IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A 136/2014

DATE: 17 NOVEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

ANNARI DU PLESSIS **Appellant**

and

THE STATE **Respondent**

JUDGMENT

MAKGOBA J

[1] The Appellant was convicted on charge of defeating or obstructing the administration of justice on 27 June 2013 in the Magistrate Court, Vanderbijlpark and sentenced to a fine of R12 000-00 or 18 months imprisonment, suspended for 5 years on the following conditions:

> 1.1 that she is not convicted of defeating the ends of justice or an attempt thereto (albeit statutory or in terms of the common law) committed during the period of suspension;
>
> 2.2 that she is placed under the supervision of a social worker from the Gauteng Provincial Government -Social Services for the full duration the suspension, in terms of Section 297 (1)(b) read with Section 297 (l)(a)(i)(hh) of the Criminal Procedure Act 51 of 1977

[2] On the said date of the conviction and sentence the Appellant applied for leave to appeal against both conviction and sentence which was refused by the Court **a quo**

Upon petition to the Judge President of the High Court of South Africa, Gauteng Division, Pretoria leave was granted on 13 February 2014 against both conviction and sentence.

[3] During the course of trial the Appellant made an application for the recusal of the trial Magistrate which was refused. The crux of this application for recusal revolves around an alleged conversation between the Presiding Officer and another person which conversation has been overheard by another colleague and fellow Magistrate of the Presiding Officer who then informed the Appellant about this conversation. The content of the aforesaid conversation was to the effect that the Presiding Officer was overheard saying that he would find the Appellant guilty and send her to jail irrespective of whatever evidence brought before Court.

[4] The refusal of the trial Magistrate to recuse himself is one of the grounds of appeal before us. At the hearing of this appeal it was agreed between the parties that in the event of the appeal being upheld on the merits, the issue relating to the recusal of the trial magistrate becomes academic. Accordingly, I proceed to deal with the appeal on the merits and shall revert to the issue of recusal later in this judgment, if need be.

[5] The charge put to the Appellant and to which he pleaded not guilty reads as follows:

> "*Dat die beskuldigde skuldig is aan die misdryf van Dwarsbomig of Belemmering van die Verloop van die Gereg; DEURDAT op of omtrent 10 Augustus 2011 en te ofnaby Vanderbijlpark, die beskuldigde wederregtelik en met die opset om die verloop van die gereg te dwarsboom of te belemmer, 'n handeling verrig het, te wete te weier on 'n 13 jarige klaagster in 'n verkragtings saak aan die polisie te oorhandig ten einde 'n verklaring van haar te bekom vir opening van 'n saakdossier en/of om haar vir mediese ondersoek te kan neem sodat monster (s) vir DNA doeleindes geneem kan word, weike handeling die geregspleging gedwarsboom of belemmer het, ''*

[6] The State case is based on an act related to the Appellant not handing and/or refusing to hand the child over the police since 10 August 2011, that even after the Appellant was arrested and kept in custody on the 13 August 2011, she still refused to tell the police where the child was.

[7] The *dramatis personae* in this matter are mainly the Appellant, the 13 year old child victim of sexual abuse known as L[...], members of the South African Police Services ("SAPS members") and one Pastor Lucas Hope McPherson ("Pastor Hope"). The Appellant resigned from the SAPS in 1999 and founded an NGO known as Crossroads in 2008. Her work at Crossroads is specifically aimed at assisting drug addicts and prostitutes and not rape victims *perse*.

[8] A contextual and chronological summary of the facts of the case over a period of four days is set out below.

Wednesday, 10 August 2011.

[9] Constable Christine Pieterse, the Appellant and one Riana Burger (a Volunteer) were together when the 13 year old victim was found on Wednesday 10 August 2011 at a house in Bequerel Street, Vanderbijlpark diagonally across from Crossroads. Bequerel Street is notorious for loitering drug addicts and prostitutes.

The victim was found in the company of two men, Piet and JJ. The victim was dirty, unkept and appeared not have washed herself over many days. Constable Pieterse decided to leave the scene and was already gone by the time the details of the victims' horrid fate were established.

[10] The victim was taken to Crossroads by the Appellant and Ms Burger. Pastor Hope, (a professional acquaintance of the Appellant) joined them at Crossroads upon their arrival there.

Pastor Hope was the only person who could engage the victim in her mother tongue and established that she had been lured away from Parys in the Free State, confined, drugged, pimped and raped repeatedly over an extended period of time. She disclosed that the men who were present when she was found at Bequerel street (Piet and JJ) were involved in her plight.

[11] The Appellant promptly phoned Constable Pieterse who left the scene earlier, and conveyed to her the information established by Pastor Hope. Constable Pieterse reiterated yet again that her mandate does not extended to child rape victims and that the Appellant must bring the victim to the charge office. The Appellant informed her that the victim was severely traumatised, in no state to be taken to the charge office and that there are allegations of SAPS members' involvement in the victim's plight.

Constable Pieterse undertook to phone the Child Family Service ("the CFS") and convey this information to them.

[12] Both Ms Burger and the Appellant then phoned Inspector (Warrant Officer) Steyn, who is the police official charged with Communication and Liaison with the Vanderbijlpark Community. They again asked for members of the SAPS to come to Crossroads to attend to and take care of the victim. Inspector Steyn told the Appellant to bring the victim to the charge office. The Appellant repeated the reasoning as to why she considered it not in the victim's best interest, as conveyed to Constable Pieterse. The Appellant also phoned Warrant Officer Blackie Swart to request for assistance but he said that he was off duty.

[13] It is common cause that the Appellant contacted the victim's family and arrangements were made for

them to be met by Pastor Hope the following day.

The Appellant also phoned Inspector Van Rooyen, a member of the flying squad, and the latter indicated his willingness to assist only once the Appellant had managed to obtained a docket registration number ("CAS number"). The Appellant informed him that they are waiting for SAPS members to come Crossroads.

[14] By late afternoon on the Wednesday, there still were no SAPS members who presented themselves at Crossroads. Ms Burger, Pastor Hope and the Appellant then arranged for the victim to be held at Lifeline (a Place of Safety) as Crossroads has not been registered as a place of safety. The Appellant duly informed Inspector Steyn that the victim will be taken to Lifeline.

Thursday, 11 August 2011

[15] During the following morning of Thursday the Appellant drafted her own affidavit and Ms Burger and Pastor Hope interviewed the victim and drafted a concept affidavit of the victim and a list of suspects.

The victim informed them of another child that was kept in confinement and that she will be able to locate the house of confinement.

Pastor Hope and Ms Burger went to fetch the victim's family members from the taxi rank.

The Appellant once again phoned Inspector Steyn and asked for assistance. He informed her that he will only be able to assist once she managed to obtain a CAS number. It is common cause that at this stage Inspector Steyn knew that the victim was brought back to Crossroads on that Thursday and that the Appellant was struggling to obtain a CAS number as the SAPS members had not come to Crossroads as requested.

[16] The Appellant then went to Vandelbijlpark charge office and requested that a docket be registered. She first spoke to Sergeant Majola who had to leave as she was busy working on another investigation. Sergeant Manganye from the CFS instructed the Appellant to accompany her to Vereening. However, the Appellant opted to continue registering a case docket in the Vaderbijlpark charge office as Crossroads is situated in and the victim was found and is present at Vaderbijlpark.

[17] While the Appellant was being assisted with the opening of a case docket by two female SAPS members in the Vaderbijlpark charge office, Constable Khumalo, Sergeant Manganye's partner, walked in and an altercation ensued about the registering of the case docket.

Pastor Hope testified on this aspect about his conversation with Constable Khumalo in Sotho during which Khumalo also threatened Pastor Hope with arrest and remarked that the Appellant would not get help from people of her own colour like in the days of apartheid. Pastor Hope also saw it fit to point out to Constable

Khumalo that the Appellant was assisting a black victim and was not refusing to allow him (Khumalo) to assist a white victim.

According to Pastor Hope Constable Khumalo's conduct was arrogant and intimidating from the onset, even in the presence of his female superior officer who was busy assisting the Appellant with the registration of the case docket.

[18] It is common cause that Pastor Hope and Ms Burger joined the Appellant whilst the altercation was playing on. Constable Khumalo grabbed the case docket from the SAPS members who were busy registering it and ordered the Appellant to follow him. The Appellant went to the office of Colonel Scheepers as she was very upset by that time.

[19] Constable Khumalo, Sergeant Manganye, Ms Burger and Pastor Hope joined the Appellant in Colonel Scheeper's Office. Colonel Scheepers requested the Appellant to bring the victim to the charge office. She was told that she would be charged with defeating the ends of justice if she did not comply.

[20] The Appellant then went to Brigadier Denge's (the Station Commander) office and explained the situation to him. Brigadier Denge phoned Captain Mokoena and it was agreed that Sergeant Majola would come to Crossroads and take care of the victim. Brigadier Denge, Constable Khumalo, Sergeant Manganye, Ms Burger Pastor Hope and the Appellant waited outside the charge office for Sergeant Majola who did not arrive.

She was contacted telephonically by the Appellant and undertook to come to Crossroads the following day on Friday. It was then decided amongst the SAPS members present there at the charge office that the victim was to stay over at Lifeline again on that Thursday night.

Friday, 12 August 2011

[21] On the Friday morning the Appellant phoned Sergeant Majola who eventually came to Crossroads, took a comprehensive statement from the victim and obtained a CAS number during the afternoon.

She also left a rape victim crime kit with the Appellant and asked her to assist her to take the victim for a medical examination after having discussed with the victim and the latter's mother.

The victim was released by Sergeant Majola into the care of her mother and family members on the Friday late afternoon.

The Appellant was arrested at Crossroads at approximately 19:00 the Friday evening, detained in the police cells and refused bail.

Saturday, 13 August 2011

[22] Sergeant Majola told Constable Khumalo on the Saturday morning that the victim was with her family in Tshepiso. Neither Constable Khumalo nor Colonel Scheepers knew that Sergeant Majola interviewed the victim on the Friday morning, whereafter she also registered a case docket. They only learnt about this during their testimony in the trial.

[23] Colonel Scheepers testified that had he known that Sergeant Majola took the statement of the victim on Friday morning, he would not have issued the order to arrest the Appellant.

[24] It is common cause that Constable Khumalo took the victim for a medical examination on the Saturday afternoon. On Saturday night Constables Khumalo and Ramogale brought the victim to the police cells where the Appellant was detained to let the victim observe the Appellant from a distance whilst she was in custody.

It is inexplicable why these policemen embarked on such a highly irregular conduct. Perhaps it was aimed at breaking the Appellant spiritually and/or morally.

According to the Appellant's evidence she indeed broke down completely.

[25] It is appropriate to mention, once more, the bizarre conduct of Constables Khumalo and Ramogale in the whole saga.

They visited the victim and her family on a Sunday morning and wanted to take the victim to their church to "drive the demons out of her." The victim's family refused.

[26] From the totality of the evidence outlined above the following significant observations are made:

> 26.1 Throughout the three days leadings to the Appellant's arrest all the SAPS members involved (about eleven) knew where the victim was and they had an unrestricted access to Crossroads;
>
> 26.2 That various members of the SAPS knew that the Appellant and her company waited for the SAPS to come and attend to the victim at Crossroads; and
>
> 26.3 The SAPS members very well knew that the victim was to overnight at Lifeline. During the victim's stay at Lifeline, an unknown person allowed the victim to take a bath.

[27] The charge against the Appellant is basically that she defeated or obstructed the administration of justice in that she failed or refused to hand over the minor child to the Police for purposes of taking her statement and submitting her for medical examination.

[28] The crime of defeating the ends of justice cannot be committed by simply failing or omitting to give heed to what the Police requested of the Appellant. There must be a duty and it must be alleged that there was a duty on the Appellant to act positively and that she omitted to so act. In **S v Orberbacher 1975 (3) SA 815 (SWA)** it was held that one of the essential elements of the crime of defeating the course of justice is the doing of an act.

Hunt South African Criminal Law and Procedure Vol 2 at page 41 defines the crime as follows:

> "*Defeating or obstructing the course of justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice. "*

This definition led to the decision in **S v Oberbacher supra,** to the effect that a positive act by the accused is necessary for the offence of defeating or obstructing the course of justice.

[29] In **S v Gaba 1981(3) SA 745 (0) at 751**C Malherbe AJ at 751 said:

> "*Voordat daar in ons reg sprake kan wees van strafregtelike aanspreeklikheid weens late, moet daar 'n regsplig op die beskuldigde rus om positief op te tree. (Hunt South African Criminal Law and Procedure band 1 te 103 en De Wet en Swanepoel Strafreg 3de uitgawe te 66-67) Of daar in 'n bepalde geval 'n regsplig bestaan om positief op te tree, sal afhang van al die omstandighede. "*

[30] **In casu** the charge sheet does not allege that there is a duty on the Appellant to act positively. This defect in the charge sheet was brought to the attention of the Court during the trial.

It is trite that where the existence of a legal duty is not averred in the charge sheet, and the charge sheet is not amended notwithstanding that the relevant defect was brought to the attention of the Court at the commencement of the trial and such legal duty is an 'essential ingredient of the relevant offence", such defect cannot be cured by evidence, in terms of Section 88 of the Criminal Procedure Act 51 of 1977, at the trial proving the matter which should have been averred. See **S v Gaba 1981 (3) SA 745 (0)**

[31] Malherbe AJ expressed himself as follows in the **Gaba case,** supra, at 751-752

> "*Soos hierbo aangetoon, is die bestaan van die regsplig nie in die klagstaat beweer nie en is die kiagstaat ook nie gewysig nie, nieteenstaande die feit dat die beweerde gebrek reeds aan die begin van die verhoor onder die aandag van die hof gebring is.*
>
> *Aangesien die bestaan van 'n regsplig 'n voorvereiste is vir 'n skuldigbevinig in die geval soos die onderhawige, meen ek dat dit ook 'n bewering is "wat 'n nood saaklike bestaandeel van die betrokke misdaad is".*

[32] In our view the evidence on record does not support or prove the charge of defeating or obstructing the administration of justice levelled against the Appellant as per the charge sheet set out in paragraph [5] above.

The charge sheet stood unamended while it did not include an allegation that there was a duty on the Appellant to act positively.

[33] There was no legal duty on the Appellant, after having reported the crime committed against the victims to various SAPS members, to also further assist the SAPS in its investigations (albeit by the handing over of the victim and/or the transporting of the victim to the charge office). Access to Crossroads was unrestricted at all times and at least eleven SAPS members knew that the victim was at Crossroads during the course of the three days leading up to the Appellant's arrest.

Since no such legal duty was alleged in the charge sheet, as brought to the attention of the presiding officer during the trial before judgment, no conviction based on this charge sheet could follow.

[34] It is appropriate to deal with certain factual findings and conclusion arrived at by the trial magistrate in order to show that the trial magistrate erred in fact and/or law in some respects.

[35] The learned magistrate found that the Appellant acted by refusing to make the child available. He made this finding, yet, he also found that the SAPS members knew that the victim was at Crossroads. The learned magistrate should have found that the SAPS members had no difficulty in accessing Crossroads on the Friday evening when a whole squad or team of about twelve SAPS members audaciously arrested the Appellant.

[36] The magistrate found that, based on the Appellant's experience as an ex- SAPS member and her work at Crossroads, she had a legal duty to take the victim to the charge office and for medical examination. The magistrate erred in this regard. A document referred to as SAPS National Instruction 3/2008 was handed in during the trial. Section 6 thereof provides that when a rape is reported telephonically by somebody other than the victim, the SAPS member should request the person to remain with the victim whilst awaiting the arrival of a SAPS vehicle. The actions of the Appellant were surely aligned with the said instructions.

[37] The Magistrate found that the Appellant defeated the administration of justice by letting the victim bath. This, he held, destroyed the medical evidence. It cannot be true that the Appellant withheld the victim and let her bath. The evidence on record is that the victim was taken to Lifeline on the Wednesday afternoon and the SAPS was informed of this. The Appellant only saw her again on the Thursday morning. The authorities at Lifeline, a place of Safety, could not have neglected the victim and allowed her to stay in such and unkept state she was. In any event the Appellant played no part in the victim taking a bath.

[38] The magistrate made a remark and/or finding that Appellant had no **locus standi** to make "demands"

before she co-operates with the SAPS. It is not clear which demands the magistrate specifically referred to. The fact of the matter is that the Appellant made reasonable request that a female police officer be made available to attend to the case involving the victim who was available at Crossroads awaiting the arrival of the SAPS members. This is in accordance with the SAPS National Instruction referred to above.

[39] On the conspectus of the evidence on record it is clear that the Appellant's intention was at all times to protect and serve the best interests of the minor child who was a victim of crime.

The Appellant did not perform any act or omission constituting and resulting in the defeat of the administration of justice. In the result the appeal against both conviction and sentence should be upheld.

[40] Having disposed of this appeal on the merits, it is unnecessary to address the issue of the recusal of the trial magistrate.

[41] The appeal is upheld and the conviction and sentence are accordingly set aside.

E.M MAKGOBA

Judge of the High Court

I agree

PD MOSEAMO

Acting Judge of the High Court

For Appellant: AdvA. Nieman

Instructed by: Van Ellinckhuijzen Davies Inc

For Respondent/State: Adv. L Williams