

SOUTH AFRICA / JUDGMENT

S v Mogoba and Another (RCM123) [2013] ZAGPPHC 338 (25 November 2013)

[2013] ZAGPPHC 338**COURT**

North Gauteng High Court, Pretoria

BEFORE

K. Manamela, E.M Makgoba

CASE / FILE NUMBER

RCM123

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Source record**IN****THE NORTH GAUTENG HIGH COURT, PRETORIA****(REPUBLIC****OF SOUTH AFRICA)****High****Court Ref No. 1020****Magistrate's****Serial No.22/13****Case****No. RCM123/****DATE:**

25 NOVEMBER 2013

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

In

the matter between:

THE

STATE

Versus

THIPE,

THABANG MOGOBA.....Accused

1

THIPE,

MAMPHARU GERMAN.....Accused

2

REVIEW

JUDGMENT

MANAMELA. AJ:

[1] This is a review in respect of the proceedings of the Regional Division of Limpopo held at Nebo (the trial court). The matter was referred to this court by the trial court after the trial court granted an application by accused 2's legal representatives for what was termed "a special review".

[2] The application for a special review followed an unsuccessful application for a discharge in terms of section 174 of the Criminal

Procedure Act 51 of 1977 (the Act). Therefore, this seems to be a review not necessarily contemplated in both the provisions of

sections 302 and 304A of the Act, although the latter provision [section 304A of the Act] seems to have some relevance. I deal with this further later on.

[3] The accused 2 pleaded guilty to charge of culpable homicide and was convicted by the trial court on the 17th October 2011. Charges

against accused 1 were withdrawn and therefore references to the accused henceforth are to accused 2.

[4] After the conviction of the accused, the learned magistrate S.E. Manasoe adjourned the matter to the 14th November 2011 for a pre-sentencing report and sentencing of the accused. The accused was out on bail at the time and was legally represented by one Mr. Mokgwatsana or Mogwatjana.

[5] The postponement in 4 above was followed by several others and for various reasons. The accused failed to appear after one of the postponements and as a result a warrant for his arrest was issued.

[6] When the accused was brought before the trial court in terms of the warrant, he was not legally represented and the matter was again postponed to enable him to make arrangements in this regard. In fact, entries in the record for this date indicate that, the accused wanted to discuss his legal representation with his family and the matter is "remanded to 8/10/2012 for R/Magistrate Manasoe". The accused remained in custody.

[7] At the next appearance the accused was represented by one Mr. Mukoma. The matter was again postponed and several other postponements

followed. As a ground for one of these postponements, Mr. Mukoma stated that he wanted [ostensibly on instructions from the accused]

to be supplied with documents from the docket, so that “he can weigh his options whether to have the matter proceeded with in terms of section 113 Act [sic] 51 77.” It is not clear from the record whether the documents were supplied and as to what became of the contemplation of a section 113 [of the Act] procedure.

- [8] However, when the accused appeared before the learned magistrate S.F. Boshielo on the 19th July 2013 a charge of murder was put to him, to which he pleaded not guilty. This was for the same offence he was already convicted of-albeit on a count of culpable homicide-and awaiting sentence. He was still legally represented when this happened by Mr. Mukoma. It is not clear from the record why Mr. Mukoma allowed his client to plead again in respect of an offence for which he [the accused] has already been convicted and for which Mr. Mukoma had contemplated dealing with in terms of section 113 of the Act. I am not in any way singling Mr. Mukoma out but, the presiding magistrate and the prosecutor at this hearing were different to those in the hearing of the 17th July 2011, when the accused was convicted on a count of culpable homicide. Mr Mukoma appears to be the only person [other than the accused] who bore knowledge of the conviction at this new trial. The others clearly did not.
- [9] The second trial went ahead after the not-guilty plea, exhibits were handed in and witnesses [including eyewitness] testified. As stated above, Mr. Mukoma - on behalf of the accused - unsuccessfully applied for a discharge in terms of section 174 of the Act at the end of the state case. The matter was then postponed for the commencement of the defence's case.
- [10] After another postponement on the 23rd August 2013, the matter came up before the learned magistrate Mphero on the 27th September 2013. This obviously is a different magistrate, as on the two material occasions mentioned above. Mr. Mukoma on behalf of the accused

submitted to the trial court that, his client [the accused] pleaded twice to the same offence and that the accused plea of guilty was changed to a plea of not guilty. However, nowhere on the record it appears that, the guilty plea was ever changed and therefore the truth is that the conviction in respect of this plea still stands. Mr. Mukoma submitted that, an irregularity has occurred due to the aforesaid and that the second trial proceedings be halted and the matter be referred to this court on “a special review”. The application wasn't opposed by the state and in fact from the available evidence, the state associated itself with the application. The learned magistrate granted same, hence this review.

- [11] From the aforesaid background, it is clear that the review is in respect of two sets of proceedings or trials, although the

involvement of this court was only requested at the second trial. It should be borne in mind that, the first trial has gone up to the conviction of the accused on a charge of culpable homicide and the second trial went on until the court's refusal of a discharge of the accused.

- [12] The first trial seems to be reviewable in terms of section 304A of the Act, in that there is a conviction and sentence is still to be imposed. But there is nothing on record to suggest that, the first trial was tainted by any form of irregularity for application of section 304A, at least when the second trial is not brought into the equation. Therefore, the first trial should not be negatively affected by the current review process.
- [13] The second trial was still under way when the review was requested and except for the unsuccessful attempt at a discharge, the defence hasn't started with its case or closed it. Therefore, it is my view that section 304A of the Act is not applicable to these proceedings.
- [14] On the other hand, section 302 of the Act deals with instances where sentences have been imposed and neither of the proceedings in both trials has reached that stage. So section 302 of the Act is not applicable in respect of both trial proceedings.
- [15] Even, if one of the two statutory provisions is found to be applicable to one of the two trial proceedings, I do not think that it is prudent to consider part of the proceedings in terms of one legal provision and the other in terms of another.
- [16] From the reasons for the request for a review as gleaned from the record, it is clear that the trial court is of the view that a gross irregularity has occurred in the proceedings, due to the accused pleading twice and differently in respect of the same offence. I am therefore of the opinion that this court has powers to intervene in terms of section 24(1) (c) of the Supreme Court Act 59 of 1959 (the Supreme Court Act).
- [17] I agree that a gross irregularity has occurred. No one person should plead to same charge twice or even worse, no one person should plead to an offence for which he had already been convicted. Section 35(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution) proscribes trial on the same offence for which a person has already been convicted or acquitted. This is what is referred to as a plea of double jeopardy which has its origin from the English common law [S v Basson [2004] ZACC 13; 2004 (1) SACR 285 (CC) 313 d-g]. The aforesaid constitutional and common law right or defence, is what is envisaged in section 106(1) (c) and (d) of the Act.
- [18] The accused in this matter could have raised a plea of autrefois convict when he was asked to plead at the second trial or legal proceedings. He did not, but this cannot be used against him and in the face of my finding that a gross irregularity has happened, his right to a fair trial is paramount [section 35(3)(m) of the Constitution]. A plea of autrefois convict would have halted the second trial or second proceedings in their tracks, so to metaphorically speak.
- [19] Therefore, it is my view that the second trial or second set of proceedings cannot stand, as the trial court lacked jurisdiction as contemplated by section 24 (1)

(a) of the Supreme Court Act because the matter was part heard before another court [S v Mathemba 2002 (1) SACR 407 (ECD) at 409], The first trial court was therefore seized with the matter when the second plea was tendered at the second trial.

[20] The second trial or legal proceedings should not have been embarked upon, in the face of the first trial and should therefore be set aside as been grossly irregular. Although, I have stated that, there is no evidence on the record of a change of plea by the accused after his conviction, other than what was submitted by his legal representative, the restoration of the first trial up to the conviction stage would allow the accused another opportunity to deal with his plea of guilty to the extent he wishes and is allowed by our law. The first trial has to run its course in terms of the applicable law and procedures.

[21] In the result, it is ordered that:

(a) The trial or proceedings of the 19th July 2013 [in terms of the record] before the learned magistrate S.F Boshielo in the trial

court, including a plea of not guilty entered by the accused in the proceedings of the 19th July 2013 [in terms of the record] and everything flowing therefrom are hereby set aside;

(b) trial or proceedings of the 17th October 2011 [in terms of the record] before the learned magistrate S.E. Manasoe in the trial

court, including a plea of guilty entered by the accused and the accused's subsequent conviction on a count of culpable homicide

in the proceedings of the 17th October 2011 [in terms of the record] may proceed before the learned magistrate S.E. Manasoe in the trial court.

K. MANAMELA

Acting Judge of the High Court

I agreed and it is so ordered

E.M MAKGOBA

JUDGE OF THE HIGH COURT

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