IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: S/H 233/02

HIGH COURT REF: CC457/05

In the matter between:

THE STATE

and

Else Accused

J U D G M E N T

TSOKA, J:

[1] This matter came before me on 25 January 2006, while on circuit in Potchefstroom for sentence as the accused was convicted of rape of an eleven year old girl in contravention of Part 1 of Schedule 2 read with the provisions of section 52 of the Criminal Law Amendment Act 105 of 1997.

[2] As I was doubtful that the proceedings were in accordance with justice, I addressed a query to the regional Court magistrate who convicted the accused. I postponed the matter to 20 March 2006. As the accused was on bail, his bail was extended. On 20 March 2006, having not received the magistrate's response to the query, I again postponed the matter to 29 May 2006. It appears from the court file that the matter came before Van Oosten J on 19 May 2006 when it was remanded to 24 August 2006. It is noted on the court file that the accused was remanded in custody. By this time I had returned from circuit and my brother Van Oosten J, had taken over the circuit duties. On 24 August 2006 Van Oosten J, postponed the matter *sine die*. The accused's bail was extended.

[3] I was contacted by the Office of the Director of Public Prosecutions who informed me that the reason for the postponement of the matter on 24 August 2006 was that I am seized of the matter. This was on the authority of the judgment of my brother Jajbhay J in the matter of *S v Mhlongo*2006 (1) SACR 11 (TPD).

[4] I then invited the parties to address me on the question whether I am seized of the matter. On 19 March 2007 I heard argument. Both the defence and the State support the decision of *S v Mhlongo supra* .argued that I am seized of this matter.

[5] The question to be decided is whether I am seized of this matter on the basis of the query I raised. Jajbhay J in *S v Mhlongo supra*thinks I am.

[6] In *S v Mhlongo supra*, the Judge who raised a query with the regional magistrate was said to be seized of the matter. The matter was referred to him to sentence the accused. At page 14a-b of the judgment of *S v Mhlongo supra*, the learned Judge said the following:

> "*Here it is clear that the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of the High Court. In other words what this means is that once a Judge sitting in chambers* ***has considered the evidence that is contained in the record*** *of the proceedings, (my emphasis) then that Judge is seized of the matter.*"

[7] The understanding of the provisions of section 52(3) of the Criminal Law Amendment Act 105 of 1997 (the Act) is important. Section 52(3)(a) of the Act provides that –

> "*Where the accused is committed under subsection (1)(b) (****as is the case in this matter*** *– my explanation) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.*

[8] Section 52(3)(b) provides that –

> "*The High Court shall,* ***after considering the record of the proceedings in the regional court*** *(my emphasis) sentence the accused as contemplated in section 51(1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient to the High Court to pass such sentence: Provided that if the judge is of the* ***opinion*** (my emphasis) *that the proceedings are not in accordance with justice or that* ***doubt*** (my emphasis) *exists whether*

the proceedings are in accordance with justice, he or she shall without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused."

[9] The provisions of section 52(3) (a) of the Act relating to the admission of the record, govern the procedure as to how to deal with the record which is not the record of the High Court. This is a mere formality. For the High Court to be able to deal with the record of the proceedings of the regional court as if it is its own, the record must first be proved to be the true record of the regional court and once this has been done, the High Court receives the record which then becomes its record. Nothing in the subsection suggests that acceptance of the record constitute the consideration of evidence.

[10] The proviso in paragraph (b) only comes into operation when the Judge is of the opinion that the proceedings of the regional court are not in accordance with justice or there is doubt in such Judge's mind that the proceedings are in accordance with justice. Once the proviso comes into operation, such Judge is obliged to obtain the statement from the regional Court magistrate. The purpose of the statement is to clear any doubt that such Judge has on the conviction of the accused. The statement is not evidential but explanatory in nature. This view is fortified by the provisions of paragraph (e) of section 52(3) which prescribes the powers of such Judge after obtaining the statement and having considered the statement.

[11] I understand the procedure of sentencing provided for in section 52 of the Act as follows:

11.1 Once the record of the proceedings of the regional court is proved and received by the High Court it becomes the record of the High Court.

11.2 The Court must then consider the record to determine whether

the proceedings in the regional court are in accordance with justice or whether doubt exists that the proceedings are in accordance with justice.

11.3 If the Judge, after considering the record, is of the *prima facie* opinion that the proceedings are in accordance with justice, the Judge must first invite the parties to address him/her on the conviction. If the Judge after hearing the parties is of the opinion that the conviction is proper, such Judge must confirm the conviction and then proceed to sentence the accused.

11.4 If the Judge, after considering the record, is, *prima facie,* the opinion that the proceedings are not in accordance with justice, or doubt exists in the mind of the Judge that the proceedings are in accordance with justice, the Judge must obtain a statement from the regional Court magistrate to clear the doubt.

11.5 On receipt of the statement, the Judge must invite the parties to address him/her as to whether the conviction is proper or not. If proper, the conviction is confirmed and **only then**is the Judge seized of the matter and must proceed to sentence the accused. If the Judge after hearing the parties is not satisfied with the conviction, he may set aside the conviction or deal with the

matter as provided for in paragraph (e).

11.6 In the context of the provisions of section 52 of the Act, a Judge is seized of a matter only when the parties have addressed him/her on the conviction and the Judge has made a ruling regarding the conviction. Only then is the Judge seized of the matter. This ruling on the conviction renders such a Judge to be seized of the matter.

[12] The mere reading and consideration of the record by a Judge does not make such a Judge to become seized of the matter, even if the Judge may have formed a preliminary view of the matter.

[13] The practical effect of *S v Mhlongo*is to hamstring the administration of justice. The consequence of the view that by raising a query I became "*seized of*" the matter in January 2006, is that this matter has not been finalised for a period of 14 months.

[14] It is not unheard of, at least in this division, for reviews, in terms of section 304 of the Criminal Procedure Act, 51 of 1977 for one Judge to raise a query regarding the record of proceedings and for a different Judge, regardless of whether the Judge who raised the query is available or not, to consider the matter and finalise it. In fact section 304(2)(a) of the Criminal Procedure Act uses similar language to the language used in section 52(3)(b) of the Act.

[15] In appeals and motion proceedings, the same applies. Judges in appeals may read the record and in fact even engage counsel regarding the merits of a conviction and when they are about to give judgment, discover that counsel who appears for the appellant has no power of attorney or that for one or other reason the appeal cannot be disposed of, resulting in the matter being postponed. The Judges in this instance are not seized of the matter. When the matter is re-enrolled, it is not and need not be re-enrolled before the same Judges. Any other two Judges may hear the matter. It is their duty to satisfy themselves of the merits or otherwise of the appeal and they too will read the record and consider the matter.

[16] In the context of motion proceedings, in this division, a Judge who has read and considered the evidence may have a *prima facie*view of the matter. If the parties agree to have the matter postponed, the matter need not be postponed to the same Judge as the Judge, despite having read and considered the evidence, is not seized of the matter. In urgent applications a Judge considers evidence on urgency and the merits. Thereafter he may struck the matter from the roll for lack of urgency. Yet such Judge is not said to be seized of the matter.

[17] *In casu* did not hear evidence. I did not pronounce myself on the conviction. I merely raised a query. The query I raised does not prevent another Judge who is available to consider the record of the proceedings. Such Judge may still consider the record of the proceedings, the query and the statement and still satisfy himself or herself that the proceedings in the regional court were in accordance with justice.

[18] The result is that I am not seized of the matter. As I consider *S v Mhlongo*to be clearly wrong, I am not bound to follow it.

[19] In the result the matter is referred to a Judge at circuit court sitting at either Potchefstroom or Klerksdorp for finalisation.

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M P TSOKA
JUDGE OF THE HIGH COURT