

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

Case No. : 618/2005

In the matter between:

THE STATE

and

BARNEY AUGUSTUS MOKOENA AND 5 OTHERS

CORAM: CILLIé J *et* BLOEM AJ

JUDGMENT BY: BLOEM AJ

DELIVERED ON: 1 SEPTEMBER 2005

[1] The six accused persons were charged and convicted of indecent assault in the magistrates' court, Kroonstad. The State was unable to prove that the accused had previous convictions. The accused, through their attorney, admitted their respective previous convictions. The magistrate stopped the proceedings and committed all the accused for sentence by the regional court in terms of section 116(1)(b)

of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

[2] The regional court magistrate to whom the matter was referred, has expressed doubt on whether or not the proceedings before the district court magistrate were substantially in accordance with justice. At the outset I express my appreciation to the regional court magistrate who raised the issues which I deal with hereunder. Before I do so, I briefly set out the facts relevant to the determination of the issues raised by the regional court magistrate.

[3] The six accused and the two complainants are inmates of the Medium B Prison at Kroonstad. The first complainant testified that on 14 January 2004 he entered his cell where the second complainant was waiting to finish tattooing a cross on the first complainant's back. As he was about to close the door behind him, the accused entered. The accused took turns to have sexual intercourse per anum with the complainants who were not consenting parties. The other accused kept watch at the celldoor while other two accused indecently assaulted the complainants. The first complainant testified that he was indecently assaulted by each one of the accused persons. The second complainant's evidence in that regard is not so clear in respect of some of the accused. The complainants reported

the activities of the accused to the prison authorities who alerted the police. Statements were taken by the police from the complainants who were seen by a medical practitioner three days after the accused had had sexual intercourse with them.

[4] I will now deal with what I believe to be the main issues raised by the regional court magistrate.

There were many deficiencies in the evidence of the second complainant.

[5] In his evidence-in-chief the second complainant testified that all the accused took turns to have sexual intercourse with him. When he was cross-examined, he stated on more than one occasion that neither accused one nor accused three had sexual intercourse with him. At some stages during cross-examination he went so far as to state that he did not see accused one on that day. Following upon leading questions by the prosecutor the second complainant testified that both accused one and three had sexual intercourse with him. Regard being had to all the evidence, I am in

agreement with the regional court magistrate that the second complainant's evidence, insofar as it relates to the first and third accused, was of such a poor quality that those two accused persons should not have been convicted of indecent assault on the second complainant. Their conviction on the second count should accordingly be set aside.

- [6] I agree with the regional court magistrate that, in the absence of medical or other expert evidence, the trial magistrate could not justify the deficiencies in the second complainant's evidence on the basis that he allegedly sustained injuries in a motor vehicle accident which caused him not to remember certain things clearly.

The State did not lead medical evidence which seems to have been available.

- [7] In the case of indecent assault, unlike rape where the penetration of the female's sexual organ by the male's sexual organ is a requirement, it is not the act but the

accuseds' intention, manifested by words or conduct, that is important. In order to constitute the offence of indecent assault, it is not necessary that the complainant's private parts should have been touched, let alone penetrated. Any action whereby the accused aims with some part of his body at the private parts of the complainant is sufficient. **REX v CURTIS** 1926 CPD 385 at 389 – 390 and **S v M** 1979 (2) SA 406 (RA).

- [8] The two complainants testified that the accused had sexual intercourse with them per anum. Whether or not the penises of the accused penetrated the complainants' anuses is, in my view, immaterial. What is of importance is that the evidence shows that the accused intended to commit indecent acts when they aimed with their penises at the complainants' anuses. It is so that if the medical evidence was lead, the State might have proved the extent of the trauma to which the complainants were subjected. The failure to lead that evidence does not disprove the indecent assault.

The conviction of accused one and three on count two.

[9] I have already dealt with this aspect above.

The acquittal of accused two on count two.

[10] I agree with the regional court magistrate that it is inexplicable how the trial magistrate could have acquitted accused two on count two. The second complainant's evidence was unsatisfactory insofar as accused one and three are concerned. However, he gave clear and satisfactory evidence regarding the indecent assault upon himself by accused two. All the evidence shows that accused two is guilty on count two. He was fortunate to have escaped a conviction on that count. I am satisfied that the State has also proved his guilt beyond reasonable doubt on count one.

The accuseds' version were not destroyed under cross-examination, there alibi defence and onus of proof.

[11] There is a duty on the State to prove its case against an

accused beyond reasonable doubt. The complainants testified that the offences were committed in their cell and that all the accused were there. During the cross-examination of the complainants it was not put to them by the attorney who represented the accused that they were either at school or at the library when the offences were committed. There was no onus on the accused to prove that their alibi was true. If one looks at the accuseds' evidence in isolation, one is tempted to believe that there is a possibility that their version is reasonable. However, when one considers all the evidence which was adduced, such evidence overwhelmingly establishes the guilt of the accused beyond reasonable doubt. **S v BRUINDERS EN 'N ANDER** 1998 (2) SACR 432 (E).

- [12] In terms of section 116(1)(b) of the Act, where the district court magistrate is of the opinion that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of the district court,

he shall commit the accused for sentence by the regional court having jurisdiction. A district magistrate should accordingly have regard to the previous convictions of the accused to determine whether or not the accused should be committed for sentence by the regional court. Clearly not all previous convictions will lead to the committal of an accused for sentence by the regional court. Only serious and related previous convictions will lead to such committal. In this case the accused admitted that they were in custody because of the following previous convictions:

Accused one	-	murder and robbery
Accused two	-	housebreaking with intent to steal and theft
Accused three	-	rape
Accused four	-	theft
Accused five	-	rape
Accused six	-	housebreaking with intent to steal and theft

[13] I am of the view that only accused one, three and five who have previous convictions of a serious nature ought to be committed to the regional court for sentence. The other

accused should be sentenced by the district court magistrate who, by virtue of his first-hand appreciation of the evidence and observation of the accused, is best qualified to assess an appropriate sentence. **S v CELE AND OTHERS** 1994 (1) SACR 616 (N).

[14] In all the circumstances, I am of the view that all the accused were properly convicted in respect of count one, that accused one and three should not have been convicted on count two and that accused two should have been convicted on count two. To avoid any confusion the acquittal of accused two on count two is confirmed. I accordingly make the following order:

14.1 The conviction of all the accused in respect of count one is confirmed;

14.2 The conviction of accused four, five and six in respect of count two is confirmed;

14.3 The conviction of accused one and three in respect of count two is set aside;

14.4 Accused one, three and five are committed to the regional court for sentence;

14.5 Accused two, four and six are to be sentenced by the trial magistrate in the district court.

G.H. BLOEM, AJ

I agree.

C.B. CILLIÉ, J

/sp