

SOUTH AFRICA / JUDGMENT

Mandlazi v S (01/2020) [2020]

ZANWHC 9 (21 February 2020)

[2020] ZANWHC 9

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje, R D Hendricks

CASE / FILE NUMBER

01/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

HIGH

COURT REF NO: 01/2020

DISTRICT:

MOSES KOTANE

MAGISTRATE CASE NO:

RCA64/2018
KATLEGO
LESLEY MANDLAZI
APPLICANT
AND
THE
STATE
RESPONDENT
REVIEW

JUDGMENT

DJAJE J

- [1] This matter was sent on special review by the Applicant. He is charged with rape, kidnapping and contravention of a protection order. The criminal proceedings are currently pending in the Mogwase Regional Court. In this application the Applicant seeks an order to set aside the decision of the Regional Magistrate dismissing the application for the recusal of the state prosecutor in the pending criminal trial.

[2] The trial commenced on 5 March 2019 when charges were put to the Applicant and he pleaded not guilty. He was legally represented by an attorney from Legal Aid South Africa. The State called its witnesses and closed its case. The Applicant began with his testimony and requested the State to avail one of the state witnesses who did not testify, to be subpoenaed as a defence witness. After the matter was remanded several times for the said witness, the state prosecutor informed the Applicant and his attorney that the witness refused to sign the subpoena to come and testify for the defence. The Applicant is in custody throughout.

[3] On 11 November 2019, the Applicant applied for the recusal of the prosecutor from the matter. The following appears from the record of proceedings during

the application made on behalf of the Applicant:

“ACCUSED: I will not be able to proceed, Your Worship. Being prosecuted by Ms Mosonodi. I will ask her to be recused from this matter, because she normally comes at the waiting cells where she would tell me that I have been already found guilty, while we are not in courtroom, but she is saying all those in the waiting cells, Your Worship. Even this morning she approached me, saying I will rot in jail.”

[4] The state prosecutor denied the allegations by the Applicant and stated as follows:

“PROSECUTOR: No, I... Ms Pheeha was there and then I went there, I told him: “Sizwe does not want to come here:, and as for the fact that I went to him several times, telling him that he was going to remain in jail, I know nothing about that and I do not know. If he says he communicated same with Ms Pheeha, Ms Pheeha has not told me that the client was complaining that I told him that I was going to convict, because I am not the person who convicts, I am just placing

facts

before Court. I cannot tell him that kind of lies.”

[5] The Regional Magistrate dismissed the application and stated following:

“Now, in our present case here, the prosecutor quite correctly stated that she could not have told accused that she will convict him, let him rot in jail, because she does not have the power to do that. And, it is clear that even the accused’s Attorney accepted that, in actual fact, if the prosecutor had said that to the accused, the prosecutor does not have power to can say that, because he is not having the power to convict. So, in other words, the accused, I think, also realise that, should she proceed with trial, trial will not be unfair, because, according to the Attorney, the decision as to the guilt, or innocence of the accused does not lie with the prosecutor, it lies with this Court. And for that reason, the application by the accused to remove the prosecutor from this case, is refused and the application of accused, even for the Court to order trial renewal, is refused.”

[6] The Supreme Court of Appeal dealt with the role of prosecutors in *Porrit & Another v The NDPP & others* (978/13)[2014] ZASCA 168 (21 October 2014) at paragraph 11 and stated that:

“[11] There is a fundamental difference between the role and functions of a prosecutor as opposed to those of a magistrate or a judge. The judiciary is held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.”

- [7] The Regional Magistrate in this matter correctly found that the decision as to the guilt or innocence of the accused does not lie with the prosecutor. The prosecutor’s role in criminal proceedings is to place evidence before court with the view to have an accused person convicted as they conduct the trial for the state.

As stated in Porrit supra, “the role of prosecutors in a criminal trial cannot be equated with that of magistrates or judges. Their functions and responsibilities are different”.

- [8] In light of what was said in Porrit, there can be no basis for the Applicant to argue that he will not have a fair trial. The prosecutor, if indeed such words were uttered, does not have the responsibility to decide whether an accused should be convicted or not. In my view the Regional Magistrate was correct in dismissing the application for the recusal of the prosecutor.

Order

- [9] Consequently, I make the following order:

1. The application to have the decision of the Regional Magistrate reviewed and set aside is dismissed.
2. The matter is remitted to the Regional Court in Mogwase Magistrate’s court for the trial to proceed.

J. T. DJAJE

JUDGE OF THE HIGH COURT

I agree

R. D. HENDRICKS

DEPUTY JUDGE PRESIDENT NORTH WEST HIGH COURT

HANDED DOWN: 21 FEBRUARY 2020

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