

SOUTH AFRICA / JUDGMENT

S v Tomose (24/493/2004) [2008] ZAWCHC 49 (19 August 2008)

[2008] ZAWCHC 49

COURT

Western Cape High Court, Cape Town

CASE / FILE NUMBER

24/493/2004

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REPORTABLE

REVIEW CASE NO. 24/493/2004

MAGISTRATE'S SERIAL NO. 22/08

- [1] This matter came before me on Special Review. On 2 April 2008 this matter was heard before Magistrate Magele. The charge was put on the Accused and he pleaded not guilty. The prosecution proceeded to prove its case by calling Mr. Donovan Gregory Daniels. The latter testified in chief and was cross-examined by the Accused who then acted in person. Upon closure of the State's case, the matter stood down for some time. On resumption and after the Accused' rights regarding his testimony in rebuttal of the State case had been explained to him, he elected to testify in his defence. It is only then that it came to light that the same matter against the Accused was partly heard before another magistrate. The prosecution discovered a typed transcrip of the same matter in his docket and brought same at that stage to the attention of the magistrate. From the transcript it appeared that the only State witness, Mr. Donovan Gregory Daniels had already testified and had also been subjected to cross-examination.
- [2] It appears that upon closure of the State case in the earlier proceedings, the Accused had absconded. The second proceedings became a reality upon his re-arrest. The magistrate is asking this Court to review and set aside proceedings (Case No. 24/493/04) of 2 April 2008 presided over by Magistrate Magele so as to enable the earlier proceedings presided over by Magistrate Ndlakuhlolo to continue.
- [3] Once an accused has been charged and has pleaded to the charge in a criminal Court which has been properly constituted and appointed to try him, that Court and no other is seized with the trial and is obliged to try him. Such Court must conduct the trial to its conclusion, unless that becomes impossible (which would be the case for example, upon the death of the judicial officer or his unavoidable and prolonged absence or his incapacity or the need arising for him to recuse himself). Subject only to those contingencies I have enumerated

above, an accused is entitled to be tried by the Court before which he has pleaded to the charge. When a Court has been duly constituted to try an accused person who has pleaded to the charge before that Court so that the issue has been joined before that Court and the trial has commenced, no other Court is competent to hear the matter. See: *S v Mphetshwa*

(1979) 3 All SA 718 (TK).

- [4] If another Court knowingly or unknowingly (as happened in the instant case) usurps the function and duty of the duly constituted and appointed Court to try the accused, the proceedings and acts of such Court in relation to the trial are incompetent and are a nullity. I am in agreement with Rose-Innes J in *Mphetshwa* case supra that the Court seized with the trial of an accused cannot be deflected from its duty nor can it abandon or surrender to another official or body its obligation to try the accused.
- [5] It is important to bear in mind that this is no review covered by the provisions of section 304 of the Criminal Procedure Act 51 of 1977 as amended. This Court derives its power to intervene in proceedings like these from section 24 of the Supreme Court Act 59 of 1959. This Court's powers in this regard also emanate from the fact that this country is governed by constitutional supremacy and the rule of law. This alone means inter alia, that if the proceedings are, for one or another reason, unconstitutional, this Court will and must intervene. See: Section 1 (c) and 2 of the Constitution of the Republic of South Africa Act 108 of 1996 ; *S v Mathemba* 2002
- (1) SACR 407 (ECD). It would result in grave injustice to subject the accused to two (2) trials for the same offence. Clearly the Court hearing the second trial had no jurisdiction to entertain a matter with which another Court was seized. It would also be Constitutionally wrong to charge an accused person twice with one and the same offence. Undoubtedly a grave irregularity was committed when the second proceedings in the instant matter were initiated and proceeded with. See also: *S v Mathemba* supra .
- [6] It follows from what I have said above that the second proceedings are a nullity. The second proceedings before Magistrate Magele (Cape Town) are hereby set aside. It is ordered that the earlier trial be proceeded with.

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