

SOUTH AFRICA / JUDGMENT

S v Mgodli (890/2011B) [2012] ZAECHGC 107 (27 December 2012)

[2012] ZAECHGC 107

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson

CASE / FILE NUMBER

890/2011B

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO: 890/2011B

CA&R NO: 456/2012

DATE DELIVERED: 27/12/2012

In the matter between

THE STATE

and

XOLANI MGODLI

REVIEW JUDGMENT

ROBERSON J:-

- [1] This matter came before me on automatic review on 21 December 2012. On that day I ordered that the accused be immediately released from prison, indicating that my reasons for doing so would follow, which they now do.
- [2] The accused was convicted in the Magistrate's Court, Aliwal North, of housebreaking with intent to steal and theft, and dealing in dagga. He was sentenced to 36 months' imprisonment for the housebreaking charge and 2 months' imprisonment for dealing in dagga.

- [3] The matter was initially before Goosen J, who raised numerous queries. Goosen J's letter reached the Aliwal North Magistrate's Court on 30 October 2012. Magistrate Dyani's letter in response was dated 12 November 2012, but it only reached the Registrar's office on 21 December
2012. No explanation has been given for the delay. The delay has caused the accused to remain in prison for longer than necessary, and it is hoped that similar delays will not occur in the future.
- [4] The matter has an alarming history. The accused first appeared on a charge of housebreaking with intent to steal and theft on 7 October 2011. According to the record on that day he was informed of his right to legal representation and to apply for legal aid, but indicated he would conduct his own defence. I shall deal later in this judgment with the question of whether or not his rights were explained at that stage.
- [5] He was remanded in custody to 9 November 2011 for further investigation, bail being fixed in the sum of R500.00. When he appeared on that day, he had not yet paid the bail and was still in custody. He was released on warning and the matter was eventually postponed to 15 February 2012 for trial. On 15 February 2012 he appeared before Magistrate Nkalweni. He pleaded to the charge of housebreaking with intent to steal and theft, and the complainant testified in-chief. Thereafter it was discovered that he had been granted legal aid. The matter was postponed to 12 March 2012 on which date the accused was legally represented. The matter was postponed to 30 March 2012 for the presiding officer. On 30 March 2012 the accused failed to appear. A warrant for his arrest was authorised and his attorney withdrew.
- [6] The accused next appeared on 8 May 2012, and the record reflected that he was in custody in another matter. The case was eventually postponed to 20 August 2012 for trial. On that day he first appeared before Magistrate Tloti. The same housebreaking charge, and a second charge of dealing in dagga, were put to the accused. Before the accused pleaded, Magistrate Tloti noticed that the accused had pleaded on 15 February 2012. The matter stood down for the position to be investigated.
- [7] The matter resumed later on 20 August 2012. Now the presiding magistrate was Mr. Dyani. The trial appears to have commenced de novo. The accused's rights to legal representation and to apply for legal aid were not explained. The accused pleaded to the two charges. The complainant in the housebreaking charge testified in-chief again. The trial proceeded and the accused was eventually convicted on both counts, and sentenced accordingly.
- [8] The gross irregularities evident in this history speak for themselves. A part-heard trial commenced de novo before another magistrate, without the prior proceedings having been set aside, and without the accused's rights being explained. He had applied for legal aid in the first trial, and would most probably have wished to apply again. A second charge was added after evidence was led. I am aware that Magistrate Nkalweni's contract was terminated and the proceedings in a number of his part-heard cases were declared null and void, the trials to commence de novo. I have ascertained from the Registrar that the present

case was not one of those cases.

[9] All the above irregularities were covered by Goosen J's queries. A further query was whether or not the accused's rights had been explained when he first appeared. Magistrate Dyani indicated that his rights had been explained by Magistrate Nkalweni on that day. However the reverse side of the J15 form reflects that the presiding magistrate on that day was Magistrate Dyani. There is therefore no proper indication that his rights were ever explained.

[10] A further aspect which concerned me occurred during the evidence of the complainant in the housebreaking charge (in the second trial). The magistrate asked the interpreter if the accused understood isiSotho. The interpreter replied that he did. I conclude from this exchange that the witness testified in isiSotho and that the accused's first language is isiXhosa. The magistrate should have ascertained from the accused whether or not he understood isiSotho.

[11] In his reply to Goosen J's queries, Magistrate Dyani stated that when the trial proceeded before him he was not informed that the accused had previously pleaded and that evidence had already been led. I should mention that the J15 reflects that a plea of not guilty was noted on 15 February 2012. In setting out the history of the matter, Magistrate Dyani was equally of the view that several irregularities had occurred, and gave the assurance that care would be taken to prevent similar occurrences in

the future.

[12] The proceedings were in my view utterly vitiated as a result of the irregularities.

[13] It appears that what happened in this case probably arose from the termination of Magistrate Nkalweni's contract, and the status of his part-heard matters. I intend giving a direction in this regard.

[14] The following order is made:

[14.1] The convictions and sentences of the accused are set aside.

[14.2] The Judicial Head at Aliwal North Magistrate's Court is directed to investigate whether or not there are any further part-heard trials where Magistrate Nkalweni presided, where the proceedings have not been set aside, and if so, to report to this Court on what action has been taken or is intended to be taken in each case.

J M ROBERSON

JUDGE OF THE HIGH COURT

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