

SOUTH AFRICA / JUDGMENT

S v Mosesi (A994/2004) [2009] ZAGPHC 17 (4 February 2009) [2009] ZAGPHC 17

COURT

High Courts - Gauteng

BEFORE

M Jajbhay, D I Berger

CASE / FILE NUMBER

A994/2004

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A994/2004

DPP REF NO: JAP 2004/889

In the matter between:

MOSESI, BUTI EDWARD Appellant

and

THE STATE Respondent

J U D G M E N T

JAJBHAY, J:

[1] The appellant was charged on one count of extortion in the Regional Court held at Hillbrow on 26 November 2001. The appellant pleaded not guilty to the charge and did not offer a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 as amended. The appellant was convicted on a lesser charge of attempted extortion by the learned Magistrate. He was sentenced to pay a fine of R10 000 or 3 years' imprisonment. The present appeal is in respect of the conviction.

[2] The particulars of the charge against the appellant were set out as follows:

"That the accused is guilty of the crime of extortion."

In that upon or about the 10 day of March 2000 and at or near Johannesburg in the Regional Division of Southern Transvaal, the accused did unlawfully and intentionally inspire fear in the mind of John Kungwone by threatening not to register his wife as a director of a team named Mobosone Young Masters unless the said John Kungwone paid to him the sum of R1 500-00 and did by means of such threat unlawfully and intentionally extort and obtain from the said John Kungwone the sum of R1 000.”

[3] At the commencement of the trial the State led the evidence of the complainant, Mr Kungwone. Immediately after the prosecutor had indicated that he did not have any further questions for this witness, the record indicates the following:

“As the court pleases. The state has got no further questions.

COURT: (Indistinct) give me the definition of the crime of extortion?

PROSECUTOR: Your worship, extortion it is whereby one instil a fear in the mind of another person that if you do not give me such, then the other person who is in power will not return the favour which is intended.

COURT: And what you say is the definition of corruption?

PROSECUTOR: Corruption, your worship, it is where a person who is power, it differs with extortion, can I just go .. Corruption is whereby a person to whom power has been conferred to, or has been charged with any duty by which of any employment holding of any office or relationship of agency or any law, want some money from a certain person with the intention to influence upon him or of such powers being conferred has been with such duty to commit or omit to do any act in relationship to his powers of duty.

COURT: I am just going to take a brief adjournment. I would like the defence to argue those as well. (Over to C2)

COURT ADJOURNS COURT RESUMES

JOHNNY MAKHUTI KHUNGWANE s.u.o.

COURT: .. the evidence is this, (indistinct) South African Criminal Law Procedure volume 2, I also have (indistinct) Straf, a book by Verschoor. The definition of extortion in Hunt on page 693 is as follows:

‘Extortion consists in taking from another some advantage by intentionally and unlawfully subjecting him to pressure which induces him to submit to the taking.’

The essential elements are these, advantage, intention, pressure, unlawful subjection to pressure and inducement.

PROSECUTOR: That is correct, your worship.

COURT: Good, on page 696, the following:

‘Pressure. There must some thing in the nature of a threat, something which is intended to inspire fear and which does inspire far. There is no (indistinct) of the kind of threats which will suffice. The threat may be for an example, bodily harm, damage to property, arrest or prosecution, defamation, dismissal, civil proceedings or inconvenience. The threat may be expressed or implied by words or conduct. It is submitted that the test is not objective.’

If there is no pressure, a crime may be fraud, corruption of something else but not extortion. The difficulty the court has is here, is that there is no indication of any threat or pressure or anything of that kind.

[4] The appellant argued that in conducting himself in the way in which he did, the learned Magistrate descended into the arena by unfairly assisting the respondent in the presentation of its case. The appellant further contended “it was wholly inappropriate for the learned magistrate to intervene in the manner which he did at the end of the examination in chief of Kungwone by asking the learned prosecutor the definitions of the crimes of extortion and corruption respectively”.

[5] The Constitution of the Republic of South Africa, 1996, provides in section 35(3) that every accused person has the right to a fair trial. In *S v Zuma and Others* [1995] ZACC 1; 1995 (1) SACR 568 (CC)

[1995] (2) SA 642; 1995 (4) BCLR 401, in dealing with the right to a fair trial provided for in the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993), the court said in paragraph [16]:

“The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. 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. In S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A) the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held the function of a court of criminal appeal in South Africa was to enquire ‘whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted’.

A Court of Appeal is now enjoined to enquire whether the trial was fair in accordance with notions of basic fairness and justice, or with the ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration: *S v Zuma* above.

[6] In our law, various principles have arisen which are to the effect that the court may intervene at any time to elucidate a point, but should not take over the examination or put leading questions to support the State case before the parties have finished their examination of the witness:

R v Ngcobo 1925 AD 561 at 561-5; R v Laubscher 1926 AD 276 at 281; S v Van Niekerk 1981 (3) SA 787 (T); S v Rall 1982 (1) SA 828 (A). This principle may be extended to the effect that a court should not anticipate or second guess a particular litigant's strategy or case.

- [7] In the present appeal, the transcript of the record set out above indicates that the learned Magistrate was not examining a witness in terms of section 167 of the Criminal Procedure Act. The learned Magistrate did not wait for the cross-examination to commence or to be completed prior to engaging counsel as to what the elements that would constitute a crime of extortion would be. Instead, the Magistrate begins to engage the prosecutor in an academic discussion in the presence of a key witness in order to establish at such an early stage of the trial whether the essential elements of the alleged offence have been proved. Here, it was imperative for the Magistrate to exercise not only patience but also restraint. He did not know what other witnesses the State had intended to lead in order to prove its case. The learned Magistrate was not aware of what questions would have been asked in cross-examination. His conduct alerted the parties and in particular the State as to what the deficiency in their case at that point in time was. This in my mind constituted a gross irregularity in the proceedings.
- [8] The purpose of a court's enquiry or examination should be to elucidate any points that may be obscure after examination of the parties: R v Kumalo 1947 (4) SA 156 (N).
- [9] It should not be to supplement the case of the State. A court must remain impartial and this should be evident not only from the nature and scope of the examination by the court, but also the type of questions that a court asks of the prosecutor or the legal representative of the accused. The debate in this matter ought to have been reserved. The learned Magistrate ought to have

engaged in this debate after all the evidence had been presented to him and the case on both sides was closed. It is at this time (at the close of both the State as well as the accused person's case) when the judicial officer will engage both sides in respect of his/her concerns.

- [10] The admonition that a presiding officer should not enter the arena cannot be overemphasised. This case bears testimony to this fact. The learned Magistrate in the manner in which he conducted himself not only tainted the proceedings, but in effect contaminated same. It did not matter what transpired thereafter, the remainder of the proceedings were simply fatal and against the interests of the accused person as well as not being coherent with the proper administration of justice.
- [11] It is trite that a criminal trial is not a game. The presiding officer's position is not merely that of an umpire to see that the rules of the game are observed by both sides. The presiding officer is the administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done: R v Hepworth 1928 AD 265 at 277. Therefore, a judicial officer is entitled and often obliged in the interests of justice to enquire from the witnesses including the accused as seem to him desirable in order to elicit or elucidate the truth more fully in respect of

relevant aspects of the case. However, in this matter, the learned Magistrate not only commenced a debate on the essential elements in respect of the crime of extortion but he thereafter instructed the prosecutor to attend to the library and investigate what the essential elements of the crime of extortion are. This the prosecutor did this, and when he returned in the presence of the complainant witness the legal debate pursued. All of this in my mind did not constitute a fair trial, and as I have already indicated whatever transpired thereafter was not in the interests of the proper administration of justice. Here, the accused did not enjoy a fair trial as is envisaged in terms of section 35 of the Constitution of the Republic of South Africa.

[12] The circumstances of this trial required the State to prove beyond reasonable doubt that the appellant acquired the advantage by exerting some form of pressure on the complainant (Kungwone), which the latter submitted to. The pressure could have taken the form of a threat or intimidation that harm will befall the complainant. These are the facts that the State had to prove beyond

reasonable doubt. At the time that the prosecutor had indicated to the learned Magistrate that he did not have any more questions for the complainant, the Magistrate should not have engaged the prosecutor in the questioning in the form or the substance in which

he in fact did. He should have allowed the cross-examination to commence. This he did not do. His invitation to the prosecutor to check the law on the particular subject was also improper. All of this was in the presence of the complainant witness, who may well have understood the difficulties in the case of the State and supplemented his answers accordingly. This as I have indicated did not envisage a fair trial for the accused person.

[13] As a result of the conduct of the learned Magistrate in the court below, justice was not done. It cannot be said that the

learned Magistrate conducted the trial in an open-minded and impartial fashion. His fairness in the manner in which he conducted

himself in this particular area was not manifest for all to see.

[14] Here, the learned Magistrate descended into the arena and accordingly, his vision was clouded by the dust of the conflict. He unconsciously deprived himself of the advantage of calm and dispassionate observation. The learned Magistrate by reason of the conduct complained of, could not have enjoyed the objectivity or neutrality of a person holding the scale between the contending

parties from his position of relative detachment. Here, the balance had already tilted in favour of the prosecution.

[15] It is clear that in order to give the accused a fair trial a judicial officer must not only be impartial, but be seen to be impartial. In *S v Sigwahla* 1967 (4) SA 566 (A) the court said at 568G-H:

“The principle is clear. A judicial officer should ever bear in mind that he is holding a balance between the parties, and that fairness to both sides should be his guiding star and that his impartiality must be seen to exist.”

[16] In *S v Mathabathe* 2003 (2) SACR 28 (T) Southwood J dealt with a matter in which the Magistrate took an active part in the trial. He quoted with approval from the abovementioned case and then dealt with the matter further:

“The presiding magistrate has dealt comprehensively with the court’s queries in very helpful memorandum. ... While I have great sympathy for judicial officers sitting in the lower courts in uncomfortable conditions and with inexperienced and sometimes incompetent prosecutors, this cannot excuse what is clearly a substantial deviation from the standard of conduct and impartiality required. There is no justification for the sneering and sarcastic and clearly hostile questions of a presiding magistrate.

The Director of Public Prosecutions does not support the conviction and sentence and is of the view that the accused did not receive a fair trial. He points out that the presiding magistrate descended into the arena and played the role of both prosecutor and judicial officer. The Director of Public Prosecutions has referred to the judgment of *S v Rall* (supra) and submits that the presiding magistrate went outside the limits set. I agree.”

[17] The transgression complained of and set out herein above constitutes an irregularity in the proceedings. To my mind, the irregularity has resulted in a failure of justice. The irregularity further prejudiced the accused person in the case that he had to subsequently meet. The court’s conduct was also against the interests of public policy. Courts should refrain from conducting themselves in the manner in which the learned Magistrate did in the court below. It is imperative, notwithstanding the invitation, to exercise restraint and patience in the discharge of a duty by a judicial officer.

[18] In all of the above circumstances, I have already set out that there was sufficient irregularity to vitiate the proceedings in the court below. Therefore, I propose the following order:

The conviction and sentence are set aside.

M JAJBHAY

JUDGE OF THE HIGH COURT

I agree:

D I BERGER

ACTING JUDGE OF THE HIGH COURT

It is so ordered.

DATE OF HEARING 4 FEBRUARY 2009

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ON BEHALF OF THE STATE ADV LOOTS

APPELLANT REPRESENTED HIMSELF

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