IN THE HIGH COURT OF KWAZULU NATAL, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. DR345/11

In the matter between:

THE STATE

and

MONGEZI DUMA

SPECIAL REVIEW JUDGMENT

Delivered on 16/8/2011

NDLOVU J

[1] The issue arising in this matter, which was submitted by the acting regional magistrate of Verulam in terms of section 304(4) of the Criminal Procedure Act[1] (the CPA), is whether an order made by a district court magistrate in terms of section 114 or 116, as the case may be, of the CPA referring a case for sentence by a regional court, renders the district court magistrate concerned *functus officio* to deal with the case any further, where it subsequently transpires that the referral to the regional court was erroneously made.

[2] On 4 February 2011 the accused was arraigned before the magistrate's court for the district of Verulam on two counts; in that, firstly, he unlawfully tampered with a motor vehicle without the consent of its owner in contravention

[1] Act 51 of 1977

of section 66(1) read with section 89 of the National Roads Traffic Act[2]; and, secondly, he was found in unlawful possession of car breaking implements in contravention of section 82 of the General Law Amendment Act[3]. The accused was legally represented at the trial and he pleaded guilty to both counts. A statement, the contents of which were confirmed by the accused, was handed up by the defence attorney in terms of section 112(2) of the CPA, amplifying the accused's guilty pleas. Thereupon the magistrate dealt with the matter in terms of section 112(1)(a) and convicted the accused on both counts as charged.

[3] However, upon the state having proved that the accused had a previous conviction of theft dated 23 June 2004 in respect of which he was sentenced to eight years' imprisonment, conditionally released on 23 September 2008 under parole supervision until 12 January 2011, the magistrate determined that the accused, by virtue of his previous conviction, deserved punishment in excess of the jurisdiction of the magistrate's court. Hence the magistrate, citing reliance on section 116[4] of the CPA, stopped the proceedings and committed the accused for sentence by the regional court.

[4] When the matter came before the regional court for sentence, as envisaged by the magistrate, the acting regional magistrate opined, correctly so in my view, that since in both instances the relevant statutes prescribed for punishment which was within the jurisdiction of the magistrate's court, the matter ought not to have been referred to the regional court for sentence in the first place. It is on this basis that the acting regional magistrate submitted the matter to this court with the request that the order made by the magistrate's court be set aside and that the matter be remitted to that court for sentence by the magistrate who dealt with the matter initially.

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[2] Act 93 of 1996
[3] Act 129 of 1993
[4] Section 116 deals with an instance where an accused pleaded not guilty, which was not the case here. The correct and applicable provision is section 114 which deals with a guilty plea situation.

[5] The penalties prescribed for the offences referred to in counts 1 and 2 are, respectively, "*a fine or to imprisonment for a period not exceeding one year*"[5] and "*a fine or to imprisonment for a period not exceeding three years*"[6]. The penal criminal jurisdiction of the magistrate's court is a fine not exceeding "*the amount determined from time to time by the Minister by notice in the Gazette"* or *to imprisonment not exceeding three years*[7]. Clearly, therefore, the penalties prescribed as maximum sentences in both instances in this case fell within the magistrate's jurisdiction[8] and, on this basis, it was indeed an error on the part of the magistrate to refer the matter to the regional court for sentence, but the magistrate ought to have dealt with the sentencing himself[9].

[6] It is apparent that the acting regional magistrate assumed that the magistrate's referral in terms of section 114 was a final order which rendered the magistrate concerned *functus officio* in the matter. I do not believe that the assumption reflects the correct legal position.

[7] Sections 114 and 116 of the CPA provide, to the extent relevant:

> "114 (1) If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion –
> (a) …..
> (b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court;
> (c) …
>
> the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.
> (2) Where an accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part

[5] Section 89(6) of Act 93 of 1996
[6] Section 82 of Act 129 of 1993
[7] Section 92(1)(a) and (b) of the Magistrates' Courts Act 32 of 1944
[8] S302(2)(a) provides that "each sentence on a separate charge shall be regarded as a separate sentence, and the fact that the aggregate of sentences imposed on an accused in respect of more than one charge in the same proceedings exceeds the periods or amounts referred to in that sub-section, shall not render those sentences subject to review in the ordinary course.
[9] It has been ascertained that the Magistrate is a male person".

> of the record of that court and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded."
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> "116(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion –
> (a) …
> (b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court;
> (c) …
> the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction."

Since the accused was convicted on his guilty plea, it followed that section 114, and not 116 (as the magistrate recorded), was applicable in this case.

[8] The general rule is that once a court has pronounced a final judgment or order in a given matter, the court has itself no authority to correct, alter or supplement that judgment or order.[10] In that respect the court has become *functus officio* in that its jurisdiction in the matter has been fully and finally exercised and, therefore, its authority over the subject matter has ceased.[11] However, as it was noted by the court in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*[12], not every decision which a court makes constituted a 'judgment or order' which was appealable. In certain circumstances the court's decision would only constitute a 'ruling' which was merely a direction against which there was no appeal[13]; unless the decision disposed of a part of the relief claimed.[14]

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[10] *Firestone South Africa (Pty) Ltd* 1977 (4) SA 298 (A) at 306F-G
[11] *Firestone* at 306F-G, citing with approval: *West Rand Estates Ltd v New Zealand Insurance Co. Ltd*., 1926 AD 173 at pp. 176, 178, 186-7 and 192; *Estate Garlick v Commissioner of Inland Revenue*, 1934 AD 499 at p. 502
[12] 1987 (4) SA 569 (A)
[13] *Van Streepen* at 580D-F. See also *Dickinson and another v Fisher's Executors* 1914 AD 424 at 427- 428. Compare *Steenkamp v SA Broadcating Corporatrion* 2002 (1) SA 625 (SCA); *Jordaan v Bfn TLC* 2004 (3) SA 371 (SCA)
[14] *Van Streepen* at 586I-J

[9] In *Van Streepen* the court also explained that the main reason that the concept of 'judgment or order' is construed restrictively is to avoid piecemeal decision of cases, adding that:

> 'This is undoubtedly a very cogent consideration, particularly where the decision in question relates, for instance, to a procedural matter or to the admissibility of evidence and it may in the end not have a decisive effect upon the outcome of the case.'[15]

[10] As was reiterated in *Van Heerdan v De Kock*[16]*,* in criminal proceedings a presiding officer is not *functus officio* until after conviction and only becomes so at the point when the accused is sentenced.[17] In the present instance the accused was only convicted but not yet sentenced. What the magistrate did was only to give a direction into the future conduct of the case, namely, to refer the matter to the regional court for the accused to be sentenced by that court. This direction was clearly not a final judgment or order which finally disposed of the case but was, in my view, only a ruling, capable of subsequent reconsideration, alteration or amendment by the magistrate.

[11] It seems to me, therefore, that the district magistrate's decision or referral under section 114 or 116 of the CPA is merely a ruling of a procedural nature seeking to direct the future conduct of proceedings in a given case. In no way does this decision dispose, or seek to dispose, of the case. Consequently, the decision does not, in my view, constitute a final judgment or order and no appeal lies against it. Accordingly, the presiding officer who made the decision is not, as I see it, rendered *functus officio* in the matter.

[12] It ought to be borne in mind that no amount of previous convictions is, in respect of a statutory offence, capable of increasing the maximum sentence prescribed by statute, regardless of the penal jurisdiction of the sentencing court. In other words, even if the regional court, in the present instance, had decided to

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[15] *Van Streepen* at 585E-F
[16] *Van Heerdan v De Kock NO en 'n ander* 1979 (3) SA 315 (E)
[17] *Van Heerdan* at 319D

proceed and deal with the matter it would still have had no power to impose any sentence beyond the maximum penalties prescribed by the relevant statutes under which the accused was charged and convicted.

[13] Every court is obliged, in determining an appropriate sentence, to take into account previous convictions that have been proved against an accused.[18] However, the relevance and importance of the previous convictions so proved will largely depend upon the elements which the previous crimes have in common with the one that the accused is currently convicted of.[19] Whether or not the previous conviction of theft is 'relevant and important' in relation to the accused's present convictions is another question, which I think is to be better left in the hands of the magistrate to determine. It seems to me that the appropriate step for this court to take, in the circumstances, is to issue the necessary declaratory orders and refer the matter back to the magistrate for sentencing of the accused, in the hope that regional magistrates shall in the future not need to refer matters such as this one to the high court, as it happened here. In the event of the magistrate who convicted the accused being not available, any other magistrate of the same court shall, by virtue of section 275(1) of the CPA, have the power to deal with the matter accordingly.

[14] In the consequence, the following order is made:

1. The conviction of the accused is confirmed.
2. It is declared that the provisions of section 114 of the Criminal Procedure Act 51 of 1977are not applicable in this case.
3. It is further declared that the magistrate's court for the district of Verulam has the requisite penal jurisdiction to deal with the matter.
4. The matter is remitted to the magistrate to give effect to the order referred to in paragraph 3 above; and, in the event of the magistrate

[18] Section 274 (4) of the CPA. See also *S v Muggel* 1998 (2) SACR 414 (C)
[19] *S v J* 1989 (1) SA 669 (A)

who convicted the accused being unavailable, the matter shall be dealt with by any other magistrate of the same court, in terms of section 275.

5. The magistrate shall, amongst others, take cognizance of any period during which the accused was incarcerated, both prior and after his conviction, when determining the appropriate sentence

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NDLOVU, J

_____ I agree

LOPES, J