

SOUTH AFRICA / JUDGMENT

Mkhize and Others v S (AR 182/2013)

[2014] ZAKZPHC 31 (13 May 2014)

[2014] ZAKZPHC 31

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Vahed, Van Zyl

CASE / FILE NUMBER

AR 182/2013

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION,

PIETERMARITZBURG

Appeal Case No: -

AR 182/2013

DATE: 13 MAY 2014

In the matter between:

SIYANDA FORTUNE

MKHIZE.....First

Appellant

SKHUMBUSO

MTHEMBU.....Second

Appellant

VUSIMUZI

MTHEMBU.....Third

Appellant

And

THE

STATE.....Respondent

JUDGMENT

Vahed J:

[1] The Bangalore Principles of Judicial Conduct, 2002 (“The Bangalore Principles”), developed by the Judicial Integrity Group, with the active participation of Justice Langa (then Deputy Chief Justice) represents the lodestar of values for the conduct of judicial officers. Although its individual clauses make reference to “a Judge” that term is defined to mean “...any person exercising judicial power, however designated”. The Bangalore Principles divides the different areas of application and operation into sections described as Values. Value 6 deals with Competence and Diligence and the defining principle provides that “[c]ompetence and diligence are prerequisites to the due performance of judicial office”.

[2] The Bangalore Principles define the application of that principle to, inter alia, include:

‘6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.’

[3] In March 2006 the Judicial Integrity Group, this time under the Co-chairmanship of Chief Justice Langa approved a commentary on The Bangalore Principles for publication and dissemination “...in the hope that it would contribute to a better understanding of the Bangalore Principles of Judicial Conduct”. In the commentary on Value 6 read with application 6.6 they said:

‘The role of the judge

211. The role of the judge has been summed up by [Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 @ 64] in the following terms:

The judge’s part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. . . Such are

our standards.

Duty to maintain order and decorum in court

212. ‘Order’ refers to the level of regularity and civility required to guarantee that the business of the court will be accomplished in conformity with the rules governing the proceeding. ‘Decorum’ refers to the atmosphere of attentiveness and earnest endeavour which

communicates, both to the participants and to the public, that the matter before the court is receiving serious and fair consideration. Individual judges may have differing ideas and standards concerning the appropriateness of particular behaviour, language and dress for the lawyers and litigants appearing before them. What one judge may perceive to be an obvious departure from propriety, another judge may deem a harmless eccentricity, an irrelevancy or no departure at all. Also, some proceedings call for more formality than others. Thus, at any given time, courtrooms across a country will inevitably manifest a broad range of 'order' and 'decorum'. It is undesirable, and in any case impossible, to suggest a uniform standard of what constitutes 'order' and 'decorum'. Instead, what is required is that a judge should take reasonable steps to achieve and maintain that level of order and decorum in court necessary to accomplish the business of the court in a manner that is both regular and manifestly fair, while at the same time giving lawyers, litigants and the public assurance of that regularity and fairness.

Conduct towards litigants

213. A judge's demeanour is crucial to maintaining his or her impartiality, because it is what others see. Improper demeanour can undermine the judicial process by conveying an impression of bias or indifference. Disrespectful behaviour towards a litigant infringes on the litigant's right to be heard, and compromises the dignity and decorum of the courtroom. Lack of courtesy also affects a litigant's satisfaction with the handling of the case. It creates a negative impression of courts in general.

Conduct towards lawyers

214. A judge must channel anger appropriately. No matter what the provocation, the judicial response must be a judicious one. Even if provoked by a lawyer's rude conduct, the judge must take appropriate steps to control the courtroom without retaliating. If a reprimand is warranted, it will sometimes be appropriate that it take place separately from the disposition of the hearing of the matter before the court. It is never appropriate for a judge repeatedly to interrupt a lawyer without justification, or be abusive or ridiculing of the lawyer's conduct or argument. On the other hand, no judge is required to listen without interruption to abuse of the court's process or arguments manifestly without legal merit or abuse directed at the judge or other advocates, parties or witnesses.

Patience, dignity and courtesy are essential attributes

215. In court and in chambers, a judge should always act courteously and respect the dignity of all who have business there. A judge should also require similar courtesy from those who appear before him or her, and from court staff and others subject to the judge's

direction or 'control. A judge should be above personal animosities, and must not have favourites amongst advocates appearing

before the court. Unjustified reprimands of counsel,' offensive remarks about litigants or witnesses, cruel jokes, sarcasm, and intemperate behaviour by a judge undermines both order and decorum in the court. When a judge intervenes, he or she should ensure that impartiality, and the perception of impartiality, are not adversely affected by the manner of the intervention.'

- [4] All of that is well and good; but what has it to do with the present appeal?
- [5] The three appellants were the erstwhile second, third and fourth accused in the Kwa Dukuza regional court. On 20 August 2012 they were convicted of robbery with aggravating circumstances and, on 17 September 2012, were sentenced to each serve a term of imprisonment of eighteen years. The court a quo having refused leave to appeal, their appeal serves before us as a result of leave to appeal having been granted on petition to this Court.
- [6] During the late afternoon of 2 June 2008 four men entered the premises of Cheryl D Properties in the central business district of Stanger and proceeded to rob the premises and the people present there. Some of them were armed with firearms. All present in the premises, about eight in all, were escorted to a small back room where they were ordered to lie down on the floor. Some of them were assaulted in that process. During that process some of them were robbed of their cellular telephones and other personal belongings, including watches and jewellery. One of the robbers remained guarding them while the others returned to the main area of the premises, taking with them one of the ladies who worked at that office in order for her to show them where the money was kept. A short while later the robbers fled, taking with them approximately R7 000,00 taken from a drawer in the office, approximately R12 000,00 taken from one of the customers at the premises and an assortment of cellular telephones, watches and jewellery.
- [7] A few days later, on 10 June 2008, one of the ladies working at Cheryl D Properties noticed two males walking on the street in the vicinity of the premises and apparently recognised one of them as one of the assailants. The police were summoned and these men were arrested. Others were arrested still later and in due course an identity parade was conducted.
- [8] The appellants were duly charged and they and the erstwhile first accused all pleaded not guilty, each electing to remain silent and reserving the basis of his defence.
- [9] The State led the evidence of seven witnesses. These were Ronald Ngema, Vasanthi Sabiya, Getty Vilana, Devama (Rani) Naidoo, Collette Bruwer, Eugene Sithole and Lt Col Petronella Ngubane. Lt Col Ngubane conducted the identity parade and gave evidence about those proceedings. The remaining witnesses were all present during the robbery and gave evidence from their respective perspectives. Of these six only three made positive identifications of the assailants. These were Naidoo, Bruwer and Sithole who were able to identify one perpetrator each, ie, each identified one of the appellants.

- [10] From a conspectus of all the evidence of the six witnesses present during the robbery the overall nature of what transpired that day was pieced together. In general terms they corroborated each other as to the main events of the day.
- [11] Naidoo is the one who saw the two men walking past the premises on 10 June 2008. She was able to recognise the third appellant as one of the assailants and it is her identification that led to the arrests. She referred to him as being one of the robbers who had pointed a firearm at her. She was also able to point out the third appellant at the subsequent identity parade held on 12 June
2008. She was unable to identify any of the other assailants.
- [12] Bruwer identified the first appellant. She identified him as the person who wore an orange T-shirt during the robbery. He had gold strips on his teeth and a whitish mark in the region of his upper lip or moustache. She was the person who was taken from the back room to the main office to point out where the money was kept but the first appellant was not the person who did this. She could not identify that perpetrator. She also identified the first appellant at the identification parade and again in the dock at court. She could not identify any of the other assailants.
- [13] Sithole was a client of Cheryl D properties who entered the premises while the robbery was in progress. He identified the second appellant as the one who spoke with him and made this identification at the identification parade. He claimed to have also recognised the first appellant (the one with shiny teeth) but failed to point him out at the time. He said he only remembered later.
- [14] No one identified the erstwhile first accused and he was discharged at the end of the State case.
- [15] Each of the appellants testified in his defence.
- [16] The first appellant confirmed that he had gold enhancements to his teeth and a whitish blemish on his upper lip. He could not specifically recall the day in question but said he would have gone about his regular occupation of transporting children from school and thus could not have been on the scene.
- [17] The second appellant testified that he was employed at Palm lakes Estate near Tinley Manor and that he was at work on the day in question. He submitted in evidence the alleged attendance register and his name indeed appears thereon but it is fair to state that that document is undated. He also submitted a letter from his employer which confirmed that he worked for the full day on 2 June 2008. That document was accepted into evidence by the court a quo.

- [18] The third appellant testified that on the day in question he could not have been at the scene as he was convalescing from a significant injury sustained by him during an assault on 30 May 2008 and that on 2 June 2008 he was at the police station laying charges against his attackers. He produced a copy of the examination records from Stanger Provincial Hospital which reflect that he was treated there at approximately 21h10 on 30 May
2008. The records reflect his history as "...assault with multiple injury, chest pain, neck pain, swelling face and injury to right foot". The examination notes reveal that he had a "Racoon left eye plus subconjunctival haematoma" and a moderately severe swollen right foot and ankle. In common parlance a "racoon eye" is a black eye. The third appellant also called one Dlamini to testify on his behalf. Dlamini confirmed the third appellant's injuries and that he had to use a crutch to go about. He said that he was also aware of the third appellant's attendance at the police station on 2 June 2008. It is significant to note that upon the third appellant's arrest no injuries were noted on him and it is equally significant that Naidoo did not notice the racoon eye.
- [19] Each of the identifying witnesses was in effect a single witness. Their evidence had to be approached with a degree of caution. Although all the witnesses on the scene on 2 June 2008 corroborated each other on the general events, no one was able to secure corroboration on the specifics involving each appellant. That is understandable because they each had different experiences and different vantage points. The question remains whether the three individual identifications are sufficient to sustain the convictions.
- [20] The evidence of the three appellants presented, for each of them, versions that are reasonably possibly true. None was significantly shaken during cross-examination and the evidence of particularly the second and third appellants raises significant doubt as to the accuracy of their respective identifications. It is trite that the state bears the onus of proving their guilt beyond a reasonable doubt and to my mind that onus has not been discharged in this case. I am compelled to add in this regard that the magistrate's treatment of their evidence was perfunctory.
- [21] Ordinarily that would have been the end of this appeal but I am compelled also to add some remarks about the magistrate's handling of the case before her and to provide content to the remarks I made during the introductory portion of this

judgment.

Throughout the trial she made unwarranted remarks, intervened in the proceedings unnecessarily and committed fundamental mis-directions. I highlight only a few examples.

- [22] Early on in the trial, during the evidence of the second State witness, Vasanthi Sabiya, the following exchange took place between the magistrate and the witness immediately after her evidence in chief:

'COURT Are any of these people in court today? --- I am not sure.

I don't believe you, you are scared, aren't you? Am I right? You are scared to say anything. --- I ...
[intervention]

Yes, you don't have to answer me.'

[23] Regrettably, that unwarranted observation on her part set the tone for the magistrate's general conduct throughout the trial.

[24] At some point Naidoo was being cross-examined on her failure to notice scars on the face of the third appellant. The record reflects the following:

'COURT Come here, please, accused 4. Come here, please. No, come here. Stay there. Turn your face that way. Turn your face this way. He has got one scar on his left cheek, but on the side of his cheek, one about two and a half centimetre scar. Go back there.'

MS GOVENDER Your worship, if the Court can just note the scar on his nose as well.

COURT On where?

MS GOVENDER On his nose.

COURT Come back here. Oh, yes, I see now he has got a scar across his right nose, but this is three years later. Go back there. Across his right nostril.'

[25] The two instances where she used the word "please" in that exchange might just as well not occurred. Her attitude and tone comes through quite plainly.

[26] In only a few instances were the appellants referred to by name by the magistrate. In most instances they were simply addressed, individually or collectively, as "accused" in a discourteous manner.

[27] The magistrate's attitude to the appellants is revealed in the following remark she made to the third appellant during his evidence:

'COURT At Palm Lakes, after all this tooth nonsense, not nonsense, sorry, tooth problem.'

[28] The fact that she caught and corrected herself is irrelevant. Her "slip" was a manifest representation of the manner in which she regarded the evidence.

[29] At the conclusion of the evidence Attorney Mbambo who appeared for the first appellant asked for time to prepare. He indicated that he was not in a position to address the court on that day. Nonetheless the magistrate still called for argument there and then. Strangely, she called on the attorney Govender, who appeared for the second and third appellants to address her first. Only then was the prosecutor called upon. The record then reveals that at 12h55 Attorney Mbambo began with his address on behalf of the first appellant. The record does not indicate how long he spoke for, but immediately upon his address being concluded, and without asking whether anyone had anything to say in reply, the magistrate pronounced a verdict on the guilt of all the appellants and adjourned court, arranging to deliver her reasons on a resumed date. The bail of the three appellants was immediately cancelled.

[30] I find that turn of events to be most startling. Her immediate pronouncement of the verdict lends much weight to a predisposition in that regard.

[31] There is more. In her judgment on sentence the magistrate said:

‘The manner in which this robbery was carried out and accused 2’s injunctions to hurry up have led this Court to conclude that you are part of what is known as the five minute gang. I now have even more reason to believe that.

...

The legislature has enacted minimum sentencing provisions for these types of robberies. That is 15 years. This Court can find no substantial or compelling circumstances which would enable it to deviate from the prescribed sentences.

I have been told that my life was in danger this past weekend and came here today escorted by police. This Court regards this as an aggravating factor.’

[32] There was no evidence at all of the so-called “five minute gang”. The magistrate does not explain where she obtained that from and how it was ever relevant. Her “reason to believe” was, quite fortuitously, revealed later.

[33] As indicated earlier, the appellants were each sentenced to 18 years imprisonment. In her judgment refusing leave to appeal the magistrate said this:

‘In respect of the sentence, I sentenced you in terms of the minimum sentencing provisions for robbery with aggravating circumstances,

that is 15 years. The three years that I added on were because my life was threatened by some members of your gangs, that is the

information that I was given and that is why I came here under police protection. It had nothing to do with any other case that day, it was your case. And since the National Intervention Unit took that threat seriously I just abided by what they asked me to do.’

[34] It is simply unacceptable for a judicial officer to behave in that fashion. All in all there is much to be said for the submission made by Mr Khan, who appeared for the appellants, that the appellants did not receive a fair trial.

[35] Ms Mazibuko who appeared for the State had no hesitation in agreeing with Mr Khan. She freely submitted that the State case had problems and went on to point out that the magistrate’s conduct in repeatedly

interfering during the trial even when it was not necessary warranted censure.

[36] In sum, the magistrate’s conduct fell far short of that outlined in The Bangalore Principles.

[37] I make the following Order:

- a. The appeal is upheld.
- b. The convictions and sentences of all three appellants are set aside.

Vahed J

I agree

Van Zyl J

CASE INFORMATION

Date of Hearing: 20 February 2014

Date of Judgment: 13 May 2014

Appellant's Counsel: I Khan

Appellant's Attorneys: Pietermaritzburg Justice Centre

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Pietermaritzburg

Respondent's Counsel: A S Mazibuko

Director of Public Prosecutions

High Court Buildings

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