

SOUTH AFRICA / JUDGMENT

S v Afrikaner (36/24) [2024]

ZAWCHC 174 (19 June 2024)

[2024] ZAWCHC 174

COURT

Western Cape High Court, Cape Town

BEFORE

M Sher, R Henney

CASE / FILE NUMBER

36/24

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IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Review case no: 36/24

Ex Hermanus Mag Crt: A2643/23

In the matter of:

THE STATE

v

DONOVAN AFRIKANER

REVIEW JUDGMENT: 19 JUNE 2024

SHER, J (HENNEY J) concurring:

1. This matter comes before us on automatic review. The accused was arraigned in the Hermanus magistrate's court on 2 charges, each of which had an alternative. He was convicted on both main counts and sentenced to a term of 24 months imprisonment in respect of the 1st charge and 6 months imprisonment in respect of the 2nd, which were ordered to run concurrently.
2. As will be apparent from the narrative which ensues, the process that was followed in the trial and conviction of the accused can only be described as extraordinary and highly irregular.

The facts

3. The accused was arrested on 4 September 2023 for allegedly breaching a 'protection order' which was granted in favour of his mother on 6 May 2022, in terms of the Domestic Violence Act ('the DVA'). [1] Amongst its terms the order prohibited him from entering her residence in Hawston and from damaging her property.
4. Following his 1st appearance on 6 September 2023 the matter was remanded on several occasions for a bail application and legal aid representation.

However, the accused subsequently indicated he no longer sought bail and at his appearance on 21 November 2023 he informed the magistrate that he wished to represent himself, at which time the charges were put to him.

5. The 1st charge was that he had contravened s 17(1)(a) of the DVA by breaching the protection order on 2 September 2023, in that he had allegedly entered the residence of his mother and had broken her kettle and window. In the alternative thereto he was charged with malicious injury to his mother's property. The 2nd charge alleged, in both the main and the alternative count, that on the same date and at the same place he had assaulted his sister with intent to cause her grievous bodily harm, by kicking her on her back, hitting her with his fists, and threatening to kill her.
6. In its formulation the main count of the 2nd charge referred to the provisions of s 51(2) and Part 3 of Schedule 2 of the Criminal Law Amendment Act ('the CLA')[2] read with the provisions of ss 256 and 266 of the Criminal Procedure Act ('the CPA')[3] and s 1 (the definitions section) of the DVA. As far as the provisions of the CPA are concerned, s 256 provides that if the evidence in criminal proceedings does not prove the commission of the offence with which an accused has been charged but merely an attempt

to do so, he may be convicted accordingly, and s 266 provides that if the evidence does not prove the offence of assault with intent to commit grievous bodily harm but that of common assault, an accused may be convicted thereof.

7. Section 51(2) and Part 3 of Schedule 2 of the CLA are so-called minimum sentence provisions. They provide that a person convicted of an offence which is listed in Part 3 will be liable to a prescribed minimum sentence of not less than 15, 20 or 25 years imprisonment depending on whether they are 1st, 2nd or 3rd time offenders. However, although assault with intent to commit grievous bodily harm is one of the offences which is listed in Part 3, it only attracts a prescribed minimum sentence when it is committed on a child who is under the age of 16.
8. In this regard the charge was nonsensical. It alleged that the accused's sister was a child under the age of 16 years 'to wit 17' (sic) at the time, and that the age difference between the accused and his sister was more than 4 years. Given the averment that the accused's sister was 17 years of age at the time of the offence, the minimum sentence provisions referred to in Part 3 were therefore not applicable to him and the charge was not a competent one.

9. As an alternative thereto the accused was charged with common law assault with intent to do grievous bodily harm, without any reference to any of the aforesaid statutory provisions.
10. Although the intricacies pertaining to the main count of the 2nd charge were not explained to the accused, he was asked to confirm that he understood the charges as they were presented. In response he said that he intended to plead not guilty in respect of all the charges. However, on being questioned by the magistrate it was

evident that he did not appreciate the distinction between the various charges, so the magistrate put them to him again, without

explaining them, at which time the accused indicated that he wished to plead not guilty to the main count in respect of the 1st charge, but guilty to the alternative, and guilty to both the main and the alternative counts in respect of the 2nd charge.

11. The magistrate did not ascertain from the prosecutor whether the state was prepared to accept the accused's plea as tendered on any of the charges, and did not enquire whether the accused was prepared to submit an explanation in respect of his plea of not guilty (in terms of s 115 of the CPA) or inform him that he could be questioned (in terms of s 112(1)(b)) in respect of the

charges to which he had pleaded guilty. Instead of following the well-established procedures set out in these provisions the magistrate directed the state to proceed with evidence in relation to the first charge, whereupon the accused's mother was called to

the witness stand. The magistrate informed the accused that after she had given evidence in chief, he would have an opportunity to ask her any questions that he wanted. He did not inform the accused that, insofar as he differed from the evidence that was to be led, he had a duty to contest it, or that he had a duty to put his version.

12. The accused's mother confirmed that she had obtained the protection order which was referred to in the charge-sheet, against the accused. She was however not asked to confirm that a copy of it had been served on him or that he was otherwise aware of it. From the documents that were received by the court it appears that only a copy of the interim order which was issued on 8 April 2022 was served on the accused, on 19 April 2022, and there is no indication that the final order which was granted on 6 May 2022 was served on him.
13. As to the incidents which gave rise to the charges it was evident, from the outset of her evidence, that the accused's mother was at a friend's house at the time and did not witness or have personal knowledge of the accused's alleged breaches of the protection order. She said she was informed by her daughter (who came to her whilst she was at her friend's house) that she had found the accused in her home, and he had kicked the kettle thereby breaking it, and had 'beaten' her.

14. Although this evidence was clearly hearsay evidence of an incriminating nature and, as such, should not simply have been admitted unless there was an indication by the prosecutor that the source thereof i.e. the accused's sister, on whom the probative value of the evidence depended, would be called, the magistrate simply allowed it to go in without demur.
15. The accused's mother said that after her daughter had made a report to her in relation to the incident the accused had arrived and had started swearing at her, whereupon the police were summoned. According to the accused's mother the side of her daughter's face was 'swollen' because 'she was beaten'. Notwithstanding the possible hearsay or otherwise inadmissible nature of this evidence insofar as it related to the reason which was given for her daughter's allegedly swollen face, it was not placed in issue and was simply allowed without a query by the magistrate.
16. As far as the alleged damage to her property was concerned the accused's mother said that on her return home a day later, she found that the handle of the bathroom window was broken, and the accused had put his hand through the window. When the prosecutor asked her how she knew this she said she had been told this by her neighbour. Once again, this hearsay evidence was allowed by the magistrate without obtaining any indication from the prosecutor that the source thereof (the neighbour) would be called to confirm it.
17. At the conclusion of her evidence in chief the magistrate indicated that the accused could cross-examine her. At the outset the accused attempted to put to her that she had not been at home at the time of the alleged incident and when he had seen her at her friend's house she was under the influence of alcohol, but the court repeatedly intervened in this line of questioning, which was then abandoned. The magistrate then allowed the cross-examination to meander into an attempt, by the accused, to canvass the underlying family issues between him and his mother rather than to focus on the evidence which she gave. Although the magistrate did ask the accused, on more than one occasion, whether he had any questions in relation to the charges, he did not inform the accused that he was required to put his case to his mother in relation to what had occurred between him and his sister. The nearest

that the accused came to dealing with the charges was when he put to his mother that he did not break the kettle and that his sister had done so when she threw it to the floor, which he claimed had resulted in his feet being burnt, which his mother was unable to respond to. The accused did indicate that he had broken the bathroom window and his mother said that she had replaced the pane and had bought a new kettle, and the accused had given her his bank card so that she could reimburse herself for these expenses. She had however not drawn any money from the accused's account for this.

18. At the conclusion of her evidence the prosecutor asked for the matter to be postponed so that she could call a witness who was 17 years of age. In all likelihood this was an indication that the state intended to call the accused's sister. The matter was consequently remanded to

29 November 2023 for further trial, at which time the prosecutor indicated that she was no longer intending to call any further witnesses in respect of the 1st charge and was closing the state's case, and requested that the matter be finalised in terms of s 112(1)(b) of the CPA i.e. that the court should question the accused in order to determine whether he admitted all the necessary elements of the charges to which he had pleaded guilty. On what basis the prosecutor sought to invoke the provision is not apparent. It is of application at the time when an accused first pleads guilty to an offence with which they are charged, and the prosecutor accepts their plea. It does not find application when a prosecutor seemingly does not accept a guilty plea and chooses to present evidence to prove a case against the accused. In such instances the court is required to determine whether the evidence which is placed before it by the state, together with any evidence that may be produced by the accused, justifies a conviction on the charge(s).

19. The magistrate did not proceed to invoke s 112(1)(b) and informed the accused that he should address the court as to whether, in his 'opinion', the evidence which had been presented on the charge was sufficient to justify a conviction. Thus, it appears that the magistrate requested the accused to address him as to whether the state had made out a sufficient case for him

not to be discharged, in terms of s 174 of the CPA. In doing so the magistrate did not draw to the accused's attention that the state's case was based entirely on hearsay evidence which had not been corroborated by the sources thereof. In response the accused indicated that he had no submissions to make, whereupon the prosecutor submitted that the accused's mother had 'testified clearly' to the offence that the accused had been charged with, and the accused had not given any 'rebutting evidence'. Given that the court was dealing with the issue of whether discharge should be granted at the close of the state's case, the statement that the accused had not given any rebutting evidence was nonsensical. Notwithstanding this and notwithstanding that the evidence the state sought to rely on was largely inadmissible as it was uncorroborated hearsay evidence, and without affording the accused an opportunity to reply to the state's submissions, the magistrate proceeded to deliver an ex tempore judgment in which he held that, upon a consideration of the evidence which was presented by the complainant and the 'evidence' which had been presented by the accused 'under oath', in which he had admitted to all the allegations that had been made by his mother, he was guilty of breaching the protection order as charged, on the first charge. In this regard he found that the accused had breached the conditions which were imposed in the protection order by entering his mother's residence and breaking her kettle and window.

20. Bizarrely, despite the accused having pleaded to all the charges a while earlier, and despite having found him guilty on the main count in respect of the 1st charge, the magistrate then proceeded to ask the accused whether he was pleading guilty or not guilty on the alternative count thereto, whereupon the prosecutor again asked the magistrate to apply the provisions of s 112(1)(b).

21. Given that the accused had already been found guilty on the main count of the 1st charge this was wholly inappropriate. The magistrate did not immediately proceed to question the accused in terms of the aforesaid

provision but asked the prosecutor to re-put the alternative count to the accused (to which he had previously pleaded not guilty) for a 2nd time and directed the accused to plead to it again. Once again, the accused entered a plea of not guilty. The magistrate then proceeded

to direct a series of questions to him in terms of s 112(1)(b) in relation to the alternative count. During this exchange the accused

stated that whilst he was at his mother's residence his sister had arrived and started shouting and swearing at him. She also allegedly referred to his child, who had been born HIV-positive, in disparaging terms. The accused said this made him angry and he struck her with his fist, whereupon she took the kettle and threw it on the floor and ran out of the house. He followed her to the place where his mother was drinking with a friend, and an argument ensued between them. The accused then left and went to live elsewhere for a few days during which time he was attacked and stabbed by a group of unknown assailants. He was arrested by the police a few days later, at which time he was also allegedly assaulted by them.

22. After considering what the accused told him the magistrate was not satisfied that he had properly admitted to all the elements of the charge and he consequently altered the accused's plea to one of not guilty and directed the prosecutor to present evidence in respect thereof, whereupon the prosecutor proceeded to recall the accused's mother to give evidence for a 2nd time, even though, as previously pointed out she had no personal, first-hand knowledge of the events which gave rise to either of the charges and had not witnessed the accused damaging her property or assaulting his sister. No surprise then that, when she was asked, at the commencement of her second testimony, what had happened on the day, she said that she had not been at home at the time and had simply been told certain things by her daughter.

23. At this point the court adjourned for a few minutes. On resumption of proceedings the prosecutor again pointed out that the accused had already been found guilty on the main count of the 1st charge. Notwithstanding the reminder the magistrate allowed the accused's mother to continue to give evidence, at which time,

instead of eliciting admissible evidence she again referred to certain hearsay intimations which had been imparted to her by her

daughter and a neighbour. When asked by the magistrate whether she personally knew anything about the kettle and the window she said that she had not seen the accused damage or break either of them. How the magistrate could have asked the accused's mother this after finding that the accused had broken the kettle and the window, when convicting him on the main count, is beyond comprehension. Understandably, given this evidence the accused had no questions in further cross-examination, whereupon the state again reminded the magistrate that the accused

had already been found guilty on the main count of the 1st charge and proceeded to close its case, for a 2nd time.

24. The magistrate then informed the accused (for the 1st time) that he had the right to give evidence. The accused elected not to testify. The magistrate then proceeded to deliver a judgment on the alternative count to the 1st charge, notwithstanding that he had already convicted the accused on the main count thereto, in which he held that the elements of the offence had not been established and acquitted the accused.
25. Thereafter, the magistrate proceeded to direct the state to present evidence on the 2nd charge. Before the prosecutor did so he directed that the main count of the 2nd charge be put to the accused again and required him to plead to it for a 2nd time. After the accused again entered a plea of guilty thereto the magistrate sought to question him again in terms of s 112(1)(b). In response the accused largely repeated what he had previously said i.e. that whilst he was at his mother's house his sister arrived and they became embroiled in an argument, as a result of which he struck his sister on her neck. But this time he added that he had also kicked in her back, whereupon she threw the kettle at him. He said he knew that it was wrong for him to hit her, but he had not caused her any injuries.
26. Upon completion of the questioning the magistrate proceeded to deliver yet another judgment, which was all of a paragraph long, in which he held that he was satisfied that the accused admitted all the elements of the offence of which had been charged on the main count in respect of the 2nd charge i.e. assault with intent to commit grievous bodily harm, read with the relevant statutory provisions previously referred to.
27. From the transcript it appears that the magistrate made no finding or determination in open court, during the proceedings, in respect of the alternative count on the 2nd charge. However, it appears from the J15 that he initially recorded on 29 November 2023 that he had also found the accused

guilty on the alternative count to the 2nd charge, which he then 'immediately corrected' by drawing a line through it.

28. Upon the conclusion of the proceedings in respect of conviction the state proceeded to prove the accused's previous convictions. These included a conviction some 10 years ago on a charge of malicious injury to property, and convictions of breaching a protection order in November 2022 and March 2023, for which the accused received a suspended sentence of 6 months imprisonment and a sentence of 90 days imprisonment, respectively. After eliciting the accused's personal circumstances the magistrate then sentenced him to 24 months imprisonment on the 1st charge and 6 months imprisonment on the second, which were ordered to run concurrently.

An assessment

29. As is evident from what has been set out, several gross and material irregularities occurred in the arraignment of the accused.
30. Instead of applying the established processes which are provided for in ss 112 and 115 of the CPA, in a holistic, single exercise at the time when the accused was first called upon to plead, and without even ascertaining from the state whether it was prepared to accept the accused's plea to any of the charges, the magistrate diverted therefrom and directed that the trial take place in a piecemeal and haphazard fashion.
31. Immediately after the accused pleaded to the charges the magistrate instructed the state to produce evidence on the 1st charge only. In the process he allowed the state to elicit incriminating evidence against the accused, which was inadmissible, in that it was entirely of a hearsay nature and there was no indication that it would be confirmed by the original sources thereof. Thereafter, he invited the accused to make submissions pertaining to a possible discharge on the 1st charge even though there was no admissible evidence on which he could properly be convicted, and even though discharge proceedings only take place at the conclusion of the state's case in respect of all the charges which an accused is facing.
32. He then proceeded to convict the accused on the main count of that charge, on the basis that his guilt had been proven by the hearsay evidence which had been given by his mother and the 'evidence' which he had given 'under oath', in which he had supposedly admitted to the elements of the charge, when he had in fact not testified and the proceedings were concerned with an application for discharge.
33. Then, notwithstanding that he had already convicted the accused on the main count, he proceeded to direct the prosecutor to put up evidence pertaining to the alternative thereto, and required the accused to re-plead to it for a 2nd time, and again allowed the witness who had previously testified, to be recalled and to give evidence on aspects on which she was unable to provide any direct, admissible evidence. He then proceeded to deliver a 2nd judgment (in respect of the same charge) in which he acquitted the accused on the alternative count thereto before directing the state to present evidence on the 2nd charge and requiring the accused to plead to it again.
34. He then again purported to apply the provisions of s112(1)(b) of the CPA, before delivering a 3rd judgment, in which he held, in a single paragraph, that the accused was guilty on the main count of the 2nd charge, as charged. As previously pointed out, the main count was defective in that, although in its formulation it made reference to various provisions of the Criminal Law Amendment Act of 1997 pertaining to prescribed minimum sentences these were not applicable as the victim of the alleged assault was not a child under the age of 16, according to the charge-sheet itself. The accused was never asked about his sister's age and no evidence was tendered by the state in this regard and he could accordingly not be convicted on this count on this basis.

35. Another reason why he could not be found guilty 'as charged' on this count is that he was never asked whether he intended to inflict grievous bodily harm to his sister during his initial questioning in terms of s112(1)(b) and he made no admissions to this effect. Likewise, although when he was questioned again he seemingly admitted to having assaulted his sister by striking her on her neck and kicking her, after she had provoked him, nothing in the exchange between him and the magistrate indicated that in doing so he ever had any intention to inflict grievous bodily harm, or to plead guilty to such a charge, and no admissible, first-hand evidence pertaining to any injuries which his sister may have sustained was tendered. In fact, the accused claimed that she had not sustained any injuries at all. Although according to the accused's mother her daughter's face was 'swollen', the accused claimed he had struck her in the neck, and whether the alleged swelling of one side of her face was in fact sustained in the incident was therefore unclear. In the circumstances, at best the accused could possibly have been convicted of common assault, as it was a competent verdict.
36. There is a further problem with the trial and conviction of the accused on this count. As indicated previously, in terms of s 51(2)(b) of the Criminal Law Amendment Act, an accused who is convicted of an offence in terms of Part 3 of Schedule 2 of the CLA becomes liable to a prescribed minimum sentence. But in terms of the section that sentence can only be imposed by a regional court or a High Court, and a magistrate's court does not have the jurisdiction to do so. It seems to me that, in seeking to arraign the accused on a charge formulated in terms of the section read with Part 3 of Schedule 2, the state therefore sought to try the accused before a court which did not have the necessary jurisdiction, as far as the charge, as formulated, was concerned. But even if the court did have jurisdiction to try the accused on the charge, having found him guilty thereof the magistrate did not have the power to impose an appropriate sentence on him, as required and prescribed by the section, and was required to refer the matter to the regional court for this purpose.
37. Then, to compound the irregularity it appears from the J15 that the accused was also convicted on the alternative count to the 2nd charge, albeit not in open court and in his presence, a conviction which was then scrapped or reversed by the magistrate, as an 'immediate correction'.
38. A magistrate does not ordinarily have the power to scrap or reverse a conviction that he/she has wrongly entered against an accused: that is something only a higher court can do, as he is considered to be *functus officio* i.e. to have discharged the powers he has to convict or to acquit, once he has pronounced on an accused's guilt.

39. It is so that in terms of s 176 of the CPA where 'by mistake' a 'wrong judgment' is 'delivered' in a criminal matter, it may be 'amended' immediately after it is recorded.[4] But as is evident from the transcript, the magistrate never formally pronounced upon the alternative count to the 2nd charge during the course of any of the 3 judgments he rendered and it is therefore doubtful whether he could 'correct' the conviction he noted outside of court, in terms of this provision.
40. In Wells, [5] s 176 was held by the Appellate Division to afford a presiding officer in a criminal matter the power of *explicare et emendare* in relation to a judgment that has been delivered i.e. the power to explain what might be obscure or unclear in the judgment and, in doing so, to correct the wording thereof where necessary, provided that the substance and tenor of the judgment is preserved. Thus, this power has commonly been exercised to correct patent typographical or grammatical errors or word choices or obvious omissions, or to clarify 'obscure formulations'.[6]
41. Recently, in Tuta
- [7] the Constitutional Court narrowed the ambit of this power of correction. It pointed out that as an accused is entitled to know the reasons upon which a court relied to convict him, these should accordingly be clearly and precisely formulated, so that he/she is able to consider the merits of the court's decision, with a view to exercising the right to a possible appeal, if warranted. Consequently, an accused must be able to rely on the reasons which are given in the judgment, as they reflect the curial pronouncement of the court's authority, and these should be made known in open court, in his presence. As a result, a person who is convicted of an offence should not be required to suffer 'ex post reformulations' (sic) or explanations which the presiding officer considers, on reflection, to best express the reasons for finding as he/she did. The CC held that therefore, whereas revisions in respect of 'infelicities of style, grammar, spelling and word choice' in judgments that are handed down *ex tempore* in criminal matters, may be permitted afterwards, the reasons given by the court in its judgment may not be altered or embellished to give further expression to what the court meant to convey.
42. On the face of it the deletion of the finding of guilty on the alternative count to the 2nd charge does not appear to amount to a correction of the kind envisaged in either Wells or Tuta. It was clearly not the correction of a typographical or grammatical error or unfortunate word choice, or of an obscure formulation. The only way it could qualify is if one considers it to have been an attempt to correct a patent error that was made, in noting that the accused had been found guilty on this count, instead of recording that the accused was found not guilty, as he had already been found guilty on the main count. The difficulty that I have with such a construction is that it is evident from the transcript that the magistrate never formally pronounced on the alternative count to the 2nd charge, at any time during the proceedings. Such a construction may have been tenable if the magistrate had, upon convicting the accused on the main count to the 2nd charge, or at any time before sentence, informed the accused that he had found him not guilty on the alternative. Then it

would have been clear that the 'correction' which was made on the J15 was made simply to bring the record in line with the finding that was made in open court.

43. But, even if one accepts this as an explanation for what happened, the difficulty I have is that the 'conviction' on this charge was deleted or scrapped by the magistrate, in the absence of the accused. This was contrary to the provisions of ss 152 and 158 of the CPA which require that, except where otherwise provided for by the Act, criminal proceedings must take place in open court and in the presence of the accused. Neither the error in recording a 'conviction' on the alternative count to the 2nd charge nor the 'correction' thereof were disclosed or made known to the accused, in proceedings in open court. In my view what was done therefore also amounted to an irregularity. In any event, as is evident, the accused was impermissibly subjected to a piecemeal process in which he was required to plead repeatedly to charges he had previously pleaded to, and was subjected more than once to questioning, purportedly in terms of s 112(1)(b) of the CPA. He was wrongly convicted on the first charge on the basis that he had testified, when he had never given evidence at all, and when the evidence which had been tendered was inadmissible evidence that had no value. On the second charge he was convicted on the main count as charged, when the charge as formulated was defective and the evidence did not substantiate it.

Conclusion

44. In my view the numerous, egregious irregularities in the process which was adopted resulted in a trial which was manifestly irregular and unfair, contrary to the accused's constitutional rights to a fair trial in terms of s 35 of the Constitution, and it would constitute an abject failure of justice were the convictions to be allowed to stand.
45. This is a most unfortunate state of affairs given the admissions which were made by the accused during the course of the repeated

questionings to which he was subjected by the magistrate in relation to both charges, but in my view the proceedings as a whole were vitiated cumulatively by the irregularities that have been highlighted. In the interests of the due and proper administration of justice it is important that the necessary corrective measures be applied, in order to ensure that criminal proceedings in magistrate's

courts adhere to due and proper process. In this regard in *Thebus* [8] the Constitutional Court pointed out that the concept of a fair trial is not limited to ensuring fairness to an accused but must also have regard for the interests of society and the administration of justice.

46. In the result I would make an order setting aside both the convictions and the sentences imposed. I would also order that a copy of the judgment be sent to the Chief Magistrate for the district of Hermanus.

M SHER

Judge of the High Court

(Signature appended digitally)

I agree, and it is so ordered.

R HENNEY

[1] Act 116 of 1998.

[2] Act 105 of 1997.

[3] Act 51 of 1977.

[4] Section 298 of the CPA similarly provides that in instances where a wrong sentence is passed 'by mistake' it may be amended.

[5] S v Wells

[1990] 2 All SA 1(A) at 820E-F

[6] Tuta v S 2024

(1) SACR (CC) para 123.

[7] Id para 61.

[8] Thebus v S

[2003] ZACC 12; 2003 (6) SA 505 (CC) para 107.

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