

LR 18/2005/

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

DATE: 14 March 2005

Magistrate MANKWENG

**Case No : 64/2004 and 69/2004
High Court Ref: 3954 and 4242**

S v F M MADIBA and S v A M MAMABOLO

REVIEW JUDGMENT

HARTZENBERG ADJP

The two matters were submitted to me under the following circumstances. They came before the court on automatic review before different judges. In both cases the relevant judges directed queries to the presiding officer in respect of the Section 112(1)(b)

inquiry. The chief magistrate of Mankweng indicated to the registrar that the presiding officer does not co-operate to answer the queries. The reason apparently is that he only acted as a magistrate in a temporary capacity and that he is in fact an attorney in that vicinity. The matter was then referred to other judges to finalise the review and they indicated that without the reasons of the magistrate they are unable to do so.

The chief magistrate confirmed those facts to me. He also indicated to me that in the case of A M Mamabolo the accused has been released on parole (he was sentenced to two terms of imprisonment of eight months each). In the case of M F Madiba the situation is that he became eligible to be released on parole on 16 February 2005 but the authorities will not release him because of other pending matters.

I referred the matter to the office of the Director of Public Prosecutions and Adv Roberts with whom Adv Mosing agrees favoured this court with a most helpful memorandum. They point out that both

accused were convicted of assault with intent to do grievous bodily harm, while Mr Mamabolo was also found guilty of housebreaking with intent to commit an offence unknown to the State.

In both instances the accused pleaded guilty and were questioned by the magistrate in terms of Section 112 (1) (b) of Act 51 of 1977. On all three counts the accused were sentenced to eight (8) months imprisonment. Mr Madiba accordingly had to serve eight (8) months imprisonment, while Mr Mamabolo had to spend the next sixteen (16) months in jail.

They submit that there are a number of serious irregularities in both trials affecting the convictions.

1. In the case of Mr Madiba, his rights to legal representation were never explained to him and that it has been held that such a failure is a fatal irregularity necessitating the setting aside of the proceedings.

See: S v Moos 1998(1) SACR 372 (C)

3. The questioning of the accused to establish whether they admitted the elements of the crimes with which they were charged leaves much to be desired. Instead of requesting the accused to tell him what had happened, the magistrate merely asked a number of perfunctory questions. These did not, in any way, cover the elements of the various crimes. Of the matters not raised, are the reasons for the assaults (to established, for instance, whether the accused had acted in self-defence), whether the accused had the requisite intent to commit grievous bodily harm, and whether the complainants had sustained any injuries. In respect of the housebreaking, the accused was never asked why he had entered the premises and whether he had intended committing a crime when doing so.

3. Guidelines regarding the manner in which the questioning has to be conducted have been laid down in various decisions over the years.

See: S v Mkhize 1981 (3) SA 585(N) at 586H

S v Mkhize 1978(1) SA 264(N)

S v Matlabeng en 'n Ander 1983(4) SA 431 (0) at 434A

S v Naidoo 1989(2) SA 114(A) at 121 F

4. What is also problematic regarding the convictions is that in the case of Mr Madiba, he was never asked whether he pleads guilty voluntarily. Mr Mamabolo, in turn, was convicted of assault with intent to cause grievous bodily harm, although he merely admitted having hit the complainant with the fist. It is doubtful whether that is sufficient for a conviction on the said charge.

See: S v Mgcineni 1993(1) SACR 746(EC) at 748

They submit that the convictions cannot stand. They also submit that the sentences also appear, *prima facie* at least, shockingly harsh, but concede there is insufficient information on record really to say so. It seems, moreover, that the accused have already served their sentences. In the light thereof, they recommend that the provisions of section 312(1) of Act 51 of 1977 not be invoked in the case of Mr

4.

Mamabolo and that in both instances the proceedings simply be set aside.

I am in full agreement with the representatives of the Director of Public Prosecutions. Not only is the magistrate no longer available to handle the matter but both accused have been punished substantially for whatever they have done or not done.

The following order is made.

1. The convictions and sentences in both matters are set aside.

W J HARTZENBERG
JUDGE OF THE HIGH COURT

J B SHONGWE
JUDGE OF THE HIGH COURT