

SOUTH AFRICA / JUDGMENT

Lowery v Jordan (CA265/2011) [2013] ZAECHGHC 2 (24 January 2013) [2013] ZAECHGHC 2

COURT

Eastern Cape High Court, Grahamstown

BEFORE

JW Eksteen, NG Beshe

CASE / FILE NUMBER

CA265/2011

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IN THE HIGH COURT OF SOUTH
AFRICA

EASTERN CAPE,
GRAHAMSTOWN

C.A.&R.:

Review No.: 130050

Date Delivered:

NOT REPORTABLE

In the matters between:

THE STATE
and
XABISO MATIES
AND
Review No.: 130048
THE
STATE
ROCCO
PIETERSE
REVIEW

JUDGMENT

EKSTEEN J:

[1] These matters came before us on review in terms of the provisions of section 303 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the “CPA”). Both matters came before the magistrate of Patensie and were heard on 18 February 2013 and 2 November 2012 respectively. Maties was convicted of housebreaking with intent to steal and theft and sentenced to 2 years imprisonment whilst Pieterse was convicted of theft and sentenced to 18 months imprisonment.

[2] Both of these cases concern the provisions of section 73(2A)(e) of the CPA which provides:

“(2A) Every accused shall-

(e) at his or her first appearance in court,

be informed of his or her right to be represented at his or her own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance.”

Section 73(2A) gives expression to the fundamental rights of the accused as set out in section 35(3)(f) and (g) of the Constitution.

[3] In each of these cases the proceedings were mechanically recorded. In the case of Maties the transcript of the recording commences with the following communication by the presiding magistrate to the accused:

“Meneer u kan n prokureur aanstel vir u saak of self praat. U mag ook aansoek, uit die Regshulpsraad vir ‘n gratis prokureur as u ‘n prokureur wil hê, maar nie geld het vir een nie, verstaan u dit? --- Ek sal praat.” (Sic)

Immediately thereafter the charge was put to the accused and the trial proceeded without any legal representation.

[4] The transcript in the case of Pieterse contains a similarly cryptic communication by the presiding magistrate as follows:

“Rocco Pieterse u kan ‘n prokureur aanstel vir die saak of self praat. U mag ook aansoek by die regshulpsraad vir ‘n

gratis prokureur as u ‘n prokureur wil hê, maar nie geld het vir een nie, verstaan u dit? --- Ja (onhoorbaar)”

(Sic)

Again, the trial proceeded immediately thereafter without representation.

[5] In the case of Pieterse the handwritten record of appearance kept by the magistrate reflects an inscription that the rights to legal representation have been explained “as per annexure”. In the case of Maties there is no similar note.

[6] Included in the record in each case is a pro forma typed page completed and signed by the magistrate. The relevant portion thereof reads as follows:

“LEGAL REPRESENTATION

The seriousness of the offence and possible consequences of a conviction are explained to the accused. The accused is informed that he is entitled to have legal representation at his trial. The accused is further advised that should he not be able to afford legal representation, he can apply for assistance to the Legal Aid Board.

The accused understands.

Rights on insight in the docket are explained. The accused understands.

The accused indicates the following:

Own defence

The case stands down for Legal Aid application.”

(I have set out herein the English version of Annexure “B” contained in the record of each case. The magistrate completed the Afrikaans version.)

[7] At the foot of Annexure “B” the magistrate signed and, in the case of Maties, the date reflected thereon is 28/11/2013. The date is clearly erroneous and the transcript reflects that the trial commenced on 28 January 2013. The offence of which he was charged and convicted was committed on 25 January 2013.

[8] In each case Annexure “B” is self-contradictory in that it reflects simultaneously that the accused had elected to conduct his own defence and that the matter stood down for Legal Aid application. Annexure “B” is furthermore in each case in conflict with the mechanical transcript of the events which occurred in court and which I have quoted above in that the transcript does not reflect that the seriousness of the offence and possible consequences of a conviction or his right to insight in the docket were ever explained to the accused.

[9] In these circumstances when the matter of Pieterse came before the review Judge, Lowe J directed the following enquiry to the magistrate in the case of Pieterse:

‘1. The record indicates that on 2/11/12 (on date of trial) the magistrate signed annexure “B” indicating the accused’s rights were explained relevant to legal representation. This form indicated that the matter was to “stand down for Legal Aid representation”.

2. On the same day the matter proceeded the accused electing to represent himself which seems out of step with the form referred to above.

3. There was a very short explanation of the accused's legal representative right at commencement and none at all thereafter and certainly none at sentence stage.
4. See *S v Tsotsi and Others* 2003 (2) SACR 623 (W); *S v Melanie and Others* 1996 (1) SACR 335 (E) at 349g.
5. The form and what occurred would seem clearly indicates that the accused's entitlement to legal representation was not adequately explained or properly dealt with.
6. The magistrate's comments are requested in this regard as also whether this does not require the entire proceeding to be set aside.'

An identical enquiry was directed to the magistrate in the case of Maties.

[10] The magistrate's response was short. She states:

"I agree that the roneod form and rights as reflected on the transcribed record of proceedings do not correspond. The explanation of the rights of the accused may fall short to the requirements of the quoted case law.

I have no objection to the setting aside of the judgment and sentence."

- [11] The response of the magistrate is singularly unhelpful in that it offers no explanation whatsoever in respect of Annexure "B". Annexure "B", as stated earlier, is included as part of the record, however, the transcript does not reveal any explanation in accordance with what has been recorded in Annexure "B". The magistrate does not take the review Judge into her confidence in advising whether the content of Annexure "B" was explained to the accused prior to the commencement of the transcription or whether the transcription reflects the only explanation of rights nor whether the accused had initially elected to obtain legal aid or how the reference in Annexure "B" to the matter standing down in order for a legal aid application to be made came about.
- [12] In respect of the transcript of proceedings it appears that when Pieterse's rights were explained to him, to the extent that they were, the magistrate enquired whether he understood. His reply was: "Ja (onhoorbaar)". His reply does no more than to acknowledge his understanding of what had been conveyed to him and it does not appear from the record that he was granted any opportunity to make an election. The magistrate, in her reply to the reviewing Judge, does not attempt to reconstruct the reply from her own record and we are accordingly left none the wiser as to what was said which is recorded as being "indistinct".
- [13] In respect of Maties, when his rights were purportedly explained to him he merely stated: "Ek sal praat".
- [14] The question of legal representation has formed the subject of numerous judgments since 1994. In *S v Ndlovu*; *S v Sibisi* 2005 (2) SACR 645 (W) Kriegler, Kuny and Whiting AJJ concluded at 654a-c:

“(1) An accused must be informed promptly of his rights in regard to legal representation, substantially in accordance with the provisions of s 35(3)(f) and (g) of the Constitution and s 73(2A) of the Criminal Procedure Act 51 of

1977. This is essential, in the sense that, where the failure to provide him with this standard basic explanation of his rights

has the effect that he is deprived of legal representation at his trial, the proceedings will be vitiated by fundamental irregularity.

See, for instance, *Mgcina v Regional Magistrate, Lenasia, and Another* 1997

(2) SACR 711 (W); *S v Moos* 1998

(1) SACR 372 (C).”

[15] In this regard Froneman J in considering the provisions of the interim Constitution and the right to legal representation at the time of the arrest of an accused in *S v Melani and Others* 1996 (1) SACR 335 (E) stated:

“In order to give proper effect to an accused’s right in terms of s 25(1)(c) he/she must be informed of his/her right to consult with counsel in a manner that it can reasonably be supposed that he/she has understood the content of that right.”

[16] That the accused’s rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation. (See *S v Daniels en ‘n ander* 1983 (3) SA 275 (A) at 299G).

[17] Where there is an ambiguity on the record which gives rise to uncertainty the benefit thereof must accrue to the accused. Accordingly, where it is unclear from the record whether the accused’s rights were explained to him in the manner set out above it must be accepted, in favour of the accused, that such rights were not so explained. (See *S v Moos* supra at 380i-j.)

[18] It is however not sufficient to pay mere lip service to the rights to legal representation. In *S v Ndlovu*; *S v Sibisi* supra at 655 Kriegler, Kuny and Whiting AJJ went on to conclude:

“In order to protect the rights of an accused, it will also be essential ... that he be allowed a reasonable time in which to obtain legal representation. Similarly, where an accused is uncertain about whether to seek legal representation, it will be essential that he be afforded a reasonable opportunity to make up his mind (and perhaps also that he be encouraged to obtain legal representation). ...And where an accused wishes to obtain legal representation at State expense and his application to the Legal Aid Board has apparently been unsuccessful, it will be essential that the presiding officer should pursue the question whether “substantial injustice” would result if the accused were not provided with legal representation at his trial at State expense ...”

[19] I agree with these comments. The right to legal assistance which an accused has in terms of the Constitution becomes meaningless if he is not afforded an opportunity of exercising that right. (See also *Tsotetsi and Others* (1) 2003 (2) SACR 623 at 635e-f.)

[20] I have set out the content of Annexure “B” earlier herein. The contradiction contained therein, as alluded to earlier, remains unexplained. In these circumstances it must be assumed in favour of the accused in each case that they had initially, perhaps prior to the commencement of the transcript, indicated their intention to be assisted by the Legal Aid Board. The record does not reflect whether such an application was made or whether the trial proceeded prior to or without an application having been made nor does it provide an explanation for a change in stance.

[21] Against this background the content of the transcript should be viewed. I do not think that in either case the explanation by the magistrate as contained in the transcript adequately advised the accused of their right to be represented by a legal advisor of their own choice. The explanation, such as it was, was terse in the extreme. In the case of Pieterse it is apparent from the transcript that he was never afforded any opportunity at all to make an election as to whether he wished to appoint an attorney of his own, conduct his own defence or to apply for a representative from the Legal Aid Board to defend him. He did no more than to declare that he understood the explanation and the trial proceeded forthwith. In

respect of Maties he merely declared: “Ek sal praat”. I do not think that this response is indicative of him having understood the nature of his rights nor do I think that he can necessarily be accepted that he intended thereby to convey that he wished to conduct his own defence. In each case I think that the explanation falls short of what is required in law and in neither case am I satisfied that the accused in fact made an election or that he had adequate opportunity to do so.

[22] In these circumstances the accused in each case has been deprived of the opportunity of obtaining legal representation. The consequence thereof, I think, is that the accused has not enjoyed a fair trial. In *S v Makhandela* 2007 (2) SACR 620 (W) at 629j-630b Kriegler AJ stated:

“The right to legal representation is so fundamental to our concept of a fair trial that its wrongful refusal or frustration constitutes a failure of justice. Nor is there any occasion to try to ascertain from the record whether the accused has been prejudiced,

for one cannot know how the record would have read were it not for the irregularity”.

I find myself in agreement with these comments of Kriegler AJ.

[23] It follows, in each of these cases that the conviction and sentence of the accused should be set aside.

[24] In the result, in each case, the conviction and sentence of the accused is set aside.

J W EKSTEEN

JUDGE OF THE HIGH COURT

BESHE J:

I agree.

N G BESHE

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