

SOUTH AFRICA / JUDGMENT

S v Mashego (R24/2021; A360/2020) [2021] ZAMPMBHC 36; 2021 (2) SACR 520 (MM) (10 August 2021) [2021] ZAMPMBHC 36

COURT

Mbombela High Court, Mpumalanga

BEFORE

TV Ratshibvumo, H Roelofse

CASE / FILE NUMBER

R24/2021; A360/2020

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Source record

THE HIGH
COURT OF SOUTH AFRICA
(MPUMALANGA
DIVISION, MBOMBELA MAIN SEAT)
(1)
REPORTABLE: YES
(2)
OF INTEREST TO OTHER
JUDGES: NO
(3)
REVISED.
10
August 2021
HIGH COURT
REF NO: R24/2021
MAGISTRATE
CASE NO. A360/2020
In the matter

between:

THE
STATE
And
NEHEMIA MASHEGO
(THE ACCUSED)
REVIEW

JUDGMENT

RATSHIBVUMO J

[1].

Introduction.

This is a special review from Bushbuckridge Magistrate Court. It was sent by the Senior Magistrate, Mr. CM Mokgotho, in terms of section 304 (4) of the Criminal Procedure Act, no 51 of 1977 (the Act). On 19 March 2021, Mr. Mashego (the accused) was sentenced

to six months imprisonment following a conviction for “failure to appear in court” by the Acting Magistrate (the Magistrate).

The Senior Magistrate sent the matter on review because he was of a view that the proceedings may not have been in accordance with

justice. The concerned Magistrate was afforded an opportunity to respond to the queries raised by the Senior Magistrate in his

covering letter. I also raised questions in terms of section 302 (2) of the Act to which he responded.

[2]. I was privileged to have the submissions from the office of the Director of Public Prosecutions, Mpumalanga, which were made available following my request in terms of section 302(3) of the Act. I am indebted to Adv. N Mpolweni, the Deputy Director of Public Prosecutions (the DDPP) assisted by Adv. Z Mata, whose views greatly assisted me in this judgment. The DDPP raised several incongruities in this case on which he argues that the conviction and sentence imposed on the accused should be set aside. While this can be done based on any one of the uncovered irregularities, I deem it necessary to look into all of them as this may be necessary for judicial training going to the future.

[3].

Background.

The accused, then aged 32, was arrested on 23 September 2020 on charges of malicious damage to property. It was alleged that he damaged a window valued at R200, and contravening the Domestic Violence Act 116 of 1998, for making verbal threats. His mother was the complainant in all the charges. Although the complainant later filed a withdrawal statement with the police, this was not acceded to by the Senior Prosecutor. She ended up acquiring services of an attorney to represent her son and apparently also paid for his bail. The accused remained in custody until 13 October 2020 when bail was fixed for him in the amount of R500.00. It is not clear from the record as to when the accused paid this. He was however in default when the matter was called on 17 November 2020. Bail money was therefore finally forfeited to the State on 07 December 2020.[1]

[4]. Upon his court appearance on 18 December 2020 following his arrest, the accused presented a doctor's letter to the effect that he was not fit to attend court on 17 November 2020. The Magistrate did not attach much weight to it as he thought it was not necessary to hold a "full inquiry." Bail was however fixed again for him at R700.00. Unfortunately this too was forfeited to the State on 07 February 2021 after the accused was again in default. He was again arrested and brought before court on 19 March

2021. An inquiry was conducted after which the accused was convicted and sentenced as reflected in paragraph 1 above.

[5]. Automatic Review.

Section 302(1) of the Act provides,

- (a) Any sentence imposed by a magistrate's court-
- (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children's Act, 2005 (Act No. 32 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

(ii)...

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction. [Own emphasis].

[6]. As already alluded to, this case was not sent on review in terms of the above provision, but by way of special review as provided in section 304(4) of the Act. Given this confusion, I raised a question on the date on which the Magistrate was appointed and why the matter was not sent on review in the ordinary course if he had not held that position for longer than seven years.

[7]. In response, the Magistrate indicated that his date of appointment to a position of a magistrate was 01 July 2019. He conceded that the case was as such subject to automatic review and gave a one line explanation for his failure to send it as provided in the Act saying, "it was due to an error and/or oversight on my part due to work load." The DDPP submitted that the explanation by the Magistrate is not good enough especially because he further dealt with this matter on more than one occasion on later dates following the date of the sentence. He had more than sufficient time to rectify his "error" by ordering that the record be transcribed and sent to the High Court for review.

[8]. In *S v Jacobs*, *S v Swart*, *S v Damon*, *S v Jas*, *S v Klaasen*, *S v Swanepoel*, *S v Xhantibe*[2] the court expressed frustrations at non-compliance with section 302 of the Act by the Magistrates who delay the submission of review

matters to the High Court. It proceeded to conclude as follows,

“In our view, if an accused’s constitutional right of review is effectively stymied and rendered nugatory because of

egregious delay, for example where, by the time the matter is reviewed he has already served the sentence that was imposed upon

him, his constitutional right to a fair trial has been infringed and this may constitute a failure of justice and a ground for the Court not only to decline to certify that the proceedings are in accordance with justice, but also to set aside or correct the proceedings or to make any other order in connection with the proceedings as well, to the Court, seem likely to promote the ends of justice. Judicial pro-activism requires that this Court move beyond being a passive bystander lamenting lengthy and unnecessary delays in the automatic review process without doing something practical in order to attempt to remedy systemic deficiencies and indeed, in the interests of justice the Court has a duty not only to the accused in the matter before it but also to other unrepresented accused who may have been sentenced at a particular magistrate’s court where there is a clear problem, to ensure that effective measures are taken to resolve such deficiencies.”

[9]. In *S v Joors*,^[3] the High Court went to the extent of directing that a copy of the judgment where there was undue delay in the submission of a case for review, be referred to the Director of the Legal Resources Centre for consideration as to what assistance should be given to the accused in order to achieve appropriate redress. In *S v Osmond*,^[4] this court held the following:

“Presenting a case for review after an accused has already served the sentence defeats the whole purpose of review. We need to understand that, for an accused to have their case reviewed by a High Court, is a right and not a privilege. We all owe it to the Constitution and to the public to respect this right and to do all within our means to make this a reality. If all the court support officers do their part without negligent delays in submitting review records, injustice can be circumvented.”

[10]. It is inconceivable that here we are not dealing with a case of a delay in submission of a review matter. This is a case of non-submission of a case for review altogether. Had it not been picked by the Senior Magistrate, the accused would have suffered great and unexplained injustice due to non-compliance with the provisions of section 302 of the Act.

[11]. Failure to have this matter submitted on review was a gross irregularity which denied the review court of an opportunity to rectify any injustice the accused may have suffered. In just over a month from today, the accused would have served his full sentence without an opportunity to be considered for parole as he remains an awaiting trial prisoner with no bail. When one’s right to liberty is taken away by judicial means, great care should be exercised to avoid any margin of error.

[12].For the Magistrate to simply put it in one line saying, “it was an error and/or oversight on my part due to work load,” leaves much to be desired. The workload magistrates face daily is not unique to one office. All the magistrates countrywide work under tremendous pressure due to increased responsibilities[5] which often come without the creation of new magisterial posts and the vacancies that sometimes take long to be filled. Magistrates

however take an oath to “administer justice to all and uphold the law and the Constitution of the Republic, without fear, favour and prejudice...” The duty to obey the law and to respect everyone’s constitutional rights is superior to any workload judicial officers may have. In fact, their workload should be seen as increased in terms of protecting these rights as opposed to being so busy that the rights are overlooked.

[13].As it is apparent hereunder,[6] the Magistrate in this case may have been too busy that he was distracted from protecting the accused’s rights, but some of his work was unnecessary and self-created. I refer to the events of 01 April 2021 when the Magistrate spent a lengthy period of time (six pages of the transcribed record) trying to force a Legal Aid Attorney on the accused, while the accused was uninterested. The Magistrate ended up making an order against the accused’s wish and postponed the matter for a legal representative. This was unnecessary and should have been avoided. Time spent in this regard could have been utilised effectively in just giving the clerks an instructions to transcribe the record and have it sent on review. I agree with the DDPP that when the Magistrate dealt with the matter on several occasions after the sentence, it should have come to his attention that the case should have been sent on review. His failure to comply with section 302 of the Act is therefore inexcusable.

[14].The nature of inquiry.

The Magistrate was also asked, “in terms of what empowering statute or authority were the proceedings held on 19 March 2021 (which resulted in the accused being convicted of “failure to appear in court” and sentenced to six months imprisonment),

conducted?” His response was that “the proceedings were conducted in terms of section 67(2)(c) and 67(3) of Act 51 of 1977.”

[15].The said section provides as follows:

“67. Failure of accused on bail to appear

- (1) If an accused who is released on bail-
- (a) fails to appear at the place and on the date and at the time-

...

the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

- (2) (a) ...
- (b) ...
- (c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.
- (3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.

[16].It is doubtful if the Magistrate took a glance at this section before penning down his response. A simple reading of this section makes it pertinently clear that it provides for the procedure to be adopted upon “failure of an accused on bail to appear” as the heading provides. This procedure was conducted by him on 07 February 2021. This section does not provide for the conviction of the accused and for any sanction to be imposed. The question was clearly directed at the inquiry that resulted in the conviction and the sentence. Questions posed on review give an opportunity to a Magistrate to reflect back and research the legal position before responding. They are not meant to invoke defence of whatever he/she did at all cost.

[17].Section 67 therefor, cannot be used to conduct an inquiry in which the accused is convicted and sentenced. However, this does not mean that the accused released on bail cannot be convicted and sentenced for his failure to appear in court. If he is to be found guilty as such, it would be based on a different section and requiring a different procedure. That would be section 67A of the. It provides,

“67A. Criminal liability of a person who is on bail on the ground of failure to appear or to comply with a condition of bail.

Any person who has been released on bail and who fails without good cause to appear on the date and at the place determined for his or her appearance, or to remain in attendance until the proceedings in which he or she must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of section 60 or 62, including an amendment or supplementation thereof in terms of section 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year.”

[18].Section 67A was inserted by section 9 of Act 75 of 1995 and came into operation on 21 September of the same year. It was created following a number of judgments such as S v Ndwayana[7] which held that an accused who was out on bail could not be convicted of the offence of failing to appear in court as the forfeiture of his bail money was sufficient punishment. Anything more was considered as double jeopardy. This has changed with the insertion of this section. The fact that an accused already had the bail money forfeited to the State only serves as mitigating factor to be considered before the sentence is passed.

[19].It is now settled that section 67A creates a statutory offence which requires the State to prove the accused's guilt beyond a reasonable doubt. Unlike the onus placed on the accused in inquiries in terms of sections 67 and 170 of the Act, where he has to satisfy the court that failure to appear was not due to a fault on his part; under section 67A, there is no onus on the accused to prove anything. The accused would have to be charged by the prosecution with a proper charge sheet drafted and have all the elements of the offence proved in a normal trial.[8] The wording of the conviction by the Magistrate which makes no reference to any statutory provision makes it look like the accused

was convicted of a common law crime. However, failure to appear in court is not a common law crime. It suffices to conclude that the conviction of the accused has no legal basis and should be set aside.

[20].Other irregularities.

The manner in which the inquiry was conducted leaves much to be desired. The accused had been legally represented on all the dates he appeared in court except the date on which he was convicted and sentenced. The Magistrate did not afford the accused an opportunity to secure the presence of his legal representative. If he/she was not present in court, the case could have been postponed for his/her presence. This was not done and the accused was not asked any question around the legal representative. One would never know if the Magistrate would still have misdirected himself as he did, had he allowed the accused's legal representative to be present. Instead, the magistrate proceeded with the inquiry without even telling the accused of his rights to legal representation.

[21].To this end, the Magistrate explained that that he proceeded in the manner he did (conducting an inquiry without explaining these rights) as the accused's legal representative had withdrawn from the record. Indeed, on the date the accused was absent in court, the legal representative withdrew as he did not have instructions on where the accused was. This however does not mean that once the accused is arrested, the legal representative would not want to represent the accused again if re-instructed. Moreover, the accused has a right to appoint a new legal representative if the one who withdrew would not want to be instructed again.

[22].The Magistrate tried to justify this lacuna by pointing at the events of a later date in which the accused refused to get a legal representative for purposes of a trial. He was adamant that he would conduct his own defence against the wishes and orders made by the court. Surely this is a misdirection in that he is trying to use the end to justify the means the same way mobility would be limited if not impossible when a cart is placed before the horse. The accused cannot be blamed for not wanting any legal representation after suffering so much injustice in a court of law. He even verbalised his mistrust on the lawyer because the one who appeared for him in the past was not appointed by him. Failure to explain the right to legal representations is an irregularity that vitiates the entire proceedings irrespective of the merits.[9]

[23].After the conviction of the accused, the Magistrate went on to pass the sentence without inviting the accused to mitigate. the Magistrate merely asked the accused, “what should the court sentence you to?” The Magistrate is adamant that this question amounts to an invitation of the accused to mitigate. The question on whether the Magistrate honestly believed that he was inviting the accused to mitigate can be answered by visiting the record of proceedings. Did the accused present mitigating factors to the court before he was sentenced?

[24].When asked as to what sentence should be passed, the accused merely asked for forgiveness. Without any further question, the court pronounced the sentence and did not even explain the rights to appeal or to make representation on review. In imposing the sentence, the Magistrate did not know the accused’s age, marital status and whether he has children or if he was their primary caregiver. If the Magistrate invited the accused to mitigate, what did he do when the accused failed to do so? The accused was not invited to mitigate and the best the magistrate could have done was to concede. Sadly, irrespective of all the irregularities exposed in the questions directed to him, the Magistrate does not see anything wrong in the nature of the inquiry and the sentence imposed.

[25].The right to conduct own defence.

Six pages of the transcribed record reflect an unfriendly exchange between the Magistrate and the accused over the right to legal representation. The Magistrate ended up ordering that the accused shall be legally represented and that the accused could not have any more say in this regard as the Magistrate’s order was final. The Magistrate went further to deliberately confuse and/or

mislead the accused who kept on saying he wanted to plead guilty, by asking him to plead well knowing that the charge sheet had not been properly read out to him. When asked why he forced legal representation against the accused’s wishes, the Magistrate

said “...the accused wanted to proceed with a guilty plea and displayed that he could not conduct his own defence properly.”

It is rather unfortunate that the Magistrate did not see this inability to conduct proper defence on the date he convicted him.

[26].The DDPP remarked that “it seems rather astonishing that the Learned Magistrate after he convicted an unrepresented accused without warning him of his right to legal representation suddenly he is eager to force legal representation to the accused as it appears on record.” His previous disregard of the accused right in this regard makes one to wonder whether this insistence was about safeguarding the accused’s interests. Towards the end of the exchange he had with the accused, the Magistrate said the following:

COURT: “No, this one is going to get us into trouble. You know what, we do not want to be going on review because you do not know. I am going to postpone your matter, you get a lawyer who is going to prepare a statement properly from Legal Aid. Now I am making a ruling on you.” (01 April 2021)

[27].With the statement above, one would be forgiven for concluding that the Magistrate wanted the accused to get legal representation to avoid a review which becomes compulsory when an accused is not represented should he be given a sentence stipulated in section 302 of the Act. As much as the accused has a right to be legally represented, the flipside of the same coin is that he/she also has a right to conduct his/her own defence. This should not be confusing to the judicial officers as section 112(1)(b) was enacted for accused who wished to plead guilty without help of a legal representative. The accused person does not have to be a law graduate to be able to plead guilty on any crime. In *S v Wildridge*,^[10] a case that deals with the right to dismiss a legal representative and to conduct one’s defence, the following was said by Plasket J,

“Section 35(3) of the Constitution provides that, everyone has the right to a fair trial. That right includes the right to be represented by a legal practitioner of an accused person's choice and to be legally represented 'at state expense, if substantial injustice would otherwise result'. The corollary of the right to legal representation is the right to represent oneself.”

[28].Court’s decorum flowing from the bench.

Something that caught the attention of the DDPP that had not been raised with the Magistrate is the unsavoury language he used in an open court in communication with the accused to which the DDPP remarked, “[T]he language of communication with the accused was even less the standard of decorum expected from the Presiding Officer.” From various sections of the transcripts, the

following appears.

COURT: Stand up. This is not a tavern. There is a warrant for you. You ran away. Now we have to hold an inquiry. (19 March 2021 page 1).

On 17 February 2021 when bail was finally forfeited to the State, the following exchange appears on record in the absence of the accused.

COURT: Are you related to the accused?

WITNESS: He is my child your worship.

COURT: Where is he today?

WITNESS: We do not know his whereabouts your worship because he is residing at some other homesteads your worship.

COURT: Okay, you heard.

PROSECUTOR: As the court pleases your worship. Since they do not know the whereabouts of the accused, it means that his bail will have to be final forfeited and the warrant then... (intervenes)

COURT: Alright, thank you. You are excused ma'am. But his bail is finally forfeited to the State because he is not here.

WITNESS: Your worship, he is present because he is residing at certain homesteads and he comes to our homestead at night your worship and he would break our window panes your worship.

COURT: Okay. Then you can see that he is even intimidating witnesses.

PROSECUTOR: As the court pleases your worship.

COURT: Definitely. His bail is finally restricted estreated but we have already issued a warrant for his arrest. The police will arrest him and bring him in.

On 01 April 2021, after a long exchange in which the Magistrate attempted to force a legal representative on the accused, while the accused refused rather opting to plead guilty without a legal representative; the following is recorded.

COURT: What do you want to do?

ACCUSED: Eish.

COURT: Do not say eish.

ACCUSED: I do not know. I do not know. I just wanted... (intervenes)

COURT: Are you playing April fool there?

ACCUSED: No, I am not.

ACCUSED: I cannot hire Machubeni. I do not have money to hire Machubeni.

COURT: Who spoke about Machubeni? Is this lady Machubeni?

ACCUSED: No, I am surprised when he came and represented me the last time.

COURT: Where?

ACCUSED: I did not ask for him.

COURT: Machubeni was not here. Machubeni did you represent you (sic). Do you not lie.

ACCUSED: I am not lying.

COURT: You are.

ACCUSED: He represented me. He came, you gave me R700.00 bail My Lord.

COURT: Okay, let us do the plea. Let us do the plea.

ACCUSED: She want me... (intervenes)

COURT: You see, now you are going to waste our time because you think speaking English is being smart.

[29].As judicial officers, we cannot expect members of the public to respect the bench if we do not accord them similar reverence. Each one of us can find himself in the dock at any given moment. All it takes is for someone to make allegations against us, and we will need people to treat us with respect. One does not lose his esteem because he is an accused. There were less intrusive ways to ask the accused to stand up without suggesting to him that he was behaving as though he was in a tavern. Everyone would

feel insulted when asked to stand up in that manner, especially if he happened to be a person who does not consume alcohol and as such, not a tavern visitor.

[30].The authority we are endowed with as judicial officers is from the public and it is not meant to intimidate it, but to execute justice to its members with respect and humility. We are not in these positions because we are indomitable. If we did not volunteer our service, there would be others doing exactly what we are doing and maybe even better. When the time is due, we will be replaced and justice will continue being meted out to the public in our absence.

[31].The utterances made by the Magistrate on the day he ordered the final forfeiture of bail money may have been the root cause of the impatience he displayed when the accused finally appeared. For it appears that he had already made up his mind that the accused was “even intimidating the witnesses.” When asked if he considered recusing himself in light of these utterances, the Magistrate’s response was a simple no. The Magistrate also accused him of playing April’s fool and of lying about being represented by Mr. Machubeni. A simple back paging of the record would have confirmed that the accused was not lying as he was represented by Mr. Machubeni, the day bail of R700.00 was fixed by the court.

[32].As outlined above, the conviction and the sentence meted out to the accused can be attacked from innumerable prongs. The most distinguishable being that there is no legal basis upon which the whole inquiry, the conviction and the sentence were founded.

[33].Under the circumstances, the following order is made.

33.1The conviction and sentence are set aside.

33.2The Registrar should avail a copy of this judgment to the Office of the Chief Magistrate – Mpumalanga.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

I agree

H ROELOFSE

ACTING JUDGE OF THE HIGH COURT

10 AUGUST 2021

[1] It is apparent that the Magistrate calculated the fourteen days from the date the accused was in default excluding the weekends. Section 1 of the Act however defines a day as “the space of time between sunrise and sunset.” There is no reason

why the space between sunrise and sunset on weekends cannot be included in the calculation of fourteen days as the Act does not

refer to business days but just days. The calculation may have been confused with Rule 2(2) of the Magistrate Court Rules which

specifically excludes Saturdays and Sundays in calculation of dies. In the Criminal Procedure Act, there is no such exclusion unless it is specified in a particular section as was done in sections 54(3) and 144(4)(a). Thus the seven days’ postponement allowed for bail hearing in section 50(6) (d) of the Act includes weekend days, otherwise the calculation would amount to nine days. In light of the above, this case should have been postponed to 01 December 2020 for final forfeiture of bail.

[2] 2017 (2) SACR 546 (WCC) at para 40.

[3] 2004 (1) SACR 494 (C).

[4] 2020 (1) SACR 357 (ML) at para 33.

[5] Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others 2013 (7) BCLR 762 (CC) at para 63.

[6] See “The right to conduct own defence under paragraph 25 below)

[7] 1983 (1) PH H93 (E).

[8] See S v Luzil 2018

(2) SACR 278 (WCC), S v Williams 2012

(2) SACR 158 (WCC) and S v Mabuza 1996 (2) SACR 239 (T).

[9] S v GR 2015 (2) SACR 79 (SCA).

[10] 019 (1) SACR 474 (ECG) at para 3.

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