

SOUTH AFRICA / JUDGMENT

Nameka v S (CA&R 79/2020) [2020] ZAECGHC 49 (22 April 2020)

[2020] ZAECGHC 49

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi, J Roberson

CASE / FILE NUMBER

CA&R 79/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE DIVISION-GRAHAMSTOWN)
Case No: CA&R
79/2020

Delivered:	22 April 2020 In
the matter between:	XOLANI NAMEKA Applicant vs THE STATE Respondent REVIEW

JUDGMENT

MALUSI J:

- [1] This is an automatic review as provided in section 302 of the Criminal Procedure Act 51 of 1977(the Act). For convenience the applicant will be referred as ‘the accused’.
- [2] After initially reading the record I held the prima facie view that the proceedings were fraught with irregularities. I sought an opinion from the Director of Public Prosecutions on a number of

issues.

I am grateful to Mr Mdolomba of that office for a reasoned opinion. My prima facie view hardened to a conviction that the proceedings were not in accordance with justice. I directed that the accused be released from custody while this

judgment

was prepared.

[3] The accused was charged with one count of stock-theft in the magistrate's court, Maclear. It was alleged that he stole a sheep from Stockenstroom Farm, Maclear. He elected to conduct his own defence. He pleaded not guilty to the charge. The basis of his defence was an alibi.

[4] The State led the evidence of the owner of Stockenstroom and his two employees. They all testified to the effect that on the night of 18 November 2019 they disturbed two men in the farm kraal who had tied up two sheep. Upon their arrival in the kraal, the intruders fled and left the sheep inside the kraal. The number and identity of the intruders was at issue during the trial.

[5] In an effort to prove identity the following exchange transpired between the public prosecutor and the first State witness (the employee):

“Q: And you said you know accused (1) before court from a previous encounter?”

A: Yes, in May this year, and he was handed over to the police, do not know the outcome of his arrest. Sheep were stolen and we searched for the sheep, we followed the trail to Mdeni, arrived there, we went to certain homestead in Mdeni, accused before court already arrested by community where he sold the meat, and police called. It transpired it was the meat from sheep stolen from our farm . . .”

[6] When the accused cross-examined this witness he elicited answers which provided more detail about the Mdeni incident. The public prosecutor called the complainant and pursued the same line of enquiry in the following terms:

“Q: How do you know the accused?”

A: We had a previous brushing with stock-theft earlier this year. . .

Q: You told court previous encounter with accused?

A: Yes, couple of years ago also caught for stock-theft at Stockenstroom farm and he was caught [charged] and sentenced in Maclear. At some stage Mdeni residents phoned me and told me accused is selling meat and [asked] if I lost sheep again but had not lost sheep. We followed it up and could not identify the sheep as ours...

Q: So you know the accused from stock-theft on your farm a couple of years ago, the May incident in Mdeni and again saw him on 18 November 2019 at your farm?

A: Yes.”

[7] When the accused testified in his defence he was cross-examined by the public prosecutor who asked the following questions:

“Q: You were once arrested for stock-theft on Mr O’Mullane farm?”

A: Yes and convicted.

Q: Also met Mr O’Mullane and Thabo Ramopu in 2019 at Ncembu?

A: Yes during 2019.”

[8] In his address to the court on the merits the public prosecutor submitted that it was not the first time the accused was before court as there were previous encounters between the accused and the complainant together with his employee.

[9] In her judgment the magistrate noted the evidence of the State witnesses regarding the accused previous conviction and the Mdeni incident. She reasoned that the accused did not deny this evidence. She found that the two State witnesses were steadfast in their evidence on identity. She convicted the accused on this basis and other reasons provided.

[10] It is expressly prohibited in s197 of the Act that an accused may be asked or answer questions having the effect of showing that he has committed or has been charged or has been convicted with any offence other than the one the court is dealing with or that he is of bad character. The leading of evidence of previous convictions prior to the accused being convicted is excluded as inadmissible in s211 of the Act except in circumstances listed therein. Likewise s89 and s271 prohibit disclosure of previous convictions before the conviction of the accused.

[11] It has been held that disclosure of previous convictions of the accused to a magistrate before conviction of an accused is an irregularity that vitiates the proceedings.[1] Goosen J in Booyesen painstakingly pointed out the reasons judgments to the contrary were wrong.[2] I align myself with his reasoning.

[12] The centrality of the right to a fair trial and impartiality have been described in the following terms:

“In Dzukuda the Constitutional Court reminded us that at the heart of a right to a fair criminal trial and what infuses its purpose is for justice to be done and to be seen to be done. To this end a judicial officer must conduct a criminal trial in such manner that her open-mindedness, impartiality and fairness are manifest to all concerned, especially the accused. Impartiality, it has been said is the ‘cornerstone of a fair and just legal system and nothing is more likely to impede confidence in judicial proceedings than actual bias, or the appearance thereof. It is important that the public should have confidence in the courts and the system of criminal justice for upon this social order and scrutiny’ depend. Confidence allows trust to develop, which ultimately results in respect for the system and moral authority for the courts which are required to administer it. Unfortunately, trust and respect are easily eroded unless there is persistent and scrupulous adherence to the fundamental requirement of

impartiality.” [3] (Footnotes omitted).

- [13] On the facts of this case it is clear that the accused right to a fair trial was so compromised by the gross irregularities to a degree that justice was not done. The evidence about the Mdeni incident was very prejudicial to the accused. It had the effect of showing that he had a predilection to commit stock-theft. The disclosure of the previous conviction of the accused had a highly prejudicial effect on the mind of the magistrate. Her reliance upon it was the clearest indication that it ‘permeated her entire reasoning process’. In my view these gross irregularities vitiated the entire proceedings.
- [14] There are other disturbing aspects of the trial which call for comment. The prejudicial and inadmissible evidence was tendered at the behest of the public prosecutor. It is trite that public prosecutors are officers of the court who must conduct their duties fairly, transparently and honestly. They should not seek a conviction at all costs especially against an undefended accused.[4]
- [15] The record is bereft of any intervention by the magistrate to stop the public prosecutor seeking and the witnesses tendering obviously inadmissible evidence against an undefended accused. The magistrate should not be a supine umpire while the record is turned into a papery swamp with inadmissible evidence only waiting to render a verdict on what has been placed before her. The role of a judicial officer in a criminal trial was aptly stated by Harms JA in the following instructive remarks:
- “A criminal trial is not a game where one side is entitled to claim benefit of any omission or mistake made by the other side and a Judge’s position in a criminal trial is not merely that of an umpire to see that rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done. . .” Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirements or in the context of resources. . .”[5] (Footnotes omitted).*
- [16] It is trite that a magistrate must render assistance to the undefended accused. It is clear from the record that no such assistance was provided by the magistrate in this case. The accused clearly required assistance in presenting his case as it appears he was an unsophisticated labourer who had no clue how to present his case. Regrettably the magistrate did not provide such assistance and left him to his own devices.
- [17] The accused called his erstwhile co-accused as the defence witness. This person had tendered a guilty plea earlier on the same day. Due to a question put to the erstwhile co-accused by the public prosecutor I deemed it in the interests of justice to request that I be provided with the record of proceedings in that other case.

[18] It transpired from the record that both accused appeared before the same magistrate on 5 December

2019. Their cases were separated due to their different pleas to the charge. Though not reflected on the record, the magistrate in the exercise of her discretion must have decided that the accused would likely be prejudiced if a joint trial was held. The magistrate finalised the case against erstwhile co-accused by convicting him on his plea and handing down a sentence. That case is a subject of a separate judgment I have prepared.

[19] On the same day the trial against the accused commenced before the same magistrate. It was postponed on a number of occasions for different reasons until finalised on 23 December 2019.

[20] To the best of my knowledge there is neither a statutory prohibition nor authority that precludes a judicial officer from presiding in two separated cases emanating from the same charge. The same judicial officer presiding in the guilty plea case and later in the not guilty plea case has previously been endorsed by superior court.[6]

[21] The practice in our courts over a number of decades has been for different judicial officers to preside in separated cases. In my view this is good practice motivated by the appearance of bias of the judicial officer in the not guilty plea case. She would not come with an impartial mind as she already heard the facts of the case and accepted the version in the guilty plea.[7] Though judicial officers are trained to disabuse their minds of irrelevant considerations, the appearance of bias may be

overwhelming.

[22] Besides that consideration, it is a course of action laden with pitfalls. The magistrate convicted the erstwhile co-accused in the guilty plea case on evidence that on the night he acted alone. In the not guilty plea case she rejected that version and accepted evidence that the two accused acted in concert. Though perfectly understandable that the two verdicts were rendered based on the evidence presented in each case, it bodes ill for the legitimacy of the administration of justice in the eyes of the public. A justice system without legitimacy is a bridge to the slippery and perilous road leading to anarchy.

[23] In light of the view I take on the irregularities it is not necessary to consider the merits of the conviction. Suffice to record that the offence of theft was not completed on the evidence tendered. That view was supported with ample authority in the opinion provided by the Director of Public Prosecutions.

[24] In the result and for the above reasons it is ordered that:

24.1 The conviction and sentence of the accused are set aside.

T MALUSI

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

J ROBERSON

[1] Nkuna v S 2013

(2) SACR 541 (GPN); S v Njiva & Another 2017 (1) SACR 395 (ECM); Booysen v S 2016 (1) SACR 521 (ECG), Ramatar ibid,

[2] Booysen ibid, at paras 12-25.

[3] S v Ramatar 2018

(2) SACR 414 (WCC) at para 8.

[4] S v Masoka & Another 2015

(2) SACR 268 (ECP) at paras 8-13.

[5] Take and Save Trading CC & Others v Standard Bank of South Africa 2004

(4) SA 1 (SCA) at para 3.

[6] R v T 1953

(2) SA 479 (A).

[7] S v Withbooi & Others 1994

(1) SACR 44 (Ck) at 51F-I.

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