

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 7/08
Delivered: 04/07/2008

In the matter between:

THE STATE

VS

DEON PATRICK KORDOM

CORAM: BOSIELO AJP et MOKGOHLOA AJ

JUDGMENT

Mokgohloa A J:

1. The accused was charged and convicted of housebreaking with intent to commit an offence unknown to the prosecution, and malicious injury to property in the Magistrate Court, Gordonia. He was sentenced to imprisonment for three (3) years of which one (1) year was suspended on suitable conditions. He was further sentenced to three (3) months on the second charge. Both sentences were ordered to run concurrently.

2. When this matter came up for review, I had doubts that the proceedings were in accordance with justice. I directed a query to the magistrate. The magistrate has since responded and maintains that the proceedings were

proper and in accordance with justice. I regret to state that I do not agree with the magistrate. I now proceed to deal with the irregularities.

3. It is clear from the record that several Legal Aid Board representatives did appear on behalf of the accused. However they all withdrew. On the day of the trial the accused informed the magistrate that he will conduct his own defence. The prosecutor put the charges to the accused. The accused pleaded to the first charge but had difficulty with the second charge. Ultimately, he pleaded guilty to the second charge although he stated that he does not understand the charge. This misunderstanding led him to deny all the elements of the charge for which he pleaded guilty. The magistrate, correctly so, changed his plea from guilty to not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977 (CPA)
4. It is trite that the duty lies with the presiding officer to ensure that the accused is fully aware not only of his right to legal representation but also of the consequences of not having a lawyer to assist him in his defence. This right is encapsulated in section 35(f) and (g) of the Constitution. This is so especially in cases where the accused is facing serious and complex charges and the possibility of substantial injustice looms large. As stated by **Jordaan AJ** in **S v Nkondo 2000(1) SACR 358 W at 360d** that:
“In my view, when courts explain the right to legal representation to accused persons and an accused person facing a serious charge elects to appear in person, the magistrate should ask the accused why do you want to appear in person and if it appears that the accused is under some or other misunderstanding that must be put right.”

However the court's failure to adequately explain to the accused his rights to legal representation does not necessarily vitiate the proceedings. The crucial question is, in my view, what legal effect such irregularity had on the trial.

5. The state led evidence of an expert witness Captain Diergaardt from the Criminal Record Centre, Upington. Certain exhibits were handed in by the state. The magistrate accepted these exhibits without enquiring from the accused whether he had any objection to their admission or not. These exhibits included finger prints, palm prints and foliens. It is clear that the accused had no understanding of all these technical aspects. This is evident from the fact that the accused did not cross-examine this witness even when it was testified that the prints on the exhibits matched that of the accused's hand and palm prints. It is true that the accused was asked whether he understand the evidence by Captain Diergaardt and he answered in the affirmative. He was further asked if he was satisfied with the evidence, he further answered in the affirmation. What is strange is that the accused in his plea explanation on the first charge stated that he has no knowledge of the housebreaking. On the second charge, the accused denied that he was at the place on the 29 and 30 April 2007. (the dates of the alleged commission of the crime) According to the accused, he worked at that place during February 2007 for only three weeks. This should have triggered the magistrate's sense that the accused does not actually understand Diergaardt's evidence. Furthermore, the magistrate should have assisted the accused in cross-examining this witness by putting the accused's version to the witness. Furthermore the exhibits handed in court were not even showed or explained to the accused. In my view the state's evidence was of such a technical nature that the

accused could hardly cross-examine effectively, or at all. It follows that the accused cannot be said to have had a fair trial where he simply did not understand the evidence led against him.

6. In **S v Sebatana 1983 (1) SA 809 (O) Booysen J** remarked as follows regarding the court's duty to assist an unrepresented accused during cross-examination:

“Experience has repeatedly taught that, particularly in the case of illiterate and untutored Black accused, they may put a few irrelevant questions to a State witness or no questions at all, and then subsequently give evidence which conflicts with that of the State witness in material respects. This may be the result of ignorance about the true nature and purpose of cross-examination, notwithstanding an explanation by the magistrate of the accused's “rights” in that connection. The presiding officer in such a case has a duty to assist the accused in presenting his defence by way of cross-examination by, for example, expressly asking him whether he agrees with each material allegation made against him by a State witness. In this way it should in most instances rapidly become clear which evidence is disputed, and the presiding officer can himself put the necessary question or contention to the State witness. This would at least give the accused the impression that he is being fairly treated during the trial.”

Regrettably the magistrate *in casu* failed to appreciate the duty that rested on him to assist the unrepresented accused to properly cross-examine and dispute the expert evidence which was tendered against him.

7. In **S v Lekgetho 2002 (2) SACR 13 (O) at 17b – d Musi J** (as he then was), emphasized the duty of the presiding officer to explain the accused's right to cross examination as follows:

“[10] It is settled that there rests on the judicial officer a duty to explain to the unrepresented accused the various procedural rights that the accused has in the conduct of his or her trial and when necessary to assist him/her in the exercise of such rights. (see S v Radebe; S v Mbonani 1988 (1) SA 191 (T) and S v Rudman; S v Johnson; S v Xaso; Xaso v Vank NO and Another 1989 (3) SA 368 (E).) The explanation must be such that the accused understands the content of the right.

‘To let him know of that right, yet not how to exercise it when he has no idea and starts running into trouble, is not of much use. Mere lip service to the duty is then paid.’

Per Didcott J in S v Hlongwane 1982 (4) SA 321 (N) at 323 C-D. Nor can such duty be delegated to the interpreter. (See S v Kester 1996 (1) SACR 461 (B) at 473.)

[11] The right to cross-examination is one such important right. Failure to explain it and to assist the unrepresented accused when necessary in its exercise is an irregularity. (See S v Modiba 1991 (2) SACR 286 (T); S v Khambule 1991 (2) SACR 277 (W); S v Raphatle 1995 (2) SACR 452 (T)).”

8. Another disturbing factor is that after the state had closed its case and the accused had started to testify, the magistrate for the first time informed the accused of competent verdicts. The position with regard to competent verdicts has engaged our courts over the years, particularly when it relates to the position of an undefended accused. It is a time-hallowed

principle of our criminal procedure that an accused is entitled to be informed with sufficient detail and clarity of the charges against him or her.

As **Bosiello J** observed in **S v Motsomi 2005 JDR 1080 T** as follows:

“[4] It is fundamental and time-honoured principle of our criminal law that every accused must be fully and properly advised of the charge which he/she is facing with sufficient details to be able to answer thereto. (See section 35(3) (a) of the Constitution). This hallowed principle is intended to avoid the possibility of “a trial by ambush”. This requires that where the state intends to rely on competent verdicts in terms of section 256 to 270 to the Code, that such an accused be informed of all relevant competent verdicts even before he pleads to the charge. Such a step will put such an accused in a position to know and make an informed decision inter alia as to how to plead, which facts to admit and how to conduct his defence. (See S v Velela 1979 (4) SA 581 (c) and S v Kester 1996 (1) SACR 461 (8) at 469i). Furthermore such an approach will avert any possible prejudice to such an accused, particularly if he is illiterate, unsophisticated and unrepresented”.

9. This principle is now enshrined in our Constitution. Section 35 (3) (a) entitles every accused person as an essential part of the right to a fair trial, to be informed of the charges he is facing with sufficient detail to answer it. It is sometimes argued that the provisions of sections 256 -270 of CPA which enables the court to convict an accused of an offence with which he is not originally charged is in conflict with this principle. This explains why, in order to avoid such criticism, it is crucial that all relevant competent verdicts be timeously, clearly and fully explained to the accused so that he/she knows what case he/she has to meet.

10. **Griesel J in S v Fielies and Another 2006 (1) SACR 302 C at 306 b-f**

summarises safeguards that have to be taken to avoid such conflict as follows:

“[9] In order to guard against the potential prejudice lurking in these provisions, the courts have over the years developed certain safeguards. The relevant principles in this regard may for present purposes be summarized as follows:

(a) The constitutional right to be informed of the charge includes the right to be informed of competent verdicts on the charge.

(b) While it is not essential to refer to competent verdicts in the charge sheet, it is extremely desirable that an undefended accused be informed timeously of any competent verdicts that might be returned on conviction. This requires the court ‘to diligently, deliberately and painstakingly inform the said unrepresented accused of his rights and to ensure and confirm that he accused understands his rights’.

(c) In order to give efficacy to this right, it is important that the accused be informed of competent verdicts before pleading.

(d) These principles have particular relevance but are not limited to the situation where a statutory provision places an onus on the accused.

(e) Failure to inform an accused of a competent verdict does not per se preclude the court from recording such competent verdict. Everything will depend upon the facts of each particular case and the extent to which an accused may or may not be prejudiced in the conduct of his or her defence by such omission. Where there is the likelihood of prejudice to

the unrepresented accused, the return of a competent verdict would not be sanctioned.

(f) In the ultimate analysis, the enquiry is simply whether the accused has been given a fair trial.”

11. It is unfortunate that the case against the accused on the merits appears to be formidable and justifies conviction. However, one can never know what effect a properly conducted defence could have had on the ultimate result. Having given this matter careful consideration, I am of the view that the proceedings as a whole were vitiated by a series of serious and gross irregularity to an extent that it cannot be said that the accused had a fair trial.
12. Having said the above, I find that the proceedings were not in accordance with justice and the conviction and sentence have to be set aside. I therefore propose the following order:

The convictions and sentences imposed by the magistrate are hereby set aside.

**F E MOKGOHLOA
ACTING JUDGE
NORTHERN CAPE DIVISION**

I agree, it so ordered.

L O BOSIELO
ACTING JUDGE PRESIDENT
NORTHERN CAPE DIVISION