

SOUTH AFRICA / JUDGMENT

S v Malahlela (A703/05 , T65/05)

[2005] ZAGPHC 63 (6 June 2005)

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COURT

High Courts - Gauteng

BEFORE

E Jordaan, M Ismail

CASE / FILE NUMBER

A703/05 , T65/05

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A703/2005/SGIN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) DATE: 06/06/2005 REPORTABLE IN THE ORDINARY COURSE OF EVENTS Magistrate SEKGOSESE Case No: 65/2005 High Court Ref No: 1021 THE STATE V GEORGE MATOME MALAHLELA 010009000003bb00000006001c00000000000400000003010800050000000b020000000050000000c022300c006040000002e0118001c000000fb021000070000000000bc02000000000102022253797374656d0000c0060000c09c0000d43a120026e28239304b17000c020000040000002d01000004000000020101001c000000fb02ceff0000000000009001000000000440001254696d6573204e657720526f6d616e0000000000000000000000000000000000040000002d010100050000000902000000020d000000320a2d0000000100040000000000c006220020c91600030000001e0007000000fc020000ff00ff0000000040000002d01020008000000fa02050000000000ffff00040000002d0103000e00000024030500ffffff2100c1062100c106ffffff08000000fa020000000000000000000000040000002d01040007000000fc020000ffff00000040000002d010500040000002701ffff040000002d0100000300000000000000REVIEW

JUDGMENT JORDAAN, J The accused was charged in the magistrate's court at Sekgosese of assault with intent to do grievous bodily harm. He initially pleaded guilty but after questioning in terms of section 112(1)(b) of Act 51 of 1977 his plea was changed to one of not guilty in terms of section 113 of the Act. In his plea explanation the following transpired: "Q: Why do you plead guilty? A: I was with her. We were from shebeen Q: Were you with a complainant on that day? A: Yes Q: What did you do to the complainant? A: I scratched her with a scissor on the head Q: Did she bleed? A: Yes Q: Did she bleed profusely? A: She bled and the blood stopped flowing Q: Why did you stab her with scissor? A: She did not want me to go home. She wanted me to go back with her late shebeen Q: You know that pair of scissors can injure a person seriously? A: Yes Q: And yet you used it to injure complainant? A: I did not think so. I was drunk and complainant throttled me and grabbed me by my private parts." (sic) The state then called to complainant the case Ms Grace Sebola. She testified that the accused is her ex-lover. She said that he forced her to go with him to his home and she refused. She left him. She crossed a street to leave him and then he produced a pair of scissors and stabbed her with it. She said that the accused stabbed her once on her left ear. She said she was treated in hospital. After the stabbing she became unconscious. When she

regained consciousness the accused was gone. She exhibited a scar of 7 cm long with seven stitches on her left temple. There was another scar of nearly 2 cm long with three stitches. Under cross-examination the accused asked only one question. The record reads as follows: "Q: Did we not leave that she been as you fought with another woman? A: I wanted my wrist watch from your younger sister." When the matter came before me on automatic review I inter alia directed the following query to the magistrate: "[2] The accused asked but one question in cross-examination which had nothing to do with his defence as set out in his plea. Why did the magistrate not assist the unrepresented accused in at least putting his version to the complainant?" In his reply the magistrate says the following: "2. The accused initially pleaded guilty to the charges. After invoking provision of section 112(1)(b) of Act 51 of 1977. The court acted in terms of section 113 to file a plea of not guilty for the accused. The court also explained at length the accused's cross-examination rights and accused indicated that he appreciated those rights. The court was therefore not of the opinion to assist the accused in his cross-examination." I thereafter referred the matter to the office of the Director of Public Prosecutions for their comments. Advocate Davhanaremarks as follows: "5. The following is respectfully submitted: 5.1 It is trite law that the court has a particular duty to assist an undefended accused person in the course of a trial. It is therefore imperative of the presiding officer to constantly remind himself/herself of assisting the undefended accused. This duty extends into the sentencing process, and includes the duty to carefully explain the rights of the accused to go about cross-examining the State witnesses by way of refuting incriminating evidence against him or her and/or admitting and explain in as far as he/she knows about the event. 5.2 In this regard the court in *S v Shiburi* 2004 (2) SACR 314 (WLD) at paragraphs 88-91, pointed out that: '(I)t, in the first place certainly, is a magistrate's duty to inform an accused of her or his constitutional rights and, as regards his right to legal representation, to do so promptly. It is also the duty of the magistrate to explain the trial procedure to the undefended lay person and the nature and implications of the various elections she or he may make during the course thereof, including those as regards and explanation of her or his plea; cross-examination of witnesses called by the prosecution; giving evidence and/or calling witnesses in his defence; addressing the court on the merits; giving evidence; calling witnesses and addressing the court on sentence; and the rights to appeal or review.' 5.3 In the present case it is evident from the record that an undefended accused, in cross-examining the complainant, asked one irrelevant question. 5.4 It is my opinion that the magistrate's failure to invite the accused to put relevant question(s) in cross-examining the complainant was uncalled for as indicated in *S v Shiburi*, above. In fact it is also the magistrate's duty to assist the undefended accused, for example, in phrasing questions and put relevant questions to the State witnesses. 5.5 In view of the above case law it is submitted that the magistrate's failure to assist the undefended accused in the circumstances amounted to an unfair trial as it violated his constitutional rights as contemplated in section 35(3) of the Constitution." I agree with these views. The accused did not have a fair trial. Under these circumstances the conviction cannot stand. The following order is therefore made: The conviction and sentence is set aside. E JORDAAN JUDGE OF THE HIGH COURT I agree M ISMAIL ACTING JUDGE OF THE HIGH COURT 65/2005

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/SGIN THE HIGH COURT OF

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(TRANSVAALPROVINCIAL DIVISION)

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REPORTABLE

IN THE ORDINARY COURSE OF EVENTS

Magistrate

SEKGOSESE

Case No:

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High Court Ref No:

1021

THE STATE V

GEORGE MATOME MALAHLELA

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REVIEW JUDGMENT

JORDAAN, J

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