

SOUTH AFRICA / JUDGMENT

S v Nkutha and Another (R 2267/10) [2011] ZAKZPHC 43 (6 October 2011)

[2011] ZAKZPHC 43

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Ntshangase, Ndlovu, Gyanda

CASE / FILE NUMBER

R 2267/10

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REPORTABLE

IN THE HIGHCOURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

REVIEW NO: R 531/11

CASE NO: R 2267/10

In the matter between:

THE STATE

vs

MSEBENZI WISEMAN NKUTHA and

SIBUSISO ERIC MASHAYA

REVIEW JUDGMENT

Delivered on:

NTSHANGASE J

NDLOVU J

- [1] Both accused were, on 8 March 2011, convicted of assault with intent to do grievous bodily harm at the Magistrate's Court, Madadeni. The assault, according to the complainant's evidence, took place on the night of 8 October 2010. The accused No

1 was sentenced to pay a fine of R4 000 or to undergo 12 months' imprisonment; the accused No 2 was sentenced to pay a fine of R2 000 or to undergo eight months' imprisonment.

[2] The case is before me on automatic review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 ('the Act'). At the outset it is necessary to point to the omission from the record of proceedings, of the record of previous convictions, SAP 69 in respect of accused No 1 and the review form, J4 in respect of accused No 2. Both the original and the typed copy of the face of the charge sheet, J15 reflect, apparently erroneously, the 'date of appointment to the rank of Magistrate' of the presiding judicial officer as '1/8/2011'. It is suggested that these shortcomings be rectified before the record of proceedings is filed away.

[3] As the proceedings were, in my opinion, clearly not in accordance with justice and the accused may be prejudiced if the record of the proceedings is not forthwith placed before court, such record is, in terms of the proviso to s 304(2)(a) of the Act, laid

before this court without obtaining the statement of the judicial officer who presided at the trial. According to the single review

form, J4 submitted in respect of accused No 1, he is in custody. The accused No 2 may also be in custody.

[4] The record of proceedings reflects several irregularities. Although the presiding judicial officer explained to the accused No 1 his rights after the close of the State case as including the right to give evidence on oath 'to tell the court his side of the story,' the court itself rendered the accord of such right nugatory. By judicial questioning of accused No 1 from beginning to the end of his testimony, whereafter he was handed over to the prosecutor to be cross-examined, he was denied even an attempt to tender evidence, exculpatory if so desired, in his own words and in the manner of his choice. It had the effect of muzzling the accused who had clearly expressed a desire to tell the court his side of the story. Even the court's last question 'is that all?' would not necessarily be regarded as an invitation to tell his side of the story in his own words as the unrepresented accused would ordinarily understand that question to be one which enquires whether that is all he wished to proffer as an answer to the question earlier posed by the court, to which his last answer responded.

[5] The accused No 1 sought and was accorded the right to call a witness. The desired evidence of his witness, Bongani Peter Nkosi was lost to the accused when the court again took over the examination of the witness from beginning to the end of his testimony, whereafter the accused's witness was handed over to the prosecutor for cross-examination. The accused became no more and no less than a passive spectator to the exclusive extensive examination of his own witness by the court. Needless to say that the accused also did not re-examine his witness after judicial questioning as the opportunity to do so was not accorded to him; nor was Mr Nkonde, who appeared for the accused No 2, accorded an opportunity to cross-examine the accused No 1's witness.

[6] It is instructive to heed the following from the case of *S v Sigwahla* 1967 (4) SA 566 (A) at 568G-H:

‘There are occasions, particularly where a party is unrepresented when a judicial officer will properly take some part in

the examination of witnesses; but in the main, and as far as is reasonably possible, he will usually tend to leave the dispute to the contestants, interrupting only when it is necessary to clarify some point in the interests of justice.’

In this case the accused had evinced no stated need for the court’s interposed ‘assistance’.

[7] While recognising that it is undesirable and difficult to attempt to set limits within which judicial questioning should be confined, the court, in *S v Rall* 1982 (1) SA 828 (A) at 831-832 enjoined for judicial questioning which does not by its frequency, length, timing, form, tone or contents, defy the imperative of the presiding judicial officer being perceived by all concerned to be impartial and fair, and which does not preclude him from ‘detachedly or objectively appreciating and adjudicating upon issues fought out before him by the litigants’, and which also does not intimidate or disconcert an accused or witness so as to affect his demeanour or credibility. To this, I venture to add that the power of the court to examine as conferred by s 167 of the Act ought not to be exercised to the total preclusion of the accused from tendering his desired evidence in his own words or examination of a witness called by the accused, as happened in this case. In regard to the limits within which judicial questioning should occur, the case of *Yuill v Yuill* 1945 P.D. 15 at 20 was cited with approval in *R v Roopsingh* 1956 (4) SA 509 (A) at 514 as setting out correctly what should be borne in mind by the judge in the conduct of proceedings over which he is presiding, in the following passage which is quoted in part:

‘A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.’

[8] Now where, as happened in this case, the examination of the accused and his own witness was conducted exclusively by the presiding judicial officer, I think that it would not be proper to hold that the answers of the accused and those of his witness to the judicial examination would necessarily embody the evidence the accused had sought to tender in his defence or to derive from his witness.

In *R v Nea Hellas (Pty.) Ltd., and Theo* 1935 TPD 262, where a magistrate had called a witness after the close of the defence case without affording the accused an opportunity of leading rebutting evidence, Greenberg J said, at 265:

‘I do not think it can possibly be intended that we should speculate as to what would have happened if the accused had given his evidence in reply; namely as to whether he would have been believed or not.’

I find this to be apposite in the present case.

The court virtually took the conduct of the case of the accused No 1 out of his hands. Therein lies the prejudice to the accused No 1.

[9] The circumstances of the accused No 2 were somewhat different in this regard. Although he was not spared extensive questioning by the court, somewhat out of turn, his position was ameliorated by the fact that he was legally represented. I say out of turn because when Mr Nkonde, his legal representative was to re-examine the accused No 2, the Court interposed its questioning of the accused No 2 which would normally come after re-examination, the main purpose whereof is to clear up any points which are still obscure. This is normally followed by an invitation to the parties to put questions which might arise from responses to the court’s questions. See *S v Mseleku* 2006 (2) SACR 237(N) at [59]. The following question by the court even pried into accused 2’s prospective witness’s version:

‘Actually these three persons that you would like to call, you want them to testify that they were with you from early in the morning until the next day, is that so?’

I think it is fair to regard the following one as bordering on cross-examination:

‘Now, the point I am trying to drive you to, could it not have happened that you left these three while you were sleeping, when you did so, they were unaware?’

Accused No 1 was not accorded an opportunity to cross-examine accused No 2 on depositions arising from the court’s extensive questioning. Mr Nkonde, probably deliberately, posed no questions as well. The position of the accused No 2 will be dealt with further when the merits in this matter are discussed briefly.

[10] There is another vexing aspect in the proceedings. The record of proceedings reflects that the accused No 1 elected to give evidence on oath but when questioned by the Court testified without an oath, affirmation or admonition having been administered

to him. This occurred in violation of the peremptory provision in s 162(1) of the Act as, in terms thereof, subject to the provisions of sections 163 and 164 of the Act, no person shall be examined as a witness unless he or she is under oath. It is an irregularity of a grave nature.

[11] Now the proceedings in the lower courts are reviewed for the purpose of establishing whether the results in such proceedings were attained in accordance with justice. Regrettably they were, in the present case, in my view, not attained in accordance with justice. The purpose of rules and procedures is to ensure that an accused person receives a fair trial. The denial of a fair trial is a denial of justice, which, in turn, is a failure of justice. There is a failure of justice where it cannot be held that

a reasonable trial court would inevitably have convicted if there had been no irregularity. This test brings me to what was stated in *S v Moodie* 1961 (4) SA 752 (A) at 758G:

‘In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have

convicted if there had been no irregularity.’

[12] In my view the irregularities pertaining to the conduct of proceedings in respect of accused No 1 bring it within the description of an exceptional case. In his definition of ‘exceptional’ in the case of *S v Mohammed* 1999 (2) SACR 507 at 515 Comrie J stated:

‘What appears from these definitions in my opinion is that ‘exceptional’ (‘buitengewoon’) was two shades or degrees of meaning. The primary meaning is simply: unusual or different. The second meaning is: markedly unusual or specially different...’

The presiding judicial officer breached the canons of judicial conduct in respect of the accused No 1 in a most unusual manner.

[13] The following in *S v Hendricks en ‘n Ander* 1995 (1) SACR 37 (C) at 46 would, by description, aptly fit the nature of the irregularities in the present matter:

‘Na my oordeel is die enigste logiese, en ook billike slotsom waartoe geraak kan word dat die onreëlmatigheid in die huidige saak, om beskuldigde 2 nie onder eed te laat getuig nie, van so ‘n growwe aard en so strydig met die normale reëls van die strafproses is, dat dit per se op ‘n regskenking neerkom.’

The following, in the same passage is an apposite statement of the value of the right of an accused who, in the present matter, elected but was denied the right to give evidence on oath:

‘Per slot van sake is die beskuldigde se reg om onder eed te getuig ‘n kern en wesenlike bestanddeel van die audi alteram partem-reël by strafverhoor.’

[14] It is a fundamental principle of justice that an accused person is entitled to a fair trial. It is a right enshrined in the Constitution by s 35(3).1 Incidental thereto is the accused’s right to adduce evidence. The irregularities which beset this case are, in my view, of such a nature that it would be fair to hold, as I do, that in the circumstances of this case the accused No 1 cannot be said to have received a fair trial in accordance with justice or his constitutional rights.

[15] I think it is also fair to hold, as I do, in respect of both accused, that by reason of the presiding officer overly actively participating in the contest between the parties, his judicial vision may have been clouded in the dust of the conflict in the arena in which he had placed himself, to such an extent that it may have precluded him from detachedly or objectively appreciating

and adjudicating upon issues being fought out before him by the litigants and that he consequently paid scant or no regard to the

poor nature of the quality of the evidence of the single witness for the State, Bheki Selby Khuzwayo, the complainant, in regard to the alleged assault. Other than the repeated bald assertion that both accused stabbed, hit and kicked him, he was utterly unable to provide an account of what happened or to exclude that the injuries on the buttocks described by the doctor as superficial may not have been caused by the terrain where he fell and lay until the following morning. He stated that he had no idea as to what had caused him to fall.

[16] In his evidence-in-chief the complainant stated that on 8 October 2010 he was with both accused at Mbatha's house, which he later corrected to 'accused No 1's house'. They were drinking liquor. The accused later suggested that the three of them proceed to a shop in quest for more liquor. At the shop the accused could not pay for the liquor because they had no money; they requested him to pay for the liquor. He could not do so as he also had no money. They left the shop. They

had parted with the shop owner when they hit him with fists, kicked and stabbed him. They stabbed him on the buttocks causing him injuries which the doctor described as 'superficial'; and they hit him 'all over the body'. His answers to questions by the court were marked by an inability to describe the assault. In one of his answers he ascribed his failure to describe what happened to the consumption of liquor. Asked whether anyone came to his rescue, his answer was:

'Because we had sadly consumed liquor, well I do not know how or why they stopped further hitting me.'

Asked whether he was still in his senses to see that the people who assaulted him were the two accused, he was non-committal and vague in his following response:

'Because I was able to walk on my own, I was still seeing them and I was able to see that it was them that I was walking with.'

He testified that he did not know what happened to him until he was, where he lay, woken up by a certain woman in the morning. An ambulance was summoned. It conveyed him to the hospital where his wounds on the buttocks were sutured.

[17] The accused No 1 under cross-examination and in answer to the Court's questions denied that he assaulted the complainant and that he was in his company and in the company of the accused No 2 on the date in question. The accused No 1 stated that the complainant had been to his (accused No 1's) home on that date. He stated that they drank liquor and he later accompanied the complainant up to the gate of his home. The accused No 2 also denied that he assaulted the complainant and that he was at any time in the company of either the complainant or the accused No 1 on the date in question. It is common cause that both accused and the complainant were neighbours. When cross-examined by the accused No 1 about the time he sustained the injuries as he had left him at his gate at 8 pm, the complainant's answer was partly somewhat irrelevant:

‘It seems as if it is a mistake that you dropped me next to my gate, Well, because I was able to walk past it was you and the accused 2 that somewhere hit me and left me along the veldt.’

When it was stated in cross-examination that the accused No 2 was never in accused No 1’s place where accused No 1 and the complainant were drinking, the complainant’s answer was not incriminatory of accused No 2:

‘Well accused 2 did arrive at my place, but there was nothing that was important that he did to me, the only thing that he did was that he asked me for tobacco or cigarette that he used to ask of me.’

[18] To a question by the court as to how they were assaulting him, whether they approached him from the front or the sides he answered:

‘Well they were hitting me anyhow because they were both of them attacking me.’

When the question was repeated he said:

‘I cannot remember.’

He stated that he ‘had no idea’ when asked what had caused him to fall down. He did not know whether he fell on his face, side or back. He also said that he did not know and had no idea what surface he fell on when asked whether there was grass or fences ‘which pricked (him) on (his) back’ where he lay and was woken up by a woman on the following day. He also stated that he did not know exactly how they stabbed him because he had lost consciousness. Asked whether he knew who hit him first he stated that he did not know.

[19] The only other witness for the State, Mduduzi Cebekhulu, testified that he was at Soul City Mzansi Store when three men came to the shop and from him sought to purchase liquor but did not have money. They were unknown to him. A suggestive question followed:

‘And the two accused before Court, were they amongst these people.’

To this, Cebekhulu’s answer was in the affirmative. Yet another question which could have been put differently was posed to Cebekhulu:

‘Who amongst these three persons was asked to pay for the beer? Was it the one that was found lying somewhere in the following morning.’

Cebekhulu said it was the latter. The complainant had also testified that he was asked to pay. Put properly the question should have been

‘(w)ho amongst these three persons was asked to pay for the beer?’

It was important to be circumspect in posing these questions to this witness as both accused had denied that they had been to Soul City Mzansi Store in the company of the complainant on the date in question.

[20] When Peter Nkosi, the witness for the accused No 1 was questioned by the court, he said that on the date in question he had been with accused No 1 and the complainant at accused No 1's home. Peter Nkosi left both at accused No 1's home at about 8 p.m. Accused No 1 shortly thereafter came to his home, (Peter Nkosi's home) and asked for matches, and soon thereafter left after he had been given matches. According to Thabani Khumalo, the witness for the accused No 2, the accused No 2 could not have been at Soul City Mzamsi Store at 22h00 as accused No 2 was with him at the time.

[21] Without indicating the reason for the rejection of the version of the accused other than to state that the basis of rejection is concoction of the version of the defence, the court a quo decided:

‘Accused 1, though in agreement with the version of accused 2 namely that he was not with complainant and that therefore accused 2 could not be involved, is rejected.’

No factual basis is provided for the court's conclusion that the version of the defence was concocted. I myself found none. The conclusion must necessarily lose its value.

In this case this court would not be justified in according the findings of the court a quo the weight normally given to the findings of a trial court as, in my view, no reasonable trial court would have rejected the accused's evidence on the basis on which the trial court did in the light of the quality of the evidence adduced by the State as contradicted by both accused.

[22] The presiding judicial officer made no credibility findings in the short judgment he delivered. His acceptance of the complainant's version and the rejection of the accuseds' appears to lie in the following passage of his judgment:

‘Now the question is, complainant who was assaulted on the day in question, why would he say it was accused 1 and 2 who assaulted

him... Now the question is why he would not be able to see the people that assaults him.’

This approach appears to have put the onus on the accused to advance such reasons when no such onus rests on the accused persons. It is a fundamental misdirection by the judicial officer where, as in this case where the State relies on a single witness who is contradicted by the accused, a conviction could have properly followed only if the court had positively found that it believed the State witness beyond a reasonable doubt and, to that extent, had found the defence version to be demonstrably false or inherently so improbable as to be rejected as false. See *S v Muniyai* 1986 (4) SA 712 (V SC) at 715G.

In all the circumstances, the convictions of the accused, in my view, cannot stand.

[23] In the result the following order is made:

The convictions and sentences of both accused are set aside.

I agree and it is so ordered:

GYANDA J

1 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

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