

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

CASE NO: A652/13

DATE OF HEARING: 14 APRIL 2014

DATE: 17 APRIL 2014

In the matter between:

B[...] J[...] G[...]

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MAKHOBIA. AJ

[1] THE APPEAL

The appeal is properly on the roll.

[2] THE CHARGES

The Appellant appeared in the Pretoria Magistrate court on one (1) charge of contravention of section 31 (1) of the Maintenance Act, Act 99 of 1998 as amended in that the accused being a person against whom a court of law to wit, the High Court Transvaal Provincial Division at Pretoria on the 16th November 2007 had made an order for the payment of the sum of money to wit, R3 000,00 plus the school fees per month towards the maintenance of his two (2) minor children did wrongfully, from the period January 2010 to date been the 6th December 2010 failed to make payment in Pretoria in the district of Pretoria in terms of the said order and the accused thus contravened section 31 (1) of the maintenance Act and that the arrears amounts to R15 240,00.

The Appellant pleaded not guilty but was convicted and sentenced. The Appellant applied for leave to Appeal against the conviction and sentence which was accordingly granted on the conviction only on the 31st May 2013.

[3] GROUND OF APPEAL

The appellant relied on the following grounds of appeal.

- a) That the state did not prove the Appellant's guilt beyond reasonable doubt as a result of the fact that the Appellant did not have a fair trial due to the incompetence of the Appellant's legal representative.

b) That the court *a quo* should have transformed the criminal trial into an inquiry in terms of section 41 of Act 99 of 1998.

c) That the Appellant did not receive a fair trial due to the conduct of the magistrate in the court *a quo* who entered the arena and cross examined the Appellant.

The Respondent opposed the appeal and argued that the conviction is correct.

I now proceed to deal with these assertions by the Appellant's counsel in order of their sequence as above.

[4.1] Incompetence of the Appellant's legal representative

In *S v Tandwa and others* 2008 (1) SACR 613 (SCA) on page 621 the court said the following "if the unwanted or inept advice of counsel improperly or unfairly thwarted his exercise of that right, his right to a fair trial would have been infringed"

It is clear from *S v Tandwa supra* that incompetence or ineptness by a legal representative does not necessarily render a trial unfair. The court on appeal will only interfere if the incompetence affected the Appellant's exercise of a right to a fair trial.

In *S v Saloman and others* 2014 (1) SACR 93 (WCC) the court held that it must be determined whether the incompetence of the legal representative objectively compromised Appellant's right to a fair trial.

Therefore the incompetence of a legal representative on its own is not a reason to render a trial unfair. Appellant must show that the incompetence was of such a nature or degree to render the trial unfair.

In this matter before us it is clear from the record that Mr Mtsweni, the Applicant's legal representative in the court *a quo*, conducted Appellant's defence in a sloppy manner.

However, I am unable to say that Mr Mtsweni's conduct rendered Appellant's trial unfair. There is no fundamental reason to come to the conclusion that Mr Mtsweni's ineptness resulted in a failure of justice.

[4.2] Whether the court *a quo* should have converted the criminal trial into an enquiry.

Section 41 of the Maintenance Act no 99 of 1988 reads as follows: "If during the course of any proceedings in a magistrate's court in respect of

a) An offence referred in section 31 (1); or

b) The enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person. It appears to the court that it is desirable that a maintenance enquiry be held, or when the public Prosecutor so requests, the court shall convert the proceedings into such an enquiry."

In this matter before us counsel for the Appellant argued that the court *a quo* should have converted the matter to establish what the Applicant's needs and means were at that stage.

In *S v Cloete* 1977 (4) SA 90 (c) it was held that it is the duty of the presiding officer to convert the trial into an enquiry if it appears to the Magistrate that the enquiry should be held.

In *S V Morekhure* 200 (2) SACR 730 (T) at page 733 Hartzenberg J said the following: "if it appears that the accused did earn an income but that there was a drastic change in his income it may very well be that an accused, although he is able to pay some maintenance is unable to pay the full amount of a court order. Those are the circumstance where a magistrate is to convert the proceedings onto an enquiry in terms of section 41 of the Act."

In S V Magagula 2001 (2) SACR 123 (T) the court held that the question whether or not the court should exercise its power to convert a criminal trial into a maintenance inquiry was one for the exercise of discretion by the court.

Therefore in this matter before us the court *a quo* had a duty if it appeared to the court that it was necessary to hold an enquiry. There is nothing on record which suggests that the magistrate failed to exercise her duty when it was necessary to do that; see S. v Morekhure supra, in addition there is nothing which indicates that there has been a drastic change in the Appellant's income. The Appellant is still in a position to pay maintenance towards his children. I therefore find no reason why the court *a quo* should have converted the proceedings in terms of section 41 of the Act.

[4.3] Conduct of the magistrate

It is argued on behalf of the Appellant that the fact that the learned magistrate conducted cross-examination and assisted the state in proving its case and thus rendering the trial unfair.

In S v Rail 1982 (1) SA 828 (A) the Appellate division held that where a presiding officer questions the accused or a witness in a way that because of its frequency, length, timing, form, tone, contents or otherwise, convey or is likely to convey the opposite impression the court of appeal shall intervene only if such an irregularity prejudiced the accused.

In S v Mseleku and others 2006 (2) SACR 237 (N) page 241 the court said "*Various principles have arisen which are to the effect that the court may intervene at any time to elucidate a point but should not take over the examination or put a leading question to support the state case...*"

In the present case it is clear from the record that the magistrate did put a number of questions to the Appellant (Mr G[...]). Some of the questions create an impression that she was cross-examining Appellant. However Appellant failed to show that these questions put to the Appellant by the magistrate were not open and fair questions by the magistrate in ascertaining exactly what the first Appellant's version was - see S v Mseleku and others supra page 251. The questions by the court *a quo* was to clarify issues.

For reasons given above I am satisfied that:

- 1) The state did prove all of the elements of the offence beyond reasonable doubt.
- 2) The Appellant received a fair trial.

I would therefore propose the following order:

"The appeal against conviction be dismissed."

D MAKHOB

ACTING JUDGE OF THE

HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

KOLLAPEN

JUDGE OF THE HIGH

COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

Representation for the Appellant:

Counsel Adv: M Bouwer

Instructed by VAN ANDEL - BRINK Attorneys

Representation for Respondent

Counsel Adv: L Williams

Instructed by: Office of the Director of Public Prosecutions