A1143/07

IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE Date: 7/1/2008

In the matter between:

LESIBA ROBERT MOETJIE Applicant

and

THE STATE

POLOKWANE REGIONAL MAGISTRATE (THE LEARNED MR H.S. GERICKE)

First Respondent

Second Respondent

High Court Reference No: 2059

Regional Court Case Number: RC1058/94

Magistrate POLOKWANE

REVIEW JUDGMENT

SOUTHWOOD J

[1]

This is an application for a special review in terms of section 304(4) of the Criminal

Procedure Act, 51 of 1977 ('the Act'). The accused seeks an order setting aside the order made on 13 September 2006 by the Polokwane regional court in terms of section 286B(4) of the Act that the sentence of imprisonment for an indefinite period imposed on the accused be confirmed, that the accused not be released and that he be brought before the court on 13 September 2011 for the court to reconsider his sentence.

[2]

The Director of Public Prosecutions has expressed some reservations about the procedure adopted by the accused to bring this matter to the court's attention. He applies to the court on notice of motion supported by an affidavit by his attorney, Moyagabo Elias Mokgotho, of the Polokwane Justice Centre, setting out the relevant facts. The notice of motion was served on the clerk of the court, Polokwane, on 11 July 2007 and sent to the registrar of the High Court, Pretoria who received it on 15 October 2007. The registrar placed the matter before a judge for a special review and, as is the practice, the judge requested the Director of Public Prosecutions to comment on the matter. Four representatives of the Director's staff have commented extensively. The regional magistrate (Mr. Gericke) who made the order which the accused seeks to set aside has not responded to the application.

[3]

This matter concerns the right to a fair trial in terms of section 35(3) of the Constitution which expressly includes the right °

(1)

to have adequate time and facilities to prepare a defence (section 35(3)(b) of

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the Constitution);
(2)
to choose and be represented by, a legal practitioner, and to be informed of this right promptly (section 35(3)(f) of the Constitution);
(3)
to have a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result and to be informed of this right promptly (section 35(3)(g) of the Constitution).
It also includes the right to have the proceedings conducted in such a manner that substantial justice is done. See S *v Zuma* 1995 (2) SA 642 (CC) para 16; S *v Ntuli* 1996 (1) SA 1207 (CC) para 1.
Where the accused's right to a fair trial has been infringed or threatened the accused may approach a court in terms of section 38 of the Constitution for appropriate relief - see *Fose v Minister* of *Safety and Security* 1997 (3) SA 786 (CC) para 19. Where this occurs the court will not be prevented by the ordinary rules from dealing with the matter - see *Gerber v Voorsitter, Komitee oor Amnestie van die Kommissie vir Waarheid* 1998 (2) SA 559 (T) at 569B and 569D-H; *Van Rooyen and Others v The State and Others* 2001 (2) SACR 376 (T) at 400g; *Van Rooyen v Departement van Korrektiewe Dienste* 2005(1)SACR 77 (T) at 91g-h and 92i-93f. In the present case the relevant parties have received the application and had an opportunity to comment on the relief sought. In my view,

even if the procedure adopted is not correct, no prejudice can be caused to the administration of justice if this court considers the application.

[5]
From the accused's application and the transcript of the proceedings on 13 September 2006 and 7 July 2007 (no other documents are available) the following facts appear:

(1)
On 5 June 1995 the accused was convicted of rape in the Polokwane regional court (Mr. Nolte) and on the 13th of June 1995 the accused was declared a dangerous criminal in terms of section 286A(1) of the Act and sentenced to undergo imprisonment for an indefinite period in terms of section 286B(1) of the Act. The regional court directed that the accused be brought before it on the expiration of 10 years in terms of section 286B(1)(b) of the Act for reconsideration of the sentence in terms of section 286B(4).

(2)
On 13 September 2006 (i.e. some 15 months after the period of 10 years had expired and clearly well outside the prescribed period) the accused was brought before the Polokwane regional court (Mr. H.S. Gericke) for his sentence of imprisonment for an indefinite period to be reconsidered.

(3)
The accused was not represented and he was not advised of his right to legal representation or encouraged to obtain such legal representation. Nor was he advised of his right to legal representation at the state's expense.

(5)
(6)
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(4)
The regional magistrate had obtained reports from the Department of Correctional Services (a confidential psychological report, a report by the social workers and a profile report of the parole officer) and the police dossier relevant to the conviction on 5 June 1995 but there is no indication that the accused was given access to these documents or was given an opportunity to read them. When given an opportunity to address the court the accused said simply: 'Ek vra net die vermindering van vonnis'.
The record of the proceedings resulting in the conviction of the accused on 5 June 1995 could not be found and was not considered by the regional magistrate.
The regional magistrate proceeded to summarise the salient facts of the case (presumably after reference to the police dossier) and the accused's previous convictions. These included convictions for rape on 13 November 1987, for which he was sentenced to four years imprisonment, on 21 February 1995, for which he was sentenced to 10 years imprisonment, a sexual offence with a girl under the age of 16, assault with intent to do grievous bodily harm, possession of dagga and theft. The regional magistrate's only reference to the reports obtained was that they sounded reasonably positive ('klink redelik positief'). He gave no reasons for not accepting the conclusions or recom°-mendations. (This contrasts starkly with the view of one of the DPP's repre°-

sentatives that the essence of the reports is that the accused appears to be a person who can be released into society - a view with which I agree). In the light of the accused's convictions for rape the regional magistrate concluded that he could not release the accused from prison.
(7)
There is no indication that the clerk of the court gave notice to the Com°- missioner of Correctional Services as required by section 286B(3)(c)(i) (if the proceedings took place in terms of section 386B(3) of the Act) or that the Correctional Supervision and Parole Board referred to in section 75(1)(b) of the Correctional Services Act 111 of 1998 had made any recommendations to the court or that it had been requested to do so.
[6]
The relevant provisions of section 286B read as follows:
'(1)
The court which declares a person a dangerous criminal shall- °
(a)
sentence such person to undergo imprisonment for an indefinite period; and
(b)
direct that such person be brought before the court on the ex°piration of a period determined by it, which shall not exceed the jurisdiction of the court.
(2)
A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1)(b) but subject to the provisions of subsection (3), within 7 days after

the expiration of the period contemplated in subsection (1)(b) be
brought before the court which sentenced him in order to enable such
court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he had not been absent.

(3)(a) The Commissioner may, if he is of the opinion that owing to practical or other considerations it is desirable that a court other than the court which sentenced the person should reconsider such sentence after the expiration of the period contemplated in subsection (1)(b), with the
concurrence of the Attorney-General in whose jurisdiction such other court is situated, apply to the registrar or to the clerk of the court, as
the case may be, of the other court to have such person appear be°fore the other court for that purpose: Provided that such sentence shall only be reconsidered by a court with jurisdiction equal to that of the court which sentenced the person.

(b)

On receipt of any application referred to in paragraph (a), the registrar or the clerk of the court as the case may be, shall, after consultation with the prosecutor, set the matter down for a date which shall not be later than seven days after the expiration of the period contemplated in subsection (1)(b).

(c)

The registrar or the clerk of the court, as the case may be, shall for the purpose of the reconsideration of the sentence °

(i)

within a reasonable before the date contemplated in paragraph

(b) submit the case record to the judicial officer who is to re-°
consider the sentence;
(ii)
inform the Commissioner in writing of the date for which the matter has been set down.
(4)(a) Whenever a court reconsiders a sentence in terms of this section it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such conside°ration: Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section 5C of the Correctional Services Act, 1959 (Act No 8 of 1959).
(b)
After a court has considered a sentence in terms of this section, it may
(i)
confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;
(ii)
convert the sentence into correctional supervision on the con°ditions it deems fit; or
(iii)
release the person unconditionally or on such conditions as it deems fit.'
[7]
In S *v Bull and Another;* S *v Chavulla and Others* 2001 (2) SACR 681 (SCA)
para 27 the court said:

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'In terms of s 286B(4) the court has three options when a prisoner is brought before it for a reconsideration of the sentence: it may confirm the sentence for an indefinite period, in which case it must fix a period upon the expiration of which the prisoner must again be brought to court, it may convert the sentence into correctional supervision or it may release the prisoner unconditionally or on such conditions as it deems fit. The subsection does provide for the confirmation, conversion or termination of the sentence but not for a new sentence to be imposed. It follows, therefore, that if, when reconsidering the sentence, the court is not satisfied that the prisoner is still dangerous, the prisoner must be released. The court reconsiders the prisoner's continued dangerousness in the light of new evidence using the same powers as the sentencing court.'

It is clear therefore that the new evidence bearing on the accused's continued dangerousness is of vital importance in the enquiry in terms of section 286B(4). The potential advantage to the accused is that there may be an amelioration of his sentence or he may even be released - see S *v* T 1997 (1) SACR 496 (SCA) at 514B-C. There is no indication that the new evidence in the reports referred to was carefully considered or analysed by the regional magistrate.

[8]

The proceedings in terms of section 286B were part of the accused's trial (section 286B(4) expressly states that whenever a court reconsiders a sentence in terms of this section it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration) and section

35(3) of the Constitution was therefore applicable: i.e. the accused was entitled to a fair trial. As an unrepresented accused with limited education and insight into the proceedings (to judge by the only comment he made at the hearing on 13 September 2006) he should have been advised to obtain legal representation or, at the very least, what was required him at the hearing. See S *v Rudman;* S *v Johnson;* S *v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 368 (E) at 377B-D; 377E-° 379A; S *v Radebe;* S *v Mbonani* 1988 (1) SA 191 (T) at 194; S *v Zulu* 1990 (1) SA 688 (T) at 660F-H; S *v Raphatle* 1995 (2) SACR 452 (T) at 455d-456b. The presiding magistrate did not explain to the accused what his rights were and what the purpose of the proceedings was. Nor did he explain what the important case law said about the section. It is also clear that the accused did not read or even have access to the crucial documents on which the regional magistrate based his finding. In these circumstances the proceedings on 13 September 2006 were not fair and the magistrate's order must be set aside.

[9]

A second, and equally important shortcoming, is that the proceedings did not take place in accordance with the provisions of section 286B. Clearly the proceedings did not take place pursuant to subsection 286B(3). They took place in terms of section 286B(2). The proviso to this subsection states-°

'Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question

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if he had not been absent'.
Mr. Nolte, the regional magistrate who sentenced the accused on 13 June 1995, was not available and Mr. Gericke took his place. Mr. Gericke clearly did not have access to the evidence recorded or even the judgment and reasons for sentence. He clearly relied solely on the contents of the police dossier. He did not even check with the accused the correctness of the facts he summarised. The subsection clearly envisages that the judicial officer who convicted and sentenced the accused must reconsider his sentence but, failing that, that the judicial officer who reconsiders the sentence must be placed as far as possible in the position of the judicial officer who convicts the accused. This did not happen.
A further shortcoming is that the regional court did not have at its disposal a report from the Correctional Supervision and Parole Board referred to in section 75 of Act 111 of 1998. The proviso to section 286B(4)(a) states:
'Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section 5C of the Correctional Services Act, 1959 (Act No 8 of 1959).'
Although section 5C of the Correctional Services Act 8 of 1959 was repealed (with the rest of that Act) on 31 July 2004, in terms of section 12(1) of the Interpretation Act 33 of 1957, the reference to section 5C of Act 8 of 1959 must be construed as a reference to sections 74 and 75(1)(b) of Act 111 of 1998 (see section 5C read with

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section 63 of Act 8 of 1959 introduced by sections 4 and 21 of the Correctional Services Amendment Act 68 of 1993).

The failure to obtain and consider recommendations made in terms of section 75(1)(b) before making a finding is therefore a fatal flaw in the proceedings which also requires that the finding and order of the regional court be set aside.

The proceedings on 13 September 2006 were therefore fatally flawed and substantial justice was not done to the accused. The order made on 13 September 2006 will therefore be set aside and the matter remitted to the Polokwane regional court for the accused's sentence to be reconsidered, after the provisions of section 286B have been complied with, and in the light of this judgment. In view of the fact that the regional magistrate, Mr. Gericke, has already made findings adverse to the accused it must be dealt with by another regional magistrate at the Polokwane regional court.

The accused has now served an indefinite prison sentence of about 12½ years without his sentence being reconsidered as required by section 386B of the Act. It is therefore vital that there be no further unwarranted delay in the proper reconsideration of his sentence. It will be ordered that this be done within two months of this order. This will allow for a reconstruction of the record and the recommendations of the Correctional Supervision and Parole Board and any other relevant documents to be obtained. These should include the memorandum of the Director of Public Prosecutions dated 13 December 2007.

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The following order is made:
I The order made by the Polokwane regional court (Mr. H.S. Gericke) on 13 September 2006 under case number RC 1058/94 in terms of section 286B(4) of the Criminal Procedure Act that the sentence of imprisonment for an indefinite period be confirmed, that the accused not be released and that he be brought back to the court on 13 September 2011 for reconsideration of his indefinite sentence, is set aside;
II
The matter is referred back to the Polokwane regional court for reconsideration by another regional magistrate of the accused's indefinite sentence imposed on 13 June 1995 after the reconstruction of the record pursuant to which the accused was convicted and sentenced on 13 June 1995 and in the light of the provisions of section 286B of the Criminal Procedure Act and this judgment;
III
The clerk of the court, Polokwane magistrates' court, is directed and ordered to attend to the reconstruction of the record under case number RC 1058/94 in which the accused was convicted and sentenced on 13 June 1995.
IV
It is ordered that the accused's indefinite sentence be reconsidered no later than two months from the date of this order;

I agree
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V
The registrar of this court is requested and directed to send a copy of this judgment and the memorandum of the Director of Public Prosecutions dated 13 December 2007 to °-
(1)
the accused;
(2)
the accused's attorney Mr. Moyagabo Elias Mokgotho of the Polo-°
kwane Justice Centre; and
(3)
the clerk of the court, Polokwane magistrates' court.

B R SOUTHWOOD
JUDGE OF THE HIGH COURT

W J VAN DER MERWE
JUDGE OF THE HIGH COURT

IN THE ORDINARY COURSE OF EVENTS