

SOUTH AFRICA / JUDGMENT

S v Musuia (156/21) [2021]

ZAMPMHC 29 (4 November 2021)

[2021] ZAMPMHC 29**COURT**

Middelburg High Court, Mpumalanga

BEFORE

HF Brauckmann, L Vukeya

CASE / FILE NUMBER

156/21

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****MPUMALANGA****DIVISION, MIDDELBURG****(LOCAL****SEAT)****Case****No: 156/21****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: /NO

REVISED:

YES

DATE

04/11/2021

In

the matter between:

THE

STATE

versus

JEREMIAH

SELAELO MUSUIA

JUDGMENT

(SPECIAL REVIEW)

VUKEYA J et BRAUCKMANN AJ

- [1] At the insistence of the head of office of the Delmas Magistrate's Court a trial Magistrate ("the Magistrate") sent one of his judgments in a criminal case for special review
- [2] I will briefly refer to the merits of the matter, but am of the view that it is not material.
- [3] In the criminal case the Accused was arraigned of assault common. From the transcribed record it appears that the Complainant provided evidence that she had been assaulted by the Accused with an open hand and a fist, whereafter she fell. She then fell on a paraffin container and injured her elbow.
- [4] According to the Complainant she sustained an injury to her shoulder and went to hospital. However, no evidence was led regarding this injury at the trial. The medical J88 form ("the J88") was handed in and accepted as evidence, but the form does not reflect an injury to the elbow or shoulder of the complainant. The J88 indicates that the injuries sustained were not life-threatening. After this evidence was presented, the State closed its case.
- [5] At that stage the Magistrate invoked the provisions of Section 174 of the Criminal Procedure Act, Act 51 of 1977 ("the Act") and discharged the Accused on the premise that the State did not prove assault common as the Magistrate was of the view that the State proved assault with the intent to cause grievous bodily harm. As it was not a competent verdict as provided for in Section 267 of the Act, the Accused was, according to him, entitled to a discharge.
- [6] The Chief Magistrate requested reasons for his judgment from the Trial Magistrate. He was of the view that the Magistrate erred and that he should have found the Accused guilty of assault common. According to him the J88 form specifying the injury was handed into evidence without the form being read into the record. According to the J88 the doctor noted that:

"She fell on her (left) side and sustained painful muscle on her (left) side". The doctor, after having examined the Complainant, found "no obvious injuries". The Magistrate, in his memo to the Trial Court Magistrate, stated the following: "Bearing in mind that for a Court to convict the Accused of assault to cause grievous bodily harm, there are two questions the Court must ask itself: Firstly whether the Accused did indeed assault the Complainant and secondly and probably most importantly, whether the Accused had the intention to cause the Complainant grievous bodily harm. I further draw your attention to the fact that if the evidence does not support the charge of assault with the intention to cause grievous bodily harm, the Court may still convict the Accused on the lesser competent charge of assault (common).

To me the evidence led and presented and the J88 does not in any event support a conviction on assault with the intent to cause grievous bodily harm, even if the Accused in casu was charged with that offence. I therefore am of the considered and respectful view that the proceedings were not in accordance with justice.”

[7] The Head of Office then submits to the Trial Magistrate that the matter should be sent on special review to be set aside and that the proceedings be ordered to start de novo before another Magistrate.

[8] The Trial Magistrate, having received this letter from the Head of Court, replied in a memo that is not dated:

“After a long discussion we had about the case, I therefore realized that I might have erred or misdirected myself on the interpretation and application of the law in the above case. Therefore the proceedings were not in accordance with justice. I also request that the matter be sent on special review.”

[9] After receipt of the record and the request by the Head of Office, I sent the matter to the Director: Public Prosecutions (“the DPP”) for their comments.

[10] Adv. M. Mpolweni and Senior State Advocate L.M. Erasmus of the DPP provided me with their view, which I found very helpful. I am indebted to them, and share their view.

[11] Section 302 to 306 of the Act governs review procedures in criminal matters. To the contrary, Section 22 of the Superior Courts Act, Act 10 of 2013, Act 10 of 2013 (“the SCA”), deals with reviews of judgments of the Magistrate's Courts. Section 22 of the SCA only applies when Section 302 to 209 of the Act does not apply.

[12] A review brought in terms of the Act is either automatic in terms of section 302 after sentencing, or in terms of Section 304A of the Act by the Presiding Magistrate before sentencing, when he or she is of the view that the proceedings in respect of which he or she brought a conviction are not in accordance with justice or doubts whether the

proceedings were in accordance with justice.

[13] A review brought in terms of Section 22 of the Superior Courts Act must fall within the ambit of Section 22(1) of that Act. These reviews are normally brought in terms of Rule 53 of the Uniform Rules of the High Court (“the rules”) and cannot simply be referred to a Judge in chambers like a review in terms of the Act.

[14] The grounds upon which the proceedings in any Magistrate's Court may be brought under review before a Court of a Division of the high Court are:

[14.1] Absence of jurisdiction on the part of the Court;

[14.2] Interest in the cause, bias, malice or corruption on the part of the Presiding Officer;

[14.3] Gross irregularities in the proceedings; and

[14.4] The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[15] From the note from the Head of Office, alternatively the Trial Magistrate, it seems that this review is brought in terms of Section 22(1) of the SCA and not in terms of the Act.

[16] In order to launch a review in terms of Section 22 of the Superior Courts Act, the application must first be launched by way of a Notice of Motion and Affidavit in terms of Rule 53 of the Rules.

[17] In casu, I only received a letter from the Head of Office together with a memo, undated, from the trial Magistrate.

[18] Even if no application was necessary, it is still to be decided whether this matter falls within the ambit of Section 22 of the Super Courts Act. It is clear that according to the Head of the Office and the Magistrate, they are of the view that the Trial Magistrate “might have erred or misdirected” himself “on the interpretation and application of the law”.

[19] The misdirection on the interpretation of the law does not resort under Section 22(1) of the Superior Courts Act. The Court clearly had jurisdiction to entertain the matter and no evidence of interest, bias, malice or corruption on the part of the Presiding Officer was alleged or appeared from the letters or record. There were also no procedural irregularities in the conduct of the proceedings before the Trial Judge. All the evidence admitted by the Magistrate was admissible and was done so regularly.

[20] What remains is to decide whether the Head of Office and Magistrate is left with any remedy in terms of any of the relevant sections in the Acts referred to. The answer is no. In the event that a Presiding Officer misdirects him in the application of the law, the remedy lies in an appeal against the decision.

[21] If the State felt aggrieved by the Magistrate’s application of Section 174 in circumstances where the law does not allow it, the State could have applied for leave to appeal.

[22] In consequence, the referral for review is not to be entertained. Should the DPP wish they may pursue an application for leave to appeal against the Magistrate’s order.

DATED AT MIDDELBURG, MPUMALANGA ON THIS 4TH DAY OF NOVEMBER 2021.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

I agree;

L VUKEYA

JUDGE OF THE HIGH COURT

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Prepared on 9 October 2026 · Esheria