

SOUTH AFRICA / JUDGMENT

S v Gqesha (217810) [2024] ZAECMHC 15 (9 May 2024)

[2024] ZAECMHC 15

COURT

Eastern Cape High Court, Mthatha

BEFORE

H. Zilwa, L. Rusi

CASE / FILE NUMBER

217810

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MTHATHA

Case no: 217810

In

the matter between:

THE
STATE
and
MZWAKHE
GQESHA
Accused
REVIEW

JUDGMENT

ZILWA AJ

[1] This is a review in terms of section 302 of the Criminal Procedure Act^[1], ('the CPA'). The accused was charged in the Tsolo Magistrate's Court for assault in that on or about 4 December 2023 in the district of Tsolo, he intentionally and unlawfully assaulted Ntombekhaya Gqesha, who happened to be his wife, by hitting her with a spear.

[2] In the court a quo, the accused conducted his own defence. He pleaded guilty to the charge and was convicted on his plea of guilty.

- [3] He was afforded an opportunity to address the court in mitigation of sentence. In his address he testified that he was a breadwinner who was supporting his wife and their grandchildren who were staying with them. The accused was sentenced to undergo six months imprisonment.
- [4] I note from the record, with concern, that it was only after the accused was convicted on his plea that the Magistrate inquired from him if he was conducting his own defence. It is the right of the accused to have a fair trial which includes the right to have legal representation, and to be informed of this right. Nowhere does it appear on the record of proceedings that the accused's rights to legal representation were explained to him.
- [5] A further cause for concern is the type of language that the Magistrate used as he interacted with the accused after his conviction– it was unsavoury and less of the standard of decorum expected from a Presiding Officer. The episode unfolded as contained in the following passage:

“ACCUSED: For us to eat at home, I am the one who is supposed to go and find.

COURT: Is it correct that the grandchildren receive the grant for kids?

ACCUSED: Their mothers took their grant so that they can find, collect and find clothes for them because my wife, their mother is eating the money, is not doing...(intervenes)

COURT: If that is the position, the easiest way is to send the kids to their mothers. You can't maintain the kids if they are clever enough to claim such grant. Anything to say in aggravation?

ACCUSED: Will I say?

COURT: No, you are a good howler. There is no need to explain.”

- [6] The interaction continued after the accused's conviction, as follows:

“COURT: Between the two of you, who took the spear?

ACCUSED: The weapons at home are always there. When I was about up, she jumped to me. I don't know, I don't even know whether I picked or I was carrying a spear, because I was drunk.

COURT: You can't equate the spear...[indistinct] it was with arms. What is happening in your head because that spear is supposed to be in the roof of a rondavel?

ACCUSED: All the things are staying in that same place. She is also a traditional healer. Her stuff and my stuff ... [intervenes].

COURT: As she is a traditional healer, does she have her own spear?

ACCUSED: Her spear is at her home. We are only having those knob kerries and ... [indistinct].

COURT: The Court is saying there is something wrong in your head. Why that spear for instance is always down because it is supposed to be down only if it is going to be used?”

- [7] At the end of the interaction between the Magistrate and the accused, the Prosecutor was given an opportunity to address the Court in aggravation of sentence. It is important to quote his address verbatim as follows:

“Your worship, if I may the Court impose a sentence that will deter the would be offenders from committing these offences. The State, Your Worship, is suggesting that the accused person be sentenced in terms of Section 276(1)(f), may he be sentenced to a fine, Your Worship, the fine of R3000 Your Worship. And that fine, Your Worship, may it be wholly suspended, Your Worship, considering that, Your Worship, during the commission of an offence, he also sustained injuries caused by the complainant, Your Worship. The complainant in this case is not entirely innocent, Your Worship. May he be given a second chance, Your Worship. It is up to him if he is ready to change his ways and decide to not be in conflict with the law.”

- [8] While I fully appreciate the fact that the Magistrate was at large not to accept the Prosecutor's proposal on sentence as sentence is a matter for the Court's discretion, good basis in law had to be laid for the Magistrate's exercise of discretion in imposing any sentence that he deemed fit. Put differently, the sentencing discretion must be exercised judiciously with a proper consideration of any fact as may be of relevance, and on the foundational principles of the law on sentencing. The excerpt below captures the Magistrate's ruling on sentence:

“

SENTENCE

The Court is going to punish you severely for not respecting complainant's rituals, because after painting your flat you were supposed to put back that ritual spear. It is not supposed to be down, unless it is going to be used, after painting your flat. The Court does not agree with the State that the last born depends on you because it is your evidence that Nasiphe is maintaining your last born in Cape Town. No, the last born in particular. The one who is staying in your RDP house in Cape Town. That is not your dependent. You are sentenced to UNDERGO SIX

- (6) MONTHS IMPRISONMENT, direct imprisonment without an option of a fine. He is hard of hearing. Did he understand? No option of a fine.”

- [9] I make three important observations regarding the proceedings in the Court a quo. The first one is that the sentence imposed did not include an option of a fine, and this is apart from the fact that the accused was unrepresented. The Magistrate was bound in this regard by the provisions of sub paragraph (b) of section 112(1) the Criminal Procedure Act, 51 of 1977 (the CPA), and I quote them hereunder:

“(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or

she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.”

- [10] Section 112(1)(b) of the CPA requires the presiding officer to conduct questioning of an accused who pleads guilty to the charge for reasons including ascertaining whether the accused admits all the elements of the offence with which he is charged. This judicial questioning is a precaution against an injustice which may flow from an unjustified plea of guilty. It serves to determine whether the accused admits the allegations in the charge sheet upon which there was a guilty plea; and enable the Court to conclude whether the accused is, in fact, guilty.
- [11] Secondly, not only did the Magistrate fail to satisfy himself as to the guilt of the accused, it appears from the record that he failed to appreciate the fact that, after all, the accused may have had a defence. There was a stage when the prosecutor ‘cross examined the accused’ after his mitigation of sentence. It is not clear whether before this stage, the accused had indicated his intention to give evidence under oath whereupon he would be cross-examined.
- [12] What is of importance is that the information that was elicited from the accused during the ostensible cross-examination, brought to light facts which required the Magistrate to correct the plea to that of not guilty. Below I provide an extract of the purported cross examination:

“PROSECUTOR: I see, sir, I see that you are injured in your face. What happened?

ACCUSED: That time I was fighting with my wife..

PROSECUTOR: What did she do to you?

ACCUSED: As we were struggling in the room, I fell and then she got on top of me.

PROSECUTOR: So you mean to say you hit her and she fought back?

ACCUSED: Yes, she retaliate when we got into argument. She usually will be the one who would jump to me first.

PROSECUTOR: She jumped to you and hit you with what?

ACCUSED: I think we were struggling and I have consumed alcohol and then I fell on my back. She stumbled on me and fell on top of me.

PROSECUTOR: She fell on top of you or did she hit you with something? So you are not sure whether she used that glass to hit you.

ACCUSED: I am not certain because I lost conscious when I fell on my back of the head. I am not sure.

PROSECUTOR: Thank you, sir. I was asking this question because it is not reasonably possible that the accused person did not ...(indistinct)

injured by just falling on his back.

ACCUSED: I think it is glasses because there were glasses in the room that we were in. Maybe she took one of those glasses.

PROSECUTOR: Thank you.”

[13] I hold the view that what the accused stated during his ostensible cross-examination by the prosecutor necessitated the correction of his plea of guilty to that of not guilty as his answers reveal a defence. This would then call upon the prosecution to prove its case against the accused beyond reasonable doubt. Section 113 of the CPA is applicable in this regard, and it provides:

“(1) If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused’s plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

(2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.”

[14] I add that had the Magistrate exercised caution and questioned the accused on the allegations put to him through the charge he sought to plead guilty to, it is not far-fetched to state that he would not have been satisfied as to his guilt.

[15] Inasmuch as sentencing stage is inquisitorial in nature, what the Magistrate sought to do after the purported cross examination of the accused by the prosecutor is worrisome. This appeared from the following passage of the record:

“COURT: Okay continue. I have got questions based on your questions. According to your – stand up. According to your understanding, are you a troublesome person when you are drunk?

ACCUSED: I am not a troublesome person, even now we got into this trouble because she came back at 10, coming back from the house where they were preparing ...[intervenes]

COURT: Between the two of you, who took the spear?

ACCUSED: The weapons at home are always there. When I was about up, she jumped to me. I don’t know. I don’t even know whether I picked or I was carrying a spear, because I was drunk.

COURT: You cant equate the spear ...[indistinct] it was with arms. What is happening in your head because that spear is supposed to be in the roof of a rondavel?

ACCUSED: All the things are staying in that same place. She is also a traditional healer. Her stuff and my stuff ...[intervenes].

ACCUSED: Her spear is at her home. We are only having those knob kieries and ... [indistinct].

COURT: The Court is saying there is something wrong in your head. Why that spear for instance is always down because it is supposed to be down only if it is going to be used?

ACCUSED: It was up there in a flat room, a kind of a flat but I put it down when I was painting, but I forgot to put it back.

COURT: Are you – was that by not putting it back, you were cooking unfortunes?

ACCUSED: Yes, that's correct.

COURT: Yes, Ms Nkewu. That is all."

[16] Despite the answers by the accused when 'cross-examined by the prosecutor', the Magistrate put questions of his own to the accused which, according to him, arose from those of the prosecutor. By any stretch of imagination, this is a travesty of justice.

[17] In the context of these proceedings, the Magistrate ought to have questioned the accused at two stages – when the accused pleaded guilty for the purposes of satisfying himself that the guilty plea was justified; and during mitigation to elicit all relevant facts and information that would aid an appropriate sentence. The latter is in line with the inquisitorial nature of the sentencing stage as the issue regarding the accused's innocence or guilt would have fallen away.

[18] Thirdly, the Magistrate sought to sentence the accused for something he was not charged for. He made it clear in his ruling that he was not punishing him for the assault but for not respecting complainant's rituals. This is an injustice of the highest order. This is something that should not be allowed to happen in our Courts especially to

unrepresented accused who are not in position to challenge such injustices.

[19] I emphasize that the language used by the Magistrate is quite concerning and was in fact degrading to the accused. It is an accepted fact that presiding officers wield enormous power resulting from judicial authority. It is not expected of a presiding officer to reduce a litigant in court, least of all, an accused, to a figure that is less of a human being. The presiding officer has a duty to ensure that litigants in proceedings presided over by him/her are treated courteously and not made to feel threatened and in any way that may inhibit the conduct of their cases.

[20] It needs to be emphasized further that as judicial officers, we cannot expect members of the public to respect the Bench if we do not accord them similar reverence. Each one of us can find himself in the dock at any given moment. All it takes is for someone

to make allegations against us, and we will need people to treat us with respect.

- [21] The authority we are endowed with as judicial officers is from the public and it is not meant to intimidate it, but to dispense justice to its members with respect and humility. We are not in these positions because we are indomitable. If we did not dispense our service, there would be others doing exactly what we are doing and maybe even better. When the time comes, we will be replaced, and justice will continue being meted out to the public in our absence.
- [22] One does not lose his esteem because he is in the dock. It was not necessary at all for the Magistrate to utter the words he uttered to the accused and in the process belittling him. It can never be justified for the Magistrate to label the accused as a good howler and further telling him that there is something wrong in his head. This type of language can never be acceptable in our Courts even if it comes from the Bench.
- [23] I accordingly find the language of the Magistrate to be distasteful, insulting and demeaning to the dignity of the Court, and it amounted to dehumanizing the accused. His conduct is egregious.
- [24] In *Re Chinamasa*[2] Gubbay CJ referred to and quoted what was said by Hope JA in the Australian case of *Attorney-General per New South Wales v Mandley* (1972) 2 NGWLR 887 AT 908 as follows:
- "There are no more reasons why acts of courts should not be as trenchantly criticised as the acts of public Institutions, including Parliaments. The truth is of course that public institutions in a free society must stand upon their own merits: they cannot be propped up if their conduct does not command respect and confidence of a community; if their conduct justifies the respect and confidence of a community they do not need the protection of special rules to shield them from criticism'
- [25] It is clear from the above passage that the conduct similar to the one displayed by the Magistrate could – if left unchecked and unabated – lead to a complete erosion of respect and confidence that the public have towards our Courts. It is for this reason that conduct such as this one should be nipped in the bud, so to speak, wherever it raises its ugly head. It is also for this reason that the conduct of the Magistrate concerned deserves referral to the legal body he is accountable to for appropriate action to be taken, if needs be.
- [26] The proceedings in the court a quo are fundamentally flawed, they do not pass legal scrutiny. Clearly, there has been an injustice on the accused's part who, as at the time this review was place before would already have served more than half of his custodial sentence. In so far as the conviction of the accused is concerned, it falls foul of sections 112(1)(b) and 113 of the CPA.

[27] No point would be served, in the circumstances of the present case, in remitting the matter to the district court for the proceedings to start de novo before another Magistrate. The accused had been unjustly caused to serve a direct term of imprisonment in circumstances where he did not receive a fair trial. It is for this reason that his immediate release should be ordered. The interest of justice dictates that the sentence which the

accused has already served is more than enough as he should have been given a suspended sentence or a fine, in my considered view.

[28] In the circumstances I shall issue the following order:

- a) The conviction and sentence of the accused are set aside.
- b) The head of the correctional facility where the accused is currently detained is hereby directed to release him forthwith.
- c) The Registrar is directed to refer this judgment to the Magistrates Commission for investigation on whether the utterances by the Magistrate referred to in this judgment do not amount to misconduct.

H. ZILWA

ACTING JUDGE OF THE HIGH COURT

I agree

L. RUSI

JUDGE OF THE HIGH COURT

Review Date

9 May 2024

[1] 51 of 1977

[2] Re Chinamasa 2001 (2) SA 902 at 914D

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Prepared on 9 October 2026 · Esheria