

A 366/18
Date: 01/10/2018

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

High Court Reference Number: 134/18

Case Number: B244/2017

Magistrate's Serial Number: 1/4/13

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

21.9.2018
Date:

E. Schuyt
Signature:

In the matter between:

The State

and

Serge Machabaphala

JUDGMENT

- [1] This case was sent on special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977.
- [2] The accused was charged with assault with intent to do grievous bodily harm. The accused was prosecuted in the Magistrate's Court for the district of Tshwane North held at Pretoria North.
- [3] On 14 May 2018 the accused was warned by the magistrate in Pretoria North to appear in court on 30 May 2018. The accused failed to appear on 30 May 2018. A warrant of arrest was issued against him.
- [4] On 15 June 2018 the accused appeared after he was arrested on the warrant to be dealt with in terms of section 72(4) of the Criminal Procedure Act, No 51 of 1977, hereafter "the Act". According to the charge sheet an enquiry was held.
- [5] From the presiding magistrate's comments contained in a letter dated 31 August 2018 and received pursuant to an inquiry from the court, the court gleans that the accused's explanation for the failure to appear was that "he had heard that he had to be back at court on the 13th and not the 30th". The magistrate then states "and he was at court on the 13th, a much earlier date. This much was confirmed by the Prosecutor, who had however not informed him of the actual date when accused was here". The accused subsequently contacted the investigating officer to enquire about the matter. The investigating officer informed the accused to go to the police station as there was a warrant issued for his arrest. The prosecutor indicated that

he accepted the explanation tendered by the accused and did not wish to pursue the matter further.

- [6] The explanation as contained in the magistrate's letter dated 31 August 2018 does not make sense. The matter was postponed on 14 May 2018 to 30 May 2018. It is therefore not possible that the accused could have been at the court on "the 13th, a much earlier date" which can only refer to 13 May 2018. It is also not possible that the prosecutor could confirm the accused's appearance at court on 13 May 2018.
- [7] It is however possible that the accused could have been at court on 13 June 2018, and spoke to the prosecutor on that date, and that the presiding magistrate is confusing the dates because he did not keep a proper record of the proceedings. This explanation would justify the magistrate's view at the time that he did not deem it appropriate to convict the accused of an offense.
- [8] Be that as it may, it is common cause that the accused arrived at court on the 15th of June 2018 after he contacted the investigating officer. It is also clear that the magistrate accepted the accused's explanation and his intention was only to issue a stern warning and not to convict the accused of an offence.
- [9] The magistrate noted the warning that he wanted to issue as a sentence on the charge sheet as "cautioned and discharged".
- [10] It is common cause that the learned magistrate did not conduct a proper inquiry before noting this sentence. It is settled law that during the enquiry in terms of s 72(4) of the Act a presiding officer is obliged to inform an undefended accused of

his or her basic procedural rights¹ – including the right to legal representation, to be presumed innocent, to remain silent and not to testify during the proceedings, to adduce evidence and to challenge the *prima facie* case against him, or her, and not to give evidence that is self-incriminating. In addition the accused should be informed about the consequences of remaining silent.

- [11] This irregularity prompted the senior magistrate to refer the matter for consideration on special review. After receiving the senior magistrate's letter I requested the magistrate concerned to comment on the issue before the court. After the learned magistrate's comments were received, the case was referred to the National Director of Public Prosecutions (NDPP) for comments and recommendation.
- [12] The comments from the office of the NDPP were received on 14 September 2018. The NDPP confirmed that a miscarriage of justice has occurred. In light of the circumstances of the case, it is however recommended by the NDPP that the sentence imposed by the court *a quo* on the accused should be set aside.
- [13] The NDPP indicated that "it will be unduly burdensome to the accused, the prosecuting authority as well as the judicial officer if the proceedings are to be referred back for the enquiry to be held *de novo*."
- [14] In light of the fact that the main trial against the accused has already been finalised and that the presiding magistrate in the court *a quo* had no intention of convicting the accused of an offence in terms of section 72(4) of the Act after accepting the

¹ *S v Singo* 2002 (8) BCLR 793 (CC) para 12.

accused's explanation, the court is of the view that it will be in the interest of justice to set aside the sentence imposed on the accused.

[15] In the result the following order is made:

The sentence imposed on the accused on 15 June 2018 by the magistrate of the Magistrate's Court for the district of Tshwane North held at Pretoria North in case number B244/2018 is set aside.



E VAN DER SCHYFF

Acting Judge of the High Court

I agree



R G TOLMAY (J)

Judge of the High Court