REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

26/01/2016.
CASE NUMBER A 265/15

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

SIGNATURE 26:01:2016 DATE

In the matter between:

MALESELA FRANS TJALE APPLICANT

and

THE STATE RESPONDENT

JUDGEMENT

AC BASSON, J

[1] The applicant, a 22-year-old male was charged with the offence of rape and was tried in the Mankweng regional court for the contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 together with a co-accused. The applicant was tried as accused number 1. Accused number 2 is not party to the present proceedings.

[2] The applicant was convicted as charged and sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act, 105 of 1977.

[3] The applicant now approaches this court in terms of Rule 53 of the Uniform Rules of Court with an application to have the proceedings in the court *a quo* reviewed and set aside.

[4] According to the applicant various irregularities occurred during the course of the trial which warrants this court to set aside the proceedings in the court *a quo*. From the record it appears that both accused - the applicant (accused number 1) and accused number 2 were represented by the same legal representative from Legal Aid South Africa (cited as the 3rd respondent in the review application). This, the applicant submitted constitutes a serious irregularity as his legal representative must have been aware of the existence of a serious conflict of interest between the applicant and accused number 2. In elaboration the applicant explains in his affidavit that he did in fact admit in his warning statement to the police that he did have sexual

intercourse with the complainant but that he did so because he was threatened with a firearm by accused number 2. Accused number 2's defence, on the other hand, was one of a complete denial. It was accordingly submitted that a serious conflict existed between the two accused and that in these circumstances they therefore could not be represented by the same legal representative. This, so it was submitted, constitutes a gross irregularity and warrants the setting aside of the conviction and sentence of the applicant.

[5] At the commencement of the trial the applicant entered a plea of not guilty. Whilst the complainant was still being cross-examined, the legal representative on behalf of the applicant informed the court that the applicant wished to change his plea from one of not guilty to one of guilty and that she had had drafted a section 112(2) statement which she proceeded to read into the record. It appears from the record that the contents of the statement were interpreted to the applicant. When the presiding magistrate enquired from the applicant whether he agreed with the statement, he responded by saying that it was not in accordance with the initial statement that he had made to the police and that he therefore disputed the contents of the statement. The legal representative on behalf of the applicant explained to the court that when she drafted the section 112(2) statement she did not merely copy the contents of the warning statement. She further indicated that she wished to withdraw as the attorney of record in light of the applicant's view that the statement read into the record was not his statement. Without enquiring from the applicant why he disagreed with the

content of the statement, the court granted the legal representative an opportunity to consult with the applicant. When the trial resumed the legal representative informed the court that she had explained to the applicant how she drafted the section 112(2) statement and that they went through the warning statement that he gave to the police. She then requested the court to enquire from applicant whether he wished to proceed with his plea. Again, without questioning the applicant, the court merely enquired from the applicant whether he wished to confirm or dispute the contents of his statement. The applicant responded by saying that he confirmed the statement. The court then required that both applicant and the third respondent sign the statement.

[6] In his affidavit, the applicant explains that he instructed his legal representative to change his plea to one of guilty on the charge of rape in light of what is contained in his warning statement and because he was under the impression that a plea of guilty would eventually lead to a lesser sentence imposed on him. He further explains that he was under the impression that the fact that he was threatened at gunpoint by accused number 2 to have sexual intercourse with the complainant, would be conveyed to the court. He also states that he did not know that a plea of guilty would be inconsistent with the fact that he was threatened at gunpoint. He further explains that, although he confirmed the contents of the statement in court and although he had signed the statement, he was still under the impression that the court was aware of the fact that he was threatened at gunpoint to have sexual intercourse with the complainant.

[7] Unfortunately the warning statement does not form part of the record before this court as it cannot be found. The court is therefore not in the position to compare what is contained in the warning statement to what is contained in the section 112 statement. It does, however, appear from the record that the legal representative was in possession of the police docket containing the warning statement and that she was in possession thereof when she later drew up the section 112 statement changing the plea of the applicant from one of not guilty to one of guilty.

[8] The fact that the applicant had a possible defence (as being alleged now in his affidavit in the Rule 53 review application), was also not raised during the proceedings. What the applicant does state in his affidavit is that he did indeed convey these facts to the legal representative who then advised him to plead not guilty to the charge (which he initially did).

[9] On behalf of the respondent it was submitted that, although it is conceded on behalf of the Sate that the irregularities referred to by the applicant did indeed occur, the State was of the view that the concession that irregularities occurred does not result in the inference that the trail was unfair.

[10] The test to be applied is whether the irregularity (or in this instance irregularities) is so fundamental, that it amounts to a failure of justice. If the irregularity is so fundamental that it nullifies the proceedings, the proceedings should be set aside.

[11] Although the evidence of the complainant, at least up until the stage when the proceedings were interrupted by the entering of a plea of guilty, does not support the allegation that the applicant was threatened at gunpoint to have sexual intercourse with her, there are indications on the record that the applicant may have conveyed these facts to the police and that it is contained in the warning statement to the police: Immediately after the section 112 statement was read into the record, the applicant stated that this statement was not in accordance with his initial statement.

[12] I am in agreement with the submission that, at the very least, the court *a quo* ought not to have admitted the statement and should not have accepted the plea of guilty without first having establishing exactly what the applicant's objection was and why he was not satisfied with the statement. The presiding magistrate merely proceeded to ask the applicant whether he confirmed or disputed the statement despite the fact that the applicant explicitly stated that he was not satisfied with the statement. In this regard I am in agreement with the submission that the fact that the applicant never had an opportunity to put his version to the trail court resulted in the court *a quo* never considering his version of having been threatened at gunpoint to have sexual intercourse with the complainant. On the face of it, had these facts been conveyed to the court, the presiding magistrate may well have decided that the applicant's version discloses a possible valid defence to the charge. Consequently, the fact that he was not afforded an opportunity to place this version before the court resulted in him not receiving a fair trial.

[13] A further irregularity occurred in the trail when sentence was imposed on the applicant. It is clear from the pre-sentence report that the applicant informed the probation officer that he was threatened at gun point by accused number 2. A disconcerting fact is that the pre-sentence report reveals that the complainant herself informed the probation officer that accused number 2 instructed the applicant to rape her and that accused number 2 proceeded to rape her when the applicant defied the order. She informed the probation officer that accused number 2 thereafter took his firearm and ordered the applicant to rape the complainant.

[14] If the content of the pre-sentencing report is considered (although I am mindful of the probative value of the report) it does appear that it affords some credence to the applicant's version that he was forced to have sexual intercourse with the complainant. At the very least, the presiding magistrate should, at that stage of the proceedings, have stopped all proceedings and should forthwith have had the record remitted for a special review to this court. This was not done.

[15] In light of the aforegoing it cannot therefore in my view be concluded that the applicant had received a fair trial.

[16] In the result the following order is made:

1. The conviction and sentence imposed by the court *a quo* is set aside.

2. The matter is referred to the Director of Public Prosecutions for a decision on whether to prosecute the matter *de novo*.

AC BASSON

JUDGE OF THE HIGH COURT

I concur

HJ DE VOS

JUDGE OF THE HIGH COURT