

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

CASE NO: A664/2000

In the matter between:

**BOOI ARNOLDUS SWARTZ
Appellant
SHANE SEBASTIAAN BENNET
Appellant**

First

Second

and

**THE STATE
Respondent**

JUDGMENT DELIVERED ON 9 APRIL 2002

TRAVERSO, DJP et DESAI, J et KNOLL, J :

[1] The Appellants were convicted in the Regional Court, Springbok of rape and indecent assault. The Magistrate found that the Appellants acted with a common purpose to rape and they were referred to the High Court for purposes of sentence in accordance with the provisions of Section 52(1)(b), read with Section 51(1) and Part 1 of Schedule 2 of the Criminal Law and Procedure Act, No. 105 of 1997 (“the Act”). (Prior to

its amendment by Act 62 of 2000.)

[2] The sentence proceedings commenced before Davis, J. on 17 June 1999.

[3] After hearing evidence on sentence, the Appellants were sentenced to 18 years' imprisonment each in respect of both convictions on 21 June 1999.

[4] After sentence was imposed an application was immediately made for leave to appeal. The grounds upon which the application was brought do not appear *ex facie* the record. The judgment of the Court *a quo* on this aspect reads as follows:

“Having heard Counsel for both sides, I am inclined to the view submitted by Miss Nel, ***namely that there are ambiguities in the evidence placed on record, and that accordingly I am prepared to grant the application for leave to appeal insofar as conviction is concerned.***

That leaves the question of sentence which might well change given the factual complex upon which an appeal Court decides the matter and for this reason alone I would grant leave to appeal.

Leave to appeal is therefore granted in relation of both sentence and conviction. There is a recommendation made that both accused be held in prison in Upington.”

[5] In view of this judgment it is necessary to analyse the provisions of

Section 52 of the Act in some detail. Because the Appellants were convicted after a plea of not guilty, and accordingly referred to the High Court in terms of Section 52(1)(b) of the Act, the High Court had to deal with the matter in accordance with the provisions of Section 52(3) of the Act which provided *inter alia*:

“(3)(a) Where an accused is committed under subsection 1(b) 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.

(b) The High Court shall, ***after considering the record of the proceedings in the regional court, sentence the accused, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass sentence as contemplated in Section 51: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.*** (Our underlining)

[6] In our view, on a proper interpretation of sub-Section 52(3)(a) of the Act, it merely creates a mechanism to facilitate the proof of the record of the proceedings in the Regional Court. (See Du Toit *et al*:

Commentary on the Criminal Procedure Act. Du Toit *et al* on 18 - 16 E.

Although this commentary

deals with Section 116(2) of the Criminal Procedure Act, the wording is identical to Section 52(3)(a) of the Act.) The significance of this will appear later.

[7] Once the record of the proceedings in the Regional Court has become part of the record of the High Court, the High Court must consider the record and thereafter sentence the accused. A Court will however only go over to the sentencing procedure if the Court is satisfied that the proceedings were in accordance with justice. If there is any doubt, the Court must act in accordance with the proviso contained in Section 52(3) of the Act.

[8] It is self-evident that a Court can never form an opinion that proceedings are in accordance with justice if the evidence is insufficient for a conviction to stand scrutiny. If a Court has any reason to doubt whether the evidence in the Regional Court was sufficient to sustain a conviction, the Court should have invoked the provisions of sub-Sections 52(3)(c), (d) and/or (e) of the Act.

[9] It would appear that the trial Judge did not follow this procedure. We say this for the following reasons. At the commencement of the proceedings Ms de Lange who appeared for the Respondent, made the following submission:

“U Edele, die beskuldigdes is in hierdie saak ingevolge artikels 51 en 52(3)(a) na hierdie hof verwys vir vonnis deur die streekhof. Ek vra dat die oorkonde van die verrigtinge toegelaat word in hierdie hof ingevolge daardie artikel asook artikel 235 van die Strafproseswet en dat artikel 3(b) van Wet 105 van 1977 bepaal dat anders as by ‘n geval van skuldig pleit, die uitspraak van die streekhof vir die doel bly staan. Die Hof hoef nie weer ‘n formele bevinding te maak nie. Soos die Hof behaag, U Edele.”

[10] This submission by Ms de Lange was wrong. Section 52(3)(a) of the Act does not provide that the judgment of the Regional Court becomes the judgment of the High Court upon proof of the record. It merely provides that the record of the Regional Court becomes part of the record of the High Court.

[11] It was also wrong to submit that the judgment of the Regional Court “*will stand*”, and that the Court is not required to make a “*formal*

finding” (“*formele bevinding*”). Although the wording of this Section is most unfortunate and all but clear, it is evident from the wording of sub-Section 52(3)(b) of the Act that the Court is in fact required to satisfy itself that the conviction is in accordance with justice, and that if it is not so satisfied, it will have to proceed in terms of the proviso to the Section, and, if necessary, set the conviction aside. It is not just a matter of “*receiving*” and “*adopting*” the Regional Court judgment.

[12] The problem was compounded by Counsel for the defence confirming the submissions made by Ms de Lange. In our view Counsel owe a duty to the Court to ensure that their submissions are correct, both factually and in law. The failure to do so in this case is most unfortunate, although we do not believe that either Counsel deliberately tried to mislead the Court. Their error was in all probability also the result of an Act which is most difficult to comprehend.

[13] A Court has of course always an independent duty to familiarise itself with the relevant provisions of the Act before hearing the matter. This was one of the first cases where the Act stood to be considered. The Act is formulated in clumsy and sometimes incomprehensible terms.

In the circumstances it is understandable that the Judge may have misconstrued his role in a case such as the one under consideration.

[14] However, upon closer scrutiny it becomes apparent that the Act provides for four different stages, namely:

14.1 Before there can be a referral to the High Court for sentence, there must be a conviction by the Regional Court.

14.2 If an accused is convicted of an offence listed in Part 1 of Schedule II of the Act, the Regional Court is obliged to refer the case to the High Court for sentence.

14.3 Before the High Court can impose a sentence, it must consider the record of the proceedings in order to establish whether they were in accordance with justice. If the High Court is so satisfied, it can proceed with the hearing. If not, it must request reasons for the conviction from the Regional Court. Thereafter the procedures set out in Section 52(3)(b) to (e)(i) and (ii) of the Act must be followed.

14.4 The fourth stage is the sentencing procedure where the High Court is obliged to apply the provisions of Section 51(1) or (2) of the Act.

[15] There is no dispute that the first two stages were followed and complied with. It is the next two stages which formed the basis of this appeal.

[16] Against this background, this Court is faced with the following dilemma:

- a) It appears from the record that the learned trial Judge was not aware of all the provisions of Section 52(3)(a) and (b) of the Act. Accordingly the learned trial Judge misconstrued his role in the case.
- b) There are clear indications (although not sufficient to make a definite finding) that the learned trial Judge did not read the record before proceeding with the hearing of evidence in mitigation of sentence.

[17] We say this for the following reasons. The record of the proceedings in the Regional Court runs into some 251 pages. The Appellants' pleas appear from the record. Several witnesses were called in the Regional Court and they were cross-examined at length by the defence attorney. Both Appellants testified in support of their contention that they were not guilty on the charges. The Magistrate saw fit to call a further witness. Despite all this, one finds the following comments of the learned trial Judge, just after the completion of the First and Second Appellant's evidence in mitigation respectively:

“HOF: Kan ek net vir u vra, het hy skuldig gepleit in verband met die misdaad van verkragting?”

....

“Ja, u sien my probleem is ek is nou deel van die hof-verrigtinge, u is nou skuldig bevind. Al wat ek hier mee te doen het is die vonnis, nie met - ek is nie ‘n appèlhof op die oomblik nie, ek is net deel van die verhoor. U sê sy het toegestem, u voel nie gelukkig omdat jy is nou skuldig bevind van iets wat jy nie gedoen het nie, as gevolg van die feit dat sy toegestem het. Is dit u posisie en dit is waarom ... (tussenbeide) --- Ja.”

[18] The first question undoubtedly creates a very strong impression that the learned trial Judge had not read the record at that stage. The

second comment, on the other hand, indicates clearly that the learned trial Judge was of the view that he was bound by the conviction of the Regional Court. This is further substantiated by certain extracts of exchanges which took place during argument and which were annexed to Ms de Lange's Supplementary Heads of Argument. In our view these extracts further demonstrate that the Court *a quo* misconstrued the provisions of the Act, and the role that it had to fulfil:

“HOF: Kan ek vir u uit die staanspoor af net een vraag vra. U weet een van my grootste probleme in hierdie soort sake is dat ek het nie die, u weet hierdie verdeling tussen die eerste deel van hierdie verhoor en die tweede deel veroorsaak groot probleme vir my, want vir my die toets is nie toets nie, dat ek moet aanvaar dat hulle skuldig bevind was van die wat die landdros gevind het.

ME DE LANGE: Dit is inderdaad die toets u Edele.

HOF: Ja, dit is. Met ander woorde, natuurlik het die beskuldigdes regte op appèl en so aan ensovoorts, maar die feit bly staan ek is nie 'n appèlhof nie. Ek sit hierso as 'n verhoorhof en dit is asof ek alreeds bevind het dat hierdie twee mense, hierdie twee beskuldigdes die klaagster verkrag het en dat hulle die klaagster verkrag het in die manier wat die landdros bevind het.

...

HOF: ... Nou kry ek 'n oorkonde soos hierdie. Ek is nie 'n regter op appèl nie, so in ander woorde ek aanvaar wat in die laerhof gebeur het en ek is gebonde aan die bevindings van hierdie oorkonde en dit is baie moeilik.

...

HOF: Ja, maar miskien is die antwoord daarop dat as u nie tevrede met die verrigtinge op die laerhof is nie, het jy 'n reg om te

appelleer.

...

HOF: Ja, maar ek sit ook met die rekord en dit is waarom ek wil vra wat sê u in hierdie situasie, as ek al die punte wat u betoog het in ag neem en die feite van hierdie saak soos die landdros dit bevind het, wat is 'n toepaslike vonnis?

[19] In our view the judgment in terms whereof leave to appeal was granted should be read against the background set out above.

[20] There is no notice of appeal. As pointed out earlier, the grounds upon which leave to appeal were sought, do not appear *ex facie* the record. The judgment in terms whereof leave to appeal was granted, is terse and of no assistance in this regard.

[21] The judgment refers to certain “*ambiguities*”, but it is not clear what these are. If it refers to ambiguities in the evidence before the Regional Court, the Regional Magistrate should have been asked for reasons. This was not done. In any event on our reading of the evidence, we do not find ambiguities of any significance in the evidence before the Regional Court. The credibility findings of the Regional Magistrate are in our view beyond criticism.

[22] We, therefore by inferential reasoning assume that the trial Judge must have been referring to ambiguities between the complainant's evidence before the Regional Court, and her evidence before the Court *a quo*. The only ambiguity that one can think of is the evidence relating to the psychological impact of this rape upon the complainant. This evidence is in our view irrelevant when it comes to the consideration of the evidence for purposes of a conviction. It was not suggested by or on behalf of any of the Appellants that the factual findings made in respect of the rape and the sexual assault would in any way be affected by the later conduct of the complainant.

[23] It is unclear what the learned Judge referred to when he said that "the question of sentence may well change given the factual complex upon which an Appeal Court decides the matter". We are bound by the facts that are on record. In our view the evidence led in the Regional Court, and the evidence in respect of sentence do not constitute a different "*factual complex*". The "*factual complex*" to which reference is made can only be the factual complex upon which the Appellants were convicted. As set out above, that factual complex remained the same.

[24] Due to the uncertainty arising from the foregoing, we called for further written submissions on the following questions:

“(a) Is it the conviction by the Regional Magistrate, or the “acceptance” thereof by the Judge a quo in terms of section 52(3)(b) of Act 105 of 1997, appealed against? (In replying to this question, reference should be made to the provisions of section 52(3)(b) of the said Act and the question of the legislature’s intention in this regard, bearing in mind the following:-

- (i) The provisions of section 309(1) of the Criminal Procedure Act 51 of 1977 which provide that “any person convicted of any offence by any lower court” has an automatic right of appeal against “such conviction”;*
- (ii) The provisions of section 315 read with 316(1) of the Criminal Procedure Act 51 of 1977, which provide that an accused “convicted of any offence before a superior court” may bring an application for leave to appeal “against his conviction”;*
- (iii) The questions in this regard raised obiter by Griesel J in S. v. Olkers 2002(1) SACR 179 at 183 a - i).*

(b) If it is found that an irregularity was committed by the Judge a quo which vitiates the proceedings, in that the record was not read, which proceedings are vitiated:-

- (iii) The conviction of the appellants by the Regional*

- Magistrate; or***
- (iv) the “acceptance” of that conviction and subsequent sentencing procedures; or***
- (v) both (i) and (ii) above?”***

[25] Due to the view that we adopt it is necessary only to consider the question formulated in (b) above.

[26] As set out in paragraph 6 above, the provisions of Section 52(3)(a) of the Act merely create a mechanism to facilitate the proof of the record of the proceedings in the Regional Court.

[27] On a proper interpretation of Section 52(3)(b), the judgment, and therefore the conviction of the Regional Court will stand and be sufficient for the High Court to sentence the Appellants if, and only if the Court is of the view that the proceedings were in accordance with justice.

[28] If the High Court, for whatever reason, has not considered whether the proceedings in the Regional Court have, in fact, been in accordance with justice, it could not, in law, have sentenced on the basis of the Regional Court judgment (conviction). But that can never affect

the proceedings, and accordingly the convictions, in the Regional Court which were not marred by such irregularity. (Cf: S. v. Shikunga & Another 2000(1) SA 616 NmSc at 629 F-J.)

[29] It was in our view the “*acceptance*” by the learned trial Judge of the convictions which were materially flawed. It was conceded by Ms de Lange that if we should find that the learned trial Judge did not read the record, the irregularity will be such that it would vitiate the proceedings before Davis, J. The dangers of the split procedure created by Section 52 of the Act were emphasised by the Constitutional Court in S. v. Dzukuda & Others; S. v. Tshilo 2000(2) BCLR 1252 CC. Ackerman, J. emphasised:

“Taking the protection and enjoyment of fundamental rights seriously demands constant vigilance and effort to attain in practice what is promised in the Constitution. This is a grave responsibility.”

[30] Ackerman, J. also stresses that Section 52 of the Act vests a High Court with original sentencing jurisdiction and is designed to place the High Court in the same position as a trial Court. It is of course self-evident that if a High Court has not familiarised itself with all the relevant

facts, it can never be placed in remotely the same (as opposed to identical) position of a trial Court. And if that is so, the Appellants would not have had a fair trial, during the sentencing proceedings.

[31] Although we have indicated that we cannot make a definite finding that the trial Judge did not read the record, there are strong indications that he did not do so. He also misconstrued the provisions of the Act in material respects. Accordingly it cannot be said that the Appellants had a fair hearing.

[32] In the circumstances, we set aside the totality of the proceedings before Davis, J.

TRAVERSO, DJP

DESAI, J

KNOLL, J

“REPORTABLE”

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

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**BOOI ARNOLDUS SWARTZ
Appellant
SHANE SEBASTIAAN BENNET
Appellant**

First

Second

and

**THE STATE
Respondent**

**Counsel for 1st & 2nd Appellants : Adv. Sonja Lötter
Amicus Curiae**

**Counsel for Respondent : Adv. A.A. de Lange
Director of Public Prosecutions**

Date of Hearing : 28 January 2002

Date of Judgment : 9 April 2002