REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: A 54/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

Signature: .....

Date: …23 November 2021.

In the matter of:

Basil Victor Jenkins

and

The State Respondent

JUDGMENT

Maumela J.

1. This is an automatic appeal brought before court in terms of Section 309(1)(a), introduced by Section 10 of Act 42 of 2013. The appeal[1] was duly noted on 4 April 2019.[2] The appeal is opposed. Before the Regional Court for the District of Gauteng, the court *a*

[1]. See transcripts, indexed page – notice of appeal, p969 to p1021.

[2]. *vide* transcript, p993.

quo, the Appellant, Basil Victor Jenkins (Senior), appeared together with three other co-accused. The first co-accused was his wife Hendrika Jenkins; then his two sons, Basil Jenkins Junior and Desmond Jenkins as co-accused number 2 and 3 respectively.

2. Basil Jenkins Junior and Desmond Jenkins were acquitted on all charges. Hendrika Jenkins was committed Weskoppies in terms of Section 77 of the Criminal Procedure Act. The proceedings in this matter were conducted in the Afrikaans language and all the exhibits were also Afrikaans documents. The writer will attempt to quote where necessary in these heads of argument the Afrikaans and include a personal translation into English to assist the parties in the conduct of this appeal.

3. The Appellant was charged with 51 counts. He understood the charges put. He pleaded Not Guilty to all the counts and chose to exercise his constitutional right to remain silent. He therefore did not disclose the basis of his defence in terms of Section 115 of the Criminal Procedure Act 1977: (Act Number 51 of 1977) - CPA.

BACKGROUND.

4. All the accused pleaded not guilty before the Regional Court to 51 charges. The state led evidence, so did the defence. At the conclusion of the trial, in some of the counts, the court *a quo* accepted the version of the state and rejected that of the Appellant. Consequently, he was convicted on the following:
   - 4.1. Count 1 – Rape of C[....] between 2008 and Augustus 2010 (vaginal/anal penetration with his penis).
   - 4.2. Count 3 - Rape of C[....] between 2008 and Augustus 2010 (vaginal/anal penetration with his finger).
   - 4.3. Count 5 - Rape of C[....] between 2008 and Augustus 2010 (by placing his penis inside her mouth).
   - 4.4. Count 7 - Sexual assault of C[....] between 2008 and Augustus 2010.
   - 4.5. Count 31 - Rape of D[....] between 2008 and Augustus 2010 (vaginal/anal penetration with his penis).
   - 4.6. Count 33 - Rape of D[....] between 2008 and Augustus 2010 (vaginal/anal penetration with his finger).
   - 4.7. Count 35 - Rape of D[....] between 2008 and Augustus 2010 (by placing his penis inside her mouth).
   - 4.8. Count 37 - Sexual assault of D[....] between 2008 and Augustus 2010.

4.9. Count 43 - Accomplice to Rape of D[....] between 2008 and Augustus 2010.
4.10. Count 46 - Instigating/inducing/instructing another person to commit a sexual offence in contravention of section 55 (c) of Act 32 of 2007.
4.11. Count 67 - Assault with intent to do grievous bodily harm (in that he stabbed D[....] with a knife).
4.12. Count 68 - Assault on D[....] (amongst other things by hitting her and forcing her to consume alcohol).
4.13. Count 68a - Assault on C[....] (amongst others by forcing her to consume alcohol).
4.14. Count 69 - Intimidation of Danielle.
4.15. Count 85 - Compelled Rape and
4.16. Count 86 - Compelled Rape.

CRIMINAL LIABILITY.

5. It is contended on behalf of the Appellant that he was not criminally responsible when he committed the offenses. It is also contended on behalf of the Appellant that the court *a quo* ought to have harbored a suspicion around the mental health of the Appellant at the time he appeared for trial before it. It if further contended consequent to its observation, the court *a quo* ought to have acted in terms of sub-section 78(2) of the Mental Health Act.

6. This section provides as follows:
"78(2)":
"*If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.*"

THE APPELLANT'S GROUNDS FOR APPEAL.

7. The Appellant filed his own notice of appeal and grounds for appeal, found at pages 993 to 1021 of the record. All the accused including the Appellant brought an application before the court *a quo*, in terms of Section 38 of the Constitution.

8. It was submitted that the Magistrate, (court *a quo*), erred in refusing to grant the Appellant and the other applicants the remedy

provided in terms of Section 38 of the Constitution. This section provides for the enforcement of rights. To that end, it provides as follows:

S 38.

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a). anyone acting in their own interest;

(b). anyone acting on behalf of another person who cannot act in their own name;

(c). anyone acting as a member of, or in the interest of, a group or class of persons;

(d). anyone acting in the public interest; and

(e). an association acting in the interest of its members.

9. It was submitted that the Magistrate, (court *a quo*), erred in refusing to grant the Appellant and the other applicants the remedy in terms of Section 38 of the Constitution. This section provides for the enforcement of rights.

10. It is not in dispute that there was a prosecutor attending the matter and assisting the State in the prosecution, especially on the evidence of the minor child C and that she has a close relationship with one of the foster parents. The Appellant argued that it is evident that there was a conflict of interest and that she was involved in dealing with this matter. It was argued that the Court *a quo* should have granted relief for access to this possible witness[3] and the State refused. The Court confirmed that access must be given to possible witnesses and to have the opportunity to interview them to ascertain whether they can contribute to the proceedings. It was submitted that in this matter, the prosecutor was a possible witness and the State denied the Appellant, (the accused in this trial), the latitude to have access to that witness.

11. It was pointed out that this could have assisted the Appellant or the other applicants in preparing a defence or getting to the bottom of how the minor child was influenced by the prosecutor and whether she had any knowledge of witnesses etcetera. The Magistrate

[3]. See S v Shabalala 1999 (1) SASV 163 (T).

stated that he allowed somebody to sit in Court who was not involved in the matter. There are procedures to be followed for persons that want to sit in in these proceedings and who do not have a conflict of interest or who do not have knowledge about the matter. It is submitted therefore that an irregularity was committed in the proceedings before the court *a quo*. The Appellant submits that the evidence of the minor child was tainted and that resulted in an error/injustice and therefore the trial was not fair towards the him.

12. The Stated called the minor witness to testify. The following important aspects transpired specifically relating to the so-called 'coaching' or in Afrikaans *'afrig'* of the witness. On page 172, line 3, the witness already stated: "*Ek verstaan nie*", (translated, "*I don't understand*"). When she was questioned on page 174, line 14 to talk about the '*slegte goed',* (translated; "*bad things*"), she said: "*hulle het sy privaat deel*, – referring to a single person), *en my koekeloeks gelek*". The aspect of the mental capacity of the accused to understand the proceedings before the court *a quo* comes into focus when regard is had to the weight to be attached to the evidence furnished by the two minor children.

13. The reading of Section 78 (2) of the CPA has the effect that the court *a quo* was supposed to refer the Appellant to Weskoppies Hospital before proceeding with trial. This is what the court *a quo* failed to do. However, the court does not view it to be proper at this stage to determine this evidence, given the fact that we find that it should not have been adduced before the court *a quo* since the Appellant should have been referred to Weskoppies Hospital forthwith.

14. The criteria on the basis of which a court may refer an accused for mental observation are the following:
    3.1. *a mental illness or an intellectual disability or any other reason.*

15. In the case of an allegation or appearance of mental illness or intellectual disability the Court must direct that an enquiry be made under Section 78 (2). However, if the allegation is made or appears that it relates to any other reason the Court may direct that an enquiry be made under Section 79. The Court does not act on a mere allegation of criminal incapacity without some indication of

the reasons thereof.[4]

16. There is no onus on the accused. There need only be a reasonable possibility. If there is such a possibility, the Court is obliged to order the enquiry in the case of an alleged mental illness or intellectual disability. The test should actually be taken under Section 78(2) of the Criminal Procedure Act (CPA) whether there is a reasonable possibility with regard to an objective assessment of all the information before the Court that the accused is not criminally responsible or has diminished criminal responsibility.[5]

17. An order in terms of sub-section (2) can be given at any stage of the proceedings;[6] even after conviction, but before sentence. In this case, documents were handed up before the sentencing procedure; see page 948 and 949, of the record of the proceedings before the court *a quo* which indicates that the Appellant has been treated at the Weskoppies Hospital for the following:
    17.1. *a panic disorder with agoraphobia; and*
    17.2. *major depressive disorder.*

18. An order may be given *suo moto* by the Court and all factors. The Appellant submitted that the Court and the State in this matter did not do such an investigation despite the fact that it had a duty to do so. The Appellant has been receiving treatment at Weskoppies Hospital since 1 May 2001. The Appellant is currently stable and he is also seeing a psychologist for counselling and therapy.

19. In a letter depicted on page 949 of the record, the diagnosis is '*major depressive disorder and panic disorder with agoraphobia'*. It is contended on behalf of the Appellant that looking at these documents, there was a reasonable possibility on that evidence that the Appellant suffered mental disability. It is accurate that the Appellant should have been referred to a psychiatric ward so that an evaluation can be done to determine his criminal liability. If diminished criminal liability could be found, it could be to the benefit of the Appellant where it concerns the sentencing procedures.

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[4]. See S v Makoka 1979 (2) SA 933 (A).

[5]. See S v Mphela 1994 (1) SACR 488 (A) at 493F-G.

[6]. See S v Mogorosi 1979 (2) SA 938 (A); S v Majola 1980 (3) SA 705 (W).

20. On that basis, it was submitted on behalf of the Appellant that the Court *a quo* erred in not referring the Appellant for such an evaluation and that the Appeal Court must intervene and set aside sentencing and conviction and refer the Appellant to an institution in order to determine his criminal liability at the time of the alleged offences.

21. In line 18 to 25 on page 182 of the record, the Magistrate specifically says that he allowed somebody to sit in Court who was not involved in the matter. That is confirmed on page 183, line 8. So, those are the procedures to be followed for persons that want to sit in these proceedings and who do not have a conflict of interest or does not have knowledge about the matter. This is contrary to the Court's own reasoning and therefore it is submitted that an irregularity was committed in these proceedings.

22. Turning to look further down the line with regard to her evidence which I will deal with here below, where the Appellant will submit that the evidence of the minor child was tainted, coupled together with this point should result in an error / injustice and would have resulted that the trial was not fair towards the Appellant.

23. On page 129, line 24 and 25 the witness stated: "*Ek weet nie*" (translated "*I don't know*"). On page 185, line 9, the following question was put to the witness: "*Het jy geskreeu*?", (translated "*Did you scream?*"). The answer is: "*yes*." Then at line 24 the question is put to her: "*Kan jy vir ons sê wat hulle gedoen het as hulle gevry het?*" (translated "*Can you tell us what they did when they were making love?*"). She replied: "*I don't understand the question*". She does not even know what making love means. She is asked: "*Wat beteken vry? Weet jy?"* (translated – "*What is making love? Do you know?*") to which she relied: "*Hulle soen en doen sulke goeters"* (translated – "*They kiss and do such things*"). Further: *"Saam met wie het jy nou hierdie flieks gekyk?*" (translated – "*Who did you watch these movies with now?*") to which she replies: "*Met _____*" and she goes on. "*Hulle het rondgerol*" (translated – "*they rolled around*"). No indication of any sexual activity is given in these lines by the witness, up to page 186, line 14.

24. Then on page 189, line 20, the prosecutor asked "*Hoekom?*" (translated – "*Why?*"). The witness replied: "*Ek verstaan nie dit*" (translated – "*I do not understand it*"). It was submitted that if the

witness was afraid of being woken up by somebody whereupon bad things would be done with her, she would have known what the bad things were and why she was scared but she stated that she cannot remember. This is but a few of the times. It was submitted that the witness did this several times further that she did not understand or did not know or cannot remember. As indicated under paragraph 13 above, it is not necessary as yet to determine the worth of this evidence given the route suggested.

25. The Appellant argues that under cross-examination, it became apparent that the witness got schooled about the contents of her evidence by Tannie Wanda. It was contended that her evidence resembled a recitation, like a rhyme which plays repeatedly. The Court also found that, the training became necessary because the witness is a shy person. The Magistrate found that in his judgment where he stated: "*Die Hof se bevinding hieroor kan gevind word in bladsy 254 vanaf paragraaf 20 tot 16. Die Appellant se submissie is dat hierdie getuienis onbetroubaar is en dat die resitasie en opleiding ter ver gegaan het. Die getuie (K) onder kruisondervraging erken op bladsy 249, lyn 20 dat 'Tannie Wanda en _____' en 23 'Oom Christopher, net julle twee? Is dit nie net hulle twee?'".* At page 250, line 1: "*Ek dink Tannie Adriana*". "*Dink jy of is dit so?*" *"Ek dink*". "*Goed nee, dit is reg*".

26. K says in her evidence at line 7: "*Sy't al die goeters wat die slegte goed wat hulle gedoen het oor en oor gesê*", meaning Wanda told me all the things they did "*oor en oor*", all the bad things, "*tot ek nie meer skaam is om dit te sê nie*" (translated – "*until I am not shy*"). Then she admits at line 10: "*So jy ken dit soos 'n rympie? Die slegte goed?*" (translated – "*So you know it like a rhyme? The bad stuff?*"). The witness replied: "*Yes*". She says she doesn't understand.

27. It goes further to the following extent on page 250, line 23 (quoting verbally Afrikaans): "*Nee Tannie Wanda het gesê ek moes soos sy Basil en Tollie in my koekeloeks gedruk. Dan sê ek dit. Basil het sy tottie in my koekeloeks…tien keer. Al hoemeer tot _____ hoe beter*".

28. On page 251, line 5 she states in Afrikaans: "*Nee, al die slegte goed hulle almal gedoen het. Sy het eers gesê ek daarna tien keer*". And it goes further, she does the recitation. What is important is that during her cross-examination she cannot go

outside these lines that she was trained to recite. The only inference that can be made is that she did not remember that and that she did not see it in her affidavit and therefore she was taught to say it. She even admits at page 252 in line 12 that she was trained "*Iaas week Saturdag en Iaas week Vryday*" – two days, by Tannie Wanda.

29. Even further in her evidence the witness cannot remember a lot of things when cross-examined by Advocate Botha – see pages 255 and 256. The Appellant submitted that the evidence of this witness is not reliable and that the extent of the training went too far. The only inference that can be made is that she was trained to the extent only to remember certain things and therefore her evidence should be rejected and the accused can be acquitted on the charges relating to this witness.

CONCLUSION.

30. Taking into account all the arguments presented by the Appellant himself and his previous legal representative and this representative, the following is submitted in the case of *Mpotle and Another v S*[7]:

"*[13] The role that the presiding officer plays in a criminal trial, inter alia, is to give meaning to the right to a fair trial as enshrined in the constitution.* In the case of *S v Zuma and Others*[8] at paragraph 16, Kentridge AJ said*: "The right to a fair trial conferred by that provision (section 25(3) of the Interim Constitution) is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal Courts before the Constitution came into force ..."* In the case of *S v Rudman and Another; S v Mthwana*[9] *the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire: "Whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted." A Court of Appeal, it was said (at 377) "does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice', or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration.'. That was an authoritative statement of the law before 27 April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with those 'notions of basic fairness and justice'. It is*

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[7]. (A97/2015) [2016] ZAGPPHC 63 (1 February 2016).
[8]. [1995] ZACC 1; 1995 (1) SACR 568 (CC).
[9]. 1992 (1) SA 343 (A).

now for all Courts hearing criminal trials or criminal appeals to give content to those notions.'

[14] The first ground of appeal, to the effect that there was a misdirection as to the nature of the alleged sexual activity, has four legs to it. Namely, the magistrate's conservative views which he expressed when he granted leave to appeal the conviction; his failure to consider evidence to the effect that the complainant requested the first appellant to remove the condom before oral sex; his view that it was improbable to have consensual sex as testified to by the appellants and finally his view about what happens in places like New York, in relation to the rape."

CRIMINAL LIABILITY.

31. It is trite law that when it is alleged in criminal proceedings that the accused was by reason of mental illness of intellectual disability for any other reason not criminally responsible when the conduct took place or if the Court itself harbours such a suspicion, the Court has to invoke the provisions of sub-section 78(2) of the CPA.

32. An order may be given *suo moto* by the Court and then consider all the factors. It is submitted that the Court and the State in this matter did not do such an investigation and had a duty to do so. It is therefore submitted that the Honourable Court erred in not referring the Appellant for such an evaluation and that the Appeal Court must intervene and set aside sentencing and conviction and refer the Appellant to an institution in order to determine his criminal liability at the time of the alleged offences.

33. The Appellant submitted that the trial he underwent before the court *a quo* did not meet the basic requirements for fairness in terms of the Constitution, He submitted that taking into consideration all the factors, it becomes clear that irregularities took place and therefore convictions and sentences should be set aside. He contended that the court has to find that the Appellant proved on the balance of probabilities that before the court *a quo*, the trial he was subjected to did not pass master for purposes of basic fairness in terms of the Constitution.

34. In the result, taking into consideration all the factors and irregularities which took place, the court stands to order that the court *a quo*, erred in convicting the Appellant and in passing the sentences it did against the Appellant. The court therefore, makes the following order:

ORDER.

34.1. The conviction and sentence arrived at and imposed by the court *a quo* against the Appellant are set aside.

34.2. In terms of Section 78 (2), of the Criminal Procedure Act 1977: Act No 51 of 1977 – CPA, the Appellant is referred to Weskoppies Hospital and the offence he is charged with is directed to be enquired into and to be reported on in accordance with the provisions of Section 79 of the CPA.”

I agree.

_____
T. A. Tsautse.
Acting Judge of the High Court of South Africa.

It is so ordered.

_____
T. A. Maumela.
Judge of the High Court of South Africa.