

In the KwaZulu-Natal High Court, Pietermaritzburg
Republic of South Africa

Case No : AR594/11

In the matter between

Suresh Haripersadh

Appellant

and

The State

Respondent

Judgment

Lopes J

[1] On the 13th September 2009 the appellant, a 56 year old male, was arrested and charged with the crime of rape in that on or about the 24th August 2009 and near Malakazi he raped the complainant, a ten year old girl. On the 9th March 2011 he pleaded not guilty and on the 10th March 2011 he was convicted and sentenced to undergo 12 years imprisonment.

[2] This matter comes before us by way of leave to appeal granted by the learned magistrate on the 15th July 2011.

[3] As the attitude of the learned magistrate, which is demonstrated throughout the trial, impacts upon the fairness and justice of the conviction of the appellant, it is unfortunately necessary to comment upon a number of issues in that regard .

[4] When the charge was put to the appellant the magistrate is recorded as saying to the prosecutor :

‘Don’t worry with all the sections. Just put the charge against the accused.’

This is an unfortunate approach on the part of the magistrate. The sections to which she refers are those sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 and s 51 of the Criminal Law Amendment Act, 1997. The provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 which are listed in the charge are important and relate to definitions and the applicability of various defences and the approach to be adopted by the magistrate with regard to the evidence. (It is unclear whether the charge sheet intends to refer to s 69 of the Act, or, whether that was intended to be a reference to s 60).

[5] The provisions of s 51 of the Criminal Law Amendment Act 1997 deal with the minimum sentencing provisions for crimes such as rape. It is important that every accused person should understand, before the charge is put to them, that it is read together with any relevant minimum sentencing provisions.

[6] That this is an important factor is demonstrated by the fact that the prosecutor, alive to the necessity that the appellant be apprised of those provisions, later asked the learned magistrate to enquire from the appellant's legal representative whether he had explained the provisions of s 51 to the appellant. When the learned magistrate asked the appellant's legal representative whether he had explained those provisions to the appellant, he said that he had not. The learned magistrate is then recorded as saying

'Please do so. Proceed. Lead your evidence please. Please proceed.'

The attitude of the learned magistrate, which is evident throughout the trial and to which I shall refer to further below, demonstrates an impatience to get on with the matter and shows scant regard for the proper conduct of the trial. It is unhelpful to have an accused person plead to a charge without fully understanding the nature and import of it. To have the legal representative of an accused explain the import of the charge after it has been put and the accused person has pleaded, is unhelpful. A full and proper explanation of the various statutory provisions, together with which a common law charge is to be understood, should be fully explained to an accused person prior to the plea stage in the trial. It is only when an accused person has a proper understanding of the charge levied against them that they are able to arrive at a reasoned decision as to how they should plead.

[7] When an accused person is legally represented, the presiding officer may be inclined to accept that the accused has been fully apprised of the charge which he

faces and the implications of any statutory provisions contained in the charge sheet, which, in the ordinary course, one would not expect an accused person to be familiar with or to be able to understand without explanation. However, where, as in this case, the learned magistrate requires that the charge sheet be read without reference to the statutory provisions, and then becomes aware that the appellant's legal representative has not explained them to him, but allows the trial to continue anyway, then the learned magistrate has failed in her duty to ensure that the appellant's rights are protected.

[8] Where, as in the present matter, the learned magistrate became fully aware of the fact that the legal representative of the appellant had failed in that duty, it was incumbent upon the learned magistrate to stop the proceedings and ensure that the appellant is properly apprised of his legal rights before proceeding with the trial.

[9] The impatience of the learned magistrate to have the evidence disposed of is indicated in the following exchanges :

- (i) when the appellant's legal representative was attempting to explain why the defence was disputing the contents of the J88 document the learned magistrate interrupted him and stated :

‘Lead your evidence, please.’

- (ii) when the prosecutor was leading the complainant's mother, and before the prosecutor had a chance to finish his examination in chief the learned magistrate asked :

‘Any further questions?’

- (iii) When the appellant’s legal representative started cross-examining the complainant, he questioned her on the distance from where she met the appellant on the day in question to his house, where he was alleged to have taken her. When the complainant said :

‘It’s very far’

the legal representative decided to leave that issue and the learned magistrate said :

‘Yes, a young child like this it is doubtful. Any further questions?’

At this stage the appellant’s legal representative had asked approximately ten or eleven questions and had not yet begun to deal with the issues in dispute. After he had asked another five questions the prosecutor objected to the fact that the complainant was being asked a question which she had already answered. The learned magistrate then stated :

‘I think move on. Any further questions?’

- (iv) The appellant’s legal representative attempted to explore the relationship between the appellant and the father of the complainant. In particular when he sought to explore the attitude of the mother of the complainant to the friendship between the father of the complainant and the appellant, the learned magistrate intervened on a number of occasions suggesting to the legal representative that he had already canvassed the relationship between the father of the complainant and

the appellant. After putting to the legal representative three times that he had already canvassed that issue she continued :

‘Any further questions based on the evidence that’s been given?’

At that stage the legal representative was attempting to explore the suggestion that the mother of the complainant had a motive for implicating the appellant in the rape of the complainant. The motive was that she did not like the fact that the father of the complainant visited the appellant. Given the instructions which were obviously given to the legal representative it was incumbent on him to explore this issue fully. The legal representative cannot in any way be said to have been bullying the complainant or being unduly repetitive in his questioning.

In my view the learned magistrate’s interventions in the cross-examination of the complainant were both unnecessary and demonstrated again her impatience to finish the trial.

[10] Immediately after the previous interventions the learned magistrate questioned the appellant’s legal representative regarding the defence case. She asked :

‘Is the accused denying seeing the child on that day or what?’

This followed an earlier exchange where the learned magistrate had asked the legal representative of the appellant whether he admitted that the complainant correctly

identified him or whether it was necessary to conduct a pointing out. She then requested that the legal representative record his answer as an admission.

[11] At the outset of the trial, and after the appellant pleaded, his legal representative had recorded that the defence elected to remain silent, that there would be no s 115 statement forthcoming from the appellant, and that he would make no s 220 admissions.

[12] In my view it is improper for the learned magistrate to have requested that something put by the appellant's legal representative to the complainant be recorded as a s 220 admission. Judicial officers should not, during the course of cross-examination, interfere with the legal representative of an accused in order to extract admissions regarding the elements which the State is required to prove. If any question which is asked by a legal representative seems unclear it is perfectly proper for a judicial officer to intervene in order to obtain clarity on the question. That is not what was occurring here.

[13] After the complainant had completed her evidence the learned magistrate suggested to the prosecutor that when it is necessary to call a doctor in a trial, the doctor should be phoned in the morning in order to enable him/her to travel in order to avoid court delays. There was nothing improper in her doing this.

[14] However when the appellant's legal representative indicated that he wanted to question the doctor the learned magistrate said :

'Give me the doctor's name and telephone. Then I'll phone him or her quickly. Then while we 're testifying I am hoping that the doctor can then travel here. If you do it last minute, then it's very hard to get them. They go into theatre and all sorts. What's the doctor's name? I'll stand down for a few minutes and phone.'

[15] Although the record appears to indicate that the learned magistrate did not ultimately phone the doctor, it is the attitude of the learned magistrate and her willingness to intervene in the prosecution case which is alarming.

[16] It is not the function of any judicial officer to ensure that witnesses attend court by going to the lengths of telephoning them and asking them to attend. That is the function of the prosecutor, or, in the event that a witness is called by the court, by one of the legal representatives involved in the trial or the court staff. It ill behoves a judicial officer to descend into the conduct of a prosecution by becoming involved in arranging for the attendance of witnesses.

[17] The message, which the learned magistrate was giving to the accused by her statement that she would phone the doctor to ensure his attendance, suggested an association between the learned magistrate and the doctor which immediately called into question the impartiality of the court. Although a judicial officer in criminal proceedings is not in the position of a referee, and is occasionally obliged to ensure

that witnesses are called, an accused's perception of impartiality on the part of the court must be carefully and zealously guarded.

[18] The learned magistrate's conduct in this regard has the undesirable consequence that it reinforces the overall impression in the record that she merely wanted to have the case disposed of as quickly as possible. Whilst any steps to ensure the expeditious conduct of legal proceedings are to be applauded, they must always be subject to the legal principle that justice must be seen to be done.

[19] The fair and just prosecution of the appellant was further hampered when the appellant gave evidence. At the outset of his evidence his legal representative made it clear that the appellant had a hearing problem. In fact the court recorded that everyone would have to speak louder because the appellant was hard of hearing. This was amply demonstrated by the first series of questions which were asked of him. He was asked whether he knew the child that was giving evidence he said he did not. He was then asked whether he knew the complainant who was named. He said :

'I know the man.'

and when he was asked to speak louder, he said :

'I know this man.'

[20] The record shows that it was then put to the appellant that it can be seen that his mouth is moving and he is making sounds, but that the words which he is uttering cannot be heard. Although it is unclear from the record it seems likely that this was put to him by the learned magistrate rather than his legal representative.

[21] The evidence of the appellant demonstrates an extensive degree of confusion on his part as to the basis of his defence. He related two separate alibis, one allegedly for the 24th August 2009, the date on which the complainant was attacked. He testified that he had gone to work, he had left work after a short while going to the doctor before returning home late in the afternoon. Repeating that this was the 24th August, it was put to him that the complainant said that he had raped her on the 24th August 2009, and he was asked whether this was the same day he was talking about when he went to work, became ill and then went to the doctor. The appellant replied that it was not and that the day he went to the doctor was not the same day the complainant alleged she was raped. He then said that on that day he had gone to work at 7.30 and finished at 4.30 in the afternoon.

[22] Whether as a result of his poor hearing, confusion over the instructions which he gave to his legal representative, a level of confusion in his own mind as to the dates which were not dealt with properly in consultation with his legal representative prior to the trial, or simply that he was an extremely poor witness because of his guilt, the evidence of the appellant can only be described as a shambles. Indeed, his evidence was so poorly presented that it fell to be rejected without even the appellant being cross-examined.

[23] It is clear from the record that more should have been done, both by the appellant's legal representative and the learned magistrate to ensure that the appellant gave his evidence in a manner which adequately resolved the suspicion that he may not have been hearing the questions properly, and if he did, that he properly understood the import of them.

[24] What is the result of all of the foregoing? Does it mean that the trial of the appellant was so poorly conducted that he has been prejudiced in his defence and that it would be unsafe for this court to rely upon the conviction, or is the evidence sufficient to have convicted him in any event?

[25] To answer this question one also needs to look at the content of the remainder of the evidence. The evidence of the complainant is not satisfactory. She gave evidence that she had only been raped once by the appellant, and related how that had happened. However, when her mother gave evidence she said that the complainant had told her that the appellant had put sellotape over her mouth and tied her hands behind her back when she was coming from school. This had formed no part of the evidence of the complainant.

[26] The mother of the complainant said that the complainant had told the social workers that the incident occurred three times to her (the complainant). The complainant's mother later said the doctor told her that the complainant had said that

she was sexually abused three times. This did not emerge in the evidence of the complainant.

[27] The learned magistrate in her judgment records that she views these contradictions in the evidence between the complainant and the complainant's mother as being a case of omission on the part of the complainant rather than contradiction, in that she was not asked about other days and did not mention that she had been raped on other days. Be that as it may, one would have expected the prosecution to be alive to the number of times which the complainant had been raped and to have asked questions which would have elicited these facts. That was not done.

[28] When the complainant was asked whether the appellant had done one, two or three things to her, she said :

'No.'

[29] In her evidence the complainant, when asked whether her mother had made any comments about her father visiting the appellant, she said :

'She would say that she didn't like the fact that Suresh was touching my breasts.'

This was a remarkable piece of evidence indicating some prior knowledge on the part of the complainant's parents of improper conduct on the part of the accused towards the complainant. This evidence was seemingly ignored by the learned

magistrate and the prosecutor, and not in any way dealt with in the evidence of the complainant's mother.

[30] A further disquieting aspect is the contents of the J88 Medical Examination Form compiled by Dr S Govender on the 14th September 2009. This examination was apparently conducted after the arrest of the appellant. Dr Govender concludes in her report that her findings are consistent with vaginal penetration. This is despite the fact that every aspect of her gynaecological examination, as recorded in her report are recorded as 'Normal', 'Nil', 'Not done' or 'Not examined'. The only exceptions to this are the recording of clefts at four and seven o'clock and a discharge which is white in colour. The recordal of clefts is consistent with the schematic drawing of her findings indicating healed scars in those positions. No expert evidence was put before the court explaining what this meant, or how this contributed to the doctor's conclusions, yet the learned magistrate was happy to rely upon the doctor's conclusions.

[31] The findings of the doctor, however, appear to have been based on information conveyed to her by the complainant's mother. This is evident from her clinical findings where she records :

'History from mother. A known male has sexually assaulted her child several times. Dates and times are not known.

History from child : a known male "raped" her.

No further history'

The notes by the doctor appear to indicate that she asked the complainant's mother when the rapes had taken place, but the complainant's mother was unable to say when. This is in apparent contradiction to the evidence of the complainant's mother where she identified the date of the 24th August as being the date upon which the complainant was first raped. She refers to that date, apparently because the complainant had arrived home late from school on that date and she had taken a sjambok to her because she was late. At that time or later, she noticed that the complainant had wet herself. The complainant's mother later contradicted her evidence and said that she only noticed in September that the complainant was wetting herself, whereupon she examined her and noticed an injury on her private parts.

[32] Although I am not suggesting that the complainant's evidence should be disbelieved in its entirety, nor indeed that the complainant was not raped, the conclusion with which one is left after reading the trial record is an overwhelming feeling of disquiet.

[33] There is a discourteous, unseemly and injudicious haste in the learned magistrate's conduct of the proceedings. This placed an unnecessary and unwarranted urgency on the proceedings and cast a subliminal shadow of subtle pressure to move on at pace, and was applied to both the State and defence representative. Indeed, in this court there was a concession by Mr *du Preez*, counsel for the State, that it seems from the record that the appellant's legal representative was pressured into accepting the J88 when he had initially indicated

that he wanted to question the doctor. This resulted in an unquestioning acceptance of the doctor's conclusions which seems to have been undesirable in the circumstances.

[34] Given the conduct of the trial, the behaviour of the learned magistrate, the conduct of the appellant's legal representative, the lack of hearing on the part of the appellant and the effect that this manifestly had upon the evidence which he gave, I am left with the conclusion that this court cannot safely rely upon the conviction. This is not a case where the appellant has demonstrated his innocence, but rather that interference by the learned magistrate, and the ineptitude of the prosecution and the defence have led to a situation where he did not have a fair trial. This was also conceded by Mr *du Preez*.

[35] It is both sad and regrettable that the administration of justice should have failed the complainant in this matter. Judicial officers should always be astute to ensure that hearings are conducted in an appropriate way. They should not allow their frustrations and impatience to cause them to dispense justice in undue haste, and with scant regard for the rights of accused persons.

[36] The Registrar is directed to deliver a copy of this judgment to the learned magistrate for her to note the above comments.

[37] In the circumstances the appeal succeeds, and I propose that the conviction and sentence are set aside.

Lopes J

Kruger J : I agree

VahedJ : I agree.

Date of hearing : 8th March 2013

Date of judgment : 14th March 2013

Counsel for the Appellant : S Franke (instructed by Legal Aid)

Counsel for the Respondent : R du Preez (instructed by the Director of Public Prosecutions)