REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A277/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

MOKOENA, CHARLES **Appellant**

and

THE STATE **Respondent**

JUDGMENT

LAMMINGA AJ:

[1] The appellant, Mr Charles Mokoena was charged, along with Mr. Abednigo Sipho Tempe, in the Regional Court for the Regional Division of Gauteng held at Johannesburg on two counts; Rape and Kidnapping. In the court a quo the appellant appeared as Accused 2 and Mr Tempe as Accused 1.

[2] The appellant and his co-accused, who had legal representation throughout the trial, pleaded not guilty to the charges on 06/11/2007. On 04/06/2009 the appellant was convicted on both counts and his co-accused was, at first convicted as charged (p362 lines 9 – 10) but then later at p362 line 16 – 17, convicted of attempted rape and kidnapping on 04/06/2009. The appellant was sentenced to 15 (Fifteen) years imprisonment on count one and 5 (Five) years imprisonment on count two. His co-accused was sentenced to 5 (Five) years imprisonment on each count. The court a quo ordered that 2(two) years imprisonment on count two shall run concurrently with the sentences on count one.

[3] On 25 November 2009 an application by the appellant for leave to appeal was granted by the regional magistrate.

[4] In this appeal the Appellant raised a point in limine and submitted that the regional magistrate descended into the arena, therefor the appellant did not have a fair trial and the conduct of the regional magistrate amounted to an irregularity warranting the conviction be set aside.

[5] The evidence for the prosecution can be summarized as follows:

The complainant testified that she had been drinking at 152 Tavern and left in the company of other women at around 1h30. At some point the other women disappeared and the appellant and his co-accused appeared, grabbed her and dragged her to appellant's home. She was tired, did not fight as she had been drinking. Her son, tried to intervene but he had to flee. At appellant's home, his co-accused went to sleep and appellant had sexual intercourse with her without her consent. Her son, later brought the police to appellant's home while appellant was still busy having sexual intercourse with her. She opened the door and the appellant and his co-accused were arrested. The second state witness, allegedly the complainant's son, stated that he saw that the complainant was being grabbed and tried to intervene by throwing stones at them, but the appellant and his co-accused took her to appellant's home. He brought the police to the said house and she opened for them. The medical examination showed no injuries.

[6] The Defence's version can be summarized as follows:

The appellant and his co-accused met at Bafana Bafana Tavern. Appellant offered his co-accused a place to sleep as it was late. They had only known each other for a few days, having met through a mutual friend. They went to appellant's home, but after a few minutes appellant asked his co-accused to accompany him. Appellant had met the Complainant four days prior to the date of the alleged offences. Complainant had called the appellant that evening and requested him to meet her at the said tavern. The two men then went to 152 Tavern where they found the complainant sitting with a man and they joined her. The man eventually left. Appellant and complainant were chatting, and they shared drinks with her. Later the co-accused requested that they leave and complainant told the appellant she would be going with him. As they were moving away from the tavern

a man, who the co-accused had noticed before peeping through the window at the 152 tavern, grabbed the complainant's hand. This man then started to swear at them, eventually threatening them and throwing them with stones as he followed them. Complainant told appellant that this man was her boyfriend. She went with them willingly and was never grabbed or dragged by them. At the appellant's room, they all sat down on the sofa, and shortly after arrival the co-accused requested a bed and went to sleep on the floor. Appellant and complainant discussed having sexual intercourse but she was menstruating and appellant did not have a condom so they did not have sexual intercourse. Later the police knocked on the door and appellant opened for them. He was arrested and the police woke his co-accused and arrested him too.

[7] Let us now first turn to the point in limine that the appellant did not have a fair trail due to the regional magistrate descending into the arena.

Trollip AJA laid down three principles of proper judicial behaviour in ***S v Rall*** 1982 (1) SA 828 (A), namely:

(i) A judicial officer must ensure not only that justice is done but in addition that it is seen to be done. He must therefore so conduct the trial that his open-mindedness, impartiality and fairness are manifest to all concerned with the trial and its outcome, especially the accused.

(ii) A judicial officer should refrain from questioning witnesses or the accused in such a way or to such an extent that it may preclude him/her from detachedly or objectively appreciating and adjudicating upon the issues.

(iii) A judicial officer should refrain from questioning a witness or the accused in a way that may intimidate or disconcert him/her or unduly influence the quality or nature of his/her replies and thus affect his/her demeanour or impair his/her credibility.

These principles have been applied in various cases dealing with the conduct of a presiding officer during a trial and were recently also applied in ***S v Musiker*** 2013 (1) SACR 517 (SCA).

[8] It was also submitted that, the regional magistrate was biased or that there are reasonable grounds to suspect bias on the part of the regional magistrate, due to the way he conducted the questioning. In ***S v Roberts*** 1999 (2) SACR 243 (SCA) at paragraph [32] Howie JA stated the requirements for the test whether there is a reasonable suspicion of bias as being:

> *"(1) There must be a suspicion that the judicial officer might, not would, be biased.*
>
> *(2) The suspicion must be that of a reasonable person in the position of the accused or litigant.*
>
> *(3) The suspicion must be based on reasonable grounds."*

[9] The un-judicial approach in questioning the witnesses is evident as early as page 11 of the record, where the regional magistrate seems impatient and condescending to the complainant. At page 13 the court is clearly exasperated with the complainant when she states:

> *"He took his penis and inserted it on me."*

The court responds with:

> *"The court does not understand what is on me? For God sake you are a 50 year old, man we must not struggle with you."*

This impatience and condescending approach persists throughout the record but is probably the least objectionable of the aggrieved conduct.

[10] During cross-examination of the State witnesses the following conduct is found questionable:

There were several instances where the Prosecutor raised objections and the Defence was not given an opportunity to respond, before the regional magistrate made a ruling.

When the Defence attorney tried to clarify contradictions between the complainant's evidence and what she told the police in her statement regarding what happened when the police arrived at the scene, and how it came about that she took Appellants underwear, the regional magistrate interjected and ruled it irrelevant without allowing the defence attorney to respond. The Defence attorney was clearly trying to establish why there was yet another contradiction as to the events of the morning at the room of the Appellant, but was not given the opportunity to canvas the issue at all. It is significant that this evidence was ruled irrelevant at that stage, but the regional magistrate allowed the evidence during examination in chief.

When the defence attorney tried to put the appellant's version to the complainant as to what happened in the room, the court interjected, without justification and argued with the defence attorney about what he wanted to ask. This altercation alone spans 5 pages of the record and any confusion emanates from the initial interjections by the court on page

40 of the record. This kind of interruption appeared repetitively throughout the record where the defence attorney tried to cross-examine witnesses.

Where the defence attorney tried to clarify issues such as what the complainant meant when she testified that the appellant 'was still busy', the court answered the question on behalf of the complainant and stated "Let's move on" without allowing the witness to answer or giving any reason for not allowing the witness to answer. This was repeated when the attorney tried to test her credibility when she stated that the doctor told her it was clear that she had intercourse with a man.

[11] The regional magistrate proceeded to subject the witnesses, including the accused, to intensive questioning under the guise of clarification. It is so that there are some questions which were indeed legitimately put to the witnesses; however the record is replete with questions intended to discredit or confuse the witnesses. This was specifically severe in the case of the second state witness, the witness in the trial-within-a-trial, the appellant and the co-accused. In regard to the second state witness, A[…], the regional magistrate goes so far as to question the credibility of the witness and say on page 162 of the record:

> *"…you call her a liar, after she brought you up she is a liar? You hear people in Johannesburg telling you stories that old lady is a liar is that what you are saying? Is that what you are saying?...You are not answering the Court's question, go out the box."*

In this instance the parties were not afforded an opportunity to put questions to the witness regarding issues raised during the questioning by the regional magistrate.

Cross examination of the Co-accused by the prosecutor spans two and a half pages, but questioning by the regional magistrate, nine pages. The tone and nature of the questions are clearly intent on discrediting the witness. For example he starts off with:

"COURT: They wake you up you were still sleepy, you do not see anything, you are still sleepy, half asleep. Is that your honest reply? Is that your honest reply sir?"

The nine pages of questioning by the regional magistrate is brimming with instances indicating that he was not merely clarifying, but actively cross-examining the witness. Again the Defence was not invited to pose questions in regard to what the court had asked.

In regard to the appellant the Regional magistrate spent 11 pages of the record questioning him, at times being sarcastic – for example, on page 272, when asking what age the appellant thought the complainant was, the regional magistrate was not satisfied with the answer that he did not know and remarked:

"You thought she was sweet sixteen?.....No you thought she was a teenager"

Again, this part of the record is rife with condescension, sarcasm and conduct indicative of cross-examination rather than clarification.

[12] During cross-examination of the appellant and his co-accused, the defence attorney, who took over the case, tried to raise objections, for example, regarding the question of the instructions given to the legal representative. The regional magistrate cut him off and misled him as to which accused alleged that he had a relationship with the complainant and did not allow him to put his point forward.

[13] The regional magistrate allowed evidence on the relationship between the complainant and the witness A[…], by the complainant and A[…], but when the defence wanted to challenge this evidence, the regional magistrate ruled the relationship irrelevant

and denied the defence this opportunity. Later he allowed a witness called by the prosecutor on the issue of the relationship.

[14] The regional magistrate clearly pre-judged the admissibility of the statement the witness Mr. A[…] made to the police. This is apparent from him saying that the police when faced with a difficult situation will take the easy way out and will say they read back the statement even if they did not. His apparent prejudice is compounded by his insistence during the trial-within–a-trial that the witness should have read back the statement, although the witness testified that he explained the contents of the statement to the deponent. The regional magistrate questioned the police officer at length on the fact that he did not read the statement in English to the witness, but explained to the witness what was written down. The regional magistrate became argumentative during the defence address in regard to this issue, which argumentative and repetitive condescending conduct spans 5 and half pages of the record.

[15] The skewed approach adopted by the regional magistrate when he conducted the trial is also evident in the manner in which he analysed the evidence. He found that the issue as to whether the complainant is A[…]' s mother or not is an administrative issue, but in the same breath relies on the relationship of mother and son to justify probabilities that led him to accept the evidence of the state witnesses. The regional magistrate bent over backwards to ignore the contradictions in the evidence of the complainant and A[…] but was quick to reject the defence version as improbable without any substantial reasons to do so.

[16] In this case it is clear that the conduct of the regional magistrate sustains the inference that, in fact, he was not open-minded, impartial and fair during the trial. The nature, content and manner of the questioning justifies a conclusion that it was a far cry from merely clarifying matters and specifically from the perspective of the appellant and his co-accused, must have seemed to be designed to produce a result favourable to the State.

[17] The language may in many instances be described as unjudicial language that is readily susceptible to an interpretation that the regional magistrate was hostile to the appellant and his co-accused to the extent that he was not able to bring an unclouded mind to bear on the adjudication of the issues before him.

[18] Therefore, it cannot be said, objectively, that the regional magistrate conducted the trial in such a manner 'that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, specially the accused'. See ***S v Rall*** *(supra).*

[19] A further concern in this matter, concerns the unwarranted interruptions by the regional magistrate, which, taken in totality, clearly undermined the fairness of the trial. The frequency, length, timing, form, tone and contents of his questioning without doubt conveyed the opposite impression. The effect of this being that the reasonable observer would perceive that the integrity of the judicial process must be called into question.

[20] It follows that the regional magistrate's transgression of the limitations within which judicial questioning should occur was grossly unfair to the appellant and his co-accused and infringed their right to a fair trial. This type of conduct has the potential to undermine the public's confidence in the courts.

[21] It is so that the former co-accused of the appellant did not appeal. However, I am of the view, having read the record, that a gross injustice would be perpetrated if we do not deal with his conviction. As was stated in ***S v Engelbrecht and Others*** 2005 (2) SACR 383 (C):-

> "*This Court also has the inherent power to review proceedings in lower courts at any stage, to restrain irregularities. This inherent power is augmented by s 35(3) of the Constitution of the Republic of South Africa, 1996, which provides that every accused person has a right to a fair trial. It is, however, trite that the power of this Court to review proceedings of a lower court in terms of its inherent jurisdiction, will be sparingly exercised."*

In the interests of fairness and justice, this is a case calling out for this court to review the magistrate's decision. Accordingly, this court's inherent power of review is invoked.

[22] In the light of what was said above, there is no need to deal extensively with the merits of the case.

[23] In summary, the complainant's evidence was fraught with contradictions and cannot be accepted. The version of the appellant and his co-accused is more probable and reasonably possibly true.

Accordingly, I propose the following order:-

1. The appeal against the conviction is upheld and the conviction of the appellant is set aside.

2. In the exercise of this Court's inherent review jurisdiction the conviction of Accused 1, Abednigo Sipho Tempe, is set aside.

3. The record of the trial and this judgment be submitted to the Magistrate's Commission.

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LAMMINGA AJ

I agree and it is so ordered:

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WEINER J

Counsel for the Appellant: MILTER
Counsel for the State: MPUNGOSE
Date of Hearing: 13 May 2014
Date of Judgment: 15 May 2014