

SOUTH AFRICA / JUDGMENT

Moodien v S (A497/09) [2010] ZAWCHC 66 (4 March 2010)

[2010] ZAWCHC 66

COURT

Western Cape High Court, Cape Town

BEFORE

Traverso, Bozalek, Ndita

CASE / FILE NUMBER

A497/09

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

CASE

NO: A497/09

In

the matter between:

ANTHONY
MOODIEN Appellant
and
THE
STATE Respondent

JUDGMENT

: 4 MARCH 2010

TRAVERSO, AJP : [1] The appellant was charged with 3 counts in the Regional Court, namely rape, indecent assault and robbery. He pleaded not guilty on 24 July

2000. He was eventually convicted on 7 December 2000. On 30 November 2001 the case was transferred to the High Court for sentencing in terms of the minimum sentence legislation. [2] On 29 May 2002 he was sentenced to life imprisonment by Conradie, J (as he then was). [3] Before I deal with the merits of the appeal I wish to place on record this Court's displeasure with the delay in this matter coming before this Court. [4] From the record it appears that the appellant, shortly after the trial, decided that he wanted to note an appeal

against both the conviction and sentence. According to correspondence contained in the record, it appears that the appellant first wrote a letter applying for leave to appeal during the early part of 2003. On 7 February 2003 the Registrar of the High Court wrote to the appellant to inform him that his application for leave to appeal was out of time, and that he had to approach the Counsel who represented him at the trial to apply for condonation for the late filing of the appeal. Further correspondence followed and eventually the appellant applied for Legal Aid. His application was received by the Legal Aid Board on 27 November 2003. Short shrift was made of this application. It was refused purely on the basis that his application was submitted more than 6 months after the date on which he was sentenced. [5] In terms of the Legal Aid Guide in such circumstances legal aid will be "denied" by the Legal Aid officer because it will be "deemed that the appellant has no reasonable prospect of being granted condonation for the late application for leave to appeal. The appellant was informed of his right to appeal to the Chief Executive Officer of the Legal Aid Board. From the record it is not clear whether the appellant, who was incarcerated throughout, in fact followed the correct appeal procedure. What is clear is that the appellant wrote several letters which were sent to the Legal Aid Board and the Registrar of the High Court in a desperate attempt to get his application for leave to appeal heard. Eventually, when he still could not get any assistance, he, in 2005 wrote to the Public Protector for assistance. It is not clear from the record what steps, if any, the Public Protector took to assist the appellant. [6] Eventually on 11 July 2006 the Registrar of the High Court wrote a letter to the appellant stating: "YOU WERE REPRESENTED BY A COUNSEL DURING YOUR TRIAL. KINDLY LET US KNOW WHETHER YOU INTEND TO ENGAGE THE SERVICES OF A LEGAL ADVISER TO HELP YOU WITH YOUR APPLICATION OR INTEND TO DEAL WITH YOUR MATTER IN PERSON. IF YOU CANNOT AFFORD A PRIVATE LEGAL REPRESENTATIVE YOU CAN STILL APPLY TO THE LEGAL AID BOARD FOR THE APPOINTMENT OF ONE AT THE STATE (sic) EXPENSE. SHOULD YOU WISH TO APPLY FOR LEGAL AID, THE PRISON AUTHORITIES CAN ASSIST YOU WITH THE APPLICATION." [7] So the poor appellant was then back to square one. He was once again informed that he could apply for legal aid even though it was a foregone conclusion that it would be refused, because by now his application was nearly 4 years old. [8] It is not quite clear what transpired thereafter and how it came about, but eventually, on 18 May 2009 the Legal Aid Board filed an application for condonation and for leave to appeal, which was heard on 4 June 2009, on which date leave to appeal was granted. [9] For some six years the appellant received no assistance from the various role players to get his appeal to Court and waited for nearly eight years from the date of his conviction just to have his appeal heard. His desperate attempts to apply for leave seem to have fallen on deaf ears. He was sent from pillar to post. This is a shocking state of affairs and sadly, is not unique. All too often situations such as this arise where there are delays of up to 10 years before an application for leave to appeal is placed before a Judge. Structures must be put in place to assist prisoners in this regard. Situations such as these can, and indeed do, lead to a failure of justice and cannot be tolerated. It is a serious disregard for the most basic rights of this appellant, in particular, but also of any other appellant who is treated in the same way. [10] I move on to the trial in the Court a

quo. [11] It is common cause that the appellant was not made aware either in Court or in the charge sheet that the provisions of the Minimum Sentence Act, No. 105 of 1997 would be invoked in respect of the rape charge. At no stage was the appellant made aware of the fact that in terms of the Act he might face life imprisonment. It is by now well established that a failure to inform an accused person of this amounts to an irregularity, but that such a failure will not necessarily result in the proceedings in the Court a quo being vitiated. The test remains whether the appellant's substantive right to a fair trial has been impaired. See, inter alia, the following dictum of Mpati, JA (as he then was) in *S v. Ndlovu*. 2003(1) SACR 331 SCA: "The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly." [12] But that was not the only irregularity in the trial. One of the witnesses, Gareth van Rooyen, testified through an intermediary. It appears to be common cause that she was not sworn in. A failure to swear in an intermediary constitutes an irregularity. (See *S.*

- v. Motaunq, 2007(1) SACR 476, SECLD; *S.*
- v. Booii & Another. 2005(1) SACR 599 B.) This irregularity will not necessarily mean that the proceedings were not in accordance with justice. The cardinal question remains whether the appellant's substantive right to a fair trial has been impaired. In this case, even if it is accepted that van Rooyen's evidence becomes inadmissible because the intermediary was not sworn in, the question remains whether on the balance of the evidence a conviction is justified. (See *S.*
- v. Naidoo, 1962(2) SA 625 (A); *S.*
- v. Sivotula, 2003(1) SACR 154 (E).) [13] In addition the Magistrate did not follow any process to determine whether the witness would be subjected to undue stress before appointing the intermediary, but instead merely relied on the submissions of the State, despite the fact that the appellant indicated that he would prefer for the witness to testify in open Court. Ms Swart, who appeared on behalf of the respondent conceded that the necessary requirements were not followed, but submitted that even if the evidence given by the witness, Gareth van Rooyen,

is left out of the equation there is sufficient evidence for the conviction to stand. I agree with this submission, and will therefore, for purposes of this appeal, regard the evidence of Gareth van Rooyen as inadmissible. It is therefore not necessary to consider in any detail the other irregularities in the manner in which his evidence was presented. I will merely mention them. The Magistrate failed to warn Gareth to speak the truth. When he was halfway through his evidence the Magistrate realised this, and only then warned him and got him to repeat his prior evidence.

The Magistrate also allowed the witness to testify prior to establishing whether he was a competent witness. [14] Mr. Burgers, who appeared on behalf of the appellant argued that these misdirections, cumulatively viewed, are sufficient to warrant a finding that the appellant's right to a fair trial has been impaired. I do not agree. Although the misdirections are serious and unfortunate, they only have, as far as the conviction is concerned, bearing on the evidence of van Rooyen. As stated above, his evidence will be regarded as inadmissible and no regard will be had thereto. It was, in my view correctly, not suggested by Mr. Burgers that the evidence of the other witnesses were in any way tainted by these irregularities. If the rest of the evidence is sufficient to establish the guilt of the appellant beyond reasonable doubt, it cannot be said that his right to a fair trial was impaired. [15] It therefore remains to consider whether the guilt of the appellant was proved beyond a reasonable doubt. I will deal, in this regard firstly with the second count of indecent assault. If one ignores the evidence of van Rooyen, the only direct evidence on this count is that of the complainant. [16] The charge sheet on this count reads, inter alia, as follows: (This is my translation) "In that the accused on or about 20/3/1999 and at or near Ravensmead in the Regional Division of the Cape, wrongfully and indecently assaulted Alwina Faro by licking her private parts." (Emphasis supplied) [17] The complainant however testified that the accused assaulted her indecently by forcing her to lick his penis. I cannot agree with the finding of Conradie, J (as he then was) that this contradiction is of no consequence because both actions constitute indecent assault. Ms Swart, on behalf of the State, conceded that such a finding (by both the Magistrate and the Court a quo) cannot withstand legal scrutiny. The only allegation mentioned in the charge sheet was that the appellant licked her vagina. That is the charge to which he pleaded and that established the *lis* between the State and the appellant. If those allegations are not proved the accused is entitled to his acquittal. On this Count therefore the appeal must therefore succeed. [18] I turn now to counts 1 and 3, namely that of rape and robbery respectively. [19] The evidence on these counts were discussed fully in the judgment of the Regional Magistrate and subsequently by the Court a quo. I will therefore merely give a succinct summary of the evidence. [20] The complainant, Alwina Faro, was at the time of the incident 9 years old. She spent most weekends with her aunt, Mabel le Roux. She once again visited her on the weekend of 19 March 1999. On that day she accompanied her aunt to the house of Theresa Pretorius. The appellant arrived there and apparently lured the complainant and Gareth van Rooyen away from that house. He took the two children to school grounds where he, while threatening the complainant with a knife, raped her. He also robbed her of R10.00. The complainant thereafter ran away and got lost. A stranger came to her assistance and took her back to the home of Theresa Pretorius. [21] The appellant simply denied that he had set eyes on

the complainant on the day in question. There was however substantial corroboration of the complainant's evidence that she was in fact in the company of the appellant. I agree with the comment by Conradie, J that the appellant's evidence is so far fetched that it appears that he had lost touch with reality. [22] The complainant was found to be an honest and reliable witness. On a reading of the record there appears to be no reason to interfere with this finding. Her evidence that she was raped was corroborated by the medical evidence. The fact that she was in the presence of the appellant was similarly corroborated. The appellant's version was rightly rejected by the Magistrate. His version during evidence is totally irreconcilable with what he put to the complainant during cross-examination. During cross-examination he stated that he and the complainant had left the gathering which they attended to fetch spices at his home. This is in stark contrast with his evidence that he had never set eyes on the complainant prior to the commencement of the trial. In short, on the record I can find no reason to interfere with the Magistrate's finding that his evidence is not reasonably possibly true. What I have just stated applies equally to the charge of robbery. [23] In the circumstances the appeal in respect of these two counts must fail and the convictions must be confirmed. The appeal on count 2 (indecent assault) must succeed and the conviction and sentence in that regard set aside. Due to the irregularities referred to in paragraph 11 above, this Court is at large to interfere with the sentence on the rape charge. [24] Firstly, the appellant was not charged in terms of Act 105 of 1997, and therefore could not be sentenced in terms of that Act. But besides that, there are other circumstances which should have been taken into account. The appellant was a first offender. The complainant did not sustain any serious bodily injuries. Although the seriousness of the crime cannot be disputed, a sentence must be balanced and a Court cannot look at the seriousness of the offence alone. It cannot be said that the appellant cannot be rehabilitated -he is not a serial offender, and he was relatively young at the time of the commission of the offence. In all the circumstances I am of the view that a sentence of 18 years will be a fair sentence. [25] Accordingly I am of the view that the following order should be made:

- 1) The convictions of counts 1 and 3 are confirmed;
- 2) The conviction and sentence on count 2 is set aside;
- 3) The sentence on count 1 is set aside and substituted with the following: "18 (Eighteen) years imprisonment"
- 4) The sentence on count 3 is confirmed. TRAVERSO, A J P I agree: BOZALEK, J I agree: NDITA, J

TRAVERSO, AJP :

[1] The appellant was charged with 3 counts in the Regional Court, namely rape, indecent assault and robbery. He pleaded not guilty on 24 July

2000. He was eventually convicted on 7 December 2000. On 30 November 2001 the case was transferred to the High Court for sentencing in terms of the minimum sentence legislation.

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- [3] Before I deal with the merits of the appeal I wish to place on record this Court's displeasure with the delay in this matter coming before this Court.
- [4] From the record it appears that the appellant, shortly after the trial, decided that he wanted to note an appeal against both the conviction and sentence. According to correspondence contained in the record, it appears that the appellant first wrote a letter applying for leave to appeal during the early part of 2003. On 7 February 2003 the Registrar of the High Court wrote to the appellant to inform him that his application for leave to appeal was out of time, and that he had to approach the Counsel who represented him at the trial to apply for condonation for the late filing of the appeal. Further correspondence followed and eventually the appellant applied for Legal Aid. His application was received by the Legal Aid Board on 27 November 2003. Short shrift was made of this application. It was refused purely on the basis that his application was submitted more than 6 months after the date on which he was sentenced.
- [5] In terms of the Legal Aid Guide in such circumstances legal aid will be "denied? by the Legal Aid officer because it will be "deemed that the appellant has no reasonable prospect of being granted condonation for the late application for leave to appeal. The appellant was informed of his right to appeal to the Chief Executive Officer of the Legal Aid Board. From the record it is not clear whether the appellant, who was incarcerated throughout, in fact followed the correct appeal procedure. What is clear is that the appellant wrote several letters which were sent to the Legal Aid Board and the Registrar of the High Court in a desperate attempt to get his application for leave to appeal heard. Eventually, when he still could not get any assistance, he, in 2005 wrote to the Public Protector for assistance. It is not clear from the record what steps, if any, the Public Protector took to assist the appellant.
- [6] Eventually on 11 July 2006 the Registrar of the High Court wrote a letter to the appellant stating:

"YOU WERE REPRESENTED BY A COUNSEL DURING YOUR TRIAL. KINDLY LET US KNOW WHETHER YOU INTEND TO ENGAGE THE SERVICES OF A LEGAL ADVISER TO HELP YOU WITH YOUR

APPLICATION OR INTEND TO DEAL WITH YOUR MATTER IN PERSON. IF YOU CANNOT AFFORD A PRIVATE LEGAL REPRESENTATIVE YOU CAN STILL APPLY TO THE LEGAL AID BOARD FOR THE APPOINTMENT OF ONE AT THE STATE (sic) EXPENSE. SHOULD YOU WISH TO APPLY FOR LEGAL AID, THE PRISON AUTHORITIES CAN ASSIST YOU WITH THE APPLICATION."

- [7] So the poor appellant was then back to square one. He was once again informed that he could apply for legal aid even though it was a foregone conclusion that it would be refused, because by now his application was nearly 4 years old.

- [8] It is not quite clear what transpired thereafter and how it came about, but eventually, on 18 May 2009 the Legal Aid Board filed an application for condonation and for leave to appeal, which was heard on 4 June 2009, on which date leave to appeal was granted.
- [9] For some six years the appellant received no assistance from the various role players to get his appeal to Court and waited for nearly eight years from the date of his conviction just to have his appeal heard. His desperate attempts to apply for leave seem to have fallen on deaf ears. He was sent from pillar to post. This is a shocking state of affairs and sadly, is not unique. All too often situations such as this arise where there are delays of up to 10 years before an application for leave to appeal is placed before a Judge. Structures must be put in place to assist prisoners in this regard. Situations such as these can, and indeed do, lead to a failure of justice and cannot be tolerated. It is a serious disregard for the most basic rights of this appellant, in particular, but also of any other appellant who is treated in the same way.
- [10] I move on to the trial in the Court a quo.
- [11] It is common cause that the appellant was not made aware either in Court or in the charge sheet that the provisions of the Minimum Sentence Act, No. 105 of 1997 would be invoked in respect of the rape charge. At no stage was the appellant made aware of the fact that in terms of the Act he might face life imprisonment. It is by now well established that a failure to inform an accused person of this amounts to an irregularity, but that such a failure will not necessarily result in the proceedings in the Court a quo being vitiated. The test remains whether the appellant's substantive right to a fair trial has been impaired. See, inter alia, the following dictum of Mpati, JA (as he then was) in *S[^] v. Ndlovu*. 2003(1) SACR 331 SCA:
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- [12] But that was not the only irregularity in the trial. One of the witnesses, Gareth van Rooyen, testified through an intermediary. It appears to be common cause that she was not sworn in. A failure to swear in an intermediary constitutes an irregularity. (See *S. v. Motaunq*, 2007(1) SACR 476, SECLD; *S.*

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[13] In addition the Magistrate did not follow any process to determine whether the witness would be subjected to undue stress before appointing the intermediary, but instead merely relied on the submissions of the State, despite the fact that the appellant indicated that he would prefer for the witness to testify in open Court. Ms Swart, who appeared on behalf of the respondent conceded that the necessary requirements were not followed, but submitted that even if the evidence given by the witness, Gareth van Rooyen,

is left out of the equation there is sufficient evidence for the conviction to stand. I agree with this submission, and will therefore, for purposes of this appeal, regard the evidence of Gareth van

Rooyen as inadmissible. It is therefore not necessary to consider in any detail the other irregularities in the manner in which his evidence was presented. I will merely mention them.

The Magistrate failed to warn Gareth to speak the truth. When he was halfway through his evidence the Magistrate realised this, and only then warned him and got him to repeat his prior evidence.

The Magistrate also allowed the witness to testify prior to establishing whether he was a competent witness.

[14] Mr. Burgers, who appeared on behalf of the appellant argued that these misdirections, cumulatively viewed, are sufficient to warrant a finding that the appellant's right to a fair trial has been impaired. I do not agree. Although the misdirections are serious and unfortunate, they only have, as far as the conviction is concerned, bearing on the evidence of van Rooyen. As stated above, his evidence will be regarded as inadmissible and no regard will be had thereto. It was, in my view correctly, not suggested by Mr. Burgers that the evidence of the other witnesses were in any way tainted by these irregularities. If the rest of the evidence is sufficient to establish the guilt of the appellant beyond reasonable doubt, it cannot be said that his right to a fair trial was impaired.

[15] It therefore remains to consider whether the guilt of the appellant was proved beyond a reasonable doubt. I will deal, in this regard firstly with the second count of indecent assault. If one ignores the evidence of van Rooyen, the only direct evidence on this count is that of the complainant.

[16] The charge sheet on this count reads, inter alia, as follows: (This is my translation)

"In that the accused on or about 20/3/1999 and at or near Ravensmead in the Regional Division of the Cape, wrongfully and indecently assaulted Alwina Faro by licking her private parts." (Emphasis supplied)

[17] The complainant however testified that the accused assaulted her indecently by forcing her to lick his penis. I cannot agree with the finding of Conradie, J (as he then was) that this contradiction is of no consequence because both actions constitute indecent assault. Ms Swart, on behalf of the State, conceded that such a finding (by both the Magistrate and the Court a quo) cannot withstand legal scrutiny. The only allegation mentioned in the charge sheet was that the appellant licked her vagina. That is the charge to which he pleaded and that established the *lis* between the State and the appellant. If those allegations are not proved the accused is entitled to his acquittal. On this Count therefore the appeal must therefore succeed.

[18] I turn now to counts 1 and 3, namely that of rape and robbery respectively.

[19] The evidence on these counts were discussed fully in the judgment of the Regional Magistrate and subsequently by the Court a quo. I will therefore merely give a succinct summary of the evidence.

[20] The complainant, Alwina Faro, was at the time of the incident 9 years old. She spent most weekends with her aunt, Mabel le Roux. She once again visited her on the weekend of 19 March 1999. On that day she accompanied her aunt to the house of Theresa Pretorius. The appellant arrived there and apparently lured the complainant and Gareth van Rooyen away from that house. He took the two children to school grounds where he, while threatening the complainant with a knife, raped her. He also robbed her of R10.00. The complainant thereafter ran away and got lost. A stranger came to her assistance and took her back to the home of Theresa Pretorius.

[21] The appellant simply denied that he had set eyes on the complainant on the day in question. There was however substantial corroboration of the complainant's evidence that she was in fact in the company of the appellant. I agree with the comment by Conradie, J that the appellant's evidence is so far fetched that it appears that he had lost touch with reality.

[22] The complainant was found to be an honest and reliable witness. On a reading of the record there appears to be no reason to interfere with this finding. Her evidence that she was raped was corroborated by the medical evidence.

The fact that she was in the presence of the appellant was similarly corroborated. The appellant's version was rightly rejected by the Magistrate. His version during evidence is totally irreconcilable with what he put to the complainant during cross-examination. During cross-examination he stated that he and the complainant had left the gathering which they attended to fetch spices at his home. This is in stark contrast with his evidence that he had never set eyes on the complainant prior to the commencement of the trial. In short, on the record I can find no

reason to interfere with the Magistrate's finding that his evidence is not reasonably possibly true. What I have just stated applies equally to the charge of robbery.

[23] In the circumstances the appeal in respect of these two counts must fail and the convictions must be confirmed. The appeal on count 2 (indecent assault) must succeed and the conviction and sentence in that regard set aside. Due to the irregularities referred to in paragraph 11 above, this Court is at large to interfere with the sentence on the rape charge.

[24] Firstly, the appellant was not charged in terms of Act 105 of 1997, and therefore could not be sentenced in terms of that Act. But besides that, there are other circumstances which should have been taken into account. The appellant was a first offender. The complainant did not sustain any serious bodily injuries. Although the seriousness of the crime cannot be disputed, a sentence must be balanced and a Court cannot look at the seriousness of the offence alone. It cannot be said that the appellant cannot be rehabilitated -he is not a serial offender, and he was relatively young at the time of the commission of the offence. In all the circumstances I am of the view that a sentence of 18 years will be a fair sentence.

[25] Accordingly I am of the view that the following order should be made:

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"18 (Eighteen) years imprisonment"

- 4) The sentence on count 3 is confirmed.

TRAVERSO, A J P

I agree:

BOZALEK, J

NDITA, J

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