

SOUTH AFRICA / JUDGMENT

S v Gordon (171298) [2018]

ZAWCHC 106 (29 August 2018)

[2018] ZAWCHC 106

COURT

Western Cape High Court, Cape Town

BEFORE

DM Thulare, MI Samela

CASE / FILE NUMBER

171298

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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REVIEW 171298

In the matter between

THE STATE

V

MAXWELL GORDON

JUDGMENT DELIVERED ON 29 AUGUST 2018

THULARE AJ

- [1] This matter came before this court on review. The matter commenced in the District Court sitting at a periodical court in Darling and after the conviction of the accused, was referred to the Regional Court for sentencing. The Regional Magistrate, sitting in Malmesbury, expressed doubt on whether the proceedings were in accordance with justice, and referred the matter to the High Court.
- [2] The Regional Magistrate did not present the Memorandum that she had compiled, to the District Court Magistrate (the Magistrate) before submission to the High Court. The matter was referred back to the Magistrate for the statement, if any, on the comments of the Judge as well as a response, if any, to the Memorandum of the Regional Magistrate.
- [3] The accused was convicted on 21 February 2017. The Memorandum of the Regional Magistrate is dated 15 September 2017. The referral of the matter back to the Magistrate was ordered on 12 December 2017 immediately after receipt of the record. The Magistrate in his

statement expressed his shock at only receiving the Judges' referral back for his statement only on 11 June 2018, that is, some six months later. According to the Magistrate, the record including the referral back was simply archived without being referred for his attention. Except that his statement is dated 14 June 2018, the statement bears no stamp as an indication of when it was received by the clerk of the court or by the Registrar of the High Court.

- [4] The accused enjoyed legal representation from Legal Aid South Africa, but terminated their mandate just before plea. The State put two charges to the accused, to wit, housebreaking with intent to steal and theft, and as an alternative, unlawful possession of goods in regard to which there was a reasonable suspicion that the goods had been stolen and the accused was unable to give a satisfactory account of such possession. The accused pleaded not guilty to the main charge and guilty to the alternative charge.
- [5] The record of proceedings simply state that the provisions of section 115 Act 51 of 1977 as well as section 220 Act 51 of 1977 and the right to remain silent were fully explained. What was in fact explained is not recorded. In any event, the accused told the court that he was sitting around a fire in the evening at his home when his friend Elroy arrived with a brown sling bag and a tog bag and asked the accused to secure the items and that he, Elroy, would come and fetch later. Elroy also told the accused that he was going to fetch a flat-screen television. The accused further said that he did not pay much attention to what Elroy was up to.
- [6] The Magistrate asked him at that point: "What did you think?" The response is recorded as: "I thereafter thought that he was stealing the goods the police found the items with me the next day. I deny the housebreaking. I did not check what was in the bags that were in my possession". (The proceedings were recorded in Afrikaans and this is my interpretation). In the next line the Magistrate recorded in Afrikaans what I interpret as follows: "Alt: Court not satisfied that the accused intended to plead guilty." The case was postponed for trial.
- [7] At the end of the testimony of each of the three witnesses, the record simply reads that rights to cross-examination were explained

fully. The accused had no questions to the witness who had oversight of the house during the temporary absence of the occupier of the property broken into. After her testimony the matter was postponed for representations. It is not clear from the record as regards the source of and about what were these representations.

- [8] Items which were later identified by the complainant as the property of the occupier were found behind a shack at his home during the absence of the accused, by the police. The report given to the police was that the accused's bedroom is in the main house behind which the shack is situated in the yard. The accused was traced, based on information that the police received from an undisclosed

source, on the strength of which he was arrested. The sergeant who arrested the accused testified that after his arrest the accused told them where he had hidden another item, a flat screen television set, which was at a church in town.

[9] The arresting officer, Sergeant Sakiwe Mnyamane, could not recall whether the accused asked the police that they go to Elroy, who brought the items to accused, when the accused put this to him. Subsequently, the arresting officer denied that the accused made such a request. The communication between the police and the accused, including the circumstances under which the accused took the police to the church where the flat screen television was discovered, were never fully explored, against the background of the accused's right not to be compelled to give self-incriminating evidence. The arresting officer also testified that the accused told him that he broke in and that he was on parole.

[10] After the closure of the State case the following is noted on the record:

"Rights explained to accused and that he could call witnesses and right to remain silent explained also that the extenuating statement made is not evidence unless it is confirmed under oath and that the admissions made stand as evidence. Accused understands. Accused elect to testify in person." [This is my English interpretation from Afrikaans].

[11] This court raised a number of comments to assist the Magistrate with the concerns for purposes of his statement. Amongst others were the following:

"2. The proceedings were not mechanically recorded.

3. The matter was postponed for 21 days for judgment, yet no reasons, part of the composite of a judgment were delivered. It appears that this is serious dereliction of duty.
4. The accused faced two counts. The verdict is only in respect of one count. Is this not serious dereliction of duty.
5. In the absence of reasons, on what basis can it be said that the Regional Magistrate was in a position to satisfy himself that the accused was convicted in accordance with justice, to enable him to sentence the accused."

Amongst others, the statement of the Magistrate has the following comments:

"3. The Periodical Court of Darling does not have a Recording Machine, therefore all proceedings follow in writing.

4. It is also practice that in such instances unless requested, the reasons for judgment and or sentence are not in writing.

5. The accused faced one (1) count of Housebreaking with intent to steal and theft and the Alternative Count of Possession of Stolen Property. He was convicted of the Main Count. My entry on the original J15 should have read ALT and not “KL.2”. The J4 was typed wrongfully as the accused was never convicted of two (2) Counts. See also copy off Annexure B of the charge sheet as well as page 3 (typed) which refer to the Main and the Alternative Charge.”

[12] It is not clear as to whether what follows the Magistrate’s remarks was a unilateral reconstruction of the record or a judgment on conviction. The structure of a judgment generally has an Introduction, a set out of the Facts, the Issues, the Law, the Analysis, the Relief and the Order. (IFILARO). Although each judicial officer has his or her own style, the narrative that is before the court lacked the necessary components constructed to fulfill eligibility to be classified as a judgment of a court. It did not show that it was an output of industry in the performance of judicial functions.

[13] This matter showed that the number of years that a Magistrate had spent on the bench, on its own, does not mean that knowledge and skill had been acquired over time in this particular field of judicial office. The Magistrate was not a new appointee to judicial office, and had 26 years on the bench. It is unfortunate that a person holding his rank for such a long period did not accept the nature of a Magistrates’ Court, which is set out in section 4(1) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) (the 1944 Act) as follows:

“Nature of the courts and force of process

(1) Every court shall be a court of record.”

[14] The sum of what he knew over the years did not include the knowledge that he presided over a trial court in which he had a duty to ensure that his acts and the proceedings before him were captured and preserved for authority, truth, testimony and memory especially for the possibility of review and appeal. The number of years on the bench did not yield knowledge provided or learned as a result of previous research or study which provided useful sound understanding of the duties on him as a presiding officer. The Magistrate was indifferent and nonchalant in his attitude towards his duties to keep a proper record.

[15] Section 35(3)(h) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution provides as follows:

“35. Arrested detained and accused persons. –

(3)

Every accused person has a right to a fair trial, which includes the right –

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;”

[16] The attitude of the Magistrate leaves a disconcerting revelation of a lack of knowledge or appreciation of his constitutional obligations. The principle of Ubuntu which is at the core of being and defines Africa, is simply absent. Nothing on the record gave any hope that the

Magistrate played his crucial role of giving content and meaning to the rights of an unrepresented accused. There is no indication that the accused was amongst others, informed that he was under no obligation to make a statement indicating the basis of his defence. It is impossible to conclude that the accused was not denied his fundamental right to remain silent. This rule forbids compelling a man to give evidence which incriminates him - [R v Camane and Others 1925 AD 570 at 575].

- [17] There is nothing to indicate that the accused was warned that he is under no obligation to answer questions put to him during the plea stage, which is an irregularity whose effect in the circumstances is very material. There is no trace of a consideration of accused's constitutional rights as demanded by section 35 (3) of the Constitution. The conduct of the Magistrate was incompatible with the thrust of section 115 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) when dealing with an unrepresented accused, and section 35(3) of the Constitution. I am under a constitutional obligation to consider the record before me through the lens of section 35(3), which is a provision in our supreme law. The Magistrate failed to keep the record in such a manner that the particularity of the explanations given would be judged to be adequate – [S v Daniels en n' ander 1983 (3) SA 275 (AA) at 299G-H].
- [18] It must appear from the record of proceedings that the accused was asked whether an admission made by him may be recorded as such and that the accused was told of the effect of making a formal admission. It must appear from the record that the purpose, which is to relieve the State of the necessity of proving the admitted fact by evidence, was explained and that he was under no obligation to make any admission or to assist the State in proving the case against him. The Magistrate must satisfy himself that the decision to make formal admissions had been made with full understanding of its meaning and effect, and that the accused was under no misapprehension that he was obliged or expected to supply the State or the court with it – [S v Daniels, supra at 399H-300B].
- [19] Cross-examination imposes certain obligations. There is a general rule that when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character.
- [20] It is essential to bear in mind that the rule includes that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged testimony is accepted as correct – [President of the RSA v South African Rugby Football Union 2000 (1) SA 1 (CC) at para 61]. The statement at para 63 is very apposite in the explanation to be given to an unrepresented accused which reads:

“It should be made clear not only that the evidence is to be challenged but also how it is to be challenged.”

- [21] This general rule is a precept of fairness. It must be applied with caution in a criminal trial. Where, despite the absence of a challenge, doubt arises about the plausibility of incriminating evidence, the accused should benefit -[S v Mavinini 2009 SACR 523 (SCA) at para 13]. The intrinsic features of the evidence not challenged or other evidence tendered at the trial should provide some basis from which such evidence is accepted. The explanation given to an unrepresented accused, understood by him or her and effect if any given thereto, provide inherent guarantees for the fairness of accepting such evidence. In the absence of a record of the explanation for cross-examination given timeously, it is difficult to conclude that the proceedings were conducted in a manner that was fair to the accused.
- [22] It cannot be fair if an accused who clearly lacked familiarity with courtroom strategy and tactics as well as legal knowledge, was ambushed with an explanation of his right to cross-examination after the evidence which he did not listen to with an informed mind, was tendered against him. Unsophisticated accused are generally not orientated in any way and arising out of ignorance, do not know what their role is and what is expected of them by the courts during evidence-in-chief. The orientation and induction of accused person should ensure that such accused find their position in relation to the unfamiliar circumstances of a court and formally introduce them to what is expected on what is to follow. In my view, fairness to an unrepresented accused demands that the right to cross-examine and the purpose of cross-examination should be fully explained to him or her before the first State witness is sworn in, affirmed or warned.
- [23] “The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person – [S v Boesak 2001(1) SA 912 (CC) at para 24; Section 35(1)(a) and (c) of the Constitution)]. On the record before me, when the testimony of the accused’s alleged admission was tendered, there was no indication that the element of compulsion was considered. It is incumbent upon a judicial officer receiving such evidence, to consider whether State compulsion or coercive means were not employed, which element of State compulsion or coercion would have impacted on the accused’s right to remain silent.
- [24] The evidence of an admission made extra-curially by any person in relation to the commission of an offence shall be admissible in evidence against him at any criminal proceedings in relation to that offence if it is proved to have been made by that person and to have been voluntarily made – [S v Litako 2015 (3) SA 287 (SCA) at para 38; Section 219 of the CPA]. The Magistrate had a responsibility to approach the evidence of the arresting officer on the accused’s alleged admission with a high degree of consciousness to the accused’s constitutional rights and what the interests of justice required and to provide a right answer.

[25] The Magistrate had a duty to inform the accused, and also to warn him of the courses which were open to him at the close of the State case in relation to whether he should give evidence or not and to note on the record that such an explanation had been given – [Rex v Nqubuka 1950 (2) SA 363 (T) at 364]. He should have explained the rights to the accused in such a manner that his open-mindedness, his impartiality and his fairness was discerned from the extent, form and manner of explanation. The explanation should demonstrate adequate assistance to the unrepresented accused.

[26] The role of a presiding officer in a criminal trial of an unrepresented accused was set out in some length in *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v Van Wyk* NO 1989 (3) SA 368 (ECD) at 377D-379A. It is not wrong to conclude that the Magistrate broke every rule set out therein in the trial before him. There is no trace, on the record, that the Magistrate was true to the rules and was awake to his responsibilities, which rules and responsibilities were summed up as follows in *S v Rudman* supra at 379A-C:

“From this brief review of the rules of practice which have been evolved by the South African judiciary it is apparent that the presiding

judicial officer in the trial of an undefended accused is required to take a more active part than a judicial officer is permitted in the orthodox accusatorial system, thereby, in some measure, redressing the disadvantage the undefended accused may suffer from the lack of legal representation. The value to an undefended accused of, and the benefit he derives from, judicial assistance emphasizes the importance of an unfaltering judicial observance of the rules of practice intended for the protection of the undefended accused, but in no way minimizes the importance of legal representation.”

[27] Three further matters called for comment in this matter. The first is that, where a Regional Magistrate to whom a matter is referred to by a District Magistrate for purposes of sentence, for one or other reason holds the view that the matter needs the attention of the High Court before such sentence is imposed, our sacred principle of *audi alteram partem* places a duty on the Regional Magistrate. He or she should provide his or her Memorandum to the District Magistrate, for his or her statement, which should accompany the record to the High Court. Failure to do so does not only deny the District Magistrate of an opportunity to be heard on the Memorandum, but unduly causes a delay as the High Court would ordinarily prefer to hear the Magistrate on the Memorandum so compiled.

[28] The second is the decentralisation and devolution of services to the Magistrates' Courts. The responsibility for provision of key services to the Magistrates' Courts, like the Court Recording Devices, Clerks of the Courts and Court Interpreters appear to reside with Regional Offices in the Department of Justice and Constitutional Development. The Regional Office, Western Cape, appear to have the responsibility to provide these key services to the Periodical Courts, whereas it appears that they do not have the authority to decide on the staff establishment.

[29] Perhaps the complex layers of government around provision of Court Support Services result in overlapping mandates which are themselves a barrier to effective and efficient support to the Magistrates. In my view, this overlap has the result that the Regional Head has the responsibility for, and not the authority to attend to the staff establishment to support the courts. This overlap of mandates results in insufficient staff establishments, and in my view, contributes to the delays in the processing of reviews and appeals from the Magistracy and the absence of interpreters in many courts in the Western Cape.

[30] The last, which is also related to reasons for delays in the processing of reviews and appeals, is the language of record. The first comment to the Magistrate was couched in the following terms:

“1. The proceedings were conducted in Afrikaans, against the background of the direction of the Chief Justice that English is the language of record of all courts in the Republic of South Africa.”

The remarks hereon in the statement of the Magistrate read as follows:

“2. I am aware of the directives of the Chief Justice and of the Honourable Judge President Hlophe dated 28 February 2018.

The proceedings in this case already started in Afrikaans on 11 July 2016 before another Presiding Officer. This trial was dealt with at the Periodical Court of Darling. Because the accused decided to conduct his own defence and is also Afrikaans speaking, I decided to proceed in Afrikaans.”

[31] The linguistic transformation of the South African legal system is work in progress along other frameworks of the nation. The

Constitution recognized the historically diminished use and status of indigenous languages and enjoins the State to take practical and positive measures to elevate the status and advance the use of these languages –[Section 6 of the Constitution].

[32] Academics have the intellectual integrity and moral courage to argue about what the language of record should be in our courts [The Role of African Languages in the South African Legal System: Towards a Transformative Agenda; A thesis submitted in fulfillment of the Requirements for the degree of Master of Arts, Rhodes University by Zakeera Docrat, November 2017]. They can afford to argue about the law. Judges do not have the luxury to argue about what the law should be. They have a Constitutional obligation to apply the law. The nation expects of Judges to resolve disputes expeditiously in a manner that is user friendly, practical and cost effective.

[33] In his book on the All African Convention, The Awakening of a People, 1974, Isaac Bongani Tabata, in Chapter 4 at page 24 discussed the “Compromise”, and gave a pyramid which I think is very helpful to understand the position of the Heads of Courts, led by the Chief Justice of the Republic, on the language of record in courts. I would replace Tabata’s layer of liberals with political, economic and social interests. The learned author said the following:

“An analysis of the situation leads us to the fact that the reasons for the “Compromise” are inherent in the past development of the people. It may help us to visualise the political structure as a pyramid where the masses constitute the broad base, above them are the intellectuals, and above that again are (political, social and economic interests) while the ... leaders constitute the apex of the structure.”

- [34] The leadership of the Judiciary had the difficult task to trace the correct footing in balancing the needs and preferences of the population as a whole, considering the sometimes competing interests of, but free from, any misplaced allegiance of the masses, the intellectuals, economic, social and political influences in the spirit of one, sovereign, democratic state founded on our constitutional values. As the nation walks towards achieving the progressive realization of an elevated status and advanced use of all languages in our courts, the Heads of Courts could only cut the cloth to the size that fits the nation today.
- [35] In the spirit of section 6(3)(a) of the Constitution, the Heads of Courts elected English as the official language for the purposes of litigation in our courts. In that way, litigants from Khayelitsha cannot shop for their own Judge by constructively excluding Binns-Ward J from their matters through the use of isiXhosa, in the same way that litigants from Langebaan cannot shop for their Judge by excluding Boqwana J by conducting the proceedings in Afrikaans, or litigants from the Cape Flats exclude Dolamo J by using the lingua franca.
- [36] The expense and delay occasioned by both transcription and translation is immediately mitigated by the use of English. CD's

on which proceedings are recorded no longer return with the line “The record cannot be transcribed because of the use of an unknown language”, whereafter another delay for the translation would be on the cards, whilst it could be a matter like the present, where the release of the accused forthwith was warranted. The expense related to transcription and translation, more so because most litigants in the Magistrates' Courts are indigent and the State has to pay, is immediately camped.

- [37] Until and unless the Department of Justice and Constitutional Development has available resources and systems to expeditiously

transcribe and prudently translate court records of proceedings from other languages than English, Magistrates in this Division should heed the directive of the Chief Justice. The courts respect the rights of litigants and witnesses to use the language they

understand. If that language is not English, the courts have proceedings interpreted into the language that a court service user

understands. The language of the court proceedings, however, remains English.

- [38] Periodical Courts are generally in far-flung areas away from the cities and towns. They are generally found in townships, villages and farms. These are generally settlement areas where the vast majority of the previously disadvantaged people are found. They are

vulnerable because of levels of illiteracy. This matter showed that even the guardians sometimes need to be guarded. The provision of elementary resources like functionally literate Clerks of the Court, Court Machines and Court Interpreters are very necessary at these courts. It cannot be, that justice is divisible and those from outside the cities find themselves in the island of miseries within the sea of a democratic and constitutional South Africa.

[39] For these reasons, the court found that the proceedings were not in accordance with justice and the immediate release of the accused was ordered.

I would further make the following order:

- (a) The conviction of the accused is set aside.
- (b) A copy of this judgment is to be served on the Honourable Minister for Justice and Constitutional Development, to draw his attention to the plight of periodical courts for resources.
- (c) A copy of this judgment is to be served to the Magistrates Commission and the National Prosecuting Authority.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

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MI SAMELA

JUDGE OF THE HIGH COURT

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Prepared on 11 October 2026 · Esheria