Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

[REPORTABLE]

High Court Ref No: 101196

Case Number: 5/1031/10
Magistrate Serial No: 11/10

In the matter between:

THE STATE **Applicant**

And

MZUKISI NYUMBEKA **Respondent**

REVIEW JUDGMENT: 18 August 2011

HENNEY, J:

INTRODUCTION AND BACKGROUND

[1] This matter came before me as an automatic review. The accused was convicted in the Khayelitsha Magistrate Court on a count of assault and escaping from custody, thereby contravening Section 117 of the Correctional Services Act

111 of 1998.

[2] Both counts were taken together for purposes of sentence and he was sentenced to R3000,00 or six (6) months imprisonment, half of which is suspended for a period of three (3) years on condition that the accused is not convicted of assault or a contravention of Section 117 of Act 111 of 1998, committed during the period of suspension.

[3] The facts upon which the charges were based are as follows:

3.1 On 27 October 2009, the accused was held in custody in the court cells of court 5 whilst awaiting trial at the Khayelitsha Magistrate Court.

3.2 Constable Luthanda Vanga, the complainant on count 1 was a court orderly on duty. As part of his duties, he escorted the accused and other awaiting trial prisoners from the court to the holding cells. The accused walked in front of him, then suddenly grabbed him and strangled him. Pulled out a shaving blade (minora) from his pocket and threatened him with it. The accused demanded the keys to the cells. The keys were dropped, he pried himself loose from the accused and ran away.

3.3 The accused managed to run from the cells up into the court and into the passage between the courts towards the exit. The police gave chase then the accused managed to run into another court back into the cells.

DUPLICATION OF CHARGES

[4] When I received the matter, I raised a question with the presiding magistrate whether there was not a duplication of convictions where he convicted the accused on a charge of assault as well as escaping from lawful custody and whether it is clear from the evidence if the accused formed two different intentions.

[5] In deciding whether there is a duplication or so-called splitting of charges, it is trite, that over the years two tests had been developed to aid a court in deciding when there is a duplication of charges. These are the so-called "evidence" and the "single intent" test.

In applying the first test, a court will ascertain whether the evidence necessary to establish the one charge also proves to other charges.

[6] As a further aid in applying this test, the court will also have regard to the essential elements of the crime to prove each of the charges.

The "intent test" is applied if there are two acts, and each would constitute a separate or different act, but there is only one or a single intent, where both acts seems to be committed to achieve or attain this single intent, there is only one offence. See **S v Davids 1988 (2) SACR 313 C**.

[7] I am in agreement with the *dictum* of **Ebrahim J in S v Radebe 2006 (2) SACR 604**, where it was held that these various tests, are not to be regarded as rules of law, but merely as practical guidelines. I am of the view that in

determining in applying these guidelines, one should have a logical and common sense approach rather than a strictly theoretical and academic one.

[8] In applying these guidelines in this present matter, and in applying a logical and common sense approach, it is apparent from the evidence that the accused formed an intention to escape from custody and not to assault the complainant. The concomitant assault was employed as a means to escape from the custody of the policeman, and not intended to commit an independent act of assault.

ESCAPING FROM LAWFUL CUSTODY

[9] The next question which arises from the evidence is whether the accused had indeed committed the offence in contravention of Section 117(a) of the Correctional Services Act III of 1998, by escaping from custody in **Joubert LAWSA 2nd Edition – Replacement Volume 2010(6) Criminal Law** offences ***"escape ..... In its ordinary meaning "escape" means the attainment of liberty or getting loose from restraint". Escape does not entail any element of a permanent or unlimited recovery of freedom so that even a brief period of freedom suffices. On the other hand, the "escaping or getting away for one yard or two yards or just out of a man's clutches "does not amount to escaping, the court must consider what the prospects are of the fugitive escaping from justice or if being brought to justice"***.

See also **S v Zulu 1973 (2) SA 587 (C)**.

In **R v Metelerkamp 1959 (4) SA 102 (ECD) at 112E** it was held that escape does not mean escaping or getting away for one yard or two yards or just out of a man's

clutches. What should be borne in mind is what the prospects are of the fugitive escaping from justice.

[10] In this matter, the accused attained his liberty albeit for a short while after he had threatened the court orderly with a blade. The orderly ran away. The accused ran in the passage between the courts, there was no control exercised over him. Effectively, according to the definition, he escaped. It does not matter that he was still in the court building; he was not in the custody or control of the police.

[11] I therefore find that the accused should only have been convicted of contravening Section 117 (a) read with Section 1 of the Correctional Services Act 111 of 1998, in that he escaped from lawful custody. He could also not have been convicted of assault.

[12] Both charges were taken together for the purposes of sentence.

[13] The reasoning of the Magistrate for this was because on the evidence that there was a connection between the two offences and that the assault was perpetrated to assist in escaping charge.

I must also immediately add that a fine of R1 500,00 or three (3) months imprisonment is a very lenient sentence, for escaping from custody, where a policeman was overpowered and threatened with a sharp object by a prisoner, where the potential for serious injury was very great.

[14] I would therefore not alter the sentence except to delete the condition that

the accused not be convicted of assault, during the period of suspension.

UNDUE DELAY IN TRANSMITTING THE PROCEEDINGS FOR REVIEW

[15] Before I finally dispose of this matter, I wish to record my displeasure and unhappiness with the manner in which this review was dealt with by the magistrate and the officials of the Department of Justice for their failure to comply with the provisions of Section 303 of the Criminal Procedure Act 51 of 1977, after the matter had been disposed of by the magistrate.

In terms of Section 303, which is a peremptory provision, the Clerk of the Court shall within one week forward to the Registrar the record of the proceedings in order for the Registrar to lay such proceedings before a judge in chambers. This was clearly not done.

[16] The accused had been sentenced on 30 June 2010 and this matter was only submitted and received by the High Court for review on 15 September 2010. Almost three (3) months after the sentenced was imposed, for the first time.

On 20 September 2010, Klopper, AJ, requested the presiding magistrate to correct the record and to submit the full record including the transcribed proceedings to him.

Thereafter, only on 12 November 2010, almost a further two months thereafter the magistrate made some of the corrections and once it was received at the High Court on 26 November 2010, once again the record was incomplete.

[17] When queries were made through the magistrate's Head of Court, an excuse was forwarded that the Clerk of the Court had sent the transcribed record to the Registrar who misplaced it. This it seems was incorrect, because through his Head of Court, it transpired that the record, before it was sent on review, initially was never transcribed.

Clearly, the magistrate never checked or verified the corrections and completeness of the record when it was sent on review in September 2010. He should have at that stage already have enquired from the Clerk of the Court why after almost three months after conviction and sentence is the record only being made available to be sent on review. This is disturbing and clear indolence on the part of the magistrate.

[18] The full record including the transcribed portion thereof was received by the High Court before 8 December 2010. It was only then that the reviewing judge could fully examine and peruse the record to see whether the proceedings were in accordance with justice. Thereafter, the record together with queries raised by me, which are dealt with in the earlier part of this judgment, was sent back to the magistrate for his comment.

[19] According to the Registrar, this review matter was placed in the "pigeonhole" for cases of the Khayelitsha Court and it was never collected by the Clerk of the Court, Khayelitsha, on 9 December 2010. After about two months on 7 February 2011, after it had not been collected by the Clerk of the Court, Khayelitsha, the Registrar sent it by mail to the relevant court.

According to the date stamp on the correspondence, it seems that this case was only received on 18 February 2011, by the Clerk of the Court, Khayelitsha. The magistrate received it 3 days thereafter.

Thereafter, the review was submitted back to the High Court and received by this office on 3 March 2011, with the Magistrate's reply to my queries. This, after almost 9 months after the date of sentence.

The delays in this matter were inexcusable.

[20] The functions of a Magistrate go beyond merely adjudicating matters in court. Magistrates have a duty in terms of the Constitution and the law to make sure that the orders of their court and matters relating thereto are implemented and given effect to.

They should not sit idly and take it for granted that the administrative component and the clerk of the court at the various Magistrates offices will implement and give effect to their orders. They should supervise and make sure that effect is given to it.

Their judicial authority is founded in terms of Section 165 of the Constitution 108 of 2006. In particular; they should ensure that in terms of Section 165(e) that .....

"***Organs of State, ... must assist and protect the courts to ensure independence impartiality, dignity accessibility and effectiveness of the courts***".
(own emphasis)

[21] When imposing a reviewable sentence, Magistrates should check:

i) that it had been entered in to the review register;

ii) that the full record had been properly typed, where it had been handwritten and transcribed, where there was a mechanical recording of the proceedings;

iii) that all the evidence presented at the trial are included, and where it is not available, try and reconstruct, such evidence from the handwritten notes, with the assistance of all the parties concerned;

iv) that all documents and annexures are attached to the record;

v) that no incomplete or incorrect record should be sent on review, because this will lead to delays as has happened in this matter. Should this happen, the Magistrate would be clearly negligent in executing his/her duties and functions imposed by the law, especially, Section 303 of the Criminal Procedure Act.

[22] Whilst the preparation of a record for a review and an appeal is primarily a function of the Clerk of the Court, it is ultimately the function of the Magistrate to see to it that a proper record is send to the High Court.

The Clerk of the Court, unlike the one in this case, should see to it that this is done timeously and within the periods prescribed by law and should follow-up after having checked the register, as to why reviews are delayed. Here they have also clearly failed in their duty in terms of Section 165(4) of the Constitution to give effect to an Order of Court.

[23] The credibility of the justice system will be severely tarnished if effect is not given to court orders, Magistrates who are at the coal face of the justice system, should ensure that this is done. This does not only apply to reviews but also to all other matters, whether of a criminal, civil or *qausi* judicial nature.

[24] **ORDER**

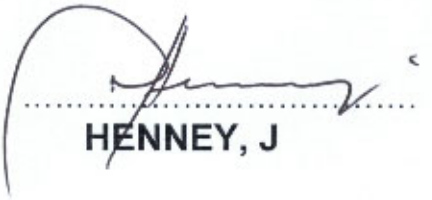
a) The conviction on count 1, the assault charged is set aside;

b) The conviction of escaping from custody in contravention of Section 117 of the Correctional Services Act 111 of 1998 is confirmed;

(c) The sentence is altered to a fine of R3 000,00 or six (6) months imprisonment half of which is suspended for a period of three (3) years on condition that the accused is not convicted of contravening Section 117 of Act 111 of 1998 and which is committed during the period of suspension.

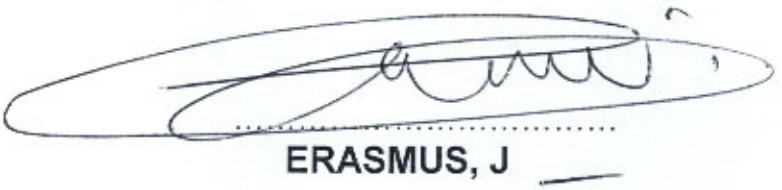
(d) The Registrar is requested to send a copy of the Judgment to the Magistrates Commission;

(e) The Registrar should also send a copy of this judgment to the Regional Head: Department of Justice, Western Cape for distribution to Court Managers and Clerks of the Court.



HENNEY, J

I agree, and it is so ordered.



ERASMUS, J