

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A248/2005

In the appeal between:

DALINGEBO ISAAC DYOYI

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* MATHEBULA, AJ

HEARD ON:

13 MARCH 2006

JUDGEMENT:

MATHEBULA, AJ

DELIVERED ON:

23 MARCH 2006

[1] The appellant was convicted by a district magistrate, Welkom of assault with intent to do grievous bodily harm and sentenced to three years imprisonment. The appeal is against both conviction and sentence.

[2] It is an undisputed fact that the appellant stabbed one John Sekamoto (Sekamoto) three times with a knife on the 27th

March 2005. As a result of the injuries sustained, Sekamoto was hospitalised for three days. The attack on him was without provocation and unwarranted.

[3] On the 19th April 2005 the appellant appeared before magistrate Ruthernberg. The right to legal representation was explained to him. He chosed to conduct his own defence. The trial commenced on the 5th May 2005 and was concluded on the 30th August 2005. Throughout the hearing he appeared in person.

[4] Counsel for the appellant submitted that the appellant was not afforded the right to a fair trial. The basis of his submission is that the court *a quo* did not before the commencement of the trial explain to the appellant his right to legal representation. This prejudiced the appellant as he was unable to conduct his defence. He did not ask the crucial questions nor adequately challenge the evidence led by the respondent. This was also unfair that the appellant did not have preview to the respondent's case

prior to the commencement of the trial. He argued that the court *a quo* did not assist the appellant in the conduct of his defence. *Inter alia* the appellant was not informed that the attendance of his witness can be secured by means of a subpoena. This led to the appellant opting for a prejudicial stance of proceeding with the matter without the crucial witness.

[5] He conceded that the conviction was correct based on the evidence before the court *a quo*. He submitted that the sentence imposed was shockingly inappropriate. It was disproportionate to the crime committed, the appellant and interest of society. In imposing the sentence, the court *a quo* over-emphasised the seriousness of the offence and interest of society over the personal circumstances of the appellant. The appellant was a first offender, gainfully employed and a young family to support. He therefore urged me to interfere with the sentence imposed by the court *a quo*.

[6] Counsel for the respondent submitted that the issue as to

whether the appellant has been denied a fair trial or not depends on the circumstances. He argued that the right to legal representation was explained to the appellant and he independently chose to represent himself. However, he conceded that on the day of the trial the same was not explained to the appellant. The appellant was aware of the existence of his right to legal representation. He did not insist on it. He further submitted that the appellant informed the court *a quo* that he will make his own arrangements to secure the attendance of his witness at the trial. He was given three opportunities to bring the witness to court but all in vain. He did not seek the assistance of the court to secure the attendance of his witness. On the third occasion he made a decision to proceed with the matter without his witness. He was not influenced or forced to decide to continue with the trial.

- [7] On the issue of sentence, he argued that the appellant had committed a serious offence. He had stabbed Sekamoto three times after he had missed him almost ten times. He had the direct intention to grievously injure him. As a result

of the injuries sustained, Sekamoto spent three days in hospital. The appellant was fortunate that he was not charged of attempted murder. He therefore urged me that there is no basis to interfere with the sentence imposed by the court *a quo*.

[8] The constitution guarantees that an accused person has a right to a fair trial. This right includes the right to a legal representative of one's choice or assigned by the state at the expense the state. A right to a legal representation has been held in **STATE v PHILEMON** 1997 (2) SACR 651 (W) as a fundamental right and one of the cornerstones of a civilised legal system.

[9] It is common cause that the appellant conducted his own defence and the right to legal representation was not explained to him on the day of the trial. However, considerable period of time elapsed between the 19th April 2005 and the conclusion of the trial. The appellant was aware of his rights to legal representation and chosed to

conduct his own defence.

- [10] In **HLANTLALALA AND OTHERS v DYANTYI NO AND ANOTHER** 1999 (2) SACR 541 (SCA) at 545 F – H the court said the following:

“The crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellants' trial. What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not per se result in an unfair trial necessitating the setting aside of the conviction on appeal.”

This was approved in an unreported case of **STATE v MAY** SCA, case number 376/2004.

- [11] In my view the practice of not informing an unrepresented accused of his rights before the commencement of his right to legal representation before the commencement of the trial is undesirable. It is important that an unrepresented accused is informed of his right to legal representation before the trial commences in order to ensure that he still

wants to exercise the option he has previously chosen. This is even more important in situations where an unrepresented accused appear before a different presiding judicial officer to the one who previously postponed the matter. In this matter there is nothing that prejudiced the appellant to the extent that he was not afforded a fair trial. The trial was conducted in accordance with the law.

[12] I shall not deal with the issue of conviction as the counsel for the appellant has conceded that based on the evidence before the court *a quo*, the conviction was in order. I also confirm that the conviction is in order.

[13] The trial court has discretion when it comes to sentence. The court of appeal will undoubtedly interfere if there is striking disparity between the sentence imposed and that it will have imposed if sitting as a court of first instance. See **STATE v PILLAY** 1977 (4) SA 531 A at 535 E – F and **STATE v SALCEDO** 2003 (1) SACR 324 (SCA).

[14] In this matter, the court *a quo* imposed a sentence which in

its own admission is harsh but not shockingly inappropriate. It seems to me, with respect, that the seriousness of the offence and interest of the society were over emphasis at the expense of the personal circumstances of the appellant. Although the court *a quo* made mention of other sentencing options, they were not considered. The same goes for the personal circumstances of the appellant.

[15] The appellant is a first offender and was 22 years at the time of the conviction and sentence. He was gainfully employed with a family to support. Although Sekamoto was seriously injured he had made complete recovery. There is no evidence of criminal propensity on the part of the appellant and that he is beyond rehabilitation.

[16] As counsel for the appellant correctly argued, direct imprisonment should not be the first and only option in sentencing. Stabbing a person with a knife is a serious offence but it does not follow that only direct imprisonment is appropriate sentence. Section 276 (i) of the Criminal Procedure Act no. 51 of 1977 provides *inter alia* in

subsection (h) correctional supervision and in (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services. These are some of the sentencing options that the court *a quo* may consider in imposing an appropriate sentence.

[17] It is not always desirable that direct imprisonment should be imposed on first offenders. The court *a quo* in its own admission is also aware that there is criticism in imposing direct imprisonment on young first offenders. In this matter, the appellant is a young person and direct imprisonment imposed upon him makes the sentence harsh and inappropriate. I am not convinced that the appellant cannot be rehabilitated by correctional supervision. In my view he is a candidate who might benefit from programs of correctional supervision to deal with *inter alia* his temper and learn some responsibility. I am at liberty to interfere with the sentence.

[18] I make the following order:

18.1 Conviction is confirmed.

18.2 The sentence is set aside.

18.3 The matter is remitted to the court *a quo* for an appropriate sentence.

M.A. MATHEBULA, AJ

I concur.

M.H. RAMPAL, J

On behalf of the appellant:

Adv. T. B. van Rensburg
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of the respondent:

Adv. S. Chalale
Instructed by:

Director of Public Prosecutions
BLOEMFONTEIN

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