A330/17
26/06/17

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

20 June 2017 A Molopa

DATE SIGNATURE

REVIEW CASE NO. SR 4/2017/BEM

In the matter between:

**THE STATE**

**And**

**TEBOGO NKGWE**
**TSHEPANG SELEPE**

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**REVIEW JUDGMENT**

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**MOLOPA-SETHOSA J:**

[1] This matter came before me on special review in terms of section 304A (a) of the Criminal Procedure Act, Act 51 of 1977, as amended, ("The CPA"), from the Magistrate's Court, Benoni; as the Legal Aid Board [Benoni]

representative, made a representation to the Regional Magistrate, in which he requested that the matter be sent on review to the High Court since he was of a view that accused no.2, Tshepang Selepe, was incorrectly convicted.

[2] Having read the record, Kubushi J referred the record of proceedings to the office of the Director of Public Prosecutions ("DPP") for comment.

[3] Advocate B E Maoke ("Maoke") of the DPP, with whom Advocate G D Baloyi ("Baloyi") agrees, commented that the proceedings were not in accordance with justice and ought to be set aside, as accused no.2 was incorrectly convicted of trespassing, as he/ accused no.2 never physically entered the land or building in question herein.

[4] The accused, Mr Tebogo Nkgwe (accused no.1) and Tshepang Selepe (accused no.2) appeared in the magistrate's court, Benoni, on a charge of contravention of section 1 (1) (a) or (b), read with sections 1(1A), 1(2) and 2 of the Trespass Act, Act 6 of 1959 (trespassing), and further read with section 250 (1)(d) of the Criminal Procedure Act, Act 51 of 1977, as amended ("the CPA"). It was alleged that on or about 20 April 2016, and at or near 23 Miles Sharp Street, Rynfield, Benoni the accused entered the property of Carl Hand "(Hand") unlawfully and without the permission of owner of the property aforesaid, the said Carl Hand.

[5] On 30 August 2016 both accused pleaded guilty to count 1 and their trial commenced before Magistrate S Naidoo in the Benoni Magistrate's court. Both accused were convicted as charged on 12 October 2016.

[6] After the conviction of the accused the State Prosecutor submitted that since the accused had previous convictions, the matter should be referred to the Regional Court for sentence in terms of "section 114(1) (b)" of the CPA (*sic*); and indeed after convicting the accused, the Magistrate stated that she was transferring the matter to the Regional Court for sentence in terms of "section 114(1) (b)" of the CPA (*sic*). The correct section is section 116 (1) since the conviction followed after the accused had pleaded guilty and evidence had been led. Section 114 applies where the accused had pleaded guilty.

[7] The magistrate stated that as a result of the accused's previous convictions, she is referring the matter to the regional court for sentence. From the record it appears that the following transpired in court after conviction of the accused and after the accused's previous convictions had been read and admitted by the accused:

> "***PROSECUTOR***: *Your Worship the State would make an application for this matter to be transferred to Regional Court 4 for purpose of sentencing Your Worship due to their previous conviction. State make (sic) an application in terms of section 114 (1) (b).*
>
> ***COURT***: *To which date?*
>
> ***PROSECUTOR***: *Your Worship we have arranged the 19th October which is sometime next week, next week Wednesday.*
>
> ***COURT***: *Ms Bhamjee?*
>
> ***MS BHAMJEE***: *Thank you Your Worship.*
>
> ***COURT***: *Court 4.*

***PROSECUTOR***: *Yes.*

***MS BHAMJEE***: *Thank you Your Worship.*

***COURT***: *Thank you gentlemen as a result of your previous convictions in terms of section 114(1) (b) of the Criminal Procedure Act your matter is transferred to Benoni Regional Court 4 for the 19th of October for sentencing purposes."*

[8] From the above it does not appear that the magistrate applied her mind to the matter prior to transferring it to the regional court. She did not even enquire from the defence legal representative what her view was in this regard (save to check if the date was suitable for the defence legal representative). In Du Toit *et al* Commentary on the Criminal Procedure Act at 18-16E (service 50, 2013) the following is stated:

> *"Section 116(1) requires that the magistrate should form his own opinion. It follows that he or she cannot stop the proceedings and commit the accused for sentence by a regional court having jurisdiction, without having applied his mind to the matter."*

Justice requires that the magistrate should have applied her mind to the matter and should have enquired from the defence what her submissions were prior to transferring the matter to the Regional court.

[9] In a letter dated 13 December 2017, one R T Willis (Willis"), of the Legal Aid Board, Benoni, made a representation to the Regional Magistrate, Mr Makamu, in which he stated the following:

> *"This matter was sent to this court for the purpose of sentencing.*
>
> *The two accused's (sic) were found guilty of trespassing and sent to this court for sentence.*
>
> *I have had the opportunity of reading the transcribed record and feel that the magistrate erred in finding both accused's (sic) guilty in that one accused was found on the property in question the other accused never entered the said property and I feel the court erred in convicting both and the doctrine of common purpose was incorrectly relied on for the conviction.*
>
> *I request the court to send the matter on review to the High Court."*

[10] The matter was sent on a special review on the request of the learned Regional Magistrate M S Makamu. In referring the matter for special review the covering letter, dated 03 February 2017, from the clerk of the court, Magistrate Court Benoni states the following:

> *"The Regional Court Magistrate received a representation from the Legal Aid representative, which is attached hereto, with regards the legality of the conviction in the District Court of the second accused.*

*The Magistrate has requested that the record be sent on special review."*

[11] It thus appears that the Regional Magistrate, Mr Makamu, had doubt whether the proceedings were in accordance with justice or not, thus he instructed that the record and the representations received from the legal aid, set out in par [9] hereabove, be referred on special review.

[12] Section 304A of the CPA does empower a judge in chambers to review proceedings before a magistrate after conviction but before sentence if the magistrate is of the opinion that the proceedings which resulted in conviction were not in accordance with justice, or doubts whether they were, as the case here.

[13] However, the Regional Magistrate did not comply with section 116 (3)(a) of the CPA as he did not transmit the recorded reasons for his opinion, as well as the reasons of the presiding district magistrate, to the registrar of this court, for the matter to be reviewed. Section 116 (3) (a) provides that:

"... *Provided that if the Regional magistrate is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she may request the presiding officer in the magistrate's court to provide him or her with the reasons for the conviction...*

*... if he or she remains of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit such reasons and the reasons of the presiding officer of the magistrate's court, together with the record of the proceedings in the magistrate's court, to the registrar of the Provincial Division having jurisdiction...*" My emphasis

[14] It has been established in the past that our courts would indeed be prepared to review part-heard matters where grave injustice would otherwise result. A similar consideration was used in the matter of S v Mathemba 2002 (1) SACR 407 (E). In the current instance grave injustice will no doubt result if the matter is not dealt on review, regardless of the Regional Magistrate not having transmitted his reasons and the reasons of the presiding officer of the magistrate's court.

[15] Section 1 (1) of The Trespass Act 6 of 1959 provides that:

"(1) A*ny person who without the permission-*

a) *of the lawful occupier of any land or any building or part of a building;*

*or*

b) *of the owner or person in charge of any building or part of a building that is not lawfully occupied by any person,*

*enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to*

*enter or to be upon such land or enter or be in such building or part of a building.*"

[16] For an accused to be convicted of trespassing, he or she must have physically entered the land or building.

[17] There is no evidence on record that accused no.2 had at some stage entered the complainant [Hand]'s property or building. The evidence of the State witnesses, Wayne Green ("Green") clearly shows that at no stage did accused no.2 enter the property of Hand. The Magistrate convicted the 2nd accused on Green's speculation that accused no.2 was standing guard and/or keeping an eye out for accused no.1. In convicting the accused, the magistrate stated the following:

"***COURT***: *In accepting the evidence of the State witnesses the court is accepting that accused 1 without permission of the owner of the property Carl Hand jumped over his wall and entered his yard thereby committing the statutory offences of trespassing. The court can also safely accept that by active association between the two accused and there is a wealth of case law to support this, that the accused were together walking and talking to one another, accused 2 watching accused 1 jump over the wall while he sat waiting, watching on the pavement that the accused acted with single intent and in concert with one another to commit the offence. Both accused are accordingly found guilty as charged."[My emphasis]*

[18] Green's evidence that accused no.2 was sitting in the pavement and watching/keeping guard for accused no.1 is pure speculation, and the magistrate should not have had regard to such speculation. From the evidence on record there is no doubt that at no stage did accused no.2 enter the property of Hand; and there cannot be common purpose to trespass. Mr Willis of the Legal Aid Board is correct in stating that "the doctrine of common purpose was incorrectly relied on for the conviction." The provisions of section 1(1) of Act 6 of 1959 *supra* are clear. One has to enter or be upon land or property of someone without permission to be guilty of an offence of trespassing. The magistrate clearly erred in convicting the accused no. 2, Tshepang Selepe in this regard.

[19] Under these circumstances the proceedings in respect of accused 2 cannot be said to have been in accordance with justice, and ought to be set aside.

[20] As previously pointed out, the Magistrate does not seem to have independently applied her mind to the matter prior to transferring it to the Regional court, and it is not clear as to why the Magistrate deemed it necessary to refer the matter for sentencing in the Regional court instead of imposing sentence herself.

[21] In the light of the aforegoing the following order is made:

1. The conviction of accused no.2, Tshepang Selepe is set aside.
2. The matter is remitted to the magistrate's court for sentencing of accused, Tebogo Nkgwe.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

VV TLHAPI

JUDGE OF THE HIGH COURT

It is so ordered