



REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: CC 182/05

In the matter between

THE STATE

and

MNCEDI DUNA

Accused

JUDGMENT DELIVERED ON 12 JUNE 2006

ZONDI, AJ

[1] The accused, who was legally represented, appeared in the Wynberg Regional Court on 17 June 2005 on a charge of rape involving a 10 year old girl. He pleaded guilty to the charge. His

legal representative prepared a written statement in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977. This statement was signed by the accused and his legal representative. The plea statement was read into the record and handed in as exhibit “A” and the medical report in respect of the complainant (J88) as exhibit “B”. As the court was satisfied that the accused admitted all allegations contained in the charge sheet, it convicted him on his plea.

[2] After convicting the accused the magistrate stopped the proceedings and committed the accused to this Court for sentence as the provisions of section 51 of Act 105 of 1997 (the Act) were applicable. This was done in terms of section 52(1)(a) of the Act which provides as follows:-

“(1) If a regional court, following on-

a) a plea of guilty; or

b) ...,

has convicted an accused of an offence referred to in –

i) Part I of Schedule 2; or

ii) Part II, III or IV of Schedule 2 and the

court is of the opinion that the offence concerned merits punishment in excess of the jurisdiction of a regional court in terms of section 51(2),

the court shall stop the proceedings and commit the accused for sentence as contemplated in section 51(1) or (2), as the case may be, by a High Court having jurisdiction.”

[3] When the matter came before this Court the accused was represented by *Mr Ballem* and the State by *Mr Badenhorst*. As the accused was convicted on his plea in the regional court, this Court has to deal with him in terms of section 52(2)(a) of the Act which provides:-

“(2) (a) Where an accused is committed under subsection (1)(a) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfied the Court that such plea or such admission was

incorrectly recorded.

(b) Unless the High Court in question-

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,

the Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51(1) or (2), as the case may be.

(c) If the Court-

(i) is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in

respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge,

the Court shall enter a plea of not guilty and proceed with the trial as a summary trial in that Court : Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(d) The provisions of section 112(3) of the Criminal Procedure Act, 1977 (Act No 51 of 1977), shall apply with reference to the proceedings under this subsection.”

[4] At the commencement of the proceedings *Mr Ballem* applied for the retraction of the accused's plea on the ground that the accused's legal representative had made a mistake in formulating a plea statement. His intention was to plead not guilty to the charge. The mistake occurred as a result of misunderstanding between him and his legal representative. His home language is isiXhosa and the legal representative communicated with him in English which is the language which he does not properly understand. There was no

interpreter to interpret for him when he consulted with his legal representative. *Mr Ballem* further submitted further that the proceedings in the regional court were conducted in Afrikaans and again what was being said in court was never interpreted for him from Afrikaans to isiXhosa though there was an interpreter present in court.

[5] The State handed up the charge sheet together with annexures thereto (exhibit “A”) and the transcript of the court record (exhibit “B”). The matter thereafter proceeded in terms of section 113 of the Criminal Procedure Act which provides as follows:-

“(1) If the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused’s plea of guilty should not stand, the court shall record a plea of not guilty and require the

prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

(1) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.”

[6] The defence called the accused to substantiate its application for a plea retraction. The state opposed the application and called three witnesses. The fourth witness, Mrs Strydom, a stenographer, was called by the court.

[7] The accused testified that on 17 June 2005 he appeared in the Wynberg Regional Court on a charge of rape. He was legally represented by Ms Amos, an attorney from Justice Centre. He confirmed that the plea statement which was read in court bears his signature. He, however, stated that certain portions in the statement are incorrect. He denied that he instructed his legal representative to

plead guilty to the charge. He always wanted to plead not guilty.

[8] He testified that his legal representative did not understand his instruction to her. He stated that he consulted with his legal representative at the court holding cells. During consultation they were standing. He was talking to his legal representative through the security bars as there are no consultation facilities at the court holding cells. The legal representative was talking to him in English and he battled to understand her as he is not conversant in English. He passed standard 4 at school. He testified that he and his legal representative misunderstood each other because of language problem.

[9] The accused further testified that he was thereafter brought to court. He did not understand the court proceedings. He stated that although there was an interpreter in court she did not interpret for him what was being said in court. He denied that the magistrate had asked him questions while in court. He denied that he had told his legal representative that he raped the complainant. He only admitted

that he knew the complainant.

[10] Under cross-examination the accused admitted to have told the investigating officer that he was born on 16 June 1961, that he was unmarried and that he was employed as a taxi driver. He denied that he informed the investigating officer that he passed standard 8 at school. When he was asked whether he was able to speak Afrikaans and English he answered in the negative saying that he understands a little bit of English but does not understand Afrikaans at all.

[11] When he was asked why he had not asked his legal representative to get an interpreter to interpret for him during the consultation she had with him at the holding cells, the accused stated that it was because she was in a hurry when she came to see him. When he was asked if the charge was read to him while he was in court, he stated that he was unable to say because he did not understand the proceedings. The proceedings were not interpreted to him. He testified that the written statement, purporting to be his plea was never interpreted to him in isiXhosa. He admitted to have

signed the plea statement though he did not understand its content. He thought that the plea statement contained and conveyed what he had discussed with his legal representative. He was merely asked by the interpreter to append his signature to the document, which he did. He denied that his legal representative had made use of the services of an interpreter when she consulted with him at the court holding cells. He did not know what the contents of the statements were until they were explained to him by *Mr Ballem*, his present legal representative.

[12] *Mr Badenhorst* read the content of the plea statement to the accused and asked him to comment on it. The accused admitted its correctness in certain respects, but denied others and in particular those relating to the fact that he had admitted that he raped the complainant.

Mr Ballem thereafter indicated that he had no further witness to call.

[13] The state called Ms Julia Nonceba Williams, Ms Melissa Amos and Ms Gladys Ncaba to testify on its behalf.

Ms Williams is employed by the Department of Justice as an interpreter. During 17 June 2005 she was working at Wynberg regional court. She is currently employed as an interpreter in the High Court. She has been an interpreter for the past 20 years and is fully conversant in English, isiXhosa and Afrikaans.

[14] She confirmed that she had read the record of the proceedings in the regional court relating to the accused. She had done so to refresh her memory. She testified that based on her recollection she was an interpreter in the accused's trial. She interpreted from Afrikaans to isiXhosa and vice versa.

[15] Under cross-examination she testified that her testimony was based on what she had read in the record. She had no independent recollection of the events. She testified that on 17 June 2005 she was not the only interpreter for Wynberg regional court M. She denied that she interpreted for the accused during the consultation he had with his legal representative. She would not have done so as she was involved in the accused's trial. She explained that in terms

of the interpreters' practice an interpreter who is involved in the accused's trial is not allowed to assist the accused's legal representative with interpretation during consultation with the accused. The rationale for this practice was to prevent any kind of conflict of interest situation from arising. She conceded that she might not have interpreted for the accused during the proceedings on 17 June 2005. Her independent recollection of the events was faint.

[16] Thereafter the state called Ms Melissa Amos to testify. She is employed by Athlone Justice Centre as a professional assistant. She legally represented the accused on 17 June 2005 on the instruction of the Legal Aid Board. She was referred to the record of the proceedings relating to the accused which she confirmed to have perused and which in her opinion accurately reflects what transpired in court. She confirmed that she was the author of the plea statement. She drafted the plea statement after consulting with the accused. She got Ms Dora Ncaba, a court interpreter to assist her with interpretation during consultation. The consultation was in English and Dora Ncaba interpreted for the accused to isiXhosa and

it took place at the court holding cells.

[17] She confirmed that the plea statement accurately conveyed the accused's instruction. She further testified that during the court proceedings which were conducted in Afrikaans, the charge was read to the accused. He understood it and pleaded guilty to it. She thereafter confirmed the accused's plea and read into the record the plea statement which she had drafted. Throughout the proceedings Ms Williams interpreted for the accused from Afrikaans to isiXhosa. After reading the plea statement, the accused was asked by the court if he was in agreement with its contents and he confirmed. The accused thereafter signed the plea statement. The court convicted the accused on his plea.

[18] During cross-examination Ms Amos conceded that her testimony was based on her reading of the court record. She had no independent recollection of the events. She, however, particularly recalled that on the day in question Ms Williams was an interpreter for court M. She had asked her to assist her during consultation. She,

however, refused because she was involved in the trial of the accused.

[19] She stated that she then asked somebody else to interpret for the accused during consultation because she was unable to communicate with him. He spoke in isiXhosa and she did not understand him. She denied that there was any misunderstanding between her and the accused, either during consultation or in court. She stated that after drafting the plea statement, she went back to the holding cells and consulted with him on its contents. This consultation took place at the court holding cells during adjournment and Ms Ncaba was present to interpret for the accused.

[20] Thereafter the matter was postponed for the State to bring the tape recordings of the proceedings.

[21] When the proceedings resumed the state called Ms Gladys Ncaba who testified as follows: she is employed by the Department of Justice as an interpreter. She has been an interpreter for 16 years and is currently based at Wynberg Magistrate's Court. She is

conversant in English, Afrikaans and isiXhosa. She passed standard 10 at school and has successfully completed an advanced interpreter's course as well as a course on sexual offences at Justice College.

[22] She was referred to the charge sheet and a transcript of the proceedings in the Wynberg Regional Court of 17 June 2005. She confirmed that she interpreted in the accused's trial on the day in question. The proceedings were conducted in Afrikaans and she interpreted for the accused from Afrikaans to isiXhosa and vice versa. The tape recordings of the proceedings were replayed and she confirmed that what is said on tape accurately reflects what transpired in court on 17 June 2005. She confirmed that the prosecutor put the charge to the accused in Afrikaans and she interpreted for the accused in isiXhosa. The accused pleaded guilty to it and his legal representative confirmed the plea and read the plea statement. She again interpreted to the accused as it was read in Afrikaans.

[23] The accused was asked by the magistrate if he was in agreement with the contents of the plea statement and he confirmed. The accused was then asked to sign it, which he did. The court convicted the accused on his plea statement.

The tape was handed in as Exhibit 1 by agreement between the State and the defence.

[24] *Mr Ballem*, after listening to the tape recording and the witness' evidence asked for an indulgence to take instruction from the accused. This was granted. After consulting with the accused *Mr Ballem* said he had no questions for the witness.

[25] The witness, in response to questions put to her by the court, denied that on 17 June 2005 she had been requested by Ms Amos to interpret for the accused during consultation. She stated that she would not have done so as the practice prevented her from doing so. It is the practice that an interpreter who is involved in the accused's trial, would not be allowed to assist with interpretation during consultation with his or her legal representative.

[26] Mrs Cornelia Francina Strydom was called by the court. She is employed as a stenographer at the Wynberg Regional Court M. She received training on this work which she has been doing for the past 8 years. She confirmed that Exhibit 1 contains the record of the proceedings relating to the accused's trial. She numbered the tape with a case number and after the conclusion of the recordings put it into the envelope which she sealed and took it to the clerk of the court for safekeeping.

[27] Thereafter counsel for the accused and the State were given an opportunity to address the court. *Mr Ballem* indicated that he had nothing to say and *Mr Badenhorst* briefly addressed the court stating that the accused had failed to give a reasonable explanation for the retraction of his plea. He accordingly asked the court to find that the proceedings in the regional court were in accordance with justice and that the conviction should stand.

[28] The question is whether the accused can, at this stage of trial, retract his plea and what he has to show in order to do so. There is

no doubt that a plea made in terms of section 112 of the Criminal Procedure Act is not a cast in stone. It can be corrected and changed either by the court or the accused himself. Section 113 of the Criminal Procedure Act facilitates a procedure to deal with a plea correction. This will also involve the retraction of an admission (**Attorney-General, Transvaal v Botha** 1993 (2) SACR 587 (A)). It is also clear that a plea can be corrected even after conviction stage as long as the accused has not been sentenced. In other words the accused can change his plea before or any time before sentence.

[29] In this case the accused cites misunderstanding between him and his legal representative as a reason for seeking to retract his plea. In effect he is saying the plea of guilty was not in accordance with his instruction. He had instructed his legal representative to plead not guilty. This instruction, because of the language barrier between him and his legal representative, was not properly conveyed to his legal representative.

[30] The approach which has to be followed in dealing with the

application of this nature is correctly set out in **S v Britz** 1963 (1) SA 394 (T) at 398H-399B:

“The accused wishing to withdraw his plea of guilty must give a reasonable explanation as to why he had pleaded guilty and now wishes to change his plea. A reasonable explanation could be, for example, that the plea was induced by fear, fraud, duress, misunderstanding or mistake. If he fails to give an explanation the court would be entitled to hold him to his plea of guilty. If he does give an explanation there is no *onus* on him to convince the court of the truth of his explanation. Even though his explanation be improbable the court is not entitled to refuse the application, unless it is satisfied not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he should be allowed to withdraw his plea of guilty.”

[31] This approach was followed in the **Attorney-General, Transvaal v Botha** case (*supra*) and the emphasis seems to be that when the accused wishes to change his or her plea after conviction and before sentence he has to give a reasonable explanation for his or her plea and the *onus* is on the state to show beyond reasonable

doubt the falsity of the explanation.

[32] Turning to the facts of this case, the explanation given by the accused for retracting his plea statement is based on the fact that, first, as a result of language difference between him and his legal representative, he was unable to communicate with her and this fact impacted negatively on his defence. He testified that he had intended to plead not guilty to the charge, but because of misunderstanding caused by communication problem his attorney ended up preparing a plea statement. Second, the other basis upon which the accused seeks to withdraw his plea statement is the fact that he was unable to follow the court proceedings because they were conducted in a language which he did not understand and an interpreter did not interpret for him.

[33] The validity of these claims must be tested against evidence which was placed before this court. However, before undertaking that exercise it is apposite to first deal with the rights which an accused person has and in particular rights relating to legal

representation.

[34] Section 35 of the Constitution of the Republic of South Africa of 1996 deals with these fundamental rights. The provisions relevant to this matter are contained in section 35 (3) (f), (g) and (k) which provides as follows:

“(3) Every accused person has a right to a fair trial, which includes the right:-

f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

g) to have a legal practitioner assigned to the accused person by the State and at state expense if substantial injustice would otherwise result, and to be informed of this right promptly;

(k) to be tried in a language that the accused person understands, or, if that is not practicable, to have the proceedings interpreted in that language.”

The court in the matter of **S v Ngubane** 1995 (1) BCLR 121 (T) had

an occasion to consider the meaning of section 35 (k) and at page 122H, the court had this to say:

“This provision is to be construed, as meaning that the interpretation should take place simultaneously with the testimony being given by the witnesses; it also presupposes and provides that the interpretation will be in a language which the accused fully understands and not into a language which he understands partially...”

[36] This right, however, does not mean that an accused has a right to insist that the proceedings be conducted and recorded in his own language (**Mthethwa v De Bruin NO and Another** 1998 (3) BCLR 336(N) at 338E). But compare with **S v Matomela** 1998 (3) BCLR 339 (CK) and **S v Pienaar** 2000 (7) BCLR 800 (NC).

[37] It is correct that an accused is entitled to legal representation at state expense if substantial injustice would otherwise result (**Legal Aid Board v Msila and Others** 1997 (2) BCLR 229 (E)). The right to legal representation at state expense does not, however, generally include the right to choose a legal practitioner. Circumstances may,

however, arise where the accused person may be justified in seeking to dispense with the services of the legal representative assigned to him and to seek the appointment of another legal practitioner (**S v Manguanyana** 1996 (2) SACR 283 (E) at 287).

[38] With this legal background I now turn to consider the validity of the accused's claims. It is common cause that the State at its own expense had assigned Ms Amos to represent the accused. It is also common cause that the accused's home language is isiXhosa and which language Ms Amos did not understand. Ms Amos was proficient in English and Afrikaans. The accused's knowledge of English was very rudimentary and he did not understand Afrikaans at all.

[39] What is, however, in dispute is whether the services of an interpreter had been provided to the accused during consultation with his legal representative as well as during trial. If such services had not been provided there is no doubt that the accused's right to a fair trial would have been severely compromised. In my view, proper

understanding between an accused and his or her legal representative is vital to an effective representation. They need to be able to communicate and understand each other very well to ensure that his or her defence is properly and efficiently conducted.

[40] Ms Amos testified that she had requested one Gladys Ncaba, a court interpreter to interpret for the accused while she consulted with him. Ms Ncaba however denied to have interpreted for the accused during consultation with Ms Amos. She could not have done so because she knew she was involved in the accused's trial. According to Ms Ncaba in terms of the workplace rule an interpreter is not allowed to participate in the consultation between the accused and his legal representative if such an interpreter is going to be involved in the accused's trial. The evidence of Ms Williams was to the same effect. I shall accept the evidence of Ms Ncaba on this issue and accept that she did not interpret for the accused during consultation with his legal representative. It is therefore possible that Ms Williams might have been used by the defence during consultation with the accused.

[41] The next question is whether the proceedings were interpreted to the accused. In this regard it is the accused's case that the proceedings were conducted in Afrikaans and the interpreter did not interpret for him.

[42] The State relied on the evidence of Ms Williams, Ms Amos and Ms Ncaba and presented the tape recording of the proceedings. Ms Williams' evidence was not that of much assistance. It was based on the information in exhibits "A" and "B". She had no independent recollection of the events. She was unable to confirm whether she definitely interpreted for the accused in court on 17 June 2005. As far as Ms Amos is concerned the court gained an impression that she was truthful and honest and her evidence regarding the court proceedings can safely be relied upon. Ms Ncaba was an impressive witness. There were no contradictions in her evidence. She gave evidence in a truthful manner. Her evidence was corroborated by the contents of the tape recordings. The tape recordings were replayed in court and it is clear that she interpreted the proceedings to the accused from the time the charges were put to him right up to the

stage when he was convicted. The accused participated in the proceedings and the general picture that emerged was that the accused fully understood the proceedings. Mrs Strydom testified regarding the source and authenticity of the tape. The tape recordings were original recordings and they relate to the criminal proceedings involving the accused (**S v Singh and Another** 1975 (1) SA 330 (N) and **S v Ramgobin** 1986 (4) SA 117 (N)). The tape recordings are accordingly admissible.

[43] The accused's claims, tested against the body of the evidence presented, are without substance and are accordingly rejected as false and to the extent that his evidence contradicts that of Ms Amos, it is rejected. The accused's explanation to retract his plea is not only unreasonable but has been shown beyond reasonable doubt to be false. I am satisfied that the plea of guilty of the accused was not incorrectly recorded. The plea statement stands. The application is dismissed.

[44] In terms of section 52 (2) of the Act I accordingly find that the

proceedings in the regional court were in accordance with justice and the judgment of the regional court shall stand for the purpose and be sufficient for this court to pass a sentence.

ZONDI, AJ