



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A95/2022

In the matter between:

THEMBA BLOM

Appellant

and

THE STATE

Respondent

CORAM: LOUBSER, J et TSANGARAKIS, AJ

HEARD ON: 6 FEBRUARY 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 6 FEBRUARY 2023

- [1] This is an appeal where the duties of the presiding officer in cases where the accused is unrepresented, again forms one of the grounds of appeal. It is contended on behalf of the appellant that the presiding officer failed to assist or guide the appellant during his cross-examination of the complainant.
- [2] The appellant was found guilty of rape by the Regional Court Magistrate of Bloemfontein in 2014 and sentenced to 20 years imprisonment. He thereafter battled for a long time to be assisted in preparing an application for leave to appeal, which application was eventually only heard in 2022. He was granted

leave to appeal against his conviction and sentence by another Regional Court Magistrate in July 2022.

- [3] The appellant was charged with the offence of rape, and at the commencement of the proceedings, he was duly informed by the Magistrate of his right to legal representation, and of the minimum sentence applicable should he be found guilty. He was also duly informed that he should put his version to state witnesses where ever he disagrees with their evidence, otherwise it could count against him. The appellant indicated that he understood what he was told, and he was then adamant that he wanted to conduct his own defence.
- [4] The appellant, who was 23 years old at the time, pleaded not guilty to the charge. He told the court that he did have sexual intercourse with the complainant, but with her consent. He explained that when he arrived at the complainant that night, he found her with another man, who then left. It later transpired that the complainant is the wife of the appellant's brother.
- [5] The complainant was then called to testify, and she told the court in chief how she was raped that night by the appellant in her house after the appellant had threatened her with a fire-arm and a knife. She testified that she did not consent to sexual intercourse.
- [6] When the appellant cross-examined the complainant, he never put to her the proposition that there were consensual intercourse. He only asked a number of questions that had little to do with his actual defence. The presiding Magistrate did nothing during the course of the cross-examination to guide or to assist the appellant to deal with the aspect of consent.
- [7] After the closure of the State case, the appellant himself testified. He told the court that he found a strange man in the house of the complainant when he went there that night. The man left. The complainant came to stand between his legs where he was sitting, and she begged him not to tell his brother about the other man who was there. She then started to fondle him and to kiss him, he testified. They then went to the bedroom where they had sexual intercourse.

- [8] None of these things were mentioned by the appellant when he cross-examined the complainant. As already mentioned, the Magistrate also did nothing to remind him that he should deal with the allegation of consent. Notwithstanding, the Magistrate held this failure to deal with the aspect of consent against him in his judgement, and it became one of the pillars on which the appellant was found guilty.
- [9] The essential question is now whether it can be said that the appellant had enjoyed a fair trial. In **R v Ramulifho 2013 (1) SACR 388 (SCA)** the Supreme Court of Appeal has confirmed that the right to a fair trial in terms of Section 35(3) of the Constitution includes the obligation on court to assist an undefended accused to present his defence properly. The Regional Court Magistrate was obliged to act as a guide to the appellant at all stages of the trial, the Court found.
- [10] In **S v Mofokeng 2013 (1) SACR 143 (FS)** the Free State High Court specifically ruled that where an undefended accused fails to cross-examine a state witness on a material issue, the judicial officer should question the witness on the issue so as to reduce the risk of a possible failure of justice. See also in this respect **S v Mula 2019 (2) SACR 579 (FS)**.
- [11] The position is therefore that an irregularity has taken place in the trial of the accused, which in turn led to an unfair trial which constituted a failure of justice. The conviction and sentence therefore cannot stand. The following orders are made:
- [12] 1. The conviction and sentence are set aside.
2. The matter is referred to the Director of Public Prosecutions, Free State, for a decision whether the appellant should be tried de novo before another Magistrate.



P. J. LOUBSER, J

I concur:



S. TSANGARAKIS, AJ

For the Appellant:

Mr P. L. van der Merwe

Instructed by:

Bloemfontein Justice Centre

For the Respondent:

Adv. S. M. Mthethwa

Instructed by:

The Director of Public Prosecutions, Bloemfontein