THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 043/2013
Not Reportable

In the matter between:

BOISILE AMOS PLAATJIES **APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL **RESPONDENT**

Neutral citation: *Plaatjies v DPP, Transvaal* (043/ 2013 [2013] ZASCA 66 (27 May 2013)

Coram: Mthiyane DP, Shongwe, Majiedt JJA, Van der Merwe and Meyer AJJA

Heard: **7 May 2013**
Delivered: **27 May 2013**

Summary: The effect of s 35(3)*(m)* of the Constitution – whether the legal position on the application of *autrefois convict* or *autrefois acquit* has been changed by the provisions of s 35(3)*(m)* and whether the common law should be developed to reflect this.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Prinsloo and Makgoba JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

MTHIYANE DP (SHONGWE, MAJIEDT JJA, VAN DER MERWE AND MEYER AJJA CONCURRING)

[1] This appeal brings into focus yet again the rule that an accused person has the right not to be tried for an offence in respect of any act or omission for which that person has previously been acquitted or convicted,[1] sometimes referred to as the double jeopardy rule. This case has its origin in the regional court, Potchefstroom, where the appellant, Mr Boisile Amos Plaatjies, stood trial on charges of murder, assault with intent to do grievous bodily harm and unlawful possession of a firearm, in contravention of s 2 read with ss 39(2) and 40 of the Firearms and Ammunition Act 75 of 1969. The appellant was convicted on all counts and was sentenced to 7 years' imprisonment on count 1, 1 year's imprisonment on count 2 and 3 years' imprisonment on count 3.

[2] The appellant appealed to the then Transvaal Provincial Division of the High Court against both convictions and sentences. The appeal was

[1] The common law right is expressed in the maxim – *'nemo debet bis vexari pro una et eadem causa'* – See Director of Public Prosecutions, Transvaal v Mtshweni 2007 (2) SACR 217 SCA para 28.

upheld and the convictions and sentences were set aside. The court (Van Rooyen AJ with Van Zyl AJ concurring) found that the trial magistrate had committed a fatal irregularity when he sat without assessors. He had done so without first obtaining the appellant's consent as required by s 93 ter (1) of the Magistrate's Court Act 32 of 1944. The requirement is expressed in the section as follows:

'(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice—

(a) before any evidence has been led, or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.'

[3] The court held that because the proviso to the section[2] was not followed by the trial magistrate, the court was not properly constituted and its judgment was therefore invalid. Consequently, the convictions and sentences imposed on the appellant were set aside. The judgment was handed down on 22 February 2005.

[4] The respondent reinstituted criminal proceedings against the appellant on the same charges mentioned above in the regional court, Potchefstroom, but before a different regional magistrate. At this trial on

[2] Quoted in para 2 above.

4 December 2007 the appellant successfully entered a plea of *autrefois acquit*.

[5] The Director of Public Prosecutions lodged an appeal to the then Transvaal Provincial Division of the High Court against the acquittal. On appeal the respondent submitted that it was entitled to recharge the appellant on the ground that he had not been acquitted on the merits but on a technicality arising from the trial magistrate's failure to sit with assessors or to dispense with that requirement in compliance with s 93 ter (1) of Act 32 of 1944. The appeal court (Prinsloo J with Magkoba J concurring) found that when the appeal was decided by the learned judges, Van Rooyen AJ and Van Zyl AJ in the earlier appeal, the merits of the convictions were never considered. The learned judges in the court a quo held that the appellant could be recharged on the same counts on which he had been acquitted and relied for that conclusion on s 324 read with s 313 of the Criminal Procedure Act 51 of 1977 as well as on *S v Moodie* 1962 (1) SA 587 (A) and *S v Naidoo* 1962 (4) SA 348 (A). The judges also held that s 35(3)*(m)* of the Constitution, which provides that an accused person has a right to a fair trial and which includes the right 'not to be tried for an offence in respect of any act or omission for which that person has previously been acquitted or convicted', had not changed the legal position, and the reinstitution of the charges was permitted as the appellant had not been acquitted on the merits.

[6] The judges however granted leave to the appellant to appeal to this court on four main grounds namely─

'1. Another court may find that the legal position as to the subject of *autrefois acquit* or *convict* may have been changed by the provisions of section 35(3)(m) of the Constitution.

2. Another court may find that the first order by Magistrate Mabile is appealable and not an interlocutory order because of the provisions and implications of section 35(3)(m) of the Constitution.
3. Another court could find that it would be fair and just to stop the prosecution of the respondent in view of the long history and many delays with the case and in view of the provisions of section 35(3)(d) of the Constitution read with section 38 of the Constitution.
4. This court erred in not making reference to the merits of the three charges in respect of which the respondent was convicted in the first trial.'

[7] In the appeal before us, the above grounds were not split but consolidated by counsel for the appellant into one primary issue. He submitted that the effect of s 35(3)*(m)* of the Constitution was to extend the scope and ambit of the double jeopardy rule so as to cover cases where merits were never considered in the earlier proceedings. Counsel argued that, in the light of the provisions of s 35(3)*(m)*, this court should develop the common law in the exercise of its powers under s 39(2) of the Constitution so as to extend the ambit and scope of the rule of *autrefois convict* and *autrefois acquit* to cover cases where the court in the first appeal has not examined the merits.

[8] The above submission on the appellant's behalf overlooks the fact that the Constitutional Court has already expressed itself on the point, albeit in a slightly different context, in the two *Basson*[3] cases. I will return to the two cases later in the judgment and demonstrate that there is no need to develop the common law in this regard. I think the dicta in the two *Basson* cases are sufficiently dispositive of the point. But before dealing with the argument, it is necessary to set out the current legal

[3] Reported as *S v Basson* 2004 (1) SACR 285 (CC) paras 64 and 65, and *S v Basson* 2007 (1) SACR 566 (CC) paras 255 and 256.

position as regards the application of the principle of *autrefois convict* and *autrefois acquit*.

[9] Sections 106(1)*(c)* and *(d)* of Act 51 of 1977 provide that when an accused pleads to a charge he or she may plead that he or she has already been convicted of an offence of which he or she is charged or has already been acquitted of the said offence. In the present matter the appellant raised a plea in terms of s 106(1)*(c)* and *(d)*, averring that he has already been convicted at the first trial and already been acquitted on appeal before Van Rooyen AJ and Van Zyl AJ.

[10] Section 324 of Act 51 of 1977 however permits the reinstitution of the criminal proceedings on the same charge when a conviction is set aside on the grounds that:

'(a) that the court which convicted the accused person was not competent to do so; or

(b) the indictment on which the accused was convicted was invalid or defective in any respect; or

(c) that there has been any other technical irregularity or defect in the procedure.'

The section goes on to state that this occurs as if the accused person had not been previously arraigned, tried or convicted, provided 'that no judge or assessor before whom the original trial took place shall take part in such proceedings'. Although the word judge is used here, this is equally applicable to a magistrate.

[11] In *S v Moodie* it was held that if an irregularity in the procedure which justifies the setting aside of a conviction by a court of appeal was technical under s 370*(c)* of Act 56 of 1955 (now s 324*(c)* of Act 51 of

1977 and similarly worded) it precludes a valid consideration of the merits, in other words if it makes it impossible for the court to give a valid verdict on the merits.

[12] In *S v Naidoo* it was held that the section empowers a retrial where a conviction and sentence have been set aside on appeal on the ground of a technical irregularity or defect in the procedure (as was the case with the previous s 370*(c)* of Act 56 of 1955). The court in *Moodie* held that an irregularity is technical within the meaning of the sub-section if it is of such a nature as to preclude a valid consideration of the merits of the appeal; in other words if it is impossible for the court of appeal to give a valid verdict on the merits (*Moodie* at 597 and *Naidoo* at 353H-354A). In the case of *Naidoo*, Holmes JA explained why *Moodie* could be retried, but not *Naidoo*. The judge pointed out that in each case there was an irregularity in the first trial. Holmes JA held that irregularities vary in nature and degree. According to him they fall into two categories. There are irregularities, he continued, which are so gross in nature as to vitiate a trial. In such a case the court of appeal must set aside the conviction without reference to the merits. There remains, said the judge, neither a conviction nor an acquittal on the merits and the accused person can be retried in terms of s 370*(c)* of the Criminal Procedure Act 56 of 1955. That was the position in *Moodie's* case in which the irregularity of the Deputy Sheriff remaining closeted with a jury throughout their two hour deliberations was regarded as so gross as to vitiate the whole trial (at 354D-F). On the other hand, continued the judge, there are irregularities of a lesser nature, in which the court of appeal is able to separate the bad from the good and to consider the merits of the case, including any finding as to the credibility of witnesses. If in the result, he comes to the conclusion that a reasonable trial court properly directing itself would

inevitably have convicted, the appeal stands to be dismissed and the conviction stands as one on the merits. But if on the merits, it cannot come to that conclusion, it should set aside the conviction and this amounts to an acquittal on the merits. In such a case s 370*(c)* of the code does not permit a retrial. That was the position in *Naidoo's* case, in which failure to swear an interpreter at one stage resulted in certain evidence being regarded as inadmissible (354F-H).

[13] Turning to the question whether the legal position may have been changed by s 35(3)*(m)* of the Constitution , the point is misconceived and without merit, as the question has already been authoritatively settled in *S v Basson* 2007 (1) SACR 566 (CC) para 255, which reads as follows:

'The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of *autrefois acquit* in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity'. See also *S v Basson* 2004 (1) SACR 285 (CC) paras 64 and 65.

[14] To the extent that it is necessary to decide the second, third and fourth ground on which leave was granted by the court below, seeing that they have not been abandoned, I deal with them briefly in what follows. I deal first with the question of whether the first order made by magistrate Mabile was interlocutory and therefore not appealable. The record of the proceedings before magistrate Mabile was so poorly transcribed that it is difficult to make out what transpired. From what one is able to glean from the record it seems that the magistrate Mabile rejected the plea of *autrefois acquit* and ruled that the matter be referred to another magistrate

for retrial. The matter then came before another magistrate, Ms Juries who upheld the plea of *autrefois acquit*. This led to the appeal which came before Prinsloo J and Makgoba J. The proceedings before the magistrate Mabile are therefore not relevant for purposes of this judgment. The same applies to the question whether the order she made is appealable or not.

[15] Turning to the question whether it would be fair and just to stop the prosecution of the respondent, in view of the long history and many delays in the case and in view of the provisions of s 35(3)*(d)* of the Constitution read with s 38 of the Constitution, the point was not pressed in an argument before us. The legal position is that an accused person who seeks to bring an application for a permanent stay of the proceedings is required to bring a substantive application before the court, alleging that his or her right under s 35*(d)* have been infringed. (See *S v Naidoo* 2012 (2) SACR 126 (WCC)). In the present matter we do not have such application. No evidence has been placed before us as to who is to blame for the delay. It seems as if the appellant was to a large extent to blame for the delay in finalising this matter. In my view the appellant must also fail on this point.

[16] The final point on which leave was granted is that the court failed to make reference to the merits of the three charges in respect of which the appellant was convicted in the first trial. The point is difficult to understand. At the first trial the merits were dealt with by the magistrate and that was not the problem that led ultimately to the appellant being recharged. The problem was that the magistrate in the first trial had sat without assessors and the court was therefore not properly constituted.

The point made under this head is also without merit and falls to be rejected.

[17] In the result the appeal must fail and the following order is made.
The appeal is dismissed.

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K K MTHIYANE
DEPUTY PRESIDENT

APPEARANCES

For Appellant:	HL Alberts Instructed by: Pretoria Justice Centre (Legal Aid SA), Pretoria Legal Aid Board, Bloemfontein
For Respondent:	L Pienaar (heads of argument prepared by FC Roberts) Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein