REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

Case no: CA &R: 360/2004
Date heard: 16.11.2011
Date delivered: 16.2.2012

In the matter between:

FUZILE DAVID MPHUKWA — **Appellant**

vs

THE STATE — **Respondent**

APPEAL JUDGMENT

SUMMARY - Appellant herein was charged in the Regional Court of East London with two counts (a) housebreaking with intent to commit an offence unknown by the State and second count of attempted rape. The verdict as recorded shows that he was found guilty on both counts. In respect of the second count the Court found him guilty of rape. On 11 March 2011, he was sentenced to 4 years imprisonment in respect of count 1 and ten (10) years imprisonment in respect of the second conviction. His rights to legal representation at State expense (legal aid) were not explained to him and throughout the trial he conducted his own defence. After sentence the magistrate explained to him his rights to appeal but did not inform him the procedure of first applying for leave to appeal before filing a notice of appeal. Three days after he was sentenced, appellant filed his notice of appeal.

This resulted in the Clerk of the Court sending the appellant's notice of appeal to the Registrar of the High Court in Grahamstown. Due to some unexplained delays while he was in custody, the hearing of his appeal only took place on the 16 November 2011, some seven (7) years after he was sentenced. On 8 June 2011, he was granted leave to appeal and was released out on bail pending the outcome of his appeal.

The Appeal Court set aside the conviction and sentence on the grounds that the proceedings in the trial Court were irregular and that a failure of justice had occurred.

TSHIKI J:

A) INTRODUCTION

[1] This case has an unfortunate history, details of which has the effect of tempering negative aspersions to the administration of justice in our Courts. Appellant, then a 55 year old man, was convicted in the Regional Court of East London on 10 March 2004 for having committed two counts, the first one of housebreaking with intent to commit a crime unknown to the State and one count of rape. The offences were alleged to have been committed on 18 May 2003 at or near Summerpride in East London in the premises of the complainant Zoliswa Ziyokwana, whom I will hereinafter refer to as the complainant.

[2] The first glaring anomaly in this case is the fact that the second count of attempted rape is known by the State to have been the offence allegedly intended to be committed by the appellant inside the house in which the complainant was sleeping. When the charges were put to the appellant, the prosecutor was already aware that when appellant broke into the complainant's house he attempted to or had intended to rape the complainant, yet the State in its indictment regrettably claims that the offence intended to be committed by the appellant was unknown.

[3] Throughout the trial the appellant was unrepresented and upon conviction he was sentenced to four years imprisonment in respect of count 1 and ten years imprisonment on count 2. His appeal rights were then explained to him after which he was taken to prison to commence his fourteen year term. After hearing his

appeal rights appellant, there and then, notified the Court of his intention to exercise his appeal rights by indicating that he would lodge an appeal as soon as he arrives in prison. It should also be noted that when the appellant's appeal rights were explained he was never advised to first apply for leave to appeal before filing his notice of appeal.

[4] It appears from the record that whilst serving sentence, appellant made numerous attempts to have his appeal processed after he had lodged his notice of appeal on 15 March 2004, having been sentenced on 11 March 2004. Instead of arranging for the appellant to appear before Court to make an application for leave to appeal his conviction and sentence, the Clerk of the Court in East London simply forwarded the notice of appeal to the Registrar of this Court in Grahamstown. The matter was delayed until 2008, when the office of the State President to whom the appellant had complained, put pressure on the authorities concerned. An arrangement was then made to have the appellant's application for leave to appeal heard in Court before a different magistrate because the trial magistrate was no longer serving as a magistrate.

[5] On 8 June 2011, the appellant was granted leave to appeal and was released out on bail pending the outcome of his appeal. Thank you to magistrate D. Rossouw for ameliorating the injustice suffered by the applellant by releasing him out on bail pending the appeal. More details of the injustice referred to are to be dealt with in the judgment.

[6] Before us the appellant was represented by Mrs H.L. McCallum and the State by Mr S. Mgenge. We are indebted to both counsels for their professional approach to the matter.

B) THE CHARGE

[7] The charge sheet reveals that the second count preferred against the appellant was attempted rape and not rape, the offence of which he was convicted. The charge sheet reads:

> "RAPE
> That the accused is/are guilty of the crime of rape.
>
> In that upon or about 18/05/2003 and at or near Summerpride in the regional division of the Eastern Cape, the accused did unlawfully and intentionally attempt to have sexual intercourse with a female, to wit Zoliswa Ziyokwana without her consent."

[8] However, during the trial on 13 February 2004, the record only shows that the "state puts the charges to accused" and "accused indicates that he understands the charges and pleads not guilty". The record does not indicate that the charges were formally put to the appellant at that stage. I assume that the charges that the state had put to the appellant are those in the charge sheet, which are, housebreaking with intent to commit a crime unknown to the State and attempted rape as detailed above. It is apparent from the indictment that though the appellant was charged with rape the contents of the indictment reveal the commission of attempted rape.

[9] What next follows is that the record specifically shows that the offences committed by the accused do not trigger the application of the minimum sentences in terms of section 51(1) and (2) of the Criminal Law Amendment Act[1] (the Act). This

[1] Act 105 of 1997

was in fact the agreement between the State prosecutor and the presiding magistrate. There was, therefore, no need to warn the appellant of the provisions of section 51 of the Act. Indeed the appellant had no reason to worry himself about the existence or otherwise of the substantial and compelling circumstances relevant for the purposes of sentence.

[10] No rights to legal representation were explained to the appellant immediately before and after the charge had been put to him. Instead, before evidence was led the Court again repeated the explanation of the two charges. The relevant details are those of the rape count where the Court stated:

> "The second count is that on the same date at Summerpride in the regional division of Eastern Cape you had sexual – you unlawfully and intentionally had sexual intercourse with a female person to wit Zoliswa Ziyokwana without her consent. You understand now?"

[11] It is not clear from the record why the Court had to explain the charges to the appellant because this had been done and that appellant had already pleaded to the charges that were put to him by the prosecutor. What is of significance in the magistrate's conduct is that in respect of count 2 he put the charge of rape and not attempted rape as is phrased in the charge sheet.

[12] This, in my view, has created lots of problems because in respect of the second count the appellant was subsequently convicted of rape a more serious offence than that of attempted rape to which the appellant pleaded at the beginning of the trial. More to this will appear later in the judgment.

C) FAILURE TO EXPLAIN RIGHTS TO LEGAL REPRESENTATION

[13] There is no indication on the record that the appellant's rights to legal representation were explained to him immediately before the trial commenced. Nor is there anywhere in the record to show that such rights to legal representation at State expense (Legal Aid) were explained to the appellant at any stage of the proceedings.

[14] The appellant has also appealed against the regional Court magistrate's failure to advise him of his constitutional rights to legal representation particularly at the expense of the State (Legal Aid). The record only shows that the appellant's rights to legal representation at his expense were explained to him by another magistrate on 12 November 2003, but none of his rights to legal representation were explained to him on 13 February 2004, when the trial commenced. He was only asked to confirm that he was going to conduct his own defence which he did.

[15] The right to legal representation is provided for by section 73(1) and (2) of the Criminal Procedure Act[2] (the CPA) which provides:

> "**S 73 Accused entitled to assistance after arrest and at criminal proceedings**
>
> (1) An accused who is arrested, whether with or without warrant, <u>shall</u>, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.
>
> (2) An accused <u>shall</u> be entitled to be represented by his legal adviser at criminal proceedings if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.
>
> (2A) Every accused shall –
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...

[2] Act 51 of 1977

(e) at his or her first appearance in court, be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance."

(2B) Every accused shall be given a reasonable opportunity to obtain legal assistance.

(2C) ..." (My emphasis)

[16] The accused right to legal representation as stated above has been constitutionally entrenched in the Bill of Rights of the Constitution[3], in that in terms of the relevant section[4], an accused should be informed, *inter alia*, of his right to legal representation by the legal representative of his choice or where substantial injustice would otherwise result, to be provided with legal representation at State expense[5].

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[3] Bill of Rights in Chapter 2 of the Republic of South Africa Constitution, 1996 (the Constitution)

[4] Section 35(3)(f) and (g)

[5] Section 35(3) of the Constitution provides:

"(3) Every accused person has a right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of his right promptly;

(g) ***to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of his right promptly;***

[17] In S v Radebe[6]; S v Mbonani Goldstone J, after examining the authorities relating to the right to legal representation in South Africa, at 196 F-I stated:

> "If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ..." See also S v Khanyile and Another 1988(3) SA 795 (N).

[18] In my view, the explanation of the right to legal presentation by the Court involves some form of an enquiry. The Court must be satisfied that the accused has understood the import of the right and, if the accused person elects to conduct his

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(h) ...

(i) ...

(j) ...

(k) ...

(l) ...

(m) ....

(n) ...

(o) ***of appeal to, or review by, a higher court***." (my emphasis)

[6] 1988 (1) SA 191 (TPD)

own defence the Court has to establish whether such election has not been occasioned by lack of means or ignorance. If the accused lacks means to pay for his legal representation or is ignorant of the effect of legal representation, this should be clearly explained to him and the explanation should include a thorough explanation of his or her right to legal representation at State expense. The Court should also try to instill to the accused the knowledge that the Legal Aid lawyers are not government lawyers, as other accused persons would be under that impression, but independent lawyers who also operate in the interest of every accused person whom they represent in Court. The explanation of the consequences of not having a legal representative where an accused person is facing serious charges is important, and the Court in such circumstances should make sure that the accused person has clearly understood the danger of not being legally represented. Thereafter, the accused should be encouraged to exercise the right to legal representation. I say so because, in most cases accused persons elect to conduct their own defence due to ignorance and of labouring under the impression that a Legal Aid lawyer, owing to him or her being "employed by the State", the same State that has preferred charges against him or her, would not apply his or her mind fully to the case[7]. Lastly, that the entire explanation must be recorded. I say all the above, because it is difficult for me to comprehend why and for what good reason would an accused person refuse to accept legal representation for which he or she will not be required to pay. My practical experience tells me that the problem lies with the lack of thorough explanation of the right by judicial officers.

[19] It is equally true that a judicial officer should not assume that an accused person is fully aware of his or her rights aforesaid. In case of doubt the Court should

[7] S v May 2005(2) SACR 331 (SCA) at 334 para 6; S v Cornelius and Another 2008(1) SACR 96 (C)

ask questions which would establish that the accused has understood the legal rights that have just been explained to him or her. If the accused elects to conduct his own defence despite his or her knowledge of availability of legal aid the Court should explain the adverse consequences and implications of conducting their own defence in circumstances where the accused is not conversant with the Court procedure due to lack of the necessary legal training. The Court has to ensure that the decision by the accused person to elect to conduct his or her defence is an informed decision and is not based on ignorance.

[20] The trial Court should also not assume that accused person's rights to legal representation have been explained to him or her only by reason of the fact the accused has previously appeared before the lower Courts. An obligation to explain the accused's rights in terms of section 73(1) and (2) of the CPA is bestowed on the trial Court. This should be the case especially when the record, as is the case *in casu*, does not clearly show that that right was fully explained to the accused.

[21] In the present case, there is no evidence to suggest that the appellant was encouraged to exercise his right to legal representation. This is so despite the fact that he was facing a serious offence of rape. In ***S v Sikhipha***[8] at 443 para [10] Lewis JA remarked as follows:

> "It should be said, however, that where an accused is faced with a charge as serious as that of rape, and especially where he faces a sentence of life imprisonment, he should not only be advised of his right to a legal representative but should be encouraged to employ one and to seek legal aid where necessary. It is not desirable for the trial court in such cases merely to apprise an accused of his rights and to record this in notes: the court should, at the outset of the trial, ensure that the accused is fully informed of his rights and that he understands

[8] 2006(2) SACR 439 (SCA) at 443 para 10. See also S v Mbambo 1999(2) SACR 421 (W) at 428 h-i

> them, and should encourage the accused to appoint a legal representative, explaining that legal aid is available to an indigent accused”.

[22] As a consequence of the magistrate’s failure to encourage the appellant to exercise his right to legal representation the Court was not in a position to know why the appellant elected to conduct his own defence. Most importantly, assuming that the appellant had no means to instruct an attorney at his own expense, his failure to apply for legal aid could have been exercised by him had he been aware of it. He did not do so and surely the failure by the Court to explain that right has resulted in accused not receiving a fair trial in terms of section 35(3)(f) and (g) of the Constitution.

[23] I must emphasize though that the failure to inform an accused of his right to legal representation and/or the availability of legal aid, in my view, does not necessarily have the effect of vitiating the proceedings in a criminal trial. To constitute a fatal irregularity warranting the setting aside of the proceedings there must be proof of substantial prejudice to the accused or a miscarriage of justice. Such can only be established by having regard to what happened during the entire trial[9].

[24] What happened in Court in this case is proof of the consequences of the magistrate’s failure to inform the appellant of his rights to legal representation resulting in the appellant’s failure to receive a fair trial. The magistrate had informed the appellant that the minimum sentences in terms of section 51 of the Act[10] were not applicable in his case. Yet ,surprisingly after conviction, the Court considered the

[9] See *Dictum by* N. Dukada AJ In S v N 1997(1) SACR 84 (TK) at 86 d

[10] *Supra*

provisions of section 51 of the Act applicable in the appellant's case. The Court having specifically and deliberately refrained from informing the appellant the provisions and import of such provisions owing to the fact that they were not applicable, he, in any event, sentenced him in accordance with those provisions. There is no doubt that this conduct by the magistrate is reprehensible in the extreme and has resulted in the appellant not receiving a fair trial and no doubt a failure of justice has occurred.

[25] The Court has in fact decided to convict the appellant for rape of which he was never charged. He has been charged with attempted rape as the indictment clearly shows that the "***accused did unlawfully and intentionally attempt to have sexual intercourse with a female, to wit, Zoliswa Ziyokwana without her consent.***"

[26] An accused person cannot be charged with a less serious offence and end up being convicted of a more serious crime. In other words, as in the present case, the appellant cannot be charged with attempted rape and end up being convicted of rape. He has pleaded not guilty to attempted rape and, therefore, cannot be convicted of the more serious offence of rape. The State did not apply for an amendment of the charge sheet to substitute attempted rape with rape[11]. In ***S v Sikhakane*** *supra*, the accused was charged with attempted indecent assault and the State having made no attempt to have the charge sheet amended, he was convicted as charged though the evidence disclosed that an indecent assault had in fact been

[11] S v Sikhakane 1985(2) SA 289 (N). (Whose relevant facts relate to the failure by the State to apply for the amendment of the charge sheet to reflect the offence proved.) See also S v Nkosiyana and Another 1966(4) SA 655 (A) whose facts are distinguishable from those of the present case.

perpetrated. The Court on review, held that the accused could only be found guilty of attempted indecent assault and not the commission of the completed offence.

[27] It, therefore, follows in this case that the appellant, having been charged with attempted rape, the Court should never have convicted him of completed rape even if the evidence proved the commission of the completed offence. This is so for the reason that the Court cannot return a verdict of a more serious offence than the one of which the accused has been charged.

[28] In the circumstances, the appellant must conceivably have prepared and conducted his case in the manner the charge was presented and explained to him. It would, therefore, not be fair for the Court to return a verdict on a serious charge than the one of which the appellant has been charged. The unfairness of the trial in this case is compounded by the fact that the charge of rape which was never put and explained to the appellant is more serious than that of attempted rape and therefore would merit a more serious punishment, if convicted. In ***S v Zuma and Others***[12] 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 ***S v Rudman and Another*** ; ***S v Mthwana 1992 (1) SA 343 (A)*** 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

[12] 1995 (1) SACR 568 (CC) [para 16], also reported at 1995 (4) BCLR 401 (SA)

> 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 now for all Courts hearing criminal trials or criminal appeals to give content to those notions." [See the relevant provisions of the 1996 Constitution on page 7 *supra*).

[29] Sections 256 and 261 of the CPA cannot assist the State in this regard. The Court can only return a verdict on the serious offence if the State had applied and granted leave to amend the charge sheet to substitute the offence charged with the offence proved. Section 256 CPA provides:

> "Attempt
> If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit the offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence."

[30] The above provisions do not cater for the situation under discussion in the present case. It has been enacted for situations where an accused has been charged with the commission of a completed offence but the evidence proves an attempt to commit that offence[13]. In that case, the Court may convict the accused for the attempt to commit the offence so charged. The irregularities which were committed by the magistrate in this case could have been avoided had the appellant been apprised of his right to legal representation at State expense and the appellant had been represented during the proceedings.

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[13] R v Kadongoro 1980(2) SA 581 (R)

[31] It is unfortunate that the appellant had to serve seven years imprisonment before his appeal was heard. There is no doubt that the Clerk of the Court and the other authorities involved in the handling of the appellant's case should have done better than what they have. The Court should have heard the appellant's application for leave to appeal on the same date of sentence. Alternatively, the Court should have advised the appellant to seek legal representation at the expense of the State. This could have saved the appellant from the resultant miscarriage of justice and inconvenience which he has suffered. The Clerk of the Criminal Court compounded the appellant's problems by forwarding the notice of appeal to the registrar of the High Court instead of advising the appellant to make an application for leave to appeal.

[32] In any event, my view is that the presiding magistrate failed to afford the appellant a fair trial by omitting to adequately inform him of his legal rights. If he had done so, in the manner suggested in this judgment, the appellant could conceivably have opted to make use of the services of the legal representative at State expense. In any event failure to advise the appellant of his rights to legal representation is sufficient to render the whole trial unfair especially in a case where the accused is charged with a serious offence.

[33] In the light of the above analysis I have no option but to set aside the conviction and sentence herein. I need not even deal with the merits of the case in detail because the irregularity that has occurred has resulted in a failure of justice which has the effect of vitiating the whole trial. Therefore, we make the following order:

[33.1] The appeal is hereby upheld.

[33.2] The conviction and the sentence of the appellant are hereby set aside.

[33.3] The Clerk of the Court East London, is ordered to refund the appellant of his bail money as soon as is practically possible.

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P.W. TSHIKI
Judge of the High Court

I agree.

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N.G. BESHE
Judge of the High Court

Representatives

For Appellant	:	Mrs H.L. McCallum
Instructed by	:	Legal Aid Board GRAHAMSTOWN
For Respondent	:	Mr S. Mgenge
Instructed by	:	Director of Public Prosecutions GRAHAMSTOWN