THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 376/2004
Reportable

In the matter between

PIETER MAY **Appellant**

and

THE STATE **Respondent**

Coram**:** **Mthiyane, Lewis, Mlambo JJA**

Heard: **10 May 2005**

Delivered:

Summary: The trial of an undefended accused held not to have been vitiated by any irregularity: no prejudice established. Convictions on two counts of rape and one of theft confirmed. Sentences reduced to take into account time spent in custody awaiting trial: sentence for theft ordered to run concurrently with one sentence for rape.

JUDGMENT

LEWIS JA

[1] The trial of an unrepresented accused inevitably presents problems. In this matter, the appellant, who conducted his own defence in the trial court, argues that several aspects of the trial in the Regional Court, Bellville, were prejudicial to him such that the trial was unfair, and the convictions and sentences imposed in respect of four counts should accordingly be set aside (a fifth conviction was set aside in an appeal to the Cape High Court, per Newdigate AJ, Selikowitz J concurring). The further appeal lies with the leave of this court. The appellant argues also, on the merits, that evidence of his identity was unreliable.

[2] The regional court convicted the appellant on two counts of rape; one count of housebreaking with intent to steal; one count of attempted housebreaking with intent to steal; and one count of theft. He was sentenced to ten years' imprisonment on each of the counts of rape; six years' imprisonment in respect of the

housebreaking on count 2; three years imprisonment in respect of attempted housebreaking on count 3; and six years' imprisonment in respect of the conviction for theft on count 4. The conviction on the count of attempted housebreaking was set aside by the court below. The appeal to this court lies against the other four convictions and the respective sentences.

[3] The complaints raised by the appellant about the conduct of the trial are that the regional magistrate (a) failed to explain to him his right to legal representation, and that should he be unable to afford a legal practitioner, one would be assigned to him at state expense; (b) failed properly to explain to the appellant his rights relating to cross-examination of state witnesses; (c) unfairly curtailed cross-examination by insisting that questions be put through him to the state witnesses, disallowing or limiting questioning by the appellant, showing irritation and intolerance of

the appellant's questions, and failing to assist the appellant in questioning; and (d) did not conduct the trial in an impartial manner in that, inter alia, he examined the state witnesses where the prosecutor had not done so sufficiently. The appellant argues also that the evidence of his identification was flawed and that there were material discrepancies in the evidence of the state witnesses which affect their credibility.

The alleged failure by the magistrate to inform the appellant of his right to legal representation

[4] Counsel for the appellant argues that the magistrate failed to advise the appellant that he had the right to legal representation, and that the state would provide legal aid. The Constitution now firmly entrenches not only the right to legal representation, but provides also that an accused person has the right to representation at state expense 'if substantial injustice would

otherwise result'. The accused is entitled also to be told about this right 'promptly'.[1]

[5] The court a quo found that the appellant's contention about the lack of explanation of the right to legal representation failed to take into account the fact that prior to the commencement of the trial the appellant did indeed have a legal representative. The trial court noted (on 15 March 1999) as follows:

`Besk teenwoordig. Besk het voor aanvang van hof aansoek gedoen vir regshulp wat goedgekeur is.'

The record states on a subsequent date (22 November 1999):

'Advokaat vra te onttrek. Probeer met beskuldigde oor sekere aspekte van saak. Vertrouens posisie word geraak. Sien nie kans vedediging waar te neem. Beskuldigde was so ingelig. Hof aangedui gaan self saak doen.

Beskuldigde bevestig. Gaan self saak doen.'

[1] Section 35(3)(f) and (g).

The matter was then postponed until 29 March 2000. It would have been obvious to the magistrate, in the circumstances, that the appellant was aware of his right to legal representation and that he chose not to avail himself of it. There was, moreover, a substantial period of time (when the appellant was in custody) between the appearance with an advocate and the time when the accused confirmed that he would continue with the trial without legal representation. As an awaiting-trial prisoner he would probably have been made aware that he had a right to another representative once the first advocate had withdrawn. But we do not know that this is the case and the appellant himself presented no evidence, either to the trial court or to the court below, of any prejudice that he suffered by virtue of lack of representation.[2]

[2] *S v Rudman; S v Mthwana* 1992 (1) SA 343 (A) at 391H-J, where the court suggested that it was open to an appellant to show that he was unaware of his right to legal representation and that there has been a resultant failure of justice.

[6] Of course, the magistrate should have informed the appellant of his right to legal representation, at state expense, expressly in court, and should have confirmed that he was aware of the right to have a different advocate or attorney appointed at state expense. It was apparently taken for granted that he was aware of his rights. Judicial officers should not assume that accused people are fully aware of their rights and of the implications of acting in their own defence. Even if the assumption is correct, it is incumbent on the person presiding over a criminal trial to ensure that the accused is fully informed, in open court, not only of the right to legal representation but also of the consequences of not having a lawyer to assist in the defence.

[7] However, as this court has previously said (in *Hlantlalala v Dyantyi NO,*[3] 'the crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellant's trial. What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not *per se* result in an unfair trial necessitating the setting aside of the conviction on appeal.' In addition it must be shown that the conviction has been tainted by the irregularity – that the appellant has been prejudiced.[4]

[8] Whether or not prejudice has resulted from the lack of legal representation is really a question that can be determined only by having regard to the whole trial, and the way in which it was conducted by the judicial officer; and the ability, as shown during

[3] 1999 (2) SACR 541 (SCA) at 545f-h.
[4] See *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T), approved in *S v Rudman; S v Mthwana* above at 382C-H.

the course of the trial, of the accused to represent himself adequately; and to whether the evidence adduced has led justifiably to the conviction and sentence.

[9] Counsel for the appellant contends further that the appellant was prejudiced by the magistrate's apparent failure, before sentence was passed, to explain to the appellant that he should adduce evidence as to his personal circumstances in order to mitigate the sentence. Had he been represented such evidence would undoubtedly have been placed before the court, and a different approach to sentence taken.

[10] The complaints made by the appellant about cross-examination, undue intervention by the magistrate both in so far as cross-examination is concerned, and in so far as assisting the state in the leading of its witnesses, and failure to present mitigating evidence, all have a bearing on the question whether the

failure of the magistrate to explain the right to legal representation expressly, and after the appellant's first representative had withdrawn, did adversely affect the appellant. I shall accordingly deal with these different complaints before making any determination.

The right to cross-examine

[11] The argument as to the failure of the magistrate to explain to the appellant his right to cross-examine is two-fold. First, the appellant contends, the nature of cross-examination and its importance were not fully explained. And secondly, when the appellant did attempt to ask questions of state witnesses his questioning was curtailed. The limitation lay in the fact that at the outset of the trial the magistrate instructed the appellant to put all questions through him, and in that when the appellant did ask

questions, admittedly repeating the same ones again and again, the magistrate became impatient.

[12] The importance of cross-examination as part of a fair trial is emphasised in *S v Tyebela*[5] and elucidated in *S v Wellington*.[6] *aTyebela* deals with the impatient and sarcastic presiding officer, of which the appellant in this matter complains too. Milne JA said in *aTyebela* that an accused is entitled to a careful and patient explanation of the rules of procedure and evidence, one not afforded to the appellant in that matter:[7]

'I know only too well from experience how protracted and seemingly irrelevant most of the cross-examination conducted by an accused person, appearing in person, often is, and how irritating it can be. The Judge's plain duty is, however, to maintain his cool-headedness in the face of irritation . . . '.

[5] 1989 (2) SA 22 (A) at 31ff.
[6] 1991 (1) SACR 144 (Nm) at 148c-e. See also *S v Raphatle* 1995 (2) SACR 452 (T) at 454i-455a; and *S v Malatji* 1998 (2) SACR 622 (W) at 625f-g.
[7] At 31D-E, and 32I-33A.

[13] In *Wellington*, dealing not with an illiterate and uneducated appellant, but with a man who could read and write, Frank AJ said that he was entitled to an explanation that covered:

'(a) that he had a right to cross-examine; (b) that it was his duty to put to the state witnesses any points on which he did not agree with such witnesses; and (c) that the purpose of cross-examination was to elicit evidence favourable to himself and to challenge the truth and accuracy of the State evidence'.

The court continued:[8]

'Failure to explain to an unrepresented accused his rights with regard to cross-examination is in my view tantamount to a failure to allow cross-examination. The latter is, of course, a gross irregularity.'

[14] I shall deal first with the argument that the importance of cross-examination and what it entails were not properly explained to the appellant. It is contended that he was not told of his right to

[8] At 148d-f.

test the evidence of the state witnesses and to ask questions that might prove his defence; that he should put his defence to witnesses; and what the consequences would be if he failed properly to cross-examine.

[15] The magistrate in fact spent some time explaining that questions should be put to the witnesses and that the appellant should contest any evidence he thought to be incorrect. It is worth setting out the initial explanation, and the appellant's responses, in full.

'Hof: Ek dink dit is van belang dat u van die begin af vir my mooi verstaan, dat ek en u mekaar nie misverstaan nie. Verstaan? - - - Ja, My Edele. - - -

Hierso is nou vyf klagtes, vyf klagtes en dit maak dit nou klaar vir my moeilik by die verhoor aan die einde van die dag met die vyf klagtes. U verstaan waar daar nou verskillende bewerings gemaak word. Daarom ek gaan nou vir u sekere maatreëls verduidelik, u moet nou mooi luister wat ek vir u verduidelik en dan wil ek vir u vra wanneer die getuies kom getuig dat u mooi

luister wat die getuies sê. U verstaan? - - - Ja. - - - Want as die getuies klaar getuig het dan *moet ek vir u vra of u verskil met die getuies, as daar iets is waaroor u verskil ek gaan vir u geleentheid gee om dit waaroor u verskil om daaroor vrae te vra*. Maar ek wil 'n reëling maak dat u die vrae vra hier deur my sodat *ek die vraag kan mooi formuleer dat almal dit verstaan* en dan sal ek so aan die getuie stel en dan hoor ons wat is die antwoord. Verstaan u dit so? - - - Ek verstaan. - - - Ek wil nie hê daar moet 'n oor en weer gestryery ontaard hier tussen u die getuies want ons kom nêrens nie. *Baie van die vrae wat u miskien sal vra, gaan ek vir u sê dit maak nie sin nie of dit is nie relevant nie, dit beteken niks nie, dan moet u maar so aanvaar dat dit wat ek vir u sê dat ek in alle waarskynlikheid korrek is.* U verstaan? Verstaan u wat ek sê? - - - Ja, My Edele.' (My emphasis.)

The magistrate then proceeded to explain other procedures and rules to the appellant before the state called the first witness. The court below, after examining the record, concluded that the appellant's right to cross examine had been adequately explained.

[16] I agree. The explanation might have been fuller; the purpose of questioning might have been made clearer; but the appellant was given a full opportunity to indicate whether he understood what was expected of him, and that included his right to contest the evidence of state witnesses, and to put his own version of events to them. Moreover, on repeated occasions the magistrate reminded him what he should be doing. I shall refer to instances of this in due course.

The curtailment of cross-examination

[17] The first question to be asked is whether the insistence by the magistrate that he put questions on behalf of the appellant was in itself a curtailment of the right properly to cross-examine. In my view, it is not inherently inappropriate for a judicial officer to attempt to formulate questions more skilfully than an unrepresented person would do himself. However, it is the manner

in which this is done that will suggest whether the right to ask questions correctly has been curtailed. The instances where the appellant was 'assisted' in this regard are far too numerous to list. A few examples will suffice.

[18] At the end of the first state witness's evidence in chief, the court said to the appellant:

'Is daar nou iets wat die beampte [a policeman] gesê het wat u nie saamstem nie? - - - Mnr Edele, ek verstaan, meneer sê, meneer het vir my . . . . - - - Praat meer hier nama my toe. - - - Okay, ek verstaan wat meneer vir my sê hier. En al dinge is bewerings wat meneer maak en aan my, sien meneer. - - - Ja. -- - Hoekom, soos ek hoor in sy verklaring wat hy aflê . . . - - - Meneer, is daar iets wat die beampte gesê het wat u nie saamstem nie? - - - My Edele, ek stem nie eintlik saam met die verklaring wat die beampte . . . - - - Maar wat is verkeerd in sy verklaring? - - - Verklaring is, hy het my gekry, ek het nie oor drade gespring wat soos die meneer beweer nie. - - - Ja. Hy sê hy het nie oor die drade gespring nie.'

The witness's response follows. The appellant continued thereafter:

'Ek het gestap in die straat eintlik. --- Sê u nou u het daardie tyd van die oggend doodnormaal in die straat gestap toe kom die beampte enan hy arresteer sommer vir u. Is dit wat u wil sê aan ons? --- Ja, my Edele'.

'Stem u saam met hom?' the court then asked the witness, who said it was untrue.

'*Nog iets anders* wat u oor wil stry? (My emphasis.)

[19] The record is replete with such interchanges. What this one reflects is that the appellant was aware of a statement that had been made previously by the witness, thus showing some familiarity with proceedings. It shows also how the appellant struggled to formulate what he wanted to ask, in effect giving his evidence, albeit not under oath.

[20] The following extract from the evidence of the complainant on the first charge of rape shows the same pattern:[9]

'HOF: Ja, dit is dan nou haar getuienis, weereens maar weer soos ons wat gemaak het in die ander twee getuies, wil ek eerstens net hoor oor dit wat sy sê wat daar gebeur het, is daar vrae wat u wil stel aan haar daaroor? - - - My Edele, ek het eintlik nie baie vrae vir die dame nie ... (onduidelik) vir myself kan ek maar net sê ek was nie daardie dag op daardie toneel gewees nie, want ek het nie . . . - - - Kom ons stop eers daar. Hy sê eerstens dat as u sê hy was binne-in die huis, dan maak u 'n fout, hy was nie daar nie. - - - [Complainant] Ek is verseker hy was daar.

HOF: Goed. Dit is die antwoord daarop. Volgende vraag.

BESKULDIGDE: Nou dame, hoe verseker is u eintlik dat ek daar op die toneel gewees het?

HOF: Hy wil weet hoe verseker is jy? - - - Ek is verseker want jy het 'n paar keer saam met my gestap in die huis en jy was naby my en kon mos gesien het in jou gesig dis jy.

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[9] The extract is taken directly from the record.

BESKULDIGDE: Kan dame enige beskrywing gee volgens, is dit toe die ‘person’ wat hier voor jou staan, is dit hy eintlik is? - - - Dit is hy, die lengte van jou lyf en die gebou van jou lyf. - - - Is mevrou doodseker? - - - Ja, ek is. - - - In die begin, van die begin tot hoe lank het die misdaad plek gevat nou.

HOF: Sy het gesê so 50 minute omtrent.

BESKULDIGDE: Nou watter maand het die misdaad plek gevat dame?

HOF: Ek kan nie hoor nie.

BESKULDIGDE: Watter maand?

HOF: Watter maand?

BESKULDIGDE: Ja, dit is mos nou 1999, watter, uit watter jaargetal uit kom die saak aan. Haar getuienis was die 13de Mei van 1996. - - - Ja.

BESKULDIGDE: Die 13de, nou is u nog altyd verseker dat dit ek is wat hier voor jou staan? - - - Ek is verseker, ek sal dit nie vergeet nie. - - - Is u dodelik verseker? --- Ek is verseker. - - - Ek glo ook nie, ek glo dit ook nie.

HOF: Ek kan nie hoor nie.

BESKULDIGDE: Ek sê ek glo nie ek is die ‘person’ wat hier voor staan vanmore nie. - - - Ek is verseker .

HOF: Ja, sy het nou al ‘n paar maal nou al gesê sy is verseker en sy is doodverseker en ek weet nie hoe verseker sy nou nog moet wees nie. Is daar iets anders wat u nog vir haar wil vra?

BESKULDIGDE: Wat ek vra My Edele, ek ... (onderbreek).

HOF: Oor die kleredrag wat sy sê u aangehad het, daaroor iets wat u wil vra?’

[21] This passage was referred to by the court below, which concluded that the court’s impatience with repetitive questioning did not render the trial unfair. Again, I agree. The passage shows that the appellant’s questions were put repeatedly, that the magistrate assisted in formulating them, and that he suggested a further line of enquiry, as to the clothing that he was wearing. When the magistrate states that the question has been asked and answered repeatedly he is correct.

[22] Mr King, for the appellant, argued, however, that the manner of the magistrate was intimidating. In particular the constant use of the question ‘Nog iets?’ is said to imply that the appellant should not continue with his questions. But the appellant, in my view, appears not to have been affected. He continued despite any possible implicit suggestion that he should refrain from asking further questions. One passage referred to by Mr King does indeed reflect the magistrate’s repeated putting of the question ‘Nog iets?’. But the same passage also reflects the appellant’s persistence in asking questions. It reads:

‘HOF: Enigiets aan die getuie wat u wil vra, beskuldigde? Vra maar so deur die tolk as daar is?

BESKULDIGDE: My Edele, weens myself meedeel ek maar net dat ek was nie op daardie toneel gewees nie.

HOF: U was nie op die toneel nie.

BESKULDIGDE: Ek was nie op die toneel nie en hierdie man wat vanmôre hier staan, hy het nie vir my gesien op die toneel nie, dit is alles leuens stories en dit is opgemaakte dinge.

COURT: The question is that you didn't saw him on the premises, it is all lies. What is the answer to that? - - - [Witness] No, I saw him, it was him.

HOF: Nog iets?

BESKULDIGDE: Mag ek vra die skoene wat ek aangehet het, hoe het dit gelyk. - - - 'Sorry', what about the shoes? - - - Die skoene wat ek aangehet het hoe het dit gelyk? ... Net een skoen opgehet, 'n tekkie en dit was op jou regtervoet.

HOF: Anything else? Nog iets? ... (geen hoorbare antwoord).

Is dit al?

BESKULDIGDE: Agter daai wat meneer, toe het meneer, hoe het meneer vir my eintlik soos meneer vanmore sê is hy, hoe verseker is meneer eintlik dat ek die 'person' is wat vanmôre hier staan?

COURT: Do you follow his questions in Afrikaans? - - - Ja. Hy wil weet hoe verseker is u dat - - - Verseker ek is?

Uhm, is u verseker? - - - Ek is baie verseker, meneer.

Ja. Nog iets?'

I do not consider that the repeated use of the question 'nog iets?' did in fact have the effect of curtailing questioning. Indeed, the appellant continued questioning, albeit repeating himself.

[23] Similarly, where the appellant persisted in questioning a police witness, Mr Abdul Ederies, and the court did not see the reason for the questions, I consider that he was correct to suggest that the appellant explain why he was asking the questions. The magistrate said, interrupting a line of questioning:

'Kyk beskuldigde, ek verstaan nie eintlik wat u probeer bereik met die vrae nie. Ek moet eerlik vir u sê vir dit wat die Hof moet bevind, weet ek eintlik nie wat u probeer vasstel by die getuie nie, maar wat is die doel van die vraag nou? . . . . Luister wat ek vir u wil sê. Hoekom wil u weet of daar 'n voertuig op die perseel was dat ek kan probeer agterkom wat die belang is van die vraag.'

[24] The appellant persisted for a while before the magistrate gave him an opportunity to ask a last question. As counsel for the state argued, there are several instances where the magistrate assisted the appellant in framing his cross-examination. Some are referred to above. It is not necessary to deal with them all.[10]

Lack of impartiality on the part of the trial court

[25] The appellant contends that the magistrate was not impartial. Several factors, he argues, bear this out. The complaint about the failure to explain the purpose of cross-examination, and the curtailment of cross-examination are argued to be demonstrative of lack of impartiality. As indicated the argument is not borne out by the record. The appellant contends also that the magistrate unfairly assisted the state in presenting its case. The clearest instance of this, the appellant argues, is the questioning of the

[10] Counsel referred to pages 69, 71, 120-123, 139-143, 146-148, and 163-164 of the record. All the passages referred to bear out the contention that the appellant was properly assisted in cross-examining.

complainant, Beauty Mnyateli, in respect of the charge of housebreaking and rape. When the prosecutor had finished his examination, and before the appellant was given the opportunity to cross-examine, the court questioned the complainant extensively. This amounted, argues counsel for the appellant, to making the case for the state. The magistrate's questioning is set out below:

HOF: Ja, nou los u my weer met 'n paar vrae. Ons het nou hierso op 'n belangrike stadium van u getuienis het ons nou weggedraai, heeltemal op 'n ander koers, laat ons dit net klaar maak. U het gesê dat u werkgewer het daar opgedaag, die man en die vrou en hulle het die polisie gebel. En ek neem aan die polisie het toe nou daar gekom. Korrek? - - - Ja. - - -

Het u op enige stadium aan iemand gesê van die feit dat u na bewering verkrag was? - - - Ja, ek het vir hulle gesê. - - - Vir wie het u gesê? - - - Die vrou. - - - Die vrou, die werkgewer? - - - Ja. - - -Was sy die eerste persoon aan wie u dit gesê het? - - - Nee, my suster was die eerste persoon. - - -Vir wie u gesê het? - - - Ja. - - - Op watter stadium het u vir haar gesê? - - - Ek

het vir haar gesê die man het my verkrag. - - - Ja, maar nou op watter stadium. Kyk, u het mos nou vir die Hof gesê, hier op ‘n tydstip het die beskuldigde vir julle daar in die badkamer laat sit en hy het gekom met, gesê hy soek ‘n plastieksakkie en hy sê vir julle moet bly sit in die badkamer tot hy weg is julle moenie uitkom nie - - - Toe hy kap, toe hy gaan kap aan die deur, toe hy my teruggebring het nadat hy my verkrag het. - - - Ja. - - - toe het ek vir haar gesê, toe was hy al uit. - - - Nadat die beweerde verkragting in die kamer plaasgevind het, en u nou terugkom daar in die badkamer, het u toe vir u suster gesê? - - - Ja. - - - Wat het u vir haar gesê? . . . Ek het vir haar gesê die man het my verkrag. - - - Op die stadium wat u dit vir haar sê, was daar nou fout met u? - - - Nee, sy het net gesê as ons uitkom moet ek nie gaan was nie. - - - Ja-nee, maar uself nou, wat was u toestand, toe u dit vir haar sê? - - - Ek was onsteld en ek het gehuil. - - - Nou goed, nou kom ons by ‘n ander aspek wat ook nie gedek is nie. Dit is nou die identiteit, die man sê hy dra geen kennis van hierdie voorval nie. U sê dit is die eerste keer die dag wat u hom gesien het? - - - Ja. - - - Het jy hom nie geken voor die tyd nie? - - - Nee. - - - Nou hoekom sê jy dit is hy wat daar binne-in die huis was? - - -

Want ek kan sien aan sy gesig en sy hare. Herken u hom aan sy gesig en die hare? - - - Ja. - - - Sy hare is nou, wat noem julle dit? . . . Rasta hare. - - - Die Rasta hare. Weet jy watter klere hy aangehad het? - - - Hy het ‘n geel ‘T-shirt’ aangehad met ‘n grys ‘jacket’. - - - Grys baadjie. - - - Ja. - - - Nog iets? - - - . . En ‘n grys sweetpak broek. Grys. - - - Sweetpak broek, ja. - - - Ja. . . . Met bruin tekkies en wit sokkies. - - - Nou goed, soos u nou hierdie vir Hof vertel het wat na bewering gebeur het lyk dit vir my dat u was nou die heeltyd was u nou naby en in noue kontak met die man, nè? .- - - Ja. Julle was mos die heeltyd daar bymekaar? - - - Ja. - - - En dit was lig? - - - Ja. - - - En die tyd wat u sê dit omtrent gebeur het, was net so hier na elfuur, nè? - - - Ja.

. . . .

As u nou moet skat, hoe lank sal u sê het hierdie hele voorval nou gebeur vandat u nou die eerste keer soos u sê die beskuldigde gesien het daar in die gang, tot en met die tyd wat hy nou daar uit die huis uit is. As u nou moet sê hoe lank sal u sê hoe sal u sê was dit omtrent? - - - Dit was seker ‘half past twelve’, as ek kan skat. - - - Ja, kom ons praat nou hoeveel minute sal u

omtrent sê was dit wat hy daar in die huis nou was na bewering wat alles gebeur het? Van hy daar gekom het totdat hy weg was, hoe lank sal u sê was dit omtrent, hoeveel minute omtrent? - - - Ek kan sê van ‘ten past eleven’ tot twaalfuur. - - - So 50 minute? - - - Ja. - - - Net laastens met dit wat u nou sê wat nou gebeur het daarso, die gemeenskap dit klink darem nou vir my u het nie vir hom toestemming gegee vir gemeenskap nie? - - - Nee, ek het nie, Edele. - - - Het u vir hom iets gesê toe hy nou daar gemeenskap hou? - - - Nee, ek het net gehuil. - - - Hoe voel u daaroor na die tyd nou? Met dit wat nou na bewering gebeur het, hoe voel u daaroor? - - - Wel, dit is onvergeetbaar, Edele. - - - Maar het hulle vir u enigsins vir u ‘n bietjie berading gegee êrens gegee, ‘n bietjie gehelp. Het u gegaan vir ‘n bietjie terapie of iets of nie? - - - Nee, die vrou wat ek by werk het altyd saam met my gepraat. - - - Ekskuus? - - - Die vrou wat ek by werk het altyd saam met my gepraat.

. . . .

Af lyk, wat sê uself hoe het u gevoel? - - - Ek het vuil gevoel. - - -

Ja, nog iets? - - - En baie keer as ek daar aan dink dan begin huil ek net. ‘

[26] Does this amount to undue intervention in the conduct of the trial? In my view, although the magistrate elicited from the complainant evidence that the prosecutor did not, it really did amount to no more than clarification of the evidence led in chief. The elements of the offence of rape had already been testified to by the complainant. The only fact put in dispute by the appellant was identification (that it was not he who raped the complainant), as to which the complainant had already testified, and in respect of which the appellant then proceeded to cross-examine in a passage already cited. The magistrate elicited facts relating only to the clothes that the appellant had allegedly been wearing, but subsequently, as appears in the passage on the appellant's cross-examination of the complainant, suggested to the appellant that he should question her as to the clothes that the rapist had worn. In

the circumstances I do not think that the magistrate in this instance made the case for the state.

[27] A similar argument is raised by the appellant in relation to the questioning of him by the magistrate when he gave evidence. The complaint in this regard is that the magistrate questioned the appellant for a longer period than did the prosecutor. But that in itself does not amount to unfairness, nor is it clear to me that contention is correct.

[28] Even if the magistrate did play a more active role than is usual for a judicial officer, in itself that is not unfair. Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires

intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become an irregularity.

In *S v Rall*[11] the court held that the following principles should determine whether judicial intervention goes too far.

(a) The trial must be so conducted that the judicial officer's 'open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused'. 'The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression'.

(b) 'A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent

[11] 1982 (1) SA 828 (A) at 831in fin to 833B.

that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. As Lord Greene MR observed in *Yuill v Yuill* (1945) 1 All ER 183 (CA) at 189B, if he does indulge in such questioning –

> "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". '

(c) A judicial officer should refrain from questioning an accused or a witness in a way that intimidates or disconcerts or unduly influences the quality or nature of his replies.

[29] Where a judicial officer breaches any of these injunctions one must still ask whether the irregularity is such as to cause prejudice. As I have indicated no unfairness to the appellant has actually been demonstrated. The magistrate was apparently

impatient at times. But he did not actually prevent the appellant from cross-examining, and he did not assist the state in making its case. At most he may be said to have been over-zealous in ensuring a proper ventilation of the issues. He asked questions not only of the appellant and his one witness, but of all the witnesses. And, as has been shown, he assisted the appellant in the process of cross-examination regularly and consistently. In the circumstances his conduct in this respect did not demonstrate lack of impartiality. Ultimately the test is whether even if he had not intervened, the evidence adduced supported the conclusions reached.

The failure by the court to explain to the appellant his right to adduce evidence of his personal circumstances before sentence was passed.

[30] This complaint relates in essence to whether the appellant was prejudiced because he did not have a legal representative. There is nothing on the record to show that the magistrate explained, before sentence was passed, that the appellant was entitled to give evidence, or to lead witnesses, on his personal circumstances which might have been taken as mitigating factors. But the appellant was made aware of his right to place factors relating to sentence before the court. The magistrate said:

'U ken die procedure rondom die kwessie van die vonnis, kan u daar vandaan aspekte voorlê ter versagtiging indien u dit wou doen, of u kan natuurlik rondom die vonnis kon getuig of getuies roep as daar is. Wat will u maak?'

The response was that he wanted to appeal. The court explained that he could do so but that sentence had first to be passed. The appellant's response was that he had nothing to say. It is far from clear to me why the explanation as to the appellant's rights to lead

evidence on any circumstances that might affect the sentence was inadequate. Nor has the appellant at any time tried to place any personal circumstances that were unknown to the magistrate before the appeal courts. In my view, therefore, the absence of legal representation, and the failure to adduce evidence in mitigation, did not result in prejudice to the appellant.

The evidence leading to conviction

[31] In each of the charges against him, the appellant placed in issue the identification of him by the state witnesses. I shall deal with the first, fourth and fifth charges together, as did the court a quo, since the offences were all committed at the same address, the house of Dr and Mrs Kader at 3 Omeria Street, Belhar. The first charge was of housebreaking with intent to rape and steal, and the rape of Ms Beauty Mnyateli on 13 May 1996. The fourth and fifth charges were that on 2 September 1996 the appellant had

broken into the same house and raped Ms Melody Mnyateli. The appellant was not convicted on the charges of housebreaking into 3 Omeria Street.

[32] Both complainants gave evidence about the first charge of rape. Beauty Mnyateli (Beauty) testified that she and her sister Melody Mnyateli (Melody) were both employed at the home of Dr and Mrs Kader as domestic workers. They were at the house on the morning of 13 May 1996. There was also a baby in the house, assumed by the court a quo to be Melody's child.[12] Beauty said that at about 11h00 she was in the kitchen when she saw the appellant walking down the passage. She identified the appellant, then in the dock, as the man who had come in to the house. She did not know him then and had not seen him previously. She asked him what he wanted. He asked where the other girl was.

[12] It is not clear from the record whether it was either of the complainants child, or that of their employers.

Beauty replied that she was in the shower. The appellant then grabbed her breasts. She ran to the bathroom and knocked on the door. Melody emerged, with a towel round her, and screamed when she saw the appellant. He slapped Melody's face and pulled the towel down beneath her breasts. The appellant asked where the money was kept. They replied that there was no money in the house. The baby began to cry. The appellant locked Melody in the bathroom. Beauty fetched the baby. The appellant then unlocked the bathroom door and Beauty handed the baby to Melody. The appellant stated that he felt like cutting off the baby's head.

[33] The appellant then demanded that she open the door to the study, which was locked. She did not have the key. He then took her to the main bedroom and demanded that she remove her T-Shirt, which she did because he threatened her with a sharp knife. The appellant removed her bra, her shorts and her pants, and then

raped her (‘hy het my toe verkrag’). She described the act of sexual intercourse and said that the appellant had ejaculated.

[34] Beauty testified that she had then dressed. The appellant then took her to the bathroom, locked her in with her sister and the baby, and asked them where the ‘tools’ were kept. They said they did not have any. They heard him banging on a door, and when he returned to unlock them he was carrying a bank bag of money, which he said he was going to distribute to the poor. The study door had been damaged.

[35] As indicated in the passage quoted above where the magistrate had questioned Beauty further, she said that he had been wearing a yellow T-shirt, a grey jacket, grey tracksuit pants and brown ‘tekkies’. Earlier in her testimony she said that he had been wearing ‘wit sokkies’ on his hands. She recognised him in the dock, she said, by his face and his hair – ‘Rasta’ hair. There was

no evidence as to how the appellant had entered the house, and no evidence of any break-in (the reason that there was no conviction on the charge of housebreaking with intention to steal and to rape).

[36] Beauty said that when the appellant left she and Melody had run to the house of a neighbour, Mrs Bray, and told her what had happened. Mrs Bray had phoned Mrs Kader who had returned to the house. Both Mrs Bray and Mrs Kader gave evidence, supporting this testimony.

[37] The appellant's version, when he questioned Beauty, and when he gave evidence, was that he had not been there. He stated that he had not been wearing the clothes described by Beauty. (Whether he meant that he did not possess such clothes, or that he had not been wearing them that day, is not clear. Roger Fortuin, who testified for him, gave evidence that the appellant had

worn clothes of a similar description one day.) The appellant said that he had had short ‘dreads’ – dreadlock hair worn by Rastas – at that time.

[38] Beauty’s evidence as to the appellant’s conduct, in so far as it related to Melody, was corroborated by Melody in all material respects. She could not remember, however, what clothing he had had on that day, save for what she described as ‘baby handskoene’.

[39] Melody too testified that she had been raped by the appellant, but some months later on 2 September 1996. He had appeared in the house when she was in the kitchen making breakfast at about 11h15. She did not know how he had got in because the doors were locked. But again, there was no sign of a break-in. The appellant asked where the ‘other girl’ was. Melody said she was away. The appellant had then made her remove her

clothes and raped her in one of the bedrooms. He had then locked her in the bathroom.

[40] The bell at the entrance gate had rung and the appellant had opened the bathroom door. She looked out of the window and saw that an employee of the butcher had come to deliver meat. The appellant told her to tell the delivery man (Mr Mohammed Antuli) that he was her brother. She had let Antuli in, and while he was there she had tried to signify to him that something was wrong. She had then managed to run away from the house to the neighbour. Later in the day the police had arrived at the Kader house with the appellant, whom she said to one of the policemen was the man who had raped her. Melody too identified the appellant in the dock. She said that she recognized him by his face, his hair (a Rasta hairstyle) and his voice. She had had the opportunity to observe him previously, when Beauty had been

raped, and had good reason to remember him. According to Melody, on 2 September, when the appellant had raped her, he had been wearing a maroon T-shirt and black track suit pants. One of the significant facts about his attire was that he was wearing only one shoe – a ‘tekkie’. His other foot was bare. The appellant’s version, put to her in cross-examination, was that it was not he who had been at the house that day, and that he had not raped her. He led the evidence of a friend, Roger Fortuin, as an alibi. I shall return to this evidence.

[41] Mohammed Antuli, the delivery man from the butcher, testified that he had arrived at the Kader household at about 12h15 on 2 September 1996, and had rung the bell at the gate twice before it was opened and he had driven his bakkie in to the driveway. He had then knocked at the kitchen door but no one had answered for some time. When he was let in by the domestic

worker (Melody) the ‘suspect’ – the appellant to whom he pointed in the dock – was with her. He thought she looked shaky, and that she had tried to indicate that something was amiss, but he had not realized what was wrong. She had then run off. He asked the appellant what was wrong with her, but the appellant had not responded, and ran away. Antuli said he had tried to chase the appellant, who had run off through an adjacent field, but gave up and returned to the house.

[42] As to identification, Antuli said that he had been very close to the appellant – an arm’s length away – and recognized him by his Rasta hair, which was shorter then than at the time of the trial. The appellant had been wearing a maroon ‘sweater’ and black track suit pants.

[43] The appellant put to Antuli that he was lying, that he had not been there. But he also asked Antuli what shoes he had been

wearing, the response to which was that the appellant had been wearing only one shoe on his right foot – a black ‘tekkie’.

[44] The appellant was identified also by Mr Ronald Juries. The third charge against the appellant related to an attempted housebreaking in to Juries’ house in Chopin Street, Belhar, also on 2 September 1996. I shall not deal with this charge since the court a quo found, correctly in my view, that there was insufficient evidence that it was the appellant who had attempted to break in to the house (the only witness to the incident was Juries’ daughter, Ronecia, who could not identify the appellant). However, the appellant, in cross-examining Juries, who had been summoned home after being told of an attempted break in, asked Juries: ‘Die tyd toe meneer by my kom, watter kleredrag het ek eintlik aangehet’. The magistrate, clarifying what was being asked by the appellant, said: ‘Did you see the accused afterwards?’ Juries

responded that he had seen the appellant in a police van, and that he had been dressed in dark pants, and had only one shoe on, a training shoe. Ronecia Juries, who had seen the attempted break in at their house, but had been unable to say that it was the appellant whom she had seen, testified that the man had been wearing dark pants and a red top. When the appellant asked her about the shoes he had been wearing, she replied that she did not know, but that she had seen prints in the backyard of a ‘tekkie’ and a foot.

[45] Abdul Ederies, a constable in the police service, testified that he had been on duty in the Belhar area on 2 September 1996. He had received a complaint about a break-in in Chopin Street at about 13h00 and had driven there to investigate. He had not seen any suspect there. He had then received a radio report about a problem in Omeria Street (the Kader house, where Melody had

been raped). On his way there he had seen in Banjo Walk, a road close to Chopin Street, a man who fitted the description given of the suspect who had raped Melody. He had driven the man, whom he identified in court as the appellant, to the Kader house in Omeria Street. An Inspector Steenberg (who had sent the radio report of the description of the suspect) was already at the Kader house. servantAntuli had identified the appellant to Steenberg as the man who had been at the house earlier, and Melody, according to Ederies, had identified the appellant as the man who had raped her to him. Ederies had then arrested the appellant.

[46] The appellant cross-examined Ederies at some length, essentially repeating a question as to the description of the suspect's clothing. Ederies remembered nothing other than that the man was wearing dark trousers. (The appellant complained about curtailment of his cross-examination of Ederies. The

magistrate had said, after many questions had been asked about the description of the suspect who had raped Melody, which Ederies was unable to answer, “Ek gaan nou met die getuie klaarmaak, want u loop nou al in die rondte en rondte en rondte, ons kom nie verder nie.’ The appellant protested. The magistrate then said ‘Is daar nou nog een laaste vraag wat u aan die getuie wil vra . . .’. The appellant asked a few more questions.)

[47] Inspector Steenberg testified that he had gone to Omeria Street to attend to the complaint of housebreaking and rape, and that when the appellant had been brought to the house by Ederies, Antuli had identified the appellant as the suspect to Steenberg.

[48] Mrs Kader testified about the theft of property from the house in Omeria Street on 2 September 1996. She said that she had been phoned by Melody, who was in a state of hysteria, and had gone home at about 12h30. There was no evidence of the house

having been broken into, but she found that the door to the study had been damaged again, and the lock broken. Her cell phone was missing, as was foreign currency. Jewellery had been taken from the bedroom. The total value of the items stolen came to about R20 000. Nothing was recovered, but she had been paid under an insurance policy. The appellant did not dispute her evidence.

[49] The appellant testified that it was not he who had committed any of the crimes charged. On the day when he was apprehended (2 September 1996), he said, he had been visiting a friend, Roger Fortuin in Banjo Walk in the Belhar area. He had gone to Fortuin's house at about 11h00, and they had smoked a couple of 'dagga' pipes together. He had left to go to Vrede's Farm, variously described as a squatter camp or a camp where Rastas live, when he was stopped by policemen and apprehended. They had taken

him to Omeria Street where he had been arrested. He said he had been wearing black track suit pants with ‘red, gold and green’ on them, a black ‘bomber’ jacket, a red top with long sleeves over the jacket and two blue Adidas ‘tekkies’ or ‘trainers’.

[50] Fortuin, called as a witness by the appellant, confirmed that the appellant had visited him on the morning in question. But he testified that it had been at 10h00, and not, as the appellant said, at about 11h00. He said that the appellant had been wearing dark tracksuit pants with Rasta colours, and a black bomber jacket.

[51] The appellant argues that the identification of him in respect of the charges of rape is materially flawed. There was no identification parade held and no forensic testing done. The only identification was when he was in the dock, some years after the offences were committed. It is true that the trial commenced only three years after the last of the offences charged was committed.

And undoubtedly the police and prosecution could and should have investigated the matter better. But in determining whether the appellant was properly identified as the person who committed the crimes charged on counts 1, 4 and 5, the question is not what was not done, but whether the identification of the appellant by the state witnesses constituted proof beyond reasonable doubt that it was he who had committed the crimes charged.

[52] Both Beauty and Melody Mnyateli were adamant that the appellant was the man who had raped them. Both had had ample opportunity to observe him, and reason to remember his face, his build and his hair. Melody had encountered him twice, first when he entered the house in Omeria Street in May 1996, slapped her face, locked her in the bathroom, let her out again, and demanded money and tools; and secondly when he had come in to the house on 2 September 1996, asked where the ‘other girl’ was (thus

showing that he had been there previously) and had raped her. The evidence of both women was consistent in material respects with regard to the incident on 13 May 1996. Their description of the course of events was largely the same, as was their description of the appellant, his conduct in demanding money and tools, his chopping of a door while they were locked in the bathroom, and what he had said.

[53] Melody's account of what happened after the rape on 2 September was corroborated by Antuli, as to what the appellant had been wearing, and in particular that he had only one shoe on. Both women and Antuli had described the appellant's dreadlocks as being shorter at the times when the offences were committed than it was when the trial took place.

[54] The identification of the appellant in the dock was corroborated by the evidence of Juries and Antuli as to the clothes

worn by the appellant on 2 September and the fact that he had only one shoe. The appellant argues that it is improbable that he could have walked to Chopin Street, some three kilometres away from Omeria Street, in the time available, especially if he were wearing only one shoe. Someone else, with a Rasta hairstyle, must thus have committed the rape. The argument is implausible. The appellant would have had at least an hour to walk there. And the possibility of another man with a Rasta hairstyle, wearing the same clothing described by Melody, Antuli and Juries, being in the Belhar area at the same time is remote.

[55] The identification of the appellant by Beauty and Melody Mnyateli, as the man who had raped them was unshaken. There was no evidence to the contrary, just a bare denial. No alibi was proffered in relation to the rape on 13 May: the appellant simply denied that he had been there. And Melody's evidence as to the

events on 2 September evidence was corroborated to some extent by Antuli. Her description of the clothing worn by the appellant on that day was corroborated by the evidence of Antuli, and Ronald and Ronecia Juries.

[56] As far as the second count – housebreaking with intent to steal – is concerned, the court a quo confirmed the conviction of the appellant. The charge was that on 22 August 1996 the appellant had broken into a business, Cash and Carry, with intent to steal. Counsel for the state conceded before this court that the evidence of the state witnesses was unsatisfactory and in several respects inconsistent. At best what was proved was that the appellant had been apprehended by two police officers running away from the premises in the early hours of the morning. The evidence does not establish that the person whom they saw climbing over the boundary wall of the premises was the same

person whom they apprehended. In the circumstances I consider that the conviction and sentence on this charge must be set aside.

Trial prejudice

[57] I return to the question whether the trial was vitiated by irregularity. In my view, the evidence of identification in respect of the counts of rape and theft was clear, unshaken and corroborated by a number of witnesses. Even if the magistrate had descended too far into the arena, or had unfairly limited cross-examination (which I indicated earlier was not the case), the appellant cannot, in the light of the overwhelming evidence that it was he who committed the rapes and the theft, show that any trial unfairness, or prejudice resulted. The instances of unfair intervention complained of by the appellant, referred to above, relate to the evidence of Beauty Mnyateli, and the police witnesses. Nothing turns on the evidence of the police witnesses, and the evidence

given by Beauty in response to the magistrate's questioning was nothing more than an elaboration of her evidence when led by the state. That evidence was in any event confirmed in material respects by her sister, Melody. I therefore do not accept the argument of the appellant that his trial was vitiated by irregularities. He did not show how or that he was prejudiced in the presentation of his defence, or in that he was unrepresented.

[58] In the circumstances I consider that the trial court and the court of first appeal correctly concluded that the appellant was guilty on the charges of rape. In the result only the convictions on the two charges of rape, and of theft, stand.

The appeal against the sentences imposed

[59] The appellant argues that the sentences imposed by the magistrate are excessively severe and that the cumulative effect is shockingly inappropriate. Given that the sentences for

housebreaking will be set aside, the cumulative sentence, if it were to stand, would be 26 years – 20 years' imprisonment on the two charges of rape, and six years in respect of the theft. In my view the sentences of 10 years' imprisonment for each charge of rape are entirely appropriate for very serious offences.

[60] However, the sentence in respect of the theft appears to me to be very severe. Both the trial court and the court below considered that such a sentence was appropriate given previous convictions of the appellant for theft and housebreaking with intent to commit crimes over an extended period. Indeed, the appellant had been released from prison only six months before the first offence was committed in 1996. I consider that the sentence should, however, run concurrently with the sentence in respect of the rape of Melody which occurred on the same day, and in the course of the same series of events.

[61] In my view, the only misdirection on the part of the magistrate in relation to the sentences that remain is that he did not take into account the period spent by the appellant in custody awaiting trial. This court has been informed by counsel for the appellant that the appellant spent a period of seven months in custody between his arrest on 2 September 1996 and April 1997 when the charges against him were withdrawn. He was subsequently rearrested in March 1999 and the trial commenced in November 1999. He thus has spent an effective period of 15 months in custody awaiting trial. This period ought to have been taken into account in determining the sentences for rape.

[62] Accordingly it is ordered that:

1 The appeal in respect of count 2 is upheld, and the conviction and sentence in respect of housebreaking with intent to steal are set aside.

2 The appeals against the convictions for rape on counts 1 and 5, and for theft on count 4, are dismissed.

3 The sentences in respect of the convictions for rape and theft are set aside and replaced with the following:

'(a) On count 1 (the rape of Beauty Mnyateli) the accused is sentenced to nine years' imprisonment.

(b) On count 5 (the rape of Melody Mnyateli) the accused is sentenced to nine years' imprisonment.'

(c) On count 4 (the theft of property from the house of Dr and Mrs Kader), the accused is sentenced to six years' imprisonment, which sentence is to run concurrently with the sentence in respect of count 5.'

_____

C H Lewis
Judge of Appeal

Concur:

Mthiyane JA

Mlambo JA