

SOUTH AFRICA / JUDGMENT

S V Mnisi (Rh138/2005, A453/09) [2009] ZAGPPHC 339 (27 May 2009) [2009] ZAGPPHC 339

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius, R D Claasen

CASE / FILE NUMBER

RH138/2005, A453/09

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

DATE: 27 MAY 2009

NOT REPORTABLE

Magistrate:

MHALA

Case number: RH138/2005, A453/09

High Court Reference number: 579

THE STATE VERSUS FRANK MNISI

REVIEW JUDGEMENT

Pretorius J

This case was placed before the court as a special review in terms of section 304 (41 of Act 51 of 1977.

The regional magistrate referred it to the High Court before convicting the accused.

The accused was charged with rape. The victim, [...] years of age at the time of the trial, gave evidence. The accused was represented by Adv Seamela and at a later stage by Mr Jordaan. Whilst the victim was being cross-examined by Mr Jordaan, the prosecutor applied to use the services of an intermediary, which was granted by the magistrate, without granting Mr Jordaan an opportunity to oppose this application. Thereafter Mr Jocdaan applied for the recusal of the presiding magistrate.

Mr Mathubula, the magistrate, then decided to send the matter on review to the High Court, without finalizing the case.

Section 304 (4) of the Criminal Procedure Act 51 of 1977 provides:

"(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance

with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid

before such court or judge in terms of section 303 or this section."

This provision makes it clear that a case can only be referred for review after a sentence has been imposed -- which is not the case in this instance.

Section 304 A of the Criminal Procedure Act provides:

"(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. "

This does not apply in this instance as the accused has not been convicted at this stage. The magistrate is seeking an opinion from this court before completing the case.

In *S v Jones* 1987 (3) SA 823 (N) Leon J held at p 826 F - H:

"The reluctance of the Supreme Court to interfere in incomplete proceedings was also reaffirmed by (the Full Court of the Cape

Provincial Division in *Haysom v Additional Magistrate. Cape Town, and Another; S v Haysom* 1979 (3) SA 155 (C) at 160S - E. In *Haysom's* case the Court refused to hold that the applicant would have suffered a grave injustice because of the

refusal by the magistrate to grant an application for a postponement. The Court went on to say that, even though it may be highly

inconvenient for an accused person to have to wait until termination of a trial before going on review, being placed in such a position did not subject the accused in such a case to grave injustice, nor result in irreparable prejudice."

The Director of Public Prosecutions was requested to comment on the application for review from the magistrate. I must agree with the Director of Public Prosecutions that the magistrate is seeking an opinion. This is not one of the rare cases where irreparable harm will be done if the matter is remitted to the trial court to finalize the matter. Although it may cause inconvenience to the accused, it will not "subject the accused in such a case to grave injustice, nor result in irreparable prejudice."

Therefore this court declines to intervene and the matter is remitted to the trial court.

C. Pretorius

Judge of the High Court

I agree

R. D. Claasen

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