

A 321/15

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

HIGH COURT REFERENCE NO: 17/15

MAGISTRATE'S SERIAL NO:

MAGISTRATE'S CASE NO: SH232/14

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO.
(2)	OF INTEREST TO OTHER JUDGES: NO.
(3)	REVISED.
.....7/5/2015.....	
DATE	SIGNATURE

19/5/2015
JUDGE'S CHAMBERS
HIGH COURT
GAUTENG DIVISION
PRIVATE BAG 442
PRETORIA
0001

MAGISTRATES COURT: NELSPRUIT
PRIVATE BAG X 11207
NELSPRUIT
1860

05 May 2015

In the matter between:

THE STATE

and

SYDNEY NYAMAYABO GQAGQA

CORAM: HUGHES J et TLHAPI J

SPECIAL REVIEW JUDGEMENT

HUGHES J

1. This is a special review in terms of section 304 of the Criminal Procedure Act 51 of 1977 ("the Act").
2. The unrepresented accused was charged as follows in the Nelspruit Regional Court:
 - 2.1 Housebreaking with intent to commit a crime unknown to the State read with the provisions of section 262(2) of the Criminal Procedure Act, Act 51 of 1977.
 - 2.2 A contravention of the provisions of section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Act (Sexual offences and related matters Act 32 of 2007) (Rape).

3. On 17 October 2014 the presiding officer convicted the accused stating the following at page 45 line 19 of the record of the proceedings:

"He is accordingly convicted as charged".

4. The accused's previous convictions were read out to him and he duly confirmed same. Thereafter the presiding officer said the following at page 46 lines 11-13:

" Thank you. I just want to add accused on count 1 you are found guilty with housebreaking with intent to rape and rape. And on count 2 of rape contravening Section 3".

5. Firstly, by doing so the presiding officer purported to invoke section 176 of the Act.

6. Section 176 reads as follows:

"176 Judgment may be corrected

When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment."

7. I am guided by the approach adopted by *Joubert JA in S v Wells 1990(1) SA 816 (A) at 820 E – G*:

"According to Voet a Judge may also, on the same day, after the pronouncement of his judgment add (*supp/ere*) to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain (*explicare*) what has been obscurely stated in his

judgment and thus correct (*emendare*) the wording of the record provided that the tenor of the judgment is preserved.

In my judgment Voet's approach should be accepted as a correct statement of our common law on this matter. It moreover accords with South African practice. In criminal matters it should be read in conjunction with s 176 of the Act if necessary..."

8. The presiding officer having heard the evidence and having dealt with the merits of the case pronounced the accused guilty as charged in respect of count 1 and 2 as per the charges put to the accused. Thus, the initial conviction in respect of count 1 was housebreaking with intent to commit a crime unknown to the State read with the provisions of section 262(2) of the Act and count 2 was rape.
9. With the attempt to amend the conviction on count 1 it is evidently irregular for the presiding officer to convict the accused of a charge not put to him in respect of count 1. This irregularity goes to the merits of the case and this conduct cannot be rescued by invoking the provisions of section 176 of the Act.
10. It goes without saying that it is evident that the purported attempt to invoke section 176 created a duplication of count 2 that being the rape counts.
11. In the result the conviction and sentence in respect of count 1 is deemed to be irregular.
12. A further complication is that during the proceedings the following interchange occurs at page 24 lines 1 to 16 of the record:

"ACCUSED: Your worship I wish to address the Court from where I am standing.

COURT: You can stand anywhere but you must take the oath and testify. You cannot make a statement which is not confirmed under oath. So you must testify under oath.

ACCUSED: Your worship I wish to address the Court from where I am standing. I do not want to go over there.

COURT: So you do not want to testify? Do you just want to address the Court?

ACCUSED: Yes, your worship.

COURT: So you do not want to testify. Is that your case or do you want to call witnesses on behalf of your case?

ACCUSED: I want to call witnesses your worship.

COURT: Do you want to call a witness?

ACCUSED: Yes, but they are not present in court today."

13. Bearing in mind that the accused was unrepresented and that when he gave his plea explanation that he had consensual sexual intercourse with the complainant, the presiding officer recorded this explanation as an admission in terms of section 115(2)(b) of the Act. The presiding officer in my view was duty bound to explain to the unrepresented accused that the admission made as it stood was not sufficient to amount to being evidence. For the said admission to have weight as a defence it was still necessary for him to testify under oath in order for the prosecution to cross-examine and test the veracity thereof.
14. It is evident from the interaction, as set out above, between the accused and the presiding officer that the accused wanted to testify from where he was

standing, that being 'the dock'. In my view had the presiding officer probed further when he posed the question below it would have been clear what the accused intended when he answered the presiding officer. It still is not clear to which question the accused said 'yes':

"COURT: So you do not want to testify? Do you just want to address the Court?"

ACCUSED: Yes, your worship."

On reading the record to me this was not a case of the accused not wanting to testify when he responded when he did. It might be that he did not want to go to the witness box and testify and rather wanted to do so from the dock. But if the presiding officer made further enquiries this court would be in a better position than what it is currently. If for any reason he feared to testify, or feared to testify in the witness box or thought there was no difference in him not testifying, I honestly do not know as it's not evident from the record.

15. I refer to *S v Mungoni 1997(2) SACR 366 at 367 f - g* where the case of *S v Mkhize 1978(2) SA 249 (N)* was quoted:

"In S v Mkhize 1978 (2) SA 249 (N) the learned Judge President said at 251G - H: 'If he is not defended, the judicial officer, when explaining the accused's rights to him at the conclusion of the State case, must make sure that he is under no misapprehension about the matter and appreciates that the statement he made at the beginning of his trial is not evidence in the case and that, if he wishes to lay his story before the Court, he must do so on oath.'"

16. In light of the fact that it was not established whether the accused was saying yes to wanting not to testify or yes to wanting to address the court, in these circumstances the accused was not afforded a fair trial in terms of section 35

of the Constitution even though an attempt of sorts was conducted to establish if the unrepresented accused wanted to testify or just address the court.

17. In this regard align myself with what was stated in *Mungoni supra* at 367 a – c:

"The magistrate did not bother to ascertain why the accused was afraid to go into the box. The apprehension could have been unjustified in which case the magistrate could have cleared up any false notions which the accused might have had of giving evidence.

When the accused said:

'The evidence that I have already tendered in this accused dock is the evidence that I can even tender there'

it should have been apparent to the magistrate that the accused had *not* understood his earlier explanation regarding his s 115 statement."

18. The accused was sentenced on 17 October 2014 for count 1 to seven years and ten years imprisonment for count 2. It was ordered that the seven years in respect of count 1 would run concurrently with count 2. Thus the accused is to serve a total of ten years imprisonment.

19. The special review request is dated 20 December 2014. Legodi J sent the record of the proceedings to the Director of Public Prosecutions (OPP) which acknowledged same on 2 February 2015. The response from the OPP was acknowledged on 2 March 2015 by Legodi J and these were transmitted to the presiding officer on 16 March 2015 for his comments. The presiding officer's response was acknowledged by this court on 30 March 2015.

20. Of concern is the comment made by the presiding officer which clearly smacks of sarcasm to say the least as reflected below:

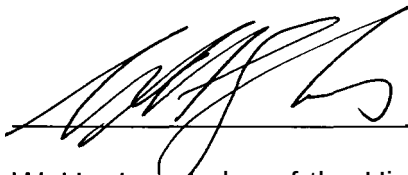
"To my surprise and disbelief I discover I did not explain to accused that his Section 115 Act 51177 statement does not constitute evidence and that if he wanted the court to take cognisance he will have to testify so it can be tested under cross-examination as reflected in Sv Mungoni 1997 (2) SACR 366 VHC"

21. This in my view goes against the grain of a presiding officer responding to the reviewing Judge in a responsible, complete and courteous manner. That much was stated in *S v Mogetwane 2000 (2) SACR 407 at 408 e - g*:

"Wanneer daar 'n navraag of navrae deur 'n Hof aan 'n landdros gerig word, word van laasgenoemde verwag om ten minste verantwoordelik, volledig en hoflik daarop te reageer - iets wat in die onderhawige geval op albei geleenthede nie gebeur het nie. Dit is onaanvaarbaar vir 'n landdros, soos in die eerste navraag die geval was, om nie eens die moeite te doen om 'n skrywe te rig waarin hy sy instemming en/of verduideliking vir sy aanvanklike optrede te kenne gee nie - die landdros se optrede vir soverre dit hierdie navraag aangaan, getuig myns insiens van onbetrokkenheid en disrespek.

Vir soverre dit die reaksie op die tweede navraag aangaan, is die posisie nie veel beter nie. Die indruk wat die landdros daarin skep, is dat die navraag ooglopend ongegrond, onnodig of oorbodig was - ..."

22. In the circumstances I am of the view that the accused in this instance will not receive a fair trial if the matter is remitted to the same Magistrate as it is clear from the attitude displayed by the presiding officer that the rights of the accused entrenched in our Constitution will be compromised.
23. Consequently in the interest of justice the conviction on both counts 1 and 2 and the sentences are set aside. The proceedings are to commence *de novu* before another presiding officer of Nelspruit Regional Court.



W. Hughes Judge of the High Court

I concur and it is so ordered:

V. V. Tlhapi Judge of the High Court