re-call whatever witnesses it saw fit and to elicit evidence beyond that pertaining to the two issues identified in the order.

[19] Furthermore, in adjudicating on the guilt of the appellant in the first trial, the trial court had made credibility findings in respect of the complainant and the appellant. In these circumstances it was irregular for the trial court to recall the complainant and to elicit evidence from her on issues upon which it already had made credibility findings. It was also irregular for the magistrate to call Ms Diamond and to elicit evidence relevant to the veracity of the appellant's version. The magistrate's conduct in this regard was contrary to the principle laid down in *S v Somciza*,[2] where the Appellate Division held as follows:

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2 1990 (1) SA 361(A) at 365

> *"It is highly undesirable that an accused who has been found guilty by a particular magistrate and whose conviction and sentence have been set aside, should be retried, or that his trial should continue, before the same magistrate, where ... that magistrate has already made findings in which he has accepted the evidence tendered by the prosecution. However dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate."*

[20] By reason of the above, I am satisfied that the magistrate committed an irregularity in effectively opening up critical issues for re-trial, and in calling witnesses beyond the ambit of the High Court Order.

[21] It is clear from the record of the re-trial that the magistrate acted in good faith in doing so. She seems *bona fide* to have believed that because the High Court had pointed out deficiencies in the evidence presented to her at trial, her duty was to try to elicit evidence to cover these gaps. She misunderstood the reference to section 167 in the High Court order as giving her the full discretion to determine which witnesses should be called and the nature of the evidence to be elicited from them. Unfortunately, the magistrate failed to understand the ambit and effect of the High Court judgment and order, resulting in a significant misdirection on her part.

[22] Is the irregularity of such a nature that it is fatal, warranting a trial *de novo*? In my view it is. The consequence of the irregularity is that the original record has now been supplemented by a substantial body of evidence that was wrongly elicited under the High Court order. This evidence goes directly to the merits of the appellant's conviction. The appellant is correct in submitting that the trial court elicited evidence intended to cover the shortcomings identified by the High Court in the State's case. The examples

listed earlier indicate this quite clearly. They also indicate that the effect of calling Ms Diamond to testify was to test, yet again, the credibility of the appellant and his version of events.

[23] The result is that it is impossible for this court to separate the good from the bad, in the words of the dictum from *Naidoo*, and to try to determine whether the trial court correctly convicted the appellant. Objectively, the appellant can have no faith that he received a fair trial leading to his second conviction. I conclude that the magistrate's conduct falls within the first category of irregularities identified in Naidoo. It is so gross an irregularity as to vitiate the appellant's trial on this basis alone. In reaching this conclusion I make no finding on the merits of the trial court's decision.

[24] Given the unfortunate history of the matter, the only appropriate remedy is to set aside the appellant's conviction and sentence. He should be retried *de novo* before a different magistrate, subject, of course, to the Director of Public Prosecutions exercising his discretion to do so. As this judgment does not involve any finding on the merits of the appellant's conviction and sentence, his re-trial would be without prejudice to his rights under section 35(3)(m) of the Constitution.

[25] I make the following order:

1. The appeal succeeds.

2. The conviction and sentence of the appellant are set aside.

3. It is directed that in the event that the Director of Public Prosecutions decides to pursue the charges against him, the appellant must be tried *de novo* before a different magistrate.

R M KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I AGREE

S KUNY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 18 October 2016

Date of Judgment:

Counsel for the Appellant: Adv E A Guarneri, Johannesburg Justice Centre

Counsel for the State: Adv N Naidoo, DPP, Johannesburg