

SOUTH AFRICA / JUDGMENT

S v Bayat (2013/08/05) [2013] ZAGPPHC 344 (21 November 2013)

[2013] ZAGPPHC 344**COURT**

North Gauteng High Court, Pretoria

BEFORE

Vally, A P Ledwaba

CASE / FILE NUMBER

2013/08/05

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Source record**REPUBLIC****OF SOUTH AFRICA****NORTH****GAUTENG HIGH COURT, PRETORIA****CASE****NO: 2013/08/05****DATE:**

21 NOVEMBER 2013

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

In

the matter between:

The

State.....Appellant

And

Ayesha

Bayat.....Accused

JUDGMENT

VALLY J

Introduction

1. This case has been referred to this Court by the Acting Senior Magistrate of the Regional Division of the South Gauteng Magistrates

Court (Vereeniging) for a special review in terms of section 304A of the Criminal Procedure Act, 1977 ("the CPA"). The referral is consequent upon a request made to the Acting Senior Magistrate by the Senior Prosecutor, which request was granted.

2. Section 304A of the CPA provides:

"(a) if a magistrate or a regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought 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 a 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.

- (b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit."
3. In terms of the section, the magistrate who has already convicted an accused but is unsure of the safeness of the conviction can, before proceeding to impose a sentence, refer the case to a provincial division to review the decision of the magistrate to convict the accused. In this case the learned magistrate that convicted the accused has not referred the matter to this Court. Instead, as mentioned above, it is the Acting Senior Magistrate that has done so. The reasons for this will become clear in a moment.

Facts

4. The accused was charged with two others in the Regional Court for contravening sections 2(1)(a)(q)(r), read with sections 1 and 2(2) of the Animals Protection Act 71 of 1962, by allegedly unlawfully and intentionally neglecting and ill-treating seven horses by not giving them adequate care and attention (Count 1), and for contravening sections 2(1)(c)(q)(r), read with sections 1 and 2(2) of the Animals Protection Act 71 of 1962 by allegedly unlawfully and

intentionally underfeeding and starving the horses by not providing them with adequate drinking water (Count 2). Initially the accused pleaded not guilty to both charges. The State commenced leading evidence against her. While the first witness was still in the process of completing his evidence, the accused had either changed her plea, or made certain admissions, which resulted in her being convicted. According to her she and her co-accused concluded a plea-bargaining agreement with the State in terms of which she would alter her plea to guilty and, once convicted, the State would recommend that she receive a non-custodial sentence. Furthermore, if she altered her plea to guilty the State would withdraw the charges against her co-accused who, accordingly, would be discharged.

5. According to the learned magistrate the following occurred:

“... there were 3 accused in this matter and it was only after the state witness testified and before cross-examination that the state and the defence came to agreement to make formal admissions in regard to acc 1 and to stop prosecution in regard to Acc 2 and 3, if the state had permission to stop prosecution is another question.” (emphasis in original, grammatical errors have been left intact).

6. Whether the accused had altered her plea or whether she merely made formal admissions is not clear from the record. The accused and the learned magistrate have a different recollection of what actually happened: the accused maintains that she altered her plea midstream, while the learned magistrate is of the view that while the State was in the process of presenting evidence in support of its case, the accused made certain admissions which led the Court to convict her. There is no record of what actually happened. In any event, what is clear is that the learned magistrate found the accused guilty, though it is not clear from the record whether it was for one or both of the counts. Having found the accused guilty the learned magistrate postponed the matter so that a pre-sentence report could be obtained. Upon resumption of the hearing the learned magistrate indicated that the pre-sentence report was incomplete as it failed to address the question of what would happen to the children of the accused if a custodial sentence was imposed upon her. The matter was postponed so that a more detailed pre-sentencing report could be obtained. In the meantime, the accused's attorney indicated that he and the accused were dismayed at the turn of events.
7. Prior to the resumption of the hearing the accused had terminated the services of her attorney and replaced him with a new attorney and an advocate. At this hearing it was brought to the attention of the learned magistrate that the accused would like to retract her plea of guilty as such a plea was entered into the record as a result of the state misleading her into changing her initial plea. As mentioned above, according to the accused her decision to enter a plea of guilty was consequent upon her concluding a so-called plea-bargaining agreement with the prosecutor who was presenting the case for the State. According to the accused, the crux of this agreement was that if the accused pleaded guilty the prosecutor would recommend that a suspended sentence be imposed on her so that she would not have to spend time in custody. It was the accused's contention that absent the agreement she had no intention to plead guilty to the charges put to her. The prosecutor,

who allegedly concluded the agreement with the accused's attorney, was now assisted by another prosecutor. (It appears that the new prosecutor took over the running of the case. However, it is not clear from the record if she had formally replaced the prosecutor who concluded the agreement). The new prosecutor took issue with the accused's contention that she was misled into pleading guilty. This resulted in the parties raising the issue with the learned magistrate who, it seems, had no difficulty in entertaining it.

The attempt to resolve the dispute as to how the accused came to be convicted

1. At the commencement of the proceedings, the counsel representing the accused asked the learned magistrate to confirm that the accused had changed her plea from not guilty to guilty midway through the proceedings, to which the learned magistrate responded: "No you cannot alter a plea, they then made admissions and the accused was convicted."¹
2. The counsel chose to deal with the matter as if there was no difference in law between the two situations. He indicated that her conviction was subsequent to her making admissions, which were only made because of the agreement that was concluded between the accused's attorney and the initial prosecutor. Thus, he submitted that absent the agreement between her and the State as to the sentence, she had no intention of making any admissions at all. Instead she would require the State to prove every fact necessary to secure a conviction on the charges.

The prosecutor's version

10. After hearing counsel for the accused, the learned magistrate decided to call on the initial prosecutor to present her recollection of what happened. The prosecutor indicated that there was no change of plea from not guilty to guilty, and that there was no agreement between her and the accused's attorney as to what sentence the State would recommend if the accused changed her plea from not guilty to guilty. The prosecutor presented her version in the form of an oral statement. The statement was not taken under oath, nor was counsel for the accused allowed to ask her any questions.

The accused's version

11. Once the initial prosecutor presented her version, counsel for the accused asked to be allowed to present sworn viva voce testimony from the erstwhile attorney of the accused as to his recollection of what transpired. He commenced his testimony by stating that in his mind there was no doubt that he had concluded a plea bargaining agreement with the relevant prosecutor. The plea bargaining agreement was not concluded in one sitting. It culminated after a series of meetings, or discussions, that took place between him (the erstwhile attorney for all three accused) and the initial prosecutor.

These, according to him, culminated into the following:

“... but at some or other stage when I represented all three accused the plea was one of not guilty. After the State then agreed to withdraw the charges against the two other accused that were on record, that were being charged, at that stage after the plea bargain was entered into between myself and the State it was specifically agreed that if they withdraw against the other two then she would require to change her plea from not guilty to guilty and plead guilty and on that basis she would then obtain a suspended sentence.”² (all grammatical errors have been left intact).

12. The difference of opinion between the accused and her erstwhile attorney, on the one hand, and the initial prosecutor, on the other hand, was never resolved by the learned magistrate. Instead, the proceedings took a turn for the worse. The issue that now took centre stage was the conduct of the learned magistrate once she had convicted the accused.

13. It is common cause that once the accused altered her plea, or made certain admissions, she was found guilty and a pre-sentence report was sought. However, what transpired next is a matter of major controversy. The understanding of the erstwhile attorney of the accused is that:

after the matter had already been stood down or postponed, the conversation that took place between myself, the magistrate and the prosecutor was aware and my client was also aware at that stage, but the magistrate indicated that she intends, either my client must pay R200 000 to the Horse Care Unit and if she is not going to do that, the magistrate herself was going to get the lady from social welfare, I think it was this lady Petra Tromp, Mrs Tromp, to make a new report in terms of which she wants to sentence the lady to direct imprisonment and she would send her out to see who would take care of her children.”³ (all grammatical errors have been left intact).

14. This caused the accused and her erstwhile attorney great consternation, which resulted in the attorney withdrawing as a representative of the accused and her replacing him with counsel. The accused and her erstwhile attorney then claimed that the learned magistrate subsequent to the conviction failed in her duty to act impartially. In the words of the erstwhile attorney:

“Yes, the fact that, firstly the Horse Care Unit people were not even here, but she (the learned magistrate) insisted that my client, in terms of this particular, what I know of this particular offence, there was a maximum fine of R5000 that the State can impose, right, and when I heard the magistrate saying that my client must go to the Horse Care Unit and make arrangements, and that is not a sign of remorse the fact that she is not going and paying them the money that is owed to them, R150 000 or R200 000, right, and she said that would be the only sign of remorse. That she must go the Horse Care Unit and pay them the money. So when I heard that I obviously felt that the magistrate is now being biased, because it is not her duty and function to get the accused to go and make arrangement to pay off a civil debt. If the Horse Care Unit needs to institute a civil action they have a right to go and proceed in a normal civil court to go and sue someone for R200 000 and get a judgment and execute the judgment.”⁴ (all grammatical errors have been left intact).

15. The erstwhile attorney was cross-examined by the new prosecutor who took over the case from the initial prosecutor (who is supposed to have concluded the agreement with the said attorney). However, it bears noting that prior to the commencement of the cross-examination,

counsel for the accused objected to the procedure adopted by the learned magistrate. The transcript

of the proceedings records his objection thus:

“Mr Maboze (Counsel): Your worship just for procedure, I am just worried about this enquiry. Your worship will bear in mind that the two prosecutors never took a stand and never.... (intervenes)

Court: That is why I ask you do you want him to address the court or do you want him under oath and you decided to put him under oath. In the meantime both of them (i.e. the two prosecutors), their address is on record. They are officers of Evidence of Suliman, p 18, lines 23 p 19 lines 1-11 the court, I believe an officer of the court should at all times be truthful and the record speaks for itself. But let us deal with it, this is an inquiry, so let us deal from (indistinct).

Mr Maboze: It is fine, but is this inquiry it is also on record your worship that I was not allowed to can pose a single question to the prosecutors, it was the court that was asking questions.

Court: We will deal with that as we go, then if need be and you feel you need to question them, we will take it further.” (Quotation is verbatim.)⁵

16. The learned magistrate did not give any indication as to why she did not accord the erstwhile attorney of the accused the same courtesy she so keenly granted to the two prosecutors by also recognising his status as an officer of the court. She merely stated that the proceedings had transformed into “an inquiry” and that it is her decision to allow him to face cross-examination. Hence, the prosecutor was allowed to cross-examine the erstwhile attorney. The cross-examination whilst robust was, in our view, unnecessarily aggressive and accusatory bearing in mind that it was a fellow officer of the court that was facing cross-examination. It focussed on whether the attorney was truthful in his claim that a plea bargaining agreement was concluded between himself and the prosecutor. During the cross-examination, the learned magistrate, too, engaged the erstwhile attorney along the same lines and in the same manner as the cross-examining prosecutor. This, in our view, was unnecessary and unfortunate. It gave credence to the erstwhile attorney’s complaint that the accused was not being treated fairly and impartially: during his testimony, the erstwhile attorney alleged that the learned magistrate was biased.
17. At the conclusion of the testimony of the erstwhile attorney, it became clear that there was a difference of opinion between the erstwhile attorney, the two prosecutors and the learned magistrate as to what transpired prior to the changing of the plea (or the making of admissions) by the accused, during the proceeding when the changed plea was recorded and during the proceedings after she was convicted. In the quest to resolve the disagreement, counsel for the accused then indicated that the accused intended to apply for

the record of the previous proceedings to be transcribed so that the dispute between the erstwhile attorney, the two prosecutors and the learned magistrate as to what transpired in court after the accused had altered her plea, or made certain admissions, could be established. The learned magistrate informed counsel for the accused that:

*"It (The record of the proceedings) is not going to be provided, you can ask for it to be typed and on cost of your own client, the State is not going to provide it."*⁶

18. It is not clear from the record why the learned magistrate deemed it necessary to speak on behalf of the State, or for that matter why it was necessary for her to make any comment on the issue, save for stating that should the accused seek the record to be transcribed she must follow the necessary procedures.

The decision of the learned magistrate to recuse herself

19. At the next sitting of the court it became clear to all that the recordings of the previous proceedings were not available and that, as a result, it would be impossible to independently verify what occurred in court when the accused altered her plea (or made admissions), and what transpired at the subsequent hearings. As a result of this the learned magistrate decided to recuse herself from the matter and ordered that the matter should commence de novo before another magistrate. This decision, it must be noted, was taken after hearing from the prosecution and the defence counsel as to what course should be followed given the strong indication by the accused (at the penultimate hearing) that she intended to mount a challenge regarding the regularity of the proceedings prior to, and after, her conviction. Both the prosecution and the defence counsel indicated that they had no difficulty with the decision. During the course of relaying her decision the learned magistrate indicated that the State should re-charge the two co-accused.
20. The decision of the learned magistrate was brought to the attention of the Acting Senior Magistrate who referred it to this Court for a special review in

terms of s 304A of the CPA. In referring the matter the learned Acting Senior Magistrate stated that:

"It is my submission that there might be an irregularity committed during the proceedings."

21. It is not clear on what basis the learned Acting Senior Magistrate made this submission. However, before she decided to refer the matter to this Court she received a letter from the senior prosecutor, who requested that it be sent for special review in terms of section 304A of the CPA. In her request the senior prosecutor indicates that in her opinion the learned magistrate "had no legal grounds for her recusal." She was of the view that it was improper for the learned magistrate to order that the matter proceed de novo before another presiding officer, and more particularly decide that the two accused, who were initially charged with the present accused, should be re-charged. On this latter point, the senior prosecutor was of the view that they were acquitted by the learned magistrate, and therefore could not be re-charged. The senior prosecutor also

pointed out that it was not for the learned magistrate to decide the issue as to whether those two accused should be re-charged.

22. The senior prosecutor also raised the question as to whether the learned magistrate should have recused herself because the mechanical recording of the proceedings was not available. The question, in our view, is based on an incorrect understanding of the factual basis for the decision of the learned magistrate to recuse herself. The learned magistrate did not recuse herself perse because of the non-availability of the mechanical recording. She did so because there was no independent record of what transpired during the proceedings, in circumstances where there was an extremely serious controversy as to what transpired between herself, the prosecutors involved in the case and the erstwhile attorney of the accused. Requiring her to reconstruct the record in those circumstances would not be a realistic option since so serious was the controversy that it affected her role as an impartial adjudicator. Any reconstruction by the learned magistrate would only perpetuate the controversy and may even extend it.
23. In any event, while the learned magistrate did not furnish any reason for not attempting to reconstruct the record, she indicated that, in the absence of an independent record, the accused's contention that there was an irregularity in the proceedings during, and subsequent to, her conviction would complicate further proceedings if she continued with sentencing the accused. Hence, her decision to recuse herself and order that the matter commence de novo before another magistrate. The learned magistrate should not have done this, instead she should have exercised her power in terms of s 304A of the CPA and referred the matter to this Court for a review of the proceedings.
24. The omission of the learned magistrate is remedied by the action of the Acting Senior Magistrate. It bears mentioning that the learned magistrate was consulted before the matter was referred to this Court for a special review in terms of section 304A of the CPA and she responded as follows:

"I have no objection if the matter is send (sic) on special review." (Emphasis in original.)

25. For the sake of completeness, and in fairness to the learned magistrate, it is necessary to record the basis upon which she came to the conclusion that the interests of justice would best be served if she was to recuse herself, and order that the matter commence de novo before another presiding officer. This is best done by quoting from her response to the decision of the Acting Chief Magistrate to refer the matter to this Court. The relevant portions of her response read:

"We then went on record and evidence was led that the state misled the defence during the plea bargaining, and if so a plea of not guilty should be noted and secondly that the court is now threatening

the accused with direct imprisonment on the 25/01/2013. Of which this allegation is incorrect. The matter was then remanded on numerous occasions to obtain the court proceedings of the 25/01/2013. ...

During this period I was called in by my Senior Magistrate Mrs Le Roux, 18/06/2013, that informed me that while I was in court a female attorney came to her office and informed her that she is an acting magistrate in Krugersdorp and is also representing this accused and wants to know if I am going to recuse myself from the case. There was also the following document handed to me by the appeal clerk. On 19/06/2013 we proceeded in court and the following document were handed up in court to me - see Annexure A and B (these are letters addressed to the lAfrica Transcriptions (Pty) Ltd, requesting a copy of the transcript of the proceedings of 25 January 2013, however in one of the letters there is a allegation that the learned magistrate demonstrated bias against the accused during the proceedings on that day).

I also placed on record what transpired on the 18/06/2013 in my senior office. The lady that introduces herself to my senior as an attorney was also present in court sitting next to the advocate.

On the 15/07/2013 I received the following e-mail from the adv. with the attachment. See annexure C. (the attachment is not included in the record)

On 30/07/2013 the matter was on the roll none of the court proceedings could be obtained and due to the application from the defence for me to recuse myself, I felt that the only thing to do is to recuse myself, as it will be of no use to reconstruct the record ...

(The learned magistrate then refers to the relevant case law concerning the issue of the recusal of a presiding officer.)” (The grammatical and spelling errors have been left intact.)

26. The above explanation furnished by the learned magistrate indicates that she was faced with a recusal application at the final hearing of this matter. In the light of the fact that the records of the previous proceedings were not available she decided to grant the application.

The legality of the learned magistrate’s decision to recuse herself and to order that the matter commence de novo

27. The decision of the learned magistrate to recuse herself was certainly lawful. An application for her recusal was placed before

her, and she decided to grant it, rightly or wrongly. It is a final decision. The State has not challenged it. However, her decision that the matter must commence de novo before another presiding officer does not sit comfortably with the State. According to the senior prosecutor, the learned magistrate has no power to make an order to this effect. Whether that is so or not is, in the circumstances of this case, irrelevant. The fact of the matter is that once the learned magistrate had recused herself the matter would have to come before another magistrate for sentencing, and before she could proceed with sentencing she would be faced with an application to have the matter adjourned in order for the accused to apply, on review, for the setting aside of all the proceedings up to the stage when she was convicted. Thus, this matter would be placed before this Court for consideration of the review application. That, however, is exactly what has happened now. The only difference is the manner in which it has been brought to this Court for a review.

Can this Court review the proceedings?

28. Section 304A does not cater for the situation that has occurred in this case. In terms of this section it is the magistrate who presides in the matter that is empowered to refer the matter to this Court and not the senior magistrate. In my view, the referral of the matter to this Court by the Acting Senior Magistrate in circumstances where the learned magistrate had decided to recuse herself from further proceedings was the only prudent route open to the Acting Senior Magistrate. This matter is now before this Court and, despite the fact that it was brought here in terms of the provisions of section 304A of the CPA, this Court has the power to intervene in the proceedings if a grave injustice would ensue if it does not do so. In other words, its intervention is called for in the interests of justice. In our view, given the facts and circumstances relayed above, it is imperative that this Court intervenes at this stage. This court is empowered to interfere in exceptional circumstances and where the interests of justice call out for its intervention.⁷ This, in our view, is one such case.
29. There is no doubt in my mind that the proceedings that gave rise to the conviction were not in accordance with justice. The evidence of the erstwhile attorney for the accused indicated that there were serious unresolved issues concerning the validity of the guilty plea. This issue was placed before the learned magistrate and she failed to resolve it, despite the fact that she had received submissions from the prosecutor and evidence from the accused. Furthermore, while this issue was being canvassed it became clear that the accused was also disgruntled at the approach adopted by the learned magistrate after she had convicted her. In that circumstance, this matter should be brought to the attention of this Court for it to consider whether the conviction should be set aside or not.
30. The evidence of the erstwhile attorney for the accused reveals without doubt that the accused changed her plea to one of guilty,
- only because she was misled into believing that by doing so she would escape a custodial sentence.
- Furthermore, once she was disabused of this impression, there occurred a disagreement between the erstwhile attorney and the learned
- magistrate. The manner in which the disagreement was ventilated was untidy, to say the least.
31. Furthermore, the conduct of the learned magistrate subsequent to the conviction, and especially during the proceedings where the dispute as to the circumstances that gave rise to the changing of the plea was aired, is a matter for serious concern. She was certainly not able to extricate herself from the controversy. On the contrary, she allowed herself to become central to the controversy. Her conduct during this proceeding is disturbing enough to call into question the safety of the conviction itself.
32. In the result, the conviction cannot be allowed to stand.

Order

33. The following order is made:

1 The conviction of the accused is set aside.

2 The matter is remitted to the Regional Division of the South Gauteng Magistrates Court (Vereeniging), to be dealt with by a magistrate

other than the one who has convicted the accused.

B Vafy J

Judge of the North Gauteng High Court Pretoria

A P LEDWABA DJP

Date of Judgement: 19 November 2013

Record, p 2, lines 14 -15

Evidence of Suliman, p 14, lines 17-24 3 Evidence of Suliman, p 17, lines 13-22

Evidence of Suliman, p 18, lines 23 p 19 lines 1-11

5 Record, p 23, lines 12-25

6 Record, p 56, lines 8-9

See: Walhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119D-120A; Ismail and Others v Additional Magistrate, Wynberg and Another 1963 (1) SA 1 (A) at 5G- 6A

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