

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: CA&R 35/22

Date of Hearing: 10/08/2022

Date of Delivered: 12/08/2022

SARAH KOTOLE

Applicant

and

THE STATE

Respondent

Coram: Tlaletsi JP et Lever J

Judgment

Lever J

1. This matter was referred to this court by the Magistrate for the District of CF MGCAWU sitting at Kakamas. The learned trial Magistrate referred the matter for “special review” under what are thankfully rare and unusual circumstances.

2. The accused in this matter has been charged with certain offences relating to the possession of certain dangerous drugs. The accused pleaded not guilty to the charges. The first State witness was called, and during her testimony a trial-within-a-trial was ordered. In the trial within a trial, the accused gave evidence. At this stage the interpreter who had initially commenced this case was not available. The first State witness spoke Setswana and the accused spoke Sesotho and the proceedings were being conducted in Afrikaans.
3. Mr Vilikazi, who initially interpreted these proceedings was not available for the proceedings on the 30 May 2022. On this date 2 casual interpreters were engaged. The first to interpret in the Setswana language and the second to interpret in the Sesotho language. The casual interpreters were duly and properly sworn in on the date in question.
4. As stated above, the accused gave evidence in the trial-within-a-trial-proceedings, during her cross-examination the record of the transcript reveals that the Prosecutor put to the accused that she was avoiding or evading his questions. It emerged from this process that the accused did not understand the Sesotho interpreter.
5. When this emerged, the learned trial Magistrate stopped the proceedings and ordered Mr Vilikazi, the original and senior interpreter to listen to the relevant recordings.

6. Mr Vilikazi listened to the recording of the proceedings of the 30 May 2022. He was then called as a witness by the learned trial Magistrate on the 5 July 2022. After being sworn-in Mr Vilikazi dealt with the interpretation of the questions put to the accused and her responses to such questions. Mr Vilikazi highlighted several errors. For present purposes, the body of Mr Vilikazi's evidence is best summed up by two questions put to him by the learned trial Magistrate and his responses to such questions. The relevant passages of the transcript read as follows:

HOF: "...Die belangrikste vraag in hierdie saak is alles dui daarop dat sover bly dit te wees as gevolg van die tolk situasie dat daar 'n moontlikheid is dat juffrou Kotole in hierdie omstandighede benadeel kan word."

Mnr Vilikazi: "Met daardie tolk Agbare ja,..."

HOF: "Goed, my problem is net is (sic) dat daar is nou volgens u is daar reeds skade."

Mnr Vilikazi: "Agbare, ja Agbare. Die skade is alreeds gedoen."

7. To paraphrase this for those not conversant in Afrikaans the learned trial Magistrate puts to the senior interpreter, Mr Vilikazi, that the accused appears to have been prejudiced by the interpretation of proceedings. Although, this is not specifically set out in the quote above, the context shows that it was the proceedings on the 30 May 2022 that were being referenced in this passage. Mr Vilikazi responds that in regard to a particular interpreter, there was a problem.

8. The learned trial Magistrate then puts to Mr Vilikazi that on his evidence before such court the damage had already been done. To this Mr Vilikazi responds that the damage had already been done.
9. The referral of the present “special review” to this court took place before the trial-within-a-trial was completed. It follows from this fact that such referral occurred before conviction in the matter and also before sentencing could take place.
10. It follows from the fact that the matter has been referred for special review before conviction and sentence that the provisions of sections 302, 304 of the CPA¹ do not apply. It follows from the fact that there has not yet been a conviction and the accused is not awaiting sentence before this referral that the provisions of section 304A² also have no application in the present circumstances.
11. It appears that the circumstances of the present matter must fall under the provisions of section 22 of the Superior Courts Act³. The said section reads as follows:

“22(1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are-

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.”⁴

¹ Criminal Procedure Act 51 of 1977.

² Above.

³ Act 10 of 2013.

⁴ Above.

12. In the circumstances of the present review, it needs to be determined if the failings in interpretation as described above, constitute a gross irregularity in the proceedings.

13. A similar question was dealt with by Watermeyer J (as he then was) in a criminal appeal in the matter of S v MAFU⁵ relied on the provisions of section 6(2) of the Magistrates Court Act⁶ to conclude that a failure to provide a competent interpreter to translate the evidence into a language professed by the accused is clearly a gross irregularity vitiating the proceedings.

14. Section 6(2) of the Magistrates Court Act is still applicable today and the said section reads as follows:

“6(2) If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given is one of the official languages or whether the representative of the accused is conversant with the language used in the evidence or not.”⁷

15. Section 6(2) of the Magistrates Court Act is reinforced by the subsequent provisions of section 35(3)(k) of the Constitution, which reads as follows:

“35(3) Every accused person has a right to a fair trial, which includes the right -

⁵ S v Mafu 1978 (1) SA 454 (CPD) at 457H to 458A.

⁶ Act 32 of 1944.

⁷ Above.

- ...
- (k) to be tried in a language that the accused person understands, or to have the proceedings interpreted in such language;...”

16. If the interpreter has made mistakes or is incompetent to the extent that the accused has been prejudiced in and substantively deprived her right to a fair trial. This constitutes a gross irregularity in the proceedings. In these circumstances, the proceedings ought to be set aside and started *de novo* before a different judicial officer.

17. In the present matter it is clear from the record that the interpreter concerned was not competent, that this prejudiced the accused and that the accused had substantively been deprived of her right to a fair trial. Accordingly, there was a gross irregularity in the proceedings as contemplated in section 22 of the Superior Courts Act⁸. In these circumstances the proceedings from the date of the plea to the date of referral for review must be set aside.

In the circumstances, the following order is made:

- 1) The proceedings from the date of the plea to the date of referral for review are set aside; and
- 2) The proceedings are to commence *de novo* before a different judicial officer.

⁸ Above.

LG Lever
Judge
Northern Cape Division, Kimberley

I agree,

LP Tlaletsi
Judge President
Northern Cape Division, Kimberley