

SOUTH AFRICA / JUDGMENT

Free v S (06/2010) [2010] ZANCHC 13 (30 April 2010)

[2010] ZANCHC 13

COURT

Northern Cape High Court, Kimberley

BEFORE

BM Pakati, M Phatshoane

CASE / FILE NUMBER

06/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION)

Review Case No.6/2010

Magistrate's serial No.16/2009

THE

STATE

V

WANDRY

FREE

REVIEW

JUDGMENT

PAKATI AJ

The matter came before me on special review in terms of section 304 of the Criminal Procedure Act 51 of 1977 (the CPA). The accused was convicted in the Regional Court, held at Douglas, in count 1 of kidnapping the complainant, a woman aged 20 years, and in count 2 he was convicted of raping the same woman. Both incidents are alleged to have taken place on 21 April 2007. In respect of the rape charge the accused was sentenced to five years imprisonment. In respect of the kidnapping charge the accused remains unsentenced for the reasons that I will explain. The Regional Magistrate, Mr P.S. Hole, gives three reasons for submitting the case for special review:

Failure to afford the State and the defence an opportunity to address Court and make submissions at the conclusion of the trial in terms of s175 of the CPA. Having realised his mistake during the course of sentencing in respect of the kidnapping conviction, the Magistrate purported to act in terms of s176 of the CPA and set aside the convictions on both counts and permitted the parties to address him and proceeded with the hearing as he should have done in the first place; and That he misdirected himself on the facts of the case; basically by confusing the fact that the alleged kidnapping was not from point A to point B but from point B to point C. It is unclear to me what that so called confusion matters if the facts establish that there was indeed a kidnapping.

I asked the office of the Director of Public Prosecution (DPP) for a legal opinion. I am indebted to Advocate Cathrene G Jansen, Senior State Advocate, for her helpful inputs. The accused was legally represented by an attorney, Mr Bergh. He pleaded not guilty to both counts and elected to exercise his Constitutional right to remain silent and not to give any plea explanation. The State adduced the evidence of several witnesses, including that of a DNA profiling expert that positively connected the accused to the rape of the complainant through the spermatozoa genetic material. This overwhelming evidence caused the accused, as legally advised, to alter his plea from not guilty to one of guilty. The Magistrate was satisfied, correctly in my view, that the accused has admitted all the elements of the charge of rape and convicted him in terms thereof. The penetration was per vagina and not per anus. There is one irregularity which Ms C G Jansen picked up. The accused was charged with rape as contemplated in s3 read with s1 and various other sections of the Sexual Offences and Related Matters Amendment Act; 32 of 2007. S3 broadens the definition of rape in this manner:

“Any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’),

without the consent of B, is guilty of the offence of rape.”

The rape took place on 21 April 2007. The provisions relevant to this charge came into operation on 16 December 2007. Subsections 69(2) and (3), dealing with some of the transitional provisions of the Amendment Act, are prospective and not retrospective. In any case when a law is

ambiguous and its provisions would affect the rights or interests of an accused adversely, there is a presumption against retrospectivity. See NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V BASSON (2002) 2 ALL SA 255 (A) at 256. As far as the rape conviction is concerned the legal requirement is that an accused person is entitled to require that he be informed of the charge with precision, or at least with a reasonable degree of clarity what the case is that he has to meet. See S v HUGO 1976 SA 536 (A) at 540E. This is what fairness in terms of s35 (3) of the Constitution requires. In the present case even though the accused was charged with the contravention of s3 of Act 32 of 2007 instead of the common law crime of rape there is substantial similarities between the charges. The accused was legally represented and he admitted all the elements of the common law offence of rape in his guilty plea, amplified by the evidence. He was therefore not prejudiced. In S v MHLANGO 2005 (1) SACR 209 (T) at 212 f-h the Court held:

“There is substantial identity between charges in terms of ss65(2) and (5), and the careless drafting of the charge sheet should not stand in the way of objective justice and the accused, having been represented and having admitted the relevant facts will most definitely not be prejudiced (S v Grey 1983 (2) SA 536 (C); R v Shimbakua 1955 (1) SA 331 (SWA) and R v Myende and Others 1959 (4) SA 135 (N).”

The Magistrate after convicting the accused realised that he committed some irregularities and purported to use s176 of the CPA to correct those irregularities’ as pointed out earlier. S176 of the CPA provides:

“When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment.”

A judgment which is based on the evidence placed before the court is final and the court has no competence to reconsider or amend it, either by virtue of its general inherent powers or in terms of s176 of the CPA because it is functus officio. See S v FISCHER EN N ANDER 1969 (2) SA 632 (A).

The same cannot be said with regards to the kidnapping charge. The accused pleaded not guilty to this charge. The record shows that it was never his intention to plead guilty. In R v PARMANAND 1954 (3) SA 833 (A) at 839E-G Greenberg J held:

“It is sufficient to say that, on the facts contained in the affidavit of the appellant and Sergeant van der Westhuizen, it is at least as clear that the conduct of the magistrate deprived the appellant of the opportunity to address, as was the case in the three decisions that I have cited that held that there had been such a deprivation and that the decision in Rex v Cooper (1926 AD 54) is not in conflict with the view that the appellant was so deprived. There was therefore an irregularity which would have entitled the appellant to have the magistrate’s decision set aside unless it was clear on the facts that, despite the irregularity, there had not been a failure of justice.”

It is my view that the failure to give an accused person an opportunity to address the court before judgment impacts negatively on the right to a fair trial under s35 (3) of the Constitution. The omission by the magistrate deprived the accused of this right and he therefore suffered prejudice.

It would be undesirable to comment on the merits of the kidnapping charge because the Magistrate must still be addressed on them before evaluating the evidence. I am also of the view that the same Magistrate, Mr P S Hole, should deal with the kidnapping charge to its conclusion. It also follows that the entry of the accused's name in the Register of Sexual Offences was wrong for the reasons already given and should be expunged from it. The sentence in respect of the rape conviction is on the lenient side and need not be disturbed. However, if the accused is convicted on the kidnapping charge the cumulative effect of both sentences must be carefully considered. It must also be taken into account the length of the sentence he already served, if any, and that as the accused is unsentenced on the kidnapping charge, the freshly imposed sentence cannot be antedated.

I make the following order:

The conviction and sentence of the accused on the charge of rape is confirmed. However, the words "ingevolge artikel Wet 32/ 2007" are deleted from the conviction to accord with the Common Law crime of rape. The kidnapping conviction on Count 1 is set aside. The accused must be brought before the same Regional Magistrate (Mr P S Hole) without delay (within three weeks) to allow the State and the defence to address the Court and to deal with the case in accordance with the law. The name of the accused must be expunged from the Register of Sexual Offenders.

BM PAKATI AJ

I concur.

M PHATSHOANE AJ

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Prepared on 9 October 2026 · Esheria