court file

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A373/2008

DATE: 6 FEBRUARY 2009

In the matter between:

MICHAEL BAATJIES

versus

THE STATE

JUDGMENT

YEKISO, J:

The matter before us relates to an appeal against sentence imposed on the appellant in the Magistrate's Court, Bishop Lavis.

The sentence so imposed arises out of conviction of the appellant in the Magistrate's Court, Bishop Lavis, on 28 November 2006 for violation of the terms of the protection order issued against him on 6 January 2006, and out of a further conviction of the appellant on a charge of assault allegedly committed at the Magistrate's Court, Bishop Lavis,

on 5 October 2006.

On 28 November 2006, the appellant, as an accused person, appeared before the magistrate where he pleaded guilty to both charges of violating the terms of the protection order and as well as the charge of assault. Once the appellant had pleaded, the magistrate proceeded to question him ostensibly in terms of the provisions of Section 112(1)(b) of the Criminal Procedure Act 51/1977. The questions posed to the appellant are recorded as follows in the record of evidence, namely:-

> "HOF: Ja, jy sê nou die eerste aanklag, soos jy gesê het, jy verstaan dit. Dit gaan oor die verbreking van die voorwaardes van die interdik. Erken u dat u die klaagster, Sandna Koopman, 'n beskermingsbevel, dit is nou 'n interdik het wat sê onder andere dat u nie binne haar woning moet gaan nie? --- Ek gaan mos nie in haar huis nie, meneer, ek het nog nooit in haar huis gegaan nie.
>
> Ja, maar erken u sy het so 'n berskermingsbevel wat so sê? --- Ja, meneer.
>
> En op 11 September 2006 het u na 4 Sandweg, Bishop Lavis gegaan waar sy bly, het u soontoe gegaan? --- Waarna toe moet ek gaan?
>
> Ekskuus? --- Waarna toe moet ek gaan?

Ja, ek weet nie, ek vra net of u soontoe gegaan het? --- Dit is so.

Het u soontoe gegaan met of sonder haar toestemming? --- Sonder haar toestemming.

Op die tweede aanklag, dit word beweer dat u op 5 Oktober hier by Bishop Lavis Hof vir Sandna Koopman gedreig het om te sê u gaan haar on doodmaak en dus uself skuldig gemaak het aan 'n aanklag van aanranding? --- Dit is so, meneer.

Is dit so? --- Ek is skuldig, ja."

It will be noted on basis of the portion of the court record cited above that the magistrate, in questioning the appellant at that stage as an accused person, did not seek to ascertain if the appellant was admitting all the allegations in the charge sheet in respect of both offences with which he was charged. The purpose of questioning of an accused person in terms of Section 112(1)(b) of the Criminal Procedure Act, it has often been said, is twofold, namely: (a) to determine whether an accused person admits the allegations in the charge sheet; and (b) to enable the presiding judicial officer to conclude for itself whether the accused is in fact guilty.

The elements of a charge based on the violation of the protection order in contravention of the provisions of section

17(a) of the Family Violence Act 116/1998 entail the following: namely (a) a protection order which should have been issued; (b) the terms of the protection order; (c) that the protection order was properly served on the accused; (d) that at the time of the alleged violation, the protection order was still of force and effect; (e) that the accused acted unlawfully; and (f) the intention on the part of the accused to violate the terms of the protection order.

Inasfar as the assault charge is concerned, the elements thereof are the following, namely: (a) conduct which results in another person's bodily integrity being impaired; (b) unlawfulness; and (c) intention. In this regard see C R Snyman, Criminal Law, 5th Edition, at page 455.

The questioning posed to the appellant, then as an accused person by the magistrate, did not seek to ascertain from him whether: (a) he admits the protection order having been issued against him; (b) whether he was aware of the terms of the protection order; (c) whether the protection order was properly served on him; (d) whether the protection order was still of force and effect when the offence complained of was committed; and (e) whether the accused's conduct was unlawful, all these being allegations contained in the charge sheet.

The magistrate follows the same pattern as far as the assault charge is concerned. All that the magistrate does as far as the assault charge is concerned is to repeat the allegations contained in the charge sheet without satisfying himself if the accused admits all the allegations contained therein. As pointed out by Didcott, J in S v Mkize, 1978(1) SA 624 (N) at 268:-

> "The proper approach ought to be that when the Court is called upon to decide whether an accused person's responses to its questions adequately supports a conviction under Section 112(1)(b) of the Criminal Procedure Act, its function is to evaluate the answers as if it were weighing evidence or to judge the truthfulness or plausibility. The Court's duty is simply to interpret them to see whether they substantiate the plea."

The method adopted by the appellant in the instance of this matter falls far too short of the threshold set out in Mkize *supra*. It is the kind of an irregularity which clearly resulted, in the instance of this matter, in a failure of justice.

This matter comes before us by way of appeal against sentence only, but the consideration of fairness cannot allow

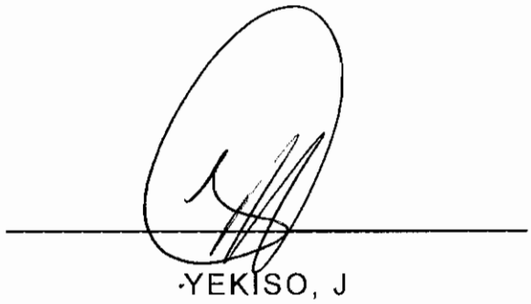
the convictions in the form they are to stand. In the normal course of events, after setting the convictions aside, we would have to refer the matter to the magistrate who presided at trial with the direction that he properly complies with the provisions of section 112(1)(b) of the Criminal Procedure Act, or to act in terms of Section 113 of the Criminal Procedure Act as the case may be, but the practical problem relating to this matter is that the appellant was sentenced as far back as 28 November 2006 and has been in custody since. What further compounds the problem, so it has been brought to our attention, is that the presiding magistrate in this matter is in the meantime deceased, although this problem could be addressed by another magistrate stepping into the shoes of the magistrate who initially heard the matter.

Having regard to all the circumstances of this matter, I would propose the following order which, in my view, is fair under the circumstances, namely:-

1. That the convictions and the sentence imposed on the appellant be SET ASIDE.

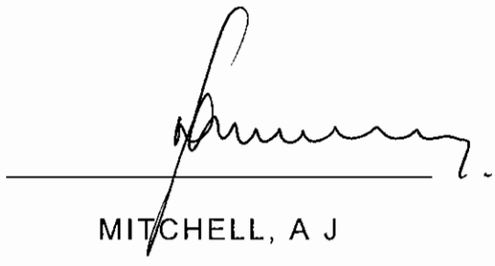
2. That the appellant be RELEASED FROM PRISON forthwith, unless lawfully detained on a count of another charge or charges.

It so ordered.



YEKISO, J

I agree.



MITCHELL, A J