

SOUTH AFRICA / JUDGMENT

S v Gulekane (HC 04/23) [2023] ZANWHC 206 (14 November 2023)

[2023] ZANWHC 206

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Djaje

CASE / FILE NUMBER

HC 04/23

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

CASE

NO: HC 04/23

MAGISTRATE'S

REVIEW NO: 5/2023

MAGISTRATE'S

CASE NO: A178/2021

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

THE

STATE

and

MOLUSI

SYDNEY GULEKANE

ACCUSED

CORAM:

DJAJE AJP, REDDY AJ

DATE

OF JUDGMENT: 14 NOVEMBER 2023

Summary:

Criminal Law and Procedure - Special Review - Withdrawal of charge by prosecution after accused has pleaded - Powers of prosecution in terms of section 6 of the Criminal Procedure Act 51 of 1977 - Withdrawal of charge (count 2) by prosecution after the accused pleaded thereto constitutes a gross irregularity in the proceedings
- Magistrate calling on an accused to plead to charges before disclosure or consultation with legal representative - violates section 35(3)(a) and (b) of the Constitution of the Republic of South Africa Act 108 of 1996 and constitutes a gross irregularity in the proceedings - incomplete trial proceedings reviewed and set aside.

ORDER

(i)

The incomplete proceedings in the criminal trial under case number A178/2021 before Magistrate Jacobs are reviewed and set aside.

(ii)

The matter is to commence de novo before a District Magistrate, other than Magistrate Jacobs or Magistrate Spandiel.

(iii)

A copy of the judgment must be brought to the attention of the Chief Magistrate, North West.

REVIEW**JUDGMENT**

REDDY AJ

- [1] These proceedings serve before me by way of a special review as ensconced in section 304A of the Criminal Procedure Act 51 of 1997 ("the CPA").
- [2] The accused in the matter made his first appearance on 19 May 2021 in the District Court, Mmabatho under case number A178/21, charged with a contravention of section 17 read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act 116 of 1998. The accused was subsequently brought before the District Court, Mmabatho under case number 0113/22 on a charge of malicious injury to property.

- [3] The proceedings under case number A178/21 were postponed on innumerable occasions for a plethora of different reasons, inter alia, for the failure of the accused to attend court, for which he was absent for a protracted period of time. These postponements nor the conviction of the accused for his failure to attend court, need not detain this Court, save to note that the accused remained in custody until the events giving rise to this special review arose.
- [4] The pivotal issue in this special review has its genesis on 9 May
2023. On the said date, before Magistrate Spandiel, the prosecutor withdrew the charge of malicious injury to property under case number D113/2022 against the accused. The prosecution by virtue of the application of section 81(1) of the CPA joined the charge of malicious injury to property, withdrawn under case number D113/2022, as count 2, where the accused was appearing under case number A178/2021, charged with a contravention of section 17 read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act 116 of 1998 (count 1). Magistrate Jacobs recorded the joinder of count 2 as a consolidation, which correctly termed is a joinder of charges. It follows axiomatically that the withdrawal of the charge of malicious injury to property under case number D113/2022, was for all intents and purposes regarded as "finalized."
- [5] On 15 May 2023, the accused duly represented by Mr Tsamo from Legal Aid South Africa (LASA) pleaded not guilty to the offence of contravening section 17 read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act 116 of 1998 (count 1) and the crime of malicious injury to property (count 2) as evinced in section 106(b), before Magistrate Jacobs, under case number A178/2021. The accused elected to remain silent in accordance with his right in terms of section 35 (3)(h) of the Constitution of the Republic of South Africa, Act 108 of 1996 and as provided for in section 115 of the CPA. The accused is presently on trial before Magistrate Jacobs.
- [6] Peculiarly, Magistrate Jacobs, once the accused had pleaded not guilty and having dispensed with the proceedings in terms of section 115 of the CPA, requested a date for the hearing of evidence (the trial stage of the matter). The prosecutor was probed on whether there were any witnesses that had to be warned, to which the prosecutor retorted in the negative. It would appear from the record that Magistrate Jacobs had already formed a preconceived view that the trial should be postponed, notwithstanding the fact that the accused was detained. This is regrettable.
- [7] The trial was postponed to 30 May 2023 for further trial by Magistrate Jacobs. Within the context of this postponement, it was averted by the prosecution and defence that there had not been proper disclosure (copies of docket) by the prosecution to the defence. The matter was accordingly postponed to 30 May 2023 for the arrangement of a trial date. It is inexplicable that an accused is to plead to the charges in the absence of a proper disclosure. The procedure that was followed by Magistrate Jacobs is mindboggling. It is not apparent from the record, as to what formed the urgency for the accused to plead, only for the trial to

be postponed for the purposes of fulfilling the constitutional imperative to provide the accused with sufficient detail to answer

the charge. (section 35(3)(a) of the Constitution). This urgency for the accused to plead was probably the reason for the morass that the prosecution ultimately found itself in, on 30 May 2023, to which I now turn.

[8] On 30 May 2023, the accused, still appearing under case number A178/2021, appeared before Magistrate Spandiel, in the absence of Magistrate Jacobs. The pro forma used by Magistrate Spandiel records that charge of malicious injury to property was withdrawn by the prosecutor, notwithstanding the fact that the accused had pleaded to the charge before Magistrate Jacobs on 15 May 2023. The manuscript endorsement reads as follows:

"State request:

Charge 2: MITP be withdrawn, state only continuing in charge 1 Protection Order. Remand 617/23 for plea and trial.

Ex-Parte address (by defence, my insertion) Noted (0113122).

Court: Charge 2: M.I.TP Withdrawn by PP, State continuing on charge 1. Remand for plea & trial, 611/23 (SENTENCED).

[9] It is indubitable that the accused pleaded not guilty to the offence of contravening a protection order (count 1) and malicious injury to property (count 2) under case number A178/2021 on 15 May 2023. The recordal by Magistrate Spandiel on 30 May 2023, that "Charge 2: M.I.T P Withdrawn by PP ... "lies at the heart of this special review.

[10] Pursuant to the proceedings of 30 May 2023 before Magistrate Spandiel, Magistrate Jacobs who was seized with the trial of the accused under case number A178/2021, forwarded a memorandum encapsulating her view, that the withdrawal of the charge of malicious injury to property (count 2), was not a proper step as the accused had pleaded not guilty and was entitled to a verdict. Quintessentially, Magistrate Jacobs is of the view that the withdrawal of the charge of malicious injury to property against the accused on 30 May 2023 be set aside, and the prosecution be allowed to act in terms of its powers that it is enjoined with in section 6(b) of the CPA.

[11] The basis on which Magistrate Jacobs sent the matter on special review brings into sharp focus the distinction between the withdrawal and stopping of a prosecution. The general law of application as evinced in section 6 of the Criminal Procedure Act 51 of 1977 provides as follows in this regard:

"Power to withdraw charge or stop prosecution

An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution

under section 8, may-

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the

court trying the accused shall acquit the accused in respect of that charge:

Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto."

(emphasis added)

[12] It is settled law, that subsumed in section 6(a) and (b) of the CPA, are two distinct independent prosecutorial processes. Section 6(a) empowers a Director of Public Prosecutions or any other duly authorised prosecutor, who is still dominus litis, to withdraw the

charge/s before the accused has pleaded, in which event the accused is not entitled to a verdict of acquittal on that charge/s. Section 6(b) speaks to the procedure that finds application after an accused has pleaded, in which case the stopping of the prosecution at the instance of a Director of Public Prosecutions or any other duly authorised prosecutor, only empowers the court trying the accused, to acquit the accused in respect of that charge/s.

[13] In casu the accused pleaded not guilty to both counts. Section 106(4) of the CPA provides that an accused who has pleaded to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on whose behalf a plea of not guilty is entered by the court, shall unless provided for differently in this

Act or any other law, be entitled to demand that he be acquitted or convicted. The section operates in favour of an accused who has pleaded to a charge. See *S v Sibuyi* 1993 (1) SACR 235 (A).

[14] There is a further profound constitutional directive entrenched in section 35(3)(d) of the Constitution of the Republic of South Africa, Act 108 of 1996. which provides for every accused to have a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay. The withdrawal of the second count after the accused pleaded is insufficient to bring the matter to a close, and the matter may continue to hang over the head of an accused indefinitely. See : *Delpont & Others v S* [2015] 1 All SA 286 (SCA) at [34].

[15] The withdrawal of the charge of malicious injury to property (count

- 2) by the prosecutor, in which Magistrate Spandiel acquiesced, in the face of a charge sheet which clearly indicates that a plea of not guilty was noted by Magistrate Jacobs to that charge, falls foul of section 6(b) of the CPA. This constitutes a gross irregularity in the proceedings and in the ordinary course stands to be reviewed and set aside. There is, however, a further issue of grave concern inherent in the conduct of the matter, by Magistrate Jacobs.
- [16] It would be remiss of this Court not to underscore that a fair trial in terms of section 35 of the Constitution lists fifteen (15) procedural rights. Of these rights, there is a symbiotic relationship between section 35(3)(a)
- to be informed of a charge with sufficient detail to be able to answer it, and section 35(3)(b) - to have adequate time and facilities to prepare a defence.
- [17] It is therefore inimical to the concept of a fair trial that charges should not simply be put to an accused in the absence of proper disclosure and consultation with a legal practitioner (where applicable). Whatever the reason may be for Magistrate Jacobs or any other Magistrates at the Mmabatho District Court, if it is practice to do so, to call on an accused to plead to charges before disclosure or consultation with a legal representative (where applicable), such conduct or practice it must be underscored, offends section 35(3)(a) and (b) of the Constitution, and must be deprecated in the strongest terms.
- [18] The procedure adopted by Magistrate Jacobs in calling on the accused to plead to the charges in the absence of disclosure or consultation by the accused with his legal representative, in fact, on its own constitutes a gross irregularity in the proceedings. The right to a fair trial before Magistrate Jacobs in the face of a violation of the two preliminary rights of section 35 of the Constitution is sufficient for vitiating the incomplete proceedings before Magistrate Jacobs based on a gross irregularity in the proceedings as evinced in section 22(c) of the Superior Courts Act 10 of 2013.
- [19] In *S v Jaipal* (CCT21/04) [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) (18 February 2005), the Constitutional Court stated as follows in respect of the right to a fair trial:
25. Section 35(3) of the Constitution states that every accused person has a right to a fair trial. The basic requirement that a trial must be fair is central to any civilized criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness. The importance and universality of the
- right to a fair trial is evident from the fact that it is recognized in key international human rights instruments.

26. Section 35(3) mentions 15 aspects of the right to a fair trial ... the list is not exhaustive. In one of its early judgments, this Court expressed itself as follows in the words of Kentridge AJ in *S v Zuma and Others*:

"The right to a fair trial conferred by [section 25(3)] is broader than the list of specific rights set out in paras (a) to

- (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire:

'whether there has been an irregularity or illegality. that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.

A Court of appeal, it was said (at 377),

'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice". or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'

That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

28. In *Sanderson v Attorney-General Eastern Cape* Krieg/er J, referring to *Zuma*, again emphasized the significant break from the past and the need to conduct criminal trials in accordance with open-ended notions of basic fairness and justice and stated that a narrow textual approach was likely to miss important features of the fair trial provision. He proceeded as follows:

"The central reason for my view ... goes to the nature of the criminal justice system itself In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial."

In *S v Ozukuda and Others*; *S v Tshilo Ackerman* AJ referred to the concept of substantive fairness mentioned in *Zuma* and said:

"Elements of this comprehensive right are specified in paras (a) to (o) of ss (3). The words 'which include the right' preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete subrights, some of which have been specified in the

subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified elements of the right to a fair trial, the specified elements being those detailed in ss (3)." (footnotes omitted)

He continued:

"At the heart of the right to a fair criminal trial and what infuses its purpose is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused." (footnotes omitted)

28. The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the

state. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.

29. In the context of the irregularity alleged to have occurred in this case, the right to a fair trial must be understood in conjunction

with the constitutional imperatives that the courts are independent and that they must apply the law impartially and without fear, favour or prejudice,..."

(emphasis added)

[20] The gross irregularity inherent in the withdrawal of the charge of malicious injury to property (count 2) in which Magistrate Spandiel presided over on its own constitutes a ground for reviewing and setting aside the withdrawal of count 2. The conduct of the trial by Magistrate Jacobs in calling on the accused to plead to the two charges, prior to disclosure and consultation by the accused with his legal representative constitutes a further gross irregularity in the proceedings, which vitiates the incomplete trial proceedings.

[21] In my view, the matter speaks to the adage "two wrongs don't make a right". Fairness to the accused and the complainant dictates that the proceedings be reviewed and set aside in its totality, with an order that the matter commences de nova before a Magistrate, other than Magistrate Jacobs or Magistrate Spandiel.

[22] Consequently the following order is made:

(ii) The matter is to commence de nova before a District Magistrate, other than Magistrate Jacobs or Magistrate Spandiel.

A REDDY

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

J T DJAJE

ACTING JUDGE PRESIDENT

OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

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Prepared on 10 October 2026 · Esheria