IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:A420/2014

28/1/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

18/12/15 .....
DATE SIGNATURE

In the matter between:

BHAKI PATRICK SHABALALA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

RANCHOD J:

[1] The appellant was charged in the Ermelo Regional court with contravening the provisions of section 1(1)(b)(i) read with section 2 of the Intimidation Act 72 of 1982.

[2] The appellant appeared in person and pleaded not guilty to the charge on 5 April 2011. He was convicted as charged on 8 August 2013 and sentenced to 10 years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 ('the Act'). He was also declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000. His application for leave to appeal against the conviction and sentence was refused on 28 January 2014. A subsequent petition to the High Court was successful and leave was granted on 5 May 2014 against both conviction and sentence.

[3] Section 1(1)(b)(i) of the Intimidation Act provides:

"Any person who -

(a) ...

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication –

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and

(ii) ...

(Section 1(1)(b)(ii) deleted by section 6 of Act 126 of 1992)

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

[4] In the charge sheet it is stated that the persons who were intimidated on 5 August 2006 were Ms Lindiwe Makhubu, Lihle Masuku and two minor children. From the record it appears that the charge related to the appellant intimidating his wife and two children. According to the complainant (the appellant's wife) she wished to go with their children to her parent's home. The appellant refused and said it would be better if they all died. He would not allow them out of the house and threatened to kill the complainant and

their children. Their elder child had managed to alert their neighbour and the police arrived. He refused to let them in so they broke down the door to enter and arrested him. Apparently, he had threatened to stab himself and the complainant with a scissor and poison the children. The complainant testified that she broke her relationship with the appellant some time before but he would not accept it. At the time of the incident he was not living with the complainant and their children. He would stay there, as the second State witness put it, 'part-time'.

[5] The appellant gave a different version in a prepared statement that he read out in court. He said the complainant was neglecting their children, not feeding them, whilst he saw her sitting with other men drinking beer. He remonstrated with her, had locked her and the children with him inside the house to prevent her from going to drink with the other men again. She had told him that as she was not married to him she could do whatever she liked.

[6] It appears from the record that the appellant had been an extremely disruptive and uncooperative person during the trial. He repeatedly interrupted proceedings, made wild allegations, was rude to the presiding magistrate and would not let the magistrate explain him his rights at various stages of the proceedings. He repeatedly insisted that the proceedings must be transferred to the High Court even though he was told that he would be allowed to apply for leave to appeal after the trial had been completed. He had to be removed from the court whilst judgment was being delivered due to his constant interruptions and again when judgment on sentence was being delivered. Nevertheless, the magistrate caused him to be brought into court to tell him what the verdict and sentence was.

[7] It is with this brief background that I proceed to deal with the magistrate's handling of the case.

[8] In view of the several procedural irregularities that took place during the course of the trial which were of such a nature as to vitiate the proceedings, it is not necessary for me to deal with the merits of the matter in

any detail. The State conceded as much in the heads of argument and in oral submissions.

[9] In order to put the procedural irregularities in proper prospective it will also be necessary to quote rather extensively from the trial record. But first a comment is warranted regarding the date of the alleged incident and when the appellant first appeared in the regional court.

[10] According to the charge sheet the alleged incident took place on 5 August 2006. The appellant's first appearance in the regional court – according to the J15 – was almost five years later on 14 February 2011. (Prior to that he had appeared in the District court on 4 November 2010 when it was transferred to the regional court). He pleaded (not guilty) on 5 April 2011 and was convicted on 8 August 2013, some two and a half years later.

[11] It appears that the lengthy delay in the finalisation of the matter may be attributed to two factors, firstly, the appellant had absconded on 8 December 2006 after he was admitted to bail on 1 September 2006. He eventually appeared in court almost four years later on 4 November 2010. Secondly, when the appellant was referred for mental observation by the court on 12 May 2011 he obtained a bed or space only about 17 months later on 22 October 2012. As I said, the trial eventually took place on 8 August 2013.

[12] The first issue arose almost immediately after commencement of trial. (The accused appeared in person). The presiding magistrate explained to the appellant after he pleaded that he may provide an explanation of plea or elect not to. The appellant elected to provide an explanation of his plea of not guilty.

[13] The interpreter at that point informed the court that the appellant wanted him to interpret what he says in English so that he (the appellant) can understand what the interpreter was interpreting to the Court. The following discussion took place:

BESKULDIGDE: Ek wil verduideliking gee.

HOF: Goed.

TOLK: Hy sê Edelagbare, ek moet in Engels sê sodat hy kan verstaan ook.

HOF: Wat moet ek sê?

TOLK: Ek moet u in Engels sê, sodat hy kan verstaan.

HOF: O goed, die tolk sê vir die Hof in Afrikaans, Meneer, dis die taal wat die hof gebruik.

[14] In my view, it was not an unreasonable request of the appellant. The magistrate could have accommodated it. After all, English is a language of the courts. Section 35(3) of the Constitution of the Republic of South Africa, 1996 provides:

'(3) Every accused person has a right to a fair trial which includes the right –

...

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.'

[15] It is so that there was an interpreter who interpreted into and from a language spoken by the appellant. To that extent there was compliance with section 35(3) of the Constitution. It seems, however, that the appellant wanted to hear the interpreter's interpretation of what he was saying if what he said was interpreted into English. Although there was compliance with section 35(3) in the strict sense there was no reason why his request could not be complied with and the refusal is to be deprecated.

[16] The State called four witnesses, namely, Ms Lindiwe Makube, Ms Cinderella Agatha Lige Masuku, Lt. Col. Zanele Winny Mafoso and Warrant Officer Mokonyane.

[17] The following appears from the record when the four State witnesses were called to testify:

"Prosecutor: State calls Lindiwe Makube

Hof: Beskuldigde moet mooi luister wat hierdie getuie gaan sê want hy sal later kans kry om met haar te stry oor wat sy getuig het. Die hof say sy regte volledig vir hom verduidelik as sy klaar getuig het, op hierdie stadium moet hy mooi luister, sodat hy later met haar kan stry as hy sou wou. Goed, getuie se volle name asseblief.

Lin Makhubu: Lindiwe Jane Prince Anel Steyn Makhubu.

Hof: Goed dankie, sal u sweer dat u die waarheid sal praat.

Lin Makhubu: Ja.

Hof: Goed dankie, sweer haar in.

Lindiwe Jane Prince Anel Steyn Makhubu ingesweer.

Hof: Goed

Examination-in-chief by the prosecutor

Record: p. 22 l. 24- p. 23 l. 12

After this witness testified, the next witness was called

Prosecutor: As the court pleases. The State calls Lige Makhubu

Hof: Getuie se volle name asseblief?

C.A.L Masuku: Cinderella Agatha Lige Masuku

Hof: Goed, sal die getuie sweer dat sy die waarheid sal praat?

C.A.L Masuku: Ja

Hof: Dankie, sweer haar in, asseblief.

Cinderella Agatha Lige Masuku ingesweer.

Record: p. 37 l. 7-14

The next witness was Lt. Col. Mafoso

Mafoso: I am Lieutenant Colonel Zanele Winny Mafoso

Court: Are you going to give evidence in English?

Mafoso: Yes

Court: Do you have any objection to the prescribed oath?

Mafoso: No

Zanele Winny Mafoso sworn in

Record: p. 48 l. 13-18

Thereafter:

Prosecutor: State calls Warrant Officer Mokonyane

Hof: Yes, jou volle name asseblief.

Mokonyane: Joshua Nstutuzedi Mokonyane

Hof: Ek kan nie onthou of, dit adjudant is... wat, u praat Zulu of praat u Engels?
Mokonyane: Enige taal
Hof: Zulu? Goed
Mokonyane: English
Hof: Englsih? No objection to the prescribed oath?
Mokonyane: No, your Worship.
Joshua Nstutuzedi Mokonyane sworn in."
Record: p. 55 l. 1-11

[18] Section 162 of the Act, as amended, provides:
"(1) Subject to the provisions of Section 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:
"I swear that the evidence I shall give, shall be the truth and nothing but the truth, so help me God."
If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so".
The provisions of Section 162 are peremptory.
Vide: *Mashava*[1].

[19] In the lower courts the oath must be administered by the judicial officer; in a superior court by the presiding judge or the registrar of the court. Naturally, where interpretation is required, it must be interpreted into the accused's preferred language.

[20] *In casu* the record shows that with regard to the first two State witnesses, the presiding officer himself administered the oath in the incorrect form and then presumably instructed the interpreter to swear them in and, it would seem, the remaining State witnesses were also sworn in by the

[1] S v Mashava 1994(1) SACR 224 (T).

interpreter. The record does not reflect the form in which the witnesses were sworn in by the interpreter.

[21] In *Nkoketsent Elliot Pilanev v S*, unreported judgment by Hendriks J Case No. CA 10/2014 in the North West High Court, Mafikeng, it was held that if an oath was not properly administered in terms of the prescripts of Section 162 of the Act, what was said by the witness lacks the status and character of evidence and is therefore inadmissible. I agree. That also being the case *in casu* there is therefore no evidence before this court in the appeal to adjudicate upon. On this ground alone an irregularity was committed by the presiding officer which vitiated the entire proceedings.

[22] I turn then to the issue of referral of the appellant for mental observation. The record shows that the presiding magistrate initiated the referral of the appellant on 12 May 2011 saying:

> "HOF: die hof gaan die beskuldigde stuur vir waarneming, dis duidelik dat hy nie heeltemal reg in sy kop is nie."[2]

[23] The appellant refused to be referred for observation.

[24] When court proceedings resumed 18 months later on 13 November 2012 after the appellant was observed for 30 days at Weskoppies Hospital, the prosecutor, without referring to this aspect merely placed on record that the State closes its case.

[25] The presiding officer then alluded to the availability of a Weskoppies report and merely read out a part of the report to the appellant:

> "Hof: Goed. Intussen het ons ook toe nou die psigiatriese verslag terug ontvang van Weskoppies en die verslag se bevinding.
>
> 'Despite his mental disorder the accused is capable (of?) understanding court proceedings and is able to contribute meaningful to his defence."

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[2] Record p71 line 19-20.

Record: p. 75 l. 23- p. 76 l.3.

[26] However the relevant part of the psychiatric report reads as follows:

"B. Psychiatric diagnosis: Cognitive disorder not otherwise specified.

C. Despite his mental disorder the accused is capable of understanding court proceedings and is able to contribute meaningfully to his defense.

D. At the time of the alleged offence the accused did not suffer from a mental disorder or mental defect that affected his ability to distinguish between the rightful or wrongful nature of his deeds. A mental disorder or mental defect did not affect his ability to act in accordance with the said appreciation of the rightful or wrongful nature of his deeds."

Record: p. 245

[27] Section 77(2) and (3) of the Act, reads as follows:

"(2) If the finding contained in the relevant report is a unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(3) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused."

[28] In *Matu*[3] Hartle J held as follows:

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[3] S v Matu 2012(1) SACR 68 ECB at 72.

"(13) Leaving aside for the moment that the accused was unassisted, the magistrate further skipped ahead to the enquiry without first making the determination that the accused is not capable of understanding the proceedings so as to make a proper defence in terms of s 77(6)(a) of the CPA. Even antecedent to that, she failed to establish from the parties whether the s 79 report was disputed. It is only on the basis of a unanimous and undisputed report that the matter may be determined without hearing further evidence.

(14) She appears to have assumed, with reference to annexure B, that the prosecutor accepted the finding of the panel, but this ought to have been clearly established and an indication made on the record to this effect. As for the accused, the record is innocent of any invitation extended to him to indicate if he wished to dispute the finding; or of any explanation made to him concerning his right to lead evidence on the basis provided for in ss (3) or indeed as to the consequences which might ensue arising from the drastic provisions of Ch 13. In my view, the phrase 'is not disputed by ... the accused' referred to in the subsection cannot be equated with an accused person being unable to dispute it by virtue of mental illness or defect. The accused has a clear election to challenge a s 79 finding and to present evidence towards this end."

In casu the appellant was not even informed by the presiding officer that he was suffering from a 'cognitive disorder not otherwise specified'.

[29] In *Matu supra*, the matter was remitted to the magistrate to make a determination pursuant to the provisions of section 77(2) or (3) of the Act as the case may be and such further order and directive thereupon as is appropriate in the circumstances. *In casu*, the Court *a quo,* at a later stage during the trial, made the following impatient remark regarding the appellant's mental state:

"Op `n stadium toe stuur ek hom Weskoppies toe, toe sê hulle daar is inderdaad toe nou iets fout met hom maar niks, nie vreeslik ernstig nie."

Record: p. 100 l. 3-5

[30] At the conclusion of the appellant's examination-in-chief, the appellant refused to answer questions posed by the prosecutor and the presiding officer then gave the prosecutor instructions to submit a typed copy of the court proceedings to the Director of Public Prosecutions for their guidance (*sic*!). The matter was postponed for this purpose to 8 August 2013.

[31] On 8 August 2013, neither the prosecutor nor the presiding officer made mention of this aspect and the presiding officer merely regarded the defence case as closed.
Record: p. 100 l. 24
p. 108 l. 23

[32] Judgment was delivered in the absence of the appellant.
Record: p. 110 l.5

[33] During cross-examination by the prosecutor, the presiding officer made the following remarks:

> "Dankie die beskuldigde, just take him outside please or must I remove him myself now? Maart maand volgende jaar mevrou gaan ek nie hierdie mannetjie se nonsense langer opvreet nie.
> Aanklaer: Onhoorbaar
> Hof: Dit is sy problem hy kan wat die hof betref ek is nou keelvol vir hom wat my betref kan hy tot ek die dag aftree sal ek sy saak uitstel."
> Record: p. 90 r. 17-24

[34] In *Sallem*[4] at 785F-J the court held as follows:

> "Ongeduld is iets wat 'n regspreker waar moontlik moet vermy en in elk geval altyd streng moet beteuel. Dit kan sy insig belemmer, sy oordeel verswak en 'n indruk van vyandigheid of vooroordeel wek by die persoon teen wie dit gerig is. Wanneer daardie persoon 'n beskuldigde is, sal so 'n indruk behoorlike regspleging tot meerdere of mindere

[4] S v Sallem 1987(4) SA 772 (A).

mate ondermyn na gelang van die geval. Dit kan die regspleging ook heeltemal verongeluk."

[35] In *Tyebela*[5] at 32 I-33A, Milne JA held as follows:

"The trial Judge, furthermore, on a number of occasions interrupted the cross-examination of State witnesses by the appellant and his co-accused. I know only too well from experience how protracted and seemingly irrelevant most of the cross-examination conducted by an accused person, appearing in person, often is, and how irritating it can be. The Judge's plain duty is, however, to maintain his cool-headedness in the face of irritation and this the trial Judge failed to do."

[36] On 5 April 2011 when the appellant was cross-examining W/O Mokonyane the presiding officer remarked as follows:

"Inspekteur, vat vir my die man weg ek gaan die saak uitstel, dis duidelik hy stel nie belang om enigiets te luister na wat gesê word verder in die hof nie. Inspekteur, u is verskoon, ek sal die beskuldigde oor `n paar weke, as ons die saak uitgestel het sal ek hom weer roep en dan sal ons u terugroep en dan kan ons kyk of hy bereid is om saak (*sic*) te werk, hy stel blykbaar nie belang nie. Die saak staan af."

[37] On 12 May 2011 he again decided to postpone the matter for the same reason and remarked that he will again postpone it until such time as the appellant 'starts listening'.

Record: p. 69 l. 9-11

[38] The same happened on 13 November 2012.

"I am going to postpone your case once again because you are starting with the same nonsense all over again."

Record: p. 78 l. 8-10

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[5] S v Tyebela 1989(2) SA 22 (A).

[39] During cross-examination of the appellant the presiding officer, ostensibly again allowed his impatience to get the better of him:

> "Dankie, die beskuldigde just take him outside please or must I remove him myself now? Maart maand volgende jaar mevrou ek gaan nie hierdie mannetjie se nonsense langer opvreet nie.
>
> Dit is sy probleem hy kan wat die hof betref ek is nou keelvol vir hom wat my betref kan hy tot ek die dag aftree. Sal ek sy saak uitstel...
>
> Volgende jaar Maart maand asseblief `n datum mevrou voor ek jou ook nou verhoor vir minagting van die hof...
>
> Goed Januarie maand is ek terug die tweede deel van Januarie dan kan ons maar weer met hom gesels en hoor of hy bereid is om te praat."

Record: p. 90 l. 17

Record: p. 91 l. 13

[40] As I said, the appellant's behaviour no doubt sorely tried the magistrate's patience. Nevertheless, it is regrettable that the magistrate allowed his irritation and impatience to get the better of him. It is particularly so where an accused appears in person that patience is required. The right to dignity is enshrined in the Constitution[6].

[41] In my view, the irregularities are of such a nature that they vitiate the entire proceedings and the conviction and sentence should be set aside.

[42] I would make the following order:

27.1 The appeal is upheld.

27.2 The conviction and sentence are set aside.

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[6] Section 10: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

RANCHOD J
JUDGE OF THE HIGH COURT

I AGREE

DE KLERK AJ
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellant	: Mr Moeng
Instructed by	: Pretoria Justice Centre
Counsel on behalf of Respondent	: Adv Pienaar
Instructed by	: Director of Public Prosecutions, Pretoria
Date heard	: 13 October 2015
Date delivered	: 28 January 2016