

A550/2012

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

REVIEW CASE NO: 447/12

In the matter between:

3/8/2012

THE STATE

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	<i>30/07/12</i> DATE	<i>[Signature]</i> SIGNATURE

PATRICK MKHACANI MATHEBULA

Accused

JUDGMENT

Tuchten J:

- 1 This matter came before me on automatic review. The accused was charged in the magistrate's court for the district of Malamulele which is situated in the province of Limpopo to the north-east of Thohoyandou, near the Kruger National Park. The charge against the accused was that he had committed the crime of housebreaking with the intent to steal and theft by breaking into and entering the shop of the complainant and stealing groceries and money to the total value of R9 659.

- 2 After the charge was put to the accused but before he pleaded, the magistrate, Mr MD Maluleke, drew the attention of the accused to his right under the Criminal Procedure Act, 51 of 1977 read with the Constitution to engage the services of his own attorney, conduct his own defence or use the services of a legally qualified person appointed at State expense through the Legal Aid Board. The accused elected to conduct his own defence and pleaded not guilty.
- 3 The magistrate then explained to the accused his right to disclose the basis of his defence under s 115 of the Criminal Procedure Act. The accused elected to do so and said that his defence was that he did not bear knowledge of the offence charged against him.
- 4 The prosecutor thereupon applied for an adjournment to lead the evidence of the complainant and informed the court that the accused was in custody. The magistrate granted the adjournment and explained, properly so, to the accused the purpose of cross-examination and what other verdicts were competent on the charge against him.
- 5 The complainant testified at the resumed hearing. He said that around 10 November 2011, a person or persons had broken into his shop by breaking the wall at the back of the shop and had stolen groceries

from his shop during the night. He could not say what the value of the stolen groceries was but claimed that he had given a value when he laid his complaint. The complainant laid a charge, after which the property stolen was returned to the complainant, presumably by the police.

- 6 The second and final state witness was W/O Masia. Acting on information received, the witness went to the kraal of the accused. Inside the house in which the accused slept, the witness found "body cream or body lotion." The accused then, according to the witness, led the police to a cooking hut at another kraal where the police found a 25kg maize meal bag containing groceries and soap, as well as a small bag of maize meal and 5 litres of cooking oil. According to W/O Masia, the complainant identified the property as coming from his shop. There is an indication in the evidence of this witness that the police recovered all the stolen items except a container of milk and perhaps one other item. The accused did not put in dispute W/O Masia's evidence that he had pointed out to W/O Masia the goods recovered at the other kraal mentioned.
- 7 The State closed its case after W/O Masia had given evidence. The accused then elected to testify. He admitted to having had body lotion in his possession (which later in his evidence he said he had not

bought from the complainant) but said he knew nothing about the other things about which W/O Masia had testified. In cross-examination he said he had signed a document at the police station which he had not read because the police assaulted him and would not allow him to read it.

8 The accused denied that he had pointed anything out to W/O Masia. He got into some difficulties under cross-examination in relation to why he had not challenged the evidence of W/O Masia about the pointing out. During cross-examination, the magistrate put it to the accused that he was wearing a uniform and was "not standing for the first time here at this court" and that the accused was wearing a "uniform from prison". The accused correctly responded that the clothes he was wearing in court were not relevant to the charge he was facing.

9 The accused closed his case without calling witnesses. The prosecutor argued for a conviction and the accused argued for an acquittal. The magistrate then proceeded to deliver judgment. The magistrate found that the allegation by the accused that he had been assaulted by the police was a concocted story and then said this:¹

¹ My emphasis.

Even if you were assaulted. If the police did not find anything, you could not have taken them to a place where they can find anything.

Whereas if they assaulted you as a means of getting information to me, they were justified in doing so because that part of their investigation.

Because otherwise, if they are going to treat thugs with kid gloves, this country of ours will be at a chaotic state.

- 10 The magistrate then explained further why he disbelieved the accused and found him guilty as charged. The prosecutor then put previous convictions to the accused. He first denied them, saying that he did so because it seemed as if the court had a grudge against him. After some prodding by the magistrate, however, he admitted them but refused to sign the formal document admitting these previous convictions.
- 11 Before passing sentence, the magistrate had an interaction with the accused. He pointed out that he, the magistrate, had nothing to lose or gain arising from the attitude of the accused toward him. I shall now quote from the record:²

COURT: ... I do not have anything to beg to a thug.
It is just unfortunate that you are not my child. *If you are*

² Again my emphasis.

my child I will even say I would kill you. I am not hiding. What I am saying is being recorded. So do not think you are to[o] wise. I think you understand what I am saying right now.

ACCUSED: I do not have any comment your worship because now I am being told that if I am a child ... (indistinct) ... the court will kill me. So what kind of a reply must I give?

COURT: Yes, I am just telling you, the way you are behaving. Because you appear as if you are not well behaved person. It is just unfortunate. *Those from, those from you have committed this offence, they did not kill you. But let me assure you. But you are about to be killed. That is a show [sure?] case.*

12 The magistrate then adjourned the case to the following day for sentence. He sentenced the accused to undergo a term of imprisonment for a period of three years.

13 When matters come before me on review, I am called upon under s 304(1) of the Criminal Procedure Act to consider whether the proceedings in the court below are in accordance with justice. In this case I caused an enquiry to be directed to the magistrate as follows:

1. There are two passages in the record which I should like to draw to the magistrate's attention.
2. At pp35-36 of the record, in the judgment on the merits, dealing with the evidence of the accused that he was assaulted by the police: ""Even if you were assaulted. If the police did not find anything, you could not have taken them to a place where they can find anything. Whereas if they assaulted you as a means of getting information to me, they were justified in doing so because that part of their investigation. Because otherwise, if they are going to treat thugs with kid gloves, this country of ours will be at a chaotic state." [my underlining]
3. At pp41-42 of the record, during argument by the accused on sentence: "It is just unfortunate that you are not my child. If you are my child I will even say that I would kill you. ... But let me assure you. But you are about to be killed. That is a show case."
4. Can the magistrate explain why he made these remarks and justify having made these remarks?
5. Does the passage quoted first not mean that the magistrate approves in principle that the police assault those in custody, if such violence is directed at obtaining evidence to be used in court?
6. Does the passage quoted second not mean that the magistrate believes that it would be appropriate in certain circumstances for the accused to be murdered and that he actually encouraged the complainants in the case to murder the accused?
7. If either of these questions is answered in the affirmative, can it be said that the accused had a fair trial as contemplated by s 35(3) of the Constitution?
8. If the reviewing judge comes to the conclusion that the trial was not fair, as contemplated by s 35(3) of the Constitution, what would be the appropriate course to follow on review?"

- 14 The magistrate responded to my enquiry in a memorandum dated 4 July 2012. I shall quote extensively from the magistrate's response (omitting paragraph numbers):

The manner how an accused person was behaving in a jam-packed court showing NO respect to members of the court as if the rights for accused alone calls for the remarks from the Magistrate to assure members of the community and the police that their safety is taken at heart and is of paramount importance, not suggesting or authorising or signing a death warrant for an accused person.

The magistrate submit[s] that it was a fair comments made to safe guard the interest of justice in the true sense of the word as the court is regarded as the custodian of good morals guided by the Constitution ... and humbly regret it that seem[s] not to have gone well with the Honourable the Reviewing Judge.

It is further my submission that the trial was conducted fairly in accordance with justice as contemplate[d] by Sec 35(3) of the Constitution ...

In a nut shell to the [reviewing judge] the Magistrate submit[s] that it was just fair comment intended to cater [for] the interest of justice taking into account and upholding the decorum of the court and to accord the dignity courts should for members of the public to respect courts.

However if that did not go well with the [reviewing judge] it is regretted and assure to guard against same with due respect.

- 15 I asked the Director of Public Prosecutions for his views on the queries I raised with the magistrate. A senior state advocate and a Deputy DPP responded in a helpful memorandum dated 12 July 2012. I am grateful for the assistance provided.
- 16 The DPP submits that the first comment relating to the alleged assault on the accused does indeed create the impression that the magistrate believes that an assault on an accused person is justified when the purpose thereof is to get information from an accused person to put before a court.
- 17 I fully agree. In my view, particularly knowing as I now do from the magistrate's response that the remark was made in a court room packed with members of the public and the police, the remark was intended plainly to tell the police that assaults on accused persons to elicit information from them are not only condoned but are actively encouraged by the magistrate.
- 18 The DPP proceeds in his memorandum to submit that the magistrate committed a number of serious irregularities during the course of the proceedings: these included taking over the cross-examination of the accused, questioning the accused about his prison uniform in an attempt to elicit information regarding his previous convictions and

accusing the accused unfairly of being disrespectful towards him. The DPP submits that the magistrate's conduct not only created a perception of partiality against the accused but manifestly demonstrated actual partiality and hostility, so much so that the accused did not receive a fair trial. The DPP suggests that the conviction and sentence be set aside and that the accused, if the State so decides, be prosecuted afresh in the regional court on the same charge pursuant to the provisions of s 313 read with s 324 of the Criminal Procedure Act.

- 19 I consider it necessary only to consider further the magistrate's utterances in relation to the accused's being killed because this utterance and that relating to assaults by the police for the purpose of gathering evidence are the only two aspects upon which I asked the magistrate to comment. I have carefully considered the magistrate's contention that the remarks in relation to the accused's being killed were made merely to assure members of the community and the police that their safety had been taken to heart and was being treated as being of paramount importance and were not an incitement to kill the accused.
- 20 The accused had a long list of previous convictions, for assault, theft, malicious damage to property and housebreaking dating as far back

as 1993. In about 2003 the accused had been sentenced to an effective 16 years imprisonment for housebreaking and assault. One can understand that the magistrate regarded the accused as an unrepentant criminal. Nevertheless it is plain from what I have quoted that the magistrate held out to the persons in the court room that killing the accused would be justified and that the magistrate expected that someone would soon kill the accused. The magistrate must have foreseen as a reasonable possibility that someone might view the magistrate's remark as a license, granted by the law, to kill the accused.

- 21 The attitude of the magistrate as demonstrated in the utterances which I have italicised is unacceptable. A magistrate is required to swear an oath of office or make a solemn affirmation before he or she takes up his or her duties. That oath is set out in s 9(2)(a) of the Magistrates' Courts Act, 32 of 1944. It reads:

I(full name)
do hereby swear/solemnly affirm that in my capacity as a
judicial officer I will be faithful to the Republic of South Africa,
will uphold and protect the Constitution and the human rights
entrenched in it, and will administer justice to all persons
alike without fear, favour or prejudice, in accordance with the
Constitution and the law.

- 22 Under s 9(2)(b) of the same Act, the oath or affirmation must be made in open court. A judge must make a similar oath or affirmation under s 174(8) read with item 6 of Schedule 2 of the Constitution. The Constitution is not upheld and it is not protected when a judicial officer encourages the police to break the law and incites the community to murder the accused. By these utterances the magistrate violated at least the fundamental right of the accused as enshrined in s 12(1)(c) of the Bill of Rights to be free from all forms of violence and threatened the accused's very right to life under s 11. In his encouragement to the police to use violence to obtain evidence, the magistrate overlooked or ignored s 35(5) of the Constitution which provides:

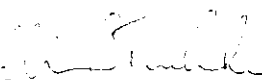
Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

- 23 Section 35(3) of the Constitution provides that every accused person has a right to a fair trial. Fundamental to a fair trial is that it is presided over by a judicial officer who respects, protects, promotes and fulfils the rights in the Bill of Rights and by his or her conduct demonstrates adherence to the value of supremacy of the Constitution and the rule


of law, as required by ss 7(2) and 1(c) of the Constitution. See *S v Thebus and Another* 2003 6 SA 505 CC para 109 per Yacoob J.

- 24 A magistrate presiding in a rural court must be the very personification of the values of the Constitution. In such communities, the local magistrate is rightly regarded as a role model for exemplary civic behaviour and may be the primary if not the only connection between such a community and the values of respect demanded by the Constitution for the lives, bodily integrity and property of all members of the community - including those whose conduct demonstrates that their own values do not measure up or subscribe to those protected by the Constitution.
- 25 The conduct of the magistrate which I have described is a gross, indeed grotesque, departure from the standards required of a judicial officer presiding at a criminal trial. In these circumstances the correctness or otherwise of the conviction and the appropriateness or otherwise of the sentence are not relevant because the accused did not have a fair trial as contemplated by s 35(3) of the Constitution.
- 26 I would make the following order:

- 1 The conviction of and sentence imposed upon the accused are hereby set aside.
- 2 It is hereby declared that if the State so decides, the accused may be prosecuted afresh in the regional court on the same charge pursuant to the provisions of s 313 read with s 324 of the Criminal Procedure Act.
- 3 Nothing in this order shall entitle the accused to be released from prison if he is being held there pursuant to any sentence or sentences imposed in any criminal proceedings other than those dealt with in this judgment.
- 4 The Registrar is directed to send a copy of this judgment to the Magistrates Commission and to request that body to take such steps in the light of this judgment as it considers fit.


NB Tuchten
Judge of the High Court
30 July 2012

I agree. It is so ordered.


WJ van der Merwe
Judge of the High Court
30 July 2012

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IN THE ORDINARY COURSE OF EVENTS