IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)

REVIEW CASE NO: A1794/2010

HIGH COURT CASE NO: 24/ 15

In the matter between

THE STATE

versus

DALUHLANGA FENI

REVIEW JUDGMENT

MBENENGE J

[1] The accused was charged with and convicted of housebreaking with intent to steal and theft by the Magistrate for the District of Zwelitsha. He pleaded not guilty to the charge. The trial proceeded. He was found guilty and thereupon sentenced to undergo two years imprisonment, on 6 December 2012. The proceedings had been conducted and recorded in isiXhosa which appears to have been the mother tongue of the presiding officer and all the parties in the case.

[2] In terms of section 303 of the Criminal Procedure Act 51 of 1977 (the CPA) the record of the relevant proceedings ought to have been submitted by the Clerk of the Magistrate's Court, Zwelitsha to the Registrar of this Court within one week after 6 December 2012.

[3] The record was received by the Registrar on 24 July 2015, more than two and half years from the date the accused was sentenced and approximately more than six months after the accused had completed serving his sentence.

[4] When the matter was dealt with on automatic review, the Magistrate was queried as follows:

> "1. The accused was sentenced by the Magistrate, Zwelitsha to undergo 2 years imprisonment on 6 December 2012. In terms of the Criminal Procedure Act 51 of 1977 the record of the relevant proceedings should have been transmitted by the Clerk of the Magistrate's Court, Zwelitsha within one week after the date on which the accused was sentenced.
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> 2. The record of the proceedings in this matter was received by the Registrar, Bhisho High Court on 24 July 2015.
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> 3. There has clearly been an ordinate delay in transmitting the record–
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> 3.1 After the expiry of more than two and-a-half years the accused was sentenced; and
>
> 3.2 more than 6 months after accused had completed serving his term of imprisonment
>
> 4. The Magistrate is called upon to account for the delay. In his response the Magistrate should have regard to *S v VC* 2013 (2) SACR (KZP) at [2].
>
> 5. What informed the decision to conduct the proceedings in isiXhosa, and not in English?"

[5] In his reply the Magistrate states that the accused was sentenced to undergo three years imprisonment on "*each count*" and that the term of imprisonment was not ordered to run concurrently. He further states that the record was submitted 6 months after of the imposition of the sentence. The delay, according to the Magistrate, was occasioned by the paucity of sworn indigenous translators, hence it took time before the services of a translator could be engaged and the record transcribed. The reason proffered for conducting the proceedings in isiXhosa is the "*campaign that Government embarked on in October/November 2008 through pilot projects to promote the use of indigenous languages in the country's courts called indigenous language courts.*"

[6] This is a classic case of an accused's fundamental rights of automatic review, including the right to have proceedings reappraised by a judge speedily, having been compromised by administrative incompetency.[1]

[7] I am mindful of the efforts that have been made by the government to promote the use of indigenous languages in courts with a view to giving expression to section 35(3)(k) of the Constitution.[2] It does not appear that those efforts have been successful principally due to the challenges associated therewith. These challenges were stated by Ndlovu J in *S v Damani*[3] as being:

> "Difficulty experienced by a presiding magistrate, prosecutor, defence attorney in articulating legal terminology in IsiZulu, including quotation from statutes and legal precedents.
> Translation into isiZulu of court annexures, roneo forms and statements in police dockets.
> Difficulty for the transcribers in preparing court records for review or appeal purposes, hence undue delay caused in this regard
> Different isiZulu dialects occasionally posed problems to court officials and litigants, despite all of them being, otherwise, Zulu-speaking."

[8] The challenges adumbrated above apply with equal force in the case of isiXhosa. The Magistrate refers to pilot projects embarked on during the latter part of the year 2008 and seems to be oblivious to subsequent developments on the subject. Ndlovu J[4] refers to recommendations made by the Sub-committee:

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1 *S v VC* 2013 (2) SACR 146 (KZP) at 148, especially para 5, where Steyn J referred to the following rationale for the expeditious transmission of review records as stated in *S v Manyonyo* 1997 (1) SACR 298 (E):

> 'The reason for the statutory insistence on the expeditious despatch of records on review is generally to provide the speedy and efficient administration of justice, but in particular *to ensure that an accused is not detained unnecessarily* in cases where the court of review sets aside the conviction or reduces the sentence. (My emphasis.)'

2 The section gives every accused person the "*right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language."*

3 [2014] ZAKZPHC 60 (9 December 2014).

4 In *S v VC supra*.

Legislation on Indigenous Language Courts pursuant to a meeting held during September 2014. The Sub-committee is on record[5] as having reported on 19 September 2014 as follows:

> "That Executive Committee of the Chief Magistrates Forum must seek the guidance of the Chief Justice on the Language Policy as regards the Magistrates Courts.
> That the Executive Committee of the Chief Magistrates Forum must establish, through the Office of the Chief Justice, as to whether the Department of Justice and Constitutional Development has ensured that there are proper structures to adequately and timeously transcribe and translate proceedings recorded in any of the nine indigenous languages into English.
> That the Chief Magistrates Forum in the meantime to do an audit of indigenous languages predominantly in use within Administrative Regions, in order to assist the National Department responsible for language policy in determining the most used languages within specific clusters and/or subcommittee, for purposes of service level agreements with service providers of translation services.
> That the Chief Magistrates Forum must support the use *of* indigenous languages in any courtroom for any proceedings, as long as it is practical to do so.
> That the Chief Magistrates Forum must inform Mr Dawood that the Forum would not, for reasons specified in the report, support the idea of '*indigenous language courts'*, but that it would take practical steps and positive measures to elevate the status and advance the use of languages with historically diminished use and status in all the courts of the Republic of South Africa."

[9] It is quite plain that the government is still engaged in coordinating the process of elevating indigenous languages for use in courts. The process has not reached the stage where it could be said indigenous languages should be used in Courts even when the exigencies of a matter did not demand such use. The explanation for the delay given by the Magistrate is far from convincing. Nothing is said, for instance, that an interpreter who could have interpreted from isiXhosa to English, and vice versa, was not available during the proceedings under review.[6] The way in which the proceedings were conducted has resulted in an inexplicable, inordinate delay, rendering justice a mockery.

[10] As to the sentence imposed by the Magistrate the record reads:

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5 *Id* at para [19].

6 This course was held to be justified in such circumstances in *S v Matomela* 1998 (3) BCLR 339 (Ck).

"Wena ke awusengomntu ufanel'uba phakathi koluntu, ufanel'uba usiwe phaya entolongweni. Yilonto nale Nkundla ke iza wuthi ikuthi uye phaya IMINYAK'EMIBINI ENTOLONGWENI (TO UNDERGO 2 YEARS IMPRISONMENT)."

[11] The transcribed record clearly does not lend support to the Magistrate's reference to "*three years imprisonment on each count*" as having been the sentence he imposed. Therefore, the matter falls to be dealt with on the basis that the accused was sentenced to undergo 2 years imprisonment. There having been nothing pointing to the contrary, the imprisonment sentence related to both counts which were treated as one for purposes of sentence.

[12] But for what is stated above and having considered the merits of the instant review, the proceedings are hereby certified as having been in accordance with justice.

[13] The Registrar of this Court is directed to forward a copy of this judgment to the-

13.1 Office of the Chief Justice; and

13.2 Office of the Director of Public Prosecutions, Bhisho.

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S M MBENENGE

JUDGE OF THE HIGH COURT

15 September 2015

I agree

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G GOOSEN

JUDGE OF THE HIGH COURT