

SOUTH AFRICA / JUDGMENT

S v Mofokeng (19/2012) [2012] ZAFSHC 117; 2013 (1) SACR 143 (FB) (18 June 2012)

[2012] ZAFSHC 117

COURT

Free State High Court, Bloemfontein

BEFORE

Lekale, Snellenburg

CASE / FILE NUMBER

19/2012

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FREE STATE HIGH

COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH

AFRICA

Review No. : 19/2012

THE STATE

versus

MAMOHLALA MOFOKENG

CORAM:

LEKALE, J et
SNELLENBURG, AJ

JUDGMENT

BY: SNELLENBURG, AJ

DELIVERED ON: 18 JUNE 2012

- [1] This is an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 (the Act). The accused, conducting her own defence, was convicted and sentenced in the Ficksburg district court on a charge of assault with the intent to do grievous bodily harm under case number R86/2011.

- [2] The original charge-sheet (J15) indicates that the accused was arrested on the 4th of December 2011 although the typed record indicates it to be on the 8th of December 2011. The accused first appeared on the 6th of December 2011; therefore the date of the 8th of December mentioned above is clearly erroneous.
- [3] On the day of the first appearance the accused indicated that she would plead guilty. Although it does not appear explicitly from the typed record, it is clear that the presiding magistrate intended to apply section 112(1)(b) of the Act after the guilty plea. After the presiding magistrate questioned the accused she convicted the accused of assault with the intent to do grievous bodily harm.
- [4] The state did not prove any previous convictions of the accused and after further questioning by the magistrate she commenced with the sentencing of the accused. The court below took into consideration for mitigation of sentence the tender age (24 years) of the accused, that the accused was a first offender and that she was a mother. The accused was then sentenced to a fine of R500.00 or six months imprisonment, which is wholly suspended for a period of five (5) years on condition that she is not convicted of assault or assault with the intent to do grievous bodily harm, which is committed within the period of suspension.
- [5] The matter was allocated to a Judge, in chambers, of this court on the 2nd of February 2012 for purpose of an automatic review in terms of section 302 of the Criminal Procedure Act *supra*. The reviewing Judge returned the record to the magistrate, Ficksburg on the 6th of February 2012 with the following queries:

“1. Was the court satisfied that the accused was pleading guilty freely and voluntarily without being influenced thereto by anyone? If so, why is that fact not apparent from the record? No questions to that effect can be gleaned from the record.

Was the accused advised of her legal rights to give evidence under oath and to call witnesses in mitigation of sentence? If so why are those facts not apparent from the record?

Was there any inquiry held in terms of section 103 of the Fire Arms Control Act no 60 of 2000. If so what were the finding and the order? Once again this information is not apparent from the record.”

- [6] The matter was returned to the reviewing Judge on 8 March 2012 accompanied by a letter (dated 14 February 2012) stating that the presiding officer was only an acting magistrate for a period of one month and that she has since then left the office. The reviewing Judge returned the matter to the Court Manager, Magistrate’s Court, Ficksburg, requesting that the matter be placed before the relevant magistrate to answer the queries as a matter of urgency so as to finalise the matter.
- [7] The matter was returned to the High Court, Bloemfontein, on the 30th of May 2012 with the response of the relevant magistrate to the queries of the reviewing Judge.

- [8] In her response, the presiding officer admits the court erred in not establishing directly from the accused whether she was pleading guilty freely and voluntarily without being influenced thereto by anyone, but says that she was nevertheless satisfied that the accused was indeed pleading guilty freely and voluntarily without being influenced thereto by anyone on the grounds of the accused's relaxed demeanour and the ease with which she answered questions posed by the court, regarding why she wanted to plead guilty.
- [9] The magistrate goes further to concede that she erred in not advising the accused to give evidence in mitigation of sentence and also that no inquiry was held in terms of section 103 of the Fire Arms Control Act, Act 60 Of 2000 and therefore no finding or order was made in this regard. She requests this court to rectify this if it deems it fit to do so.
- [10] The matter was subsequently placed before me for review. It is the duty of this court in reviewing this matter to ensure that the proceedings in the trial court as well as the conviction and sentence are according to justice.
- [11] It is apposite to evaluate the procedure that was followed before turning to the conviction and sentence.
- [12] As appears from the incorrect date of arrest reflected on the original charge-sheet, the paperwork leaves a lot to be desired. The charge sheet (J15) for instance also refers to the gender of the accused as a male. Upon reading the record, however, it is clear that the accused is indeed female. The charge sheet was never amended. I leave it at that.
- [13] At the commencement of the proceedings the interpreter at the request of the magistrate explained the accused's rights to legal representation including her right to apply for Legal Aid should she not be able to afford legal representation. The accused indicated that she understood her rights and wished to represent herself.
- [14] The court then enquired from the accused whether she would indeed plead guilty as indicated by the prosecutor and the following was said:

"COURT: The State has also indicated that you wish to plead guilty to the offence of which you are charged, to wit is assault."

ACCUSED: Indeed your Worship.

COURT: Yes Mr PP?

PROSECUTOR: Thank you your Worship. The charge against the accused person is the crime of assault."

The prosecutor then proceeded to put the charge to the accused.

- [15] The charge preferred against the accused as per annexure "A" appended to the original charge-sheet and put to the accused reads as follows:

"THAT the accused is/are guilty of the crime of Assault with intent to do grievous bodily harm."

IN THAT upon or about 03/12/2011 and at or near ROSEDAL in the District of FICKSBURG the accused did unlawfully and intentionally assault MR LEFU MOTINYANE by STABBING HIM WITH A BROKEN BOTTLE with the intent to do him grievous bodily harm.”

After the charge was put to the accused the court asked the accused if she understood the charge against her and she confirmed that she did. The court proceeded to enquire from the accused how she pleads to the charge and the accused indicated that she is pleading guilty.

[16] It is imperative to keep in mind that the court below was dealing with an undefended accused.

[17] The right to a fair trial conferred by s 25(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 is broader than the list of specific rights set out in paras (a) to (o) of the subsection.¹ It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. The various rules of practice according to which our law requires a criminal trial to be initiated or conducted and which have been developed in our judiciary have to an extent been enclosed in section 35(3) of the constitution. The “rules” not specifically enclosed still applies, but the constitutional rights also require that the trial must be fair in accordance with “notions of basic fairness and justice”. *S v ZUMA AND OTHERS* [1995] ZACC 1; 1995

(2) SA 642 (CC) para [16]. As appears from *S v RUDMAN AND ANOTHER*; *S v MTHWANA* 1992

(1) SA 343 (A) the rules of practice evolved to assist the illiterate and indigent accused in an endeavour to ensure that he or she is tried fairly and that justice is done. Although all of the “rules” are not necessarily relevant in this matter, it is apposite to reiterate them. The failure to comply with one or more “rules” may result in a failure in justice, depending on the facts and circumstances of the specific case. The rules can succinctly be summarised as follows:

17.1 Before the accused is called upon to plead the presiding judicial officer is obliged to examine the charge-sheet, ascertain whether the essential elements of the alleged offence(s) have been averred with reasonable clarity and certainty and then give the accused an adequate and readily intelligible exposition of the charge(s) against him. Section 35(3)(a) of the Constitution now confers this right.

17.2 Unless the charge-sheet contains an appropriate reference to it and the factual basis for bringing it into operation, the accused should be informed by the presiding judicial officer or the prosecutor of the operation of any presumption he may have to rebut and the prosecutor should inform the court and the accused of the content of the evidence he intends to lead.

17.3 Where it is competent for a court to convict an accused of an offence other than the one alleged in the charge-sheet a judicial officer may be obliged to inform an undefended accused of the competent verdict, unless the contravention is an alternative charge or the prosecutor indicates that the State's case is restricted to the offence(s) alleged in the charge-sheet.

17.4 At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights - the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence and in comprehensible language to explain to him the purpose and significance of his rights.

17.5 During the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the State witnesses.

17.6 Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question - not cross-examine - the witness on the issue so as to reduce the risk of a possible failure of justice.

17.7 If, at the close of the State case, an undefended accused is not discharged, the presiding judicial officer is obliged to inform him of his rights and in clear and unequivocal terms explain the courses open to him.

17.8 The judicial officer is obliged to inform the undefended accused in clear and simple language of any presumption the prosecutor is relying on, the implications thereof and the manner in which it can be rebutted.

17.9 The judicial officer should assist an undefended accused whenever he needs assistance in the presentation of his case and should protect him from being cross-examined unfairly.

17.10 The judicial officer has a general duty to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place. This includes the right to legal representation, especially where the charge is serious. In such event the accused should be informed of the seriousness of the charges and the possible consequences of a conviction. In cases where the charges are extremely serious it may be appropriate to encourage the accused to exercise his right to legal representation and the option to apply for Legal Aid assistance. Section 35(3) of the Constitution also guarantees these rights.

A conviction and sentence will only be set aside if the irregularity has led to a failure of justice. If an irregularity leads to an unfair trial, then that will constitute a failure of justice. *S v JAIPAL* [2005] ZACC 1; 2005 (4) SA 581(CC) para [39]. Each case will depend upon its own facts and peculiar circumstances.

[18] It is clear that where an accused is unrepresented there is a duty on the presiding officer to take extra care to ensure that the accused knows what is expected of him/her, that he/she understands his/her rights and the procedure to follow.

[19] At no stage of the proceedings did the magistrate inform the accused of the procedure that was to be followed in applying section

112 of the Act. The magistrate also failed to inform the accused, at any stage before she pleaded guilty, of the possible competent verdicts that she could be convicted on should the plea of guilty not stand on a charge of assault with the intent to do grievous bodily harm.

[20] The purpose of section 112(1)(b), which is particularly relevant in this instance, was recently re-stated by Rampai, J in *S v KHOLOANE* 2012 (1) SACR 8 (FB) at para [5]:

“The purpose of the subsection is to ensure that the accused really admits all the elements of the crime to which he pleads guilty. The questioning strives to protect the innocent from erroneous convictions based on their own ignorance of the law or improper influence. By compelling the courts to embark on this procedure the underlying idea was that the court should make doubly sure that a person who pleads guilty has indeed no possible defence to the crime he admits committing. In S v Baron 1978 (2) SA 510 (C) at 512G the court held that ss (1)(b) was designed to protect an accused and especially an uneducated and undefended accused from the adverse consequences of an ill-informed plea of guilty.”

[21] Can it be found, in relation to the record of proceedings, that the accused indeed understood the charge against her if the court and also the prosecutor first indicated that the charge is one of assault, but then puts a charge of assault with the intent to do grievous bodily harm to the accused?

[22] The following appears from the record:

“COURT: Why do you plead guilty? Why do you say you want to plead guilty?”

ACCUSED: I did it your Worship.

COURT: Why did you stab her?

ACCUSED: Your Worship I actually hurt him with this bottle and hit him.

COURT: You actually did what?

ACCUSED: I hit him with the bottle. I did it at him and hit him your Worship.

COURT: Did he sustain any injuries as a result?

ACCUSED: Yes he did sustain injuries your Worship.

COURT: Why did you stab her, or hit her with the bottle?

ACCUSED: We were at the public hall and he refused me entry into the hall your Worship.

COURT: Yes? Did you have a right to stab her?

ACCUSED: No your Worship.

COURT: What made you stab her when she refused you to enter the hall?

ACCUSED: I was very angry your Worship. I was very angry, because actually wished to get into the hall. I was drunk, however, I was not so much drunk so that I wasn't aware of my conduct your Worship.

COURT: So you were under the influence, but you were not too drunk as not to entertain what you were doing when you stabbed him? Is that what you are saying?

ACCUSED: Yes.

COURT: This court is satisfied that you have pleaded guilty to all the elements of the offence of which you are charged and you are therefore found GUILTY as charged."

[23] In *S v NAIDOO* 1989 (2) SA 114 (A), and in particular *S v PHUNDULA AND OTHERS* 1978 (4) SA 855 (T) on page 861 Boshoff, AJP had the following to say on questioning in terms of section 112 of the Criminal Procedure Act supra:

"Die artikel verg dat die landdros die beskuldigde ondervra met betrekking tot die beweerde feite sodat vasgestel kan word wat die beskuldigde te sê het oor die gebeure wat neerkom op die pleeg van die misdryf. Uit sy relaas sal die landdros kan vasstel of hy inderdaad erken dat hy die misdryf gepleeg het en of hy enige verdediging het wat blyk uit sy relaas. Dit word stellig nie van die landdros verwag om alle denkbare verwerpe te ondersoek en uit te skakel nie. Dit blyk uit ervaring dat 'n onontwikkelde en ongesofistikeerde beskuldigde wat besluit het om skuldig te pleit, geneig is om bevestigend te antwoord op enige direkte en leidende vraag met betrekking tot die bestanddele van die misdryf wat hy sou gepleeg het. Die manier en omvang van die ondervraging van 'n beskuldigde sal noodwendig wissel van geval tot geval, en sal in 'n baie groot mate afhang van faktore soos die aard van die aanklag teen die beskuldigde, die ingewikkeldheid van die feite van die saak, en die aard en omstandighede van die beskuldigde. In die algemeen gesproke sou die aangewese manier wees om die beskuldigde te vra wat gebeur het en hoe die misdaad gepleeg is. Die landdros kan dan toesien dat hy hom by die punt hou en met vrae verseker dat hy ook aandag skenk aan die bewerings in die aanklag. Deur 'n beskuldigde op hierdie manier te ondervra met betrekking tot die beweerde feite van die saak, word daar aan die aanklaer 'n geleentheid gegee om vas te stel of die beskuldigde se relaas strook met die getuienis waaroor die Staat beskik. Die aanklaer mag besluit om sy getuienis ook voor die hof te lê, want dit mag 'n groot verskil maak wat die vonnis aanbetref."

[24] The answers given by the accused clearly differs from the averments in the charge-sheet. The accused says that she hit the victim with a bottle, whereas it is averred in the charge sheet that the victim was stabbed with a broken bottle. This aspect was never cleared up by the magistrate. Also ex facie the record, we do not know if the person the accused hit with the bottle is indeed the person named in the charge sheet, nor if the date and place as averred in the charge sheet is indeed correct. Another aspect that was never cleared up by the magistrate is the injuries suffered by the victim. Although actual injuries are not a requirement to be convicted of assault with the intent to do grievous bodily harm, it will have bearing on the sentence imposed by the court. No medical report (J88) was handed in either. The state was also not asked whether it accepted the plea as tendered by the accused or if it was in accordance with the contents of the facts at its disposal.

[25] Since there is nothing on record that the state accepted the plea as tendered by the accused, it is clear that the magistrate should have applied section 113(1) of the Criminal Procedure Act supra, as the accused clearly did not admit all the allegations in the charge sheet. Section 113(1) provides:

“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”

[26] In any event, the accused’s answers do not satisfy the requirements for a conviction on the charge of assault with the intention to do grievous bodily harm. The distinction between the crime of assault and assault with the intention to do grievous bodily harm was aptly re-stated in *S v ZWEZWE* 2006 (2) SACR 599 (N) at 603B-D. For the crime of assault with the intention to cause grievous bodily harm, the offender must have the necessary intention to cause the complainant grievous bodily harm. The enquiry into the existence of such intent requires consideration of the following factors:

- (a) the nature of the weapon used and in what manner it was used;
- (b) the degree of force used and how such force was used;
- (c) the part of the body aimed at; and
- (d) the nature of injury, if any, which was sustained.

The list is not a numerus clausus. *S v MAPASA* 1972 (1) SA 524 (E); *S v DIPHOLO* 1983 (4) SA 757(T) at 760E-G.

[27] Clearly the questions posed to, and the answers by the accused did not establish the requirements to infer the necessary intent.

[28] The court could also not have been satisfied that the accused admitted all the allegations in the charge sheet. This is apparent from the record when the court passed sentence on the accused and made the following remark:

“...because you were refused entry into a hall and definitely though it is not clear before this court what actually occurred there, that you had no right at all to do what you did.”

- [29] As indicated above, after conviction the court also failed to inform the accused of her rights to give evidence under oath or call witnesses in mitigation of sentence and also failed to hold an inquiry with regards to Section 103 of the Fire Arms Control Act, Act 60 of 2000. The result of this is that the accused is now deemed unfit to possess a firearm.
- [30] Returning briefly to the magistrate's response to the initial reviewing Judge's enquiry as to whether the accused did indeed plead guilty freely and voluntarily, without influence, I am of the view that where such a fact can be established directly from the accused, it is not sufficient, nor advisable to rely on the demeanour of the accused or the ease with which he or she answers the court's questions, especially where the accused is not represented. Although this failure would not necessarily mean that the trial was unfair, this is but one of several omissions.
- [31] Having regard to:
- 31.1 the court a quo's failure to properly inform the unrepresented accused of possible competent verdicts before her plea;
- 31.2 the court a quo's failure to properly inform the unrepresented accused of the procedure that would follow in applying section 112 of the Criminal Procedure Act *supra*;
- 31.3 the court a quo's failure to make sure that the unrepresented accused understood what the charge was that she was facing, and to which she ultimately wanted to plead guilty, to wit either assault or assault with the intention to do grievous bodily harm;
- 31.4 the probable application of section 113 of the Act;
- 31.5 the failure to inform the accused of her rights with regards to mitigation of sentence;
- 31.6 the failure to hold an inquiry in terms of the Fire Arms Control Act, 60 of 2000 as mentioned above; and-
- 31.7 the fact that the court informed the accused that it would explain her appeal and review rights to her, but *ex facie* the record it does not appear to have been explained at all, even though she did say that she was satisfied,
- I am of the view that the accused did not have a fair trial and that a failure of justice occurred.
- [32] The conviction can clearly not stand.
- [33] The office of the Director of Public Prosecutions, Free State was requested to consider whether that office wanted to make any submissions regarding this matter before I deliver judgment. The DPP, rightly to my mind, conceded that it appeared from the record that the accused did not have a fair trial.

- [34] It remains to consider what order should be made. This not a matter where the matter can be remitted so that section 112(1)(b) can simply be followed, nor where a plea of not guilty in terms of section 113 of the Act can merely be directed. The proceedings, to my mind, must start de novo, if the remittance will not impede the applicant's right that trial begin and be concluded without unreasonable delay (section 35(3)(d) of the Constitution).
- [35] The sentence has been wholly suspended. The trial was concluded within days from the incident. Due to the unavailability, initially, of the acting magistrate who presided at the trial, the review became protracted. Six months has passed since the date of the alleged crime. I am satisfied that the delay of 6 months will not lead to a failure of justice. To my mind the matter must be remitted and the prosecuting authority authorised to commence with proceedings de novo before another judicial officer if it so decides.
- [36] In the result I make the following order:
1. The conviction and sentence are set aside.
 2. Leave is granted to the Director of Public Prosecutions, Free State, to reinstate prosecution against the accused if it so decides.
 3. In terms of section 324 of the Criminal Procedure Act, Act 51 of 1977 the matter is remitted back to the Magistrate's Court, Ficksburg to be tried, de novo, before another magistrate.
 4. A copy of this judgement must be sent to the magistrate, Ms N.I Sili, who presided over the matter in the court a quo.

N. SNELLENBURG, AJ

I concur and it is ordered.

L.J. LEKALE, J

/am

1Section 35(3) of the Constitution of the Republic of South Africa 108 of 1996 provides: '(3) Every accused person has a right to a fair trial, which includes the right- (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried;

- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court.'

1Section 35(3) of the Constitution of the Republic of South Africa 108 of 1996 provides:

'(3) Every accused person has a right to a fair trial, which includes the right-

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.'
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