

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No. 43/1955/2004

Registrar Ref. No. 304/07

In the matter of:

THE STATE

versus

GEORGE MBA

Accused

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JUDGMENT

[1] The accused, George Mba, was charged in the Regional Court, Protea, Soweto with offences of kidnapping (*count 1*), intimidation (*count 2*), assault with the intent to do grievous bodily harm (*count 3*), indecent assault (*count 4*), rape (*count 5*), rape (*count 6*), and indecent assault (*count 7*). All the counts concern events which allegedly took place at Soweto on the 27<sup>th</sup> September 2004, and they relate to acts allegedly committed against the same complainant, who was

sixteen years old at the time. The accused was legally represented at the initial stages of the proceedings in the regional court, but he then elected to conduct his own defence and he was legally unrepresented throughout the actual trial proceedings. On 21 October 2005, the accused pleaded not guilty to all the charges. The learned regional magistrate concluded his judgment on 3 May 2007. The accused was found guilty of kidnapping the complainant (*count 1*), of intimidating her (*count 2*), of assaulting her with the intent to cause her grievous bodily harm (*count 3*), and on two counts of raping her (*counts 5 and 6*). The accused was acquitted on the indecent assault charges (*counts 4 and 7*). Upon conviction the proceedings were stopped and the accused committed for sentence by a High Court in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 ("the Act").

[2] I considered the record of the proceedings and I heard argument on the issue of the accused's convictions from counsel for the State, Adv Ranchod, and for the accused, Adv Thompson. Whilst noting the commendable attempts on the part of the learned regional magistrate at ensuring a fair trial for the accused, I nevertheless was of the opinion that doubt exists whether the proceedings are in accordance with justice and I accordingly, in terms of section 52(3)(b) of the Act, requested the learned regional magistrate to furnish a statement setting forth his reasons for convicting the accused and *inter alia* to deal with the following aspects:

(a) At the request of the accused (*record: p 97, line 24 et seq*) and acting in terms of section 167 of the Criminal Procedure Act 51 of 1977, the learned regional magistrate granted the request for the complainant to be recalled (*record: p 107, line 16 – p 108, line 8*). The complainant was, however, never recalled. In his judgment the learned regional magistrate referred to the unavailability of the complainant and he then referred to the fact that the accused “...never once again alluded to the fact that he wanted to have the complainant recalled” and “...that even when the State had closed their case and the accused was explained his rights that he could testify under oath or call witnesses, never did he then ask to have the complainant recalled.” But was it not for the learned regional magistrate to ensure the recalling of the complainant? (compare: *S v Mgudu 2008(1) SACR 71 (NPD)*).

(b) The accused made certain allegations, such as “... the reason why I walked out of this Court your Worship, it is the way this Court is conducting the trial” (*record: p 334 lines 11 – 12*); “I would like to remind the Court that on 12 May I was here. I do not know what was the discussion on that day between the Magistrate and the Prosecutor, but an English word I heard, I heard the Magistrate saying he will not tolerate. So I do not know what is the Magistrate meaning about that.” (*record: p 336, lines 4 – 8*); and “...at some stage the Court and the State whispered to each other, I could not hear what was happening, and I was told to go back to the cells and I will be called back.” (*record: p 358, lines 2 – 9*). The learned regional magistrate also *inter alia* referred to an allegation by the accused “... that this Court cannot tolerate him...” (*record: p 345 lines 21- 23*) and the learned regional magistrate also noted “... that Mr George Mba is in court today and the court has noted off – record that he has been arguing with the Court and also indicating to this Court that

- he still wants the matter to go to the High Court ....*” (record: p357, lines 5 – 10). It appears that some of the issues raised might not have been fully addressed and others might even have been raised off the record. The learned regional magistrate is accordingly requested to deal with all such and other similar allegations.
- (c) The learned regional magistrate made reference to the fact that “... *the Court has not been approached by the accused to recuse itself* “, but it does not appear from the record that the unrepresented accused’s rights in this regard were ever explained to him. Should the learned regional magistrate not have informed the accused of his right to apply for the recusal of a presiding judicial officer and, if he did apply, to then have adjudicated such application in accordance with the relevant legal principles? (see: *President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC)* at p 172 B; *Sager v Smith 2001 (3) SA 1004 (SCA)*).
- (d) It is clear from certain passages in the record that the accused intended to testify (record: p 208 line 21 – 22; p 409, lines 14 – 17) and the learned regional magistrate is requested to address the concern whether his election not to avail himself of the opportunity “*to re-open [his] case and testify* “ (record: p410, lines 19 – 20) was as a result of a possible perception on his part of an unfair trial.
- (e) What are the grounds for and the significance of the conclusions reached by the learned regional magistrate that the accused was employing delaying tactics?’

[3] The statement received from the learned regional magistrate did not allay the concerns I had. I accordingly afforded both counsel a further opportunity of addressing argument on the issue of the accused’s convictions.

[4] The learned regional magistrate states that *[t]he court made an order that the complainant be recalled because the court wanted to ensure that the accused had a fair trial.* Also that *'...it was the courts intention at all times to have the complainant recalled. Never once did the court over-turn this decision nor refuse the accused the opportunity to recall this witness.'* With reference to a statement in his judgment that *'[t]he complainant was unavailable'*, the learned regional magistrate states that: *'What the court does concede is that the court should possibly have added in its judgment all the other dates that the complainant did not come to court which made the request to recall the complainant difficult.'* The learned regional magistrate concludes on this issue that *'[e]ven though the court states in its judgment at page 462 line 11 "The court has noted that after the accused's request on 28 March 2006 he never once again alluded to the fact that he wanted to have the complainant recalled" does not mean the court left the matter there. The court postponed the matter on numerous occasions to have the complainant recalled.'*

[5] Relying on S v Motlabane & Others 1995 (8) BCLR 951 (B), and with reference to a court's discretion to exclude the evidence of a witness where death or ill-health prevents the completion of cross-examination or where a witness fails to return for the completion of cross-examination, Adv CE Thompson, on behalf of the accused, submitted that the purpose of the cross-examination of the complainant had not been achieved in this case since the

accused did not cross-examine the complainant adequately on all aspects of the case, and the evidence of the complainant should therefore be excluded against the accused. The principles referred to by Adv Thompson are, in my view, not apposite to the facts and circumstances of this case.

[6] The accused was given a full opportunity to cross-examine the complainant. Once his cross-examination had been completed and she had already been excused as a witness, it occurred to the accused that he had left out certain aspects on which he should have cross-examined her, and he accordingly requested the learned regional magistrate for the complainant to be recalled. Acting in terms of s 167 of the Criminal Procedure Act 51 of 1977, the learned regional magistrate granted the request for the complainant to be recalled. It appears from the record of proceedings that the matter was thereafter postponed from time to time for the continuation of the trial and not only to recall the complainant. The complainant did not appear at any of the adjourned hearings. It does not appear that the complainant was in fact recalled to appear, that she refused to be further cross-examined, or that she was unable to reappear for further cross-examination. The learned regional magistrate states that he '*...is unaware of the reasons why the complainant did not come back to court...*'. Adv Ranchod informed me that the complainant would be available for further cross-examination should the case be remitted to the regional court.

[7] The accused never insisted on the exercise of his right derived from the court *a quo*'s ruling permitting him to further cross-examine the complainant and the learned regional magistrate never redecided the issue or denied the accused the exercise of such right. It seems to me, however, that the learned regional magistrate should have been more active in pursuing the recalling of this witness since the accused was not legally represented. His failure to have done so, in my view, amounts to an irregularity.

[8] Adv Thompson submitted that the complainant remained the witness of the State, it was obliged to ensure her attendance at court, her return to court necessitated eleven postponements, and the conclusion of the trial was unreasonably delayed by such postponements. Counsel accordingly submitted that the court should therefore act in terms of s. 342A(3)(d) of the Criminal Procedure Act, deem the State's case to have been closed due to an unreasonable delay, and refuse to remit the matter to the regional court for the complainant to be recalled. Suffice it to say, counsel's submission that the recalling of the complainant necessitated eleven postponements is factually incorrect. The record of the proceedings reveals that the continuation of the trial was postponed from time to time and for a variety of reasons. The trial proceeded on the adjourned dates and the complainant was never recalled for further cross-examination.

[9] The record of the proceedings shows that the accused made certain allegations of bias on the part of the learned regional magistrate during the course of the trial. The learned regional magistrate made reference to the fact that he had not been approached by the accused to recuse himself, but the right of the accused to apply for the recusal of the learned regional magistrate was never explained to him. I am of the view that the learned regional magistrate should in the circumstances of this case have informed the unrepresented accused of his right to apply for the recusal of the presiding judicial officer, and if the accused availed himself of such right, then to have adjudicated such application on its facts and in accordance with the relevant legal principles. The learned regional magistrate's failure in this regard, in my view, constitutes an irregularity in the proceedings.

[10] The learned regional magistrate seems to acknowledge the irregularity, but states that he would not have recused himself even had the accused's rights in this regard been explained to him. It appears from the record and from the magistrate's statement, however, that certain issues might also have been raised off record and the accused's version on such issues accordingly does not form part of the record of the proceedings. Whether or not there had been actual and substantial prejudice to the accused can accordingly not be determined at this stage without the accused's full version also before this court. It should be clearly understood that I do not make any finding on whether or not the



magistrate should have recused himself because of the allegations made by the accused.

[11] It is clear from certain passages in the record of the proceedings that the accused intended to testify at his criminal trial in the regional court. I am fortified in my concern that the accused's final election not to testify was as a result of a possible perception on his part of an unfair trial by the fact that counsel for the accused informed me that the accused will avail himself of the opportunity to re-open his case and to testify should the case be remitted to the regional court and such opportunity be afforded to him.

[12] I am unable to find that the accused was correctly and fairly convicted on the various counts and that the proceedings in the regional court were in accordance with justice. Section 35(3) of the Constitution guarantees the right to a fair trial. I accordingly propose to issue an appropriate order under ss 52(3)(e)(iv), 52(3)(e)(v), and 52(3)(e)(vi) of the Act.

[13] In the result the following order is made:

1. The accused's convictions on counts 1, 2, 3, 5 and 6 are all set aside.
2. The case is remitted to the regional court, Protea and the learned regional magistrate who presided at the trial is directed:

- 2.1 to inform the accused of his right to apply for the recusal of the learned regional magistrate and, if the accused applies, to adjudicate such application in accordance with the law;
- 2.2 to recall the complainant and to allow the accused or his legal representative to further cross-examine her in accordance with the ruling that had been made by the learned regional magistrate on the 28<sup>th</sup> March 2006;
- 2.3 to permit the accused to re-open his case, to testify if he so wishes, and to call any witness in his defence; and
- 2.4 thereafter to deal with the case as if judgment had not already been given.

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P.A. MEYER  
JUDGE OF THE HIGH COURT

1 August 2008