

SOUTH AFRICA / JUDGMENT

S v Matthews and Another (83/10)

[2010] ZANCHC 71 (17 December 2010)

[2010] ZANCHC 71**COURT**

Northern Cape High Court, Kimberley

BEFORE

JI Henriques, HJ Lacock

CASE / FILE NUMBER

83/10

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Source record**Reportable: Yes /****No****Circulate to****Judges: Yes / No****Circulate to****Magistrates: Yes / No****IN****THE HIGH COURT OF SOUTH AFRICA****[Northern Cape High****Court, Kimberley]****High Court Review Case No: 83/10****Magistrate Case No: RC 13/2010****Date delivered: 17/12/2010****In the review matter****of:**

THE STATE

versus

ELSTON MATTHEWS

.....ACCUSED

1

GLADWIN

GREEFF.....

ACCUSED 2

Coram:

LACOCK J et HENRIQUES

AJ

JUDGMENT**ON REVIEW****HENRIQUES AJ:**

This is a special review in terms of section 304A of the Criminal Procedure Act, 51 of 1977 (the “CPA”) as amended.

Parts of the proceedings were not transcribed and the transcript of the proceedings was difficult to read as parts were inaudible. Neither the presiding officer nor the clerk of the court took time to ensure that the record had been properly reconstructed for the review of the proceedings. The magistrate’s reasons for referring the matter did also not form part of the record either. I accordingly requested same and was provided with such reasons for the referral.

In essence in her reasons the magistrate indicates that on the day the accused were to be sentenced she was advised by their attorney that they had intended to plead guilty to “common robbery”. In the light thereof, an application was made by the attorney for the matter to be dealt with in terms of section 304A. Faced with such application, and in light of the fact that she was of the view that the proceedings were not in accordance with justice, she ordered that the proceedings be stopped and referred the matter in terms of section 304A.

The accused Elston Mathews and Gladwin Greeff were arraigned in the District Court of Warrenton on a charge of robbery with aggravating circumstances as defined in terms of section 1 of the CPA read with the provisions of sections 51(2), 52(2), 52A and 52B of the Criminal Law Amended Act, 105 of 1997 (the Minimum Sentencing Act) .

In terms of the annexure to the charge sheet, the state alleges that on 12 February 2010 and at or near 2039 Mohammed Drive, Warrenton in the district of Warrenton the accused did unlawfully and intentionally assault Rashid Ahmed and with force take the following items from him to wit airtime at R200,00, cigarettes at R20,00 and cash of R1 320,00, in total R1 540,00 being his property or property in his lawful possession, aggravating circumstances being assaulting him on his head with an unknown object.

The exact date is not clear from the record but it appears that prior to 12 May 2010 the accused were represented by Mr. Hanise of the Legal Aid Board. On the day that the matter was enrolled for trial the accused pleaded guilty in terms of the provisions of section 112(2) of the CPA.

It is not apparent from the record that the magistrate advised the accused of the seriousness of the charges and that the provisions of the Minimum Sentencing Act applied.¹ Mr. Hanise who appeared on behalf of the accused confirmed that the plea of guilty was in accordance with his instructions and so did the accused. He then asked for leave to read the section 112(2) statement into the record.

The section 112(2) statement did not form part of the record, the transcribed record, however reads as follows:

“We, the undersigned, Estin Mathews, Accused number 1 and Gladwin Greeff, Accused number 2, hereby declare as follows. We are the Accused in this matter and fully understand the charges against us. We elect to plead guilty to this (sic) charges and would do so freely and voluntarily without any undue influence of (sic) coercion. On the 12th day of February 2010, who were at the Mohamed Rylaan venue, which place falls within this Honourable Court’s jurisdiction. The events which lead to the charges against us are briefly set out as follows. While at Mohammed venue we proceeded to the Complainant’s

business premises and demanded that the Complainant forward (sic) us with the items set out in the charge sheet, which are,....

(inaudible), cigarettes and cash. Prior to us entering the Complainant’s premises, one of us picked up a steel object, which had been laying around and we used this steel object to hit the Complainant on the head. Once. When we demanded and it (sic) took the aforementioned items. We then misappropriated the property of the Complainant, known to us as Mr. Ahmed and ran away. We admit that when we acted as aforesaid our conduct was aimed at depriving the Complainant permanently of his possession and use of the said property. As we intended to keep these as our own. We admit that the value of this items amounted to R1 540,00. We further admit that we had no right, whatsoever to conduct ourselves in the matter (sic) we did. At all material times, we were aware about the wrongfulness of our conduct and its seriousness. We regret our conduct and ask for forgiveness and mercy from the Complainant and the Court respectively.”

It is apparent from the record that the accused confirmed the contents of the section 112(2) statement.

The prosecutor however, then indicates that the defence failed to deal with essential allegations in the charge sheet. This is evident from the record which reads:

“Your Worship, I stand to be corrected. I think I missed the part ... (inaudible) the charge sheet. I don’t know if maybe ...

(inaudible).

The presiding officer then questions Mr Hanise who then reads the following into the record:

“Thanks Your Worship. I am checking the explanation. Right. I think it is the paragraph 3.3 Your Worship. I shall read it again for clarity purposes.”

“We admit that when we acted, as aforesaid our conduct was aimed at depriving the Complainant permanently of his possession and the use of the said property, as we intended to keep this as our own.”

The presiding officer then questions the prosecutor as to whether or not the plea of guilty is in accordance with the State’s case and the prosecutor confirms same. The presiding officer then convicts the accused.

“The two of you pleaded guilty to the charge of robbery with aggravating circumstances. And as such your attorney prepared statement in terms of sec 112(2) Criminal Procedure Act. This too has been read into the record. The two of you gentlemen confirmed its content.

The Prosecutor was asked and in turn was satisfied with the content of the statement. Ultimately court is satisfied that you truly pleaded guilty to the charge in issue, and therefore found guilty of the charge of robbery with aggravating circumstances.”

The matter was then referred to the Regional Court in terms of the provisions of section 114 of the CPA for sentence and was adjourned either to 20 or 28 April 2010.

From the record it appears that on 12 May 2010 an annotation was made by a presiding officer that the matter was referred from the District Court for sentence and was adjourned to 20 May 2010. On such date the matter was again remanded to 26 May 2010 to enable the accused to apply for legal aid afresh.

On 26 May 2010 when the matter was called in the Regional Court the accused were now represented by Mr. Rwaxa. He advised the presiding officer that the accused had not pleaded guilty to a charge of robbery with aggravating circumstances. They further instructed him that they were never warned of their rights neither were they aware of the nature of such offence and the implications thereof.

Some debate occurred between the presiding officer and Mr Rwaxa as to precisely what charge the accused pleaded guilty to as same was not clear from the record. This is confirmed if one has regard to the record where it reads as follows:

“MR RWAXA Your Worship, according to them they did not plead guilty on robbery aggravating, according to what they said to me.

COURT Yes what did they plead guilty to?

MR RWAXA What is indicated also in the plea directed to them, ...(inaudible) as indicated. Further Your Worship, they indicated and said that is not what they confirmed. And further that they were never warned of their rights that they will face the nature of such an offence.

COURT Yes?

MR RWAXA They were not aware of the nature of such an offence and also they were never warned of the implications of such an offence.”

From a further exchange it would appear that the accused only pleaded guilty to what they termed “common robbery” and not the charge of robbery with aggravating circumstances. Their instructions to Rwaxa was that they intended pleading not guilty to a charge of robbery with aggravating circumstances and also disputed the contents of the section 112(2) statement that was handed in to the court..

In this regard the record reads as follows:-

MR RWAXA: What I am indicating to this Honourable Court Your Worship, is that Your Worship, according to what I could gather they were informed that we can summarize the matter on the common robbery. Then if I understand well, maybe....(inaudible) but what I am saying to this Court not only do they have a problem with the matter that they were charged with robbery aggravating, which they were not aware of, they pleaded guilty first without having the knowledge of the fact that are pleading guilty to robbery aggravating. Second of all Your Worship, the manner in which the plea itself is drafted, they are not admitting what is the contents, which are there.....

COURT: Do they confirm that?

INTERPRETER: Yes Your Worship.

COURT: They intended to plead guilty to common robbery?

Following this exchange, the presiding officer was of the view that he could change the plea to not guilty and the matter could proceed.

COURT: No the Court has to enter a plea of not guilty, if there is doubt as to confirmation to the plea.

There is no question of review here. In fact as it is, the Regional Court acts as a Review Court now.....

That is why I say if-the Court has no problem we can change the plea to not guilty and then we can proceed.

At this stage the matter appears to have stood down for Mr. Rwaxa to explain this to the accused. Once again a further exchange took place as follows:-

MR RWAXA: Your worship, according to them Your Worship, the position is that they never pleaded guilty to robbery aggravating.

COURT: So they confirm that they were pleading guilty to robbery with aggravating circumstances? Is that the position?

MR RWAXA: Your worship, that is what I told the Court.

COURT: Tell the Accused that their case, in view of the gravity of the offence, the case was-the proceedings was placed before the District Court and sent to the Regional Court for purposes of sentence. The Court finds that the proceedings in the District Court were in accordance with justice and the conviction is confirmed.

At this stage, Mr Rxawa, sought to be excused from the matter to enable the attorney who dealt with the matter previously to further deal with it.

There also appears to have been a misunderstanding once again and he indicated that he had never confirmed that the accused's instructions were to plead guilty to robbery. Mr Rwaxa indicated that his instructions were that the accused were pleading not guilty and this is what he had conveyed earlier to the presiding officer.

This is evident from the record where it is recorded as follows:

“MR RWAXA Your Worship, I did not understand that the Court says that I did not act according to their instructions.

COURT: I say you are acting according to the instructions now. I gave you an opportunity to consult with your client and you came back and you said no, they are pleading guilty to robbery.

MR RWAXA: I never said that Your Worship.

COURT You .. (inaudible) instructions. Your instructions are that they should plead guilty, so what is your problem now that requires the original legal representative? What actually did you say?

MR RWAXA I said Your Worship, they are pleading not guilty, that is what I was saying.

COURT: Not guilty.

MR RWAXA That is what I have said.

COURT Oh sorry. I thought that you are saying that they pleaded guilty to robbery. So there is no problem. The Court can correct it and enter a plea of not guilty. There is no problem with that.

Further on the presiding officer records the following:

“COURT The Court did not hear you properly. I thought you were saying that they pleaded guilty to robbery. If that is the case, then it is very easy. We can correct the record and enter a plea of not guilty. It is all on record. We can start afresh then and enter a plea of not guilty. Whenever they accused are confused about the manner in which they should plead, the Court has got the right to enter a plea of not guilty, there is no problem.

MR RWAXA As the Court pleases Your Worship.

COURT I will change the plea now to not guilty.”

The matter was then postponed on two further occasions to 14 July 2010, but there is no record as to what transpired. On 14 July 2010 Mr Hanise, the attorney who previously represented the accused, re-appeared.

It was noted that the matter had been sent to the Regional Court for sentence but at the Regional Court the plea was changed in terms of section 113 of the CPA. Both the prosecutor and the attorney, Mr. Hanise were of the view that this matter ought to be referred to the High Court in terms of section 304A of the CPA.

When such application was made, both the prosecutor and the defence attorney were ad idem that the real issue was whether or not the District Court correctly convicted the accused on the charge of robbery with aggravating circumstances.

This is evident from the record which reads as follows:

MR HANISE: “As it pleases the Court Your Worship. Your Worship, the issue at point here as advocate by my learned colleague is indeed whether these Accused persons were properly convicted in the District Court. Your Worship ... (inaudible) Defence Attorney as well as the State Prosecutor in the District Court did not apply their mind to a charge of robbery with aggravating circumstances indeed is triable in the Regional Court.”

Later on it records as follows:

MR HANISE: “As it will appear that the Defence Attorney as well as the State Prosecutor in the District Court did not apply their minds when it come to the offence in question and therefore I am agreement with what the State Prosecutor has said, that the Court must take into account the provisions of section 304A of the Criminal Procedure Act.”

“304A Review of proceedings before sentence

- (a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in 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 is practicable, lay the same for 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.

Section 304(2)(c) provides:

“c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312-

- (i) confirm, alter or quash the conviction.....;
- (iii) set aside or correct the proceedings of the magistrate's court.....;”

In S v Msomi 2009

- (1) SACR 441 (N) the court considered the provisions of section 304A and found that:

“A magistrate on encountering irregular proceedings after conviction but before sentence, is enjoined to stop the proceedings and send the matter to the High Court for review.”

In S v Hlongwane 1990

- (1) SA 310 (NC) the Court held that the provisions of the section are also available to the magistrate other than the magistrate who convicted the accused. Such magistrate must be satisfied that the proceedings are not in accordance with justice.

See further in this regard: *S v Ncgobo* 2010 (1) SACR 403 (KZP) at paragraph 16 where the Court held as follows:

“However, before this court can intervene in terms of those provisions it must form an opinion that the proceedings in respect of which the convictions were brought: ‘are not in accordance with justice.’”

The question to be answered is -was there an irregularity in the proceedings and is it of such a nature that it requires the proceedings to be set aside in terms of the provisions of section 304A? It is trite that in considering a review one must determine whether the proceedings were in accordance with justice. In considering this question our courts have held that in determining whether proceedings are in accordance with justice one must consider whether or not an accused has had a fair trial as envisaged in section 35 (3) of the Constitution.

In this regard the decision in *S v Maputle and Another* 2003 (2) SACR 15 (SCA) is incisive. The Supreme Court of Appeal restated the principle that not all irregularities require proceedings to be set aside. At paragraph 6 the Court held as follows:

“It is well established that there are two kinds of irregularities: the kind that per se vitiates the proceedings and the kind which requires consideration of the question whether, on the evidence and credibility findings unaffected by the irregularity, there was proof of guilt beyond a reasonable doubt..... It is necessary to emphasize that the word ‘irregularity’ has a technical meaning. Not every deviation from a norm constitutes an irregularity in law. Where the deviation is fundamental, it is properly categorised as an irregularity per se. If the deviation is not fundamental, it is not an irregularity at all unless it results in prejudice.”

What stands to be determined is whether the district court had the necessary jurisdiction to have dealt with the matter? A determination of same requires that the court be satisfied that it has territorial, punitive and substantive jurisdiction. All three must be present.

Section 89(1) of the Magistrate’s Court Act 32 of 1944 provides that a district court has jurisdiction over all offences except treason, murder, rape and compelled rape as contemplated in section 3 and 4 of the Criminal Law Amendment Act. Section 92 of such Act sets out the punitive jurisdiction of the district court and provides that a district court cannot impose a term of imprisonment exceeding three years and a fine exceeding R 60 000.00. In terms of section 51 of the Criminal Law Amendment Act 105 of 1997, schedule 2, part 2 a sentence of 15 years is prescribed for a first offender, convicted of robbery with aggravating circumstances, unless the court finds that substantial and compelling circumstances exist. It is thus clear that the district court did not have the necessary punitive jurisdiction to deal with this matter.

Importantly courts should establish that they also have the required substantive jurisdiction to hear the matter, and henceforth regard must be had to the kind of offence which the accused were charged with. Robbery with aggravating circumstances is defined in section 1 of the CPA and is considered a serious offence so much so that our courts are empowered to impose minimum sentences in the event of a conviction on such an offence.

If one has regard to the record of proceedings, the prosecutor did not alert the court to the fact that this was a plea in terms of chapter 19 of the CPA or that the court did not have jurisdiction to deal with the matter.

In addition it further appears that the accused had not intended to plead guilty and that this was confirmed subsequently by their new legal representative. What further complicates matters is that even though this was conveyed several times the magistrates got it wrong and never applied their mind to the aspect of jurisdiction.

It is also not clear from the section 112(2) statement as it appears from the record of proceedings precisely what charge the accused pleaded guilty to. Section 112 (2) reads as follows:-

“If an accused or his legal adviser hands in a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.”

It appears to be a common occurrence in the lower courts that when legal representatives are drafting plea explanations in terms of sec 112(2) of the CPA, there is a tendency to merely repeat the allegations in the charge sheet verbatim. This is not acceptable. The section requires an accused not only to admit each of the allegations contained in the charge sheet, but also to set out the facts which he admits to enable a court to determine whether or not the plea is one indeed in terms of sec 112(2).

In this regard I refer to the decision of Edward Boyise and The State, an unreported judgment of Steyn AJ (as she then was) with which Majiedt J (as he then was) concurred.

“[3] Ek wil vir ‘n wyle stil staan by die verklarings wat in terme van artikel 112(2) ingedien is ten opsigte van die appellante. Dit is kommerwekkend dat die appellant se regsverteenwoordiger slegs die elemente soos vervat in die klagstaat verbatim herhaal het, sonder om werklik erkennings te maak ten opsigte van die essensiële feite wat aanduidend is van die skuld en omstandighede waaronder die misdryf gepleeg was.”

- [4] Wat vereis word deur die artikel is dat die feite waarop die skuldigbevinding uit gebring behoort te word erken moet word en dit sal onder andere insluit erkennings van die tipe handeling of handeling deur die beskuldigde gepleeg sowel as die omringende omstandighede wat relevant is tot sy of haar skuld tot die misdryf. Daar moet dus gewaak word om bloot die bewerings vervat in die klagstaat te herhaal”.

The plea explanation in this matter merely constitutes a regurgitation of the allegations in the charge sheet. It does not set out any facts as to for example how the complainant was robbed, what force was used and so forth.

I have also considered the decision of *S v Klaase* 1998 (1) SA 317 (C). In such decision which was subsequently referred to in *S v Williams* 2005 (2) SACR 290 (C) and *S v Shamatla* 2004

- (2) SACR 570 (E) the court held that the provisions of section 304A were not applicable where an accused was legally represented during his trial.

The facts of the present case are distinguishable from those mentioned in paragraph 47 above, as in the present case an application was made by the accused's attorney to have the matter referred on special review in terms of section 304A which application was supported by the prosecutor.

I am of the view that the proceedings were grossly irregular and given the nature of the irregularities an order setting aside the convictions is warranted even though the accused were legally represented throughout the trial.

Accordingly, the order I make is the following:

The convictions in the magistrates' court are hereby set aside.

The matter is to be referred to the Regional Court for the trial to commence de novo.

JI HENRIQUES

ACTING JUDGE

I agree and it is so ordered:

HJ LACOCK

JUDGE

¹See *S v Ndlovu* 2003

- (1) SACR 331 (SCA).

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