IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES.	
(2) OF INTEREST TO OTHER JUDGES: YES.	
(3) REVISED.	
2024-05-06	
DATE	SIGNATURE

Case Number: A15/2022

In the matter between:

MXOLISI MOKONE First Appellant

ANDRIES NDHLOVU Second Appellant

and

THE STATE Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 6 May 2024.

JUDGMENT

POTTERILL J

[1] The matter before us is an appeal against the convictions and sentences of the two appellants handed down by the Regional Court held at Tsakane. The matter was before a Full Bench, but was postponed to a Full Court with an order directing the parties to address the following:

> "2.1 Whether there arose any conflict of interest for the legal representative in respect of the two accused; and
>
> 2.2 Whether the lateness of the identification of the conflict of interest is fatal to the fairness of the trial."

[2] The first appellant, Mr Mokone, was found guilty of count 1; contravention of section 3 of the Sexual Offences Act 32 of 2007 [rape], count 2; contravention of section 3 of the Sexual Offences Act 32 of 2007 [rape] and count 3; robbery with aggravating circumstances. He was sentenced to life imprisonment on count 1 as well as life imprisonment on count 2 and 15 years' imprisonment for count 3.

[3] The second appellant, Mr Ndlovu, was found guilty on count 1 and 2, both contraventions of section 3 of the Sexual Offences Act 32 of 2007 [rape]. He was sentenced to life imprisonment on both counts.

[4] Both the appellants were represented at trial by one legal representative from Legal Aid, first Ms Rachoshi who later had to go on maternity leave and then Ms Bhamjee took over. Ms Bhamjee took over after the witnesses for the state had

testified. She had been furnished with a transcript of the evidence led by the state and proceeded with the defence's case.

[5] Both appellants had pleaded not guilty on all counts. Appellant 1 provided a plea explanation of having consensual sex with the complainant once, thus confirming his plea of not guilty on all counts. Appellant 2 provided no plea explanation.

The evidence

[6] In a nutshell the complainant testified that she and three companions were after dark walking in the street. Two men approached them, one grabbed her arm and the other man chased after her companions who had fled. They had fled because they saw appellant 1 had a firearm. When appellant 1 returned to her and the other man she too noticed the firearm. The firearm alternated between the two men. They took her to a nearby open veldt and both raped her; one after the other. They left the veldt and when they reached a passage both raped her again. Accused number 1 also took a jacket she was wearing. The jacket did not belong to her but to Arthur, one of her companions who had fled the scene. He testified and confirmed it was his jacket and that when they went to confront the perpetrator at his house, appellant number 1, was wearing the jacket and he returned it to Arthur there at the house.

[7] The complainant's evidence was corroborated by the evidence of her two companions who confirmed that she was taken by force and that immediately after she was taken by the two men they went to the police and they together with the police started to search for her. When the complainant returned she was crying, shaken and reported to Arthur that she was raped twice by the two men.

[8] The medical evidence confirmed, without a doubt, that forceful sexual intercourse had taken place and that the complainant was not under the influence of liquor at the time of the incident. The forensic analyst testified that the DNA of both the appellants were found in the samples obtained from the complainant.

[9] Appellant 1 testified that he and appellant 2 were at the park drinking and listening to music. After a fight broke out because two men wanted to take the complainant and another girl away, he and appellant 2 with the complainant and another girl, Nomcebo, left the park and went to his house. He had sexual intercourse with the complainant and the other girl and appellant 2 had intercourse with both the girls. After the incident and before his arrest he twice had sexual intercourse with the complainant again. They had consensual sex because she was his girlfriend for 18 months. He denied that he had taken the jacket, or that the complainant and her friend went to his house where he handed over the jacket to the friend to whom it belonged. He opined that he thought the charge was laid because he and one of the companions of the complainant, the last state witness, were fighting over the complainant. He saw the complainant for a year after that and was surprised to hear that she had laid the charges the same day that the incident had occurred.

[10] Appellant 1 called his mother to testify. She testified that she assumed that the complainant was the girlfriend of appellant 1 because after they entered her house they went to bed together. She denied that four people had entered her house that evening. In the morning she and the complainant and appellant 1 had breakfast together.

[11] Appellant 2 testified that on the night in question he, appellant 1, Nomcebo and the complainant were listening to music and drinking. He was "over-intoxicated" and when they reached appellant 2's house he immediately fell asleep. He did not have sex with Nomcebo or the complainant. It was put to him that appellant 1 had testified that they had intercourse with both Nomcebo and the complainant. He said

that although he had been drunk, he could recall that intercourse did not happen. He suggested that perhaps appellant 1 testified to that effect because he was cross. The mother of appellant woke them up and he left. He did not have breakfast.

[12] The respondent [the State] sought that the appeals against both convictions and sentences be dismissed.

Can conflict of interest for the first time be raised on appeal?

[13] Appellant number 2 raised the conflict of interest issue for the first time on appeal. The State has not objected to the fact that a new issue has been raised for the first time on appeal and therefore it should not be entertained. I think it did not do so simply because it knew such an argument would be bad in law. There is no bar to an irregularity of a trial being raised for the first time on appeal. The powers of a court of appeal in criminal matters are derived from s322(1) of the Criminal Procedure Act 51 of 1977. Section 322(1) reads:

> "322(1) In the case of an appeal against conviction or of any question of law reserved, the court of appeal may –
>
> (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice."

An irregularity would equate to a failure of justice and can be raised on appeal for the first time.

Was there a conflict of interest?

[14] "In every case of multiple representation, there exists a likelihood, if not a certainty, that the strategic maneuvers of the criminal defense attorney will adversely affect the interests of at least one defendant at some point in the trial process."[1]

This rings true still today and is magnified by section 35(3) of the Constitution affording every accused a right to a fair trial.

[15] It speaks for itself that a legal representative may not undertake the defence of two accused who incriminate each other. It is untenable for a legal representative to conduct cross-examination or argue in conflict with the interests of someone with whom he or she has a legal client relationship.

[16] The State accepted as much in conceding that during the testimony of the first appellant, the first appellant implicated the second appellant by stating that the second appellant had sexual intercourse with the complainant. Ethically the legal representative was obliged to withdraw as attorney of both appellants because there was a conflict of interest.

Did this irregularity result in an unfair trial?

Appellant 2

[17] Section 322 of CPA has a proviso that reads as follows:

> "Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect."

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[1] Harvard Law Review; Geer op cit 135-136

[18] On behalf of appellant 2 it was argued that the conflict of interest had infringed the accused's right to a fair trial. The mere fact that an accused's right to a fair trial was infringed does not equate to an acquittal. The fact that there was a conflict must lead to a failure of justice. In *S v Jaipal* 2005 (1) SACR 215 (CC) the Constitutional Court found that "the concept of a failure of justice in section 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial."

[19] On behalf of both appellants it was argued that there was actual prejudice to appellant number 2. Pursuant to the first appellant implicating appellant number 2, the legal representative could not have confronted the second appellant with the version of the first appellant. The trial magistrate had based his rejection of the appellants' versions in part on the appellants' contradictions as to whether appellant 2 had intercourse with the complainant.

[20] Furthermore, that effective legal representation entails that the legal advisor act in the client's best interests is implicit in the rights entrenched in s35(3)(f) of the Constitution.[2]

[21] On behalf of the State it was argued that the conflict of interest had not gone to the core of the trial as the witness' evidence itself was not tainted. The conflict only arose after the state witnesses had testified. The conflict in fact arose after the first appellant tailored his evidence to suit the overwhelming evidence against appellant 2. It was argued that the appellants had received a fair trial as no actual prejudice was proven.[3]

[22] It was further submitted that the Court must ascertain the legal effect of the irregularity as set out by Holmes AJ in *S v Moodie* 1961 (4) SA 752 (A) in 756A:

[2] *Beyers v Director of Public Prosecutions, Western Cape and Others* 2003 (1) SACR 164 (C)
[3] *S v Lubbe* 1981 (2) SA 854 (C)

> "Now the administration of justice proceeds upon well-established rules, but it is not a science and irregularities sometimes occur. To meet this situation the Legislature [section 322(1)] has enabled the Court to steer a just course between the Scylla of allowing the appeal of those obvious gulty and the Charybdis of dismissing the appeal of those aggrieved by irregularity."

Reliance was also placed on *Key v Attorney-General Cape Provincial Division and Another* 1996 (2) SACR 113 (CC) and the *Jaipal*-matter wherein both matters it was found that fairness of a trial requires fairness to the accused as well as fairness to the public as represented by the State.

Decision pertaining to whether the trial was unfair and whether the late arisal of conflict had an effect on the conviction

Appellant 2

[23] In the *Jaipal*-matter it was found that the meaning of the concept of a failure of justice in section 322(1) must be understood as "to raise the question of whether the irregularity has led to an unfair trial."[4]

[24] Appellant 2 did not have a fair trial. Not only was his version not put to the state witness, it was not put to appellant 1. It could not have been put because where two accused incriminate each other it is simply untenable for a practitioner to cross-examine an accused who he is representing. The testimony of the state witnesses was not tainted because they were not confronted with a version of appellant 2. The evidence of appellant 1 was not affected by appellant 2 because no version was put. These irregularities are not only non-compliant with professional practice but "is essential to fair play and fair dealing with witnesses."[5]

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[4] *Jaipal* par [39]

[5] *S v Boesak* 2000 (3) SA 381 (SCA) par [51]

[25] In this matter, although legally represented, appellant 2's representation was illusory. Failure to take certain basic steps such as cross-examining appellant 1 on the version of appellant 2 rendered the representation nugatory[6].

[26] Where basic rights of that appellant were infringed he did not receive a fair trial and his convictions and sentences must be set aside. Even if the conflict only arose later on in the trial, then there was a duty on the legal representative to withdraw.[7] The fact that the conflict arose later on in the trial does not negate the fact that the trial was tainted.

Appellant 1

[27] This question raises a factual enquiry as to the whether the conflict of interest impacted on the rights of appellant 1 to a fair trial. I am of the view that the mere fact that the conflict of interest tainted the second appellant's trial does not *per se* render appellant 1's trial unfair. Appellant 2 did not in his plea or evidence in chief implicate appellant 1. The version of appellant 1 was put in more detail to the state witnesses. A plea explanation was provided on his behalf and there was cross-examination on this appellant's version of all the state witnesses. The legal representative also called a witness on behalf of the appellant 1. There was nothing put, or led, on behalf of appellant 2 to implicate appellant 1. I am satisfied that the conflict of interest did not cause actual prejudice to appellant 1 and did not result in an unfair trial.

Convictions of appellant 1

[28] A court of appeal will only interfere where a trial court has materially misdirected itself insofar as its factual and credibility findings are concerned.[8]

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[6] *S v Halgryn* 2002 (2) SACR 211 (SCA)
[7] *S v Moseli en 'n Ander* 1969 (1) SA 646 (O)
[8] *S v Francis* 1991 (1) SACR 198 (A)

[29] It was submitted that the learned Regional Magistrate had erred in not applying the cautionary rules relating to a single witness to the complainant's evidence in regard to contradictions between the statement she made to the police and her *viva voce* evidence.

[30] The trial court did not pay mere lip-service to the cautionary rule that a single witness attracts. He evaluated the contradictions and he remarked "The prosecutor took great care to go through the witness' statement with her in Court and the witness was able to give plausible and acceptable explanations for each discrepancy pointed out to her. At no stage did the Court get an impression that the witness was purposefully not telling the truth or that she was embellishing her version to make it sound worse than what it actually was. Overall she impressed the Court as a truthful and honest witness. The Court can therefore find that the discrepancies in her evidence was not because she was lying, but because she is not versed in all the legal processes."

[31] The trial court considered and evaluated the versions on a holistic basis and correctly found that the deviations did not affect the credibility of the complainant.[9] The complainant was corroborated by the state witnesses that she was forcefully taken. It was definitively confirmed that she did not smell of liquor and that there was forceful penetration. The jacket that was robbed was found on the body of appellant 1.

[32] The state proved its case beyond reasonable doubt and there was no misdirection.

Sentences

[9] *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 584d-h

[33] It was argued that the court *a quo* should have found compelling and substantial circumstances and deviated from the prescribed sentence of life imprisonment. The personal circumstances of the appellant and the fact that he was in custody awaiting trial for a substantial period should have been found to be compelling and substantial.

[34] Rape is a humiliating, degrading and brutal invasion of the privacy and dignity of a victim rendering rape a very serious offence. The court was provided with a report from the Department of Correctional Services. In respect of appellant 1 the court was also placed in possession of a letter written by the Department of Correctional Services, the correctional supervision officer setting out that appellant 1 did not qualify to be placed or considered for placement on correctional supervision as he was in beach of his parole conditions of a previous conviction, also of rape. The report of the Department of Social Services opined that the Court should consider direct imprisonment due to the severity of the offences of which appellant 1 was convicted.

[35] The Court considered the appellant's personal circumstances and correctly found that there was not a single, or cumulative factors, that would constitute compelling and substantial circumstances. The court did consider the fact that the period awaiting trial was quite some time, but found that on its own it is only a factor to consider and not an overriding factor.

[36] I am satisfied that there were no compelling and substantial circumstances and the sentence imposed in terms of the provisions of section 51 of Act 1997 is not shockingly inappropriate.

[37] I accordingly propose the following order:

37.1 The appeal against the convictions and sentences of appellant 1 are dismissed.

37.2 The appeal against the convictions and sentences of appellant 2 are upheld and the convictions and sentences are set aside.

37.3 The retrial of appellant 2 is left in the discretion of the National Prosecuting Authority.

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S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

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N. DAVIS

JUDGE OF THE HIGH COURT

I agree

____

D. MAHOSI

JUDGE OF THE HIGH COURT

CASE NO: A15/2022

HEARD ON: 18 March 2024

FOR THE FIRST APPELLANT: ADV. J.S. GAUM

INSTRUCTED BY: Pretoria Justice Centre

FOR THE SECOND APPELLANT: MR. M.G. BOTHA

INSTRUCTED BY: Pretoria Justice Centre

FOR THE RESPONDENT: ADV. T.S. NYAKAMA

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 6 May 2024