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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: A588/14

In the matter between:

SIYABONGA XABA

Appellant

And

THE STATE

JUDGMENT DELIVERED ON 8 MAY 2015

SAVAGE J:

[1] The appellant, who was legally represented, was charged in the regional court, Khayelitsha, with one count of rape committed on 7 October 2007 at or near Khayelitsha and was given notice in the charge sheet that the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 were applicable. Despite pleading not guilty to the charge, on 2 December 2008 the appellant was convicted of the rape and sentenced to fifteen (15) years’

imprisonment. Leave to appeal against both conviction and sentence was refused by the magistrate but on 18 November 2014 granted on petition to this Court.

[2] The evidence before the trial court was that on 7 October 2007 the appellant, who was known to the then fourteen-year old complainant as her brother's friend, asked the complainant to accompany him and his friend [B.....] to Harare at around 20h00 to call his girlfriend. En route the appellant put his arm around the complainant's waist and said that he did not want the police to see him. At Harare the appellant and the complainant went to [B....'s] shack. [B.....] left. The complainant saw that the appellant had a firearm and told her that there was a girl he wanted to kill in Harare. He asked the complainant to call the girl. The complainant refused. Holding the firearm in his hand, the appellant told the complainant to enter [B....'s] shack and closed the door. The complainant testified first that the appellant told her that *'if a person does not want to go where he is sending him...he must touch the private parts of the female'*. She then testified that the appellant said that *'if he wants to shoot a person he must touch a private part of a female first'*. The complainant told him she wanted to go home but the appellant threatened her with the firearm and told her to take off her clothes. The complainant refused. He then pushed her onto the bed and the two were, in the words of the complainant, 'pulling each other'. The complainant cried but the appellant took off her pants, forcefully opening her thighs. She told him that whatever he does he must use a condom. He got up and went to look for a condom. When [B.....] knocked, he and the appellant spoke in *tsotsi taal* and when he left [B.....] winked at the appellant. The complainant stated that she did not tell [B.....] of her predicament as he did not look at her

and she was afraid of the appellant, who she described as slightly drunk. The complainant was not sure if the appellant wore a condom when he then raped her. During the course of the rape the firearm was on the bed.

[3] After the appellant fell asleep the complainant crept out of the shack and ran home. When she arrived home after midnight she told her mother what had happened. Her mother told her that they must go to the police station but they did not do so as it was night. Although the complainant saw the appellant many times after the rape, the matter was only reported to the police in 2008 as the complainant's mother was scared of the appellant who she believed could kill them. The complainant did not consult a doctor following the rape and was examined by a doctor only on 11 January 2008. On examination the doctor found the complainant to be 12 weeks pregnant. The complainant denied in cross examination that the appellant had not raped her. She stated that she told the doctor that before the rape she had not had sexual intercourse with consent but that she had had consensual sexual intercourse after the rape. The doctor proceeded to record the date of her last menstrual period and not the last date on which she had sexual intercourse on the form completed.

[4] The complainant's mother confirmed that the complainant left home after having been called by the appellant and that when she came back at midnight her daughter was crying and said that the appellant had locked her in [B....'s] shack, pointed a firearm at her and raped her once. The rape was not reported to the police as they were scared of the appellant. The complainant's sister was also told by the complainant that the appellant had raped her.

[5] The appellant stated that the complainant was his secret girlfriend and that [B....] and one '[P.....]' also had a relationship with the complainant. He confirmed that he had gone to [B....'s] shack in Harare with [B.....] and the complainant. At the shack they talked, [B.....] left after two minutes, returning later, and the complainant informed him that she needed to leave. He denied having sexual intercourse with the complainant on 7 October 2007 but stated that prior to this date the two had had consensual sex. He also denied being drunk on the day of the incident. The appellant accompanied the complainant to the road when she decided to return home before he returned to [B.....'s] shack. He became aware of the allegation of rape against him on 8 October 2007 while at his girlfriend's house and later reported to the police station.

[6] On 2 December 2008 the magistrate convicted the appellant of rape. It appears from the record that no reasons were provided for the decision with the transcript of proceedings simply stating under the word 'Judgment':

'The accused has been found guilty of rape'.

[7] The magistrate's judgment on sentence read as follows:

'The accused is sentenced as follows. Accused is sentenced to 15 years imprisonment without the option of a fine. He is declared unfit to possess a firearm.'

[8] From the record it is apparent that no reasons were provided for either decision. On 26 September 2014 the magistrate filed a document headed 'Presiding Officer's Reasons' in which it was stated that:

‘At the conclusion of the trial, the court delivered an ex tempore judgment. It is respectfully requested that the reasons for conviction and sentence which were then furnished be regarded as forming part hereon.’

[9] Judicial officers have the duty to give reasons for their decisions. In

*S v Mokela*¹ Bosielo JA stated:

‘I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know the courts do not act arbitrarily, but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical, if not obligatory, where one judicial officer interferes with an order or ruling made by another judicial officer.’

[10] In *Strategic Liquor Services v Mvumbi NO & others*² the Constitutional Court stated that the failure to supply reasons for a judicial decision *‘will usually be a grave lapse of duty, a breach of litigants’ rights, and an impediment to the appeal process’*. The Court noted that although there is no express constitutional provision which requires judges to furnish reasons for their decisions, the judiciary is nevertheless bound by the rule of law as one of the founding values of our democratic state.³ This requires that judges not act arbitrarily and that they be accountable as to the manner in which they arrive at their decisions by furnishing reasons.

¹ 2012 (1) SACR 431 (SCA) at para 12

² 2010 (2) SA 92 (CC) at para 15

³ S146 of the Criminal Procedure Act 51 of 1977 requires reasons to be provided by a judge presiding in a criminal trial in a superior court in particular circumstances stated in the provision.

[11] In *Mphahlele v First National Bank Ltd*⁴ it was stated that reasons for a decision serve a number of purposes. Reasons explain to the parties and to the public at large, who have an interest in courts being open and transparent, why a case is decided as it is. Reasons curb arbitrary judicial decision-making and are essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal. Reasons assist the appeal court to decide whether or not the lower court is correct and provide guidance to the public and the legal profession in respect of similar matters.

[12] In *S v Mcoseli* 2012 (2) SACR 82 (ECG) the court criticised the calibre of the judgment of a regional magistrate as being '*so shoddy and careless...that it amount[ed] ... almost to a dereliction of duty*' (at 85i-j). In that matter the magistrate failed to set out or analyse the evidence.

[13] In *S v Van der Meyden*⁵ Nugent J, as he was then, made it clear that:

'Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there are reasonable possibilities that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which could incriminate the accused, and evidence which exculpates him, cannot both be true - the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the state evidence is so convincing and conclusive as to exclude a reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation.'

⁴ 1999 (2) SA 667 (CC)

⁵ 1999 (1) SACR 447 (W) at 449c-e

[14] The conclusion which is arrived at by the court as to whether the evidence establishes the guilt of an accused beyond reasonable doubt must account for all of the evidence.⁶ The judge continued that:

‘The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.’⁷

[15] There is no indication from the record in this matter that the magistrate considered any of the evidence before the trial court in the manner required of him. He made no findings as to whether evidence was false or unreliable. He failed to consider whether the state had discharged the onus that rested upon it to prove the guilt of the accused beyond reasonable doubt. He made no findings as to why, if he considered the onus had been discharged, this was so, and he failed to indicate whether he considered the version of the accused to be reasonably possibly true.

[16] It is noteworthy that the magistrate was provided with an *ex post facto* opportunity to provide reasons for his decisions on conviction and sentence. Yet in a response which can only support a conclusion that he did not consider the record in the matter, the magistrate relied on the non-existent reasons given by him upon conviction and sentence as the basis for his decisions made. There is no suggestion made by either of the parties before this Court that the transcript of

⁶ At 449h

⁷ At 450a-b

proceedings is incomplete, nor any suggestion that the record required reconstruction. Furthermore, it is pertinent to note that the magistrate similarly made no such suggestion.

[17] This Court is permitted under s 309(3) of the Criminal Procedure Act 51 of 1977 to confirm, alter or quash a conviction or sentence by reason of an irregularity or defect where on appeal it appears that a failure of justice has resulted from such irregularity or defect. A right to reasons is a fundamental fair trial right and a failure to provide reasons constitutes an irregularity. Where no reasons are provided, there is a failure of justice such as is contemplated in s 309(3). As was stated in *S v Mavinini*⁸ by Cameron JA, as he was then:

‘It is sometimes said that proof beyond a reasonable doubt requires the decision-maker to have “moral certainty” of the guilt of the accused....It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.’

[18] This Court cannot vouch for the integrity of the system that has produced the conviction in this matter. An appeal Court lacks *‘the advantage of judging the credibility of witnesses by observing their deportment in the witness-box’*.⁹ Where the trial court has made no findings as to the credibility of

⁸ [2009] 2 All SA 277 (SCA) at para 26

⁹ *R v Abel* 1948 (1) SA 654 (AD) at 660

witnesses and the appeal court is unable to come to a definite decision on this material before it, the ordinary burden of proof becomes decisive.¹⁰

[19] In *S v Shackell*¹¹ Brand AJA, as he was then, stated that:

‘It is a trite principle that in criminal proceedings the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo it’s reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant’s version, the reasonable possibility remains that the substance thereof may be true’ (See also *S v V* 2000 (1) SACR 453 (SCA) paragraph 3).’

[20] An accused is entitled to be provided with reasons for conviction and sentence without undue delay. Having already been afforded two opportunities to provide reasons for his decision on conviction and sentence, it would be inappropriate to remit the matter back to the magistrate on a third occasion in the hope that he will finally see fit to provide reasons for his decisions.

[21] It is furthermore impossible in the circumstances of this matter for this Court to step into the shoes of the trial court and arrive at conclusions on the evidence as a whole without the benefit of assessing the credibility and reliability

¹⁰ *Van Aswegen v De Clercq* 1960 4 SA 875 (A) 881–882; *Rautenbach v Fourie* 1977 4 SA 276 (T) 281; *Blysaag (Edms) Bpk v Theron* 1978 2 SA 624 (A) 627.

¹¹ 2001 (4) SA 1 (SCA) at para 30

of witnesses in the witness box. It follows that on appeal there can be no moral certainty on a conspectus of the evidence the State discharged the burden of proof or that the balance weighed ‘*so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt*’¹². His right to a fair trial under s 35(3) of the Constitution has been compromised by the magistrate’s failure to take into account all of the evidence before the trial court and provide reasons for the appellant’s conviction and sentence. The appeal against conviction and sentence must succeed on the basis that an acquittal must follow a trial vitiated by an irregularity, in circumstances in which the acquittal is not founded on the merits of the charge.¹³

[22] Whenever a conviction and sentence has been set aside by a court of appeal on the ground *inter alia* that there has been a technical irregularity or defect in the procedure, proceedings in respect of the same offence may in terms of s 324 be instituted again. I agree with Bozalek J in *Davids v S*¹⁴ that this provision does not envisage a prior order by the court of appeal to the effect that the conviction and sentence has been set aside on account of a technical irregularity or defect; nor is such an order a necessary prerequisite to the State reinstituting prosecution. This is so on the basis that:

*‘It is for the Director of Public Prosecutions or his/her delegee to form a view on the matter and take a decision on whether to institute proceedings or not’.*¹⁵

¹² *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139

¹³ See *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA) at para 29

¹⁴ Unreported WCC A571/12

¹⁵ At para 16

[23] Given the conduct of the magistrate in this matter it is appropriate that a copy of this judgment be forwarded to the magistrates' commission for its consideration with a view to taking possible action against the magistrate. This is so given the nature of the irregularity committed, its consequences and the impact of such conduct upon the administration of justice and public perception regarding the functioning of our courts, particularly in areas plagued by criminal misconduct and crimes against women and children.

[24] In the result, I propose an order in the following terms:

1. The appeal against conviction succeeds.
2. The conviction and sentence are set aside.
3. This judgment is to be forwarded to the Magistrate's Commission for consideration and appropriate action.

I agree and it is so ordered

KM SAVAGE
JUDGE OF THE HIGH COURT

MI SAMELA
JUDGE OF THE HIGH COURT

Appearances:

For appellant: Adv N J van Rensburg

For state: Adv M Z Seroto