FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A249/2014

In the matter between:-

KGOPHOTSHA PETRUS MOHOJE	Applicant
and	
REGIONAL MAGISTRATE PJ VISSER	1st Respondent
THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS FREE STATE, BLOEMFONTEIN	2nd Respondent

---

CORAM: DAFFUE, J *et* WILLIAMS, AJ

JUDGMENT BY: DAFFUE, J

HEARD ON: 13 APRIL 2015

DELIVERED ON: 14 MAY 2015

I INTRODUCTION

[1] This is a review application brought in terms of the provisions of High Court Rule 53. It concerns a judgment of a regional court magistrate who convicted the accused person on two counts of rape and sentencing him to 10 years' imprisonment on each count, whilst ordering that 8 years in respect of count 2 would serve concurrently with the sentence imposed

on count 1. The effect hereof is that the accused person was sentenced to an effective period of 18 years' imprisonment.

II THE PARTIES

[2] The accused person, Kgophotsha Petrus Mohoje, is the applicant in the review proceedings before us. Adv N J G Dreyer appeared for the applicant. Regional court magistrate P J Visser who has been cited as first respondent does not oppose the review application and a notice to abide was filed on his behalf. Mr Visser's affidavit explaining the events leading to the convictions and sentences form part of the record before us.

[3] The Deputy Director of Public Prosecutions, Free State Province ("the DPP"), is cited as second respondent. The application is opposed and reliance is placed on two affidavits, one by Mr Tshepo Milton Mosethe, the attorney employed by Legal Aid South Africa, (Bethlehem Justice Centre), who appeared on behalf of applicant in the regional court and the other by Mr CHJ Brits, the prosecutor at the time. Adv Chalale appeared on behalf of the DPP.

III THE RELIEF SOUGHT

[4] Applicant seeks an order in the following terms:

> "1. That the judgment and sentence given in the criminal proceedings before the First Respondent in Case Number SH04/2013 be set aside and referred back for trial."

Applicant indicated in the notice of motion that in the event of the application being opposed, he would seek an order that any of the respondents opposing the application be ordered to pay the costs of the application. However during argument Mr Dreyer made it clear that he was not seeking costs against the DPP.

[5] A condonation application was lodged by the DPP, seeking condonation for the late filing of the answering affidavits. Adv Mohlala deposed to the founding affidavit in the condonation application and attached the affidavits of the attorney and prosecutor to that application. The two gentlemen were not called upon to deal with the applicant's averments in the usual order and to admit or deny particular allegations. They merely gave general versions of the events that took place on the relevant day.

IV FACTUAL BACKGROUND

[6] The factual background which is mostly common cause is provided *infra*. In so far as there is a dispute between the parties in respect of specific events or facts, this will be indicated.

[7] Applicant was arraigned in the regional court in Senekal on two counts of rape. He was at all relevant times represented by Mr Mosethe, an attorney and an employee of Legal Aid South Africa as indicated above. The record of proceedings in the regional court forms part of the evidential material before us and is not in dispute.

[8] On 8 May 2014 applicant pleaded not guilty to both charges and made the following plea explanation through his attorney which was confirmed by him at the request of the regional court magistrate:

> "Your Worship, in respect of both counts the defence would plead consent and as such does not dispute the contents of the J88 as well as the DNA report in possession of the state."

Consequently the J88 was handed in as exhibit "A" and the DNA analysis as exhibit "B".

[9] The prosecutor did not call the complainant as first witness, but a Ms F[…] R[…]. She testified about an assault by applicant on the complainant, her friend. She was not led by the prosecutor about any reports made to her by the complainant, but in cross-examination she stated the following:

> "When I arrived at D[…]'s (the complainant) place, she at some stage cried and complained that the accused person had raped her as I heard before from T[…] that the complainant complained that the accused person had raped her.

> When she complained of being raped, did you or T[…] advise her to go and open a case? … Yes.”

The witness testified that she had been informed of a cellphone recording, but that she never listened to the recording.

[10] After completion of the evidence of the witness, the prosecutor sought a postponement by agreement with the defence attorney to 30 July 2014, the reason being that a transcript of the recorded conversation was required. Mr Mosethe requested further particulars before the commencement of the trial, but the State did not provide him with either a copy of the cellphone recording referred to by the prosecutor during the first witness' cross-examination or a transcript thereof. He needed time to listen to the recording and to read the transcript that had not been typed at the time.

[11] On 30 July 2014 the matter resumed. According to the transcript of the court record the prosecutor indicated to the regional court magistrate that the defence attorney would like to address the court on formal admissions to be made. Mr Mosethe made the following statement:

> “Earlier this morning, your Worship, you did indicate that you (sic) received certain evidence which I wanted to discuss with the accused and, your Worship, I have looked at the evidence and discussed the evidence with the accused and as a result the

> defence makes the following admissions in terms of section 220 of the Criminal Procedure Act."

[12] The admissions were read out by Mr Mosethe and the applicant confirmed this whereupon the admissions were formally recorded as such in terms of section 220 of the Criminal Procedure Act.

[13] The transcript of the cellphone recording was handed in by agreement as exhibit "B". It should have been "C". Both the prosecutor and Mr Mosethe confirmed on a question of the regional court magistrate that the cellphone recording was made during the incident, referring to the rape, and Mr Mosethe went further to confirm that he had listened to the recording and that it corresponded with the transcription thereof. Thereafter the State closed its case. The defence case was closed as well whereupon the regional court magistrate convicted applicant based on the evidence led, the change of his plea to guilty on both rape counts and the admissions made by him. I confirm that, contrary to his plea explanation, applicant admitted when he changed his plea that he had had sexual intercourse with complainant without her consent and that he had acted unlawfully with the necessary intention.

[14] It is applicant's case in the review application before us that he was convicted and sentenced "after I was forced by my legal representative to change my plea from not guilty to one of guilty".

[15] Strangely enough and notwithstanding the allegation of duress by the legal representative, the grounds of review relied upon include *inter alia* an allegation that the regional court magistrate committed several gross reviewable irregularities which constituted judicial misconduct. Mr Dreyer conceded during argument that the regional court magistrate did not commit any irregularities at all.

[16] It is applicant's case that on the morning of 30 July 2014 Mr Mosethe, after reading a transcript of the cellphone recording which the applicant had given to the police earlier, advised him to plead guilty, but that he refused. Mr Mosethe then informed him that he was going to see the regional court magistrate in chambers. After a while he returned to applicant, informing him that the regional court magistrate granted him permission to withdraw from the case, but that the regional court magistrate indicated that the case would proceed the same day with or without legal presentation. Mr Mosethe also told him that because he did not want to plead guilty, he would be sentenced to life imprisonment. This caused applicant to be in a "state of panic" and as a result, he "agreed to plead guilty because I believed at that stage that I will go to prison for life if I refused". Applicant further states the following: "I would never have changed my plead (sic) of not guilty to one of guilty if I was aware of the fact that the court will afford me the opportunity to obtain a new legal representative."

[17] In the affidavit filed on behalf of the regional court magistrate no reference was made to the allegations contained in the

founding affidavit of the applicant. Mr Visser recorded the material events in chronological order from the start of proceedings on 8 May 2014 until the convictions and imposition of sentences on 30 July 2014. He mentions that Mr Mosethe regularly appears before him, that *"he is an experienced attorney who always present (sic) his case with diligence and a high degree of ethics."* The regional court magistrate furthermore confirms the version as set out in the record of proceedings to which I have referred earlier. Although the version of applicant was not dealt with at all, it is clear from the version of the regional court magistrate that Mr Mosethe never indicated that he had reason to withdraw and that he was warned that in such a case the regional court magistrate would proceed with the matter that day whether or not applicant obtains new legal representation.

[18] Mr Mosethe states the following in the affidavit attached to the DPP's condonation application: *"The recording itself was against Mr Mohoje as it was incriminating him to the offence. I then advised my client with regard to the recording and its legal implications. Client then instructed me that under this circumstances he intend (sic) changing his plea to one of guilty seeing that the recording which he handed to the police has the great potential of damaging his case. … We then began to draft the admissions which client confirmed and signed. We read the admissions into the record and the client confirmed them on record. He was accordingly found guilty and sentenced. … I did not in any way undermine my professional duties and ethics. I did not influence client to change his plea. His sudden change of plea was influenced by the contents of the recording which he made and gave to the police."*

It needs to be mentioned that Legal Aid South Africa filed a further affidavit by Mr Mosethe, making it clear that it wanted to set the record straight and was not opposing the application. In this affidavit Mr Mosethe confirms the first affidavit, but deals more specifically with the particular averments of applicant. I must also point out that Mr Dreyer did not object to the filing of any of the affidavits and the condonation application was also not opposed. Mr Mosethe attached to this last affidavit his consultation notes reflecting the admissions to be made and which document was signed by applicant. According to him the signature appearing at the bottom of page two of the written admissions on page 96 of the record is that of applicant. I pointed out the signature to Mr Dreyer during his argument and he had to concede that it appears to be that of the applicant as is evident from the founding affidavit. The prosecutor's version is in harmony with those of the attorney, the regional court magistrate and the record of proceedings. Applicant did not file a replying affidavit to deal with any of the averments made by the regional court magistrate, the attorney or the prosecutor.

[19] I have had a look at the transcript of the cellphone recording made by applicant. It is clear that the recording does not commence at the initial encounter between the two parties. It is also clear that applicant tried his best to put leading questions to the complainant, *inter alia* insisting that she should tell him that she liked him. It is apparent that applicant believed that the recording would confirm his version that he had sexual intercourse with the complainant

with her consent. Unfortunately for him, midway through the conversation complainant made the following remark which is indicative of a prior threat by applicant and negates the version of sexual intercourse by consent: "Jy het mos gesê jy gaan my doodmaak."

V CERTAIN LEGAL PRINCIPLES

[20] The leading case relating to the right to legal representation as envisaged in section 35(3)(f) of the Constitution is **S v Halgryn** 2002 (2) SACR 211 (SCA). In para [14] Harms JA (as he then was) mentioned the following:

> "[14] The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. … Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. … The Court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect."

[21] Where an accused has not taken any steps to withdraw his counsel's mandate and expresses no disagreement with the conduct of his case until after the verdict has been given, he is not entitled to challenge the correctness of the verdict on appeal on the ground that his counsel had been negligent in the conduct of his defence. See **S v Bennet** 1994 (1) SACR 392 (CPD) at 397h – 399e.

[22] In **R v Matonsi** 1958 (2) SA 450 (AD) at 456 Schreiner JA referred with approval to the following *dictum* in **Swinfen v Lord Chelmsford,** 157 E.R. 1436 at 1449: *"…. a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial."*

[23] In *casu* there is no complaint that Mr Mosethe was incompetent, but rather that he deliberately lied to applicant in order to persuade him to plead guilty under duress. However it is apposite to consider the authorities relating to counsel's alleged incompetence as these may be helpful to adjudicate this application . I refer to the *dictum* in **Halgryn** *supra.* If complaints are made about the incompetence of counsel, there would be no finality in a criminal trial until the proficiency of counsel who represented the accused and which is complained about after the event had also been adjudicated upon. See **Bennet** *loc cit* at 398g. As mentioned by Borchers J in **S v Mvelase** 2004 (2) SACR 531 (WLD) at 535j it would be *"a sad day indeed if a presiding officer were to be required to assume the incompetence of legal representatives and was thus to treat the accused as if he were unrepresented."* The *dictum* is explained by the learned judge not to mean that if it is apparent to the presiding officer that the legal representative is clearly incompetent, he or she should be inactive, but must inform the accused and his legal representative about certain aspects of the law in order to

ensure a fair trial. However these cases should be the exception and not the norm.

[24] It is accepted that, within the four corners of the ethics which bind each defence advocate, counsel is not free to make submissions designed to destroy his client's case or which may have that effect. He is in control of the presentation of the defence case and he may otherwise bind his client through "vicarious admissions", but where he, to the knowledge of the court, refutes his instructions, he fails to act as a representative. See: **S v Mofokeng** 2004 (1) SACR 349 (WLD) at 357f. Where an accused entrusts his defence to his legal representative, he is as a general rule bound by what his representative does. This rule was held by Broome JP in **R v Muruven** 1953 (2) SA 779 (NPD) not to be "entirely inflexible, but it is clear that a very strong case must be made before a decided case can be reopened on the ground of an error of judgment on the part of the legal representative. But for that, there would be a lack of finality about court judgments which would be entirely against public interest". This *dictum* was cited with approval in **S v Chabedi** 2004 (1) SACR 477 (WLD) at para [19].

[25] The applicant wishes to set aside a criminal conviction and sentence on the ground of irregularity. It is of course trite that an irregularity in the conduct of a criminal trial may be of such an order as to amount *per se* to a failure of justice, which vitiates the trial. The applicant must prove such irregularity on a balance of probabilities. See **Pretorius v DPP** 2011 (1) SACR 54 (KZP) at para [24]. See also:

Pretorius v Magistrate, Durban 2013 (2) SACR 153 (KZP) at para [26] and further, in particular paras [29] and [30]. Contrary to the applicants' complaint about lack of consultation with their legal representative and his consequent incompetence, the court accepted the attorney's version of the events and found that adequate and proper consultation took place. The court concluded as follows in para [30]: *"Now that this has failed (their constitutional challenge in the court a quo), and, as per their new-found legal opinion is doomed to fail on appeal, it would not be in the interests of justice to allow the applicants a further opportunity at escaping liability."*

[26] *In casu* the irregularity upon which the applicant purports to rely is based on the alleged unethical and deceitful – and not merely negligent conduct - of his own legal representative which caused him to change his plea under duress. The averments relied upon remind one of the applicant's version in **Pretorius v DPP** *supra.* Senior counsel in that case advised the accused to plead guilty, failing which he would withdraw from the case. This persuaded the accused to plead guilty which he did. He also confirmed his section 112(2) statement at the request of the presiding officer. Sometime after the case was postponed for sentence the accused lodged an application for review to the High Court, averring that he did not act freely and voluntarily when he offered his plea. The High Court found on the facts that the accused had a choice to accept counsel's advice, or to reject same, thus terminating counsel's mandate, but he decided

"…to place his fate on, and accepted, that advice." The application was dismissed.

[27] In the event of a factual dispute the application should be adjudicated on the DPP's version. The **Plascon-Evans** rule is applicable. It is only possible to adjudicate the application on applicant's version if it is found that the DPP's version is far-fetched, untenable or so improbable that it should be regarded as false.

[28] Mr Dreyer referred us in his heads of argument to the situation where an accused had pleaded guilty, but wished to tender a plea of not guilty in accordance with the provisions of section 113 of the Criminal Procedure Act based on the accused person's version that he pleaded guilty under duress. It is correct that in such a case the accused does not carry any onus, but merely has to show that his proffered explanation was reasonably possible. See: **S v Botha** 1990 (1) SA 665 (TPD) at 674F. In *casu* the applicant pleaded not guilty, relying on consent, but eventually pleaded guilty once the transcript of the cellphone recording was made available and his attorney had an opportunity to listen to the recording, the authenticity of which was never in dispute. Unlike the situation that arose in **Botha** *supra,* applicant who seeks relief in an application for review must prove his case, to wit duress and a consequent fatal irregularity in the criminal proceedings on a balance of probabilities.

[29] I conclude this chapter on applicable legal authorities with a reference to the full bench judgment in **S v Toba** 2008 (1) SACR 415 (ECD), although it is acknowledged that the facts in that matter are not on all fours with the facts *in casu.* An experienced attorney appearing for the applicants in their criminal trial decided not call them to testify in their defence. They were eventually convicted. Their appeal and accompanying review application were dismissed notwithstanding the fact that the attorney refused to submit an affidavit in opposition of the review application. In that matter the applicants conceded that the decision not to call them as witnesses was discussed by the attorney with them and that he had advised them not to testify. The High Court found that the only inference to be drawn from this is that the attorney thought that it would be dangerous for them to testify as they would not stand up to cross-examination. Their attorney, aware of the danger of calling them as witnesses, deliberately decided not to call them, but to close their case. Consequently the court found that it had not been established that the applicants did not get a fair trial. The court referred with approval at p. 426a-b to the US Supreme Court judgment, **Strickland v Washington 466 US** 688 (1984) at 689 where the court stated the following: *"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is too easy for a court, examining counsel's defence after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."*

VI **EVALUATION OF THE FACTS AND LEGAL SUBMISSIONS**

[30] It is accepted that counsel or an attorney appearing for an accused may and should give his advice in strong terms, although there can be no doubt that the ultimate choice, and a free choice, is in the accused person. See **Pretorius v DPP** *loc cit* at para [27].

[31] An accused person that has been properly and competently counselled about the possibility of a sentence of life imprisonment if he pleaded not guilty and where he has been given the choice of rejecting counsel's advice and of accepting other legal representation, should not complain afterwards if he had decided to accept the advice. If a decision had been voluntarily and intelligently made and it revealed no irregularity in counsel's conduct, there is no ground to set aside the trial court's judgment on review. Although the facts *in casu* differ somewhat from those in **Pretorius v DPP** *loc cit,* I am of the view that applicant had a choice to reject the advice and to terminate Mr Mosethe's mandate, even if his version as to what the attorney told him, can be accepted.

[32] Mr Dreyer argued that something must have triggered the decision to change the plea of not guilty to guilty in circumstances where, on applicant's version, he stated under

oath that notwithstanding the transcript of the recording being read to him, he refused to change his plea. This is indeed applicant's version, but it must still be considered with the totality of the evidence and the rule in **<u>Plascon-Evans</u>** must also be applied. Mr Dreyer's argument that the matter should be referred back to the trial court in order to hear evidence of the complainant and the applicant so that the transcript could be put in context, should be adhered to only if we are satisfied that he has proved his case.

[33] We are confronted with two diametrically opposed versions. The applicant's case is that he was confronted by his attorney, stating that he would have to withdraw and that the regional court magistrate indicated in chambers that in the event of a withdrawal, the matter would proceed that day even if it meant that applicant would be unrepresented during the remainder of the trial and that life imprisonment will (not might) be imposed upon him.

[34] There is no doubt that insofar as the complainant was raped twice by the same person, such person and the applicant in *casu* was faced with the possibility that life imprisonment as a minimum sentence might be imposed upon him. It would not be wrong for the attorney alerting him to that fact and, in any event, he was duty-bound to inform him accordingly.

[35] Mr Dreyer conceded that no irregularity was committed by the regional court magistrate. The DPP's version is

confirmed by objective evidence, the record of the proceedings, and also by the regional court magistrate. Mr Mosethe is adamant that he never forced applicant to plead guilty. He mentions the following in the affidavit presented by Legal Aid South Africa:

> "Had I noted any discomfort on the Applicant I confirm that I would have proceeded with the trial on the Applicant's plea of not guilty."

The attorney makes it clear that he did not have anything to gain if applicant was convicted of the offences charged with. There is no doubt, according to the attorney and as the record reflects, that the applicant did not dispute the authenticity of the recording or its admissibility and that the attorney advised applicant of the incriminating evidence contained in the recording and the legal implications thereof. According to Mr Mosethe applicant's sudden change of his plea was influenced by the incriminating evidence contained in the recording and his advice regarding the legal implications.

[36] It is therefore necessary to consider the two diametrically opposed versions in order to establish whether applicant is entitled to the relief claimed. There are no improbabilities in the version of the DPP, and in particular that of Mr Mosethe and it is not possible to find that this version is far-fetched, untenable or false. Bearing in mind the **Plascon-Evens** rule it is unnecessary to make any finding as to the improbability or credibility of applicant's version. If the matter is evenly

balanced, applicant must fail. However I am of the view that it is necessary to mention that applicant probably believed that the cellphone recording would prove his version that he had sexual intercourse with the complainant with her consent. It is clear that the recording was not made from the initial encounter and it is furthermore clear that applicant tried his level best to influence complainant to say whatever he wished her to say. Unfortunately for him complainant mentioned midway through the recording that applicant had threatened to kill her. The transcript is in my view no proof of a sexual encounter between two lovers or two consensual partners, but quite the contrary. I am not prepared to accede to Mr Dreyer's request that the matter be referred back to the regional court for the trial to continue before the regional court magistrate and the leading of the evidence of the complainant and applicant in order to establish the truth about or alleged real context of the conversation between the two parties.

[37] The applicant went further in his founding affidavit to state that he was in a state of panic when he heard that the regional court magistrate granted permission to his attorney to withdraw from the case and that the matter would proceed that day with or without a legal representative. Furthermore, applicant would be - not might be - sentenced to life imprisonment. This version is so improbable that it can safely be rejected as false. I have reason to believe that if it was really the intention of the regional court magistrate to finalise the trial in the event of Mr Mosethe withdrawing from

the case, he would have informed the applicant accordingly in open court and after allowing him an opportunity to address him in that regard.

[38] There is no acceptable evidence that Mr Mosethe acted unethically or that his conduct constituted judicial misconduct that should be regarded as a gross reviewable irregularity. If applicant was not satisfied with the advice given at that stage of the proceedings, he should have declined to make the admissions and should have terminated the mandate of his attorney. He did not do so and must bear the consequences. It would be too easy for convicted persons to show dissatisfaction with their legal representatives by attacking the integrity of legal representatives once the criminal trials have been concluded and for the court to come to their "rescue" on their mere *ipse dixit.*

[39] The applicant has not proven on a balance of probabilities that any reviewable irregularity has been committed. There is no merit in the application and it should be dismissed. Neither the applicant, nor the DPP sought costs orders in the event of they being successful and consequently no costs order shall be made.

VII <u>THE ORDERS</u>

[40] The following orders are made:

1. Condonation is granted for the late filing of the second respondent's answering affidavits.
2. The applicant's application for review is dismissed.
3. The convictions and sentences of the regional court in case number SHO4/2013 are confirmed.

J. P. DAFFUE, J

I concur.

A. WILLIAMS, AJ

On behalf of applicant: Adv. N. J. G. Dreyer
Instructed by:
Jacobs Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv. Chalale
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

/eb