

SOUTH AFRICA / JUDGMENT

S v Prince (SS57/05) [2005] ZAGPHC 80 (5 August 2005) [2005] ZAGPHC 80

COURT

High Courts - Gauteng

BEFORE

Moshidi

CASE / FILE NUMBER

SS57/05

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Sneller Verbatim/semIN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL
DIVISION)

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IN THE HIGH COURT OF SOUTH AFRICA

(

WITWATERSRAND LOCAL DIVISION

)

JOHANNESBURGCASE NO: SS57/05

JOHANNESBURG

CASE NO: SS57/05

2005-08-05In the matter between

THE STATE

and

OWEN PRINCE Accused

J U D G M E N T

_____MOSHIDI J: This matter was referred to the High Court by the Soweto regional court in terms of the provisions of section 52(1) of act 105 of 1997, (hereinafter referred to as the act) which reads as follows:

MOSHIDI J

: This matter was referred to the High Court by the Soweto regional court in terms of the provisions of section 52(1) of act 105 of 1997, (hereinafter referred to as the act) which reads as follows:

"If a regional court following on -(a) a plea of guilty or;(b) a plea of not guilty, has convicted an accused of an offence referred to in - (i) part I of schedule 2; or (ii) part II, part III or part IV of schedule 2 and the court is of the opinion that the offence concerned merits punishment in excess of the jurisdiction of a regional court in terms of section 51(2), the court shall stop the proceedings and commit the accused for sentence as contemplated in section 51(1) or (2), as the case may be, by a High Court having jurisdiction."

In this matter Mr Prince Owen, then 34 years of age, (hereinafter referred to as the accused) stood trial in the Soweto regional court on two counts of rape, one count of kidnapping and one count of assault as well as one count of pointing a firearm - all involving one complainant. The accused was legally represented and pleaded not guilty to all the charges and in terms of the provisions of section 115 of Act 51 of 1977 the accused elected to remain silent. However, in spite of his plea of not guilty the accused was eventually convicted on two counts of rape, that is counts 1 and 2. He was acquitted on counts 3, 4 and 5, being the counts of kidnapping, assault and pointing a firearm respectively. In this court the accused was represented by Adv Themba whilst the state was represented by Adv du Toit. Before confirming the convictions and sentencing the accused I had to be satisfied that the proceedings in the regional court were in fact in accordance with justice as envisaged in section 52(3)(b) of the Act. In this regard, see *S v Muger* 2004 1 SACR 371 (TPD) 382c. When the merits of this matter were argued before me on 27 July 2005 I raised with counsel for the state certain procedural aspects during the trial in the regional court which disturbed me hugely. I also raised certain concerns regarding the merits of the convictions which were not entirely satisfactory. Let me deal with the procedural aspects first. It was common cause that the complainant, the accused, and indeed most of the state witnesses and the two defence witnesses were Afrikaans speaking. Mr Morewa, an attorney represented the accused up to almost the end of the trial when another attorney, Mr Mofokeng, took over before judgment was delivered. It was abundantly clear from the record of the proceedings that neither Mr Morewa nor Mr Mofokeng could communicate in court in the Afrikaans language. It was also clear that Mr Morewa, with respect, could not effectively cross-examine Afrikaans speaking state witnesses and to convey the accused's version as best as he wanted to. To make matters worse for him, the regional magistrate was not at all impressed with Mr Morewa's deficiency in communicating in Afrikaans. In fact, she appeared to be impatient and also, to an extent, biased against the accused's attorney, and also very unhelpful in resolving the problem of communication between the accused and his legal representative. I must refer here to specific instances in the proceedings; At the commencement of the trial, that is page 7 of the record, the following transpired:

In this matter Mr Prince Owen, then 34 years of age, (hereinafter referred to as the accused) stood trial in the Soweto regional court on two counts of rape, one count of kidnapping and one count of assault as well as one count of pointing a firearm - all involving one complainant. The accused was legally represented and pleaded not guilty to all the charges and in terms of the provisions of section 115 of Act 51 of 1977 the accused elected to remain silent. However, in spite of his plea of not guilty the accused was eventually convicted on two counts of rape, that is counts 1 and 2. He was acquitted on counts 3, 4 and 5, being the counts of kidnapping, assault and pointing a firearm respectively. In this court the accused was represented by Adv Themba whilst the state was represented by Adv du Toit. Before confirming the convictions and sentencing the accused I had to be satisfied that the proceedings in the regional court were in fact in accordance with justice as envisaged in section 52(3)(b) of the Act. In this regard, see

S v Mugeru

2004 1 SACR 371(TPD) 382c. When the merits of this matter were argued before me on 27 July 2005 I raised with counsel for the state certain procedural aspects during the trial in the regional court which disturbed me hugely. I also raised certain concerns regarding the merits of the convictions which were not entirely satisfactory. Let me deal with the procedural aspects first. It was common cause that the complainant, the accused, and indeed most of the state witnesses and the two defence witnesses were Afrikaans speaking. Mr Morewa, an attorney represented the accused up to almost the end of the trial when another attorney, Mr Mofokeng, took over before judgment was delivered. It was abundantly clear from the record of the proceedings that neither Mr Morewa nor Mr Mofokeng could communicate in court in the Afrikaans language. It was also clear that Mr Morewa, with respect, could not effectively cross-examine Afrikaans speaking state witnesses and to convey the accused's version as best as he wanted to. To make matters worse for him, the regional magistrate was not at all impressed with Mr Morewa's deficiency in communicating in Afrikaans. In fact, she appeared to be impatient and also, to an extent, biased against the accused's attorney, and also very unhelpful in resolving the problem of communication between the accused and his legal representative. I must refer here to specific instances in the proceedings; At the commencement of the trial, that is page 7 of the record, the following transpired:

2004 1 SACR 371

"HOF: Is u ook gereed meneer? MR MOREWA: Yes I am ready your worship. COURT: Are you Afrikaans speaking sir? MR MOREWA: English. I am just requesting that we use the services of an interpreter your worship for the sake of my client. I will be conducting the trial in English your worship. HOF: Watter taal praat die getuies? AANKLAER: Die getuies praat Afrikaans. COURT: Everybody is speaking Afrikaans sir, can't you speak Afrikaans? MR MOREWA: Your worship I must say I can speak Afrikaans but I am not very much fluent in Afrikaans your worship, I would prefer if it could be in English your worship. COURT: Yes, I can understand that, you would prefer to speak in English but why do you take an Afrikaans client if you know the witnesses and everybody is going to be Afrikaans and you cannot speak it? MR MOREWA: Your worship I was hoping we could use the services of an interpreter. COURT: Yes. AANKLAER: Edelaagbare moet ek

voortgaan in Engels?HOF: Nee, gaan voort in Afrikaans."

"

HOF

: Is u ook gereed meneer?

MR MOREWA

: Yes I am ready your worship.

COURT

: Are you Afrikaans speaking sir?

: English. I am just requesting that we use the services of an interpreter your worship for the sake of my client. I will be conducting the trial in English your worship.

: Watter taal praat die getuies?

AANKLAER

: Die getuies praat Afrikaans.

: Everybody is speaking Afrikaans sir, can't you speak Afrikaans?

: Your worship I must say I can speak Afrikaans but I am not very much fluent in Afrikaans your worship, I would prefer if it could be in English your worship.

: Yes, I can understand that, you would prefer to speak in English but why do you take an Afrikaans client if you know the witnesses and everybody is going to be Afrikaans and you cannot speak it?

: Your worship I was hoping we could use the services of an interpreter.

: Yes.

: Edelagbare moet ek voortgaan in Engels?

: Nee, gaan voort in Afrikaans."

The trial then, on the said order of the magistrate, proceeded in Afrikaans and the charges were put to the accused. The accused pleaded not guilty and Mr Morewa confirmed in English that the plea was in fact in accordance with his instructions. It must be noted that at this stage there was no attempt at all on the part of the magistrate to accommodate, or even to consider, the defence attorney's request for the use of an Afrikaans interpreter. In my view, with respect, this was the beginning of the unfairness and prejudice the accused would suffer in the trial ultimately. The first state witness, that is the complainant, testified in Afrikaans. At the end of her evidence-in-chief, and just before cross-examination, the record of the proceedings in the regional court revealed the following:

"HOF: Hoe goed is u Engels Juffrou? Nie so goed nie.

: Hoe goed is u Engels Juffrou? Nie so goed nie.

Die prokureur gaan vrae aan u stel, hy Engels praat. (sic) Okay.

Moenie probeer om hom in Engels te antwoord nie, ons gaan nie snaaks van u dink as u net Afrikaans praat nie want u het die reg om Afrikaans te praat. "

Mr Morewa, the attorney, then proceeded to cross-examine the complainant in English. Prior to the commencement of the defence case the record revealed the following exchange of words between the presiding officer and Mr Morewa:

"HOF: Ja meneer?MR MOREWA: Before I proceed, is it alright if I proceed in English for you? Can you hear English properly or do you need ...(intervene) (sic)COURT: You need to speak up sir because your client cannot

: Ja meneer?

: Before I proceed, is it alright if I proceed in English for you? Can you hear English properly or do you need ...(intervene) (sic)

: You need to speak up sir because your client cannot

hear you, never mind understand you."At this stage of the trial, in my view, it should have been more than obvious to the presiding officer that there were indeed communication difficulties between the accused and his legal representative. The latter, that is Mr Morewa, could not communicate in Afrikaans, while the accused was Afrikaans speaking. One shudders to think how Mr Morewa had consulted meaningfully and obtained proper instructions from the accused in order to render effective legal representation to the accused during the trial. Thereafter, as the record indicated, Mr Morewa continued to lead the accused in English and the accused responded in Afrikaans. It indeed came as no surprise that immediately after the commencement of the accused's evidence-in-chief a further misunderstanding arose between the accused and his attorney on page 149 of the record, which was reflected in the following exchange:

"COURT: On 11 February 2001 your client was in custody for this case sir.MR MOREWA: As the court pleases your worship, let me just ..(intervenes) (sic)COURT: Please be prepared when you want to lead your client sir, make sure of the date. According to the charge sheet this happened on 10 February 2000.MR MOREWA: As the court pleases your worship, I made a mistake, my apologies your worship.COURT: Sir if you make mistakes it is going to go to your client." (sic)

: On 11 February 2001 your client was in custody for this case sir.

: As the court pleases your worship, let me just ..(intervenes) (sic)

: Please be prepared when you want to lead your client sir, make sure of the date. According to the charge sheet this happened on 10 February 2000.

: As the court pleases your worship, I made a mistake, my apologies your worship.

: Sir if you make mistakes it is going to go to your client." (sic)

Immediately thereafter the magistrate took over the questioning and led the accused in Afrikaans. Incidentally, the magistrate was incorrect in this regard as it was the magistrate who, when the accused was represented by a second attorney, Mr Mofokeng, suggested later that the charge sheet be amended to reflect the date of the incident as 10 February 2001 and not 10 February 2000. This appeared on pages 294 to 295 of the record. The first defence witness, Mr Benjamin Malas, was also led by Mr Morewa in English and the witness responded in Afrikaans after the magistrate had said the following on page 243 of the record:

"U kan in Afrikaans antwoord al praat die prokureur Engels."

When the second defence witness, Rachel Louise, had to testify a further exchange of words, which in my view was more disturbing than the previous exchanges between the presiding officer and the defence attorney occurred on the language issue. This was reflected on pages 271 to page 272 of the record as follows:

"COURT: Yes sir? MR MOREWA: As the court pleases your worship. Before I proceed your worship we would like to bring to the attention of the court that I will proceed in English. Maybe the interpreter can translate into Afrikaans your worship. COURT: I do not think this interpreter can speak Afrikaans sir. MR MOREWA: Your worship my Afrikaans is not so good your worship. I will not be able to put the proper questions your worship. As the court pleases, if the court can assist me in that regard your worship. COURT: How do you wish the court to assist you? Translate for you? MR MOREWA: Maybe get somebody who will interpret for the client in Afrikaans your worship. HOF: Hoe goed is u Engels mevrou? Nie so goed nie. There we have it. I asked you from the start how can you defend an Afrikaans accused if you cannot speak the language ..."

: Yes sir?

: As the court pleases your worship. Before I proceed your worship we would like to bring to the attention of the court that I will proceed in English. Maybe the interpreter can translate into Afrikaans your worship.

: I do not think this interpreter can speak Afrikaans sir.

: Your worship my Afrikaans is not so good your worship. I will not be able to put the proper questions your worship. As the court pleases, if the court can assist me in that regard your worship.

: How do you wish the court to assist you? Translate for you?

: Maybe get somebody who will interpret for the client in Afrikaans your worship.

: Hoe goed is u Engels mevrou? Nie so goed nie.

There we have it. I asked you from the start how can you defend an Afrikaans accused if you cannot speak the language ..."

It was not entirely evident what exactly transpired after this exchange. It would appear that an interpreter was eventually arranged for the defence witness, Rachel Louise, when she was led in her evidence-in-chief by Mr Morewa. Thereafter the record of the proceedings began to appear more orderly. However, in her cross-examination by the state prosecutor the witness was cross-examined in Afrikaans, she responded in Afrikaans. Thereafter from the middle of page 286 to page 288 of the record the magistrate took over what clearly appeared to be further cross-examination of the witness, as opposed to questions in clarification. It was also significant to note that after Mr Morewa had addressed the court on the merits of the case the magistrate explicitly invited the state prosecutor, if she wanted to add anything on the law. A careful scrutiny of the record of the proceedings indicated that there were indeed additional procedural issues which could quite clearly be construed as amounting to bias on the part of the magistrate and undermining the defence of the accused. In this regard, mention should be made of the magistrate's decision not to afford or encourage the accused's legal representation when she had enquired into the accused's failure to attend court on 13 June 2002. As a result, the accused was kept in custody without bail from about 3 June 2004 up to the present time. In the light of the above events in the regional court, the pertinent question arose whether the accused had had a fair trial in accordance with the provisions of section 35(3) of the Constitution of the Republic of South Africa Act No. 108 of 1996. There was no doubt that the accused faced extremely serious charges which, in the event of a conviction, attracted a possible life sentence imprisonment. That was in accordance with the provisions of section 51(1) of the Act. It was therefore, in my mind, imperative that he not only had legal representation, but indeed effective legal representation. It was in the accused's best interests to have assigned to him a legal representative who could properly communicate with him, who could understand the language of the witnesses and convey the accused's defence in the best possible effective manner. All of this did, unfortunately, not materialise in this case. In *S v Charles* 2002 2 SACR 492 (ECD) 496e-f Pillay J said the following:

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S v Charles

2002 2 SACR 492(ECD) 496e-f Pillay J said the following:

2002 2 SACR 492

"It is therefore implicit that for section 35(3)(g) of the Act (that is the Constitution of the Republic of South Africa act 108 of 1996), complied with, legal assistance to an accused person must be real, proper and designed to protect the interest of the person so represented. It is trite that upon appointment the legal representative has the obligation to conduct the case in the best interest of his or her client while still ensuring that the inherent duty towards justice is maintained. In order to be able to conduct the trial in such a manner, the legal representative has to acquaint himself or herself with the charges, the facts with which the accused is confronted and, more importantly, the version of the accused."

See also in this regard S v Chabedi 2004 1 SACR 477(WLD). In ensuring that an accused has a fair trial not only is such accused entitled to legal representation, but also a legal representative with whom he could communicate in his own language. See in this regard S v Pienaar 2000 2 SASV 143 (NKA). See also S v Halgryn 2002 2 SACR 211(SCA). In the instant case, the accused's legal representative, Mr Morewa, made it perfectly clear to the magistrate at the outset of the trial that he was not proficient in the Afrikaans language. He requested assistance from the magistrate by way of an interpreter. His client was Afrikaans speaking. The magistrate ignored the request. During the trial Mr Morewa repeated his request, instead he was unfairly lambasted by the magistrate for taking on the defence of an Afrikaans speaking accused. In my view, the magistrate's conduct was unreasonable and also inconsistent in the circumstances, especially in that it appeared that towards the end of the trial, when defence witness, Rachel Louise, testified an interpreter was ultimately arranged. It is clear to me therefore that the unfairness of the accused's trial manifested itself from the onset of the trial and endured until judgment when the accused was eventually convicted. I am not at all doubting the competence of Mr Morewa. To the contrary, he tried his best to conduct the accused's defence under what must have been very difficult circumstances. However, had he done so in a language he was fluent in, or the language in which he could effectively understand the accused and the other witnesses, the end result of

the trial might very well have been different. I have no doubt in my mind that this fact on its own resulted in the breach of the accused's fundamental rights to a fair trial and the trial did not meet the requirements as envisaged by section 35(3) of the Constitution of the Republic of South Africa act 108 of 1996. If I am wrong in this approach in this regard, then there was the clear bias on the part of the magistrate against the accused's legal representative for not knowing Afrikaans, and accompanied by the somewhat discourteous manner in which she addressed him. Mr Morewa must have been thoroughly embarrassed and humiliated in front of the public and his client for taking on a case of a client whose language he could not speak. This ground alone, that was the ground of bias, was sufficient to render the proceedings irregular, in my view. There were indeed concerns I raised with both counsel regarding the merits of the case per se. In the light of my ultimate finding however, I deemed it unnecessary to deal with such issues. An accused person should not be prejudiced by the inability of his legal representative to communicate effectively with such accused or witnesses, or to conduct his defence efficiently and properly. From the above exposition as to what transpired at the accused's trial, it was clear that the accused did not in fact receive a fair trial and his constitutional rights had been severely negated. See in this regard *S v Ntuli* 2003 1 SACR 613 (WLD). I have indeed given serious consideration to remitting this matter to the regional court for the trial to commence de novo before another magistrate. However, due to the lapse of time, in particular that the alleged offences occurred in February 2001, and that the accused had been in custody for some time, etcetera, I did not deem it in the interests of justice to do so. In the result, I make the following order; 1. The convictions of the accused on the two counts of rape are hereby set aside. For the sake of clarity, the convictions in the regional court on the two counts of rape against the accused are hereby set aside. ADVOCATE obo STATE

: ADV DU TOIT ADVOCATE obo ACCUSED

: ADV THEMBA ATTORNEY'S FIRM obo ACCUSED

: LEGAL AID BOARD DATE OF HEARING

: 08-06-2005

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2004 1 SACR 477

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2002 2 SACR 211

per se

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2003 1 SACR 613

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