

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

Review no: 236/2015

In the review between:

THE STATE

and

THABA MAFIKA

CORAM: VAN ZYL, ADJP *et* EBRAHIM, J

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 4 FEBRUARY 2016

- [1] This is a review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977. The accused was charged with 2 counts of housebreaking with intent to steal and theft. At the plea stage of the proceedings he informed his legal representative he was unaware of one of the charges against him. It appears that this led to a conflict arising between them as the accused refused to give instructions to his legal representative in regard to that charge. As a result the said legal representative withdraw from the matter due to lack of proper instructions.

[2] The presiding magistrate went ahead and insisted on the charges being put to the accused who refused to plead and requested that his trial be adjudicated before another magistrate. The magistrate noted a plea of not guilty in respect of both charges and proceeded to act in terms of section 115 of the Criminal Procedure Act 51 of 1977 (as amended).

[3] The accused's response was as follows:

“Die Hof is teen my want ek het gevra dat die saak voor ‘n ander hofwant daar is aspekte wat ek nie verstaan nie en die klagtes teen my is gelê ... ander persone gearrester en die polisie het die persone laat gaan ...”

(Record page 2, line 1 – 5)(the underlining is mine)

Despite the accused's objections the magistrate instructed the prosecutor to proceed with the state case. In his judgment on the merits he provides the following reason for adopting this stance:

“Dit was vir die hof duidelik dat die beskuldigde nie ‘n probleem het met die prokeur nie, maar dat hy sê dat hy weier om verhoor te word op ‘n spesifieke aanklag. ‘n Ander prokureur sou nie die saak verander het nie.”

(Record, page 58, lines 20-23)

[4] The trial was finalised with the accused appearing in person, despite his request for legal representation. At page 14 of

the record lines 22 – 23 the accused advised the presiding magistrate:

“I am asking for a lawyer. I cannot represent myself.”

This occurred after the state had led the evidence of the complainant on the second housebreaking charge, which was the charge the accused had objected to at the outset of the trial. When called upon to cross examine the witness, the accused informed the magistrate he was unable to do so as he did not have the required experience.

Once again the magistrate refused the accused the opportunity to obtain legal representation. The following exchange then ensued:

Hof: Ons gaan voort met die saak, u kry 'n geleentheid om die getuie te kruisondervra, dit beteken dat waarmee u nie saamstem nie moet u betwis. U kan dit doen by wyse van vrae en stellings aan die getuie. As u dit nie doen nie dan gaan die hof aanvaar dat u met sy getuienis saamstem. Dan kan u nie later argumenteer of betoog dat hy nie die waarheid gepraat het nie.

Accused: I am not educated. I cannot represent myself.

Hof: Meneer het u dan geen vrae nie?

Accused: If I was educated I would ... had some questions, but unfortunately I am uneducated. I don't, I cannot, I am not able to ask questions.”

- [5] After each witness for the state testified the presiding magistrate explained the accused's rights of cross examination to him. The accused made no effort to respond

to the magistrate's explanation at all. The following extracts from the record of the trial proceedings demonstrates this:

5.1 At page 8, line 6 – 20:

"Nou meneer, het u die getuienis van die getuie gehoor en verstaan?"

BESKULDIGDE: ...

HOF: Geen antwoord. Meneer, u kry nou geleentheid o die getuie te kruisondervra. Dit beteken dit waarmee u nie saamstem nie moet u betwis en u kan dit doen by wyse van vrae en stellings aan die getuie. As u dit nie doen nie gaan die hof aanvaar dat u met haar getuienis saamstem. Dan kan u nie later argumenteer of betoog dat sy nie die waarheid gepraat het nie. Verstaan u dit?

BESKULDIGDE: ...

HOF: Beskuldigde staar net voor hom uit, gee geen antwoord nie. Meneer, 'n laaste keer. Is daar enige vrae?

BESKULDIGDE: ...

HOF: Beskuldigde swyg. Dankie mevrou, u kan maar afstaan."

5.2 At page 14, lines 14 – 25, page 15, lines 1 – 2, page 15, lines 8 -14:

"HOF: Meneer, het u die getuienis van die getuie gehoor en verstaan?"

ACCUSED: ...

HOF: Meneer, het u die getuienis van die getuie gehoor en verstaan?"

ACCUSED: ...

HOF: Staen op meneer. Meneer, het u die getuienis van die getuie gehoor en verstaan?"

ACCUSED: I am asking for a lawyer. I can't represent myself.

HOF: Meneer, ons het reeds by die begin met die aanvang van die saak die situasie met betrekking tot die prokureur uitgeklaar. Ons gaan voort met die saak. ...

ACCUSED: I am not educated. I cannot represent myself.

HOF: Meneer, het u dan geen vrae nie?

ACCUSED: If I was educated I would ... (indistinct) had some questions, but unfortunately I am uneducated. I don't, I cannot, I am not able to ask questions.

HOF: Any re-examination."

5.3 At page 8 lines 11 – 22:

"HOF: Nou meneer, het u die getuienis van die getuie gehoor en verstaan?

BESKULDIGDE: ...

HOF: Beskuldigde swyg. U kry die geleentheid om die getuie te kruisondervra. Dit beteken dat waarmee u nie saamstem nie moet u betwis. U kan dit doen by wyse van vrae stellings aan die getuie. As u dit nie doen nie gaan die hof aanvaar dat u met sy getuienis saamstem. Dan kan u nie later argumenteer of betoog dat hy nie die waarheid gepraat het nie. Verstaan u dit, het u vrae?

ACCUSED: ...

HOF: Beskuldigde swyg."

5.4 Page 26, lines 13 – 16 and line 21 – 22; page 27, line 9:

"HOF: Meneer het u die getuienis van hierdie getuie gehoor en verstaan?

BESKULDIGDE: Ja.

(The magistrate goes on to explain to the accused his rights of cross examination)

HOF: Verstaan u , het u vrae?

BESKULDIGDE: Ja, dit is 'n ander saak. Ek het vrae hierso.

(The accused proceeds to ask one question.)

HOF: Nog vrae?

BESKULDIGDE: No further questions, your worship.”

5.5 Page 32, lines 22- 24; page 33, lines 1 – 4:

(The accused's rights of cross examination are explained)

Lines 5 – 9:

“KRUISONDERVRAGING DEUR BESKULDIGDE: Ek kan dit nie betwis nie. I cannot deny it when it is said that these are my fingerprints because I cannot see it.

HOF: Is dit al?

BESKULDIGDE: Ja”

5.6 Page 37, lines 8 -17:

“(Accused's rights of cross examination explained by the magistrate)

Page 37, lines 18 -19:

“CROSS EXAMINATION BY ACCUSED:I do understand, but I do not have questions for this witness.”

5.7 Page 42, line 6 – 9:

“ACCUSED: Your worship, concerning the second count I have been requesting my lawyer.

HOF: Ja meneer, daardie aansoek is reeds van die hand gewys. U kry 'n geleentheid om die getuie te kruisondervra.”

Line 15 – 22:

“ACCUSED: Your worship, it is my right to get a lawyer, to be given a lawyer.

HOF: Meneer, ek het daardie versoek van u reeds hanteer. Vir die laaste keer, is daar enige vrae aan hierdie getuie?

ACCUSED: I did not undertand your worship when you forbid me the opportunity to get a lawyer while I still need that lawyer.

HOF: Goed, daar is geen vrae van die beskuldigde se kant nie.”

[6] On convicting the accused of both counts of housebreaking the presiding magistrate referred the matter to the regional court for the imposition of sentence in terms of section 116(1)(b) of Act 51 of 1977. The regional magistrate allocated the case was of the opinion that the accused had not been given a fair trial because he had been denied his constitutional right to legal representation as embraced by the provisions of section 73(2A) and (2B) of the Criminal Procedure Act 71 of 1977. The matter was accordingly forwarded to this court for special review in terms of section 304(4) of the Criminal Procedure Act, 71 of 1977.

[7] The extracts of the record quoted reflect an arrogance on the part of the presiding magistrate vis-à-vis the accused as well as an authoritarian stance in taking a summary decision not to afford the accused any opportunity to obtain legal

assistance. In **S v Radebe; S v Mbonani** 1988 (1) SA 191 (T) Goldstone J referred at 195B to:

“... a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.”

At 196 F – I, he added:

“If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se or the absence of the suggested advice to an accused person per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances.”

- [8] An accused's right to legal representation was recognised as fundamental to his right to a fair and just trial long before the enactment and coming into operation of the Constitution. See **S v Seheri en Andere** 1964 (1) SA 29 (A); **S v Shabangu** 1976 (3) SA 533 (A). It is now, since the advent of the new constitutional dispensation imperative that an accused person should be informed promptly of his rights in terms of section 35(3)(e)(f) and (g) which provides:

“Every accused person has a right to a fair trial which includes the right:

...

- (e) to be represented when being tried;
- (f) to choose, and be represented by a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

- [9] 9.1 In the case of a self-confessed unlettered, and unsophisticated person such as the accused the dictum of the United States Supreme Court in **Powell vs Alabama** 287 US 45 (1932) at 68 – 29 comes to mind:

“Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his

defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

9.2 How much more apt and applicable must those remarks be in the accused’s case? Not even his direct appeal to the presiding magistrate’s apparent sense of fair play, by repeatedly alluding to his lack of legal expertise and his feeling of impotence in the conduct of his defence on his own without the assistance of a lawyer as well as his need for a lawyer to bring proper legal skills to bear in the presentation of his case had any effect whatsoever in jolting the magistrate out of his state of anaesthesia as regards the accused’s fundamental right to be legally represented. Despite repeated requests from the accused the magistrate ignored the constitutional imperatives contained in section 35, and dispassionately proceeded to inform the accused of his rights of cross examination, well knowing that the failure of the accused to challenge the state case rested squarely on his refusal to allow the accused an opportunity to obtain someone legally qualified to assist him to properly prepare and conduct his defence. Nor was the accused informed at any time during the trial of his right to apply for legal aid, Had he obtained the assistance of a legal representative, with knowledge and expertise to properly cross examine the state witnesses the outcome of the trial might well have been different.

- [10] The failure by the magistrate to accord to the accused these fundamental rights to which he was entitled constituted a gross irregularity in the proceedings such as to amount to a failure of justice. The accused, in my view, was not properly tried. He was, in fact, deprived by the magistrate of a fair trial. The magistrate's refusal to allow the accused the opportunity to obtain the services of a legal representative was calculated to prejudice the accused in the conduct of his defence and did in fact do so. The accused informed the magistrate that he was not in a position to properly and adequately cross examine the state witnesses so as to elicit evidence which he considered necessary to establish his defence and/or his innocence. The deprivation of the services of a legal representative for the accused was fundamental and resulted in the trial proceedings being vitiated by irregularity. It was essential for the presiding magistrate to stop the proceedings at the very outset of the trial when the accused refused to plead without legal assistance. He did not do so but proceeded to hear evidence prejudicial to the accused, whilst at the same time ignoring the accused's pleas for legal assistance. The charges levelled against the accused were serious with severe consequences for the accused upon conviction. In these circumstances the irregularity was fatal and a failure of justice occurred.
- [11] The convictions are set aside and the matter is remitted to the magistrate, Bloemfontein for the trial to be commenced *de novo* before a different magistrate. In passing I wish to

express my appreciation to the office of the Director of Public Prosecutions, Bloemfontein for the very helpful opinion written by Advocate Giorgi in response to my request therefor.

S. EBRAHIM, J

I concur.

C. VAN ZYL, ADJP

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