FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No: 354/2010

In matters between:

The State vs. Motlatsi Monyane; The State vs. Leeto J Monyane and The State vs. Moholo A. Ramateletse

---

CORAM: KRUGER, J et C.J. MUSI, J

JUDGMENT BY: C.J.MUSI, J

DELIVERED ON: 30 SEPTEMBER 2010

INTRODUCTION

[1] These matters, which were presided over by the magistrate: Clocolan, were referred to this Court, in terms of section 304 (4) of the Criminal Procedure Act, 51 of 1977 (the Act)[1], by the senior magistrate Bloemfontein, who is also the judicial quality assurance magistrate.

---

1 Section 304 (4) reads as follows:

> "if in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have a powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

BACKGROUND

[2] According to the senior magistrate, the magistrate was suspended pending an investigation to have him removed from office *inter alia* for performing his judicial duties whilst under the influence of alcohol. The senior magistrate was requested by the Magistrates' Commission to inspect some of the cases that were presided over by the magistrate. His inspection unearthed these three matters.

[3] The issues in S v Motlatsi Monyane (case number 144/09) and S v Leeto Julius Monyane (case number 145/09) are the same. I will consider them together and consider the matter of S v Ramateletse (case number 238/08) separately.

S v M. Monyane and S v L .J. Monyane

[4] The two accused were purportedly charged with contravening section 49 (1) (a) of the Immigration Act 13 of 2002.[2] The annexures to the respective charge sheets were not completed. The annexure in each case reads as follows:

"Deurdat op omtrent _____ en te of naby _____ in

2 Section 49 (1) (a) reads as follows:

"Anyone who enters or remains in, or departs from from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months."

die Distrik/Streekafdeling van _____ die beskuldigde die Republiek binnegekom en/of in die Republiek gebly het in stryd met hierdie Wet, deurdat_____ en daardeur 'n oortreding begaan het.

Strafbepaling:

Boete of gevangenisstaf wat nie 'n tydperk van drie maande oorskry nie."

[5] According to the roneo forms annexed to the charge sheets the accused's rights to legal representation were explained to them. Each accused preferred to conduct his own defence.

[6] According to the charge sheets the accused pleaded guilty and were convicted in terms of section 112 (1) (a) of the Act.[3]

[7] They were each sentenced to a fine of R500-00 or 100 (one hundred) days imprisonment.

---

3 Section 112 (1) (a) reads as follows:

"Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-

(i) imposed any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or

deal with the accused otherwise in accordance with law.

[8] There is no indication on both records that the charge was put to the accused. Although the accused were charged separately the magistrate inexplicably and irregularly consolidated the trials and dealt with the accused as if they were accused one and two in the same matter.

[9] The mechanical recording commences at judgment stage. There is no reason or indication why the plea proceedings were not recorded, either mechanically or longhand. The magistrate did not keep a proper record of the proceedings in both matters. The magistrate's court is a court of record. The magistrate had a duty to record the proceedings comprehensively and accurately.[4]

[10] In terms of section 105 of the Act the charge shall be put to the accused by the prosecutor.[5] In both cases there is no indication on record that the charge was put

4 See section 76 (3) (a) of the Act which reads as follows:
"The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge sheet, summons or indictment shall form part thereof."

5 See section 105 reads as follows:
" The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provision of section 77, 85 and 105 A, be required by the court forthwith to plead thereto in accordance with section 106."

to the accused by the prosecutor. In fact the lack of any substantial averments in the annexure to the charge sheet point indubitably to the fact that the charge was not put to the accused. If the accused pleaded, it is clear that they were not informed of the charge with sufficient detail to answer it. Their constitutional right to be informed of the charge with sufficient detail was therefore violated.[6]

[11] The right to be informed of the charge with sufficient detail *inter alia* encompasses the State's duty to set out all the allegations that it intends to prove in order to prove the accused's guilt. The State must set out detail including when the crime was allegedly committed; where it was allegedly committed and by what means or how it was committed. [7]

[12] The information in the preceding paragraph must be set out in such a manner that the accused understands

6 See section 35 (3) (a) of the Constitution of the Republic of South Africa, 1996 which reads:
"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 to it;"

7 See section 84 (1) of the Act, which reads "…a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed… as may be reasonably sufficient to inform the accused of the nature of the charge."

the nature of the charge. It must enable the accused to make proper choices with regard to the course he/she is going to chart. The accused will have to decide whether he/she wants to object to the charge or request further particulars. The charge must therefore contain sufficient detail to put the accused in a position to plead thereto or to challenge the correctness and legality thereof. The ability to plead properly and mount a defence to the charge is undermined and compromised if the accused does not know the nature of the charge. When the charge is inadequately formulated the accused should not be asked to plead thereto. In this case the accused were asked to plead to an inadequately formulated charge.

[13] The magistrate disregarded the accuseds' rights. His conduct was grossly irregular and it should not be countenanced. To convict an accused under these circumstances would be totally inimical to his/her right to a fair trial. The convictions in both matters ought to be vacated.

[14] The magistrate imposed an incompetent sentence. The maximum imprisonment that he could impose is 3 (three) months but he imposed 100 (hundred) days. The sentences in both matters ought to be set aside.

S v Moholo Abel Ramateletse case number 238/08

[15] The accused terminated his legal representative's mandate and indicated that he will conduct his own defence. He informed the magistrate that he is dissatisfied with the prosecutor's conduct because the prosecutor told his erstwhile legal representative that he must apply for legal aid. He requested that another prosecutor, prosecute his case. The record then reads as follows:

> "HOF: Vir wie, wie … (tussenbei)?
>
> TOLK: Die aanklaer sê die beskuldigde praat kak as hy so sê. *(The prosecutor says the accused is talking s**t if he says so*.) My translation.
>
> HOF: As hy wat sê?
>
> TOLK: As hy sê hy het gesê hy moet aansoek doen vir regshulp.
>
> HOF:…Dit maak nie saak wat die aanklaer gesê het nie en ek glo u ook nie. *(It does not matter what*

the prosecutor said and I don't believe you.) My translation. U moet besluit. Dit is u keuse. Wil u 'n regsverteenwoordiger hê of wil u nie een hê nie?"

[16] The accused was unimpressed with the offensively coarse word used by the prosecutor and the following dialogue ensued:

"TOLK: Hy sê hy sal self praat, maar hy het nou nie "ge–like" wat die aanklaer nou gepraat het met die hof. *(He says he will conduct his own defence but he did not like what the prosecutor just said to the court*. My translation.)

HOF: Maar meneer, u weet, die aanklaer, hy mag bevooroordeeld wees, want hy tree namens die staat op en hy mag sê net wat hy wil meneer. En as hy sê u praat nonsens dan mag hy dit ook sê meneer, daar is niks fout daarmee nie want u weet, hy kla vir u aan namens die staat en hy moet sy saak teen u bewys. So hy kan bevooroordeeld wees teenoor u. Maar meneer, u moet nou stop met u nonsens en net vir ons sê, wil u aangaan sonder regsverteenwoording?..." (My underlining).

[17] After the charge of theft was put to the accused, by the

prosecutor, he pleaded not guilty. The magistrate then endeavoured to explain his rights in terms of section 115 of the Act.[8] He explained it thus:

"HOF: Goed meneer, noudat u so pas skuldig (?) gepleit het, het u die geleentheid om vir die hof ook, u pleit van onskuldig, 'n sogenaamde pleitverduidelikende verklaring te gee. Dit is 'n verklaring wat nie onder eed is nie en dit is 'n geleentheid wat u gebied word nou by die aanvang van die verhoor om 'n verskillende verduidelikende verklaring aan die hof voor te lê. Ekskuus, ek is jammer. Ek moet myself korrigeer. 'n onverskuldigde verklaring. Meneer, met so 'n verklaring kan u enige bewerings, wat in die kagstaat vervat is, kan u in geskil plaas met die staat en dit ontken en daaroor ook verduidelik, ensovoorts. Of die hof kan ook vir u vra ter opheldering van enige verduidelikings of beskuldigings wat u met die staat in geskil plaas. Of u meneer, u is glad nie verplig om enige verklaring in elk geval af te lê of enige vrae van die hof te beantwoord nie. U kan met ander woorde van die begin af kies en sê; ek kies ek beoefen my swygreg. Dan in so geval meneer, in elk geval, dan mag u vra, dan mag die hof (?) geen vrae

8 The relevant part of section 115 reads as follows:

1) Where an accused at summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by plea, the court may question the accused in order to establish which allegations in the charge are in dispute.
   (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission recorded and shall be deemed to be an admission under section 220.

antwoord nie en die aanklaer kan ook nie in die aanvangstadium enige vrae van u vra nie. En dit is dit.

BESKULDIGDE: Ek verstaan.

HOF: Goed. The state may proceed to prosecute. (My underlining).

[18] It is ironic that the magistrate, seemingly with considerable effort, gave the ramshackled explanation but in the end he did not allow the accused to elect whether he wanted to give a plea explanation or not.

[19] The magistrate's ramblings did not stop there. When he was about to explain the accused's rights to cross-examination he said to the accused that he is going to explain his rights to legal representation and then corrected himself. A portion of the accused's rights to cross examination is explained in an incoherent manner. The magistrate said:

"Indien u geen kruisondervraging op enige aspekte van die getuie se getuienis gelei het nie, dan kan daar later deur die staat geargumenteer word meneer, dat u dit nie as juis en korrek aanvaar het nie. Ekskuus, die teendeel is waar meneer. Dan kan daar later geargumenteer word dat u dit juis as korrek en waar aanvaar het."

The accused was not informed that he may put his version to the witness.

[20] The proved facts were briefly as follows. Mr Morallane, a security officer at Sibusisu Construction, who was on duty at a construction site on 4th August 2008 heard a noise at approximately 01H05. He went outside to investigate and found three pieces of the timber removed from their usual storage place. It was put on the ground. He found the accused on the premises. When he confronted him the accused apologised. He called the police and the accused was arrested.

[21] The magistrate found that the state did not prove theft but attempted theft. Regardless of this correct, clear and unambiguous finding he proceeded to convict the accused of theft! He sentenced him to a fine of R400.00 or 80 (eighty) days imprisonment.

[22] The senior magistrate listened to the mechanical recording and is of the view that given the magistrate's history of misusing alcohol and the manner in which the accused's rights were explained there is a

possibility that the magistrate was under the influence of alcohol when he presided over these proceedings. I requested the senior magistrate to present the transcript of the record and his referral letter to the magistrate for his comment, if any. The magistrate chose not to comment. He gave no reasons for his stance.

[23] The Magistrates' Commission has adopted a code of conduct for magistrates, which is applicable to all magistrates.[9] The aforementioned code of conduct *inter alia* provides that:

23.1 A magistrate administers justice without fear favour or prejudice.

23.2 A magistrate executes his/her official duties objectively, completely and with dignity, courtesy and self control.

23.3 A magistrate acts at all times (also in his/her private capacity) in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice.

23.4 A magistrate executes his/her official duties

9 See Regulation 54A Schedule E of the regulations as amended promulgated in terms of section 16 (1) (e) of the Magistrates Act, 90 of 1993 published in Government Gazette No 20714 dated 17/12/1999

diligently and thoroughly and requires his/her subordinates to do likewise.

23.5 A magistrate maintains good order in his/her court and requires dignified conduct from litigants, witnesses, court staff, legal practitioners and the public.

[24] The code of conduct sets out, broadly, the normative becoming conduct that magistrates should strive and adhere to. Non compliance with the code of conduct does not necessarily constitute an irregularity nor does it render a trial unfair. A deviation from the standard can however be so serious that it becomes an irregularity that renders the trial unfair.

[25] An independent, fair, impartial and competent judiciary is the bedrock of our justice system. The integrity of the judicial officer is as important as the integrity of the judicial process. Proceedings should be conducted in a dignified manner and judicial officers should respect their office and strive to maintain and enhance confidence in the judiciary and the legal system. Public confidence in the judiciary is eroded by conduct that compromises the independence, integrity, fairness and

impartiality of the judiciary.

[26] In my view the integrity of the process in this trial was seriously compromised to the extent that it is nigh impossible to say that the accused had a fair trial.

[27] The magistrate forsook his duty to conduct the proceedings with dignity, courtesy and self-control. When the prosecutor used foul language he was not reprimanded by the magistrate. The accused sensing that the magistrate is not saying or doing anything about the inappropriate language took it upon him to register his disapproval at the erosion of the dignity and decorum of the court. His objection came to nought because he was told, in no uncertain terms, that the prosecutor did nothing wrong. Instead he was told that he is a liar and that he should stop his nonsense.

[28] As stated above, the accused's rights were explained in a disjointed manner. Although the accused was never informed that he may put his version to the witness, the magistrate held his omission to do so

against him. If his rights were explained properly he might have put his version to the witness. The accused was incorrectly convicted of theft instead of attempted theft. There is in my view a substantial likelihood that the magistrate was impaired from diligently and responsibly performing his duties by virtue of him being under the influence of alcohol. I am however of the view that a definitive finding in that regard is not necessary in this matter.

[29] The conduct of the judicial officer in this matter fell far short of the high standard of the conduct demanded from judicial officers. The integrity of the trial was compromised by his conduct. These proceedings were conducted in such an irregular manner that it constitutes a gross departure from the basic principles governing the conduct of a criminal trial. The conviction and sentence ought to be set aside.

ORDER

[30] I accordingly make the following order:

[a] S v Motlatsi Monyane (case number 144/09).

The conviction and sentence are set aside.

[b] S v Leeto Julius Monyane (case number 145/09).

The conviction and sentence are set aside.

[c] S v Moholo Abel Ramateletse (case number 238/08).

The conviction and sentence are set aside.

_____

C. J. MUSI, J

I concur

_____

KRUGER.J

/ar