REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: SS135/2006

In the matter between

THE STATE

vs

PHILLIP CORNELIUS AND ANOTHER

JUDGMENT DELIVERED ON 14 SEPTEMBER 2007

SAMELA, AJ

[1] This matter came before me by way of committal of the accused to the High Court for consideration of appropriate sentences after conviction in the regional court. The alleged offences referred to fell under Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (hereinafter called the Minimum Sentences Act). Both accused were charged in the regional court, Wynberg, for kidnapping, rape and attempted rape. The allegations against both accused were that on 22 October 2004 at or near Ottery, within the regional division of the Western Cape, the accused, both adult males, wrongfully and intentionally kidnapped and had sexual intercourse with the complainant, one J H, an adult female person, without her consent.

[2] The trial culminated in the conviction of both accused. Accused 1

was convicted of rape only, while accused 2 was convicted of attempted rape and as well as being an accessory to rape. After the conviction, the Regional Magistrate was of the view that the offences which the accused were convicted of, were offences referred to in Part 1 of Schedule 2 of the Minimum Sentences Act. The component of the Act referred to above carries punishment in excess of the jurisdiction of the regional court, hence the Regional Magistrate's referral to this court for consideration of appropriate sentences.

[3] The issues in this matter were, whether:

(i) the regional court is a court of record;

(ii) there was a constitutional duty on the part of the Presiding officer to one more time explain in detail accused's constitutional rights to legal representation;

iii) the Presiding officer had a duty not only to explain accused's constitutional rights but also to encourage the accused to seek legal representation, especially in serious cases where life imprisonment could be imposed;

iv) the Presiding officer is expected to assist the unrepresented accused in conducting their trial.

[4] Initially when the trial commenced on 10 June 2005, both accused were represented by a Legal Aid Attorney. After the completion of evidence of the first state witness, the Legal Aid Attorney's mandate was terminated by both accused on 21 June 2005, as the trust between the accused and their legal representatives was alleged to have broken down. The attorney had told the court that:

"*ME AMOS:* *Dankie Edelagbare. Edelagbare na konsultasie met my kliënte was my mandaat beëndig Edelagbare. Die vertrouensverhouding tussen my en my kliënte is verbreek Edelagbare. Om daardie rede gaan verdediging versoek*

om vandag te onttrek as prokureur op rekord.

HOF: *Mnr Cornelius is dit korrek soos juffrou Amos die Hof meedeel?*

BESKULDIGDE 1: Ja.

HOF: *Mnr Plaatjies?*

BESKULDIGDE 2: Korrek.

HOF: U is verskoon juffrou Amos.

ME AMOS: Dankie Edelagbare.

The Magistrate then addressed both accused in the following manner:

HOF: *Mnr Cornelius met betrekking tot regsverteenwoordiging wat is die situasie nou.*

BESKULDIGDE 1: Wel Edelagbare … (onduidelik) die klaer dat sy getuig dat sy … (tussenbeide)

HOF: Meneer, ek wil nie hoor van die saak nie ek vra vir nè u het nou u mandaat van die prokureur beëndig. Gaan u self met die saak voort of wil u ḥ ander prokureur aanstel of wat is die situasie?

BESKULDIGDE 1: *My Edelagbare ek het nie eintlik my witness by my nie omdat ek nie in my plek gaan nie daarom moet ek maar … (onduidelik) want ek het haar reeds benader dat ek die community het dat ek gemeenskap en sy getuig nou in die hof dat sy vir my ontken … (tussenbeide)*

HOF: *Meneer, meneer hoor u wat ek vir u sê?*

BESKULDIGDE 1: Ja, mevrou maar ek sal vir my ḥ ander prokureur aanstel mevrou.

HOF: Wanneer gaan u dit doen meneer?

BESKULDIGDE 1: Ek sal vir my ene kry hier op die hof.
HOF: Maar u het nie ḥ prokureur dan nie meneer. Wanneer gaan u ḥ prokureur aanstel.

BESKULDIGDE 1: So gou as moontlik my Edelagbare as ons nou ḥ volgende datum kry dan sal ek in die tyd ḥ way maak vir ḥ prokureur.

HOF: Mnr Plaatjies?

BESKULDIGDE 2: Ek gaan self praat Edelagbare.

HOF: Gaan u self u saak behartig?

BESKULDIGDE 2: … (onduidelik) liewerste klaarmaak volgende datum.

HOF: Hḥ?

BESKULDIGDE 2: … (onduidelik) dan sal ek … (tussenbeide)

HOF: Ek sal vir u sê wanneer u u getuies hier moet hê. Is u seker dat u op u eie wil voortgaan?

BESKULDIGDE 2: Dit is korrek Edelagbare.

HOF: U wil nie ḥ ander prokureur aanstel nie. Mnr Cornelius wanneer sal u prokureur gereed wees om voort te gaan met die verhoor?

BESKULDIGDE 1: Wel as ek nou ḥ datum dan sal ek na hom toe gaan mevrou om vir hom te sê volgens die saak wat ek het en hy sal my kom verdedig hier.

HOF: Watter prokureur het u in gedagte meneer?

BESKULDIGDE 1: Wel, ek sal maar enige Staatsprokureur neem mevrou.

HOF: Maar meneer u het nou net die Staatsprokureur se mandaat beëndig.

BESKULDIGDE 1: Ja, ek het mos gesê ek sal voortgaan met hulle my Edelagbare.

HOF: Maar u kan nie dit doen nie meneer as u ḥ prokureur wil aanstel dan met u nou vir my sê want die mense wag hier

buitekant die Hof.

BESKULDIGDE 1: Ek sal my ḥ prokureur aanstel my Edelagbare.

HOF: Meneer jou saak word uitgestel na komende Vrydag die 24ste Junie sodat beskuldigde nommer 1 ḥ prokureur kan aanstel, wat kan voortgaan met die verrigtinge. U borg word verleng en u word beide gewaarsku om kwart voor nege op 24 Junie by streekhof M teenwoordig te verstaan u beide?

[5] On reading the court record, I noticed that the Regional Magistrate gave accused 1 only three (3) days within which to obtain the services of a privately paid legal representative (that is from 21 June 2005 to 24 June 2005). In the record, there were no recordings by the Regional Magistrate of explanation of the minimum sentence one more time to both accused, the seriousness of the offences and the punishment likely to be imposed should they be found guilty. I did not also find any recordings of encouragement to the accused to seek legal representation. After reading the record, I addressed a letter to the Regional Magistrate raising my concerns and requested reasons for convictions. The Regional Magistrate responded, even though her response has not addressed my concerns.

[6] With regard to the recording of criminal cases in the Magistrates' Courts, section 65(5) of the Magistrates' Courts Act 32 of 1944 (as amended) is relevant and it provides that:

> "*The judicial officer presiding at the hearing shall himself record in the criminal record book any sentence imposed or other order of disposal made by him including acquittal, or other discharge, postponement of sentence, adjournment, remand to another court or committal for trial.*"

The recordings in the criminal book is peremptory. Regional Magistrates

are not exempted from the abovementioned section. The recording in the criminal book assists in indicating what happened to proceedings in courts when accused appear before Magistrates, especially where the information is not on tape. In the present matter, the Regional Magistrate's recordings leave much to be desired. The section mentioned above clearly indicates that all Magistrates Courts are courts of record. There is no excuse on the part of the Regional Magistrate to omit recording the events in a criminal case on the day/s accused appear before him/her.

[7] Section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that:

> *Every accused has a right to a fair trial, which includes the right –*
>
> *b) to have adequate time and facilities to prepare a defence; and*
>
> *g) to have a legal practitioner assigned to the accused person by the state and at the state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.*

In this matter, both accused were not given enough time to find legal representatives. I am of the view that three (3) days was too short a time for the accused to obtain legal representation. This is even more so, as the accused person was going to engage the services of privately paid legal representative. Taking into consideration the known poor socio-economic background of the accused persons, they ordinarily would have had to auction whatever assets they possessed. In the rural areas, for example, it is not uncommon for poor people to auction their cattle or other domestic animals, in order to secure funds for the engagement of the

services of legal representatives. Regarding the importance of a legal representative to the unrepresented accused, Goldstone, J (as he then was) in **S v Radebe**, **S v Mbonani** 1988 (1) SA 191 (T) at 196 F-G said the following:

> "*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 a 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.*"

[8] In summary the right to legal representation has three (3) separate and distinct forms, namely,

(a) the right to a legal practitioner of one's choice;

(b) the right to a legal practitioner assigned to one at the state expense; and

(c) the right to a legal practitioner furnished by the Legal Aid Board.

The first two forms are recognized and entrenched in the Constitution. Section 35(3) of the Constitution provides that the right to a fair trial includes the right:-

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; and

(g) to have a legal practitioner assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result,

and to be informed of this right promptly.

The third form is based upon common law. See **S V Hlantlalala and Others v Dyantyi N.O. and Others** 1999 (2) SACR 541 (SCA) at 544 d-j and 545 a-e.

[9] The second and third forms are generally confused by Magistrates and the Legal Aid Board. After the adoption of the Constitution, no mechanisms were put in place to make it possible for accused persons to invoke and assert their right to legal representation at the state expense. Instead the Legal Aid Board was used as a vehicle for providing legal representation at the state expense. In this regard the amended section 3 of the Legal Aid Act 22 of 1969 reads:

> "*The objects of the board shall be to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution…"*
>
> (Such amendment came into effect on 1 October 1998.)

[10] It is significant to note that two distinct tests apply in determining whether a person is entitled to legal representation under common law or at state expense. Under common law, one must be indigent and the board has its assessment criteria to determine whether indeed the person is poor and qualifies for legal aid assistance. This is normally referred to as the means test.

[11] There is only a single test for an accused person to qualify for legal representation at the state expense. Every accused person coming before our courts is entitled to legal representation at state expense if substantial injustice would occur in the case, if the trial is conducted without him being legally represented. This has nothing to do with his poverty status and it is

completely wrong for the board to apply the means-test in the latter instance because that is not what the Constitution requires. This, the majority of Magistrates, fail to point out to the accused. Consequently, the board turns down their applications on the basis that they do not qualify. The constitutional right of many accused persons is violated when their trials proceed without legal representation pursuant to the boards' refusal. It must be emphasized that the board has no authority to replace the constitutional requirement with its own criteria, nor does it have to treat every request made for legal representation as if they are all made under common law. Although the Constitution does not define "substantial injustice", our courts have construed the phrase to include instances where direct imprisonment is the likely punishment to be imposed. See **Mgcina v Regional Magistrate, Lenasia and Another** 1997 (2) SACR 711 (W), **S v Chauke and Another** 1998 (1) SACR 362 (V) and **S v Du Plessis** 1995 (2) SACR 125 (CC), [1995 (3) SA 292; 1995 (7) BCLR 851 par 15].

[12] It is the duty of the Presiding officers to first determine before the trial commences whether the offence warrants direct imprisonment especially in cases where the accused's request has been turned down by the board. If the answer thereto is in the affirmative, then the board's attention should be brought to the fact that it is constitutionally obliged to provide legal assistance to the accused in order that he/she should realize his/her right to legal representation at state expense.

[13] As a result when an accused person is advised of his/her right to legal representation, the distinction between three forms of the said right should be clearly made in order for the accused to understand them. Indeed the Constitution does not only confer the right to a legal representation but it also requires, in peremptory terms, that the accused

be informed promptly of the said right. It must be borne in mind that the exercise of the right to legal representation is of critical importance in any trial as it is the only source through which the other rights can be effectively exercised. It also eliminates the need for the Presiding officer to assist an accused which is an onerous task, demanding a delicate and balanced approach lest the Presiding officer be accused of having descended into the arena of trial.

[14] Furthermore it is not unusual to come across records indicating that, in spite of the accused having been advised of his rights to legal representation through the Legal Aid Board, they would have chosen to act in person even where they faced serious charges. Although it ultimately depends on the individual decision of the accused whether or not to have legal representation. In some cases such decision is based on misconception or misunderstanding of the system relating to free legal representation. It is therefore incumbent upon Magistrates to go an "extra mile" in cases where the accused declines legal representation particularly in cases of serious charges. They must find out what motivated the decision to act in person in the light of the complexities in court procedures. See **S v Nkondo** 2000 (1) SACR 358 (W) at 360b-e and **S v Manele** 2000 (2) SACR 666 (NC) at 669e-670. Failure to investigate the reason for declining free legal representation might defeat the very objects of the right to a fair trial entrenched in section 35 of the Constitution.

[15] Dlodlo, J in **S v Ambros** 2005(2) SACR 211 (C) at 217g-I has succinctly explained the importance of legal representation at the state expense. The learned Judge said that:

"*… the presiding officer should inform the accused person:*

a) That he or she has a right to legal representation at state expense if substantial injustice would otherwise result.

b) That he or she has a right to appeal to the director of the Legal Aid Board against the refusal of legal aid by the legal aid officer, and how to exercise that right;

c) That if the Legal Aid Board refuses to provide legal representation, he or she may ask the court to make an order that he or she be provided with legal representation at state expense (the procedure and matters to have regard to, are set out in s3B of the Legal Aid Act).

The learned Judge correctly pointed out that a failure by the Presiding officer to inform the unrepresented accused of the above rights, is an irregularity, which is not capable of being condoned or cured in subsequent proceedings.

[16] The Supreme Court of Appeal again in **S v Sikhipha** 2006(2) SACR (SCA) 439 at 443f-g per Lewis, JA one more time, emphasized the duties of Presiding officer, when Lewis, JA said that:

"*It should be said, however, that where an accused is faced with a charge as serious as that of rape, and especially where he faces a sentence of life imprisonment, he should not only be advised of his right to a legal representative but should also be encouraged to employ one and to seek legal aid where necessary. It is not desirable for the trial court in such cases merely to apprise an accused of his rights and to record this in notes: the court should, at the outset of the trial, ensure that the accused is fully informed of his rights and that he understands them, and should encourage the accused to appoint a legal representative, explaining that legal aid is available to an indigent accused."*

A thorough explanation of accused constitutional rights is the thrust of a fair

trial. A failure by the Presiding judicial officer to tender such explanation, may result in an irregularity which may vitiate the proceedings, especially where accused would be prejudiced by such a failure. In this matter, the Regional Magistrate failed to explain to the accused thoroughly their constitutional rights, which resulted in them being prejudiced, as they faced direct imprisonment. In my judgment this was undoubtedly an irregularity which cannot be condoned.

[17] Magistrates as part of the judiciary, are expected to apply and uphold the constitution, as was correctly pointed out in **S v Lukhandile** 1999(1) SACR 568 (C) at 570e-g per Ntsebeza, AJ when he said:

> "*Magistrates, being part of the judiciary, are as much obliged to conduct themselves in a way that is consistent with the Constitution as is anyone else. In their daily conduct of their affairs in their courts, magistrates must realize that for the proper administration of justice in a constitutional democracy, especially when they deal with unrepresented accused, they must forever have in the forefront of their minds the dictates of the supreme law of the land. To conduct themselves otherwise, is to render their actions not only irregular but unconstitutional to the extent of their actions' inconsistency with the Constitution."*

[18] In this matter, the Regional Magistrate as reflected in the court record failed to explain to the accused their constitutional rights. She also did not encourage the accused to seek legal representatives as the accused cases were of serious nature. Also the Regional Magistrate failed to assist the unrepresented accused in conducting their trial, for example, conducting cross examination. All the above mentioned omissions by the Regional Magistrate did prejudice both accused in their trial, resulting in their trial being unfair. These were irregularities, which, in my judgment, are incapable of being condoned.

[19] It is on the basis of the aforementioned reasons that on 17 August

2007 I ordered that the conviction in the instant matter be set aside.

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SAMELA, AJ