

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

Case No : AR 546/11

In the matter between :

Logasiven Munusamy

Applicant

and

The Regional Magistrate Port Shepstone

First Respondent

Jayshree Juglal

Second Respondent

The State

Third Respondent

Judgment

Lopes J

[1] On the 1st September 2010 in the Port Shepstone Regional Court the applicant in this matter was convicted of the crime of rape and sentenced to undergo four years imprisonment. It had been found by the court a quo that on the 16th June 2006 he had raped a 17 year old female.

[2] The applicant then applied for leave to appeal against his conviction, and simultaneously sought leave to adduce further evidence. Both applications were dismissed by the learned magistrate.

[3] The applicant now applies to have the criminal proceedings reviewed and set aside. He does so on two grounds :

- (a) that his attorney of record, Ms Jayshree Juglal, had a conflict of interest, and should not have represented him;
- (b) that his advocate at the trial, Advocate Viljoen, failed to cross-examine the complainant and witnesses in that his version was not put to them, and he failed to consult with, and call two crucial witnesses.

[4] In my view the first ground of review has no merit. I say this because :

- (a) at the first hearing of the matter on the 13th November 2008, Ms Juglal placed on record that because the applicant was known to her, she had told the Legal Aid Board, who had instructed her, that she could not act for the applicant;
- (b) despite her telling them that, they again sent her an instruction to act in the matter. On the 24th March 2009 Ms Juglal again told the court what had happened, recorded that she had discussed the matter with the applicant, and said that she had referred the matter to one Advocate Viljoen who would act in the matter;

(c) on the 30th March 2009, Advocate Viljoen appeared for the applicant and recorded at the outset that he was briefed by Ms Juglal. That statement was incorrect. As is clear from the opposing affidavit of Ms Juglal in the review application, after receiving the second instruction to act on behalf of the applicant, she appeared at court and thereafter contacted the Judicare officer of the Legal Aid Board in Port Shepstone and told her of the problem. The Judicare officer told her that she should seek a colleague to attend to the matter as a new appointment would delay the proceedings. Pursuant to that Ms Juglal obtained the assistance of Advocate Viljoen;

(d) Ms Juglal confirms that she at no stage played any part in the trial and did not attend the hearings when evidence was led. The contents of the police docket were conveyed to Advocate Viljoen by the prosecutor and she had nothing to do with that process.

[5] It is clear that what happened was that Advocate Viljoen thereafter had the conduct of the matter entirely, as an advocate would have under the former pro deo system. As I understand the position, the Legal Aid Board simply hands the matter over to the advocate who is then required to deal with the matter in its entirety, and without the assistance of an attorney. There is no attorney of record and no attorney/advocate relationship as one would normally have in a trial with the attorney assisting the advocate.

[6] Accordingly, not only did Ms Juglal not appear or attend at the hearings when evidence was led, but she played no part in assisting in the conduct of the trial.

[7] The applicant submits in his review application papers that Ms Juglal had no authority from the Legal Aid Board to brief Advocate Viljoen and it was irregular for her to have done so. That is dealt with by Ms Juglal in her affidavit, and there is no basis upon which this court should not accept her explanation in that regard.

[8] Accordingly there is no basis upon which the applicant can suggest that he was prejudiced in any way by the conduct of Ms Juglal.

[9] The second ground upon which the applicant seeks to have this court review and set aside the criminal proceedings is to be found in the conduct of Advocate Viljoen. It is common cause that :

- (a) at the instance of the members of the South African Police investigating the matter, two affidavits had been deposed to, one by Malanie Moodley and one by Perumal Nadarajen Moodley. They are married to each other, and Perumal is the complainant's brother. In her affidavit Malanie recorded that the complainant had told her that she had slept with the applicant, did not use protection and was accordingly worried about falling pregnant, and did not know what to do. She records in her affidavit that the complainant did not tell her that she had been raped. Malanie also says that she went with the complainant to visit a doctor a few days later;
- (b) the affidavit of Perumal records that he was never told that the complainant was raped at any stage. He records that the applicant is his wife's cousin. His affidavit records that the complainant did not want Perumal and Malanie to

disclose to the complainant's parents that she had had sex with the applicant because she was afraid of her father. Perumal's stance was that he did not want to be told later that he had withheld information from their parents.

[10] In the founding papers in the review application the applicant stated that these statements had not been in the possession of Advocate Viljoen during the trial, and that was the reason why the witnesses had not been called to testify to the information contained therein. He made this statement on the basis of an affidavit deposed to by Advocate Viljoen in which he recorded that he had never been given the statements of Perumal and Malanie. He said that he had been shown them for the first time by the applicant's attorney on the 13th December 2010. He recorded that the 'witness statements' given to him had been handed to him by Ms Juglal. He also records that the applicant told him that he had witnesses and he would ensure that they would come to court. They did not arrive at court despite the applicant having attempted telephonically to contact them. Advocate Viljoen maintains that he closed the applicant's case with his consent after consulting with him. He records that the applicant agreed that he could close the applicant's case without calling his witnesses.

[11] In Ms Juglal's opposing affidavit, she records that after receiving the application papers she approached Advocate Viljoen, who confirmed that he had signed his affidavit but had done so 'upon the persistence and harassment of the Applicant's Attorney ...'. He then recanted on what he had said in his affidavit and told Ms Juglal that on returning to his office after signing the affidavit he had checked his

file and found the two statements referred to by the applicant – i.e. the affidavits of Malanie and Perumal. He had not contacted the applicant's attorney (Mr Morgan, who had obtained his initial affidavit) because he could not remember his name, and did not have his contact details.

[12] What emerges from the foregoing is that Advocate Viljoen did, indeed, have in his possession at all times during the criminal trial, the two important affidavits. That he must have done so and that he had read them appears to emerge clearly from a record of the proceedings. When cross-examining the complainant Advocate Viljoen put to her that his instructions were that Malanie would come and tell the court 'because she is coming to give evidence' that the complainant had told her a long time afterwards that she had slept with the applicant. It was also put to her that she was worried that she might be pregnant. It was also suggested that Malanie would come and tell the court that the complainant had gone with her to the doctor and that the complainant had told the doctor that she had slept with a boy, without giving details of that person.

[13] In the trial, and after the applicant had given evidence in his defence, the learned magistrate recorded that, on a previous occasion when the matter was adjourned (and it is clear from the record that the applicant was not present at that hearing but that Advocate Viljoen was present), Mr Viljoen had recorded that he would conclude the case for the defence. Mr Viljoen then asked the learned magistrate if he could approach the applicant. The learned magistrate agreed, and

the record then shows that he thanks the magistrate, records that he is indebted to the court, and closes the defence case.

[14] The only extent to which Advocate Viljoen casts any light on what happened after he had asked the learned magistrate whether he could confirm that the defence case could be closed, is what is recorded in his initial affidavit. Given the extent to which he has recanted on that affidavit, I would hesitate to place any reliance on anything contained therein.

[15] The position of this court then is that we do not know what really transpired between the applicant and Advocate Viljoen. The applicant records in his founding papers that he had told Advocate Viljoen that he wanted him to consult with the two witnesses and to call them. He said that he had given Advocate Viljoen their contact numbers and that Advocate Viljoen had undertaken to contact them and consult with them. He further records in his affidavit that on the 1st September 2010 (the date on which the defence case was closed by Advocate Viljoen) Advocate Viljoen had asked him if his witnesses were present, he had told Advocate Viljoen that they were not and Advocate Viljoen had then closed his case. He records that he could very easily have arranged for them to be present.

[16] This version of events as testified to by the applicant seems to be wholly improbable. I say this because the applicant was present throughout the criminal proceedings and would have heard Advocate Viljoen cross-examining the

complainant and putting to her what Malanie would say. He also knew, as did Advocate Viljoen, that the versions of Malanie and her husband indicated that the applicant was innocent of the crime of rape. Yet the witnesses were not called. There are a number of possible explanations for this, but the applicant has not taken this court into his confidence, and the reasons remain speculation.

[17] Mr *Morgan* who appeared for the applicant, submitted that the failure by Advocate Viljoen to consult with, and call the two witnesses, constituted such a serious irregularity that it vitiated the proceedings and that the conviction and sentence should be set aside.

[18] Mr *Truter*, who appeared for the third respondent, the State, submitted that the matter should be referred back to the learned magistrate and the applicant be given leave to call the witnesses. Mr *Truter* submitted that it was a matter of some concern that the learned magistrate had made a finding of guilty without hearing all the available evidence. Two witnesses who made exculpatory statements to the police did not give evidence on a very material aspect of the case. This was because Advocate Viljoen had not made available to the court the previous inconsistent statements made by the complainant. Mr *Truter* submitted that the court should have exercised its rights in terms of s 186 of the Criminal Procedure Act, 1977, to subpoena Malanie and her husband to give evidence.

[19] S 186 deals with the powers of a court to subpoena witnesses and states :

‘The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.’

[20] It is clear from the section that the learned magistrate had a discretion to subpoena the witnesses. If he had considered them to be essential to the just decision of the case then he had a duty to call them. However, he does not appear to have considered the matter in any way at all, at least not prior to the giving of judgment.

[21] The problem with Mr *Truter’s* argument is that there is no evidence to suggest that the learned magistrate was aware of the two statements. Hearing what Advocate Viljoen put to the complainant about what Malanie would say when she came to give evidence was insufficient to alert him to the fact that sworn statements had been made by her and her husband.

[22] The learned magistrate cannot then be criticised for failing to act in terms of s 186.

[23] What remains to consider is whether Advocate Viljoen was so incompetent in his conduct of the applicant’s defence that a failure of justice resulted such as would justify the setting aside of the conviction. The crucial question is whether Advocate

Viljoen was told by the applicant that he could close the applicant's case without calling Malanie and Perumal. When the applicant deposed to his founding affidavit in the review application, he had read, and relied heavily on the initial affidavit deposed to by Advocate Viljoen. That affidavit recorded that Advocate Viljoen was not in possession of the two statements and it was on that basis that the applicant relied for his allegation that there had been an irregularity in the conduct of the trial. However, that turned out not to be the case and the applicant had to change his tack.

[24] Also contained in the affidavit of Advocate Viljoen was the following :

‘4

The Appellant did inform me that he had witnesses. He stated that he would get them to come to court. They did not arrive at court and he tried telephoning them, unsuccessfully.

5

I closed the case for the defence after consulting the Appellant and with his consent. The Appellant agreed that I could close the case without calling his witnesses.’

[25] The above extracts from Advocate Viljoen's affidavit are at odds with what the applicant stated in his founding affidavit. In his founding affidavit the applicant alleged that Advocate Viljoen had undertaken to contact the witnesses and consult with them. His version of what happened when Advocate Viljoen closed the case is materially different to that testified to by Advocate Viljoen. The problem faced by the applicant when he was drafting his application papers seems an obvious one. If he dealt with paragraphs 4 and 5 of Advocate Viljoen's affidavit and admitted them, he

would seriously weaken his case because the calling of the witnesses would then have been considered by both him and his counsel, and he would be held to have elected to close his case without calling them. In those circumstances he would not be able to complain of any irregularity.

[26] On the other hand, if the applicant had stated in his founding affidavit that he disputed what was said in paragraphs 4 and 5 of Advocate Viljoen's affidavit, that would have thrown doubt upon the other allegations by Advocate Viljoen that he was not in possession of the two witness statements.

[27] The applicant's failure to take this court into his confidence in setting out fully what transpired between himself and Advocate Viljoen damages his case to the point where it cannot succeed. That these difficulties may have been occasioned by the hurried and unwise circumstances in which Advocate Viljoen deposed to his initial affidavit is neither here or there. On the record of the criminal proceedings there is no evidence that Advocate Viljoen conducted himself in such an incompetent manner during the trial that the defence of the applicant was prejudiced. On the papers before us, the reason why the evidence of the two witnesses was not given cannot be attributed to either the magistrate or Advocate Viljoen. In those circumstances the review cannot succeed.

[28] With regard to the question of costs, Ms Juglal, the second respondent, was represented at the review hearing. It was submitted that she is entitled to her costs

because she was unnecessarily joined in the application by the applicant. The applicant's reliance upon his first ground of review as being an irregularity caused by the second respondent Ms Juglal,

occasioned her opposition to the application. In that regard she has been exonerated and is entitled to her costs.

[29] In the circumstances I make the following order :

The application is dismissed. The applicant is to pay the second respondent's costs.

Madondo J : I agree.

Date of hearing : 11th April 2013

Date of judgment : 16TH April 2013

For the Applicant : Mr S Morgan (instructed by Govender, Pather and Morgan)

For the Second Respondent : Mr P Hardeo (instructed by AK Essack, Morgan Naidoo & Company)

For the Third Respondent : Mr A Truter (instructed by the Director of Public Prosecutions)