

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT : MTHATHA

Case No: 86/2011

(ex Tsolo Magistrates Court A790/10)

NOKHANYO KHOHLISO

Appellant

versus

THE STATE

1st Respondent

THE MEC, ECONOMIC DEVELOPMENT,

TOURISM AND ENVIRONMENTAL AFFAIRS

2nd Respondent

APPEAL JUDGMENT

MJALI, J:

[1] The appellant who is a traditional healer was convicted in the Magistrate's Court, Tsolo, on a charge of possession of two vulture's feet in contravention of section 13(c) read with section 84(13) of Decree No 9 of 1992

(“the Decree”) which was promulgated by the then President of the Republic of Transkei on 24 July 1992 and came into operation on 1 January 1993. She was sentenced to pay a fine R4000.00 or in default thereof to undergo to 12 months imprisonment which was wholly suspended for a period of five years on condition that she is not convicted of contravention of sections 13(c), 84,1,2,3 and 4 of the Environmental Conservation Decree No. 9 of 1992. With the leave of the court *a quo*, the appellant has appealed to this court against her conviction only. In essence the appeal is directed against the constitutional validity of sections 13(c) and 84(13) of the said Decree.

[2] The Decree was promulgated at the time when the Transkei was still a sovereign independent State and continues to apply only in the erstwhile Transkei area even after almost two decades after the advent of our Constitutional democracy have elapsed. With the advent of our democracy, Transkei was incorporated into South Africa as part of the Eastern Cape Province. In the remainder of the Eastern Cape Province legislation known as the Nature and Environmental Conservation Ordinance (No. 19 of 1974) (“the Ordinance”) is applicable. As will become apparent later in this judgment, there is a considerable difference between what is viewed as an offence in terms of the aforementioned two forms of legislation.

[3] The appeal is opposed by the state which is of the view that the appellant’s conviction should stand and that the constitutional issues raised in the appeal are justified in terms of section 36 of the Constitution, which allows for the limitation of rights contained in the bill of rights under certain circumstances.

[4] In view of the fact that the validity of certain sections of the Decree which are still in force in the Transkei geographical area of the Province of the Eastern Cape is challenged, the MEC for Economic Development, Tourism and

Environmental Affairs, Eastern Cape (who is responsible for the administration of the Decree) was joined as a further party in these proceedings. In the written submissions and in argument before us counsel for the MEC submitted that this appeal can be dealt with without having to decide the constitutional issues raised. Put differently, it was argued that this court could simply uphold the appeal purely on the basis that the state failed to prove mens rea. That being the case, it would not be necessary to decide on the constitutional issues raised. This approach would in my view be an easy answer but would not deal with the real issues raised. The challenged sections would remain in force despite the constitutional challenge raised against them.

[5] The salient facts giving rise to the appellant's conviction, briefly stated are: On 20 February 2010 the appellant was in her traditional chemist together with a client when she was arrested for possession of protected wild life carcass. She admitted to being in possession of two vulture's feet and stated that it was her intention to mix them with other substances in the production of traditional medicine to protect her clients against theft. It was common cause that she had no permit to possess the said feet. The appellant was trained in 1994 as a traditional healer. As part of her training she was taught to mix traditional medicines using animal parts or birds. She was never informed of the existence of any prohibition with regard to possession of certain species of animals or birds. As such she was in no position to know of any prohibition in law pertaining to possession of certain kinds of animals or birds, or their carcasses.

[6] Section 13(c) of the said Decree provides that "*no person shall, unless duly authorised by the Minister acting on the advice of the Council, sell, buy, donate, receive as donation or be in possession of any carcass of a protected wild animal*". Ignorance of the law and lack of intention to commit the crime are no defences as section 84(13) creates strict liability and stipulates that "*it shall be no*

defence in any prosecution for an offence in terms of the Decree that the accused had no knowledge of some fact or other or did not act wilfully.”

[7] It was therefore not necessary for the state to prove mens rea. No evidence was led and the appellant was convicted on her plea. It is common cause that Vultures are protected species and possession of any part thereof constitutes an offence in terms of section 13(c) of the Decree.

[8] In a multi pronged approach the appellant challenges her conviction on the constitutional validity of said sections which in effect create inequality between the persons of the former Transkei and the rest of the Eastern Cape. Before us Counsel for the appellant argued that in areas where the Ordinance applies the appellant would have been prosecuted for possession of a carcass of what is defined therein as an “endangered species” instead. Such "endangered species" as defined in the Ordinance are species which are rare compared with “protected wild animal”, as defined in the Decree. In this regard, a "protected wild animal" is defined in the Decree as *"any wild animal of the species mentioned in Schedule 1"*. Schedule 1 to the Decree, in turn, and under the heading "Birds", specifies all species except for a relatively limited number of prolific species. She has argued further that the Ordinance does not create strict liability in the same manner as does the Decree. Accordingly, in a prosecution under the Ordinance more would be required from the state to secure a conviction for a similar offence in terms of the Ordinance than in a prosecution under the Decree.

[9] A further contention on behalf of the appellant is that had the magistrate not misconstrued her ability to enquire into the constitutional validity of the Decree, the appellant would not have been convicted of the offence. For this contention counsel for the appellant seems to have relied on the provisions of section 170 of the Constitution. In terms of that section: *“Magistrates’ Courts and*

all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President”.

[10] Counsel for the appellant argued that the Decree promulgated by the President of the then Republic of Transkei is not an Act of Parliament in the context of the Constitution as it was promulgated prior to the commencement of our interim constitution. For this reason, she argued that the Magistrate’s Court has the power to enquire into the Constitutionality thereof.

[11] This contention can be dealt with swiftly. First, the Decree is a piece of legislation that was promulgated by a competent authority at the time. Despite the cessation of the Republic of Transkei as an independent State, the Decree remained in force by virtue of section 229 of the Interim Constitution (No. 200 of 1993) in the geographical area where it previously found application. In terms of the provisions of section 235(8) of the Interim Constitution, the administration of certain sections of the Decree were assigned to the Department of Economic Affairs, Environment and Tourism of the Eastern Cape Province. In **Barnett and Others v Minister of Land Affairs and Others** (2007 (11) BCLR 1214 (SCA)), reliance on certain sections of this Decree was upheld by the Supreme Court of Appeal.

[12] Secondly, the Magistrates’ Courts are creatures of statute. In terms of Section 110(1) of the Magistrates’ Courts Act (No. 32 of 1944), Magistrates’ Courts shall not be competent to pronounce on the validity of any law and shall assume that every law is valid. Apart from this, section 170 of the Constitution prohibits any enquiry into or ruling by the Magistrates’ Court on the constitutional validity of any Act. For these reasons the court *a quo* cannot be faulted for its refusal to pronounce on the constitutional validity of sections 13(c) and 84(13) of

the Decree. This finding does not in any way detract from the fact that the issue of the validity of the aforementioned sections must be considered.

[13] On the issue of constitutional validity, counsel for the appellant contended that section 13(c) is in conflict with the rights to equality and dignity postulated in sections 9 and 10 of the Constitution. She argued further that section 84(13) is in conflict with the right to a fair trial, in particular the right to be presumed innocent until proven guilty.

[14] The specific protection provided by the Constitution for equality is found in section 9 which states:

- “1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

[15] Section 10 provides that everyone has inherent dignity and the right to have that dignity respected and protected. As stated earlier in this judgment, there are two pieces of legislation in the same province dealing with the same subject matter, namely nature conservation, but differing in their territorial application, definitions and the standard of proof that is required to found a conviction. For example, the Decree finds application in the territorial area formerly known as the Transkei. In the rest of the same province as well the rest of South Africa the Ordinance, with different implications, is in force. This then calls for a determination as to whether or not unfair discrimination has resulted from this state of affairs.

[16] In doing so a two stage enquiry set out by Golstone J in **Harksen v Lane NO and others**¹³ (1998 (1) SA 300 (CC) at paragraph 54) must be applied. In that matter the court stated:

“At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary when an attack is made on the provision in reliance on s 8 of the interim Constitution. They are:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*
 - (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

- (ii) *If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).*
- (c) *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."*

[17] Applying the aforementioned enquiry to this case, I have no doubt in my mind that the provisions of sections 13(c) and 84(13) of the Decree differentiate between people living in the former Transkei area and those living in the rest of the Eastern Cape Province. Both counsel for the state and for the MEC did not try to convince this court that such differentiation bore any rational connection to a legitimate government purpose. In fact counsel for the MEC sought to avoid dealing with the constitutional issues raised on the basis that the Department is aware of the anomalies that exist as a result of the different pieces of legislation in existence within the Province, this Decree being one of them, and that the Department is in the process of correcting such anomalies. That being the case there can be no doubt but that the differentiation between people in the former Transkei area and the rest of the Eastern Cape bears no rational connection to a legitimate government purpose. It therefore amounts to unfair discrimination which cannot be justified under the provisions of section 36 of the Constitution. For the aforementioned reasons I have no difficulty in finding that the provisions of sections 13(c) and 84(13) of the Decree offend against the provisions of sections 9 and 10 of the Constitution. The conviction of the appellant thus falls to be dismissed on this ground. In **President of the Republic of South Africa v Hugo** (1997 (4) SA 1 (CC) at paragraph 41) Goldstone J said:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”

[18] Even if I am wrong in my finding that the provisions of sections 13(c) and 84(13) offend against the Constitution on the above-mentioned the basis, the conviction of the appellant falls to be dismissed on another ground, namely that the strict liability created by section 84(13) of the Decree erodes her right to a fair trial and in particular her right to be presumed innocent until proven guilty. As such it unjustifiably infringes the right to be presumed innocent contained in s 35(3)(h) of the Constitution of the Republic of SA, 1996. No attempt was made by the state or the MEC to prove that the presumption of guilt created by section 84(13) is necessary if certain offences are to be effectively prosecuted in terms of the Decree. No good reason has been advanced by the prosecution to show that it cannot be expected to produce the evidence itself. It is trite that in criminal matters it is incumbent upon the prosecution to aver and prove its entire case, including the element of mens rea, against the accused beyond reasonable doubt. Our courts have repeatedly emphasised that the presumption of innocence is a fundamental principle of our law. In **S v Zuma** (1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at paragraph 33), the court held that the presumption of innocence is not new to our legal system. As early as 1883, in **R v Benjamin** 3 EDC 337 at 338, Buchanan J noted that:

“But in a criminal trial there is a presumption of innocence in favour of the accused, which must be rebutted. Therefore there should not be a conviction unless the crime charged has been clearly proved to have

been committed by the accused. Where the evidence is not reasonably inconsistent with the prisoner's innocence, or where a reasonable doubt as to his guilt exists, there should be an acquittal."

[19] These remarks are equally apposite to this matter.

[20] Not only does this subsection offend against an accused's right to a fair trial, its applicability in the geographical area of the former Transkei results in further unfair discrimination in that those citizens of the Eastern Cape who do not reside in the area of the former Transkei, will not, in a criminal prosecution pursuant to the Ordinance, be subject to such strict liability, whereas those that do, will.

[21] In an affidavit delivered subsequent to the hearing of this matter on behalf of the second respondent, it is stated that a process of rationalization of all environmentally related legislation in the province is at present being undertaken. The deponent to that affidavit who is described as the "General Manager: Environmental Affairs" stated therein that as a consequence of this he has, in consultation with the Head of the Department, given instructions to the Department's law enforcement officers that persons who are alleged to have committed breaches of the environmental laws in the Eastern Cape should henceforth be prosecuted in terms of national legislation and not in terms of the Decree. In the circumstances, it appears that it is not necessary to make any further order which has the effect of staying such prosecutions.

[22] It seems to me that the mere declaration of invalidity will be sufficient without more as the impugned sections ought to have been repealed. Accordingly such declaration will achieve the same result.

[23] In the result the following order shall issue:

1. The appeal is upheld. The conviction and sentence imposed on the appellant are set aside.
2. Sections 13(c) and 84(13) of Decree No 9 of 1992 (Tkei) are inconsistent with sections 9, 10 and 35 of the Constitution of the Republic of South Africa, 1996, and are thus declared to be invalid.
3. The matter is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution, 1996.

G N Z MJALI

JUDGE OF THE HIGH COURT

GRIFFITHS, J. : I agree.

JUDGE OF THE HIGH COURT

DELIVERED ON : 12 DECEMBER 2013

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