THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 409/2015

In the matter between:

MATHEWS SIPHO LELAKA **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Lelaka v The State* (409/15) [2015] ZASCA 169 (26 November 2015)

Coram: Ponnan, Shongwe, Petse and Mathopo JJA and Van der Merwe AJA

Heard: 4 November 2015

Delivered: 26 November 2015

Summary: Criminal Procedure — sentence — whether plea of double jeopardy applicable where accused had been convicted of assault with intent to do grievous bodily harm and where after the conviction, the victim died and the State intends preferring charges of murder against him.

ORDER

On appeal from: The North West Division of the High Court, Mahikeng (Gura J, Matlapeng and Djaje AJJ sitting as a court of review):

1. The appeal succeeds.
2. The order of the full court is set aside and replaced with the following:

> 'The matter is remitted to the Magistrate's Court, Ga-Rankuwa for the appellant's trial to be finalised before another magistrate.'

JUDGMENT

Mathopo JA (Ponnan, Shongwe, Petse JJA and Van der Merwe AJA concurring):

[1] On 10 February 2013, the appellant, Mr Mathews Lelaka and Mr Kgotatso Moshe (the complainant) were on their way from a tavern. The latter took a bottle of whisky from the appellant. This incensed the appellant, who then took the bottle from the complainant and assaulted him by striking him in his face. The appellant was charged with one count of assault with intent to do grievous bodily harm. On 14 February 2013 the appellant pleaded guilty to the charge. He made a detailed statement in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 (the Act), in which he set out his version of events. Satisfied that all of the essential elements of the charge were admitted, the magistrate convicted him as charged. The State then applied for a postponement of the matter to obtain a record of the appellant's previous convictions. The magistrate postponed the case to 28 February 2013 and

cancelled the appellant's bail and remanded him in custody. On 28 February 2013, the magistrate was informed that the complainant had died in the interim on 15 February 2013. In the light of this new fact, the magistrate granted the State a postponement to obtain a post-mortem report (the report) to determine the exact cause of the death.

[2] The report only became available after several further postponements on 27 May 2013. The report reflected the cause of death as 'severe blunt force head trauma'. The magistrate postponed the matter once again to enable the State to seek a directive from the office of the Director of Public Prosecutions (DPP). There were several other postponements whilst the appellant was kept in custody. On 13 June 2013 the appellant appeared in court with a new legal representative, who urged the court to sentence the appellant in terms of his plea of guilty.

[3] The State opposed the application and requested another postponement for the DPP's directive as to whether murder charges should be proffered against the appellant or not. In essence the State contended that it would not be in the interest of justice to proceed with the sentencing procedure in the light of the death of the deceased. On 20 June 2013 and for reasons that are not clear the magistrate recused herself from the matter. She further stated that 'the case can start de novo, then you can argue a bail and everything afresh when there will be no prejudice to you'. She did not explain why she arrived at that decision. At that stage, the appellant had been in custody for a period of four months.

[4] Some seven months after her recusal, the magistrate sent the case to the North West Division of the High Court, Mahikeng (high court) on special review in terms of s 304A*(a)* of the Act. She requested the high court to set aside the

conviction on the basis that the proceedings were not in accordance with justice. Section 304A*(a)* reads as follows:

'304A Review of proceedings before sentence

(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that *the proceedings in respect of which he brought in a conviction are not in accordance with justice*, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.' (My emphasis.)

[5] Upon receipt of the review, Landman J requested the DPP for an opinion, which was to the effect that a grave injustice would occur if murder charges were not preferred against the accused, and submitted that the high court could invoke its inherent power in terms of s 173 of the Constitution to set the proceedings aside. The two reviewing judges, Landman J and Hendricks J, could not agree on the matter, with the result that the Judge President of that division directed that the review be placed before the full court for argument. After hearing the argument, the full court (per Gura J, Matlapeng and Djaje AJJ) held that it would not be in the interests of justice if the appellant was sentenced on a lesser charge where the victim had died as a result of the appellant's unlawful actions arising from the same facts. Consequently, acting purportedly in terms of s 173 of the Constitution, it set aside the conviction and ordered that the trial should commence de novo. The appeal by the appellant against that order is with the special leave of this court.

[6] It is a general rule of the common law that a person may not be punished twice for the same offence. This common law rule is now entrenched in the

provisions of s 35(3)*(m)* of the Constitution.[1] In terms of the rule, an accused may raise the plea of autrefois convict or acquit. This principle is grounded in the maxim that no person is to be brought into jeopardy more than once for the same offence. This principle finds expression in the rule of law that if someone has been either convicted or acquitted of an offence he or she may not later be charged with the same offence or with what was in effect the same offence.[2] According to Lord Devlin in *Connelly v Director of Public Prosecutions* 1964 (2) All ER 401 '[t]he word offence embraces both the facts which constitute the crime and the legal characteristics which make it an offence.'[3] Lord Morris elaborated:

'It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The Court is concerned with charges of offences and crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction.

In *R v Long*[4] Schreiner JA said the following:

'It is not enough to support the plea that the facts are the same in both trials. The offences charged must be the same, but substantial identity is sufficient. If the accused could have been convicted at the former trial of the offence with which he is subsequently charged there is substantial identity, since in such a case acquittal on the former charge necessarily involves acquittal on the subsequent charge. Another way of putting it is that he must legally have been in jeopardy on the first trial of being convicted of the offence with which he was charged on the second trial.'

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[1] This subsection provides that an accused has the right 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.
[2] *S v Ndou & others* 1971 (1) SA 668 (A) at 676C-E.
[3] At 433G-H.
[4] 1958 (1) SA 115 (A) at 117F-H.

[7] However, our law has long recognised that a plea of autrefois convict is not available when it was impossible at the previous trial to prefer the more serious charge later presented.[5] Voet 48.2.12 puts it thus:

'One convicted (but not one acquitted) of light crime can be charged again with serious crime arising out of the same act—

Finally nothing prevents one who has been charged with and punished for a somewhat light crime from being afterward charged in turn with a heavier crime which is proved to have sprung from the same act. An instance would be when a person has been first punished as having inflicted a wound and it later becomes clear that the wounded man perished from such wound as being a lethal wound, and therefore he is account afresh as a homicide. It would be otherwise if one who was accused of wounding a person has not been convicted by the judgment, but has been acquitted, since his innocence has already been approved by the Judge in respect of the very act from which the ensuing.'

It follows that a conviction for assault is no bar to a prosecution for murder or culpable homicide where the victim has died since the conviction 'for the fact of the death has altered the essential nature of the crime'.[6] Put somewhat differently, 'the death is a new fact'.[7] See also *S v Gabriel* 1971(1) SA 646 (RA) and *S v Ndou* supra. In N*dou* (at 676C) the general principle was expressed as follows: 'it is clear that a plea of autrefois convict or acquit is not available to an accused charged with murdering A on a stated occasion notwithstanding that he has previously been acquitted or convicted of assaulting A on that occasion'.

[8] It follows that both courts below misconceived the position in their approach to the matter. Reverting to the facts of this case, the deceased was assaulted on 10 February 2013. The appellant pleaded guilty and was convicted on 14 February 2013. The deceased died on 15 February 2013 from what appears to be assault

[5]F Gardiner and C Landsdown *South African Criminal Law and Procedure* 5ed (1946) p297.
[6]See 5 above.
[7]WM Russel KNT *A Treatise on Crimes and Misdemeanors* 8ed (1923) p1817.

related injuries. When the appellant was convicted the deceased was still alive. It was thus not possible at that stage to charge him with murder. A case on all fours with the present case is that of R *v Stuurman* (1863) 1 Roscoe 83. In that case an accused had been convicted of common assault and the man assaulted subsequently died. It was held that this conviction was no bar to his subsequent trial and conviction for culpable homicide. It follows that nothing stops the state from instituting a charge of murder against the appellant, if so inclined. In the result there was no basis for setting aside the conviction and the trial should be finalised.

[9] There is one aspect which requires final comment. The high court was rightly critical of the magistrate because she recused herself. The effect of her recusal though is that the matter must be remitted to another magistrate for the trial to be finalised. The appellant was convicted on his plea of guilty and it should not occasion any great difficulty for another magistrate on the strength of the present record and such evidence as may be placed before the court in either aggravation or mitigation to proceed to sentence the appellant.

[10] I therefore make the following order:

1. The appeal succeeds.
2. The order of the full court is set aside and replaced with the following:

> ‘The matter is remitted to the Magistrates’ Court, Ga-Rankuwa for the appellant’s trial to be finalised before another magistrate.’

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R S Mathopo
Judge of Appeal

Appearances

For Appellant:	M L Skibi
	Instructed by:
	Legal Aid, Mahikeng Justice Centre, Mahikeng
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	L van Niekerk
	Instructed by:
	The Director of Public Prosecutions, Mmabatho
	The Director of Public Prosecutions, Bloemfontein