

SOUTH AFRICA / JUDGMENT

S v Pheka (263/2018) [2019] ZANWHC 4 (6 February 2019)

[2019] ZANWHC 4

COURT

North West High Court, Mafikeng

BEFORE

R.D Hendricks, T.J Djaje

CASE / FILE NUMBER

263/2018

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST HIGH COURT, MAHIKENG

HIGH COURT REF: 01/2019

MAGISTRATE CASE NO: 263/2018

In the matter between:-

THE STATE

AND

RICHARD PHEKA

REVIEW

JUDGMENT

HENDRICKS J.

[1] This matter was sent on special review by the presiding Magistrate in terms of the provisions of section 304 of the Criminal Procedure Act 51 of 1977, as amended. The contents of the covering letter by the presiding magistrate states that:

“1. A trial-within-a-trial was prematurely requested at the instance of an attorney and the evidence of the witness for the State was led by the defence instead of the State.

2. The admissions or statement of confession was read into the record.”

[2] During the proceedings, the presiding magistrate stated:

“But on this matter I have realised that there is an error that the [indistinct] committed during trial-within-a-trial. I come to a conclusion that I should send the matter [indistinct] for special review.

The one reason is that I am of the view that the witness who was called, was a state witness and he should have been led in his evidence by the state and cross-examined by the defence.

The same aspect is that the merits of the case, based on the confession were dealt with during a trial-within-a-trial.

So I am of the view that such a review, such procedure was irregular and could result in the accused being prejudiced in his case and for that reason I will refer the matter for special review.”

[3] In this matter, a very strange procedure was indeed followed during the trial-within-a-trial. The defence attorney submitted that a trial-within-a-trial be conducted in order to determine whether the statement made by the accused before a magistrate was indeed freely and voluntarily made. It was alleged that the accused was forced and coerced in order to make the statement (confession) before a Magistrate.

[4] Instead of the State presenting the evidence of the two police officers Warrant Officer Flemming and Captain Ferreira and the Magistrate, Mr. Petrus Erasmus, the attorney acting on behalf of the accused Mr. Mkanzi called these witnesses and presented their evidence, much to the surprise of the Magistrate, Mr. Erasmus. The record reflect:

“PETRUS ERASMUS: (duly sworn state)

COURT: Thank you, your witness, you may proceed Mr Mkhanzi.

EXAMINATION BY MR MKHANZI: I am a magistrate in the district of Delareyville.

COURT: Thank you. --- On the [intervene]

Just a second Mr Erasmus. The attorney will lead you in terms of your evidence? --- The attorney? Am I a defence witness or what?

He is going to lead you, you are not against the witness sir. --- Oh thank you, no I am just asking.

[Laughing] --- I could not understand.”

This is an incorrect procedure that was followed which placed a reserved onus on the accused.

[5] To add to this, the magistrate was asked to read the whole contents of the statement (and not only the roneo part, consisting of the questions and answers thereto, in order to determine the admissibility of the statement) into the record. This was done before a pronouncement could be made by the presiding officer about the admissibility of the said statement (confession).

- [6] It really goes without saying that this was totally wrong and it amounts to a gross misdirection on the part of the presiding magistrate. The accused's fair trial rights had been infringed. Fortunately, the presiding magistrate realized his mistake and was bold enough to admit it and took the appropriate steps to have it rectified.
- [7] Under these circumstances, I am of the view that the proceedings should be reviewed and set aside. The matter should be remitted to the Magistrate Court, Atamelang to be tried de novo before a differently constituted court.

Order

[8] Consequently, the following order is made:

- (i) The proceedings under case number 263/2018 held at Atamelang is hereby reviewed and set aside in its entirety.
- (ii) The matter is remitted to the Magistrate Court, Atamelang for a trial de novo before a Magistrate other than the presiding Magistrate, Mr. S Ndade Maphango.

R.D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

I agree

T.J DJAJE

DATED: 06 February 2019

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