IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**
EASTERN CAPE DIVISION – GRAHAMSTOWN

Review No.: 170002
CA&R No.:
Delivered: 06/04/2017

In the matter between:

THE STATE

and

1. XOLANI HEWU

2. ANDILE NKATA

3. SITHEMBELE SOPHANGISA

4. THANDUXOLO THANDANI

REVIEW JUDGMENT

REVELAS J:

[1] This matter concerns the legality of authorizing warrants for the re-arrest of accused persons who had appeared previously, with regard to the same offence and where the case had been struck from the roll. The matter was referred for special review by Mr C. E. Schutte, the Senior Magistrate, Port Elizabeth. The questions raised herein emanate from the proceedings in the Motherwell Regional Court on 5, 6, 7 and 13 October 2016.

[2] The four accused were arrested on 11 January 2016 on suspicion of participating in an armed robbery (a schedule 6 offence) and attempted murder. The accused appeared in the Regional Court for the first time on 4 May 2016. On 22 June 2016 the matter was remanded to 19 August 2016 for trial. On that day the matter did not proceed as there was no foreign language interpreter to assist the complainant, and it was remanded to 5 October 2016 for trial in the Regional Court.

[3] On 5 October, the foreign language interpreter was yet again, not available. The prosecutor requested the further remand of the case, with the accused to remain in custody. At this point they had been in custody for almost ten months. The Regional Magistrate in question refused to postpone the case again for purposes of trial, and struck the matter from the roll. The accused were almost immediately re-arrested the same day, during the lunch adjournment, pursuant to a warrant issued by a peace officer in terms of section 43 of the Criminal Procedure Act, 51 of 1997 as amended *("the Act")* or as the State termed it, "*a J50 warrant of arrest*".

[4] The accused were brought before court again the following day, 6 October 2016, before a different Regional Magistrate. According to the Prosecutor, it was for purposes of bail. The defence submitted that

the accused were re-arrested and brought to court for a different reason, i.e. to circumvent the effect (the release of the accused from custody) of the matter being struck from the roll. On a previous occasion accused number one had abandoned his bail application and bail was refused in respect of accused two, three and four. This fact supports the defence's argument.

[5] The State opposed the granting of bail, on the grounds that the accused were charged with an offence (armed robbery) listed in Schedule 6 to the Act and 60(11) of the Act, precludes accused persons charged with such offences, to be released on bail, unless they demonstrate exceptional circumstances which, in the interest of justice permit their release.

[6] The court and the accused were advised by the Prosecutor that the foreign language interpreter, whose attendance was required to assist the complainant, would indeed be available the following week, on 13 October 2016, on which day the trial would proceed. There was an objection to a further postponement of the matter by the defence counsel who submitted firstly, that the State did not follow the correct procedure to secure the attendance of the accused before court and, secondly, that their arrest by the investigating officer Constable Leander, almost immediately after the matter was struck from the roll

the previous day, was malicious. The accuseds' legal representative also told the Regional Magistrate that he was not available for purposes of trial on that day (13 October). The accused then applied for the matter to be either struck off the roll, alternatively, that if the matter were to be postponed, the accused should be released on warning.

[7] The Prosecutor insisted on a postponement of the matter, arguing that the accused should remain in custody since they were lawfully before court, and the State was entitled to re-arrest the accused, as opposed to summonsing them to court because of the provisions of section 60(11) of the Act. The Prosecutor maintained that the manner in which the attendance of the accused was secured at court, passed constitutional muster. The proceedings were rolled over to 7 October 2016, the following day, for purposes of judgment.

[8] With reference to section 12 and 35 of the Constitution and the decisions in *Ramphal v The Minister of Safety and Security*[1] and *Raduvha v The Minister of Safety and Security (Centre for Child Law as amicus curiae*)[2], the Magistrate, Ms Rhodes, held that the continued incarceration of the accused was unjustified. She stressed the fact that the previous Regional Court Magistrate had struck the matter from the

[1] 2009 (1) SACR 211 (ECD)
[2]2016 (10) BCLR 1326 (CC)

roll on 5 October, two days before, because it had been set down for trial on more than one occasion, due to the unavailability of an interpreter. Regarding the re-arrest of the accused immediately after the matter had been struck off the roll, the Magistrate held that the *"method used by the State to secure the attendance of the accused before court was procedurally unfair",* on the basis it infringed their rights as guaranteed in sections 12 and 35 of the Constitution. In the event, she struck the matter from the court roll for a second time.

[9] On 13 October 2016, a week later, the matter came before the same Regional Magistrate, Ms Rhodes. It had been set down for trial, notwithstanding her dismissal of the application for postponement to that date and the fact that she had struck it from the roll. The accused were arrested that very morning, on a warrant signed by a different Magistrate, taken into custody and brought to court. Ms Rhodes expressed her misgivings about the warrant being obtained without an appropriate affidavit and stressed the fact that she had already made a ruling in the matter, namely to strike it from the roll. She struck the matter from the roll once again (the third time) and told the Prosecutor: *"If you intend bringing, re-arresting the accused what I would advise is that you bring it before the presiding officer*[3] *because I am not going to entertain this matter any further".*

[3] The Magistrate who signed the warrant of arrest after the matter had been struck from the roll.

[10] On 2 December 2016, Mr Schutte wrote to Ms Rhodes advising her that there was no basis for her ruling to the effect that the authorization of J50 warrants of arrest issued by another, different Regional Magistrate, was *"unfounded"*. He criticized her second-guessing her colleague's decision to authorize the warrant for the arrest, and also her decision to strike the matter from the roll, simply because she did not approve of the manner in which the accused were brought to court. He contended that her reasoning was unsound in law and emphasized the import of the peremptory terms of section 60(11) of the Act. It provides that when an accused who is charged with an offence referred to in Schedule 5 and 6 to the Act, the court ***"shall"*** order that the accused be detained in custody until dealt with in accordance with the law, unless the accused is able to demonstrate *"exceptional circumstances which in the interest of justice permit his or her release".*

[11] Mr Schutte held the firm view (which he also expressed in his letter to Ms Rhodes), that it was contrary to the provisions of section 60(11) of the Act to bring an accused before court (on a Schedule 5 or 6 offence) through a warning or on a summons. He submitted that *"no matter how many times an accused is brought before a court on a Schedule 5 or 6 offence afresh, such accused should always be*

brought in custody in order to enable the court to comply with section 60(11)". He added that those sections which provide for the release of an accused on bail or otherwise (sections 59 and 59A of the Act), the offences referred to in Schedules 5 and 6 are specifically excluded.

[12] Ms Rhodes responded to Mr Schutte's letter, reiterating her strongly held view that her decision to strike the matter from the roll was justified. Relying on a passage from *Minister of Police and Another v Ashwell du Plessis,*[4] she concluded that had she not struck the matter from the roll, it would have been a further infringement of the accuseds' rights and she would have simply been a *"tool of the state furthering ... a gross injustice ... of an individual who is deemed to be innocent until proven guilty".* The passage from the *Ashwell du Plessis* case reads:

> "Once an arrestee is brought before a court, in terms of s 50 of the Criminal Procedure Act 51 of 1977 (CPA), the police's authority to detain, inherent in the power of arrest, is exhausted. In this regard see *Minster of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) para 42. As pointed out by Campbell AJ in the court below, before the court makes a decision on the continued detention of an arrested person, comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. A prosecutor must act with objectivity and must protect the public interest. In *State v Jija and others* 1991 (2) SA 52 (E) at 67I-68B the following appears:
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> > 'I must also mention that the Court had an uneasy feeling that State counsel had misconceived his function. It appeared to the Court from the

[4] (666/2012) [2013] ZASCA 119 (20 September 2013) paragraph [28].

> nature of his address and attitude that he regarded his role as that of an advocate representing a client. A prosecutor, however, stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth (*R v Riekert* 1954 (4) SA 254 (SWA) at 261D-G; *R v Berens* [1985] 176 ER 815 at 822). See also *R v White* 1962 (4) SA 153 (FC); *R v Tapera* 1964 (3) SA 771 (SRA); *S v Van Rensburg* 1963 (2) SA 343 (N); *R v M* 1959 (1) SA 434 (A) at 439F.' "

[13] When Mr Schutte subsequently referred the matter for special review, his referral was accompanied with the request that *"a ruling be made regarding the correct procedure to be followed in this types of issues"*. Due to the two divergent, and strongly held views of the different role players, as is evident from the court record and subsequent correspondence, I sought opinions from offices of the National Director of Public Prosecutions (NDPP) in both Grahamstown and Port Elizabeth. I was provided with opinions from both offices and I wish to express my appreciation for this assistance herein.

[14] The prosecutors from the Port Elizabeth NDPP office submitted that section 60 (11) makes no distinction between accused persons who appear for the first time following their arrest and persons who have been in custody for several months and the charges against them had been withdrawn and their matter had been struck from the court roll. It was suggested that the review judge make an order that *"the attendance of accused be secured before Court by way of J50 warrants*

of arrest. To secure their Court by way of summons of warning, as opposed to warrants of arrest, could be contrary to the provisions of section 60 (11) and would eliminate the discretion bestowed on a Court in dealing with Schedule 5 and 6 offences".

[15] Section 304(2)(c) of the Act, confers very wide powers on a review court, but each review is confined to the facts of a particular case that has been referred. In this case I am called upon to determine whether the proceedings of 13 October 2016 were in accordance with justice, and for the sake of completeness, I must also refer to the conduct of the police and magistrates in the proceedings of 5, 6 and 7 October 2016, since they formed the background to what occurred on 13 October 2016.

[16] With regard to the proceedings of 5, 6 and 7 October 2016, it has to be noted, that by that time the accused been in custody for almost ten months. The matter was ready for trial, but for the fact that the foreign language interpreter was absent from court, and not for the first time.

[17] It is a most undesirable state of affairs that the expedition of prosecutions are increasingly often hamstrung by the absenteeism of interpreters, social workers, witnesses other court personnel and even,

sometimes the magistrates. There are also other administrative shortcomings in our courts that undermine the progress of justice in our courts. It is therefore understandable, to a degree, that the Magistrate who presided on 5 October 2016, felt that the interests of justice would not be served if the accused remain in custody until it was convenient for the foreign language interpreter to attend court. The re-arrest of the accused by the police, immediately after their release, seemed like conduct aimed at thwarting the effect of the magistrate's order and bore a close resemblance to contempt of court. Such conduct by the police, might also, at later stage, constitute grounds for or bolster a civil suit for damages against the Minister of Police. If the arrest served merely to circumvent the magistrate's order, as the facts in this case suggest, that would call for some censure and should be taken up with the appropriate authorities. However, striking a matter from the roll for a second and a third time as a summary response to the actions of the police, was not the appropriate way to deal with the matter.

[18] Mr Marais of the Grahamstown Offices of the NDPP suggested, that instead of striking a matter from the roll, as had been done in this case, courts considering an application for a remand of a matter, should invoke the provisions of section 342A of the Act. This section provides as follows (in peremptory terms):

"(1) A court before which criminal proceedings are pending **shall** investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his legal advisers, the State or witness,

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

(a) the duration of the delay;

(b) the reasons advanced for the delay;

(c) whether any person can be blamed for the delay;

(d) the effect of the delay on the personal circumstances of the accused and witnesses;

(e) the seriousness, extent or complexity of the charge or charges;

(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of costs;

(g) the effect of the delay on the administration of justice;

(h) the adverse effect on the interests of the public, victims in the event of prosecutions being stopped or discontinued;

(i) any other factor, which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any order as it

deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order –

(a) Refusing further postponement of the proceedings;

(b) granting a postponement subject to any such conditions as the court may determine;

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution should not be resumed or instituted de novo without the written instruction of the attorney general;

.....

(f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay." (emphasis added)

[19] The guidelines set out in the aforesaid section are not novel in our law by any means. In this regard the decision in the *State v Geritis*[5] may be referred to. This was a case decided before the promulgation of the present criminal code and long before the present Constitutional era, in time when human rights were given scant regard. In that matter the court considered an application by a prosecutor to postpone a matter for five months, on the ground that a material witness was overseas. The accused was out on bail, but he opposed the application. The application was refused on the ground that there had been gross neglect on the part of the prosecution in securing the

[5] 1966 (1) SA 753 (W).

witness at the trial and there was no assurance that the witness would attend on the proposed date. The following trite principles were restated by Vieyra J:

> "I venture to suggest that in exercising such discretion two basic principles must be borne in mind. The one is that it is in the interests of society and accordingly of the State that guilty men should be duly convicted and not escape by reason of any oversight or mistake which can be remedied. The other, no less valid, is that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition."

[20] The learned judge supplemented the aforesaid by adding the following:

> "... a Court would also take into consideration whether the accused is on bail, how long the prosecution has been pending and the period of the postponement that has been requested. There are instances where there has been no neglect and yet the witness does not attend on the day of trial. A short postponement might then well be granted to enable investigations to be made as to the cause for the absence... [T]he nature of the charge must (also) be taken into account. Thus there is a difference between a murder charge and one of theft or of fraud."

[21] The aforesaid judgment demonstrates the desirability and practical benefits of an enquiry conducted before a decision is made regarding the further progress of the matter, as well as the continued

incarceration of the arrestees. That is also what section 342A envisages. The discretion whether or not to postpone a case and strike it from the roll, as considered in *Geritis,* was curtailed by the introduction of section 60(11) of the Act which is primarily concerned with a court's discretion to grant bail in circumstances where Schedules 5 and 6 find application.

[22] Section 342A of the Act is concerned with a broader issue, namely the investigation by a court into delays in the completion of criminal proceedings in a prosecution. This section confers very wide powers on the investigating court, including "*Refusing further postponement of the proceedings"*[6]*.* Such an order would naturally result in an accused's release from custody. The section also makes provision for striking the matter from the roll.

[23] Section 60(11) of the Act does not constitute an absolute bar to a court's refusal to postponement and a decision to strike it from the roll in terms of section 342A(3)(a). It will always depend on the facts of the matter. Where a postponement is refused as a result of an investigation by the court in terms section 342A which revealed that the accused had been in prison for a very long time and there appears to be no prospect of bringing the matter to trial, the immediate re-arrest of the accused immediately after such a ruling and in terms of

[6] Section 342A(3)(a)

Act 60(11) of the Act, would constitute an abuse of power in some circumstances. If it later transpires that the trial can be proceeded with and be completed soon, the re-arrest of the accused could be justified. Once again it will all depend on the facts. Mr Marais gave the example of instances where charges are provisionally withdrawn against an accused for purposes of awaiting forensic test results. If the tests are positive and the prosecution has a case to prosecute, there is no reason why the re-arrest of the accused should be impermissible, simply because the accused had appeared in court before.

[24] With regard to the proceedings of 13 August 2017, it is not clear from the record whether the trial was ready to proceed on that day or not, because the magistrate struck it from the roll without investigating that aspect. She did not consider the provisions of section 60(11) either. She appears to have been motivated by her view that the police and her colleagues undermined her authority and the rights of the accused. The concerns Ms Rhodes had regarding the rights of the accused were not misplaced, but she ought to have investigated the reasons for the postponement and the prospects of finalizing the matter in terms of section 342A, with due regard to the purposes of section 60(11) of the Act. Had she investigated and considered all the facts she would have appreciated that the postponement requested on 6 October 2016 (until 13 October 2016) was for a very short period.

She had also been given the assurance on 7 October that the foreign language interpreter would be present on 13 October and that the matter would be able to proceed to trial. She should rather have postponed the matter, subject to any such conditions she deemed appropriate as provided for in section 342A(3)(b). Not even on the test reiterated in *Geritis* was she entitled to strike the matter from the roll on 13 October 2016 on the facts of this case. That applies equally to the events of 5 and 7 October 2016. Had Ms Rhodes and the Magistrate who struck the matter from the roll on 5 October, conducted an investigation in which it was established that, apart from the delay in proceeding with the trial, the matter was not likely to even proceed to trial, due to the State's negligence, a postponement could have been refused and the matter struck from the roll, with the reasons for such a ruling. An immediate re-arrest of the accused in such circumstances, would then have been unjustifiable, irrespective of the provisions of section 60(11) of the Act.

[25] An enquiry conducted in terms of section 342A of the Act, ensures that courts, in circumstances where they detect unnecessary delays, would apply their minds to the facts and considerations underlying each application for postponement. Striking the matter from the roll without further ado, assisted neither the prosecution nor the defence in this case.

[26] For all the reasons set out above, I believe that the proceedings on 19 August 2016 were not in accordance with justice, and the accused may be re-arrested for purposes of trial.

[27] The Magistrate who is to preside in the matter is directed to hold an enquiry in terms of section 342A of the Act, in the event that a further postponement of the matter is sought by the State.

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E REVELAS
Judge of the High Court