



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG DIVISION)

8/5/09.

Appeal case A450/05

In the matter between:

MNISI, MTHOBIAI CHARLES

First Appellant

NDUBANE, SIBUSISO MAFIKA

Second Appellant

and

THE STATE

Respondent

CORAM BOTHA et MAVUNDLA JJ et EBERSOHN AJ

DATE HEARD 6 MAY 2009

DATE JUDGMENT HANDED DOWN 8 MAY 2009

JUDGMENT.

EBERSOHN AJ.

[1] The two appellants were convicted by a regional magistrate on a count of rape

and both were sentenced to a period of imprisonment of 10 years.

[2] The offence was allegedly committed on the 5th March 2003 and both appellants were arrested on the 6th March 2003.

[3] The first appellant was born on the 31st October 1988 and at the time of the commission of the alleged offence he was 14 years 4 months and 5 days of age. The second appellant was born on the 11th September 1987 and at the time of the commission of the alleged offence he was 15 years 5 months and 24 days old.

[4] Leave to appeal against sentence was granted by the magistrate and he released both appellants on bail.

[5] The appeal against the sentences imposed initially came before two judges of this court on the 28th August 2006. The Presiding Judges, however, raised certain issues regarding the convictions and granted leave that the appeal be argued on the basis that leave to appeal was granted against the convictions as well. They then ordered that supplementary heads of argument be filed regarding the convictions as well as certain other issues which were raised by the Presiding Judges.

[6] The appeal was argued before two other judges of this court on the 10th September 2007 and as they were not ad idem the matter was referred to a full court for argument and the matter was postponed.

[7] The matter then came before a full bench.

[8] The two appellants at the time of the trial obviously were in fact still immature and unsophisticated children.

[9] At p. 11-12 of **Du Toit et al: Commentary on the Criminal Procedure Act**, the following is stated:

"In S v Khanyile 1988(3) SA 795 (N) Didcott J (Friedman J concurring) held that a presiding officer has a duty, prior to the commencement of the trial, to determine whether the absence of legal representation will place an indigent accused at so great a disadvantage that the ensuing trial would be grossly and palpably unfair. It was held that in

determining this question, the presiding officer should conduct an enquiry into the following three aspects (p. 815D-H):

- (a) the inherent factual or legal simplicity or complexity of the case;
- (b) the personal resources of the accused (eg. how mature, sophisticated, intelligent and articulate he looks and sounds); and
- (c) the gravity of the case and the possible consequences of a conviction (eg. imprisonment, a crippling fine, loss of employment or means of earning a livelihood).

Having determined the necessary answers, the presiding officer should decide whether (816B-G):

'their cumulative effect is such that the man would be placed at a disadvantage were it to go ahead without a lawyer for the defence.....But I do not see what room our constraints leave us for improvement on it. The judicial officer will no doubt try his best, at all events. If he answers the question in the affirmative, he should refer the case at once to those administering the legal aid scheme or to one or another of the various associations of lawyers that are willing and keen nowadays to offer assistance pro bono. He should decline to proceed with the trial, furthermore, until representation is procured through some other agency.....'.

(See also **S v Mokoena** 2005 (1) SACR 594 (T) at 597d-f).

[10] It does not appear that the magistrate, in fact, conducted such an enquiry. Before him he had two children as accused, both immature, unsophisticated and obviously without the means to afford counsel. The charge facing them was that of rape being a most serious case with possible consequences of a very long term of imprisonment if convicted.

[11] Had he conducted such an enquiry he undoubtedly would have concluded that the absence of legal representation would place the two indigent accused at so great a disadvantage that the ensuing trial would be grossly and palpably unfair and an irregularity.

[12] **Du Toit et al** op cit, p. 11-12 stated the following in this regard:

"In *S v Ramuongiwa* 1997 (2) BCLR 268 (V) it was held constitutionalization had revived the "Khanyile rule": where lack of legal representation renders the trial unfair, the conviction must be set aside. See further the discussion below, sv 'The Supreme Court of Appeal and the indigent accused'. See also *Mgcina v Regional Magistrate, Lenasia & Another* 1997 (2) SACR 711 (W) and *S v Makhandela* 2007 (2) SACR 620 (W) at 634i."

[13] In review case 209216/03 (Transkei Local Division) of *S v Molose and Another* I ruled as follows regarding this aspect:

"[11] There is the problem with and indeed a fatal irregularity with regard to legal representation of the two accused. S 73(2C) of the CPA introduced a novelty. Where an accused fails to appoint a legal advisor, a court may in certain circumstances take steps to secure legal representation on behalf of the accused. At some stage the discretion of the magistrate no longer is a discretion but becomes a legal obligation and if the magistrate then fails in this respect the proceedings before him become irregular. For the reasons that follow this is such a case where the Court had to order that legal representation be assigned to the two accused."

[14] The trial of the two appellants commenced before the magistrate on the 19th February 2004. It does not appear from the transcript of the proceedings, which were mechanically recorded in court, that the magistrate informed the two appellants of their right to legal representation. The trial was, but for a short period, conducted in English.

[15] Page 2 of the record, however, contains a printed form in the Afrikaans language with the heading "**VERDUIDELIKING VAN 'N BESKULDIGDE SE REG OP REGSVERTEENWOORDIGING**". It is dated the 15th July 2003, some 7 months before the trial of the appellants commenced. There is also a notification in the record that a some stage, also many months before the actual trial commenced, the two appellants were informed of their right to legal representation. The full contents of what was stated to them on this occasion was, however, not stated. It is not recorded whether the mothers of the two accused were present at

these information sessions or not. Counsel for the State was asked, during argument, whether that was enough and sufficed, and he conceded that by the time the actual trial commenced, they would most likely have forgotten most of the contents of what the magistrate informed them about legal representation.

[16] The fact that the mother of each accused "assisted" her son is meaningless and of no legal significance in view of the fact that it is clear from the record that they were both equally unsophisticated and lay persons and could not really be of assistance to their sons with regard to the conduct of the case. It appears that the trial commenced on the 19th February 2004 and the evidence of the complainant was led. There is no indication or reference on record that the mothers of the two accused were present in court on that day. First appellant commenced with some cross-examination of the complainant and the matter was then postponed to the 23rd April 2004.

[17] The record relating to the 23rd April 2004 commenced as follows:

"HOF: **Dankie, nommer een u is besig met kruisondervraging. U kan voortgaan.**

BESKULDIGDE EEN: **Waarom het jy nie die Polisie daarvan vertel.**

HOF: **Van wat vertel?**

BESKULDIGDE EEN: **Nadat jy saam met beskuldigde twee was, na hierdie voorval? ---- Ek het die Polisie daarvan vertel.**

Geen verdere vrae.

HOF: **Nommer twee? Die twee beskuldigdes is hulle broers of wat?**

BESKULDIGDE TWEE: **Ja Edelagbare.**

HOF: **So hulle het een moeder?**

BESKULDIGDE TWEE: **Nee.**

HOF: 2 Moeders.

BESKULDIGDE 2: Ja.

**HOF: Want ek sien hier sit twee vrouens in die hof.
Goed Nommer een se moeder dan. Het sy vrae
aan die getuie."**

It was apparently only at this stage that the magistrate became aware of the existence of the two mothers.

[18] After the medical practitioner, who examined the complainant, testified neither the first appellant nor his mother had any questions for the witness. Second appellant asked the witness three questions and his mother asked no questions. Neither first appellant nor his mother put any questions to the witness. In all likelihood they neither understood the evidence nor the significance thereof.

[19] After the state witness Lukhele, to whom the complainant allegedly made a report, testified neither first appellant nor his mother put any questions to the witness. Second appellant put only 3 questions to her and his mother none.

[20] After the state case was closed the first appellant didn't testify and closed his case. The record (p.73) in this regard reads as follows:

"COURT: Number one? Speak up I can't hear you.

ACCUSED 1: I elect to remain silent Your Worship.

COURT: Have you got witnesses?

ACCUSED 1: No witnesses.

COURT: Is that your case?

ACCUSED 1: That is my case Your Worship."

At this stage and having noticed that the first appellant elected to remain silent the magistrate should have pointed out to him the need to testify in view of the prima facie case against him. The silence on the part of the first appellant also prejudiced

the second appellant because his evidence could have corroborated the evidence and version of the second appellant.

[21] When the second appellant called a witness the magistrate unduly interfered and took over her cross-examination from the prosecutor and cross-examined the witness for about three pages in a manner which was unbecoming (record p.86-89).

[22] After the defence case was closed the prosecutor addressed the court on the merits and he asked for a conviction.

[23] The magistrate then called upon the two appellants to address him and the record in that regard reads as follows:

"COURT: Accused on the merits whether you are guilty or not guilty. Would you like to address the Court number one?"

ACCUSED 1: I am not guilty.

COURT: His mother?

ACCUSED 1 GUARDIAN: He is not guilty Your Worship.

COURT: Number 2?

ACCUSED 2: I'm not guilty Your Worship. The guilty part is those complainant Your Worship. They are guilty.

COURT: His mother?

ACCUSED 2 GUARDIAN: I see accused number two guilty Your Worship. he is guilty because he says that there was consent but the complainant testified here that she did not consent to sexual intercourse. He is guilty Your Worship."

[24] The invitation by the magistrate to the appellants to state whether they were guilty or not was misleading and in actual fact the magistrate should have asked them to address him on the evidence as a whole and the evidence of the

complainant and the other States witnesses and not just to state whether they regarded themselves as guilty or not guilty. When he noticed the cryptic response of the appellants he should in any case, on his own, have taken up the matter and caused the two appellants to address the court regarding the evidence of the various witnesses.

[25] It is clear that with regard to the admission of the birth certificate of the complainant in terms of section 42(3) of Act 81 of 1963 the magistrate erred as that act was repealed by Act 51 of 1992. The magistrate merely accepted, under re-examination of the prosecutor, the birth certificate and did not ask the appellants for their views and/or consent and also did not invite the appellants to even look at it and also did not ask them whether they had any questions regarding the alleged birth certificate. The record in this regard reads as follows (record p.72):

"PROSECUTOR: As the court pleases Your Worship. Your Worship the court is in possession of a birth certificate of the complainant Your Worship. It's (sic) repeats that she was born on the t day of October 1988. Your Worship the State will apply that said be handed in Your Worship to form part of the evidence of the case?

COURT: The birth certificate is then accepted in terms of section 42-3 of Act 81 of 1963(Sic) s exhibit B.

PROSECUTOR: As the Court pleases Your Worship.

STATE CASE."

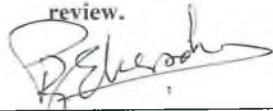
[26] It also appears that the magistrate was under the impression that the provisions of Act 105 of 1997 regarding minimum sentences, were applicable. On page 108 of the record, when sentencing the two accused the magistrate said the following:

"The offence you have committed is indeed a serious offence. In terms of Act 105 of 1997, you qualify for a compulsory sentence of lifelong imprisonment in view of the fact that you raped a girl under the age of 16 and in respect of the fact that two of you raped one girl."

[27] In view of the abovementioned aspects I am of the view that the proceedings before the magistrate were not in accordance with justice and in terms of the inherent review powers of this court the convictions and sentences of both appellants will be set aside. It is up to the Director of Public Prosecutions to decide whether the two appellants be re-charged or not.

[28] I accordingly make the following order:

The convictions and sentences of both appellants are set aside on review.

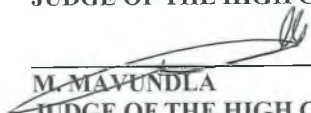


P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

I AGREE:



C. BOTHA
JUDGE OF THE HIGH COURT



M. MAVUNDLA

JUDGE OF THE HIGH COURT