

A 269/10 /SG

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 13/4/2010

Magistrate
NKOMAZI

Case No: A757/08
High Court Ref No: 1525

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒
(3) REVISED.	☐
24.03.2010	<i>[Signature]</i>
DATE	FILED

THE STATE V

1. WONDER NDLELA MAPHANGA
2. THULANE MUNTU NKOSI

REVIEW JUDGMENT

MAKGOBA, J

- [1] The two accused were charged with one count of housebreaking with intent to steal and theft. It was alleged that on or about 8 to 15 November 2008 the accused broke into and entered the bottle store of one Sifiso Mabaso and stole a certain quantity of liquor. Both accused were convicted as charged and sentenced to eighteen months imprisonment, suspended for a period of three years on certain conditions. Both accused were unrepresented.
- [2] The matter came before me on automatic review and I addressed the following questions to the trial magistrate:

1. AD IRREGULARITIES

- 1.1 The magistrate failed to apply the provisions of section 115 of the Criminal Procedure Act 51 of 1977 properly in that instead of explaining the rights to disclose the basis of defence to the accused he merely put a vague question to this effect: "Do you want to tell the Court why you plead not guilty?"
- 1.2 Instead of explaining to the accused the rights to cross-examine the state witnesses the magistrate put the following question to accused number one: "Do you agree with what he told the court?" To accused number two the following question was put: "Mr Nkosi, question?"
- 1.3 The magistrate took over from the prosecutor and led the state witnesses' evidence on behalf of the state.
- 1.4 The magistrate allowed and/or made the accused to give unsworn statements from the dock instead of giving them an opportunity to give evidence under oath so that they can be cross-examined in order to test their credibility.
- 1.5 The magistrate subjected the accused to cross-examination on the basis of their unsworn statements and thereby extracted admissions prejudicial to the accused.

2. AD MERITS

2.1 Can it be said that on the evidence presented by the state it has been proved beyond reasonable doubt that the accused broke into the business premises?

2.2 Even if it can be said that the accused were in possession of the stolen liquor, was it fair to convict them when they have not been given an opportunity to explain their possession under oath?

[3] In response to the questions addressed to him the magistrate conceded that on both issues of irregularities and merits of the case there has been a failure of justice and that the conviction and sentence ought to be set aside.

The magistrate's sincerity and honesty in this regard is commendable.

[4] The record of proceedings in the magistrate court were referred to the office of the Director of Public Prosecutions for his opinion. The Director of Public Prosecutions is of the view that there were fatal irregularities at the trial and that the conviction and sentence should be set aside.

- [5] The trial magistrate did not explain the provisions of section 115 of the Criminal Procedure Act 51 of 1977 to the accused. Section 115 offers a discretion to a presiding officer whether to question an accused or not. But where an accused is unrepresented, time and effort should be taken to explain the provisions of all relevant sections to enable accused to make an informed decision whether to disclose the basis of his defence. It does not suffice, as was done in this case, to merely ask the accused whether he wants to tell the court why he pleads not guilty.
- [6] The magistrate did not explain the right to cross-examination and especially the purpose thereof to the accused. For the magistrate just to ask an accused whether he follows the testimony of a witness and agrees with what the witness told the court is insufficient, especially as it is clear from the record that the accused had no idea how to cross-examine or how to present evidence.
- [7] In *S v Ndou* 2006 2 SACR 497 (T) 500e-g SOUTHWOOD J had this to say:

“The right to cross-examination is of vital importance. It is of no use to the accused to be told of this right if he does not know what it entails. What is required to be explained appears in *S v Tyebela* 1989 2 SA 22 (A) 32A-C where the court said:

'Furthermore, when the first state witness had finished his evidence-in-chief, there should have been an explanation to the appellant and his co-accused as to their right to cross-examination and some indication as to how they should conduct a cross-examination and that it was their duty to put to the state witnesses any points on which they did not agree with the state witnesses, and put their version to the state witnesses.'

[8] During the course of the trial the magistrate entered the arena. At several instances, more in particular at page 3 lines 14 to 25 and page 4 lines 1 to 13 of the record he took over from the prosecutor and actually led the evidence-in-chief. This irregularity prejudiced the accused more so that the questions posed were leading questions.

[9] At the close of the state case the magistrate did not explain to the accused their rights properly. The following explanation was given to the accused:

"The state case is closed. You can present your case, you do this by testifying yourself, you can call witnesses, you can only choose to close your case without calling witnesses, without testifying, but you must remember that what you told the court when you pleaded and the questions that you asked these witnesses that were called is not testimony on your behalf."

Apparently accused 1 elected to testify and accused 2 to make an unsworn statement. Whether accused 1 chose not to testify under oath and whether he was simply not sworn in is unclear from the record. Neither of the accused was informed of the consequences of their decision. It was even more damaging and/or prejudicial to accused 2 when he was questioned by the court on his unsworn statement.

[10] It is trite law that the accused's rights should be fully explained to him.

"At the end of the state case it should be clearly explained to an undefended accused that he has the right to remain silent or to give evidence under oath. It should further be explained to him that he will be subject to cross-examination by the prosecutor and to questioning by the court. It should further be explained to him that the evidence under oath which is tested by cross-examination carries more weight than a mere unsworn statement from the dock. It is clear that this accused did not have his rights fully explained to him and that he obviously did not make an informed choice not to testify."

Per PRELLER J in *S v Mashaba* 2004 1 SACR 214 (T) 218c-d:

[11] In my view the irregularities in this case render the trial unfair and have resulted in justice not being served.

The old adage that justice must not only be done but must also manifestly be seen to be done operates with even greater force under the new constitutional dispensation. That means that an objective observer sitting on a trial must come away with a clear feeling that the accused has had a fair trial. This also applies to a judge reading the record on automatic review – see *S v Mashaba supra* at page 216a-b.

[12] I am of the view that the irregularities in this case resulted in a failure of justice and the conviction and sentence should be set aside on this ground alone.

[13] Furthermore with regard to the merits of the case the state did not prove its case beyond reasonable doubt. The state called three witnesses, Mr Sifiso Mabaso (the owner of the store) Constable M J Mashaba (the arresting officer) and Mr Bheki Makhanya, an eyewitness.

[14] Mr Mabaso testified that he went to the shop after he received a report of a break in. He met the suspects on his way to the shop and proceeded to report the matter to the police. At no stage during his evidence did he place the accused at the scene or identify the accused as the suspects that he found on his way to the shop. He did not testify as to when and where the accused were found, who had what in his possession, what were they doing or if any explanation was given.

[15] The second state witness did not take the matter any further. The accused were brought to the police station and the second state witness arrested them. The court *a quo* stopped the state from leading any explanation that may have been offered by the accused.

[16] The third state witness does not assist the state's case. The witness admitted that he did not see who broke into the shop. He later saw that the accused had liquor in their possession.

[17] This is a typical case wherein the court *a quo* should have applied section 174 of Act 51 of 1977 *mero motu* and discharged the accused at the close of the state case. See *S v Ndlangamandla* 1991 (1) SACR 391 (T) 393g-h.

[18] The conviction and sentence in respect of the two accused are set aside.



E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



159001
A-P LEDWABA
JUDGE OF THE NORTH GAUTENG HIGH COURT

A757/08/sg

IN THE ORDINARY COURSE OF EVENTS