THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case number : 179/2002

In the matter between :

MOSEKI MAPUTLE — **FIRST APPELLANT**
SONNYBOY FORTUIN — **SECOND APPELLANT**

and

THE STATE — **RESPONDENT**

CORAM : MARAIS, NAVSA and CLOETE JJA

HEARD : 17 MARCH 2003

DELIVERED : 26 MARCH 2003

Summary: No indication should be given to a trial court that an accused has a previous conviction. Such an indication is nevertheless not an irregularity which *per se* vitiates the trial. Whether there has been an irregularity, ie whether the accused's constitutional right to a fair trial has been infringed, is a question of fact in each case.

JUDGMENT

CLOETE JA/

CLOETE JA :

[1] The appellants were convicted by a regional magistrate of robbery and each sentenced to ten years' imprisonment. The convictions were confirmed by the Witwatersrand Local Division (Lewis and Cachalia JJ) but three years of the second appellant's sentence was conditionally suspended. The judgment is reported in 2002 (1) SACR 550 (W).

[2] The Court *a quo* was of the view that this Court may differ from its conclusion as to whether the second appellant's right to a fair trial in terms of s 35(3) of the Constitution had been infringed and accordingly granted the second appellant leave to appeal to this Court on that question. It also granted leave to appeal to both appellants on their convictions generally, even although both judges were of the view 'that another court is not likely [to] or may not reasonably arrive at another conclusion' in this regard. Leave to appeal against sentence was refused.

[3] Leave to appeal against the convictions generally should not have been granted. There is obviously no merit in either appeal for the reasons adequately set out by the Court *a quo* at 551c-552g, which it is not necessary to repeat. The purpose of the requirement for leave to appeal is to protect an appeal court against the burden of having to deal with appeals in which there are no prospects of success, and further to ensure that the roll of this Court is not clogged with hopeless cases: *S v*

Rens 1996 (1) SA 1218 (CC) at 1221A-B (par [7]) and 1225E-F(par [25]); *S v Twala* (South African Human Rights Commission Intervening) 2000 (1) SA 879 (CC) at 888F (par [20]).

[4] The only question which requires detailed consideration is whether the second appellant's constitutional right to a fair trial in terms of s 35(3) of the Constitution was infringed because he appeared before the magistrate in prison clothing, and the cover sheet to the proceedings before the magistrate reflected, under the heading 'date of arrest', that he was 'gevonnis'. In other words, the magistrate, before convicting the second appellant, must have been aware of the fact that he was dealing with an accused who had at least one previous conviction which resulted in imprisonment.

[5] This Court, in deciding a matter on further appeal in terms of s 21 of the Supreme Court Act, 59 of 1959, cannot, because of the provisions of s 22 of that Act read with the proviso in s 309(3) of the Criminal Procedure Act, 51 of 1977 ('the Act'), reverse a conviction by reason of an irregularity in the proceedings unless it appears to this Court that 'a failure of justice has in fact resulted from such irregularity'. The meaning of the proviso is that 'the Court, before setting aside the conviction, must be satisfied that there had been actual and substantial prejudice to the accused' — *R v Matsego and Others* 1956 (3) SA 411 (A) at 418E.

[6] It is well established that there are two kinds of irregularities: the kind that *per se* vitiates the proceedings[1] and the kind which requires consideration of the question whether, on the evidence and credibility findings unaffected by the irregularity, there was proof of guilt beyond a reasonable doubt, in accordance with the test laid down in *S v Yusuf* 1968 (2) SA 52 (A) at 57C-D.[2] It is necessary to emphasize that the word 'irregularity' has a technical meaning. Not every deviation from a norm constitutes an irregularity in law. Where the deviation is fundamental, it is properly categorized as an irregularity *per se*. If the deviation is not fundamental, it is not an irregularity at all unless it results in prejudice.

[7] It is equally well established that despite the provisions of ss 89[3] and 211[4] of the Act, disclosure of an accused's previous convictions is

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[1] As in *S v Moodie* 1961 (4) SA 752 (A).

[2] Eg in *S v Xaba* 1983 (3) SA 717 (A).

[3] Section 89 reads: 'Except where the fact of a previous conviction is an element of any offence with which an accused is charged, it shall not in any charge be alleged that an accused has previously been convicted of any offence, whether in a Republic or elsewhere.'

[4] Section 211 reads: 'Except where otherwise expressly provided by this Act or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he has been so convicted.'

not an irregularity which *per se* vitiates the proceedings: *S v Mgwenya* 1931 AD 3; *S v Papiyana* 1986 (2) PH H115 (A); *S v Mthembu and Others* 1988 (1) SA 145 (A) at 155C.

[8] Where there has been such a disclosure, judicial officers have, on occasion, recused themselves.[5] But they are not obliged to do so. It is for the individual court to decide whether this is the right and proper course to be followed: *Papiyana* at 206.

[9] Where the court has not recused itself, the question in a case such as the present is whether an irregularity has taken place. In *Papiyana* Nestadt JA, writing for the Court, said at 206:

'The test to be applied, in order to determine this, is the possibility of bias on the part of the court resulting from the improper divulgence of the previous convictions (or other damaging matter). Where it exists, or appears to exist, the judicial officer will be held to have been bound not to have heard the case, and, having done so, the accused would not have received a fair trial. In this event, an irregularity would have been committed. But this need not necessarily be the case. *Ex hypothesi*, one is dealing with a case where the detrimental information does not comprise admissible evidence of the accused's actual commission of the crime for which he is charged; moreover, it has not been admitted, but, on the contrary, was, in effect, rejected and purportedly disregarded by the trial court. It is assumed that a judge or magistrate, as well as assessors, will not, in view of their training, normally be influenced thereby but will give an objective decision on the merits.'

[10] Innes CJ said in *R v Essa* 1922 AD 241 at 246-7:

'Now it must be borne in mind that the real disqualification for the due discharge of a juror's duty is not knowledge, but bias. And a Judge is specially trained to separate the two; to acquire the one without entertaining the other. He is continually confronted with the task. He listens to a hardened offender relating a plausible story; he must not allow the knowledge of a long list of previous convictions to influence him in the lightest degree in summing up the case to the jury. He has a record read to him, from which it is necessary in the result to excise certain portions; he must dismiss these portions from consideration. During the course of a trial important evidence is objected to. Its nature and effect transpire before he can give his decision, he must treat the case as if he had never heard the evidence. So that his intellect is trained to discriminate between various facts all within his knowledge, to apply some and to reject others as having no bearing upon the matter to be decided. These general considerations show that a Judge is not in the same position as an ordinary juryman as regards the propriety of acquainting himself with the earlier stages of a criminal investigation.'

The same applies to a magistrate: *R v Alli Ahmed* 1913 TPD 500 at 503. Assessors, since the amendment to s 145(4) of the Act by s 4 of Act 64 of 1982, do take part in the decision whether a disputed confession which, *ex hypothesi*, contains information highly prejudicial to the accused, should be admitted, unless the presiding judge is of the opinion that it would be in the interests of the administration of justice that they should not do so.

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[5] Eg *S v Stevens* 1961 (3) SA 518 (C); *S v Pakkies* 1985 (4) SA 592 (Tk SC).

[11] Since the decisions in *Essa* and *Alli Ahmed*, the Constitution was enacted. The advent of the constitutional era in South Africa and the right of an accused to a fair trial entrenched in s 35(3) of the Constitution requires criminal trials to be conducted in accordance with notions of basic fairness and justice: *S v Zuma and* Others 1995 (2) SA 642 (CC) at 652 (D) (par [16]). But it remains untenable to argue that simply because a judicial officer has been made privy to information prejudicial to an accused, the accused has not received the fair trial which the Constitution guarantees. Section 35(5) itself provides:

'Evidence 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.'

The section contemplates that the admissibility of evidence which will be prejudicial to the accused will be adjudicated upon by the trial court: cf *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1078A-B (para [153]).[6] In the process the nature of the evidence could well become known to the court. Yet the section does not contemplate that in such a case the trial is automatically rendered unfair.

[12] The appellant's counsel submitted that a distinction is to be drawn between the situation where prejudicial information inadvertently comes to the attention of the judicial officer, and the situation where this is done deliberately. The submission is without substance. It is the effect of the disclosure, and not the intention with which it was done, which is relevant.

[13] I return to the test formulated in *Papiyana* to determine whether

[6] Although contained in a minority judgment, the passage quoted accords with the view of the majority. See also *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) at 196A-B.

there has been, or appears to have been, bias on the part of the magistrate. As Smallberger JA pointed out in *Mtembu* at 155C-D:

'[O]ne cannot always gauge the extent of the influence which inadmissible evidence or prejudicial information which comes to light during a trial may have on the subconscious mind of a presiding judicial officer (and/or, where appropriate, his assessors), particularly where issues of credibility are being dealt with.[7]'

In *Estelle v Williams* 425 US 501 (1976) Burger CJ, delivering the opinion of the Court, said in this context at 504 (and I respectfully adopt this approach):

'Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle and common human experience.'

[14] In the present appeal the evidence placed before the court of first instance, objectively assessed, established the guilt of the second appellant beyond any reasonable doubt; and a consideration of the record and the result of the trial give no reason to believe that the regional magistrate was in any way influenced by the knowledge that the second appellant had a previous conviction. I accordingly conclude that no irregularity took place.

[15] This Court has in the past emphasized that potential prejudice to an accused should be eliminated, where possible; and in view of what happened in this case, I shall repeat that was said in *S v Mthembu and Others, supra,* at 155G-H:

'The practice [of allowing an accused person to appear in court in prison garb] is undesirable and is to be deprecated. I trust that the responsible authorities will heed this and similar comments that have been made in the past, and act accordingly. The only instance where the appearance of an accused in prison garb may be justified is

[7] Indeed, it may be difficult for the trier of fact to gauge this for him- or herself: see *Mgwenya supra* at 5.

where his trial involves an offence committed in prison, or one related to his imprisonment, eg escaping from custody.'

These remarks apply equally to an entry on a cover sheet in the magistrate's court which reflects that the accused is a sentenced prisoner and the registrar is requested to forward a copy of this judgment to the National Director of Public Prosecutions so that steps can be taken to obviate such entries being made in the future.

[16] The appeals are dismissed.

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T D CLOETE
JUDGE OF APPEAL

Concur:

Marais JA
Navsa JA`