

SOUTH AFRICA / JUDGMENT

Mathebula v S (A31/2017)

[2019] ZAMPMHC 1; 2020 (1)

SACR 534 (ML) (22 July 2019)

[2019] ZAMPMHC 1

COURT

Middelburg High Court, Mpumalanga

BEFORE

TV Ratshibvumo, S S Mphahlele

CASE / FILE NUMBER

A31/2017

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDLEBURG LOCAL SEAT

CASE

NO: A31 / 2017

In

the matter between:

BONGANI
CHARLES
MATHEBULA APPELLANT
and
THE
STATE RESPONDENT
J
U D G M E N T

RATSHIBVUMO AJ:

1.

Introduction:

The appellant was convicted by the Mpumalanga Regional Court sitting in Delmas on a charge of robbery with aggravating circumstances. Following the conviction, Regional Magistrate Greyvenstein sentenced him to 15 years imprisonment. The current appeal against both the conviction and the sentence is with the leave of the trial court.

2.

Background:

Here

is the background that brought about the appellant's conviction. On 12 June 2012 at Delmas a Vodacom outlet named High Cell was attacked by four men armed with firearms. This happened just as the store was about to open its doors to the public. After verifying that the CCTV cameras were not working, the assailants stole 54 cell phones valued at R102 000.00. The five High Cell employees were tied with cable ties and locked inside one of the offices in the store before the robbers fled the scene.

It was

the appellant's fiddling with the CCTV computer box that left a trail. His finger prints were uplifted therefrom ultimately leading to his arrest.

3.

The appellant did not dispute his fingerprints found and uplifted from the robbery scene. He however had an explanation to the effect that he worked as a technician subcontracted to Dimension Data, Olivetti and Ceicom. That contract only lasted for 7 years but in June 2012 they would still call him to do work for them in case he was not busy. These companies used to do IT work for Vodacom and as such he would be sent to various Vodacom shops all over the country to install or connect points. Although his memory faded as to the details such as date and the exact location, he could however remember visiting a Vodacom shop in Delmas for this work, which could have been the same shop that was robbed on 12 June 2012.

4.

This version was

refuted by the State which led the evidence of Stephanus Adriaan Kok, an IT manager for High Cell and a son of the owner of the shop that was robbed. His responsibilities involved all IT work and CCTV related issues for all their Vodashop and dealership including the shop that was robbed in casu. He did not know the accused and disputed ever allowing or inviting any person or company to do IT work at his father's store saying that was his responsibility. According to him, the store that was robbed was not owned by Vodacom, but it was owned privately by his father. He knew that there was no contract between Vodacom and his father or the store for Vodacom to do IT related work at the store. Moreover, had

the appellant done any IT related work at the shop, the three employees who testified in the trial including the store manager, would have testified to that effect, but they all disputed this. According to the expert who lifted the fingerprints on the day of the incident, the fingerprint was still fresh when it was uplifted.

5.

The appellant also raised an alibi saying that on the date of the robbery, he was in Zimbabwe. To that end, he produced a passport bearing the boarder stamps suggesting the entry and exit through the Beit Bridge border post. Evidence was however led by the State to disprove this. An officer from the Department of Home Affairs named Ms Estensia Mina testified that from the computer records of the department, the appellant did not legally leave South Africa between 28 April 2012 and 08 July 2012. The Department's IT system was upgraded so that since 2010, movements in and out of the country are not only stamped on the passports, but the passports are also scanned to capture the movements in the centralised data held by the department.

6.

Over and above being linked through the fingerprints, the appellant was identified at an ID parade by three different High Cell employees who were present when the robbery was committed. According to their evidence, the accused was the gunman who led the robbery and also fiddled with the CCTV computer box on the same day. At the hearing of this appeal, counsel for the appellant conceded that there was overwhelming evidence implicating the appellant and that she could not genuinely take the argument on appeal against the conviction any further. In my view, that was a wise concession to make.

7.

In line with principles laid down in Minister of Safety and Security and Others v Graig and Another NNO[1] the court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. I cannot find any misdirection on the trial court rejecting the appellant's version and its finding to the effect that the case for the State was

proved beyond a reasonable doubt.

8.

The sentence:

Counsel for the appellant was adamant that the trial court misdirected itself in imposing the sentence of 15 years imprisonment in that it allowed itself to be prejudiced by its personal experience in encountering the perpetration of crime. Counsel was referring to where the learned magistrate in imposing the sentence indicated that she understood what the victims of crime were going through because she has been a victim of crime herself. The relevant section of the judgment on sentence reads, “I have to consider community interest. I have to consider that many of the victims in this specific case were so traumatised, even after we took you down to the cells so that the court could have discussions with them in court about would they not be willing to continue as we had court time available. They were too traumatised to talk before you in your presence, and I cannot fault these people. I am also other than a presiding officer an ordinary human being who is the subject of victim, who is the victim of crime more often than I would like to be and it causes so much trauma that one cannot sleep at night without doing abnormal things. One cannot drive in the street without locking yourself in the car and being petrified to stop at every stop street and robot. One cannot go to town, go to the pharmacy across the road here without only hiding my bank card in a pocket out of fear that somebody will come and stab me to take the phone or the purse. That is real life in Witbank and Delmas. Innocent members of the community, hard-working, contributing towards keeping, maintaining this country, they have become prisoners in this country. We have policemen that work around the clock. If you look at the magnitude of work put into this case to try and get one criminal off the street, the money involved, the manpower involved, the loss of time they had to spend in a different way, it is just unbelievable.”

9.

The long standing sentencing principles laid down in S

v Zinn[2],
demand of a sentencing court to balance the triad consisting of the
offender, the crime and the interest of the society in arriving
at a
just sentence. While it is true that judicial officers should avoid
personal experiences and prejudices to influence their
decision
making while on the bench, it is equally true that they are human
beings who come from the very community whose members
are the victims
of crime. A fine balance needs to be struck to avoid understating or
overemphasising the interests of the society
over the crime and
legitimate needs of the offender. In reaching this goal, a judicial
officer needs not only come from the same
society, but should also be
seen and sounding as such and avoid being too aloof to the challenges
it faces over crime.

10.

This

balance is well explained by the Appellate Division in S
v Rabie[3]
when it held that “[a] judicial officer should not approach
punishment in a spirit of anger because, being human, that will
make
it difficult for him to achieve that delicate balance between the
crime, the criminal and the interests of society which his
task and
the objects of punishment demand of him. Nor should he strive after
severity; nor, on the other hand, surrender to misplaced
pity. While
not finching from firmness, where firmness is called for, he should
approach his task with a humane and compassionate
understanding of
human frailties and the pressures of society which contribute to
criminality.”

11.

It is clear that as
opposed to bringing the personal prejudices to the bench, the learned
magistrate was associating and identifying
herself with the
challenges faced by the society. She made it a point that after
identifying herself as such, she still imposes
a sentence not only
permissible in terms of the law but also takes into consideration the
triad referred to above. In terms of
the Criminal Law Amendment Act,
105 of 1997, the minimum sentence the accused had to undergo
following his conviction and in the absence of substantial and
compelling circumstances
is 15 years imprisonment. Emphasis is

unfortunately usually placed on the minimum sentences and not the maximum permissible in terms of this Act, which is 20 years imprisonment for a first offender. This sentence was contemplated by the trial court but after considering the appellant's personal circumstances and the time he spent in custody as an awaiting trial prisoner, it opted to impose the minimum sentence prescribed. I cannot find any misdirection by the trial court in finding no substantial and compelling circumstances that justify the imposition of a sentence below the prescribed minimum. As a result, the appeal against the sentence also stands to fail.

12.

Court's

decorum

We have noted few

disconcerting issues that could not escape our attention and that need to be corrected. On p. 79 of the record, the following appears,

"COURT:

Court orderly. Hallo staan op. Come do

your only work and that is give the,

please stand up I am talking to you. Bring the exhibit to the attorney. [Own emphasis].

On

p. 165 after a short discussion in which the magistrate voiced her frustration in that the matter was long on the roll the following appears,

"COURT:

I do not what to do (sic). It is an old matter, I am in trouble, it is a plea taken down a year ago, I have to go I have got to report to

the Chief Justice, what what..."

[Own emphasis].

13.

The conversation

between the magistrate and the court orderly suggests that the only work he does in court is to hand over exhibits to attorneys present

in court. But she should know better because this is far from the truth since court orderlies are court officers who see to it that

there is order, security and decorum in a court room. Court orders including the penalties imposed by the court would be academic if it

was not for these officers who see to it that orders are implemented and complied with. The remarks directed to the court orderly are

demeaning to his profession to say the least. The fact that they come from a presiding officer who should be taking the lead in respecting court officers is rather unfortunate. If we are not able to respect court officers and the support staff whose role is to bring efficiency in court, we cannot expect respect from members of the public since court decorum flows from the bench.

14.

Equally, the reference to the Chief Justice of the country as “Chief Justice What What” reflects disrespect overflowing from the courtroom to the highest judicial office in the land. I can only presume that this must have been in reference to Chief Justice Mogoeng Mogoeng. Without suggesting that she had a duty to know the name of the Chief Justice, the least she could have done is to merely refer to the office he holds simply as “the Chief Justice” as opposed to Chief Justice What What.

15.

Chief

Justice Gajendragadkar of India said, “[w]ise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.”[4] This approach found approval in South Africa when the Constitutional Court per Sachs J held, “[i]f respect for the Judiciary is to be regarded as integral to the maintenance of the rule of law, as I believe it should be, such respect will be spontaneous, enduring and real to the degree that it is earned, rather than to the extent that it is commanded.”[5]

16.

Court language

of record

We

also noted that there are witnesses who gave evidence in Afrikaans and this was not interpreted into English. Once the magistrate established that a witness was well conversant in Afrikaans; he/she would be allowed to give evidence in Afrikaans. It is a prerogative of the witnesses to give evidence in the language they prefer, but this should be interpreted into English which is the court language

of record.[6] The public prosecutor who was not well conversant in Afrikaans was forced to lead these witnesses in English and they responded in Afrikaans and their responses were not interpreted to English. A right to fair trial need not be limited at the accused having a right to have trial conducted in the language he understands, but should extend to the State and its witnesses having a fair opportunity to present their case too. I am not sure if the Public Prosecutor had a fair share to present the case for the State with this apparent language barrier.

17.

This trial took place before the adoption of the court language of record referred to above. However the potential prejudice in the State's presentation of its case and the fact that there are many trial records being submitted from the Lower Court to the High Court today that are in Afrikaans; beckon on us to intervene. To expect that the Judge President or any judge allocating the matters for appeal, review or petition, to allocate files based on language proficiency of a particular judge against the language used in the specific file, could be unnecessarily burdening the already busy office of the Judge President. Moreover, it is not always easy to detect if the trial record is in a particular language because in other instances, it is only in the middle of the record that court language gets switched to another in order to accommodate a witness and then back to the original language once the said witness finishes giving the evidence.

18.

Court language of record is English and it should be adhered to uniformly. Witnesses are free to give evidence in any language (not limited to 11 South African official languages), provided the same is interpreted into English which is the court language of record. This is not aimed at accommodating particular judicial officers presiding over cases at a particular time, but it is for smooth running of the court and administration of justice. As an individual. I may be conversant in all the 11 South African official languages, but judicial officers on the next hierarchy of the judicial system who

may have to deal with the same matter on appeal,
may not be
conversant in those languages. Where the trial is conducted in any
language other than the court language of record,
the presiding
officer has a duty to see to it that the record that is submitted to
the High Court is translated into English.[7]

19.

In the result the

following order is made:

19.1

The appeal against the
conviction and the sentence is dismissed.

TV

RATSHIBVUMO

ACTING

JUDGE OF THE HIGH COURT

I agree and it is so
ordered.

S S MPHAHLELE

JUDGE OF THE HIGH

COURT

FOR

THE APPELLANT: ADV I ERASMUS

INSTRUCTED

BY: LEGAL AID SOUTH AFRICA

MBOMBELA

FOR

THE RESPONDENT: ADV FW VAN DER MERWE

INTRUSCTED

BY: DIRECTOR OF PUBLIC

PROSECUTIONS

MPUMALANGA

DATE

HEARD: 28 JUNE 2019

JUDGMENT

DELIVERED: 22 JULY 2019

HEADS OF COURT RESOLUTION ON THE LANGUAGE OF RECORD IN SOUTH AFRICAN COURTS

In February 2003, the Heads of Court established a committee tasked with preparing a report on the usage of the various official languages of the country in the courts, to determine whether there are any issues with its usage and offer recommendations, if necessary. The view of the Heads of Court is that changes are necessary in the use of the various official languages in the courts, as not all languages are currently afforded the same status. Only English and Afrikaans

enjoy the status of official languages and the other nine are handled in exactly the same manner as foreign languages.

The question that therefore arises is how can the need for an increase in the usage of all official languages in the courts be recognised, when only Judges who speak a certain language end up adjudicating cases where the parties involved are from the same language group? An appropriate balance must be struck among the various cultural interests by addressing the need for factors such as the following:

- Providing for our constitutional imperatives on official languages, whilst taking practicality and expense into cognisance;
- Developing and advancing the official indigenous languages, with particular regard for the development of legal terminology in all official languages;
- Ensuring fair trials and hearings to make sure justice is served and access to justice is promoted, and
- Accommodating reasonable and legitimate expectations of all language groups in our country, within the severe constraints of various resources.

The Committee recommended that, for reasons of practicality, English should be regarded as the language of record for all courts. This should not deny the litigant, witness or legal practitioner the right, where practicable, to address the court in the language of his or her choice. In instances where a language other than English is used during court proceedings, it must be translated

contemporaneously into English. Where contemporaneous translation is not available, the court record, or portions of the court record in a language other than English, must be translated into English.

At the Heads of Court meeting held in March 2017, it was decided that the recommendation that English be the language of record at the Superior Courts must be implemented in the absence of a policy decision from the Executive in this regard.

[1] 2011

(1) SACR 469 (SCA). See also *R v Dhlumayo* 1948

(2) SA 677 (A)

[2] 1969

(2) SA 537 (A)

[3] 1975

(4) SA 855 (A) at p.866 para A-C.

- [4] In re, Under Article 143, Constitution of India AIR 1965 SC 745 at 791 para 142.
- [5] S v Mamabolo (E TV and Others intervening) 2001
- (1) SACR 686 (CC) para 78.
- [6] The Heads of Court Committee on court language policy established in 2003 recommended that English be the court language of record. This was adopted as a resolution by the Heads of Court under the auspices of the Chief Justice in March 2017 – see attached.
- [7] See S v Feni 2016
- (2) SACR 581 (ECB)
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Prepared on 10 October 2026 · Esheria