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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case No:A123/2009

Date:11-05-2010

In the matter between:

KENNETH MAPULE MAKAU APPLICANT

And

**MAGISTRATE MR. M. K. FIRST RESPONDENT
MAKHWENTLA**

**DIRECTOR OF PUBLIC SECOND RESPONDENT
PROSECUTIONS, PRETORIA**

JUDGMENT

PHALANE AJ:

[1] This is a review application against applicant's conviction and sentence by the regional court of Sebokeng on a charge of rape

read with provisions of Section 51 of Act 105 of 1997 and one count of robbery with aggravating circumstances.

[2] Applicant's sentence for rape was 16 years and four years for robbery. Applicant had legal representation for the entire duration of the criminal proceedings.

[3] Applicant currently seeks the court as fully stated in his Notice of motion to review and correct or set aside the proceedings of the regional court on grounds fully stated in the Notice of Motion and applicant's affidavit attached to the Notice of Motion. The grounds of review are briefly that the regional magistrate's conduct during trial proceedings was irregular in that the magistrate descended into the arena and interfered with the prosecution of the case, and the magistrate's was biased and prejudiced against applicant and as a result of this irregular conduct applicant's right to a fair trial as enshrined in the constitution, was infringed.

[4] Respondents are opposing the review application and argue that the regional magistrate's conduct did not infringe applicant's constitutional right to a free trial.

[5] The review application arises from the conduct of the presiding officer during criminal proceedings of the 28th October 2007 against applicant when applicant was originally charged with the following three counts:

1. First count of rape more than once read with Section 51(1) of the Criminal Law Amendment Act 105 of 1977 in that applicant unlawfully and intentionally had sexual intercourse with a female person L A M, 18 years old without her consent.

Second count of indecent assault in that applicant unlawfully and intentionally committed an act of indecent character upon L A M, an 18 year old adult woman by penetrating her anus with his penis.

(c) Third count of robbery with aggravating circumstances read with Section 51(2) of Act 105 of 197 in that applicant wrongfully and intentionally assaulted the complainant and with force and violence took a cellphone valued at R950 from her personal lawful possession and robbed her thereof and whilst committing the said crime applicant handled a dangerous weapon, a knife and threatened to cause serious bodily harm to the complainant with the said knife.

[6] A defect to count two of indecent assault was brought to the attention of the parties by the presiding officer. The magistrate referred to the Constitutional Court judgment in *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007(2) SACK 435 (CC) where Nkabinde J extended the common law definition of rape to include non consensual anal penetration of females.

[7] Presiding officer invoked Section 86 of Act 51 of 1977 and ordered the amendment of the charge sheet.

Section 86 of the Act provides as follows:

'Court may order that the charge be amended:

2. Where a charge is defective for the want of any essential averment therein.... or where it appears that words or particulars that ought to have been inserted in the charge have been omitted there from... or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant

amendment will not prejudice the accused in his defense,
order that the charge___be amended...

3. Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.'

The court record indicates no objection to the amendment of the charge sheet and the charge sheet was accordingly amended to two counts:

(a) One count of rape read with section 51(1) of the Criminal Law Amendment Act 105 of 1977; and

(b) Robbery with aggravating circumstances read with Section 51(2) of Act 105 of 1977.

[8] Applicant was legally represented and pleaded not guilty to all two counts.

[9] Four witnesses were called to testify on behalf of the State:

(a) First state witness - the complainant, testified that she was in the company of friends including a boyfriend at a party. At about 01:00 she went outside with the boyfriend where they had a verbal altercation. The boyfriend left her in the street and as she was going back to the party, applicant grabbed her from behind holding a knife. She screamed, she pleaded with him and offered her cellphone. Applicant said he does not want a cellphone, he wants

one round of sexual intercourse. He dragged her into one yard and forcefully had vaginal, anal and oral sex with her. Applicant, with the knife still on his hand took out her cellphone and watch from her lumber jacket. He also took her earrings. She went back to the party and reported this to her friend Jemina.

(b)The second state witness is Morokwe Jemina Kubu, a friend of the complainant who was with her at the party on the day of the incident. She testified that on the day in question she was at a party in Sharpeville with co-workers including the complainant. The complainant reported to her that a man unknown to her, raped her, took her watch and her cellphone. Her clothes were full of mud, she was crying, shocked and shaking. The witness admitted to taking alcohol at the party - four red square purple ice dumpies and complainant had taken appletiser. The witness also did not see complainant leave the party before her report of rape and robbery. Complainant returned to the party before 05:00 but since home was far away they had to wait at the party until the sun came out. The witness accompanied complainant home and complainant ordered the witness not to inform her mother about the rape and robbery.

(c)The third state witness is Godfrey Ranyawo who is the applicant's cousin. He testified that applicant wanted ten rand to buy food and offered him a watch as collateral. The witness agreed to the offer and took the watch. After three days applicant in the company of police and complainant came to him, identified the watch as belonging to complainant and took the watch from him.

(d)The fourth state witness is Phillip Mogaela who bought

complainant's cellphone from applicant for R350. After few days police in the company of the applicant and complainant arrived to identify the cellphone from him and took the cellphone away.

[10] The applicant was the only witness to testify in his own defense. He testified that complainant greeted him and informed him that her home was far away and she asked for a place to sleep. They both went to a nearby unlocked tin shack, undressed, slept on a mattress with blankets. They had consensual vaginal, anal and oral intercourse. Complainant handed her cellphone to him and said he can take her watch. They went out, they kissed at a corner, complainant requested her cellphone and applicant told her that she can come collect it at his residence.

Applicant then sold the cellphone to a taxi driver for R350. Applicant testified that they had no love relationship and it was the first time that he met complainant that night and denied using a knife.

[11] During the applicant's and fourth slate witness' testimony presiding officer asked questions and made comments which are the subject of the present review application:

(a)Comments and questions by presiding officer during applicant's testimony.

(i) What just a minute then what was the **last** sentence'. '... She asked me to Penetrate from behind. **No**, she says her vagina is sore. now. I think that she has got **a** problem with penetration in the vagina. Now to say he must penetrate **her** behind. I **think** we are missing ,the context. Is it not that she said she must **be** penetrated **anally? If the vigina is painful even if you penetrate**

penetrate it from behind do **you** get my logic, wants to say that the complainant asked him to penetrate her **anally?** ... **She** said that since **her** vagina is painful it is sore, it is better if,anally - - -

(ii)_____ 'Sucked? ... Sucked.

Using your tongue?"

(iii) "You have informed us that you inserted your tongue into her vagina. You inserted your tongue before sexual intercourse or after sexual intercourse?

Was it a nice taste to taste your sperm in her vagina? I know he has already ejaculated into her vagina so it was a nice thing to insert your tongue there, have your own sperms into your mouth? ...

No. she was not having any taste the person who was having the organ ..."

(iv) "that tastes namely the tongue, it is yourself into her vagina? ...

I often see people often men - referring now to men - who are hygienic, hygienic men. After urinating they wash their hands because before they urinate and during urination they touch their penis and then they dry their penis and clean and then after that they wash their hands. Now; the complainant says, after you had inserted your penis into her vagina and you ejaculated there and then you inserted it into her anus, you took that filthy penis, inserted it into her mouth. Do you think that that is a cruel thing to do so or is it a pleasure? Can you say you are treating a lady lovingly or you are being cruel to the lady? ..."

No, I do not say you forced her what I am saying is this practice how do you look at it or to put it in other words, can you suck

somebody's penis? ...

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Now do you think that it is a good thing now to take your filthy penis, insert it into the mouth of a lady? ...

Did she say: "Now insert it into my mouth¹¹? ...

On this day you were sex hungry, on that day? ...

So this lady was just manna from heaven as you were walking in the street. Just a beautiful lady appeared and said "I want to go and sleep at your place tonight?"¹ ... You saw her here at court that she is a beautiful young lady?

(v) 'And then you say that day God just brought you that beautiful young lady who came to you at night and said "Please let us go and sleep?" ... From the questions asked by the court, any cross-examination Moloro?

[12] Applicant argues that the comments and questions above by the presiding officer are an indication of bias, prejudice amounting to gross irregularity depriving him a right to a fair trial as guaranteed in the constitution.

[13] Respondents deny any bias, prejudice on the part of the presiding officer and argue that the presiding officer was merely discharging his obligation to clarify obscurities or uncertainties in the evidence, and that it was unavoidable that he would form provisional impressions favourable to one side or the other.

[14] The question to be answered by this court is whether the questions and comments above by the presiding officer were irregular and therefore vitiated the trial court's findings. In making this determination the court must decide whether the reasonable

limits of judicial questioning have been exceeded in this case.

[15] Muller JA in *S v Rail* 1982 (1) 828 AD noted the difficulty and the undesirability of an attempt to define precisely the limits within which judicial questioning should be confined, and proposed the following broad limitations that should generally be observed:

a) The trial judge should so conduct the trial that his open-mindedness, his impartiality and his fairness are manifested to all those who are concerned in the trial and its outcome, especially the accused. The judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression.

(b) A judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by litigants.

(c) A judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility."

[16] The learned Muller JA went on to state that any serious transgression of these limitations will in general constitute an irregularity in the proceedings. Whether or not the Appellate Division will then intervene to grant appropriate relief at the instance of the accused depends upon whether or not the

irregularity has resulted in a failure of justice. That in turn depends upon whether or not the irregularity prejudiced the accused, or possibly whether or not the Appellate Division's intervention is required in the interests of public policy. If the offending questioning of the witness or the accused by the judge sustains the inference that in fact he was not open-minded, impartial or fair during the trial, the Appellate division will intervene and grant appropriate relief.

Muller JA also referred with approval to the dictum of Curlew's JA in *R v. Hepworth* 1928 AD 265 that the judge must insure that justice is done, and equally emphasized the importance of also ensuring that justice is seen to be done as this requirement is a fundamental principle of our law and public policy.

[17] In the present case, it is in my view that applicant's admitted conduct of ejaculating inside complainant's vagina followed by the insertion of his tongue into her vagina to lick his own sperm, thereafter penetrate complainant's anus with his penis and thereafter take his penis directly from the anus to the mouth of the complainant seriously offended presiding officer's personal morals, values and standards. This was too much to handle for the learned regional court magistrate, and I have no doubt that ordinary members of the public would be uneasy with the applicant's admitted conduct.

[18] However the presiding officer is no ordinary member of the public. He is a judicial officer and is under sworn obligation to discharge justice to all including applicant, impartially and without fear, favour or prejudice. Imposition of personal morals, values and standards on witnesses and the accused has no place in the office of a judicial officer.

[19] Applicant's review application heavily relies on the questions and comments made above by the presiding officer. It is my view that the presiding officer in his questions and comments during trial proceedings clearly and far exceeded the limitations within which judicial questioning should be confined.

[20] However, this in my view still does not mean that it can be inferred that in fact he was prejudiced against applicant and prejudged the case against applicant. I thoroughly read through the judgment of the presiding officer and could find no finding with a direct relation to any of the questions and comments referred to above and I find the judgment on the merits to be well reasoned and motivated, for example how can the complainant's clothes be muddy if applicant claims that they had consensual sex on a mattress with blankets? I therefore do not think that the presiding officer in his judgment was prejudiced against applicant and prejudged the case against him.

[21] I however think that the offending questions and comments obviously created an impression in the minds of all present including applicant that the presiding officer was prejudiced against applicant and had prejudged the case against applicant.

[22] Muller JA in *Rail* case cited above stated that justice must not only be done, but must also be seen to be done.

It is my view that the offending questions and remarks by the presiding officer constitute an irregularity in the proceedings, and public policy requires this court to intervene and grant suitable relief to applicant.

[23] In the result I am of the view that the conviction of the

accused on both counts, count one of rape and count two of robbery are not in accordance with justice and should therefore be set aside and be substituted with the order set herein below:

1. That the convictions of the accused on rape and on robbery are both set aside and substituted with the following:
2. "1. That accused is found not guilty and discharged."

T. PHALANE
ACTING JUDGE OF THE HIGH COURT

I agree

N M MAVUNDLA
JUDGE OF THE HIGH COURT

[24] I have read the judgment of my brother Phalane AJ, and I agree with the order he proposes. I however deem it necessary to comment about the conduct of the magistrate, which is in fact the chagrin of the applicant.

[25] The Constitution of the Republic of South Africa¹¹, accords every person the right to dignity. This right is accorded every person, irrespective of his status and circumstances. Even an accused person enjoys these rights. The converse is that the courts, *inter alia*, must respect the right to dignity of every person who appear before them.

[26] Judicial officers, in my view, when conducting proceedings, must do so bearing in mind the need to ensure that decorum of the court is preserved. This entails showing respect to those who

¹¹ S9 of the Constitution of the Republic of South Africa Act 108 of 1996.

appear before the court, irrespective of their circumstances. There is no room for disparaging language to litigants, witnesses and their legal representatives. *Decorum* must flow from the bench².

[27] *In casu*, the magistrate failed to observe this basic tenant. He was base in his language, for instance directing himself to the applicant he said, *inter alia* "that filthy penis". This type of language needs to be censored in the strongest terms.

[28] It is indeed so that a presiding officer is not expected to sit as a statue. He sits as an umpire, to ensure that the rules of the game are observed. Where necessary, the presiding officer is entitled to ask questions to clear ambiguity or uncertainty³. When discharging this judicial function, he must do so ensuring that decorum of the court is preserved.

[29] The diction of the magistrate reflects a measure of arrogance and disrespect to the appellant⁴ and consequently taints a well reasoned judgment on the merits to the prejudice of a ravaged complainant, thus resulting in the freeing of an otherwise guilty person. But for this diction of the magistrate, I would have urged that the appellant's conviction on both counts be confirmed.

[30] I would recommend that this judgment be brought to the attention of the magistrate concerned.

[31] The proposed order mentioned herein above is made an order

² Vide *S v Owies and Another* 2009 (2) SACK 107 at 113 a-j.

³ *Vide Sv Mosesi (supra)* at 34 f-g "[8] The purpose of a court's inquiry or examination should be to elucidate any points that may be obscured after examination of the parties: *R v Khumalo* 1947 (4) SA 156 (N)."

⁴ H S9 of the Constitution of the Republic of South Africa Act 108 Of 1996.

of this Court.

N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

DELIVERED 11 MAY 2010