



**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

Case number: A40/2016

In the matter between:

DITABA JEREMIAH MOKHOSI

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* MHLAMBI, AJ

HEARD ON:

22 AUGUST 2016

JUDGMENT BY:

RAMPAI, J

DELIVERED ON:

6 OCTOBER 2016

- [1] This was an appeal against the custodial term of 8 years imposed on the appellant. He was aggrieved. He came to us on appeal with the leave of this court granted on petition. The appeal was opposed.

- [2] An incident took place at Sasolburg on 26 July 2014. The police investigation led to the arrest of two men, namely:

Mr Ditaba Jeremiah Mokhosi, who was arrested on 29 July 2014, three days after the incident and Mr Tlole Ben Lehoko, who was arrested on 30 July 2014, four days after the incident.

- [3] The two suspects were subsequently charged. The first charge was one of kidnapping. It was alleged that they unlawfully and intentionally deprived Mr Thabiso Piet Mpondo of his freedom of movement at 5110 Chris Hani Sasolburg on 26 July 2016 by placing him in the boot of a motor vehicle and that they took him from there to the Vaal River. The second charge was that they unlawfully and intentionally attempted to kill the said person by throwing him into the said river.

- [4] The accused suspects were tried in the Sasolburg Regional Court. Ms Ngewu presided over the proceedings. Mr Nhlahesi appeared for the state and Mr Charlie for the defence. The appellant was accused 1. His co-accused, Mr Lehoko, was not before us in these appeal proceedings. Even though an impression was created that he was the second appellant, he did not file a petition for leave to appeal. Therefore, I shall refrain from deciding his fate.

- [5] On 31 July 2014 the appellant was convicted on his plea in terms of section 112 Criminal Procedure Act 51/1977 in respect of both charges. The regional magistrate took the two charges as one for

the purpose of sentence. The appellant was then sentenced to 8 years imprisonment.

[6] The appellant was aggrieved by the sentence imposed on him. On 25 August 2014 he applied for leave to appeal. The regional magistrate refused him leave to appeal on 29 August 2014. He subsequently approached this court by way of a petition. He succeeded. Accordingly, he came to us with the leave of this court granted by Mocumie J *et* Mia AJ on 4 June 2015.

[7] The principal grounds of the appellant's appeal were:

7.1 that the regional magistrate erred by sentencing the appellant on the basis of facts that were contrary to the facts as set out by the appellant in his written statement in terms of section 112(2) Act No. 51/1977;

7.2 that the regional magistrate erred by imposing on the appellant a sentence which was disproportionate to the crimes he committed and thus disturbingly inappropriate.

[8] As regards the first ground, Mr Monareng argued that the regional magistrate incorrectly sentenced the appellant on the strength of the complainant's version instead of the appellant's version, which version the state had accepted. Mr Steyn disagreed. In view of this, I deem it necessary to give a summary of each version in order to determine whether the regional magistrate committed the alleged misdirection.

- [9] The appellant's version was that the complainant, Mr Thabo Piet Mpondo, his friend, owed him money; that he no longer wanted to repay the loan; that he and his co-accused drove to Sasolburg to enquire from him why the complainant was avoiding him instead of settling the debt; that they found the complainant; they put him in their motor vehicle against his will; that they took him to the Vaal River for questioning; that there he became aggressive and that as a result of his aggression, they pushed him into the river where they left him behind. He admitted that his actions of 26 July 2014 were wrongful; unlawful and intentional. Consequently he pleaded guilty to kidnapping and attempted murder.
- [10] On 31 July 2014 the regional magistrate convicted the appellant on his plea. The plea was set out in a formally written "statement in terms of section 112 Criminal Procedure Act 51/1977." The statement was handed up and marked "exi a". I shall revert to the verdict.
- [11] After the verdict, Mr Charlie, counsel for the defence, addressed the court in mitigation of sentence. When he was done, Mr Nhlahesi, the public prosecutor, likewise addressed the court in aggravation of sentence. When he was done, the regional magistrate remanded the case to 5 August 2014 for the evidence of the complainant and the imposition of the sentence.
- [12] On 5 August 2014 the trial resumed. Mr Mpondo, the court witness, took a stand. He testified that he was a police informer. He and the appellant met through a common friend but they were

not friends. He, the appellant and his erstwhile co-accused conspired to rob whites at Denneysville. In the furtherance of the conspiracy a vehicle and firearms were secured. On the day in question the three conspirators set out from Vereeniging to Denneysville to execute the armed mission. However, the mission flopped because they were arrested on the way. Two firearms were found in the vehicle and seized by the police.

- [13] The three conspirators were charged for possession of unlicensed firearms. All were released on R500.00 bail each. Somehow the complainant's co-conspirators got wind of his secret undercover police operations. The appellant sent him an sms and told him that they had received information that he betrayed them to the police. Three more sms from the appellant followed. The appellant threatened him. He warned him that they would teach him a lesson. He showed the sms to his secret police handler and a police captain.
- [14] He feared for his life. Because he got no joy from the police, he fled from Sasolburg to Heilbron. From Heilbron to Denneysville and from Denneysville back to Sasolburg. The appellant and his co-perpetrators were constantly hot on his heels which was why he was always on the run. They did not give up.
- [15] Eventually his luck ran out. On 26 July 2014 he was in hiding at his uncle's place of residence commonly known as 5110 Chris Hani at Zamdela at Sasolburg. He was sleeping in the shack on the premises that night. His cousin, who was sleeping in the main house, shouted to alert him that "Dithabaneng" wanted to see

him. He woke up and opened the door. Instead of Dithabaneng he came face to face with an unknown woman. Before he could ascertain who she was, the appellant unexpectedly emerged behind the woman with a firearm pointed at him and punched him. He warned him to keep quiet. The appellant, aided and abetted by accused 2, took him out of the house to their car, put him into the boot and drove off to Deneysville.

[16] They stopped on the outskirts of Themba Kubheka, a local township. There another perpetrator, the driver of a white Corsa sedan arrived. The three perpetrators assaulted him. They decided his fate there and then. He had to be killed not by shooting but rather by drowning. They stripped him completely naked, tied together his legs and then his arms behind his back. They fastened his limbs with cable strippings or ties. The female perpetrator remained behind with the unidentified latecomer when the two kidnappers drove away with him in the boot once again.

[17] They stopped the car, opened the boot and carried him out of the boot. They put him down on the pedestrian sidewalk on the bridge. The appellant said to him:

“Bye-bye Sparks”.

They then pushed him, naked as he was from the top of the bridge down into the Vaal River. By then he had already partially untied the cable ties around his arms but they were obviously unaware. The scene of the incident was on Ascort Road on the bridge between Deneysville and Vereeniging. He managed to

swim out. He was spotted by a passing motorist who rushed to Sharpville Police Station where the incident was reported.

[18] It is obvious that the complainant's version was completely different from the appellant's version in many factually material respects. Now the question is whether the sentence imposed upon the appellant was substantially influenced by the facts as alleged by the complainant as the appellant contended it was? To that question I turn now.

[19] In the first place I proceed to consider the comments of the trial magistrate during the sentencing phase of the proceedings.

“The reason why I called the Court witnesses (sic) was to establish how big is the amount that would warrant you, I mean killing a person in the way that you sought to do and from the evidence that was led the only money that was spoke (sic) of was R2500.00 for sheep and that amount is quite minimal.”

It is somewhat unclear to me as to why the trial magistrate did not call upon the appellant through his legal representative, Mr Charlie, to specify, in his written statement the exact amount of money that had induced him to kill the complainant. It must be borne in mind that the appellant and not the complainant had made the allegation concerning the motive to kill.

[20] In his direct evidence neither the trial magistrate nor the prosecutor asked the complainant any question about the amount of money the appellant alleged he owed him. The omission to ask him any question concerning the alleged debt watered down

the reason given for calling him. It seemed to me that he was called because the court believed there was more to the incident than the appellant revealed in his statement, “exi a”. Details of and question about the alleged debt were first put to the complainant by the appellant’s counsel. In his indirect evidence he denied the appellant’s allegation that he was indebted to him in the sum of R2500.00 for sheep purchased but never delivered. In brief he dismissed the substantial portion of the appellant’s account of the incident as untrue.

[21] The trial magistrate went further to say:

“Yes, he has testified that you **were planning a robbery** in Deneysville of some whites in (sic) the day of your arrest for possession of firearms.”

There were no such factual averments made by the appellant in his statement.

[22] The trial magistrate further remarked as follows:

- “I mean for you now to go about committing crime is out of greed and not out of need. I mean you **hunted this complainant**, you traced him until you tracked him down, he was in hiding.”
- “You managed **to trick him**, find him and accomplish your mandate of throwing him into the Vaal River.”
- “You mean you have ensured or you tried **to ensure that he does not escaped by tying both his hands and feet.**”

- “I mean to expose somebody, **to strip him and leave him naked**, throw him into the river, tied, it is a serious offence.”

None of those factual averments appeared anywhere in the appellants’ statement. All of them, without any exception were extracted from the complainants’ elaborate version.

[23] During the course of delivering judgment in connection with the appellant’s application for leave to appeal, the trial magistrate remarked that the appellant was so determined to kill the complainant that he hunted him in three different towns before he eventually tracked him down. The trial magistrate commented that the appellant used a certain woman, a stranger who lured the complainant out of his secret haven under a false pretext that she was someone he knew. All those facts obviously stemmed from the complainant’s testimony and not the appellant’s statement.

[24] Given the aforesaid analysis of the trial proceedings and the judicial comments in particular, there can be doubt that the court *a quo* was largely influenced by the testimony of the complainant. The trial magistrate disbelieved the appellants account of the incident but believed the complainant’s. The trial magistrate remarked that the appellant showed no respect for the life of the complainant and that, whether or not he was an informer, there was no justification to kill him. Correct though that view was, it could not redeem the trial magistrate from the shackles of her internalized belief that the version of the appellant was untrue. Accordingly there was substance in the argument that the court *a quo* repudiated the factual matrix as set out in the appellant’s

written plea of guilty in terms of section 112 and punished him on the strength of the extrinsic factual considerations.

[25] In those circumstances, I would not ordinarily hesitate, on that ground alone, to come to the conclusion that the court *a quo* materially erred. **S v Van der Merwe & Others** 2011 (2) SACR 509 (FB). But there is something more in the instant appeal. It is significant in this instant case to revert to what transpired at the trial shortly before the verdict was pronounced. Of course, that concerned the substantive rather than the punitive dimension of the proceedings. The appellant's legal representative first read the appellant's statement, "exi a", into the record and handed it up. Immediately after doing so he proceeded to read the second statement, "exi b", made by accused 2. He then took his seat.

[26] What subsequently followed and mechanically captured reads:

COURT: Will the accused confirm that the statement was compiled in their presence and their cooperation [?], and that the signature at the end of the statement is their own signature.

INTERPRETER: Both confirm, Your Worship.

COURT: You are fully aware of the contents of the statement?

INTERPRETER: Correct, Your Worship.

COURT: This statement, is this document the 29th that this document was signed?

ADV CHARLIE: Indeed, Your Worship.

COURT: The statement will be admitted as Exhibit A and B, for accused 1 and 2 respectively.

JUDGMENT

COURT: **The accused will (sic) be found guilty on the basis if (sic) their pleas to both counts**

PROSECUTOR: Your Worship, the State is not in possession of the SAP69, may the matter be finalised.”

[27] It was quite clear *ex facie* the above extract that the public prosecutor did not participate after the appellants’ plea but before the court pronounced the verdict. He was not invited to say whether the plea accorded with the facts at his disposal or not. That was the first omission. It is not necessary now to guess as to what his response to the obligatory invitation would have been. What has to be necessarily pointed out is that the facts as set out by the appellant were poles apart from the facts as set out by the complainant in his evidence. The latter set of facts were probably embodied in his witness statement. The prosecutor, and indeed the defense counsel, had those facts at their disposal.

[28] After the verdict, the prosecutor stood up, informed the court that he was not in possession of the appellant’s criminal record and urged the court to summarily sentence the appellant without it. He did not then and there draw the trial magistrate’s attention to the procedural misstep that I have outlined in the preceeding paragraph. That was the second omission.

- [29] The first omission was a material procedural irregularity. The substantive merits of the state case were substantially compromised. It is always the prerogative of the prosecutor and not a trial magistrate to decide whether to accept or to reject an accused persons plea. It is also his prerogative to decide on what factual matrix to accept an accused person's plea. Such a prosecutorial decision determines whether or not a lis is reached between the two adversaries. If a prosecutor rejects a plea, a trial magistrate is obliged to note a plea of not guilty. Since a lis has not been reached, a prosecutor is then called upon to lead evidence against an accused.
- [30] On the facts, it is clear and obvious that the critical stage was never reached. The appellant believed otherwise – hence he was aggrieved when he was subsequently sentenced on the basis of the factual matrix not contained in his statement. I have demonstrated that his belief was erroneous.
- [31] The second omission, though not as material as the first, was nonetheless also significant. The way the prosecutor reacted immediately after the verdict, was ambivalent. On the one he created the unfortunate perception that the prosecutor tacitly accepted the appellant's plea. On the other he tacitly downgraded the appellant's factual matrix by explicitly promoting the factual matrix of the complainant's version. Instead of probating and reprobating as he did, the prosecutor was obliged to immediately point out to the regional magistrate, ideally in chambers, that the court erred in prematurely pronouncing the

verdict without first giving him the opportunity of exercising his prerogative by either accepting or rejecting the appellant's plea.

- [32] The deplorable temptation to accept a plea based on distorted facts must be resisted by prosecutors because distortion of true facts will almost invariably have an adverse impact on the ultimate measure of punishment. Ensuring that an offender's plea is grounded on true factual foundation is a prosecutor's exclusive responsibility. That duty must be carried out without any fear, favour or prejudice in order to preserve the integrity of the criminal justice systems. It is also incumbent upon a trial magistrate to ensure that s(he) does not overstep the mark between prosecutorial decisions and judicial decisions. At times that fundamental and defining line of demarcation may be very thin.
- [33] The first omission constituted an irregularity of such a magnitude that it vitiated not only the sentencing component of the proceedings (**S v Pillay** 1977 (4) SA 531 (A) at 535 F-G) but the entire trial proceedings. Both parties were substantially prejudiced by the material irregularity. Since it resulted in a mistrial, neither the conviction nor the sentence should be allowed to stand. In my view, the appeal was not so much about the unlawfulness of the sentence but rather the lawfulness of the verdict. Consequently, I am inclined to nullify the trial proceedings as a whole. The interest of justice dictate that the case be remitted to the regional court for the fresh retrial of the accused persons before a different regional magistrate.

[34] Accordingly I make the following order:

34.1 The conviction and the sentence are set aside.

34.2 The case is remitted to the regional court for a fresh trial of the accused person by a different regional magistrate.

M. H. RAMPAL, J

I concur

J.J. MHLAMBI, AJ

On behalf of the appellant:	Adv. M.M Monareng Instructed by: Botes Mahlobogoane Van Heerden Attorneys Vereeniging
On behalf of the respondent:	Adv. C Steyn Instructed by: Director of Public Prosecutions Bloemfontein