REPORTABLE

"IN THE HIGH COURT OF SOUTH AFRICA"
NORTH WEST HIGH COURT, MAHIKENG

CAF 10/2014

In the matter between:

MATHEWS SIPHO LELAKA **APPLICANT**

and

THE STATE **RESPONDENT**

GURA J, MATLAPENG AJ AND DJAJE AJ.

REASONS FOR JUDGMENT

MATLAPENG AJ:

[1] One of the most quoted maxims lawyers love to refer our courts to is the mantra “justice delayed is justice denied”. Taken as it stands, this phrase may seem to encapsulate a truism. However, this is not always the case. To understand its full import, it is important to refer to the full quotation as it appears from a paper delivered by the Right Honourable Sir Frank Kitto, formerly a Justice of the High Court Australia in a paper presented to a Convention of Judges of the High Court of Australia and the Supreme Court of the States and Territories in 1973, wherein he stated the following in relation to delays caused by reserved judgments:

> “ ‘Reserve thy judgment’. To do so will mean delay, but while there is truth in the maxim that justice delayed is justice denied, in many it is true that hurried justice is not justice at all, in many more that it is not justice done sufficiently, and still more that it is not justice done manifestly.”

[2] The facts of this current matter aptly demonstrate the pitfalls that may befall all the actors in the administration of justice when they attempt to push matters to finality without “delay”. The question which I am called to decide upon is both novel and controversial: Is it permissible for the state to approach a court on special review to overturn a conviction which was properly accepted in an instance where a lesser charge was initially preferred only for circumstances to change later to lead to a more serious charge?

[3] The applicant, who was the accused will be referred to herein as such, was charged in the magistrates’ court with the offence of assault with intention to do grievous bodily harm (“assault GBH”). The background

facts leading to the charge were as follows: On 10 February 2013, the accused accompanied by the complainant, returned from a tavern. He had a bottle of whisky with him. The complainant took the bottle from the accused and had a drink. It appears that the accused did not take kindly to this as he took the bottle and hit the complainant on the head with it. This resulted in the complainant being hospitalised, whilst the accused was arrested.

[4] On 14 February 2013, the accused appeared in court and was legally represented. Charges were put to him and he pleaded guilty. The court upon being satisfied that he had admitted all the elements of the offence, found him guilty on his plea. The case was postponed to enable the prosecutor to submit proof, if any, of whether the accused had a record of previous convictions. The accused's bail was withdrawn and he was remanded in custody.

[5] On 28 February 2013, being the appointed day, the prosecutor informed the court that the complainant had died in the interim. As a result, he sought and was granted a postponement to obtain a copy of the post-mortem report to confirm this and to enable the state to weigh its options with regard to the new developments.

[6] The case was adjourned to 27 May 2013, and on that day the post-mortem report was available and reflected the cause of death as "*severe blunt force head trauma*". The prosecutor informed the court that the state intends to send the case to the Director of Public Prosecutions ("the DPP") for instructions on what to do in light of this new development. The matter was for that reason postponed.

[7] On 13 June 2013, the accused appeared in court represented by a different legal representative. His legal representative argued that as the accused was already convicted, he was entitled to be sentenced and have the matter finalised. The state was of the opinion that it cannot proceed with the trial in the light of the new information that had emerged, namely, the death of the complainant.

[8] After the two parties presented their submissions, the learned magistrate held, having traversed the authorities that were available to her, that she could not, as she was seized with the case, wait for the DPP to give her direction on what to do. She also took the view that there is no provision in the Criminal Procedure Act 51 of 1977 ("the CPA") which covers the factual situation of this case. Should she follow the law as it stands, she would be compelled to sentence the accused for assault GBH when the facts point to murder having been committed. She was of the view that this would lead to injustice. Faced with this conundrum, she recused herself from the case and pointedly stated that the reason for doing so, was to enable the case to be taken on review with the hope that the review court may decide that the matter be commenced *de novo*.

[9] I feel constrained to comment on the conduct displayed by the learned magistrate. Whilst she displayed a good understanding of the law, recusing herself *mero motu* with the sole intention to have the matter sent on review, is to be discouraged. Once a presiding officer is seized with a matter, he or she is legally obliged to finalise it unless there are good grounds not to do so. Presiding officers cannot be allowed to recuse themselves from cases, particularly those that are partly tried for flimsy reasons. The learned magistrate should have

referred the matter to this court for special review without having to recuse herself.

[10] In this court it was strenuously submitted, on behalf of the accused, that this court should refer the matter back to the magistrate who presided over the trial to finalise the matter by sentencing the accused. We were referred to sections 123(b) and 116 of the CPA, and a decision of the Supreme Court of Appeal ("the SCA") in **S v Tieties 1990 (2) SA 461 (A)**, where it was held that the DPP cannot instruct a lower court, after conviction, to convert a trial into a preparatory examination. It was further submitted that the state would have a recourse if the matter is finalised in the lower court by making an application in terms of section 116 of the CPA to have the accused sentenced in the regional court. It was further argued that public interest demands that there should be finality to litigation. Lastly, it was submitted that to set the conviction aside would violate the accused's right in terms of section 35(3)(m) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), namely, not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

[11] The state's submission is that section 304A of the CPA is not applicable in this instance. The section provides that a magistrate or regional magistrate who is of the opinion that proceedings in which a person has been convicted are not in accordance with the law may, before sentence, submit the case for review to the High Court. This section, according to the state, is not applicable as it deals with situations where a person was erroneously convicted. The accused in this matter was properly convicted.

[12] A further submission was that in terms of section 35(3)(d) of the Constitution, an accused has the right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay. However, the state conceded correctly in my view, that given the time when the plea of guilty to assault GBH was tendered and what happened after the conviction of the accused, it cannot be said that there was any unreasonable delay which violated the accused's right as set out in section 35(3)(d) of the Constitution. This being the case, this matter cannot be reviewable in terms of section 24(1) of the Supreme Court Act 59 of 1959 (as replaced by section 22(1) of the Superior Courts Act 10 of 2013), which sets out a limited number of grounds on which proceedings of the lower courts may be reviewed by this Court.

[13] The state, having disavowed reliance on the above, submitted that this case can be reviewed in terms of this Court's inherent powers to restrain illegalities in inferior courts. The question that arises is whether it is permissible for this Court to use its inherent power, based on the interests of justice to set the proceedings aside, to enable the state to prefer a suitable charge against the accused.

[14] It would seem to me that the facts of this matter are both unique and novel. We were not referred to any authority that has a bearing in this case. The course advocated by the applicant, namely, that this Court should confine itself to the strict letter of the law as it stands is untenable. The application of strict and correct law may sometimes

give birth to serious injustices. While this arid legalism may lead to legally correct decisions, there are times when such decision may subvert the course of justice. This, in my view, a Judge or any presiding officer must guard against. As shall appear more clearly hereunder, it is my constitutional imperative to develop the common law.

[15] The inherent power of the courts is recognised by section 173 of the Constitution which provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice."

In **S v Taylor 2006 (1) SACR 51 (CPD) at paragraph 17** the Court held that:

> "The approach suggested in s173 of the Constitution is indeed comprehensive for it allows the exercise of the Court's inherent power, taking into account the interest of justice, without being subjected to any form of statutory constraints."
> (My own emphasis).

This is the route I intend following.

[16] In any event, the exercise by our courts of their inherent power in order to prevent an injustice is not something recent. In **Wahlhouse v Additional Magistrate Johannesburg 1959 (3) SA 113 (A) at 120B**, the Appellate Division referred with approval to the following passage by the authors Gardiner and Landsdowne:

> "While a Superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might by no other means be attained . . .”

[17] Criminal law is a branch of public law where the litigating parties are the state representing the people against an individual (the accused). Unlike in private law disputes, in a criminal trial, some of the interested parties are not before court and may even not be represented. I have in mind in this regard the deceased and his relatives in a murder trial as well as general populace. Crucially, when one talks about the interests of justice, it is the broader interests of these people, not only of the accused, that are at stake. One of the most important outcomes of a criminal trial is to restore the equilibrium between the community and the accused, which was disturbed by the accused's alleged conduct.

[18] The interests of justice demand that a person should be charged and if convicted, punished for a crime he/she committed. I am of the view that it will be a monumental failure of justice and an anomaly for a person to be charged, convicted and sentenced for assault GBH, whilst there are allegations that the complainant has died as a result of such assault.

[19] The submission on behalf of the accused that, to set the proceedings aside and for the trial to start *de novo* on the correct charge, will be a violation of the accused's constitutional right to a fair trial provided for

in section 35(3)(m) of the Constitution, and the negation of the well-established principle that there should be finality to litigation is, in my view, fallacious. In **S v ZUMA 1995 (1) SACR 568 (CC)**, the Court **at paragraph [16]** stated:

> "[16] That *caveat* is of particular importance in interpreting section 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another; S v Mthwana* 1992(1) SA 343(A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire
>
> 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.
>
> A court of appeal, it was said, (at 377)
>
> 'does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice', or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration'.'
>
> That was an authoritative statement of the law before 27th April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with just those "notions of basic

> fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

See also **NDPP v King 2010 (2) SACR 146 (SCA) at paragraph [4]**.

[20] Section 35(3)(m) of the Constitution does not bring about a new concept in our law. It merely constitutionalises the well-known maxim in our law, namely, *nemo debet bis vexari pro una et eadem causa*. The accused, if the state so decides, will be charged with murder. In my view, merely because the state is given the opportunity to substitute a lesser charge of assault GBH with a more serious charge of murder, will not lead to any injustice. In fact, the opposite is true. Such a substitution will, to my mind, serve the interests of justice in that the accused will have his time in Court to answer to the correct charge rather than be convicted on a lesser charge because of a mere accident of time.

[21] It is common cause that at the time of the institution of the proceedings against the accused, the state was not in possession of the information that the deceased was about to die. The deceased was still in the hospital. The accused pleaded guilty to the lesser charge of assault GBH, which entitles him to a lesser sentence. However, the deceased has since died, which changes the charge to murder. It is only fair that the accused be charged with murder, and if convicted, be sentenced for murder.

[22] The prosecution acts on behalf of the people of South Africa. For a prosecution to have adopted a supine position in the face of this

injustice would have been an abject dereliction of duty, which would result in the accused getting away with murder both literally and figuratively.

[23] This case should serve as a warning to public prosecutors in general, particularly where seriously injured complainants are still hospitalised. Whilst the state acted within its right by prosecuting the accused as soon as possible for assault GBH, one wonders why the state did not wait to receive all the medical reports about the condition of the complainant. The incident happened on 10 February 2013 and the complainant was admitted at the hospital, apparently on the same day, as the record is silent in this respect. On 12 February 2013, the accused appeared in the channelling court, where he was granted bail and his matter was referred to B court on the same day and for further investigations. Surprisingly, when the case was called on 14 February 2013, barely four days after the assault, the accused pleaded guilty to assault GBH. Notwithstanding the fact that there were still pending investigations, the state accepted the plea. This was without the medical report. The court accepted the plea and convicted the accused as charged. It is unthinkable how the state was able to determine that the offence was assault GBH without medical evidence. A further question that arises is what happened to the police investigation that was supposed to be conducted. Would it not have revealed that the complainant was moribund?

[24] Given the above factual background, I have no doubt that to proceed to sentence the accused on a lesser charge when there is evidence that the deceased died of the injuries inflicted by the accused, would be a serious travesty of justice. It will certainly not be in the interests

of justice. I have no doubt that such a step will result in a serious loss of faith and confidence by the public in the criminal justice system.

[25] For the above reasons, the following order is made:

a) The criminal proceedings in Case No. RE 571/2013, held at Magistrate Odi, Ga-Rankuwa are hereby reviewed and set aside.

_____

D.I. MATLAPENG
ACTING JUDGE OF THE HIGH COURT

I agree

_____
SAMKELO GURA
JUDGE OF THE HIGH COURT

I agree

_____
T.J. DJAJE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 15 AUGUST 2014
DATE OF JUDGMENT	: 10 OCTOBER 2014
COUNSEL FOR APPLICANT	: ADV N.L. SKIBI
COUNSEL FOR RESPONDENT	: ADV L. VAN NIEKERK
ATTORNEYS FOR APPLICANT	: MAFIKENG JUSTICE CENTRE
ATTORNEYS FOR RESPONDENT	: THE DIRECTOR OF PUBLIC PROSECUTIONS