

Reportable: Yes / No
Circulate to Judges: Yes / No
Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
[Northern Cape High Court, Kimberley]

Case no: CA&R 68/08
Date heard: 2009-05-04
Date delivered: 2009-05-08

In the appeal of:

MOSES SEBOKO

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J *et* HENRIQUES AJ

JUDGMENT ON APPEAL

MAJIEDT J:

1. An oft stated complaint against the administration of justice is that the wheels of justice grind too slowly. That complaint can, regrettably, with justification be levelled in this appeal. The Appellant, who was unrepresented at the trial, had been convicted on two counts of rape and sentenced to 15 years imprisonment on each the said charges (i.e. 30 years imprisonment in total) and he was granted leave to appeal to this Court on petition as long ago as 20 May 2005. Leave was granted in respect of his conviction on count 2 as well as the sentences imposed on both counts, 1

and 2. The inordinate delay in having the matter enrolled, has not been explained at all. Furthermore, the Appellant had been convicted and sentenced on 5 May 2000. His application for leave to appeal was refused on 13 July 2000. Numerous letters written from prison by the Appellant to the relevant authorities had done little to expedite his appeal.

2. As stated, the Appellant's appeal is with the leave of this Court against his conviction on Count 2 and against the sentences imposed on both counts. The fact that these two rape incidents occurred during 1997 (count 1) and 1998 (count 2) respectively, vividly illustrate my concerns adumbrated in the preceding paragraph. The eventual outcome of this appeal, substantially exacerbates the matter.
3. The nub of the matter with regard to the Appellant's conviction on count 2 is whether the reception of hearsay evidence by the trial court had rendered the Appellant's trial unfair to the extent that the proceedings should be vitiated. In respect of sentence, the crux of the matter is whether the sentences imposed are of sufficient severity to render same shockingly inappropriate. Mr. Setouto for the Appellant has attacked the conviction and sentence on wide-ranging grounds, including the reception of the hearsay evidence by the trial court. Ms Mabaso on behalf of the State had originally supported the conviction and sentence in her written Heads of Argument, but has very properly conceded during oral argument that the conviction on count 2 is untenable in law.
4. In respect of the conviction on count 2, I propose dealing with the

evidence somewhat succinctly, given the fact that the decision on the correctness of that conviction will eventually turn on the reception of the hearsay evidence as set forth above. The Appellant was charged with having had intercourse with the complainant without the latter's consent on 25 May 1998. The complainant had, regrettably, passed away prior to the trial's commencement. At the hearing, the prosecutor advised the Regional Magistrate of that fact and also handed in a death certificate in respect of the complainant. He applied, on the basis of section 3 of the Law of Evidence Amendment Act, 45 of 1988 (*"the Amendment Act"*) for the trial court to receive hearsay evidence in respect of the complainant's oral reports regarding the alleged rape to *inter alia* a policewoman and other lay witnesses and also concerning the pointing out of the scene by the complainant. The prosecutor contended that the reception of this evidence would be in the interests of justice and also indicated to the trial court that the State would ask for this evidence to be received, not as proof of the contents of the allegations, but as part of the circumstantial evidence regarding the objective facts which had occurred on the day in question.

5. I deem it of sufficient importance to repeat verbatim the prosecutor's concluding remarks in respect of the application to receive the hearsay evidence as aforementioned and also the Regional Magistrate's response thereto. The exchange went thus:

"AANKLAER: Die Staat sal nie aanvoer dat die getuienis deur die Hof aanvaar te word as bewys van die inhoud of die waarheid van die beweringe wat gemaak is nie. Die Staat sal bloot aanvoer dat die

Hof dit wel in ag neem as omstandighedsgetuienis van objektiewe feite wat plaasgevind het nadat 'n voorval na bewering plaasgevind het en is die Staat dus van oordeel, op grond van dit wat ek op hierdie stadium gesê het, dat die Hof hierdie sodanige getuienis in hierdie lig behoort te beskou en dit aan die einde van die dag te oorweeg om dit wel toe te laat Edelaagbare.

HOF: Meneer, u kan voortgaan om die getuienis aan te bied. Ek sal later my redes in hierdie verband gee.”

6. The difficulty that arises is twofold, namely:
 - a) That the Regional Magistrate did not explain at this juncture or at any other stage during the trial to the Appellant, who was unrepresented throughout the trial (having dismissed his erstwhile legal representative who was instructed by the Legal Aid Board and having declined the offer to engage another legal representative), as to the meaning and import of this particular provision, and
 - b) The Regional Magistrate did not make a ruling on this hearsay evidence at any stage during the trial and more particularly at the stage when the State had closed its case, in order that the Appellant could be fully cognisant of the totality of the evidentiary material against him.
7. The following facts were common cause at the trial, or were not seriously disputed by the Appellant, with regards to count 2:
 - a) While on her way to catch her lift to work at approximately 6 am during the morning of 25 May 1998, the complainant

was accosted by a man in a footpath which had adjoining bushes;

- b) That the complainant had been dragged into the bushes, where this man had intercourse with her without her consent;
 - c) That the complainant had afterwards made certain reports to her co-passengers in a motor vehicle which was her regular transportation to her place of work as well as to a policewoman thereafter;
 - d) That, having been examined by the district surgeon, certain specimens were taken from the complainant's vagina, her blood and her hair and later transmitted to the police's forensic laboratory together with specimens of the Appellant's hair, blood and penis;
 - e) That forensic analysis showed that the Appellant's sperm was found to be present in the complainant's vagina.
 - f) That, based on the medical examination later the same day and J88 medical report handed in as an exhibit, the complainant had indeed been forcibly penetrated earlier that day.
8. The State called a number of witnesses to testify on count 2 against the Appellant, who in turn was the sole defence witness. The Appellant proffered an alibi defence in his testimony. I do not deem it necessary to deal with the evidence in much detail, given the eventual conclusion herein. Suffice to state that, excluding

momentarily the hearsay evidence, the State had established a formidable case based on circumstantial evidence against the Appellant. Indicators of the Appellant's guilt beyond reasonable doubt are in my view the following:

- a) Primarily and conclusively, the DNA evidence which incriminates the Appellant as the rapist on the day in question, having regard to the fact, as I have stated, that forensic analysis showed conclusively that the Appellant's sperm was found to have been present in the complainant's vagina. In this regard, the evidence of the expert witness was that the DNA STR-profile of the Appellant's spermatozoa was found to match that of the foreign material in the complainant's vagina.
- b) A footprint, matching in size and in pattern that of the sport shoe worn by the Appellant on the day in question, was found at the scene by a footprint expert, although the footprint was not of sufficient clarity to be lifted so that points of comparison could be prepared on a court chart as is usually the case.
- c) A witness, Mr. Seekoei, whom the Regional Magistrate correctly in my view found to be a credible witness, testified that he had seen the Appellant, who was well known to him, in the vicinity of the scene of the alleged rape immediately prior to the witness having met up with the complainant in the vehicle in which they travelled to work together, whereafter the complainant made a report to him.

- d) The complainant's emotional state of shock and her general condition of untidiness is an indication that something untoward must have happened to her that morning (this particular evidence emanating from the police witnesses as well as from the complainant's co-passengers in the motor vehicle alluded to hereinbefore, does not constitute hearsay; it is simply the impressions formed firsthand by these particular witnesses themselves).
 - e) The Appellant's untruthful testimony and alibi defence which were correctly rejected as false beyond reasonable doubt.
9. I have no doubt whatsoever that the DNA evidence, corroborated by the other circumstantial evidence and the factors enumerated above in the preceding paragraph, overwhelmingly proved the charge of rape against the Appellant. The crucial aspect for adjudication, however, is whether the Appellant had received a fair trial in respect of the reception of the hearsay evidence and the procedure followed at the trial. I turn now to discuss and decide this particular aspect.
10. Section 3 of the Amendment Act reads as follows:

“Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.”

11. The Appellant did not consent to the introduction of the hearsay evidence; in fact, his views were never canvassed. It is evident

that the reception of the hearsay in the present matter would fall under the provisions contained in section 3(1)(c) of the Amendment Act. In **Key v Attorney General, Cape Provincial Division and Another** 1996(2) SACR 113 (CC) at para [13], the Court held that unconstitutionally obtained evidence which would render a trial unfair must be excluded, since it would not be in the interests of justice to have same admitted as evidence against an accused person. In **S v Ramavhale** 1996(1) SACR 639 (A) at 649 d-e Schutz JA warned that

“a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so.”

It is, with respect, correct as the learned Judge of Appeal observed, that

“an accused usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness.”

[at 647 a-b].

12. In **S v Ndhlovu and Others** 2002(2) SACR 325 (SCA) at para [18], 338 b-c, Cameron JA (as he then was), in cautioning that a trial court must be scrupulous to ensure respect for an accused person’s fundamental right to a fair trial, stated that:

“[18] Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in

argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, **before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.**" (emphasis supplied).

13. In **S v Molimi and Another** 2006(2) SACR 8 (SCA) the central question before the Court was whether, in the circumstances of that case, the reception of hearsay evidence was unfair to the Appellants and therefore not in the interests of justice. At para [27], 18 c-d, Cachalia AJA (as he then was), stated that:

"[27] The trial Court's admission of the evidence 'provisionally' was regrettable. The Act allows the admission of hearsay evidence on a provisional basis when 'the person upon whose credibility the probative value of such evidence depends, himself testifies (later) at such proceedings.' If the person does not testify the evidence must be left out of account. However, there is no such requirement when the hearsay evidence is required to be admitted in the 'interests of justice'. In such a case, as Ndhlovu makes clear, 'the trial Judge must rule on its admissibility so that the accused can appreciate the full evidentiary ambit he or she faces'. A vague provisional ruling, as was made in this case, is not conducive to such an appreciation and may be prejudicial to an accused. It conflates the admissibility of the evidence with its weight and may leave an accused unfairly in a state of uncertainty."

14. In the present matter, the Regional Magistrate simply stated that the prosecutor can proceed with leading the hearsay evidence and that he would furnish his reasons later. At no stage did the Regional Magistrate explain to the accused the meaning,

substance and import of the subsection as opposed to the common law position with regard to hearsay evidence. In **S v Ndhlovu**, *supra* at para [17], 337 f, Cameron JA stated that

“.. the Act cannot be applied against an unrepresented accused to whom the significance of its provisions have not been explained. “

The learned Judge of Appeal referred to an earlier decision of Didcott J in **S v Ngwani** 1990(1) SACR 449 (N) at 450 d where the learned Judge stated as follows:

“The accused, who was unrepresented, had to have the effect of the subsection fully explained to him, in contrast with the legal position were it not invoked. He then had to be heard on the issue whether it should be invoked. In particular, he had to be heard on the important one raised by para (vi), the issue whether he would be prejudiced were it to be invoked.”

Furthermore, the Regional Magistrate did not make a final ruling on whether the hearsay evidence is to be admitted or not at the end of the State's case, so that the Appellant could be fully cognisant of the totality of the State's case against him. As had been held in the decisions above, namely **S v Ndhlovu** and **S v Molimi**, this was a gross irregularity on the part of the Regional Magistrate.

15. In his judgment the Regional Magistrate indicated that he had admitted the hearsay evidence provisionally only. He put it thus:

“Om dit in leketaal saam te vat dink ek dan die Aanklaer het die Hof versoek om te sê kyk na al die getuienis wat voor u is en besluit later

watter afleiding daaruit gevorm moet word. In die lig daarvan het ek hierdie getuienis voorlopig toegelaat.”

Later in the judgment, having discussed the provisions contained in sec 3 of the Amendment Act, the Regional Magistrate said the following:

“Die hoorsê-getuienis rondom wie hierdie klaagster gesê het wie haar verkrag het, gaan ek nie aanvaar nie. Ek kyk meer na die omstandighede wat voor my geplaas is.

Dit is meer na die toestand, die emosionele toestand van die klaagster en ook wat sy sou sê wat het met haar gebeur.”

The provisional admission of the evidence by the Regional Magistrate was a misdirection. The provisions of sec 3(3), quoted above, does not apply here at all, for in the present matter the person upon whose credibility the probative value of the hearsay evidence depends did not and could not have testified later, since that person (the complainant) was deceased at that time.

Consequently, as I have stated, the Regional Magistrate should have made a ruling based on the provisions contained in sec 3(1) (c).

Compare: **S v Molimi and Another**, *supra*, at para [27], 18 c-d.

16. What is the effect of this gross irregularity? It is trite that not every irregularity renders a trial to be vitiated; it is only those irregularities which constitute such a gross departure from established rules of procedure that an accused person has not been properly tried thus resulting in a failure of justice, which would have the effect of vitiating the proceedings.

See: **S v Moodie** 1961(4) SA 752 (A) at 758 F-G; 760 G-H.

In the present matter I am of the view that the unrepresented Appellant was severely prejudiced by these gross irregularities, in the following respects:

- a) the Regional Magistrate's failure to explain the meaning and import of sec 3 of the Amendment Act to him fully and to contrast that with the common law position in respect of the inadmissibility of hearsay evidence; and
- b) the Regional Magistrate's failure to make a ruling at the end of the State's case as to the admissibility of the hearsay evidence, so that the Appellant fully understands what the totality and ambit of the State's case which he had to answer was against him.

In my view it matters not that the Appellant did indeed testify and was quite clearly, as correctly found by the Regional Magistrate, untruthful in many material respects. It matters even less that, on a conspectus of all the evidence, in particular the overwhelming circumstantial evidence against the Appellant and his material untruthfulness as aforestated, that the State had proved beyond reasonable doubt that the Appellant had indeed raped the complainant on count 2. Justice must be seen to be done, particularly so in a constitutional dispensation. The Appellant has had a grossly unfair trial and in my view the prejudice which ensued therefrom is so serious that the conviction on count 2 cannot stand.

17. With regard to the sentence on count 1, the Appellant was

correctly convicted of raping a young lady who was 17 years of age at the time and a scholar. The complainant had been accosted in broad daylight by the Appellant who had threatened her with a knife, whereafter he had dragged her to nearby bushes and raped her. At that time the complainant had her monthly menstrual cycle. Apart from a superficial laceration on the labia minora, the complainant sustained no other physical injuries. It should, however, be self-evident that she must have suffered severe psychological trauma due to the ordeal.

18. The Appellant was 31 years of age at the time of sentencing. He had been employed at the Beeshoek mine prior to his arrest. He was in a cohabitation relationship with a woman for approximately four years and had fathered a child of two years in this relationship. He was the sole breadwinner in this family. At the time of sentencing the Appellant had been in custody awaiting trial for nearly two years. He has a number of previous convictions, including three involving an element of assault, namely:
 - a) in 1986 he was sentenced to 7 lashes with a light cane for rape;
 - b) in 1990 a sentence of 5 years imprisonment, of which 3 years were conditionally suspended for 4 years, was imposed on the Appellant for attempted rape; and
 - c) in 1991, the Appellant was sentenced to 3 years imprisonment for robbery where a firearm was used.

19. From the above exposition, it is readily apparent that there are no exceptional mitigating circumstances in Appellant's favour, save for the fact that he had been gainfully employed in the past and had supported his family. He is no stranger to violent crime and to prison. Of particular concern is the Appellant's apparent propensity to commit (or attempt to) rape. He is quite clearly a danger to society in this respect. Quite rightly the Regional Magistrate emphasized the frequency of rape in this area and also the brazenness of the Appellant's attack, which happened in broad daylight in a public place (albeit in a bushy area, which enabled him to conceal his vile act from passersby). Rape is indeed a scourge in this province – the Northern Cape is the unenviable leader of the pack when it comes to rape statistics.
20. On a conspectus of all the relevant factors, having regard to sentencing objectives and while mindful of the limited powers of an appeal court in respect of sentencing, I am of the view that the sentence is shockingly excessive. This sentence was imposed in the exercise of the trial court's usual sentencing discretion, i.e. outside the ambit of the minimum sentencing regime introduced by Act 105 of 1997 (which came into operation on 1 May 1998, the present offence having been committed prior to that date). The sentence induces a sense of shock when one has regard to the Appellant's personal circumstances, the nature and gravity of the offence and the interests of society.
21. Our Courts have given recognition to the fact that not all rapes deserve equal punishment.

See, *inter alia*:

S v Abrahams 2002(1) SACR 116 (SCA) at para [29] 127 c-e;

S v Mahomotsa 2002(2) SACR 435 (SCA) at paras [17] – [19], 443 f – 444 e;

S v Nkomo 2007(2) SACR 198 (SCA) at para [21], 205 h.

Imprisonment of 15 years is a sentence which should in my view, particularly where a sentencing Court has an unfettered discretion, be reserved for the more serious cases of rape where, for example, serious bodily and/or psychological injuries are inflicted or where a perpetrator acts in a particularly vile and callous manner. The present case does not fall into that category.

22. The Regional Magistrate did not, in my view, lay sufficient emphasis on the fact that the Appellant had been in custody awaiting trial for nearly two years. In **S v Brophy and Another** 2007(2) SA 56 (W) at paras [16] – [19], 59 b – 60 b, the Court approved of other preceding *dictae* that imprisonment while awaiting trial is equivalent to a sentence of twice that length.

See also:

S v Stephen and Another 1994(2) SACR 163 (W) at 168 f.

While not necessarily subscribing to the exactitude of the aforementioned equation, I support the general approach in respect of custody while awaiting trial.

23. In my view a sentence of 10 years imprisonment would be more appropriate to the crime, the criminal and the interests of society in this case.

24. The following order is issued:

- 24.1 The appeal against conviction on count 2 is upheld. The Appellant's conviction and sentence on count 2 is set aside.
- 24.2 The appeal against the sentence on count 1 is upheld. The Appellant's sentence of 15 years imprisonment is set aside and replaced with one of 10 years imprisonment.
- 24.3 The sentence of 10 years imprisonment on count 1 is antedated to 5 May 2000.

**SA MAJIEDT
JUDGE**

I concur:

**JI HENRIQUES
ACTING JUDGE**

FOR THE APPELLANT	:	ADV SETOUTOU
INSTRUCTED BY	:	LEGAL AID BOARD
FOR THE RESPONDENT	:	ADV MABASO
INSTRUCTED BY	:	DPP