

SOUTH AFRICA / JUDGMENT

S v Samuels (15726/2015, SH3/65/15, 8/15) [2015] ZAWCHC 144 (9 October 2015)

[2015] ZAWCHC 144

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward, L.J. Bozalek

CASE / FILE NUMBER

15726/2015

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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

High Court Review Ref: 15726/2015

Bellville Magistrates' Court case no. SH3/65/15

Kuils River Magistrates' Court serial no. 8/15

DATE: 09 OCTOBER 2015

In the matter between:

THE STATE

And

CATHLEEN SAMUELS

REVIEW JUDGMENT

BINNS-WARD J:

- [1] In this matter the magistrate made an order in terms of s 78(6)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA') finding the accused not guilty on a charge of murder and directed, in terms of s 78(6)(i)(aa), that she be detained in a psychiatric hospital pending the decision of a judge in chambers in terms of s 47 of the Mental Health Care Act, 2002. The matter was thereafter placed before me in chambers as a 'special review', without any reason for that procedure being apparent. I therefore queried why the matter had been sent on special review. When the file found its way back to me a few weeks later, it bore a Postit sticker on the cover, presumably attached by the magistrate, on which was written 'This is not a special review. The record must be given to a Judge in chambers'. This was mystifying as the

accused had been legally represented in the trial court, and thus there was no reason for the case to have come on so-called 'automatic review' in terms of s 302 of the CPA.

- [2] It appears that the magistrate may have been influenced by the judgment in *S v Ramokoka* [2006] ZAGPHC 37; 2006 (2) SACR 57 (W), or the recent judgment of the full court of the North Gauteng Division in *S v Maluka* 2015 (2) SACR 273 (GP) to send the case on review. If so, it would have been helpful if he had said so. It would have spared me the time and trouble of trying to identify a reason for the matter having been sent on review.
- [3] In *Ramokoka*, the court held that as 'a matter of good practice', magistrates should refer all their orders under s 77(6) of the CPA to the High Court for review. It seems, however, that the judgment was given in ignorance of two previous decisions in the Transvaal Provincial Division to the opposite effect: *S v Wills* 1996 (2) SACR 105 (T) and *S v Van Wyk* (1) 2000 (1) SACR 79 (T). The judgment was also confessedly at odds with the judgment of this court (per Grosskopf J, with Friedman J concurring) in *S v Blaauw* 1980 (1) SA 536 (C).
- [4] In *S v Zondi* 2012 (2) SACR 445 (KZP), the KwaZulu Natal Division of the High Court declined to follow *Ramokoka* and endorsed the aforementioned Cape and Transvaal

Provincial Division judgments.

- [5] In *Maluka*, as in the current matter, an order in terms of s 78(6) of the CPA. was involved. The full court essentially endorsed the approach taken in *Ramokoka*. It did so acknowledging that it was primarily the task of legislature to amend the CPA if matters of this nature were to be sent on review as a matter of course. The court held, however, that pending legislative intervention, such matters should be sent on review 'as a matter of good practice'. The opportunity for legislative intervention in the light of pertinent reported jurisprudence has existed for 35 years. There is no reason to believe that it will happen. On the contrary, the legislative trend has been towards increasing the jurisdiction of the regional magistrates' courts to a level where their powers as courts of first instance are largely

indistinguishable from that of the High Court. The very fact that the accused in the current matter was arraigned in the regional court on a charge of murder illustrates the point.

- [6] I would respectfully associate myself with the views expressed by Ploos van Amstel J (Patel AJP concurring) in *Zondi*, at para 17-21:
- [17] There is ample authority for the proposition that an order in terms of s 77(6) is not subject to automatic review in terms of the CPA. Section 302, read with ss 303 and 304(1) and (2), provides that certain sentences 'shall be subject in the ordinary course to review by a judge . . .'. An order in terms

s 77(6) is not a sentence, with the result that s 302 does not apply to it. Nor does s 304(4). The special review provided for in that section also only applies where a sentence has been imposed.

- [18] The basis on which the court in Ramokoka suggested that such orders should be submitted for review is 'the potential for serious prejudice to an accused person where an order is made in terms of s 77(6)' and that it would be a good practice to do so.
- [19] An accused against whom an order is made in terms of s 77(6) has the right to appeal against that finding. Where the appeal is allowed the court of appeal sets the direction aside and remits the case to the court which made the finding, whereupon the relevant proceedings continue in the ordinary way. Further, in terms of s 47 of the Mental Health Care Act a number of persons may apply to a judge in chambers for the discharge of a state patient. They are the state patient, an official curator ad litem, an administrator (if appointed), the head of the health establishment at which the state patient is admitted, the medical practitioner responsible for administering care, treatment and rehabilitation services to a state patient, a spouse, an associate or a next of kin of the state patient, or any other person authorised to act on behalf of the state patient.
- [20] Magistrates have the power to impose sentences which involve serious prejudice. Not all their sentences are subject to review. Some sentences are subject to review only if they were imposed by a magistrate below a specified level of seniority. The potential for serious prejudice does not seem to me to justify the creation of a new category of automatic review. In *S v Blaauw Grosskopf J* (as he then was) said:

'Die landdros wys daarop dat 'n persoon ten opsigte van wie so 'n bevel gemaak is, moontlik nie sy reg tot appel sal begryp nie. Die reg van appel is egter juis bedoel om 'n persoon te beskerm wat wel in staat is om die verrigtinge behoorlik te begryp en derhalwe veronreg is deur 'n bevel ingevolge art 77(6). Maar, hoe dit ook al sy, selfs al sou 'n reg tot appel nie genoegsame beskerming bied nie, sou dit na my mening nie die Hof veroorloof om 'n stelsel van outomatiese hersiening te skep waarvoor die Wetgewer geen voorsiening gemaak het nie.'

I respectfully agree with this approach.

- [21] In my view there is no obligation on magistrates to submit orders in terms of s 77(6) of the CPA for review as a matter of course. If a magistrate has reason to believe that there may be a problem in a particular case he is, of course, free to submit the matter for review. In such a case the high court will exercise its powers of review if the circumstances require it.

(Footnotes omitted.)

Those remarks apply equally to proceedings resulting in an order in terms of s 78(6) of the CPA.

- [7] The judgments in Ramokoka and Maluka in any event do not affect the binding authority of the judgment in *S v Blaauw* in this Division. Accordingly, if the magistrate was not concerned that there had perhaps been something untoward or irregular in the proceedings, the matter should not have been sent on review.

A.G. BINNS-WARD

Judge of the High Court

BOZALEK J:

I agree.

L.J. BOZALEK

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