

SOUTH AFRICA / JUDGMENT

S v Nhlapho and Others (A291/15) **[2015] ZAGPPHC 273; 2016 (1)** **SACR 489 (GP) (6 May 2015)** **[2015] ZAGPPHC 273**

COURT

North Gauteng High Court, Pretoria

BEFORE

Jansen, Bertelsmann

CASE / FILE NUMBER

A291/15

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IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

HIGH COURT REF. NO. 70/2015

MAGISTRATE'S SERIAL NO. 18/2014

REVIEW CASE NO. SH103/2013

DATE: 6 MAY 2015

DATE: A291/15

REPORTABLE

OF INTEREST TO OTHER JUDGES

THE STATE v THABANG NHLAPHO, LUCAS BONGANI KHALANGOBE, MODIBEDI ROOI
THAMAHA AND MTOMBENI VUSI GODFREY

REVIEW JUDGMENT

1. This matter came before the court as a special review in terms of section 304A of the Criminal Procedure Act 51 of 1977. The matter commenced on 26 February 2013 according to the notes preceding the typewritten transcript of the proceedings. All the accused were in custody.
2. Section 93ter of the Magistrates' Court Act 32 of 1944 provides as follows: —

“The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice

- (a) before any evidence has been led; or
- (b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in any regional court on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him."

3. Section 304A(a) of the Criminal procedure Act reads as follows: —

"(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."

4. Furthermore section 304A(b) provides as follows: —

“(b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.”

5. In the case of *S v Naicker* 2008

(2) SACR 54 (N) Msimang J and Ngobene AJ held that there were various forms of irregularity which could taint proceedings in the magistrate's court.

6. Section 93ter(l)(b) employs peremptory language in providing for assessors to be appointed where an accused is charged with murder before the regional court.

7. This fact notwithstanding, the court in *Naicker supra* held that the failure to appoint assessors is not an irregularity which renders proceedings per se irregular. Such an irregularity, according to Holmes AJ was not so fundamental that it, in fact, amounted to a per se failure of justice. His Lordship stated the following at paragraph 61 h: —

“Having regard to the purpose and the history of the system of trial by assessors in the lower courts as briefly stated above, it is my considered opinion that despite the peremptory manner whereby the proviso to section 93ter(l)(a) has been couched, failure to comply therewith is not so serious and fundamental as per se to vitiate the proceedings. To borrow from the American nomenclature, such an irregularity may be subjected to a harmless error analysis. ”

8. In sharp contradistinction, in the matter of *S v du Plessis* 2012 (2) SACR 247 (GSJ), it was held that the failure to provide assessors fundamentally taints such proceedings and the court cannot condone non-compliance. Because the Naicker case emanates from Natal, the court in *S v Dladla* (A583/14) [2014] ZAGPPHC 595 (14 August 2014) *supra* held that in terms of the stare decisis rule, it had to follow the Gauteng judgment of *S v du Plessis*.
9. Clearly that is not what the stare decisis rule dictates. A Gauteng court may follow the judgment of another division if it believes it to be the correct judgment and the Gauteng judgment to be clearly erroneous.
10. This Division has adopted the stance that a failure to appoint assessors is a gross irregularity and has decided to follow Naicker *supra*, see Southwood J and Makgoka AJ (as he then was) in *Moka!aka v S* 2010
 - (1) SACR 88 (GNP). I respectfully associate myself with the reasoning in their judgment.
11. A further question which arises is - given the fact that the accused have not yet been convicted, may this court interfere? Clearly the answer should be in the affirmative. It would be folly and a waste of the court's time and financial resources to proceed to conviction in the full knowledge that there is an irregularity in the proceedings.
12. In the matter of *S v Ralo* (CA&R 39/2012) [2012] ZAECGHC 7 (16 February 2012) at paragraph 7 the following section of the Criminal Procedure Act was quoted: —

“7 Section 304(4) of the Criminal Procedure Act provides that: If in any criminal case in which a magistrate’s court has imposed 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 the section”
12. It was further held in the said matter that: “(o)n a plain reading of the section it only provides for a review of the proceedings at the instance of a magistrate after conviction and sentence of an accused person. This does not however detract from a court's inherent jurisdiction to interfere in

exceptional circumstances at any stage of uncompleted proceedings where a grave injustice may otherwise arise. (See in this regard *S v April* 1985 (1) SA 639 (NC) at 645; *S v Shezi* 1984 (2) SA 577 (N) at 579 -580.)”

13. In *S v Ralo* supra reference was also made to the following dictum from *S v Titus* 2005 (2) SACR (NC) at paragraph 14: —

"In my view, the Act prescribes the manner in which a court should be constituted. Non-compliance with the peremptory provisions of how a court should be constituted in murder trials, is per se grossly irregular. One need not go further and check whether such an irregularity amounts to a failure of justice, or that, given the circumstances of the case and the seriousness of the offence, it will not be in the interests of justice to upset the conviction. The fact that the legislature made it incompetent for the magistrate to preside alone under certain circumstances. cannot be made competent by the fact that there is overwhelming evidence that the appellant is guilty of the offence of which he has been convicted. This situation is different from instances analysed by Steenkamp J (as he then was) in *S v Khuzwayo* 2002 (1) SACR 24 (NC) which Mr JJ Cloete has extensively referred this Court to. I agree with the submission that not all irregularities will lead to a failure of justice and that each case should be considered on its own facts. The nature and the degree of the irregularity should play an important role." [emphasis added]

14. In *S v Khambule* 1999

(2) SACR 365 (O), it was decided in an appeal against a conviction by the regional court that section 93fer(1)(b) requires a positive act on the part of an accused who must request that the trial proceed without assessors. Since the section deals with the composition of the court which may have a material bearing on the outcome of the proceeding it is necessary that the provisions of the section be brought to the attention of the defence and that the request to proceed in the absence of assessors must appear from the record of proceeding. On the basis of this the court found that non-compliance with the provisions of the section constitutes not only an irregularity but also a failure of justice.¹

15. In *S v Ralo* supra at paragraph 18 it was held, incorrectly, in the court's opinion, that proceedings must reach the conviction stage before a matter may be reviewed by a court. It is clear from the record that the accused were never appraised of their right to have assessors appointed.

16. However, there are different schools of thought on this issue. It has been stated that when the matter has run its course and a conviction has been obtained, only then may another court ascertain whether the appointment of assessors was a necessity. This reasoning is circuitous. One would never be able to peer through a crystal ball regarding the possible impact which the lack of assessors may or may not have on a trial. In the court's view, the irregularity should be addressed as soon as possible.

17. The main charges against the four accused were murder (read with the provisions of section 51(1) of the Criminal Taw Amendment Act 105 of

1997) in that they had: —

“...unlawfully and intentionally killed one VUSI SELBY MATHIBELA a male person BY SHOOTING HIM WITH A FIREARM.

When it was planned and/or premeditated,

When the death of the victim was caused by the accused in committing and/or attempting to commit and/or after having committed and/or having attempted to commit one of the following offences:

ii Robbery with aggravating circumstances, or

When the offence was committed by a person, group of persons or syndicate acting in the execution and or furtherance of a common purpose and/or conspiracy.”

18. The lesser charge was one of “...robbery with aggravating circumstances as amended in section 1 of Act 51 of 1977”. (sic)
19. Further, according to the typed notes preceding the written transcript, the matter was postponed on approximately 25 occasions. Some of them were caused by the accused requesting legal representation, legal representatives not being available, witnesses not being available or further witnesses having to be called, the public prosecutor being ill, investigations still pending, the accused not having received the docket and the like.
20. The accused pleaded not guilty to the charges put to them and when asked whether they wished to give a plea explanation, exercised their right to remain silent. The provisions of section 51 were also correctly explained to the accused. Evidence was led and later a trial within a trial relating to a confession on the part of accused number one was conducted.
21. The true transcript of the proceedings commences on 15 October 2013. Part of what has been set out above was gleaned from notes made by Mr. C K Matshitse, the acting regional magistrate - Benoni.
22. On 15 October 2013, the prosecutor was clearly painfully aware of all the undue delays, and took it upon himself to explain that there had been a miscommunication between the previous prosecutor Ms Mbhele, who became ill and the investigating officer as Ms Mbhele had undertaken to indicate on the docket which witnesses had to be called, but had failed to do so. The public prosecutor who apparently took over from her. Mr Mthethwa, referred to section 35 of the Constitution which guarantees an accused a fair trial but sought to argue that this right was limited by section 36 of the Constitution. He pre-empted what the legal representatives for accused number one and number two intended to argue with reference to cases such as *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) wherein it was stated: —

“Every accused person shall have the right to a fair trial, which shall include the right —

- (a) to a public trial before an ordinary court of law within a reasonable time after having been charged [emphasis added]

23. The legal representative also forcefully argued that public prosecutors obtained dockets well in advance of hearing dates and should be able to ascertain which witnesses have to be called. The legal representative for accused number three and number four similarly objected to a further postponement. Ultimately the matter stood down to the following day in order for one relevant witness to be called. However, on that day, the relevant witness was not available.
24. The regional magistrate was then forced to make a finding about the unreasonable delays and referred to section 342A of the Criminal Procedure Act. He quoted the learned author Hiemstra² who states that the questions to be posed in terms of section 342A are twofold: was there an unreasonable delay and, if this is the case, what should be done about it. In his discretion, the learned

regional magistrate gave the state a further remand stating as his reason for doing so that not only the accused's rights had to be considered, but also the seriousness of the offence and the interests of the community.

12. After the evidence in the trial within the trial had been led (but argument had not yet been presented) the regional magistrate

apparently wished to give a judgment. Before giving judgment in respect of the trial within the trial, the regional magistrate

realised that the proceedings in their totality were tainted by an irregularity, namely that, in terms of section 93 ter of the Magistrates' Court Act 32 of 1944, the court had not appointed assessors and neither had the accused requested the

presiding officer to proceed without the assistance of assessors.

13. All the parties concurred that this irregularity had occurred and it was for this reason that the matter was referred to me as a special review.

14. In consequence, the following order is made: —

1. The proceedings in the matter of *The State v Thabang Nhlapho, Lucas Bongani Khalangobe and Modibedi Rooi Thamaha* (Case No. SHI03/2013) which commenced before Magistrate Mr Matshitse on the 15th of October 2015 in the Regional Court for the Regional Division of Gauteng, Benoni are declared to be void ab initio.
2. The four accused are to be released immediately.

JANSEN J

JUDGE OF THE HIGH COURT

I agree

BERTELSMANN J

1 S v Ralo (CA&R 39/2012) [2012] ZAECGHC 7 (16 February 2012).

2 Hiemstra's Criminal Procedure - V.G. Hiemstra, Albert Kruger (Author) LexisNexis 2011 at 33-20.

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