

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A67/2010

In the appeal between:

P SEHLABAKA

1st Appellant

V MOFOLO

2nd Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J *et* KUBUSHI, AJ

HEARD ON:

16 MAY 2011

DELIVERED ON:

25 AUGUST 2011

KUBUSHI, AJ

[1] This is an appeal against the judgment of the Regional Magistrate, Senekal. The appellants were convicted on three counts of corruption in contravention of section 4 (1) (a) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004. On the 19 March 2009 the appellants were each sentenced to four years imprisonment. The offences having been taken together for the purpose of sentence. Leave to appeal was refused by the trial court and, on petition, granted by this court.

The appeal lies against the convictions and the sentences imposed.

[2] The facts of the case are that on the 12 or 13 June 2007 appellants were arrested at Senekal for unlawfully soliciting money from the complainants, namely, three Chinese businessmen, trading in the town of Senekal. It was alleged that the appellants, who were policemen from the Crime Intelligence Division in Ficksburg, whilst performing their duties of checking the validity of the permits of foreigners in the town of Senekal, approached the three complainants and demanded money from them claiming that their permits were not valid when in fact they were. The Chinese reported the case to the police and the appellants were arrested. The complainants identified the appellants by the motor vehicle they were driving on the day in question - a white double-cab bakkie with registration number CVR 679 FS.

[3] The appellants denied having solicited money from the complainants. They conceded that on the day in question they were working at Senekal, and in the vicinity of the complainants' businesses, checking the permits of Chinese and

Pakistan foreigners. They argued that they neither demanded nor received money from any one on that day. They alleged that they were investigating a case for the Department of Home Affairs and handed in a copy of the report of that investigation to the court. During the proceedings, the trial court made use of the services of a Chinese interpreter.

- [4] In order to curtail the proceedings, the appellants, through their legal representative, allowed the state to hand in the affidavits of Thabang Radebe, Simon Lesetja, Simon Sephapo, the police officers who investigated the case and arrested the appellants, and Mmamodiehi Violet Mosiuoa, an employee at Creeks Clothing Shop a Chinese shop in Senekal, as evidence. The affidavits were also formally admitted by the appellants and the trial court admitted them as evidence into the record as exhibit B, C, D and E respectively.

- [5] On the convictions, the appellants' counsel argued that the state failed to prove its case beyond reasonable doubt and based his argument on four points, namely that:

- a. the state failed to use a competent interpreter as a result

of which the interpretation was not accurate and could not be relied on. In the heads of argument, we were referred to a number of passages in the record where the interpretation was inaccurate. The counsel submitted that the interpretation was so defective that it rendered the proceedings invalid;

- b. dock identification was used to identify the appellants. The appellants stated in the heads of argument that the complainants could not have been able to identify them as it was the first time they saw them on the day of the incident;
- c. the trial court accepted the hearsay evidence of the police officers which was presented on affidavit; and
- d. the trial court failed to apply the cautionary rule in respect of the complainants who were single witnesses as regards the commission of the offences.

[6] In respect of sentence, appellants, in their heads of argument, contented that the sentence of direct imprisonment was inappropriate. They argued that Act 12 of 2004 specifically make allowance for fines even in serious offences decided in the High Courts. In the light of the amount of money involved in

this case and the fact that the appellants were first offenders, the trial court erred by not imposing a sentence of a fine.

[7] At the hearing of the appeal, counsel for the respondent did not argue the matter and conceded that he will abide the decision of the court. In the respondent's heads of argument, it was submitted in respect of the convictions, that on the reading of the record it was apparent that the complainants' evidence had been fully set out. It was conceded that the dock identification was used to identify the appellants but that the second complainant (Cheng Ming Yu) was able to identify the appellants because the incident that happened to him happened for about 20 minutes and that the appellants were wearing civilian clothes. According to the respondent the appellants corroborated the evidence of the complainants by admitting that at the relevant time they were working in the town of Senekal and in the vicinity of the complainants' businesses.

[8] Four questions in respect of the conviction arose: firstly, whether the use by the trial court of an incompetent interpreter rendered the proceedings invalid. A question which if answered in the positive will render the other questions

academic; secondly, whether the state proved the identity of the appellants beyond reasonable doubt; thirdly, whether the trial court erred in admitting the evidence presented by the state on affidavits into the record as evidence; and fourthly, whether the trial court erred in failing to apply the cautionary rule in respect of the evidence of the complainants as single witnesses in respect of each count.

- [9] The right of an accused person to understand the proceedings at all times is a prerequisite of a fair trial. In terms of section 35 (3) (k) of the Constitution, Act 108 of 1996:

‘Every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.’

The requirements of a fair trial will, therefore, be satisfied if the trial is conducted in a language with which the accused person is sufficiently conversant, or if the proceedings are interpreted into such a language. See **MPONDA v S** [2004] 4 All SA 229 (C) at 234f.

- [10] In this instance the appellants were black South Africans. The

record does not state which language they spoke or were conversant with. The appellants were employed in Ficksburg and sometimes carried out their work in Senekal. Both towns are in the Free State Province. The main language spoken in the Free State Province and as such in Ficksburg and Senekal is Sesotho. Their surnames are also those of people belonging to the Basotho ethnic group. I presumed therefore that the appellants spoke Sesotho and/or were conversant with the Sesotho language. The complainants on the other hand were Chinese. As *per* the record they spoke Chinese and understood very little English let alone Sesotho. One of the complainants even testified that his brother was the one who dealt with customers in his shop.

- [11] The trial court employed the services of two interpreters. A casual interpreter, Ms Judy Lin, translated the evidence of the complainants from Chinese to English and *vice versa*; and a permanent interpreter, Mr Konxela, interpreted the English into the language with which the appellants were conversant *vice versa*. As *per* the record, because Ms Lin was a casual interpreter, when she was sworn in, the magistrate specifically enquired into her ability to understand the language spoken by

the complainants, namely, Chinese and found that she would be able to interpret. And this she did.

[12] However, the appellants were not satisfied with Ms Lin's translation. They contended that Ms Lin was incompetent. According to them she seemed not to understand the proceedings and did not interpret correctly. In the heads of argument they referred us to a number of passages in the record where the interpretation was inaccurate or did not make sense. The question that had to be answered was whether, as argued by the appellants, Ms Lin was a competent interpreter or not. Section 6 (2) of the Magistrates' Courts Act 32 of 1944, provides that:

'if, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, ...'

[13] The meaning of a "competent" interpreter has been a subject of many court decisions. In **S v ABRAHMS** 1997(2) SACR 47 (C) at 49h – i it was stated that an interpreter who does not appear

to understand the language that the accused person is conversant with is not competent to provide that service. In **S v NDALA** 1996 (2) SACR 218 (C) at 221a – c it was held that a competent interpreter must be able to give a “true and correct” interpretation of evidence as is implicitly guaranteed by section 25(3) (i) of the Interim Constitution (the current section 35 (3) (k) of the Constitution). The principle should always be that the accused person must be able to understand the proceedings at all times.

- [14] The issue of the competence of the interpreter never arose *per se* during this trial. There is no indication on the record that the appellants had a concern about Ms Lin’s interpretation. Neither their legal representative nor the appellants objected to the interpretation. There was no indication whether the appellants did not understand the interpretation or not. The case proceeded normally with no interruptions by the appellants or their legal representative. The magistrate referred to the issue only during his judgment and concluded that the contradictions were negligible and accepted the evidence as interpreted. At page 132 par 10 -15 of the record he ruled as follows:

‘Ten spyte van geringe afwykings, loop dit soos ‘n goue draad deur

die weergawe van al drie hierdie Chinese getuies; dat die twee beskuldigdes hulle as polisiebeamptes voorgedoen het wat hulle inderdaad is; dat hulle die dokumente nagegaan het; dat hulle beweer het die dokumente is vals; en dat hulle geld geëis het daarvoor. By hierdie getuienis het hulle al drie konsekwent gebly.'

[15] My opinion is that the magistrate erred in coming to this conclusion. The appellants were correct, Ms Lin was not a competent interpreter. The passages from the record which we were referred to by the appellants could not be regarded as minor contradictions. The passages are an indication that Ms Lin might have not understood the proceedings or the language she was expected to interpret into. She frequently did not give a true and correct interpretation. Indeed, when reading the record I did get an impression that she did not understand the language which she was expected to interpret into. And there were numerous indications on the record that showed that the evidence adduced against the appellants was not entirely satisfactorily interpreted. The interpretation was at some places distorted and did not make sense.

[16] Mr Konxela (the permanent interpreter) had to rely on Ms Lin's

interpretation for his interpretation to the appellants. As a result he must have also interpreted incorrectly to the appellants. In my understanding Ms Lin was used as a Chinese interpreter because Mr Konxela did not understand or was not conversant with Chinese. He could therefore not have understood what the complainants were saying and relied entirely on the translation by Ms Lin. Since Ms Lin did not interpret truly and correctly it stands to say that Mr Konxela did not translate truly and correctly to the appellants. To my mind, therefore, because of this interpretation there was a possibility that the appellants did not understand the proceedings and thus their right to fairness of the trial was infringed.

- [17] Regard being had to section 6 (2) of Act 32 of 1944, the failure to provide a competent interpreter might lead to a gross irregularity and subsequent invalidation of the proceedings. See **S v NDALA** 1996 (2) SACR 218 (C); **S v NGUBANE** 1995 (1) SACR 384 (T); **S v ABRAHMS** 1997(2) SACR 47 (C) at 49g and **S v MAFU** 1978 (1) SA 454 (CPD) at 457H. The question to be answered at this stage was whether the extent of the incompetence in this case was such that it vitiated the proceedings. Put in other words whether the appellants in this

case had a fair trial. This question could be answered in the positive only if the requirements of section 35(3)(k) of the Constitution had been complied with. Because the magistrate accepted the interpretation as it was there was no need for him to enquire into the extent of the incompetence. This left us at large to enquire into the degree of this irregularity.

[18] The correct approach for a court to determine whether an irregularity is such that it would vitiate the proceedings was laid down by Holmes JA in **S V MOODIE** 1961 (4) SA 752 (AD) at 758 as follows:

- ‘(1) The general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.
- (2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is *per se* a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial Court would inevitably have convicted if there had been no irregularity.
- (3) whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity.’

[19] In terms of this approach the use of an incompetent interpreter would therefore strike at the root of a fair trial and would normally fall within the second category of irregularities referred to in the Moodie – case *supra*. See also **S v MAFU** *supra* at 458H. This instance, to my mind, is also an exceptional case the incompetence of Ms Lin was gross, so gross that it struck at the very root of a fair trial.

[20] In the premises I find that the failure by the state to use a competent interpreter was a gross irregularity which invalidated the proceedings and that the appellants did not have a fair trial. The other grounds of appeal had become academic. I therefore consider that the following order should issue:

1. The appeal is allowed.
2. The convictions and the sentences are set aside.

E. M. KUBUSHI, AJ

I concur and it is so ordered.

K. J. MOLOI, J

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On behalf of the respondent:

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