



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

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

DATE

SIGNATURE

CASE NO: A62/2012

In the matter between:

WILLIAM NKUNA

APPELLANT

V

THE STATE

RESPONDENT

RESPONDENT

JUDGMENT

RATSHIBVUMO AJ:

1. Mr. Nkuna, the appellant, was sentenced to 30 months imprisonment on the 17th November 2011 following a conviction by Mokgopong District Court on a charge of theft. It was alleged that he stole a cell phone from a motor vehicle belonging to Ms. Dalene Du Plessis (the complainant). He appeals against the conviction and the sentence with the leave of that court.
2. Two issues arise from this appeal. Firstly, whether the magistrate's prior knowledge of the appellant's previous convictions, obtained during the bail application in which he presided, precluded him from presiding in the subsequent trial; secondly, whether the proper approach was applied to the State's circumstantial evidence.
3. During the bail application before same magistrate who later convicted him, the appellant disclosed two previous convictions of theft and an outstanding case of housebreaking. Bail was refused, after the magistrate remarked that the appellant had 'the tendency to commit crimes, being a repeat offender (with) previous convictions.'
4. The issue is the appropriateness of the magistrate to have presided over the trial under those circumstances. In the ordinary course, a judicial officer is not entitled to know of an accused's previous convictions until after the conviction. Sections 89, 197, 211 and 271 of the Criminal Procedure Act¹ are all against the disclosure of

¹ Act 51 of 1977.

previous convictions at any stage before the conviction of an accused person. Section 211 in particular provides,

“Except where otherwise expressly provided by this Act or the Child Justice Act, 2008, or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he or she has been so convicted.”

5. It is a long standing practice in our courts that for the judicial officer to be informed of the previous convictions before the accused is convicted constitutes an irregularity that nullifies the proceedings as a whole. In *S v Mavuso*², the Appellate Division set aside the conviction and the sentence because it held that the proceedings were irregular after the accused was convicted by a judicial officer who knew his previous convictions.³ In *S v Mdletye*⁴, the High Court did not attach any weight to the fact that the accused had pleaded guilty to the charge, thereby minimizing the prejudice. Once the previous conviction were known to the magistrate during questioning in terms of section 112 (1) (b) of the Criminal Procedure Act, the appeal court found that it constituted irregularity and thereby nullified everything that followed. In *S v Mofokeng and Others*⁵, although the evidence that the accused were guilty of a crime of housebreaking with the intention to steal and theft was overwhelming, the knowledge of previous convictions to the magistrate constituted an irregularity that nullified the proceedings as a whole.

² 1087 (3) SA 499 (A).

³ In this case the public prosecutor had asked the questions to show that the accused knows the dagga by reminding him of his previous conviction. This was after the accused had claimed he did not know dagga.

⁴ [2005] JOL 13933 Tk.

⁵ See unreported judgment, case no. A421/11 by the Gauteng South, Johannesburg delivered on the 12th October 2011.

6. In *S v Bruinders*,⁶ it was observed that a judicial officer fails to uphold the constitution that requires him to apply the law impartially if he allows his reasoning to be affected by bias. The appearance of bias may be enough to vitiate the trial in whole or in part.⁷ The very fact that the appellant knew that the magistrate who presided over the trial knew of his previous convictions, was enough to create a reasonable apprehension on his part that the magistrate would not be impartial. The approach in *Bruinders*⁸ marked a departure from *Hlati*⁹ where the court had found no irregularity in a case where the magistrate proceeded with the trial after she was apprised of the accused's previous convictions. I prefer the reasoning of the court in *Bruinders*. My respectful view is that once the circumstances create the perception of bias; a judicial officer becomes disqualified from presiding any further. Failure to recuse herself/himself under those circumstances, renders the proceedings a nullity, irrespective of the merits of the case.¹⁰

7. Apart from that, *Hlati* is distinguishable, on the facts, from the present case. First, in that case, the accused's previous convictions were disclosed to the magistrate after the trial had commenced, when the accused applied for bail. Second, the magistrate was the sole presiding

⁶ 2012 (1) SACR 25 (WCC) at 29

⁷ *S v Roberts* 1999 (2) SACR 243 (SCA) at 249.

⁸ *Supra*.

⁹ In *S v Hlati* 2000 (2) SACR 325 (N) the high court had said the following "[e]vidence of previous convictions was legally irrelevant because of the highly prejudicial effect it had on the mind of the trier of fact: the issue was not however whether knowledge of an accused's previous conviction had caused bias on the part of the presiding officer but whether such knowledge had created a perception that he may have been biased against the accused in the trial."

¹⁰ See *S v Roberts supra*.

officer in a small magisterial district. Finally, the court found that the evidence against the accused was overwhelming.

8. Back to the facts of the present case. The magistrate's lack of impartiality manifested itself once the appellant was convicted. The prosecutor requested a postponement in order to obtain the appellant's record of previous convictions (the so called SAP 69). Without inviting the defence attorney's response, the magistrate impatiently demanded to know the reason for the non-availability of the SAP 69, and directed that two police officers, whom one was apparently the investigating officer, to be in court 'within 15 minutes' after the adjournment. On resumption of the proceedings, the prosecutor was in possession of the SAP 69 form, and read out the appellant's previous convictions, which the appellant disputed. Without any indication that the State intended proving the previous convictions, the magistrate indicated his intent to postpone the matter for 'expert evidence', after which the accused admitted the previous convictions.
9. From the above, it seems that the magistrate was instrumental in availing the SAP 69 form, and in ensuring that the appellant admitted his previous convictions. Not a single question was asked to establish what the appellant disputed in the SAP 69 records or why he changed his mind almost immediately. In my view, the magistrate's judgment was clearly blurred by his prior knowledge of the appellant's previous convictions. His conduct described above, is testimony to that fact. He should have recused himself, and his failure to do so, vitiated the proceedings. On that basis alone, the conviction should be set aside.

10. Even without the conclusion reached above, the conviction of the appellant falls to be set aside on the basis of insufficiency of the evidence. The accused was convicted on circumstantial evidence since no one saw him steal the phone. The complainant testified that she saw a person running from the direction of her car when she emerged from a shop. It was only after observing that her car had been broken into, and her cellphone stolen, that she suspected that the person she saw running was the thief. She dialled her number, and it was answered by a person who identified himself as 'William' (the appellant's name is William). She reported the matter to the police, and gave the clothing description of the man she saw running, since she did not observe his face. Coincidentally, the police officer to whom the report was made, remembered seeing a man with clothes matching those described by the complainant, earlier that day at the police station. That person happened to be the appellant. He also knew where he resided. The said phone was not recovered.
11. *R v Blom*¹¹ laid down the basic requirements for a conviction based on circumstantial evidence. There are two cardinal rules of logic which cannot be ignored: first, the inference sought to be drawn must be consistent with all the proved facts. Secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. In the present case, it cannot be the only inference that the person seen running by the complainant was the appellant. Even if he was, it cannot be the only

¹¹ 1939 AD 188.

inference to be drawn that he was a person that stole the complainant's phone. The complainant herself did not see anything amiss in the man running because he could have been running just past her car. Inference should not be mistaken for speculation.¹² I conclude therefore that the evidence was not sufficient to convict the appellant.

12. To sum up, the magistrate should have recused himself from hearing the trial in view of his knowledge of the appellant's previous convictions. Further to this, the evidence upon which the appellant was convicted falls short of the basic requirements of circumstantial evidence laid down in *Blom*¹³ case.
13. In the result the following order is made:
 1. The appeal against the conviction is upheld;
 2. The conviction and the resultant sentence imposed by the trial court are set aside.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree,

T.M. MAKGOKA

¹² S v Cooper 1976 (2) SA 875 (T).

¹³ Supra

JUDGE OF THE HIGH COURT**APPEARANCES:**

DATE HEARD : 18 APRIL 2013

JUDGMENT DELIVERED : 6 MAY 2013

FOR THE APPELLANT : ADV. O.K. MATSHEGO

**INSTRUCTED BY : PRETORIA JUSTICE CENTRE,
PRETORIA**

FOR THE RESPONDENT : ADV J.J JACOBS

**INSTRUCTED BY : DIRECTOR OF PUBLIC
PROSECUTIONS, PRETORIA**