

REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-06-09

Case Number: A534/08

In the matter between:

PETRUS MOKALAKA

Appellant

and

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J & MAKGOKA AJ

- [1] On 1 June 2004 the appellant was convicted of murder, rape and robbery in the Klerksdorp regional court and was sentenced to 15 years imprisonment for the murder, 10 years imprisonment for the rape and 10 years imprisonment for the robbery. The regional court ordered

that the sentences for the rape and robbery be served concurrently, effectively sentencing the appellant to 25 years imprisonment. When the appellant was sentenced he was already serving a sentence of 12 years imprisonment for a previous conviction for rape. With the leave of the court granted on 13 February 2008 the appellant appeals against the convictions and sentences.

[2] On appeal the appellant's counsel has not attacked the convictions for murder and robbery and confined his submissions to the conviction for rape. The appellant's counsel contends that the state did not prove beyond reasonable doubt that the appellant raped the complainant and that his version was reasonably possibly true. With regard to sentence the appellant's counsel argues that the sentence is excessive and that the regional magistrate did not properly take into account the appellant's personal circumstances and his relative youthfulness. The respondent contends that the convictions and sentences are in order.

[3] The four witnesses directly involved in the crimes testified that early in the morning of 9 March 2003 they left a tavern and started walking home. S F, the complainant in respect of the rape charge, was walking with Scotch Motshenana, and Tandiwe Mbenjeng was walking with Peter Mahabie. All four had known the appellant for some time. All were aware of George Madlasie who was walking a distance behind them. When they reached the football stadium they heard the appellant shouting. He was approaching from behind. When the

appellant reached George Madlasie he stopped and asked George for money. When George said he had none the appellant stabbed him with a knife and stole his ID book and some money. George then managed to escape and ran away pursued by the appellant. After a while the appellant returned and was visibly interested in S F. The appellant walked with the four witnesses and when they met another man walking in the street the appellant approached him and stabbed him in the chest. This man was found dead in the street early the next morning. The appellant then succeeded in separating S F from Scotch and took her to his home. There he threatened her with a knife, forced her to undress and had intercourse with her twice. He allowed her to go after she promised not to tell anyone. S then went to her friend Diphio Mtopo who also gave evidence and reported to her that the appellant had raped her. Diphio Mtopo confirmed this in her evidence. None of this evidence was shown to be untrue or unreliable. The appellant's evidence that he walked with the four state witnesses as far as the soccer stadium and then left them and went home with nothing untoward happening (i.e. complete innocence) rings hollow and provides no reason for finding that the witnesses conspired to falsely implicate him in a murder, a rape and a robbery. The appellant conceded that all the witnesses knew him and that there was no ill feeling between them and him and he was patently unable to put forward any reason why they would deliberately perjure themselves. The regional magistrate correctly rejected the appellant's version and found him guilty of rape.

[4] The difficulties which arise in this case are procedural and are twofold:

- (1) Whether the regional court was properly constituted to try the appellant for murder; and
- (2) Whether the regional court was entitled to sentence the appellant for the rape and the robbery.

[5] With regard to the constitution of the court, section 93ter(1) of the Magistrates Court Act, 32 of 1944 provides:

‘(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice –

- (a) before any evidence has been led; or
- (b) in considering a community-based punishment in respect of any person who has been convicted of any offence

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be

proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.'

(Our emphasis).

The proviso is clearly peremptory and therefore must be complied with. The difficulty in the present case is that the record does not show that the proviso was complied with. It does not reflect that the regional magistrate required the appellant to elect whether to proceed with assessors or not.

[6] The effect of such failure has been considered in three reported judgments with conflicting conclusions. In ***S v Khambule* 1999 (2) SACR 365 (O)** at 367e-g and ***S v Titus* 2005 (2) SACR 204 (NC)** at 209d-f the courts decided that the proviso prescribes how the regional court must be constituted in a murder trial and that non-compliance with these peremptory provisions is *per se* grossly irregular. Accordingly the courts set aside the convictions and sentences. In ***S v Naicker* 2008 (3) SACR 54 (N)** at 62b-f the court did not agree with these decisions (that the irregularity vitiated the proceedings) and that, absent prejudice to the appellant, the irregularity was of no consequence.

[7] I prefer the reasoning of the courts in ***S v Khambule supra*** and ***S v Titus supra***. The issue is the constitution of the court. If the court is

not properly constituted it has no power to hear the matter; the proceedings are irregular and must be set aside. The court is in the same position as a court which lacks jurisdiction. This conclusion is consistent with decisions in which proceedings were set aside because the assessor, who was part of the court, did not participate in the court's deliberations – see ***S v Ndzamdela and Another* 1990 (2) SACR 282 (TKA); *S v Daniels and Another* 1997 (2) SACR 230 (T)** and ***S v Van der Merwe* 1997 (2) SACR 230 (T)**.

- [8] The conviction and sentence for murder must therefore be set aside.

- [9] With regard to sentence, the rape complainant, Filander, testified that the appellant raped her twice. In terms of section 51(1) of Act 105 of 1997 read with Part I of Schedule 2 to that Act (as they read prior to their amendment by Act 38 of 2007 on 31 December 2007) the prescribed sentence was life imprisonment and in terms of section 52(1) of Act 105 of 1997 the regional court was obliged to stop the proceedings and refer the matter to the High Court for sentencing – see ***Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004 (2) SACR 1 (T)** paras 23, 29 and 30. In terms of section 52A of the Act the regional magistrate was not empowered to sentence the appellant for any other offence. Since the regional magistrate proceeded to sentence the appellant the sentence for rape (and the other sentences) was a nullity and on appeal the court must set aside the sentences imposed and refer the matter to the appropriate court for

sentencing – see **S v Liau 2005 (1) SACR 498 (T)** at 500g-h and 503f-h. As pointed out in the unreported judgment of the full court in **S v Sydney Camako** TPD Case No A450/2007 delivered 18 September 2008 para 5 the Criminal Law (Sentencing) Amendment Act 38 of 2007 (which commenced on 31 December 2007) has altered radically the power of the regional court regarding sentencing for offences referred to in Part I of Schedule 2 of Act 105 of 1997. It introduced a new section 51(1) which provides that a regional court has the power to sentence a person to imprisonment for life when it convicts that person of an offence referred to in Part I of Schedule 2 of Act 105 of 1997 and shall do so subject to subsections (3) and (6). It also repealed section 52 of Act 105 of 1997 which required the regional magistrate to stop the proceedings and refer the matter to the High Court for sentencing.

- [10] Act 38 of 2007 also introduced a new section 53A containing transitional provisions which are applicable in the instant case. The effect of these provisions is that the appropriate court to impose the sentence is the regional court. The sentences imposed for rape and robbery must be set aside and referred back to the regional court for sentencing in terms of the relevant provisions of Act 105 of 1997 as amended by Act 38 of 2007.

Order

- [11] I The appeal is upheld insofar as –

- (1) the conviction and sentence for murder are set aside;
- (2) the sentences imposed for rape (count 2) and robbery (count 4) are set aside.

- II The murder charge (count 1) is referred back to the regional court for prosecution *de novo* if the Director of Public Prosecutions is so advised;
- III The matter is referred back to the regional court for sentence to be imposed in respect of the rape (count 2) and the robbery (count 4) in terms of section 51(1) read with Part I of Schedule 2 of Act 105 of 1997 as amended by Act 38 of 2007;
- IV The appeal against the convictions for rape (count 2) and robbery (count 4) is dismissed.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

T.M. MAKGOKA
ACTING JUDGE OF THE HIGH COURT

CASE NO: A534/2008

HEARD ON: 17 March 2009

FOR THE APPELLANT: ADV. A.M. VIVIERS

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. L. SWART

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 9 June 2009