



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MTHATHA]**

Case no: CA&R 02/2024

In the matter between:

MAQEBA MAKAU

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

HINANA AJ:

[1] This is an appeal judgment which originates from the Mount Fletcher District Court. The appellant had been convicted and sentenced to a period of (3) three years. He filed an application for leave to appeal which was dismissed and he filed a petition which was granted on 24 January 2024.¹

On facts

[2] The appellant was, on 09 May 2023 found guilty of having contravened the protection order which was granted against him by insulting one Lulisile Mlamla by calling him a “dog” and threatening to kill him.”²

[3] Grounds of Appeal

3. AD Conviction

In his notice to appeal, the appellant lists the following grounds of Appeal:

- 3.1. (a) The learned magistrate erred in not explaining the appellant’s rights in terms of section 35(3)(f) of the Constitution, Act 108 of 1996, as amended, after non availability of his legal representative;
- 3.1. (b) The learned magistrate erred in not affording the appellant an adequate opportunity to engage services of another legal representative if the legal practitioner of record was not available;
- 3.1. (c) The learned magistrate failed to adequately inform the appellant about choices he had in respect of legal representation and possible implications of having no legal representation at the trial;
- 3.1. (d) The learned magistrate erred in not affording the appellant adequate time to prepare for the trial;

¹ See order granting Leave to Appeal, p 7

² Page 6, the charge.

- 3.1. (e) The learned magistrate erred in failing to safeguard the rights of the appellant in terms of section 35 of the Constitution Act 105 of 1996; (sic)
- 3.1. (f) The learned magistrate erred in admitting exhibits (Protection Order and Return of Service) without applying a proper procedure for admissibility on such exhibits;
- 3.1. (g) The learned magistrate erred in admitting the protection order by consent even though the appellant did not consent in respect of the admissibility of the protection order;
- 3.1. (h) The learned magistrate erred in relying on the contents of the protection order which contents were not proven by the State;
- 3.1. (i) The learned magistrate erred in relying on the interim protection order and confirmed final protection order even though there was no evidence led to that effect;
- 3.1. (j) The learned magistrate erred in concluding that the appellant insulted the complainant with the word “asshole” even though no such evidence was led;
- 3.1. (k) The learned magistrate erred in not applying the provisions of section 342A of the Criminal Procedure Act 51 of 1977, as amended, in the circumstances;
- 3.1. (l) The learned magistrate erred in not assisting the applicant as an unrepresented accused;
- 3.1. (m) The learned magistrate erred in concluding that the State witnesses corroborated each other and they had no reason to falsely implicate the appellant to the commission of the offence;
- 3.1. (n) The learned magistrate erred in finding that the State had proved its case beyond reasonable doubt.

4. AD Sentence

4.1 The learned magistrate erred in sentencing the appellant to undergo three (3) years direct imprisonment which sentence induces sense of shock and disproportionate to the crime.³

5. ANALYSIS

The grounds of appeal are, to a large extent, interwoven and relate to the appellant's constitutional rights. The Preamble to the Constitution⁴ provides that:

“We, the people of South Africa, [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen⁵ is equally protected by the law.” (My underlining.)

6. The Bill of Rights⁶ is the cornerstone of South Africa's democratic government and it is for everyone to enjoy the constitutional rights contained in section 35 of the Constitution.

7. This appeal is founded on the failure by the presiding magistrate to properly apply his mind to the prescripts of section 35(3) (a)-(o) of the Constitution, these include a right to fair trial; a right to give an accused sufficient time to prepare for his defence; right to legal representation, or to have one allocated to him in the event that the accused is unable to secure his or her own legal representative.

³ Pages 1-7 of the separately bound index.

⁴ Act 108 of 1996

⁵ The Preamble of the Constitution, Act 108 of 1996.

⁶ Ibid section 7.

8. In this matter, the magistrate committed serious misdirections. The following hereunder is the extract from the record:

8.1. **“Court:** - I have called your attorney Mr Makau, he said that you are giving him problems. He is unable to consult with you in that you are saying that is too far Matatiele and I am not going to postpone this case. We will proceed.

Accused: - Sorry sir, can I talk please

Prosecutor: - Yes, you can

Accused: - Sir, can you please not listen to my lawyer, Because sorry, Sir, he, my lawyers have ended behaving like this because Mr Lande is the one who always have communication with my lawyers without my consent.”⁷(sic)

9. Further, the debate between the magistrate and the appellant appears below:

“Court: I cannot come here Mr Mapeba, each and every day and this case is not proceeding. Because of you.

Accused: Yes

Court: Non representation. I cannot travel all the way from Matatiele to be from (sic)

Accused: Yes

Court: Maluti

Accused: Yes

Court: In fact. To come here and stay and postponed the case I cannot. I am not willing to do that.”(sic)

10. It is always important for judicial officers not to directly communicate with one legal representative in the absence of another. It is trite that justice must be seen to be done. The magistrate should have communicated with both legal

⁷ Page line 11 of the record.

representatives at the same time and same place. This would have been possible to ask his clerk to call both of them to his office.

11. Van der Westhuizen J in *s v Jaipal*⁸ had this to say:

“The right of an accused for a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.

...

The fairness of a trial is threatened if a court is not independent, does not apply the law impartially, or does not function free from interference. Inappropriate contact by a judicial officer with any of the parties in a trial, or with witnesses, outside the formal court proceedings and especially in the absence of the parties on the other side, cannot be conducive to the fairness of the trial. The principle of that justice must not only be done but also seen to be done is well known, and has been recognized by this Court as at the heart of a fair criminal trial.” (My underlining.)

12. It was the legal duty of the magistrate to have explained to the appellant the implications of being unrepresented, and even inform the appellant to apply for Legal Aid. The magistrate should have encouraged the appellant to be legally represented.⁹

13. In *s v Melani and Others*¹⁰, Froneman J had this to say:

“The purpose of the right to counsel and its corollary to be informed of that right...is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty.”

Submissions by the parties

⁸ 2005 (1) SACR 215 (CC) at paras 29 and 31.

⁹ *S v GR* 2015 (2) SACR 79 (SCA).

¹⁰ 1996 (1) SACR 335 (E) at p 348.

14. The State conceded that trial was unfair and the sentence was harsh, and further prayed that both sentence and conviction should be set aside. The appellant's counsel did not make submissions in view of the concession by the State.

15. I have alluded to the fact that the grounds of appeal are interwoven and in view of the position I take; I do not deem it appropriate to deal with every ground

of appeal, suffice to find that in my view, the trial of the appellant was unfair and concession by the State was correct. The misdirection by the Magistrate has led to the injustice. The right to legal representation is central to the fairness of criminal trial.¹¹ As a result, the conviction and sentence must be set aside.

16. Conclusion

Accordingly, I make the following order:

1. **The appeal is upheld.**
2. The decision of the court *a quo* is set aside and substituted with the following:
The accused is found not guilty and is discharged.

11 *S v Luwani & Another* 2004 JDR 0500 (E).

HINANA AJ

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

MAKAULA J

JUDGE OF THE HIGH COURT

Matter heard on : 30 April 2024

Judgement Delivered on : 04 June 2024

APPEARANCES

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