IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: CC512/2007

DATE: 4/12/2007

REPORTABLE

IN THE MATTER BETWEEN

STATE

AND

JABU PHIRI

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JUDGMENT

MAKHAFOLA, AJ

Introduction

Vincent Duma Sithole and Jabu Phiri appeared in the Regional Court of the Division of Gauteng held in Benoni charged with raping a 16 year old female on or about 11-12 February 2006 at or near Daveyton. The accuseds were legally represented by counsel throughout the trial. They pleaded not guilty and elected not to give any plea-explanation.

At the time of the trial the complainant was 17 years old. The prosecution applied

in terms of section 170A of Act 51 of 1977 that the complainant testify through an intermediary. The application was not opposed and was granted by the court.

The evidence in court points to four alleged rapists who had sexually assaulted the complainant and one N interchangeably. But only two accuseds were arrested and finally prosecuted. Further evidence indicates that an identification parade was held where both accuseds were pointed out. But it appears from the record that no SAP329 form was ever handed in. And subsequently the trial court did not rely on the said parade.

0n 17 0ctober 2007 when this matter appeared for the first time for sentencing, both counsel for the state and defence made submissions relating to declaring the proceedings to have been in accordance with justice for the confirmation or non-confirmation of the conviction. I also raised certain concerns about the manner the trial court had conducted the proceedings. I raised six points which I invited both counsel to address me on. Both counsel were *ad idem* that as far as the said points are concerned the matter should be referred back to the trial court to clarify the points.

Subsequently, an order referring the six points to the trial court was issued. The learned magistrate has complied by supplying the reasons contained in the order with a reply dated 6 November 2007. The learned magistrate tried to defend each and every point of the six points mostly relating to procedure.

The points raised for clarification are the following:

1. The learned magistrate is requested to clarify why the trial court stopped the prosecution from leading evidence of identity and instead led the evidence.

   *Vide:* Record page 21 lines 10-25;

   page 22 line 1.

   The clarification was that anyone experienced in criminal law knows that no weight can be attached to a person's inability to describe physical appearance of an individual.

   She further cited a few months' experience of the public prosecutor in the regional court.

2. Is there any reason why the court was answering for the complainant?

   *Vide:* Record page 23 lines 22-25

   page 24 lines 1-3

   page 25 lines 5-7

   The learned magistrate states that this question had been asked and answered at least thrice. But the record shows that this question had not

been asked before by the defence.

3. The trial court stops the complainant from answering a question by the defence. This relates to accused 2's version being put to the complainant.

*Vide:* Record page 25 lines 12-14

The learned magistrate justifies this stoppage because the complainant had not been implicated, yet adds that if it were not for DNA evidence proving accused 2's guilt beyond a reasonable doubt he would have been acquitted. Adding that "the attorney obviously did not think!"

(4) Is there any justification why the court takes over examination of Eunice Puza from the prosecution?

*Vide:* record page 26 lines 18-15

page 27 lines 1-12

The justification is that the court wanted clarity and the prospect to finalise, on average, at least eighteen trials per month to counter new cases received and to keep the remand roll under control.

5. Is there any justification why the court takes over the examination of Jabulile Mdlolo from the prosecution?

*Vide:* Record page 29 lines 5-23

page 30 lines 4-19

The justification by the learned magistrate is clarifying aspects in the evidence, citing also an inexperienced prosecutor in the case. He also requests this High Court to give him an experienced and competent prosecutor and she will be allowed to just sit back and listen without becoming confused due to lack of order.

6. From the record it is not clear who does the investigation about DNA tests. The magistrate is requested to clarify.

*Vide:* Record page 33 lines 24-25

page 34 lines 1-6

The learned magistrate says "With all due respect, I am not certain what is being suggested and if it is suggested that I did the investigation, it is nonsense."

Further the answer is that this was a discussion about why a remand should be granted.

DNA

DNA evidence was given by Sergeant D S Mtsweni. In his evidence in chief he gives the panty reference no as (05D12845XX) marked T Nozasiyu as this is found on page 37 line 10 of the record. But on page 38 line 5 of the record the panty reference

number is depicted as (05DIAB2854XX) and on exhibit "B" on table I the panty reference number is depicted as (05DIAB2845XX).

In all, we have three reference numbers relating to the same panty of the complainant. The question which immediately arises is which number is the correct one. 0n the other hand the Evidence Collection Kit form completed by Sister Annelie Prinsloo records the panty reference number as (05DIAB2845). These inaccuracies relate to scientific data which make a huge difference when the numbers do not correspond but relate to one and the same object. Had these discrepancies in numbering been captured by the court, the prosecution and the defence it would have been clarified in evidence by Sergeant D S Mtsweni.

BLOOD SAMPLES OF THE ACCUSED

No evidence of who took the blood samples from the accused is before court. How this blood was taken, how it was sealed, the serial numbers of the containers, the competence of the person who took the blood and to whom the blood was handed after having been taken is not before court either by affidavit or *viva voce* evidence. It is further not clear if blood taken from the accused was ever locked away and not interfered with.

The record does not reflect the chain from the taking of blood to the handing of the blood samples at the forensic laboratory until tested to by Sergeant Mtsweni. That

broken linkage which has not been testified to, creates a missing link and the trial court is aware of that fact. It refers to it on page 40 of the record lines 18-23. Yet the defence is asked to admit the causal link which is not there. And, unfortunately the defence admits what has not been proved by evidence or affidavit.

THE LAW

Questioning by the court

In *Gade v S* [2007] 3 All SA 43 (NC) at p46 par 15 the following is stated:

> "The general principle about questioning a witness by the court is noble and sound. The court has the right to question any witness at any stage of the proceedings the main purpose being to clarify and clear up points which are still obscure."

Taking over any examination or cross-examination of a witness by the court is not to conform to the generally accepted norms. In *Hamman v Hamman* 1968 4 SA 344 (A) at 344D-G the learned Judge of Appeal (WESSELS JA) expressed regret that the court *a quo* did not at all times conform to the generally accepted norm and expressed that sentiment as follows:

> "He sought from time to time to expedite the hearing of the matter by virtually taking over from counsel both the examination and cross-examination of witnesses. In so doing, it appears that he may at times have overlooked the judge's usual role in our system of civil trial procedure, and to have associated

himself too closely with the conduct of the case, thereby denying himself the full advantage usually enjoyed by the trial judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts. The limits which a judge should observe in intervening in the conduct of proceedings over which he presides were dealt with by this court in *R v Roopsingh* 1956 4 SA 509 (AD)."

In *S v Schietekat* 1998(2) SACR 707 (C) at 716e the learned judge said the following in regard to the conduct of the presiding officer:

"A judicial officer wields enormous power. Gowned, sitting on high and surrounded by the trappings of his office he cuts an imposing and terrifying figure. Consequently he must constantly ensure that every courtesy is extended to those who appear before him. To stand accused of a crime is a frightening ordeal. No person should be allowed to feel intimidated in the orderly presentation of his case …"

In *S v Rall* 1982 1 SA 828 (A) at 831H the learned Judge of Appeal expressed the following sentiments relating to the conduct of a trial:

"(1) According to the above-quoted *dictum* of CURLEWIS JA the Judge must ensure that 'justice was done'. It is equally important I think that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of

our law and public policy. He should therefore conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused …"

In *S v 0mar* 1982 2 SA 357 (NPD) at 359 the learned judge made remarks about the conduct of the magistrate despite the appellant having been represented by counsel.

"The magistrate in his reasons in reply to criticism observes that the appellant was represented by counsel who could have objected had he considered the manner of cross-examination to be unfair. This is correct, so far as it goes. I am constraint to remark, however, that the fact that the accused is represented by counsel does not absolve the presiding officer from ensuring that he receives a fair trial or from requiring those who appear before him to comport themselves properly in his court. The magistrate should never have permitted the prosecution to behave in this fashion."

In *S v Sallem* 1987 4 SA 772 (A) the appeal dealt with a situation where there was a trial irregularity because the proceedings were characterised by judicial impatience.

"Impatience is something which a judicial officer must where possible avoid and in any event always strictly control. It can impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it is directed. When such a person is an accused, such an impression will, to a greater or lesser extent, undermine the proper course of justice. It can also

> lead to a complete miscourage of justice. A judicial officer can only perform his demanding and socially important duty properly if he also stands guard over himself, mindful of his own weaknesses (such as impatience) and personal views and whims and controls them."

The decided cases quoted above address the six point query which I had sent to the magistrate for her clarification and reply. After reading the reply from the trial court I observed disturbing comments about the defence attorney at the court *a quo* and about this court. When asked to clarify why the court had stopped the complainant from answering a question by the defence relating to the version of accused 2, the learned magistrate says the complainant knows nothing about accused 2. To ask that question "the attorney obviously did not think".

When asked to clarify who does the investigation about DNA tests as it was not clear from the record, the learned magistrate in answer elects to give an answer and take a swipe at this court. I quote the relevant words AD6:

> "With all due respect, I am not certain what is being suggested and if it is suggested that I did the investigation, it is nonsense."

The clarification sought by the court relates to page 33 lines 24-25 and page 34 lines 1-6 of the record. The query is part of the record and can be accessed. It does not in the slightest iota depict any suggestion about the magistrate. The use of the word

"nonsense" in reference to this court is a discourtesy of a high order which the utterer must reconsider.

The trial is fraught with serious irregularities scratching the core of the proper administration of justice. The said irregularities are manifested by the manner of criticising the police, the prosecution, the defence and this court. Ms Mdlolo has been called stupid, the public prosecutor is directed to watch TV and DSTV on channel 69, and she was also given lessons on how to conduct the prosecution during court proceedings. From the record nearly every arm of the court is labelled incompetent. I must remark, as I hereby do, that such a conduct is unbecoming and should be discouraged at all costs. Discourtesy to witnesses cannot be condoned as well as insults hurled with impunity in *facie curiae*.

No one in the court *a quo* has picked up the differences in the panty references, yet the court relied on the results of the DNA as conclusive against accused 2. In *S v Maqhina* 2001(1) SACR 241 (T) the court dealt with DNA analysis, its presentation and the requirement that its process be properly recorded. The state case lacked because the scientific results were not executed and recorded with such care that at any time later they could be verified by any objective scientist, and eventually also the trial court.

0n his own version Sergeant D S Mtsweni says: "Should it happen that it was the same everywhere except at one location then I could have excluded." But here, as I have

pointed out above the panty reference numbers are three. Does it mean that three panties were involved or not? Does it mean that the recordings were not carried out with care and accuracy to exclude wrong results or not? The answers cannot be found in the record and the evidence of Sergeant D S Mtsweni. In the absence of this certainty about the correct reference numbers relating to the panty, the chain from collecting the accused's blood samples then the DNA results are not conclusive. Both the state counsel and the defence counsel have conceded that there are material irregularities in the proceedings.

0ther irregularities that I have pointed out above and the so many others apparent from the record coupled with the fact that the trial court was incentivized by the prospect to finalise, on average, at least eighteen trials per month as stated in the reply to my query, I have to look at the cumulative effect that this has had on justness and fairness of the trial.

Each of the irregularities sketched above and found in the record are so serious that this case suffered the casualties of injustice to the prejudice of the accused. The cumulative effect of the irregularities considered together with the shortcomings of the DNA procedures are decisive and have destroyed the legal validity of the accused's trial. The trial was not in accordance with justice.

In the result, the conviction cannot be confirmed. The accused is found not guilty and discharged.

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

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