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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

Case no: 2023/012763

1. Reportable: No

2. Of interest to other judges: No

3. Revised

12 January 2024

In the matter between

KHAALID AZIZ

APPLICANT

and

DIRECTOR OF PUBLIC PROSECUTIONS

FIRST RESPONDENT

DISTRICT COURT MAGISTRATE

ALEXANDRA

MS BARDARD

SECOND RESPONDENT

LEGAL AID SOUTH AFRICA

THIRD RESPONDENT

REVIEW JUDGMENT

SIDWELLAJ

In this matter an order reviewing the criminal proceedings against the Applicant in the magistrate's court, Alexandra, Johannesburg under case number B656/2022 on 10 October 2022 and setting aside those proceedings was granted by this Court. The immediate release of the Applicant from detention was ordered. The reasons for these orders follow hereunder.

INTRODUCTION

1. On 10 October 2022 the Applicant was tried before the district magistrate sitting at Alexandra, Johannesburg, under case number B656/2022, on a charge of assault with intent to do grievous bodily harm. It was alleged that the Applicant unlawfully and intentionally assaulted R[...] K[...] on or about 12 July 2022 at or near Marlboro, Johannesburg, by hitting her head with his head and by hitting her with open hands all over the body.
2. The Applicant pleaded not guilty to the charge and did not make a plea explanation. He was represented by a candidate attorney, Mr X, in the employ of the Alexandra branch of the Legal Aid Board.
3. The State called only one witness to testify, the complainant, R[...] K [...], and then closed its case. The Applicant testified in his defence and called his father as a witness. He then closed his case.
4. The Applicant was convicted as charged and sentenced to imprisonment for three years without the option of a fine. He was declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act no 60 of 2000. On the same day the Applicant was committed to serve his sentence, and, as at the time of the hearing of this application he was still in detention.

THE APPLICATION

5. The Applicant sought an order, *inter alia*, reviewing the trial proceedings and setting aside the conviction and sentence, and ordering the release from custody of the Applicant from the Johannesburg Prison within forty eight hours of the setting aside of the conviction and sentence.

6. The application was brought in terms of section 22 of the Superior Courts Act no 10 of 2013. This section provides that the proceedings of a magistrate's court may be brought under review before a superior court on the grounds of gross irregularity in the proceedings (section 22(1)(c)) and the admission of inadmissible evidence or the rejection of admissible evidence (section 22(1)(d)).

7. The Applicant also relied on section 304(4) of the Criminal Procedure Act no 51 of 1977, which provides that if it is brought to the notice of a superior court having jurisdiction that the proceedings in which a magistrate's court imposed a sentence not subject to review in the ordinary course, were not in accordance with justice such superior court shall have the power of review of such proceedings set out in section 304.

8. It was argued on behalf of the Applicant that the incompetent representation of the Third Respondent's candidate attorney, Mr X, who conducted the defence of the Applicant, was such that the Applicant was dispossessed of a fair trial. There was a failure of justice resulting in the trial being void *ab initio*. It was also submitted that the Second Respondent, the magistrate presiding at the trial, should have intervened to protect the Applicant from a potential miscarriage of justice.

9. The First Respondent opposed the application on the grounds that the Second Respondent did not preside over the trial in an improper manner in any respect, that she was not misdirected in the exercise of her discretion in

imposing sentence, that the Applicant's representation at the trial was not deficient in any way and that the conviction was based on formidable evidence against the Applicant. The Applicant did not raise the incompetence of his representative till after the case and he did not object during the trial to the service rendered to him or terminate the mandate of Mr X. The Applicant had a fair trial.

10. The Second Respondent filed a notice to abide the decision of this Court, as did the Third Respondent. An explanatory affidavit was filed by Mr X.

THE FAIR TRIAL ISSUE

COMPETENCE OF LEGAL REPRESENTATION: CONSULTATION

11. A few days after the incident giving rise to the charge against him, the Applicant was arrested for this case. Thereafter he was released from custody and was in a position to conveniently consult with his representative before the trial commenced. He was anxious to do so before the date of trial arrived and he made certain arrangements with the Legal Aid Board in Alexandra; however, no consultation for the purposes of trial was held with him or his witnesses before the day of trial by any legal representative or paralegal employee or any other member of the Third Respondent, despite the efforts of both the Applicant and Mr X to do so.

12. The Applicant and his father and Mr X first met at court on the day of trial, 10 October 2022. They were all agreed that a postponement should be sought to consult properly for the trial. The Applicant states in his founding affidavit that Mr X consulted with him during an adjournment of the court. This consultation lasted some twenty minutes and although the case was not a complex lengthy matter he found that he could identify a multitude of issues for consultation. He asked Mr X to apply for a postponement as he was not fully apprised of his defence. In addition, the Applicant had not been aware that that day was the trial date and all his witnesses were not at court. Mr X went into court to speak to the prosecutor about a postponement and returned to report

that the prosecutor was opposed to a postponement. Shortly thereafter the trial commenced. The Applicant asserts in his founding and replying affidavits that no application was made in court by Mr X for a postponement.

13. Mr X in his explanatory affidavit states that he sought a postponement of the matter as he did not have time to consult with the Applicant. The court refused to grant the application 'to [him] and the State' but stood the matter down so that Mr X could consult.

14. The dispute regarding whether or not an application for postponement was made in court by Mr X can be resolved on the papers. There is no record or mention of such an application in the transcribed record of the proceedings in this case on 10 October 2022, from which circumstance I conclude that Mr X is incorrect.

15. In the consultation held at court the Applicant told Mr X that he was not guilty of the offence charged and he told him his version of the incident which led to the case. He read the docket and pointed out to Mr X that the J88 medical report of the examination of the complainant was not signed by the doctor. His father and other family members and his ex-wife were witnesses who could corroborate his version that the complainant had no visible injuries and that she did not complain of an assault by the Applicant when she saw them on the day in question. Instead she said that she feared an assault by him.

16. Mr X states that he 'got [the Applicant's] version as the matter was an assault case and he could gather the necessary facts to enable him to proceed'. The State had only one witness, the complainant, and the matter was not complicated. There were no other witnesses to the alleged assault. He was aware that the Applicant's parents met the Applicant and the complainant after the alleged assault for a mediation session. The Applicant states that the complainant saw and spoke to his witnesses on the day of the incident and a mediation session was planned for later in the week.

17. Whether or not the complainant had visible injuries, as she testified she did, and what she said or did not say about the incident afterwards to the Applicant's witnesses, were material aspects of the case as the Applicant disputed that he assaulted her as she alleged and that she had visible injuries as a result. No proper consultation on these matters was held by Mr X and consequently none of this part of the Applicant's case was put to the complainant in cross-examination. Nor were any of these witnesses called except for the father of the Applicant, whose evidence was cut short by the Second Respondent who was of the view that the father could not testify on any part of his version which had not been put to the complainant. This was an error of law which should not have deterred Mr X from endeavouring to present the Applicant's case fully; however, Mr X appears to have abandoned this aspect of the defence case and he did not apply during the trial for an adjournment to consult with these witnesses.

18. Mr X concedes in his affidavit that the failure to consult prior to the trial date 'contributed to poor preparation on the hearing date of the matter as by then [he] did not know the version of the Applicant'.

19. The entire trial was completed on the same day, in one hour and forty-two minutes, from 13:17 to 14:59. After conviction, sentencing proceedings immediately commenced. There was no adjournment for preparation on sentence. There is nothing in the papers to indicate that any consultation was held on sentence at any stage. A victim impact statement was presented by the prosecution to the court, an affidavit by the complainant in which she related a history of continual grave abuse of her by the Applicant from the start of their marriage. There was no reaction from the defence to this statement, which was not confirmed by the complainant in the witness stand and to the admission of which the defence did not consent. From the evidence it was clear that the Applicant disputed the allegations therein and objection to the admission thereof should have been made. Instructions should have been taken by Mr X on this statement and on sentence generally. An adjournment in order to prepare on sentence should have been sought.

20. Mr X was thus not equipped with sufficient instructions to conduct the defence of the Applicant in material respects and he should have applied for a postponement to prepare properly, before the trial started, in order to do justice to the right of the Applicant to a fair trial.

COMPETENCE OF LEGAL REPRESENTATION: CONDUCT OF THE DEFENCE IN THE TRIAL

21. At the start of the evidence of the complainant the Second Respondent addressed the Applicant *mero motu*, stating,

"Please stop looking at the witness. If you look at her again, I will take you in contempt of court. Do you understand."

There was no response from the defence to this, and no submission by the prosecutor. The complainant continued with her evidence. No justification appears from the record of the trial or the papers before this Court for this denial of the Applicant's right to observe a public trial, as much as any member of the public. In particular, one of the ways in which an accused's right to a fair trial may be exercised is by observation of a State witness while testifying, for the purpose of giving instructions to the legal representative on demeanour. Demeanour is relevant to the assessment of credibility of witnesses. It would have been appropriate for Mr X to have submitted this to the Second Respondent in order that his client might be allowed to fully exercise his right to a fair trial.

22. In her evidence the complainant described the incident in question and then stated that she thereafter visited a doctor who filled out a document. The Second Respondent then asked if there was any objection if the J88 medical report went into evidence. Mr X objected as the report had not been signed by the doctor. The prosecutor made an indistinct submission regarding section 213 of the Criminal Procedure Act and the court then ruled that she would allow the report to go in 'for now', 'provisionally'. The basis on which the report was admitted provisionally was not dealt with.

23. At the request of the prosecutor the Second Respondent then allowed the report to be handed to the complainant. She confirmed her name on the report and then, at the suggestion of the Second Respondent, testified of the injuries she sustained at the hands of the Applicant with reference to the sketches by the doctor on page 4 thereof. She was not, however, allowed to read out the doctor's clinical findings on page 1. The Second Respondent said that she would read that paragraph for herself.

24. This manner of placing the content of the report on record was irregular and should not have been allowed. This part of the evidence by the complainant was a continuous series of leading questions derived from the knowledge and information of another potential State witness. The author of the report should have been called to confirm the report, alternatively, the report should have been signed by her, to make it admissible. See S v Adendorff 2004 (2) SACR (SCA) 185 at [20]; [2004] All SA 645 SCA. Mr X should have objected to this procedure.

25. The complainant had already testified that she had a 'burst' lip, bruises on her eye, bruises on her leg and bruises on her chest from the assault by the Applicant. Her prior evidence of these injuries and how they were caused differed in some respects from her evidence given with reference to the J88 report. The witness confirmed the report, however, and in this way corroboration of her evidence was introduced. There was no other corroboration of the complainant.

26. The evidence of the complainant on her injuries and how they were caused was unclear in some respects. In cross-examination Mr X asked her about her head injuries. She said she had two of them, one from being head butted by the Applicant and 'obviously the other one was from the impact of it'. These two injuries were from the way he head butted her, she said. This was different to her earlier evidence but Mr X did not take it further. This was the only question he asked her about her injuries and how each one was caused. The discrepancies and uncertainties in her evidence on this were not put to her.

This aspect of her evidence was important because the Appellant's version of the physical interaction between them that morning was quite different. Further, as stated above, his witnesses could support him on the question of her injuries and the fact that she did not complain of an assault by him.

27. Not surprisingly, after the cross-examination the Second Respondent found it necessary to 'go through [her] injuries' in questions by the court. At the end of this questioning discrepancies and uncertainties remained. There was no argument on this by Mr X during his address on the merits or on the complainant as a single witness whose evidence was not properly corroborated. The gravity of the assault alleged by the complainant was also not dealt with in argument. Persuasive argument could have been submitted that the Applicant was not guilty of anything more than common assault even on the complainant's version.

28. The prosecution did not produce the necessary certificate, signed by the doctor author of the J88 report, and did not call the doctor to testify. The issue of the admissibility of this report was not referred to again until the stage of argument on conviction. It was then that the Second Respondent stated that it would not be handed in as an exhibit. This issue should have been resolved before the close of the State case. The Applicant was entitled to know what case he had to meet before embarking on his defence. See S v Molimi 2008 (3) SA 608 CC at [37] and [41]. Mr X should have raised this issue at that stage.

29. The J88 report remained in evidence as the Applicant and his witness, his father, testified. The Applicant was cross-examined by the prosecutor on the injuries recorded in the J88 report. During questions by the court, the Second Respondent also asked him to explain how the complainant sustained the injuries, as he and the complainant were the only people present during the incident. 30. There was no objection by Mr X to the Applicant being taxed on the content of the report. The Applicant conceded in this questioning that it was possible that the lip of the complainant may have been injured when he placed his hand over her mouth, which action he did not deny. This was apparently not

consistent with the defence case that she had no visible injuries but Mr X did not ask any questions in re-examination to clarify the position.

31. The father of the Applicant testified that he saw the complainant on the day in question in the afternoon and she told him that she feared an assault by the Applicant, not that he had already assaulted her. During his evidence in chief the Second Respondent twice queried if this aspect of the defence case had been put to the complainant. The prosecutor submitted that they had not and Mr X closed his examination. He should have submitted that the failure to put an accused's version or an accused's witness's version to a State witness is not fatal. It does not make the evidence by the accused or the witness inadmissible; only the weight of the evidence may be affected. See S v Mkhize Unreported judgment [2019] ZASCA Case no 390/2018 1 April 2019. The Applicant's father should have been allowed to elaborate on what he heard or did not hear from the complainant. The evidence he had already given on this was admissible and Mr X should have submitted in argument that it had to be considered by the Second Respondent.

32. The complainant was allowed to testify at length in her evidence in chief on the ill treatment she had received from the Applicant during their marriage of eight months duration. It was only when prompted by the Second Respondent that Mr X objected to this inadmissible prejudicial narration. Not only should Mr X have objected at the start, the Second Respondent should have immediately checked the complainant and rebuked the prosecutor. Nevertheless, later in the complainant's evidence in chief, at the suggestion of the Second Respondent, the prosecutor led her on the way the trauma of her marriage had caused her weight loss and also the loss of her employment. There was no objection by Mr X.

33. In cross-examination Mr X asked the complainant what kind of person the Applicant was to her and her daughter, and why she did not seek help before when the Applicant allegedly abused her. Nothing in favour of the Applicant was elicited through these questions, or anything that could advance his case. On the

contrary, the complainant took the opportunity to denounce him further. It appeared that Mr X was endeavouring to establish the good character of the Applicant without appreciating that this was a most unwise method of doing so. It also appears that he did not realise that in setting up his client's good character he might be exposing him to cross-examination along the lines of the long term abuse alleged by the complainant, when he testified.

34. After the close of evidence, when the prosecutor was arguing, she applied to read the complainant's victim impact statement into the record. This application was granted by the Second Respondent. This statement not only detailed serious physical abuse by the Applicant of the complainant in the past but accused him of theft of her belongings and her impoverishment. It dealt with the crime charged as well. It was received as an exhibit although the Applicant had not yet been convicted. The Second Respondent did not invite Mr X to indicate the attitude of the defence to the admission of the statement at that stage. As the Applicant disputed the content of the statement and as the Applicant had not yet been convicted there should have been an objection to the statement at the conviction stage. At the sentencing stage as well the statement could not be admitted if the complainant did not confirm the allegations therein in evidence, which she did not.

35. The Second Respondent remarked in the sentencing proceedings before she gave judgment on sentence that she had found the Applicant 'guilty now of all this or of this offence and all the ways in which he assaulted his wife'. In her judgment on conviction the Second Respondent referred to some of the evidence of prior abuse and accepted this evidence. Mr X had objected to this evidence on the prompting of the Second Respondent but the court took it into account. Similarly, the finding that the Applicant had committed the alleged past misconduct was based on inadmissible evidence.

36. This finding by the Second Respondent indicated that she had already accepted the impact statement before the sentencing stage, irrespective of the defence stance on it and irrespective of its admissibility or otherwise. There can be no doubt that she was influenced by the statement to impose the maximum

sentence of her penal jurisdiction and to make an example of the Applicant. This was a gross misdirection which is sufficient in itself to vitiate the sentence.

THE TEST FOR COMPETENT LEGAL ASSISTANCE

37. The Constitution guarantees every accused person the right to a fair trial in section 35(3) of the Bill of Rights. This includes the right to legal representation and this means the right to competent representation or representation of a quality and nature that ensures that the trial is fair. The inquiry is into the quality of the representation afforded. See *S v Tandwa and Others* 2008 (1) SACR 613 SCA at [7].

38. An accused has, in principle, the right to proper, effective or competent defence. Whether a defence was so incompetent that it made the trial unfair is a factual question. The assessment of the defence must be objective. See *S v Halgryn* 2002 (2) SACR 211 (SCA) at [14]; [2002] All SA 157 SCA.

39. In the instant case Mr X in his explanatory affidavit states that he is a candidate legal practitioner 'who does not possess the adequate experience and is still under training and supervision.....to get the necessary adequate experience'. That Mr X did not possess adequate experience to conduct an effective defence in this case is borne out by the record of the trial before the Second Respondent. The cross-examination of the complainant was limited to questions on who saw her injuries, on whether or not she provoked the Applicant in the argument they had that day, on what she had been doing before their argument, on her pregnancy test and on the date when she consulted the doctor in this case, in addition to what has been stated above on the defence cross-examination. The Applicant's version was also put. The address by Mr X on the merits was brief. He stated that the Applicant's evidence was that he did not assault the complainant, that he did not inflict injuries on her, that he did not know how they came about and that the Applicant was 'just a normal guy' who was not in a financial position to care for his family but his frustrations never made him abuse his wife in any way. In his address on sentence he stated that the Applicant was a first offender who did not intend injuring his wife and who

was young and unemployed with a child on the way. On taking instructions at the request of the Second Respondent he advised the court that his client was remorseful but that he did not accept that he committed 'those actions'.

40. The Applicant has established that the conduct of the defence at his trial was not competent or effective or proper. The cumulative effect of this circumstance taken together with the other features of the trial discussed in this judgment is that the Applicant did not have a fair trial. In the result the order setting aside the trial proceedings and the conviction and sentence was granted.

G.Y. SIDWELL

ACTING JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

DATE OF HEARING: 09 OCTOBER 2023

DATE OF JUDGMENT: 12 January 2024

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