REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: R1071/09

In the matter between:

THE STATE

and

BONGANI ANTHONY NGCOBO

Handed down

REVIEW JUDGMENT October 2009

MSIMANG, J:

[1] In this matter the accused was convicted on 2 counts of rape by the Pietermaritzburg Regional Court and the facts which that Court found to have been proven and which led to those convictions were that during or about the month of June 2006 the accused had unlawful and intentional sexual intercourse with one "N S", a 9 year old female and that, during or about the month of September of the same year, he had unlawful and intentional sexual intercourse with the said "N S" who, at the time was still aged 9.

[2] After a document containing the particulars of the accused's previous convictions had been handed up and after the accused had admitted his previous convictions as recorded therein, the accused's attorney intimated that, before the

sentencing process could commence, she would call for a pre-sentence report from a probation officer. The matter was accordingly adjourned for that purpose.

[3] When the Court reconvened on 27 January 2009 the probation officer had responded, intimating that she was unable to compile a pre-sentence report, the reason being that, when she had conducted an interview with the complainant for the purpose of compiling one, the complainant had informed the officer that she had not been raped by the accused but that she had been raped by one Nonjabulo's boyfriend.

[4] In view of this departure from the version which had been given by the complainant when she testified during the trial and on the basis of which the accused had been convicted, the officer deemed it prudent not to compile the requested pre-sentence report but to refer the matter back to Court for further directives.

[5] Notwithstanding this unexpected turn of events and the resultant non-availability of a pre-sentence report, the sentencing process began on 7 January 2009 with the accused's attorney submitting that the fact that the complainant had recanted her original version when she made a report to the officer should be taken into account and that it should constitute a substantial and compelling factor justifying the imposition of a sentence which would be less severe than a minimum sentence prescribed in the Criminal Law Amendment Act 105 of 1997.

The view of the prosecutor was that no enquiry or investigation had been held into the veracity of the complainant's retraction and therefore that it should be completely ignored and the Court should, in terms of that Criminal Law Amendment Act, proceed and impose an appropriate sentence.

[6] During the ensuing debate, it became evident that the Regional Magistrate held the view that the matter should be referred to this Court on special review in terms of Section 304A of the Criminal Procedure Act 51 of 1977 but that, before such a route could be taken, some evidence of the said retraction should be placed before it. To that end, the Court opted for a sworn statement to that effect from the complainant and ordered that the same should be obtained by the investigating officer and that, thereafter, it should form part of the record of the proceedings and be submitted to the Registrar of this Court for review in terms of Section 304A of the Criminal Procedure Act. Indeed, after a statement had been obtained from the complainant by the investigating officer the record was referred to this Court in terms of Section 304A of the Criminal Procedure Act.

[7] The matter first came before my brother **Mnguni J** and, after having considered the same, he referred it to the office of the Director of Public Prosecutions with the following remarks :-

> "The office of the Director of Public Prosecution (sic) is requested to consider this matter and provide its views on same as urgently as possible".

[8] The Acting Director of Public Prosecutions has since responded, intimating that this Court has wide powers set out in Sections 304(2)(b) and (c) of the Criminal Procedure Act. He, however, opined that, as the Regional Magistrate has already dealt, in some depth, with credibility issues, it would be more appropriate for another Court to hear further evidence, should the complainant wish to recant on the evidence she gave during the trial.

[9] He concludes that the appropriate way of dealing with the matter would be for this Court to make use of the powers set out in subsection (4) (I think he meant subsection 304 (c) (iv)) [1] and to place the matter before the High Court with a view to summoning the probation officer and the complainant to testify.

[10] The first issue to be determined in this matter is whether the Regional Magistrate was correct in invoking the provisions of Section 304A of the Criminal Procedure Act when she referred (and for the purpose of referring) the matter to this Court. Such an enquiry is essential for it is on the basis of those provisions that she referred the matter to this Court for review and it would only be if she could lawfully have done so that the Court would be able to accede to her request and proceed to exercise its review powers in terms of those provisions.

[11] The relevant provisions of Section 304A read thus :-

---

[1] Subsection (4) seems to be inappropriate for the present purpose whereas subsection 304(c)(iv) gives this Court powers to :- " …… (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter in such manner as the provincial or local division may think fit." This subsection appears to be the relevant one and the provisions of which the Acting Director must have had in mind.

> "(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… 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."

[12] This section was introduced into the Criminal Procedure Act during 1986, [2] no doubt in response to a call for a legislative intervention made by **Malherbe AJ** in **S v Seloke en Andere.** [3] Prior to the promulgation of that amending Act the review of cases in which the accused had been convicted but not yet sentenced, were dealt with differently by the provincial courts. In the Orange Free State Provincial division the prevailing view was that, if the court entertained doubt as to the integrity of the conviction, it should, nevertheless, proceed and sentence an accused person and that, only thereafter, could it submit the case for review, the view held in that division being that sections 302 and 304(4) of the Criminal Procedure Act applied only to proceedings in which a sentence had been imposed. [4]

[13] The Courts in the provinces of Natal, Transvaal and the Northern Cape, however, felt free to exercise their review powers in those cases, notwithstanding the fact that sentences would not, as yet, have been imposed, invoking the powers provided for by the inherent jurisdiction of the Court to do so. [5]

---

[2] Inserted by Section 22 of Act 33 of 1986;
[3] 1983(2) SA 455 (O);
[4] See, for instance, S v Thabanchu en 'n Ander 1967(2) SA 323 (O);
[5] See S v April 1985(1) SA 639 (NC); S v Shezi 1984(2) SA 577 (N) and S v Mamejja 1979(1) SA 767 (T);

[14] It was against the background of this judicial divergence of opinion that **Malherbe AJ** remarked :-

> "Die gevolge van hierdie stand van ons regspraak is onbevredigend omdat dit daarop neerkom dat 'n landdros verplig is om vonnis op te lê op 'n beskuldigde aan wie se skuld hy ernstige twyfel het en wat hy, as 'eerste landdros', nie skuldig sou bevind het nie. Dit is egter 'n geval waar die Wetgewer moontlik kan oorweeg om in 'n geval waarop art. 275 van die Strafproseswet van toepassing is, dieselfde voorsiening te maak vir hersiening voor vonnis as wat daar bestaan in die geval van streeklanddroste ingevolge art. 116(3)." [6]

[15] The legislature decided on an intervention in the form of the provisions of Section 304A which then brought an end to the said divergence while bringing about uniformity in interpretation of the law on this issue.

[16] However, before this Court can intervene in terms of those provisions it must form an opinion that the proceedings in respect of which the convictions was brought :-

> "are not in accordance with justice".

[17] In forming such an opinion, should a court take into consideration only those factors prevailing at the time when the proceedings took place or should the court also take heed of subsequent evidence where such evidence casts a totally different light upon a conviction sufficient to warrant its setting aside?

---

[6] Seloke (supra) at 457 B-C;

[18] Though this enquiry would, in the past, form an integral part of the investigation into whether the proceedings upon which the conviction was brought about were in accordance with justice, [7] the consideration of recent cases (particularly those decided in the post-constitutional era) has revealed that pre-occupation with that enquiry is no longer rewarding. That enquiry has since been replaced by constitutional imperatives which should be uppermost in the court's mind when deciding the issue. For instance, in **S v Smit** [8] **, Nugent, J** put the matter as follows :-

> "In addition, whatever the position might have been at the time that case was decided, this court is enjoined by Section 39(2) of the Constitution of the Republic of South Africa 1996 to 'promote the spirit, purport and objects of the Bill of Rights, which provides in Section 35(3) that every accused person is entitled to a fair trial, which includes the right to 'appeal to, or review by, a higher court'. In our view it would be a parsimonious construction of the Bill of Rights which confined it only to the immediate consequences of the trial itself. In our view the clear spirit, purport and object of these sections is to ensure that no person is condemned to endure a penalty provided for by the criminal law without recourse being had to another court in order to correct any irregularity or injustice which might have occurred in the course of the proceedings which have had that result." [9]

[19] This was also the *ratio* behind the decision of **Davis J** in **Hansen v The Regional Magistrate, Cape Town and another** [10] when he relied on Section 9(1) of the Constitution to ameliorate a sentence which had been imposed upon an applicant so as to bring it into line with that of his co-accused, holding that :-

> "Moreover the courts are enjoined by s39(2) of the Constitution, to promote the spirit, purport and objectives of the constitution. Section 9(1) guarantees that 'everyone is equal before the law' and

---

[7] See S v Sithole 1988(4) SA 177 (T);
[8] [1999] 4 All SA 16 (W);
[9] Ibid. 19-20;
[10] 1999(2) SACR 430 (C);

> recognizes that everyone 'has the right to equal protection and benefit of the law'.
> Applicant will not have enjoyed that right, protection and benefit unless his sentence is suitably ameliorated so as to bring it into line with that of his co-accused". [11]

[20] **du Plessis J** in **S v Mahlangu** [12] made the position even clearer when he remarked as follows :-

> "If justice so demands, this Court can in a review …… have regard to facts which took place after the sentence in the magistrate's court had been imposed". [13]

[21] **Plasket J** in **S v Z and 23 similar cases** [14] expressed a final word of approval upon the decisions in the post-constitutional era cases, adding the following caveats :-

> "31. I am in full agreement with the views expressed by du Plessis J. I add, for the sake of clarity, that in circumstances such as these, section 304 of the Criminal Procedure Act, when interpreted in accordance with the spirit, purport and objects of the Bill of Rights, and bolstered by the inherent jurisdiction of the superior courts to regulate their process and develop the common law in the interests of justice, envisages courts having the power to review competent sentences where subsequent events, if no interference occurs, would create or lead to a miscarriage of justice. The focus of courts should, in my view, be on the justice of the end result rather than the technicalities of the process. If I am wrong, and section 304 cannot be interpreted in this way, then the inherent jurisdiction, on its own, vests the court with the necessary power to remedy such injustices". [15]

[22] It is true that these decisions dealt with the interpretation of the words as they appear in the provisions of section 304 of the Criminal Procedure Act.

---

11 At 434J – 435b;
12 2000(2) SACR 210 (T);
13 Ibid. at 211-b;
14 [2004] 1 All SA 438 (E);
15 At 452 d-f;

Clearly though, it matters not whether one is dealing with the use of those words in the provisions of section 304 or in section 304A. The context remains the same.

[23] Returning to the facts of the present case, I have since perused and considered a statement which was purported to have been minuted by the investigating officer from the complainant. The statement is dated 12 February 2009 and bears the signatures of the complainant, her mother and that of the investigating officer. However, contrary to the order made by the Regional Court Magistrate on 6 February 2009, it does not constitute a sworn statement.

[24] The allegations of complainant's retraction of the evidence which she had given during the trial implicating the accused in the commission of the crimes and upon which the accused had been convicted are therefore contained in that statement as well as in the probation officer's response dated 15 January 2009. Needless to say, both statements, unsworn and untested as they are, do not constitute evidence.

[25] The question which then presents itself is whether a Court can form an opinion contemplated in Section 304A(a) of the criminal Procedure Act on the basis of such unsworn and untested statements?

[26] In the course of preparing this judgment I came across two pre-constitutional era cases the facts of which I found to be comparable to the facts

of the present case in the sense that, after the conviction of the accused, new facts came to light which threw a different light on those convictions.

[27] In **S v Taylor,** [16] despite his plea of not "guilty", the accused had been convicted of the crime of theft. His daughter had later testified in mitigation of sentence and, in her evidence, had disclosed facts which established, beyond doubt, that the accused had not intended to steal. The accused had, thereafter, addressed the court and confirmed the facts as stated by his daughter.

[28] In **S v Shezi** [17] on a charge of rape the accused had admitted sexual intercourse but advanced the defence of consent. He was nevertheless convicted of the crime of rape and, on a fair reading of the record, the conviction appeared to be in order. In mitigation of sentence he called his uncle who testified that the incident had been reported to the council of the township within which both the complainant and accused resided and that, at the meeting of that council, a letter which had been written by the complainant had been discussed. When the complainant was recalled and confronted with the allegations about the letter, in response, though not conceding the authorship thereof, she became extremely evasive in her answers to questions put to her by the court. Besides, the prosecutor disclosed to the court that she had confessed to one of the members of the prosecuting staff that she had not been a virgin at the time of the incident which apparently departed from a previous confession to the contrary which assertion had been essential in supporting the conviction.

---

16 1976(4) SA 185 (T);
17 1984(2) SA 577 (N);

[29] In both these cases the Courts, after considering subsequent evidence, acceded to the lower courts' requests and reviewed and set aside the convictions.

[30] The facts of the present case present a totally different picture in that there is no the evidence upon which the Court can base its decision to review and set aside the conviction handed down by the Regional Court. In my judgment, the matter was prematurely referred to this Court for special review in terms of Section 304A of the Criminal Procedure Act 51 of 1977.

I would therefore make an order remitting the matter to the Regional Court for that Court to take evidence, if any, upon which it has formed an opinion that the proceedings in respect of which it brought in that conviction is not in accordance with justice and, thereafter, to refer the matter to this Court for Special Review in terms of Section 304A of the Criminal Procedure Act 51 of 1977 and, should such evidence not be forthcoming, to proceed and sentence the accused and generally to deal with the matter until its final conclusion.

GORVEN, J

MSIMANG, J. It is so ordered.