

SOUTH AFRICA / JUDGMENT

S v Teu (R18/2023; CA&R36/2021; CA&R 24/2021) [2023] ZANCHC 92; 2024 (1) SACR 543 (NCK) (28 November 2023) [2023] ZANCHC 92

COURT

Northern Cape High Court, Kimberley

BEFORE

MC Mamosebo, AD Olivier

CASE / FILE NUMBER

R18/2023; CA&R36/2021; CA&R 24/2021

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: R18/2023; CA&R36/2021;

CA&R 24/2021

Delivered on: 28/11/2023

In the matter between:

THE STATE

v

FLOYD TEU

ACCUSED

Mamosebo J et Olivier AJ

JUDGMENT ON REVIEW

MAMOSEBO J

- [1] The accused, Floyd Teu, together with two others who were acquitted at the end of the proceedings, was charged in the Regional Court in Kimberley on two counts of fraud and defeating the ends of justice. He appeared before Magistrate VM Smith who found him guilty on both counts on 17 September 2020 and sentenced him on 23 March 2021 to seven years' direct imprisonment on each count. Both sentences were ordered to run concurrently. In other words, the

accused was sentenced to an effective custodial sentence of seven years.

[2] The trial court refused him leave to appeal on 06 May 2021. Aggrieved by this decision, the accused petitioned the Judge President of this division. On 25 May 2021 Lever AJ, then, and Snyders AJ, granted the petitioner leave to appeal against the conviction and sentence.

[3] On 28 February 2022 Lever J et Erasmus AJ granted the following order having heard Adv Mokoena for the applicant and Adv Mphela for the respondent (the State):

“It is ordered that:

1. The conviction and sentence imposed by the Learned Regional Court Magistrate, Mr Smith, on 17 September 2020 and 23 March 2021, respectively, be and is hereby set aside;
 2. The matter be and is hereby referred back to the Regional Court for hearing of further evidence”.
- [4] The second order is specific in that the matter is remitted to the Regional Court for further evidence. This makes plain that the further evidence was to be heard by the same Magistrate before whom the matter commenced. Had the order been for the trial to start de novo before another Magistrate, the appeal court would have specified same in its order.
- [5] There has been countless postponements at the instance of the defence since the matter was remitted for further evidence. I will not deal with every postponement or what transpired since then but will only focus on critical aspects. Of more significance is the unreadiness of the defence to proceed on 30 January 2023, almost a year after the order was made by the High Court. Mr Alexander, attorney appearing for the accused, submitted that witnesses had not been consulted and that there was a specific witness, a private investigator, apparently untraceable that they required to call first. It was inexplicable why the defence counsel and the main witness were absent when the date was arranged between the parties. When the Court probed further in seeking clarity, the accused terminated the mandate of Mr Alexander.
- [6] Adv Van Heerden was briefed to argue the recusal of Magistrate Smith. I should point out that the engagements between the Court and Mr Van Heerden were unnecessarily long and could have been curbed to the bare essential to afford the Magistrate to make a ruling. The recusal application was unsuccessful.
- [7] Mr Van Heerden, for the accused, argued that the reason for the accused to ask Magistrate Smith to recuse himself is because he holds the perception that he may not get a fair trial.

It is unclear how the Magistrate is expected to hear further evidence if he recuses himself. A more prudent approach would be to comply with the order and furnish the evidence that the defence intended to provide and at the end of the entire trial the accused would still have remedies to explore should that need arise. In this way, a piecemeal approach is prevented and the matter can receive finality.

[8] The recitation of Bozalek J's judgment in *S v Ross*[1] seems copious but it demonstrates insightfully the procedure required in casu:

[13] The power of a high court, sitting as a court of appeal, to hear further evidence derives from s 309(3) read with s 304(2)(b) of the Act, as well as s 22 of the Supreme Court Act 59 of 1959. See *S v M* 2002 (2) SACR 411 (SCA) (2003 (1) SA 341) at 419i – 420b. The court need not hear the evidence itself, but may remit the matter to the magistrates' court with instructions regarding the hearing of new evidence. A court of appeal will generally only allow the leading of new evidence in exceptional circumstances. See *S v Sterrenberg* 1980 (2) SA 888 (A) at 893G. In the normal course, remittal for the hearing of further evidence will only be indicated where the proposed evidence is of a formal or technical nature, or such as would prove the case without delay and without dispute. See *S v Mokgeledi* 1968 (4) SA 335 (A).

[14] In *S v De Jager* 1965 (2) SA 612 (A) Holmes JA set out the basic requirements which must be satisfied before an application for the reopening of a case and its remittal for the hearing of further evidence can succeed (at 613C – D):

'(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.'

In *S v M* supra at 420e – j Corbett JA quoted with approval the following statement of Holmes JA:

'It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified. And there is always the possibility, such being human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty.'

And added that:

'A study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused: and that where relief had been granted the evidence in question is related to a single critical issue in the case....'"

[9] Based on the aforementioned reasons and authorities, this matter is remitted back to the Regional Court to enable Magistrate VM Smith to comply with the order of this court dated 28 February 2022.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I agree

AD OLIVIER

ACTING JUDGE OF THE HIGH COURT

[1] 2013

(1) SACR 77 (WCC) at paras 13 and 14

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