REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

HIGH COURT CASE NO: REV 36/2020
MAGISTRATE CASE NO: B800/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES / NO

[18 JUNE 2020]

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SIGNATURE

In the matter between:

THE STATE

AND

MOKWENA, KHASHANE STEPHEN **ACCUSED 1**
MAMABOLO, LINA **ACCUSED 2**

J U D G M E N T

MUDAU, J:

[1] The two accused, a couple aged 56 and 44 years respectively were on 11 March 2020, convicted by the magistrate at Ga-Kgapane, Letaba Magisterial district on a charge of assault with intent to cause grievous bodily harm. Consequently, accused 1 was sentenced to serve 12 months' imprisonment of

which six months was suspended for three years on condition that he was "*not found guilty of a similar offence (assault) during the period of suspension*". Accused 2 was sentenced to six months' imprisonment on condition that she was "*not found guilty of assault during period of suspen*sion". The sentences were imposed on the date they were convicted. The matter came before me by way of "automatic review".

[2] I take issue in the manner in which the conditions of suspension were phrased. The accused can arguably be forced to serve prison terms for any assault related charges, and in the case of accused 2, including common assault, without an option of a fine, committed before they were convicted for the charge under consideration. However, that is the least of my concerns. The order as it stands could easily have been remedied, as it was not a fatal error.

[3] According to the well-known dictum of Curlewis JA[1] :

> "A criminal trial is not a game... and a Judge's position... is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

[4] I was not satisfied that the proceedings were in accordance with justice and directed certain questions to the trial magistrate to which he promptly responded. I also solicited the views of the Director of Public Prosecutions, Limpopo, for which I am indebted. The DPP lend support to the view I have of the matter. On 5 June 2020, the conviction and the sentences were set aside.

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[1] *R v Hepworth* 1928 AD 265 at 277

I ordered the immediate release of the first accused who, as it turned out, was already out of prison on parole conditions. It is trite that a judicial review is not concerned with the correctness of the result on the substantive merits of the decision in question, but with the fairness and regularity of the procedure by which the decision was reached[2].

[5] Sections 302 and 303 of the Criminal Procedure Act 51 of 1977 (the CPA) provide that the record of the proceedings in which a reviewable sentence has been imposed by a magistrate shall be forwarded to the registrar of the High Court for review within seven days. The provision in section 303 that the clerk of the magistrate's court must forward the record to the Registrar of the High Court within one week after the determination of the case has been held to be imperative[3].The record of the proceedings was sent for review outside the mandatory period of seven days. Section 302(1)(a) of the CPA provides that proceedings in which a sentence has been imposed by a judicial officer who has not held the rank of magistrate for a period of more than seven years and which exceeds three months' imprisonment (or R6000), or in the case of magistrates who have held the rank for longer exceeds a term of imprisonment of six months (or R12 000), are automatically reviewable by the High Court.

[6] In this case, attached to the record of proceedings is a letter from the clerk of the court dated 8 May 2020, which reads thus: "*Kindly take note that the attached record is not submitted in time as expected due to inconveniences*

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[2] See *Ekurhuleni West College v Segal and Another* (1287/2018) [2020] ZASCA 32 (2 April 2020) at [16]

[3] *S v Lewies* 1998 (1) SACR 101(C) at 103*i*; *S v Ntantisos v Papazayo* 2004 (1) SACR 171 (C).

caused by the national lockdown. I was told by the Registrar of the High Court that your office was not operating due to lockdown", in apparent reference to Covid 19 pandemic Regulations and ensuing directives by the Chief Justice, and the Judge President of this Division. However, the J4 certificate bears two different dates. The first court stamp reflects 18 March 2020. The 18th was altered manually to reflect the 19th, which suggests that it was on the latter occasion that the papers were prepared for signature by the trial magistrate.

[7] The second court stamp is 8 May 2020, on which date the record was finally dispatched for consideration by the High court for review purposes. Covid 19 Regulations and related Court Directives came into operation after 26 March 2020, which is common cause. It is a significant number of days during which the record could, and should have been sent to the High Court for review purposes. The letter by the clerk of the court is silent in that respect.

[8] The objective of the provision for automatic review proceedings is self-explanatory. It is to ensure, as far as possible, that legally unrepresented convicted persons have been tried fairly and sentenced justly[4]. In a plethora of decided cases, the High Courts have often expressed warranted concern at delay in submitting matters on review[5].

[9] In *S v Jacobs And Six Similar Matters*[6], the court was of the view that if an accused's constitutional right of review is effectively stymied and rendered nugatory because of egregious delay, for example, where, by the time the

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[4] *S v Joors* 2004 (1) SACR 494 (C)
[5] *S v Raphatle* 1995 (2) SACR 452 (T) at 435*h*, *S v Manyonyo* 1997 (1) SACR 298 (E) at 300*b* - *e* (1996 (11) BCLR 1463 at 1465J - 1466C) and in *S v Lewies* 1998 (1) SACR 101 (C) at 104*b*, *S v Hlungwane* 2001 (1) SACR 136 (T).
[6] 2017 (2) SACR 546 (WCC) at para 40

matter is reviewed he has already served the sentence that was imposed upon him, his constitutional right to a fair trial has been infringed and this may constitute a failure of justice. The delay regarding the review of this matter for obvious reasons cannot be condoned, but is viewed in a serious light. Though viewed in a very serious light, it is the least of my concerns for reasons that will become apparent.

[10] In the review matter under consideration, the magistrate, during cross-examination of the complainant, subjected accused 1 to detailed and incisive questioning which takes up six pages of the transcript even before the accused could take the witness stand, ostensibly intended to assist him as an unrepresented accused person. The results were grossly unfair and detrimental in my view to the accused's case. In response to my concern, the trial magistrate wrote that: *"I concede that in the pursuit of attempting to determine a cogent version to put the complainant, it may appear to slant towards cross-examination, but the purported version that was being proffered required clarity in order for the complainant to properly answer to it".*

[11] The exchanges between the trial magistrate and the accused, unedited, are as follows:

> "Court: Sir, I am going to say this sir. If you are saying... I missed something. If you say you she was hitting you on my arm, and you indicated my left arm, to what point did she starts biting you? You are putting a version that she was biting you. How did that come about? --- I grabbed her by her collars and at the time she started biting me.
> Ja, but did she bit ... I am lost here. She kicked the beer bottle because she wanted to assault you.
> Accused 1: Yes, that is correct. I kicked the beer bottle because she wanted to hit with the beer bottle.
> Court: Okay, but was the beer bottle in your hand when you kicked it or was it on the floor that you kicked it or what?

Accused 1: she was holding the beer bottle and it had liquor inside. She was drinking from that bottle.
Court: She was drinking. I cannot understand what version you are putting.so she is holding a bottle and then there is liquor inside the bottle.
Accused 1: Yes.
Court: Now how was she about to assault you with that bottle? Did she turn it upside down so that the liquid falls out? In other words, she is busy standing like this drinking. Does she then take the bottle like this, turn it upside down so she can hit you with it or is she hitting you, how is she trying to hit you with the bottle?(My emphasis)
Accused 1: Your Worship, she was drinking from the bottle. She then grabbed the bottle with the neck of the bottle but there was still liquor inside the bottle.
Okay, so she held down next to her.
Accused 1: Yes.
Court: Yes sir, how did you conclude that she was about to hit you with it? (My emphasis)
Accused 1: she was hurling herself Your Worship. She was swearing at me.
Court: Yes, she is holding the bottle next to you. So then you kick the bottle and then you grab her. Is that correct or is that the version you are putting to the witness?
Accused 1: she is the one who started grabbing me with my collars. I am the one started hurting. I kicked the bottle. Then she grabbed me by my collars.
Court: Did the bottle fall out her hand? (My emphasis)
Accused 1: It fell off Your Worship from her hand.
Court : okay, then she grabbed you. You kicked the bottle first.
Accused 1: yes, I kicked the bottle.
Court : Alright, and that is when she grabbed you and you then grabbed her and she started biting you and next minute you slapped her with an open fist and then you hit her with a fist. (My emphasis)
Accused 1: that is correct your worship. She will not let go of me. She was biting me.
Court: Yes, no, no, she would not let go of you but you are holding her so she is biting your hand like that. (My emphasis)
Accused 1: But she was also holding me.
Court: no, you can put that version. I am just trying to establish you must put your version to her. In other words, you are now holding each other. You have kicked the bottle first. She then grabs you. That is the version you are putting to her and then she starts biting. Okay, she's biting. So I mean how big is your mouth around your... How is she biting you? You are holding at the collar. How is she getting to you? I want you to explain that to us. (My emphasis)
Accused 1: she leaned forward your worship and then she then started biting me.
Court: How far down your arm was she biting you?
Accused 1: all around.
Court: again, so while the caller is here, are you getting [intervenes]
Accused 1: now it was no longer the collars your worship it was on the chest.
Court: holding the chest and in the meantime, as she was released from holding you at the collar.

Accused 1: she was holding me. She did not release me.
Court: okay, but you are no longer holding her by the collar. You released her.
Accused 1: I was holding her.
Court: So you are both holding each other at arm's length, how does she bend down to bite you? Explain that to the Court. (My emphasis)
Accused 1: I also do not know. I was surprised to see her biting me.
Court: okay, you will get an opportunity to lead that evidence. Okay so madam, after the court's questioning, he is suggesting that you were both holding the bottle.. He first kicked the bottle out the hand. You then grabbed him. He grabbed you back and then you started biting him and because you were biting him, he punched you, slapped you, and then punched you. That is the version he is putting to you. What is your response to that--- that is not correct.
Thank you. So she denies your version. Thank you. You may proceed sir.
Accused 1: your worship, after that, I dragged the complainant to accused 2's homestead. I wanted her to clarify us as to why was she swearing at us and I further told her that if she is not prepared to tell us as to why she was swearing at us , we were going to further assault her--- that is not correct.
Court: Sorry, when you say that is not correct, your evidence is that you were dragged. That is common cause.--- They were together your worship when they dragged me. (My emphasis)
Accused 1: I was alone.
Court: Okay, but how did you drag her?
Accused 1 [not interpreted]
Court: so she was on the ground.
Accused 1: she was working your worship but I was pulling her.
Court: No, we have got past the point of your version being put that she was biting, then you slapped and then you fisted her. When you fisted her, did she fall to the ground or she was still standing upright? (My emphasis)
Accused 1:[indistinct] [audio glitch]
Court: And then you kept holding on to part of her clothes and then you dragged her. Did she fall when she was dragging or... (My emphasis)
Accused 1: okay, did not fall...."

[12] The questions asked have not been exhausted. The burden on the record is huge enough. From the above extracts, it is clear that the trial magistrate did not observe the basic notion of fairness and procedural justice in the conduct of the trial. It is just to characterise the manner of questioning by the magistrate as falling under the nature of cross-examination. Quite clearly, the magistrate subjected the accused to prolonged grilling at the stage when there was no obligation on him to answer to the questions. In my view, the

questioning was at times, conducted in a badgering and distinctly combative manner.

[13] To my mind, the rights of the accused to a fair trial which are entrenched in section 35 (3) (h) of the Constitution (i.e. to be presumed innocent, to remain silent and not to testify during the proceedings) as well as section 35 (3) (j) of the Constitution (i.e. not to be compelled to give self-incriminating evidence) were breached long before their rights to adduce and challenge evidence were explained to them. Section 35(5) of the Constitution also finds application. It provides that evidence, which include admissions, obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[14] There are three broadly stated limitations that confine judicial questioning, which Trollip AJA in *S v Rall*[7] summarised, restated in *S v Joors*[8]. I take liberty to echo them briefly: While it is difficult and undesirable to attempt to define precisely the limits within which judicial questioning should be confined, the following broad, well-known limitations should generally be observed: (1) The trial Judge should conduct the trial in a way 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. (2) The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression. (3) A Judge should also refrain from indulging in questioning witnesses or the accused in

[7] 1982 (1) SA 828 (A) (supra at 831H - 833B).
[8] Supra.

such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. (4) A Judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility. Any serious transgression of these limitations will in general constitute an irregularity in the proceedings.

[15] It is accepted that, a judicial officer is entitled and often obliged in the interests of justice to put such questions to witnesses, including the accused, as seem to him or her desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case[9]. Much depends, of course, upon the particular circumstances of the trial itself as to whether, when, to what extent, and in what form or manner such questioning should be indulged in by the judicial officer. The questioning by the trial magistrate in the instant case went beyond the acceptable limitations. In this case, however, it is apparent that the trial court discredited the accused during cross-examination of the complainant given the tone and nature of the questions posed back to the accused. Moreover, section 167 of the CPA specifically prohibits the examination of an accused unless he or she chose to testify, with purpose of elucidating any points that may still be obscure after examination by the parties.

[16] The list of shortcomings regarding this matter does not end here. In fairness to the trial court, after the complainant had finished with her testimony, the court

[9] *S v Rall* (supra)

invited the accused to test her version by asking questions. however , the following also transpired : " *[A]nd further, if you put a version to the complainant which is different to her version, in other words, if you say no , what happened is this ,what you say about that , you cannot put that version to this accused (sic) if you are not going to testify . You must then testify and subject yourself to cross-examination if you are going to put her version that is different to the... complainant*" (my emphasis). The right to cross-examination in terms of section 166 of the CPA is a distinct right from the right to testify and must be explained meanifully at the relevant stage of the proceedings in the trial. Once accused 1 was done with his questioning of the complainant. The rights of the second non-defended accused were explained thus: *"right madam, you have the right to now cross-examine or add further questioning. Do you wish to ask any further questions?"* (The underlining is mine).

[17] The explanation given to accused 2 presupposes that accused 1 asked the complainant questions on her behalf. The State had a duty to establish a case against accused 2 in her own right. The explanation was woefully inadequate. It is trite that the right to cross-examine and the purpose of cross-examination be fully explained to an unrepresented accused[10].This includes an explanation that it was the accused's duty to put to any State witness any points on which the accused disagreed with the witness and to put his version to the witness[11]. Failure to do so meaningfully is a gross irregularity. Accused 2 as naturally expected, hardly asked any questions. She denied to have assaulted the complainant. She put her version that she was the one who rescued the

[10] *S v Mashaba* 2004 (1) SACR 214 (T). See, too, *S v Ndou* 2006 (2) SACR 497 (T) at 500.
[11] See, too, *S v Macrae & another* 2004 (2) SACR 215 (SCA) at [24].

complainant and the complainant provoked them. Thereafter, the state closed its case.

[18] The rights of the accused after the closure of the state's case were explained thus: *"Sorry, the state has closed its case and you can do so if you so wish to present your defence"*. It is no surprise that both of them chose to remain silent and closed their case. When the trial magistrate further inquired: *"Okay, you do understand that by exercising that right to remain silent, it is your right to do so. However, your failure to lead evidence means that the court is then faced with one version before it"*. This was too little too late. As the proverbial saying goes, 'it was closing the stable door after the horse has bolted'.

[19] After the accused were convicted as charged, their procedural rights in mitigation of sentence were explained thus: "*right, sir, madam, according to the state's records, you have no previous convictions. You are a first offender in the matter. You may now address the court on the basis of what is an appropriate sentence"*. There was no explanation given that the accused may testify in mitigation of sentence in terms of section 274 (1) of the CPA. The explanation was inadequate and therefore, irregular.

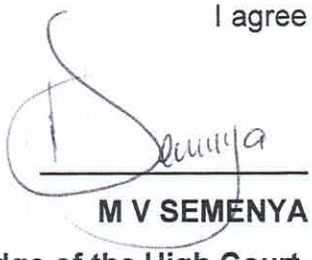
[20] I accordingly conclude that the nature, number, and cumulative effect of the gross irregularities committed by the trial court were fatal, which warrants interference by this court. Consequently, the proceedings fall to be set aside as there was in sum, a failure of justice to the two accused. Cumulatively they fall within the purview of section 22 of the Superior Court Act[12]. The

[12] Act 10 of 2013

irregularities referred to above rendered the trial of the two accused unjust. It is for the above reasons that the convictions and sentences were set aside.

T P MUDAU
[Judge of the High Court,
Limpopo Division,
Polokwane]

I agree



M V SEMENYA
[Judge of the High Court,
Limpopo Division,
POLOKWANE]