IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

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DATE SIGNATURE

Case number: A352/2014
Date of hearing: 25 May 2015
Judgment: 29 May 2015

In the matter between:

LUVUYO MALIWA **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

A.M.L. PHATUDI, J

[1] The appellant was charged at Protea Regional Court with:

Count 1: Kidnapping

Count 2: Contravention of the provision of Section 3 read with Section 1; 56(1); 57; 58; 59 ; 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment act, Act 32 of 2007 (Rape).

Count 3: Robbery with aggravating circumstances as intended in Section 1of Criminal Procedure Act 51 of 1977.

[2] The appellant conducted his own defence. He pleaded not guilty to all counts. He was convicted as charged and sentenced to two (2); eight (8); and eight (8) years imprisonment in respect of count 1, 2 and 3 respectively.

[3] The appellant who is now legally represented, appeals, with leave of this Court on petition against both conviction and sentence.

[4] At the commencement of the hearing of this appeal, we condoned the late filling of his heads of argument.

[5] It is trite that the state must prove its case beyond reasonable doubt. It is further trite the accused must be released if his or her version is reasonably and possibly true.

[6] The following are grounds for this appeal. It is submitted that the magistrate failed:

(i) To enquire as to whether the lack of legal representation will place the appellant at such a disadvantage resulting in the trial being unfair.

(ii) To properly assist the appellant during the cause of the trial

(iii) To properly assist the appellant to obtain his hospital records and

(iv) That the appellant's version is reasonably and possibly true

[7] In delivering the judgment, the magistrate enquired if the Legal Aid would take over this matter again in representing accused. The legal representative employed by Legal Aid South Africa assured the court that they (Legal Aid South Africa) would not because the accused had terminated their mandate.

[8] Ms Botha, for the appellant, submits that the magistrate ought to have ordered the Legal Aid South Africa to consider appointing a "Judicare" to represent the appellant after his termination of a specific legal representative's mandate employed by the Legal Aid South Africa.

[9] In rebuttal thereto, Mr Mbaqa for the State, submits that the magistrate cannot be faulted for having let the accused conduct his own defence. The magistrate correctly accepted the submission from an officer of this Court, who stated that Legal Aid South Africa would not reconsider acting for the accused because of his termination of the mandate.

[10] Ms Botha explains that a "Judicare" is an attorney in private practice who gets instructed by Legal Aid South Africa to represent accused persons at the Legal Aid's expense. She reiterates that the magistrate ought to or was reasonably expected to have ordered Legal Aid South Africa to instruct a "Judicare" to represent the appellant due to the nature and seriousness of the offences the appellant was facing.

[11] Considering the submission made and what Goldstone J (as he then was) penned in S v Mbonani 1988 (1) SA 191 (T) that:

"If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should

not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of the judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances."(emphasis added)

[12] I am persuaded to accept that the magistrate ought to have informed the appellant of his further rights to apply to the Legal Aid South Africa to instruct a "Judicare" who would have represented him further. The magistrate's failure to do so is a failure of justice.

[13] The other issue to consider is the court's failure to assist the appellant to retrieve his hospital records. Immediately after the appellant pleaded not guilty to all counts, he placed on record the basis of his defence. It is recorded:

ACCUSED: "Understood your Worship.

COURT: Right is there anything you want to say or would you like to remain silent?

ACCUSED: Yes there is an explanation.

COURT: You may proceed

ACCUSED: I was not resident in township, and at that stage I was sick, and I was only recuperated after being arrested in this matter. I deny the allegation because even when I was at the police station an ambulance was summoned and even in court during the my appearance I was I also was sick I would not be in a state to commit the said offence. On the said day of the 23rd it is one of those days I was taken with an ambulance to the hospital. When I requested assistance from the police officers to assist in getting this information or prove that I was in hospital on the said day it was alleged that the hospital needed a parent or a family member and I do not have a parent who would be able to get this information for me."

[14] At the end of the defence case and just before the delivery of the judgment, the appellant again requested the court to assist him in getting the hospital records. It is further recorded:

COURT: "Did you get, what are you going to do if you got the medical records?

ACCUSED: The hospital says it is only the court that can make an order that information taken out to prove as they wanted my blue card so I did not have a blue card.(sic)

COURT: What does your blue card say?

ACCUSED: I no longer have the blue card because when I got arrested everything that belonged to me got lost. And there are witnesses the people who took me to hospital."

[15] The appellant's version is that he was sick on the day in question. He was taken to the hospital by an ambulance. He testified that the

hospital records, if retrieved from the hospital, will speak for themselves. The hospital refuses to release the records other than to the owner and or to his wife. He indicated that he has no wife and, tipping the scale, he lost his blue card. He placed on record that 'the hospital says it is only the court that can make an order [for] that information be taken out.'

[16] The court was appraised that the hospital needs the court order or the blue card (Patient's hospital card). The appellant was at pains to obtain the hospital records which would have corroborated his version or even exenorate him. The magistrate failed to assist the unrepresented appellant to obtain his hospital records notwithstanding his plea to the court.

[17] Considering the appellant's efforts and plea to obtain the hospital records that had fallen on deaf ears, I am of the view that the magistrate's failure to assist an unrepresented appellant renders the trial unfair. The magistrate's failure to order the release of the appellant's hospital records is a complete failure of justice (see S v Mbonambi).

[18] Considering the appellant's version, I am of the view that it is reasonably and possibly true and the appellant must be released.

ORDER

[19] In the result, the appellant's appeal against conviction is upheld. The trial court's conviction is therefore set aside and replaced with the following:

'The accused is found not guilty and must be released.'

AML Phatudi
Judge of the High Court

I agree

Hertenberger-Brack
Acting Judge of the High Court