

SOUTH AFRICA / JUDGMENT

S v Magagula (SH224/07) [2008] ZAGPHC 486 (9 December 2008)

[2008] ZAGPHC 486

COURT

High Courts - Gauteng

BEFORE

P.A. Meyer

CASE / FILE NUMBER

SH224/07

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IN THE HIGH COURT OF SOUTH AFRICA

TRANSCAAL PROVINCIAL DIVISION

CIRCUIT LOCAL DIVISION FOR THE DELAMAS CIRCUIT

Case No: SH224/07

Registrar Ref. No: CC109/08

Date:09/12/2008

In the matter between:

THE STATE

versus

LOUIS MAGAGULA.....Accused

MEYER, J

[1] On 7 May 2008, I granted an order setting aside the accused's conviction of rape by the Regional Court, Benoni on 21 November 2007 and releasing the accused from custody. I delivered a brief judgment that is supplemented by this judgment.

[2] The learned regional magistrate heard a bail application brought by the accused on 20 March 2007 and she thereafter presided at his criminal trial in the regional court. The Constitutional Court in *S v Dlamini and Others* [1999] ZACC 8; 1999 (7) BCLR 771 (CC) has held that there is no objection to a magistrate having heard a bail application presiding at the subsequent trial, except if relevant previous convictions or charges pending against an accused were disclosed. In such event an accused's right to a fair trial might well be compromised. Also see: *S v Hlati* 2000 (8) BCLR 921 (N).

[3] In the circumstances of this matter, the accused was prejudiced inter alia by the fact that the same regional magistrate who heard his bail application also presided at his criminal trial. His right to a fair trial was, in my judgment, compromised. Compare: *S v Thusi and Others* 2000 (4) BCLR 433 (N), at pp 437C – 438B.

[4] The accused was inter alia legally represented by Mrs M Govender. The State commenced in leading evidence at the bail application. The investigating officer testified. The learned regional magistrate asked him this:

‘Tell us about the story, what happened?’.

He then gave an account of the State’s case against the accused. The learned regional magistrate read the relevant J88. The transcript of the proceedings then reads as follows:

‘... I have heard enough, you want to have a look at this?’

Mrs Govender: Yes, your worship.

Court: Okay. Read it and weep. Okay, previous convictions, I do not want to hear the rest of this. Previous convictions, what do ... (intervenes)

Prosecutor: Address (inaudible). Inspector, the accused last time indicated that there are (inaudible) that are in his car, his passport is in the car.

Court: No passport, no passport?

Prosecutor: And I saw the pink document, it shows he has got another name. --- It is Louis Kwelambo.

Court: Louis? --- Kwelambo.

Just show me this? This, Mrs Govender, you know what, this is a waste of time. Your client does not have an alternative address, now he has got a false number, what is this? This is a permit. Okay, so, now he has clearly given a, Louis Kwelambo. He is attached to the Ministry of Transport at communication. This is an old thing,

2004. No passport and he is still legally in this country. What is this? Special driver’s ... Oh, this is a ... Traffic Department Mbutu. Okay, all right, where did you get this, in the car? Good work, anything else, nothing?

Prosecutor: Nothing.

Court: No? No questions? Thank you very much, sir. This (inaudible) Mrs Govender?

NO FURTHER QUESTIONS

Mrs Govender: Your worship, that was ... (intervenes)

Court: We have got a lot of work, you just handed in?

Mrs Govender: Thank you, your worship.

Court: Your clients bail is denied.

Prosecutor: Your worship, because (inaudible) remand ... (intervenes)

Court: For what?

Prosecutor: Two weeks for pre-luminal results, your worship. The swabs and the blood has been taken to the forensics already.

Court: Okay, Mrs Govender, you will consult with your client first.

Mrs Govender: Yes, your worship, just one question quickly?

Court: Yes, (inaudible)

(Mechanical interruption)

Court: Louis, well, your name is something else now, is it not? Louis, this is a false name. Your name is actually Louis Magagula.

Okay. --- Kwelambo, my grandmother's surname, your worship.

Ja, do not give me that, you only have got one name. --- I understand.

Any other name is a false name, okay. What language does he speak? What language will he speak at the trial? --- Soshangane, your worship.

Fine. You remain in custody, sir. See you 29 may. --- I understand, your worship.

[5] It is not clear from the learned regional magistrate's notes or from the transcript of the record of the proceedings whether any relevant previous convictions had been disclosed to the regional magistrate at the time of the bail application. The learned regional magistrate furthermore seems to have considered the evidence against the accused that was led and presented at the bail application as overwhelming and it appears that the accused was not afforded the reasonable opportunity to establish exceptional circumstances to be released on bail. This matter, in my view, is a classroom example of one where there is every objection to the same magistrate then presiding at the trial in circumstances where the learned regional magistrate's views were made evident before the commencement of the trial. Her conduct was sufficient to justify a reasonable apprehension of bias. The learned regional magistrate should in the present case have recused herself from the trial or adjourned it so that it could be heard by a different magistrate.

[6] In *S v Hlati* (supra), at p 926 H - I, Combrinck J said that '[t]he issue is not however whether knowledge of the accused's previous conviction has caused bias on the part of the presiding officer but whether such knowledge has created a perception that he may have been biased against the accused in the trial.' Reference was then made to a statement by Lord Denning in *Metropolitan Properties (FGC) Limited v Lannon* (1969) 1 QB 577 at 599, which statement is, in my view, equally apposite to this matter. It reads:

'Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: 'the Judge was biased.'

[7] When I gave the order I made it clear to the accused that the setting aside of his conviction of rape was not equivalent or

tantamount to an acquittal and that the State was at liberty in future to recharge him on the same set of facts should the State wish to do so.

P.A. MEYER

JUDGE OF THE HIGH COURT

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