

SOUTH AFRICA / JUDGMENT

S v Madito and Others (151/2013)

[2013] ZAFSHC 156 (8 August 2013)

[2013] ZAFSHC 156**COURT**

Free State High Court, Bloemfontein

BEFORE

Kruger, Sepato

CASE / FILE NUMBER

151/2013

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Source record**FREE STATE HIGH
COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA****Review No: 151/2013****In the review of:**

THE STATE
and
PIET MADITO
.....Accused
no 1
PAUL ITUMELENG
.....Accused
no 2
GOODWILL MOKHUANE
.....Accused
no 3
JERRY LEPHOI
.....Accused
no 4

CORAM:

KRUGER, J et SEPATO, AJ

JUDGMENT

BY: KRUGER, J

DELIVERED ON: 8 AUGUST 2013

- [1] This matter was sent on review by a regional magistrate because she was unsure whether accused no 1, Piet Madito had suffered any prejudice during the district court hearing before the matter was sent to the regional court for sentencing under section 116(1) of the Criminal Procedure Act 51 of 1977. The basis for the fear of prejudice entertained by the regional magistrate was that for a period when accused no 1 was a minor, no guardian was present on his behalf and the proceedings were not held in camera. In my view there were other aspects of the case

which required scrutiny, and I referred the matter to the Director of Public Prosecutions for an opinion. I am indebted to Adv J H S Hiemstra SC and Adv F Pienaar for their thorough and helpful opinion.

- [2] The facts of the matter pertinent to this judgment appear from my enquiry to the Director of Public Prosecutions:

“1. Four accused were charged in the district court with public violence. They were convicted on 27 August 2010. After convicting all four accused it was brought to the attention of the district magistrate that the case had to be heard in the regional court by virtue of “directives”(?) (p103). Thereupon the district court magistrate referred the case to the regional court on 30 August 2010.

2. Did a jurisdictional basis exist in section 116(1) of Act 51 of 1977 for the referral to the regional court? The prosecutor requested the transfer; no mention of sentence is made. From the record it appears that on 14 November 2012 the point was raised by a legal representative that an inappropriate section was possibly used to transfer the matter to the regional court.
3. As to the concern of the regional magistrate regarding the age of Accused No 1 in the district court, it appears that the magistrate was informed that Accused No 1 turned 18 on 26 January 2010, the day after he pleaded. This birth date was confirmed by the legal representative of Accused No 1. Could there have been prejudice to Accused No 1 under these circumstances?
4. In the meantime Accused No 4 has died. Accused No 1 is on warning and Accused No 2 and 3 on bail. Under section 35(3)(d) of the Constitution an accused has the right to have his trial concluded without unreasonable delay. The public violence took place on 19 November 2009, we are now in June 2013. Is this not an unreasonable delay? According to the record of proceedings in the regional court there was a request for final postponement in terms of section 342A of Act 51 of 1977 on 12 September 2012.

5. Can this court make an order under section 342A of Act 51 of 1977 that the remaining three accused be discharged? Would this be “any such order as it deems fit” (section 342A(3)) in order to eliminate the prejudice to the accused. Is this court (the High Court) “A court before which [the] criminal proceedings are pending” (section 342A(1))?
6. Input from the Director of Public Prosecutions will be greatly appreciated.”
- [3] In their memorandum, counsel make it clear that the Directives of the National Director are merely guidelines, and have no binding force. They also point out that the prosecutor in the district court committed an error of judgment in referring the matter to the regional court for sentence. They refer to the guidelines of the National Director of Public Prosecutions which determine that the case should be referred to the regional court for sentence only in exceptional circumstances. Counsel are of the view that in this matter a suitable sentence will not exceed the jurisdiction of the district court.
- [4] As to the compliance with section 116(1) of Act 51 of 1977 counsel point out that a matter can be referred to the regional court for sentence only –
“(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion-
 - (a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;
 - (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; or
 - (c) that the accused is a person referred to in section 286A (1), [Para. (c) added by s. 19 (b) of Act 116 of 1993.] the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.”

The intention is clearly to ensure that an appropriate sentence is imposed. The trial magistrate must exercise an own judgment as to whether the above requirements have been met, and cannot simply act upon the request of the prosecutor, because the matter will then not properly be before the regional court (*S v Kgomo* 1978 (2) SA 946 (T)). Counsel point out that it is clear that none of the accused can be regarded as dangerous criminals. There is also no suggestion that they have previous convictions. There is no indication that the district magistrate gave any consideration to the seriousness of the offence, contemplated in section 116(1)(a). From the record it appears that the magistrate slavishly acted upon the request of the prosecutor. Thus the matter was not properly before the regional court (*S v Kgomo*, supra). Counsels are thus of the view that the matter should be referred back to the district court for sentence as was done in *S v Beyers* 1978 (4) SA 816 (T).

- [5] Regarding the question whether accused no 1 was prejudiced because of his age, counsel point out that non-compliance with the provisions of section 74 of Act 51 of 1977 is not automatically a fatal irregularity, with reference to *S v Ramadzanga* 1988 (2) SA 816 (V). Section 74 has in the meantime been replaced by section 65(1) of the Child Justice Act 75 of 2008, which does not alter the situation in this case. Counsel indicate that the accused was not prejudiced in this case:
- (a) A day after the trial started accused no 1 turned 18. He was 18 years old when he testified.
 - (b) Accused no 1 was throughout assisted by an attorney.
 - (c) Accused no 1 pleaded not guilty and went through an entire trial and there is no indication on the record that there was any prejudice.
 - (d) The trial court was in camera when the trial started.

Thus accused no 1 was not prejudiced and there is no basis to set aside the proceedings.

- [6] As to the question whether there was an unreasonable delay in this matter the following dates are pertinent:

Offence committed 19 November 2009

Bail application and release 19 November 2009

Plea and start of trial 25 January 2010

Judgment 27 August 2010

Referred to Regional Court 30 August 2010

Typed record received 24 July 2012

First Regional Court date 22 August 2012

Regional Court consideration 14 November 2012

Counsel point out that the longest delay was caused by the waiting for the typed record and delivery of the record to the regional court. A further delay was caused by enquiries and correspondence between the regional court and the district court. A delay of about four months was caused by the defence not being ready to proceed in the regional court.

- [7] Unreasonable delay is a factor which a court can take into account in determining whether the interests of justice were served. It is not only the accused who has an interest in the completion of a criminal trial (*Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC)). In the present matter a conviction was in place 9 months after the plea. The accused were all on bail or on warning.

- [8] The important question is whether the accused have been subjected to an unreasonable delay as a result of which they have been substantively prejudiced. In this matter the state was not responsible for the delay. It cannot be found that the state is responsible for the delay. The accused were on bail and warning throughout. The setting aside of the proceedings will not be in the public interest. Although the delay in this matter is lamentable, the circumstances do not justify the setting aside of the proceedings. The matter should be referred back to the district court for sentence.

ORDER

- [9] The referral by the district court magistrate of this case to the regional court for sentencing is set aside and the matter is referred back to the district court so that the magistrate who convicted the accused, or if that magistrate is no longer available, another magistrate, can sentence the four accused.

A. KRUGER, J

I agree

R. M. SEPATO, AJ

/eb

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