

SOUTH AFRICA / JUDGMENT

Dladla v S (AR 483/09) [2010] ZAKZPHC 37; 2011 (1) SACR 80 (KZP) (1 June 2010)

[2010] ZAKZPHC 37

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Madondo, K Pillay

CASE / FILE NUMBER

AR 483/09

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

AR 483/09

In the matter between:

TWO BOYS DLADLA APPELLANT

Vs

THE STATE RESPONDENT

APPEAL JUDGMENT

MADONDO J

- [1] The appellant and his former co-accused, Christopher Ngidi, who was accused no1 in the Court a quo and to whom I shall refer as “his co-accused”, were convicted in the Pietermaritzburg Magistrate’s Court on a charge of assault with intent to do grievous bodily harm and were sentenced to a fine of one thousand Rand (R1000.00) or one hundred (100) days’ imprisonment, half of which was suspended for a period of five (5) years on usual conditions.
- [2] Only appellant now appeals to this Court against both conviction and sentence. This Court is called upon to decide two issues raised on behalf of the appellant: Firstly, whether the complainant, suffering from mental illness and a schizophrenic, was a competent witness. Secondly, whether the accused had any onus to discharge in order to be acquitted. It therefore follows that for the purposes of this case it is not necessary to decide whether the

state has succeeded to discharge the onus rested on it, to prove the guilt of the accused beyond all reasonable doubt, but rather whether the acceptance of the complainant's evidence and placing an onus on the accused constituted an irregularity, having an effect of vitiating the proceedings.

- [3] The appellant and his co-accused were convicted on the evidence of a single witness, the complainant, who was a mental patient at Fort Napier Mental Institution. He had been committed to the Mental Institution during the year 2000, suffering from mental illness and schizophrenia. The appellant and his co-accused were professional nurses employed at the said institution, taking care of the inmates of the institution.
- [4] The complainant's testimony was that on the night of the 15th of March 2005, the appellant and his co-accused were on duty. They came to his bed, in his ward, and administered tablets to him, but when he refused to take such tablets the appellant assaulted him by hitting him with an open hand, kicking him and attempted to strangle him with a towel. The appellant's co-accused also participated in the assault by pouring water onto him. When all this took place, the lights in and outside the ward were not switched on. However, before he could finish his testimony, the complainant indicated to the Court that he was then tired of talking and as a result, the proceedings were adjourned to another date. On the said date the complainant was not in attendance. The Investigating Officer, Moodley, then informed the Court that the complainant had prior to the adjournment date signed a withdrawal statement which was counter signed by the nurse on duty, and asked to be excused from further attendance at Court. The Court insisted that the complainant be brought to Court since he was by then at a late stage of his testimony. In consequence thereof, a warrant of arrest was issued against the complainant.
- [5] Six months from the last date of hearing, the complainant attended Court to finish his testimony. Under cross-examination the complainant changed his earlier version and said that during the alleged assault incident the lights in and outside the ward were on. It was through such lights he managed to see and identify the appellant and his co-accused from the time they entered the ward until they assaulted him.
- [6] At the close of the state case, the defence attorney, acting in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the Act), asked for the discharge of the accused on the ground that the state witness was suffering from mental illness and schizophrenic and that as a result, he was not a competent witness. In his submission, no reliance could be sought from the evidence of a person who was not competent to testify and he argued that the complainant's evidence be struck off.
- [7] Without hearing any medical evidence on the mental condition of the complainant the Learned Magistrate ruled that the complainant was in a lucid interval and that he was therefore a competent witness. She based her decision on the note the doctor, who examined the complainant nine (9) days after the alleged assault incident, had made in J88 form that the complainant was at the time lucid, and she dismissed the defence's application

for a discharge. However, the said doctor had not been called as a witness to explain and clarify his findings.

- [8] Subsequent thereto, the appellant testified for the defence and stated that the complainant was suffering from mental illness and schizophrenia. In support thereof, the medical record of the complainant was handed in by consent. The appellant denied that he and his co-accused had at any stage assaulted the complainant and stated that on the day in question the complainant had had a fight with one of the inmates of the institution, Gounden Govender. However, he stated that on the day of the alleged assault incident he and his co-accused were on night duty and that they administered medication to inmates including the complainant, using torches.
- [9] At the conclusion of the trial the Learned Magistrate accepted the evidence of the complainant as true and correct and rejected the evidence of the defence as false beyond reasonable doubt. The reasons for such decision were; Firstly, that the complainant was sane. Secondly, that he had given a full and clear account of what took place on the day in question. Thirdly, his evidence had been far better than the evidence of some of the witnesses that had testified before the Court a quo. Fourthly, that the complainant could vividly remember the evidence he had given six months prior to the adjournment date, and that his evidence has been consistent. She concluded by holding that in her view the complainant had shown no sign of mental disorder. Also, she held that in order for the accused to succeed, they must prove their case on the balance of probabilities.
- [10] A witness is competent if he or she may lawfully give evidence. Generally, everyone is presumed to be a competent and compellable witness. A compellable witness is one who is competent and in addition can be forced to testify under the pain of punishment in terms of section 189 of the Act. Section 192 of the Act provides:

“Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent to give evidence in criminal proceedings.”

In civil matters the corresponding section 8 of the Civil Proceedings Evidence Act 1965 provides:

“Save in so far as this Act or any other law otherwise provides, every person shall be competent and compellable to give evidence in any civil proceedings.”

However, some people lack competence because of undeveloped or impaired mental ability.

- [11] In terms of section 193 of the Act any question concerning the competence and compellability of the witnesses shall be decided by the Court in which criminal proceedings are conducted. The Court must decide all the questions relating to the competence of a witness to give evidence, not the parties. See *S v Khumalo* 1962(4) SA 432(NPD) 436. and *S v Katoo* 2005(1) SACR 522 (SCA) para 13.

The accused cannot consent to evidence being given by an incompetent witness. Thus when the state calls a person who is incompetent to testify for the state, cross examination by the defence does not render such person a competent witness. See *S v Kanyapa* 1979(1) SA 824(AD) 836-837.

[12] Disputes about the competence to testify are approached in the same way as disputes about admissibility. In the case of a trial where Assessors assist the Judge, the Judge alone will decide the point, even if questions of fact are involved. If necessary, a trial within a trial be held to dispose of the question of competence separately. See *CWH Schmidt and H Rademeyer*; *The Law of Evidence* para 8-4, *S v Thurston* 1968(3) SA 289(A) 291B and *S v L* 1973(1) SA 344(C). In *S v Zenzile* 1992(1) SACR 444(C), Thiring J held that it is not always necessary to decide the question of incompetency by means of a trial within a trial. The Court may base

its decision about a witnesses' competency on its own observation in the witness box.

[13] With regard to mentally disordered and intoxicated persons, section 194 of the Act provides:

"no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while he is so disabled or affected."

Mental illness maybe of a permanent or temporary nature. Incompetence is relative and only lasts for so long as the mental illness lasts. The fact that a person suffers from a mental illness or defect is not itself sufficient to warrant a finding that he or she is not a competent witness. The mental illness or defect must have a certain effect on his or her abilities. The words "while so afflicted" or "disabled" make it clear that a person is incompetent only while the mental affliction or disablement continues. What must be considered with the words "who is thereby deprived of the proper use of his reason" is the witness's ability to observe, to remember what he or she has observed and to convey this to the Court. See *S v Thurston*, *supra*, at 290D.

[14] In *S v Katoo*, *supra*, at 527

para 11 the Court held that both requirements set out in section 194 be satisfied: Firstly, it must appear to the Trial Court or be proved that the witness suffers from (a) mental illness or (b) that he or she labours under the imbecility of the mind due to intoxication or drugs or the like. Secondly, it must also be established that as a direct result of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason. Those two requirements must be collectively satisfied before a witness can be disqualified from testifying on the basis of incompetence.

[15] Section 193 enjoins the Trial Court to inquire into the issue and decide whether a witness is in fact competent. This, maybe done by way of enquiry whereby medical evidence on the mental state of the witness is led or by allowing the witness to testify so that the Court can observe him or her and form its own opinion on the witness's ability to testify. See *S v Katoo*, *supra*, at 528a.

- [16] Whether the witness was or is suffering from a mental illness or mental defect must be determined with the aid of psychiatric evidence. See *S v Mahlinga* 1967(1) SA 401(A) 417 F-H. In the present case, the Learned Magistrate without hearing any medical evidence as to the mental faculties of the complainant, both at the time of the commission of the alleged assault and at the time of testifying, held the complainant to be in a lucid interval, and such decision was merely based on the J88 form which was completed nine
- (9) days after the alleged assault. However, the medical practitioner who completed the form had not been called as a witness. As a result, it was not established whether the complainant at the time of the commission of the alleged assault was not afflicted with mental illness and that he had sufficient ability to observe and to remember what he had allegedly observed. Nor was it established what effect his then taking of medication had or would have had on his mental faculties. In his testimony, the complainant could not tell when he was admitted to the mental institution and for what reason. Without medical evidence it could not be established with certainty that the complainant was at the time of testifying not afflicted with mental illness or not labouring under imbecility due to the medication he was then taking.
- [17] The Learned Magistrate concluded by saying that the complainant was not suffering from any mental disorder on the ground that he had testified in a rational and intelligible manner and that he, complainant, was consistent in his testimony notwithstanding a six month gap in his testimony. In the absence of medical evidence it could not be established as to what had contributed to the complainant's
- fatigue in the middle of his testimony, the making of a withdrawal statement and his refusal to attend Court on the first adjournment
- date, if it was not due to mental affliction and disablement of mind due to the drugs the complainant was then taking in the form of medication. In the premises, the possibility of delusions and hallucinations on the part of the complainant could not be excluded,
- regard being had to the evidence of the appellant, supported by the medical record, that the complainant had psychotic problems.
- [18] Since no medical evidence was tendered to prove the complainant's capacity at the time of the commission of the alleged assault and at the time of testifying it could not be assumed from his behavior in Court that he was in a sane interval. A Court would be undertaking an impossible and even dangerous task if it were to seek a general symptom which would enable it to identify a mental abnormality as a "mental illness" or "mental defect". See *S v Mahlinga*, supra, at 417 F- H and *S v Kok* 2001(2) SACR 106(SCA) 110c-b.
- [19] The Learned Magistrate in the present case held that the complainant was not suffering from any mental disorder. It is trite that a Court cannot reach a decision that a witness is not suffering from mental illness without hearing evidence by a psychiatrist. See *S v Mahlinga*, supra, at 417. When the question of mental faculties arises, medical evidence is usually

adduced and the potential witness is to be questioned not only by the Court but also by the parties to the action. See *R v Creinhold* 1926 OPD 151 at 154. Instead, in the present case the Learned Magistrate took it upon herself to define medical phrases “mental illness”, “mental retardation” and schizophrenia” and she also analysed medication given to the complainant, nine (9) days after the alleged assault incident, and the effect thereof. Obviously, she assumed the role of a medical expert witness.

[20] Nor were the parties afforded an opportunity to question the complainant on his mental faculties. As a result, it was not psychiatrically

established whether or not the complainant was suffering from mental illness or whether at the time of the alleged assault incident he was not afflicted by mental illness, and whether when he testified he had sufficient capacity to testify in a rational and intelligible manner.

[21] Since an appropriate inquiry into the mental state of the complainant was not made, it could not be said that on the date of the alleged assault incident he had the necessary ability to observe what he alleged to have observed happening and to remember what he observed. Nor can the possibility of delusions and hallucinations on the part of the complainant be excluded.

[22] Before a Trial Court can convict upon such evidence it is necessary that the Trial Court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is a reason to suppose that such appreciation was absent, a Court of Appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks, is naturally to be in the reasons furnished by the Trial Court. See *R v Manda* 1951(3) SA 158(AD) at 163, *S v Khumalo and others* 1962(4) SA 432(N) at 436A-B. In the present case there is absolutely nothing in the Learned Magistrate’s reasons for judgment from which it can be inferred

that she appreciated the dangers inherent in the acceptance of the evidence of the complainant, the mental patient. At the time of the alleged assault incident the complainant had been detained in the mental institution for a period of five years. In my view, this was indicative of the severity of his psychotic condition.

[23] In *S v Thurston*, *supra*, the Trial Judge had allowed a witness who had apparently escaped from a mental institution to testify without inquiring whether he was a competent witness. The Appellant Division held this to be an irregularity. In the present case the Learned Magistrate had without hearing any medical evidence on the mental state of the complainant, at the time of the alleged assault incident and at the time he testified, held that he was not suffering from mental illness or metal disorder. The risks inherent in her decision are that the possibility still existed that the complainant was during the alleged assault afflicted with mental illness or labouring under the imbecility of mind, due to medication he had taken. According to the defence the complainant had a fight with another inmate of the mental institution. The complainant could possibly have hallucinated that it was the appellant and his co-accused who had assaulted him, instead. In the circumstances,

it cannot be said that the complainant had the necessary ability to observe what he claimed to have observed. The complainant had in mid testimony indicated that he was then tired of talking. He later signed the withdrawal statement and refused to attend Court. Asked under cross examination why he had earlier on said that during the assault incident the lights were off, the complainant testified that at the time he was confused. This behavior could possibly be attributed to his psychotic condition, regard being had to the fact that the appellant and his co-accused had come to his bed at night, using torches. In the premises, the decision by the Court a quo that the complainant was not suffering from any mental illness or mental disorder amounted to a serious irregularity for which the conviction must invariably be set aside.

- [24] With regard to the second question whether the accused in criminal proceedings has an onus to discharge in order to be acquitted, it is a general principle of our law that in criminal proceedings the accused is not obliged to convince or persuade the Trial Court of anything and the suggestion to that effect was misplaced. In order for the accused to be acquitted in the criminal trial his or her version must reasonably possibly be true. See *S v Jochems* 1991(1) SACR 208 (A). It, therefore, follows that the Learned Magistrate misdirected herself in holding that the appellant and his co-accused had an onus to discharge on the balance of probabilities. Nor were the accused obliged to explain why in all the years of his detention in the mental institution, the complainant would fabricate a story against them.
- [25] No argument has been advanced on sentence and it can therefore reasonably be inferred therefrom that the appellant has abandoned his appeal against sentence.
- [26] In the result, the following order is proposed:
- (a) The appeal against both conviction and sentence is upheld, and
 - (b) The conviction and sentence imposed by the Court a quo is set aside.
- And it is so ordered.

I agree, ____

K. PILLAY J

DATE RESERVED ON: 25/05/2010

DATE DELIVERED ON:

COUNSEL FOR APPELLANT: ADV P MARIMUTHU

COUNSEL FOR THE STATE: ADV I NEYT

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