



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	
25/03/24	_____
DATE	SIGNATURE

Case Number: A120/2020

In the matter between:

BAFANA JAN HLABATHI

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

MOGALE AJ:

1] This is an automatic appeal in terms of s10 of the Judicial Matters Amendment Act no 42 of 2013 against the conviction and sentence handed down in the Regional Court, Pretoria, on 7 May 2018, where the appellant was found guilty on 2 charges of robbery, 2 charges of kidnapping and 9 charges of rape. He was sentenced as follows:

- a) counts 1 to 4¹ concurrently to 15 years imprisonment;
- b) counts 5 to 13² concurrently to life imprisonment.

2] The appellant was one of three accused before the court *a quo* during the proceedings. One of his co-accused passed away, and the other entered into an agreement with the State, pleaded guilty to the charges, and testified against the appellant at the latter's trial. His evidence was amongst that relied upon by the court *a quo* in convicting the appellant.

3] The appellant was represented at trial.

The record

4] Not much needs to be said about the state of the record in this matter, for the reasons that will appear later, save that the record missed certain parts of the evidence and cross-examination of some of the witnesses. Attempts at a reconstruction had been made and this appeal was postponed on various occasions by other appeal courts for that purpose. However, both the appellant and the respondent were of the view that there was sufficient before us to entertain the matter, and given the view taken by the court, I agree.

Summary of evidence

5] In the early hours of the morning of 30 January 2011 at around 01h00, the complainant boarded a taxi in Hatfield to go home to Mandela. The taxi stopped in Nellmapius Ext 4 but refused to take her to Mandela as there were not enough other passengers. She then received a call from her boyfriend, and during the ensuing conversation, he told her to wait for him at a nearby pub. It was during the walk to the pub that the co-complainant, Mr. William Nkadimeng, saw her. He offered to take her to his friend, who had a vehicle, and they would take her home. But on their way, they encountered Mr Nkadimeng's friend, who refused to give her a lift as he was inebriated. It was after this, as they were walking to go to the pub, that a motor vehicle with 4 occupants stopped in front of them. The occupants got out of the

¹ The charges of kidnapping and robbery

² The 9 charges of rape

vehicle, and one of them took her handbag. Another warned her not to make a noise, took off her pants and panties, and raped her. Both the complainant and Mr. Nkadimeng were then unceremoniously bundled into the vehicle and were driven to various locations. During the ride, and when the vehicle stopped in various locations, the complainant was raped multiple times by the four perpetrators of which the appellant was one. The account of their ordeal was corroborated not only by Mr. Nkadimeng but also by Mr. Ngwenya, the appellant's co-accused, whose trial was separated from that of the appellant. The complainant and Mr. Nkadimeng clearly identified the appellant, and during argument, Mr. Steenkamp conceded that the identity of the appellant could not be disputed on the evidence before the court *a quo*.

6] Sometime after that, the complainant was with her boyfriend when she saw one of the perpetrators driving past them in a vehicle. Her boyfriend followed the vehicle in order to take down the number plate. As it turns out, Mr Nkadimeng had also taken down a partial number plate. Having received various leads on the appellant's whereabouts, Constable Mphela later arrested the appellant. The complainant and Mr. Nkadimeng identified the perpetrators, and Mr. Nkadimeng also identified the vehicle. However, Constable Mphela conceded during his evidence in chief that he had not informed the appellant of his s35 constitutional rights during the arrest. It also appears that at the time of his arrest, the appellant was assaulted, and he later confessed. His confession statement was taken by Warrant Officer Racheku purportedly in terms of s217³ of the Criminal Procedure Act no 51 of 1977 (CPA). It does not appear from the record that the appellant was informed of his s35 rights at any other stage.

³ **217. Admissibility of confession by accused**

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided—

(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorised to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; ...”

7] The appellant's defence amounted to little more than a denial of the State's witnesses evidence. In his plea explanation and his later evidence, his version was that he was home on 30 January 2011 when he was approached by Mr Ngwenya, who came to borrow his parents' vehicle. Mr Ngwenya returned the vehicle in the early hours of the morning, but at all times, he was at home and had no knowledge of any of the events of which he was accused. He stated that, upon his arrest, he was assaulted and he was pepper sprayed, and the police asked him to identify his cohorts. He took them to Mr Ngwenya's house.

Appellant's argument

8] Whilst the appellant took a number of points relating to the fact that the court found him guilty of common purpose vis-à-vis the various charges even though the charge sheet was silent on this issue, and the fact that it could not be proven that he was complicit in, or had perpetrated, all 9 counts of rape, the true issue was that highlighted in paragraph [6] *supra* i.e. that the appellant had never been informed of his s35 rights. A further issue was that his confession was not taken in terms of s217 of the CPA and was, therefore, inadmissible.

9] As stated, the arresting officer conceded that he did not inform the appellant of his s35 constitutional rights during the arrest. Regrettably, the court *a quo* failed to attend to this patent injustice and allowed the proceedings to proceed.

10] Although this issue was not raised in the notice of appeal, the appeal court raised this issue with both legal representatives during their oral arguments. Both conceded that this failure constitutes a serious irregularity which resulted in an unfair trial.

11] The purpose of the appeal court is to dispense justice. An appeal court cannot close its eyes to a patent injustice because the injustice is not the subject of the appeal.⁴ Section 322(1)(a) empowers the appeal court to adjudicate the issue and grant the appeal if it thinks that the judgment of the trial court should be set aside on the "*grounds of a wrong decision of any question of law or that on any ground there was a failure of justice.*"

⁴ S v Toubie 2012 (4) ALL SA 290 (SCA)

12] It is my view that the fact that the appellant was not warned of his rights in terms of section 35 of the Constitution during his arrest is an issue that must be decided on.

The arresting officer's obligations during an arrest

13] Section 39(2) of the CPA provides that:

"The person effecting an arrest shall, at the time of effecting an arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant. "

14] Subsection (3) provides that:

"The effect of an arrest shall be that the person arrested shall be in lawful custody and shall be detained in custody until he is lawfully discharged or released from custody."

15] The Constitution requires that the accused be warned of his rights during the arrest. Sections 35(1) to (3) provide that:

"(1) Everyone who is arrested for allegedly committing an offence has the right to be warned-

- (a) To remain silent*
 - (b) To be informed promptly-*
 - (i) Of the right to remain silent; and*
 - (ii) Of the consequences of not remaining silent*
 - (c) Not to be compelled to make any confessions or admissions that could be used as evidence against that person.*
- (2) Everyone who is detained, including every sentenced prisoner, has the right-*
- (a) to be informed promptly of the reasons for being detained*
 - (b) to choose and consult with a legal practitioner and to be informed of this right promptly*
- (3) Every accused person has a right to a fair trial, which includes the right-*

(a) *to be informed of the charges with sufficient details to answer it.*"

16] The arrest of a suspect in a crime is regulated by legislation. An arrest is only lawful when effected in accordance with statutory regulations.⁵ If the arrest is unlawful, the subsequent detention of the arrestee will similarly be unlawful.⁶ The arrest constitutes a serious restriction of the individual's freedom of movement and can also affect his right to dignity and privacy. Therefore, the object of the arrest must be to bring the arrested person before the court to be charged and either convicted or acquitted.⁷

17] The right to a fair trial does not begin during the court proceedings but when the accused is arrested⁸. The arresting officer had the duty to warn the appellant of his rights, in terms of s35, including the right to be informed of the charges he was facing and the reasons for his detention. This failure thus deprived the appellant of his right to a fair trial.

18] In *Phukubye v Minister of Safety and Security*⁹, the court held that "*the following factors led the court to conclude that no arrest had taken place; no criminal docket had been opened by the police at any stage; no charge had been made; and the matter had never been processed by the Notice of Rights being read out to the plaintiff.*"

19] But that is not where the irregularities end: the appellant had, after this arrest, made a confession before Warrant Officer Racheke. Warrant Officer Racheke is not authorized to take a confession statement in terms of s217(1)(a). In terms of that provision, a confession must be made to a peace officer. In terms of the First Schedule to the Justices of the Peace and Commissioner of Oaths Act 16 of 1963, a

⁵ *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E) at para 9

⁶ *Minister of Law and Order, Kwandebele, & Others v Mathebe & Another* 1990 (1) SA 114 (A) 122(D)

⁷ *Ex parte Minister of Safety and Security & Others: In re S v Walters & another* 2002 (2) SACR 105 (CC), 2002 (4) SA 613 (CC) and *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security & others* 2009 (6) SA 513 (WCC), discussed in 2010 (4) TSAR 821. The decision to arrest must be based on an intention to bring the accused person to justice and not for ulterior purposes.

⁸ *S v Sebejan* 1997 (1) SACR 626 (W) 6335g-h, *S v Mpetha* (2) 1983 (1) SA 576 (C)

⁹ [22176/2015] unreported GP case, 06 August 2021

peace officer is, *inter alia*, a “Commissioned Officer of the South African Police Service” (SAPS). A Warrant Officer is the highest rank of non-commissioned officers within the SAPS. This being so, Warrant Officer Racheke is not a peace officer and was thus not authorized to take the confession in terms of s217(1)(a) of the CPA.

20] Therefore, the appellant’s statement confession, which was accepted by the court *a quo* as evidence, is inadmissible.¹⁰

Conclusion

21] The failure to read the appellant his rights under s35 of the Constitution has resulted in a material irregularity in the conduct of the proceedings and it is for this reason that the conviction must be set aside.

Interest of justice

22] From the reading of the record, it is clear that the facts of this appeal emanate from the same complainant, pertaining to the offences committed on the day by the appellant and his co-accused and the arrest by the same officer on the same day. The appellant’s co-accused, Dickson Mnisi, has not exercised his right to appeal his conviction or sentence and is not a party to the proceedings. Given the findings of this court, Legal Aid South Africa will be requested to bring this judgment to his attention and advise him of his rights.

The order

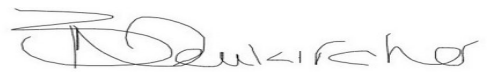
23] Consequently, the following order is made:

- a. The appeal against the conviction imposed on all counts is upheld, and the appellant is found not guilty and discharged
- b. The sentence imposed on all counts is set aside.
- c. The appellant is to be released immediately.

¹⁰ Section 35(5) of the Constitution provides that “*evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admissibility of that evidence would render the trial unfair or otherwise be detrimental to the administration of Justice.*”

**KJ MOGALE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA**

I agree, and it is so ordered.



**B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA**

Date of hearing: 14 February 2024

Date of Judgment: 25 March 2024

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 25 March 2024

Appearances:

For the Appellant: Adv. A Steenkamp

Instructed by: Legal Aid South Africa, Pretoria

For the Respondent: Adv. S Scheepers
The Director of Public Prosecutions,
Pretoria