

SOUTH AFRICA / JUDGMENT

S v Ralo (CA&R 39/2012) [2012] ZAE CGHC 7 (16 February 2012) [2012] ZAE CGHC 7

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen, JD Pickering

CASE / FILE NUMBER

CA&R 39/2012

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: CA&R 39/2012

REVIEW NO: 2012011

Date Delivered: 16 February 2012

In the matter between:

THE STATEPlaintiff

and

SIMPHIWE RALODefendant

REVIEW JUDGMENT

GOOSEN, J:

This matter came before me by way of special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977. The regional magistrate requested the reviewing court to set aside the proceedings as irregular and to refer the matter back to the regional court for the trial of the accused to start de novo before another magistrate.

The accused has been charged with a number of offences including a charge of murder. The trial has progressed to the stage where the regional magistrate is called upon to consider whether or not the prosecution has proved any of the charges against the accused. Accordingly no conviction (and therefore sentence) has been entered against the accused.

The circumstances upon which it is alleged that a reviewable irregularity has occurred are set out in a letter from the regional magistrate concerned. According to the magistrate it came to her attention at the stage when the parties were to address her in regard to the merits of the case, that the erstwhile attorney for the accused, a Mr Nel, had not placed on record that the accused had requested that the trial of the matter proceed in the absence of assessors. The magistrate also indicates that she failed to enquire whether the accused wanted to proceed without assessors.

The record indicates that the magistrate drew this to the attention of the accused's current representative, Mr Charles, and the prosecutor. The prosecutor made enquiries of Mr Nel who addressed a letter to the magistrate in which it is recorded that, prior to the commencement of the trial, he had advised the accused and the accused's father about the provisions of section 93ter of the Magistrate's Court Act 32 of 1944 (hereinafter referred to as the "Act") and that he could elect to proceed to trial without assessors. The letter further records that, acting upon his advice, the accused had indeed elected to proceed to trial without assessors, although his file does not record this fact.

Mr Charles, who now appears for the accused, obtained instructions from the accused which places this issue in dispute. According to his instructions had the accused been so advised he would have elected to have assessors summoned as is required by section 93ter of the Act.

In the light of this the magistrate formed the view that a fatal irregularity had occurred in the proceedings and the trial was postponed in order to enable the matter to be referred on review.

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."

On 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).

Since this is not a matter which falls within the ambit of section 304(4) the question that arises is whether an irregularity is disclosed which will give rise to a grave injustice in the event that the proceedings are not set aside.

The relevant portion of section 93ter provides that:

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

before any evidence has been led; or

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 the court of a regional division 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.”

The section is peremptory. It determines the composition and constitution of a court which tries an accused person on a charge of murder. The proviso however grants an accused person the right to request that the trial proceed without assessors. Upon such request the magistrate concerned has a discretion whether or not to accede to the request having regard to the interests of the administration of justice.

There is a conflict in the authorities regarding the effect of an irregularity arising from the failure to comply with the peremptory provisions of section 93ter. In *S v Khambule* 1999(2) SACR 365, it was decided in an appeal against a conviction by the regional court that section 93ter(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.

Similar reasoning was applied in *S v Titus* 2005(2) SACR 204 (NC). In that matter, which was also decided on appeal, the magistrate had informed the accused, who was unrepresented, that he could apply for the appointment of assessors. When the accused indicated that he wanted assessors to be appointed the magistrate proceeded to explain that assessors are untrained lay persons whose appointment may work to the disadvantage of the accused. Suitably intimidated by this explanation the accused demurred and the magistrate proceeded to commence the

proceedings in the absence of assessors.

The court (at paragraph

14) said:

“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.”

Although the court in Titus found that non-compliance with the peremptory provisions of section 93ter per se amounts to a failure of justice, the decision to set aside the conviction and sentence was based on the conduct of the magistrate in that matter. In this regard the court said (at paragraph 17):

“In conclusion, I am of the view that the conduct of the magistrate has under the circumstances amounted to a serious irregularity which affects the entire proceedings. (See S v Mitshama and Another 2000 (2) SACR 181 (W) at 183 – 4). The request that the public prosecutor should quickly put the charge to the appellant after the appellant conceded, to a leading question, that he did not require assessors was not necessary. The magistrate lost the opportunity, at least at this stage, to give consideration to have assessors summoned, taking into account the factors contained in ss (2). The dominant role played by the magistrate in leading the evidence of State witnesses, and calling for documentary evidence and the reminder to the public prosecutor not to forget to prove ‘chain evidence’ is indicative of the need for assessors to have been

summoned.”

In S v Naicker 2008(2) SACR 54 (N) a contrary approach was adopted to a similar question. In that matter the question of the appointment of

assessors was not broached at all and the matter proceeded to finality without the assistance of assessors. In dealing with the

failure to comply with section 93ter the court accepted that its provisions are peremptory and that non-compliance constitutes an irregularity. The proper approach it said however, was to determine the effect which such irregularity had on the integrity of the proceedings. In adopting this approach the court relied on the dictum of Holmes, JA in *S v Moodie* 1961 (4) SA 752 (A) where the learned judge at 758 F – G, said the following:

“(1) The general rule in regard to irregularities is that the court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably convicted if there had been no irregularity.

- (2) In an exceptional case, where the irregularity consists of such a gross departure from the established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably convicted if there had been no irregularity.
- (3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity.”

The court in *Naicker* then proceeded to evaluate the nature of the irregularity established by non-compliance with section 93ter. For the purpose of that enquiry, it said (at 61b), a court is ‘... not precluded from investigating the policy behind the enactment of such a procedural requirement with a view to establishing as to whether the transgression thereof would, in all cases, amount to a violation of such a policy.’ The court concluded (at 61h to 62a that:

“Having regard to the purpose and 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(1)(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.”

It is not necessary to express a view on the apparent conflict in approach to non-compliance with section 93ter, since each of these matters (*Khambule*; *Titus* and *Naicker*) is distinguishable. Those matters were all decided on appeal and upon a record disclosing both the nature and effect (if any) of the irregularity.

In this matter there is a dispute regarding whether or not the accused was advised of the terms of section 93ter by his erstwhile attorney and whether or not he then elected to proceed to trial without assessors. Whilst it is so that the magistrate did not, at the commencement of proceedings, broach the subject of the composition of the court in terms of section 93ter and whilst it may be so that the magistrate proceeded without regard to the peremptory provisions of the section, the nature and effect of such irregularity as that may constitute will undoubtedly be materially impacted by a finding as to whether or not the accused in fact gave instructions as indicated by Mr Nel.

That issue – and therefore the existence and nature of the irregularity – cannot be determined on the record as it now stands. Ordinarily a reviewing court will not act on the mere assertion of the existence of an irregularity by the magistrate. The irregularity must clearly appear from the record of proceedings and, in the event that it does not, it must be established by the filing of appropriate affidavits (see *S v Mothae* (2) 1965(2) SA 128 (O) at 129H).

A court will only in rare and exceptional circumstances intervene, on review, in uncompleted proceedings. Its power to do so is sparingly exercised particularly if regard is had to the fact that redress by means of review or appeal will ordinarily be available to the accused in due course (*Wahlhaus v Additional Magistrate, Johannesburg* 1959(3) SA 113(A) at 119H – 120E).

In the circumstances the review is premature. I accordingly refuse to set aside the proceedings as requested. The magistrate is directed to proceed with the trial of the matter, and is further directed to draw to the attention of the accused and his legal representative the outcome of these proceedings by making available to them a copy of this

judgment.

G GOOSEN

JUDGE OF THE HIGH COURT

PICKERING, J:

I concur.

JD PICKERING

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