IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: A289/2018

In the appeal between:

MULA MULA Appellant

and

THE STATE Respondent

CORAM: MATHEBULA, J et MOROBANE, AJ

JUDGMENT BY: MATHEBULA, J

HEARD ON: 15 APRIL 2019

DELIVERED ON: 01 JULY 2019

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[1] The appellant was convicted in the Regional Court, Kroonstad on a charge of rape. He was sentenced to life imprisonment. This appeal is before us as of right.

[2] One of the grounds of appeal relate to the fundamental issue of the right to legal representation and the general conduct of the trial

by the learned magistrate pertaining to an unrepresented accused person. This is an issue that goes to the core of a right to a fair trial which is enshrined in our Constitution.[1]

[3] On 3 October 2016, the Public Prosecutor informed the learned magistrate that her colleague had made arrangements to postpone this matter to 14 November 2016 for trial. The learned magistrate flatly refused and insisted that the matter must be called and proceed. Literally he commanded that the charges be put to the accused. Nothing was said to him regarding his right to legal representation on that specific day. The learned magistrate explained the charges in broad terms and enquired from the accused whether he plead guilty or not guilty to the charge.

[4] The learned magistrate reminded the accused about the applicability of the prescribed minimum sentence. The accused responded that he was informed that twenty five (25) years imprisonment might be imposed in the event he is found guilty of the offense. It appears that the learned magistrate did not bother to explain in detail the provisions of Act 105 of 1997. There was a clear misunderstanding between the learned magistrate and the accused regarding the appropriate sentence. The learned magistrate simply let it slide when it was expected from him to explain the seriousness of the applicable minimum sentence in matters of such nature.

[5] The charges were put to the accused and he pleaded guilty. I could not find any explanation by the learned magistrate to the accused about this serious step taken by the accused. The plea of not guilty was abruptly changed when he was informed about the possible sentence in the event of conviction.

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[1] **Section 35(3) of Act 108 of 1996**

[6] Once again he was invited to make a statement in terms of section 115 of Act 51 of 1977. The learned magistrate, on his own accord, elicited certain admissions from the accused which would later prove fatal. He was warned that he is under no obligation to answer the said questions. He was pertinently asked whether he had sexual intercourse with the complainant. He answered in the affirmative. This was recorded as an admission in terms of section 220 of the Criminal Procedure Act 51 of 1977.

[7] The implications of the questions and recording of the admissions were not explained to the accused. I venture to say that the learned magistrate in haste to finalise the matter continued with it irrespective of the rights of the accused. It is difficult to understand what the rush was all about because even the two (2) witnesses, whose interests were being protected, did not even testify on that day. The matter was postponed to 15 December 2016.

[8] On the latter date, the learned magistrate did not even take time to explain the process to the accused. The witnesses were called to testify. He was told to listen attentively because he would later be called upon to cross-examine them. What is cross-examination to a layman? It was not even explained to him that he must put his version across during cross-examination. The failure to explain this part constitutes an irregularity and renders the proceedings unfair. Exhibits “A”, “B” and “C” were also handed in without this aspect being explained at all by the learned magistrate to the accused. The public prosecutor simply requested that they be handed in and nothing was said to the accused and they were admitted as part of the record. It was as if he was not part of the trial proceedings.

[9] It is imperative that criminal trials are conducted in accordance with notions of fairness and justice. This means that the accused person must participate in a process that is designed to achieve a fair trial. It will be an absurdity when expediency is preferred over a principle.

[10] The right to legal representation is one of the cornerstones of the right to a fair trial. This right was recognised as such in the pre-Constitution era of our law.[2] In **S v Radebe, S v Mbonani,** Goldstone J said the following:-

> **"The inherent and fundamental nature of the right to legal representation in criminal trials is now universally recognised in most civilised societies."[3]**

[11] The judicial authority of the Republic is vested in the courts. The Constitution of the Republic confers upon every accused person the right to a fair trial. *Inter alia* it enjoins the presiding officer to inform the accused properly of the right to choose and be as represented by a legal practitioner.

[12] In order to satisfy these notions of fairness and justice, the rules of practice have evolved to assist an undefended accused person to ensure that he is tried fairly and that justice is achieved. Relevant to the matter on hand is that the learned magistrate was in a position and expected to act as a guide of the accused. He was obliged to inform him of his right to cross-examine, the right to testify and the right to call witnesses. He was also required to assist him in formulating his questions and defence. Further to assist him in situations where he does not properly state is case. Lastly it is incumbent upon the presiding officer to ensure that the

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[2] Section 73(2) of the Criminal Procedure Act 51 of 1977

[3] 1988 (1) SA 191 (T) at 195 E

accused person understand what he is doing in the process that he is participating in.

[13] The importance of these procedural rights were pointed out in **S v Hlongwane** eloquently as follows:-

> **"A judicial officer trying an accused person who has no legal representation must explain to him his procedural rights, and assist him to put his case before the court whenever his need for help becomes apparent. Such duty has been proclaimed time and again. Informing the accused person of his right to call witnesses is one of its most important aspects. To let him know of that right, yet not how to exercise it when he has no idea and starts running into trouble, is not of much use. Mere lip service to the duty is then paid."[4]**

[14] Clearly in this matter the learned magistrate did not remotely measure to this standard. This irregularity, in my view, led to an unfair trial which constituted in apparent terms of failure of justice. I have alluded to a number of instances where the conduct of the learned magistrate fell short of delivering a fair trial in accordance with the accepted rules of practice and the law. It therefore stands to reason that the conviction and sentence cannot stand.

[15] Therefore I make the following order:-

15.1. The conviction and sentence are set aside.

15.2. The matter is remitted to the Regional Court Kroonstad to be tried *de novo* before another magistrate.

MATHEBULA, J

[4] **1982 (4) SA 321 (N) at 323 C-D**

I concur.

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MOROBANE, AJ

On behalf of the appellant:	Mr. P vd Merwe
Instructed by:	Bloemfontein Justice Centre BLOEMFONTEIN
On behalf of the respondent:	Adv. M. Lencoe
Instructed by:	Director: Public Prosecutions BLOEMFONTEIN

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