HELP AT MSABANE

CASE NO. 46/34

In the matter of -

CAIPHAS DLAMIHI Appellant

and

REGINA Respondent

CORAM: ISAACS, J.A.

Van WINSEN, J.A.

WELSH J.A.

JUDGEMENT

29/3/85

WELSH J.A.

On 1st February, 1934, the appellant was indicted on a charge of rape. The trial before the High Court took place on the 22nd October, 1984. The appellant was undefended. He pleaded not guilty. He was found guilty and sentenced to six years' imprisonment. On 30th October, 1984, a Notice of Appeal against the conviction was lodged on behalf of the appellant by the firm of attorneys who acted for him when the appeal came before us. The grounds of appeal set forth in that Notice of Appeal are now irrelevant, since en amended Notice of Appeal was lodged with this court shortly before the hearing of the appeal and the amendment was allowed by the court.

The first three paragraphs of the amended Notice of Appeal read as follows:-

"1. The Court erred in law in failing to explain fully to the appellant his rights at the close of Crown



"case in as much as the accused was not apprised of the fact that he may call witnesses in his defence.

"2. The Court erred in law in not giving due regard to the Appellant's request to obtain legal representation at the close of the case for the Crown.

"3. The Court erred in law in not giving Appellant an opportunity to address the Court after all the evidence had been led."

Counsel for the Crown called four witnesses and then closed its case. The record on appeal then goes on to say this:-

"Accused rights explained. Accused elects to give an unsourn statement. I have a request to make. I did not have time to contact my attorney. In the circumstances I request the Court to

grant me an appeal."

The trial judge then interposed to say this:-

"Appeal against what? There has been no verdict given in the matter?"

The appellant is recorded as having replied as follows:-

"I was saying this thinking that the Court is going towards the judgement."

The trial judge is then recorded as having said this:-

"The Crown has closed his case, that is, he has presented all the evidence he needs to support the charge against you. You have heard your rights explained to you as to what is open to you in conducting your defence. It was your opportunity to give your side of the story of what happened. It was explained to you that you may do so from where you are without taking the oath or that you could come

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"over to the witness box and take the oath and give your evidence and be cross-examined thereafter on such evidence. You said you understood all those rights and you elected to speak from where you are without taking the oath. Now what is it you are talking of appealing?"

The appellant replied as follows:

"I am not satisfied with the evidence that has been adduced before this Court."

The trial judge then said;

"Before you start doing that you had your rights explained as to how you can present your case to the Court and you said you want to give an unsworn statement from the dock?"

The appellant replied:-

"I now elect to give sworn evidence." The trial judge then said:

"Because if you do not understand anything say so, don't say you understand the situation when you do not in fact understand what is happening. You have not been convicted in this matter yet. The chance you have now is to give your side of the story. You elect to give a sworn statement?" The accused then said:

"I may." The trial judge said:

"I don't say you can that is your decision?" The appellant then said:

"I will give a sworn statement."

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The appellant proceeded togive sworn evidence in his own defence and was cross-examined by counsel for the Crown. At the end of the appellant's evidence, it is recorded that the trial judge

found the appellant "guilty as charged". In his judgement, the trial judge rejected the evidence which had been given by the appellant.

The trial judge did explain to the appellant, at the end of the Crown case that he was at liberty to make an unsworn statement from the dock or to give sworn evidence in the witness box. He did not, however, inform the appellant that he was at liberty to call other witnesses in his own defence, if there were any. Nor did he respond to the appellant's statement that "I did not have time to contact my attorney". Nor did he afford the appellant any opportunity to "contact" his attorney or otherwise to obtain legal representation. Nor does the record contain any indication that, at the conslusion of the evidence, the trial judge invited the appellant to address any argument to the court. It was only after the appellant had been convicted, and was giving evidence in mitigation, that he said, inter alia, that:-

"The court did not allow me to call witnesses to give evidence in my defence."

In the course of the appeal, it became an issue whether the trial judge had asked the appellant whether he wished to call any witnesses. The appellant, at that stage, was represented. The court requested counsel for the Crown and counsel for the appellant to listen to the original tape recording of the proceedings in the trial court and to report to this court on the question whether the trial judge had indeed asked the appellant whether he wished to call any witnesses in his own defence. This was duly done. We were later informed that, according to the original tape recording, the trial judge had not so asked the



appellant. It was also not disputed by the Crown that the trial judge did not afford the appellant any opportunity to obtain legal representation, despite the appellant's statement, at the end of the Crown case, that "I did not have time to contact my attorney". Nor, it was common cause, did the trial judge invite the appellant to address the court after the conclusion of all the evidence.

Section 174 of the Criminal Law and Procedure Act, No.67 of 1938, in so far as it is relevant, reads as follows:-

"(5) At the close of the evidence for the prosecution the proper officer of the court is required to ask the accused, if more than one, each of them, or his legal representative, if any, whether he intends to adduce evidence in his defence.

"(6) If the accused or his legal representative answers in the affirmative such accused may by himself or his legal representative address the court for the purpose of opening the evidence intended to be adduced for his defence, but without comment thereon.

"(7) The accused or his legal representative shall then examine the witnesses for the defence and put in and read any documentary evidence which may be admissible."

Section 175(1) reads as follows:

"After all the evidence has been adduced, the prosecutor shall be entitled to address the court, summing up the whole case; and every accused shall be entitled by himself or his legal representative to address the court."

Section 176 reads as follows:

"After the evidence is concluded and the legal representatives or accused (as the case may be) have addressed the court or stated that they do not wish to do so, the presiding officer may give judgement or may postpone it to a future time."

These provisions are derived from the corresponding legislation in South Africa, which has been interpreted by the courts on numerous occasions.

I refer first to Rex v. Sibia, 1947(2) S.A. 50 (AD), at pp.54 to 55, where Schreiner, J.A., referring to section 221(4) of the South African Criminal Procedure and Evidence Act, No.31 of 1917, said that:-

"It is to be observed that what the opening sentence of the sub-section requires the proper officer to ask the accused is 'whether he intends to adduce evidence in his defence'; it does not in terms provide that the accused must have his mind directed separately to the questions whether he wishes to give evidence himself and whether he wishes to lead the evidence of other persons. But consideration of the fact that the accused may well be an ignorant person unaquainted with court procedure has led those courts before which the question has been raised to interpret the provisions strictly, against the Crown. On this view the portion of the subsection with which we are concerned should be interpreted so as to require that the accused be asked both whether he wishes to give evidence himself and, separately, whether he wishes to call any other witnesses."

Having referred to certain earlier decisions, in one of which it was said that the accused must be asked not only if he wishes personally to give evidence but also if he wishes to



call witnesses, Schreiner, J.A. went on to say this:-

"These statements undoubtedly represent the established practice, which it is of great importance to maintain without relaxation. Where the court is obliged to approach the accused through an interpreter, it may, and in my experience frequently does, happen that the latter in anticipation of directions from the court puts the two questions to the accused, but it is essential that the court should itself be satisfied that they have been put."

Schreiner, J.A. went on to say that in most of the cases which had been quoted, the advantages of recording the questions and the accused's answers, is mentioned; but he added that:-

"I do not wish to be understood as suggesting that it is an irregularity, of which the accused could take advantage, if no such record is made. Speaking only from my own experience I do not think that it could be inferred from the absence of any reference thereto in the judge's notes or in the shorthand record that the accused was not asked whether he had any witnesses to call."

In S. v Alexander and Others (1), 1965 (2) S.A. 796 (AD), at p. 816, Ogilvie Thompson, J.A. referred to Sibia's case as holding that the accused must be asked both whether he wishes to give evidence himself and, separately, whether he wishes to call any other witnesses, and went on to say this:-

"There is no statutory provision which in terms requires a presiding judicial officer to explain to an accused the difference between giving evidence on oath and making an unsworn statement from the dock.

In the case of an accused who is unrepresented, the established - indeed, invariable and very salutary -practice is for the presiding judicial officer to make such an explanation. The general form which that explanation should take is, I think, succinctly and correctly stated by Caney, J. in S. v Vezi, 1963(1) S.A. 9 (N) at p. 11 C to E."

The passage in the judgement of Caney, J, reads as follows:-

".... Practice requires that an accused who is unrepresented at his trial should be afforded an explanation of the courses open to him at the close of the prosecution case, namely that he may give evidence on oath or make an unsworn statement from the dock, that if he decides upon the latter course he may not be cross-examined nor questioned by the court, but that generally evidence on oath carries more weight .... To the explanation of these two courses I consider there should be added information that a third course is available to him, namely to remain silent if he so wishes."

It is also quite clear from section 175(1) that every accused person is entitled to address the court at the conclusion of all the evidence. In R v. Parmanand, 1954(3) S.A. 833 (AD), at p. 839, Greenberg, J.A. referred to the corresponding provision in South Africa (section 222 of the Criminal Procedure and Evidence Act, No.31 of 1917) and said this:-

"It does not provide, as does section 221(4) in regard to witnesses, that there shall actually be an enquiry whether these persons (the prosecutor and the accused

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or his representative) wish to address the court, but it is clear that they must not be deprived by the presiding judicial officer of the opportunity to do so. Although the statute does not provide that such enquiry shall be made, I think that judicial officers should not only make such enquiry but also record what the response to it is."

Similarly, in S. v. Mabote en Andere, 1983(1) S.A. 745 (0), at p. 746, the court pointed out that it is a basic principle of criminal law that an accused person should have theright to address the court which is trying him before judgement is given on the merits and that the opportunity to exercise that right should be afforded to him regardless of his prospects of success. The court expressed the view that a failure to afford the accused that opportunity affects the essence of the administration of criminal justice and cannot be regarded as anything other or less than a gross irregularity, which destroys the fairness and therefore also the validity of the proceedings in question.

Another fundamental right of an accused person is the right to be legally represented at his trial. That right is recognised not only by the common law (see S. v. Wessels and Another,1966(4) S.A. 89 (C), at pp.91 to 92) but also by section 171 of the Criminal Law and Procedure Act, No.67 of 1938, which provides that:-

"Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross-examined by his counsel, or other legal representative ....."

The corresponding South African provision was referred to in S. v. Ngula, 1974(1) SA 801 (E), at p. 804, where Eksteen, J. said this:-

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"It is to my mind a matter of considerable importance in the interests of justice and the administration of justice that every accused person should be accorded every opportunity of putting his/her case clearly or succinctly to the court and this can only be properly done when it is put by a person who is trained in the law. Such a person must obviously be in a much better position to put the case of an accused person much better and much more clearly than that person could fairly do himself."

More recently, in S. v. Baloyi,1978(3) S.A. 290 (T), at p. 293, Margo, J. referred to a number of cases dealing with "the right of an accused to legal representation where he wishes it" and holding that "the mere fact of being denied legal representation can by itself be fatal to the validity of the trial", ana said this:-

"However, where he (the accused) does not seek it, and where no irregularity occurs by which he is deprived of it, there is no principle or rule of practice of which I am aware which vitiates the proceedings. Compare the case where a legal representative is not available because of the accused's own fault. R. v. Zackey, 1945 AD 505. Naturally, where an accused is not legally represented - and this is especially so in the case of an -illiterate or foreign accused who is not familiar with the judicial process, the court will be careful to craw 'attention to the advisability of being legally repre -sented, and, in the absence of legal representation, will take all reasonable steps to protect the interests of the accused ."

Finally, reference must be made to section 327 of the Criminal Law and Procedure Act, No.67 of 1933, which sets out



the powers of this court in any appeal against a conviction. The proviso to section 327 states that:-

"Notwithstanding that the appeal court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such appeal court that a failure of justice has in fact resulted therefrom."

In the well-known case of Rex v. Patel, 1946 AD 903, at p.908, Tindall, J.A., in dealing with the corresponding provision in the South African Act of 1917, said that:-

"Whatever form of language is used to enunciate the principle on which an appeal court acts under the proviso ..., the point of importance is that the appeal court does not attempt to divine what the particular trial court would have decided had the irregularities not been committed, but concerns itself with finding out what a reasonable trial court, properly directed and unaffected by any irregularity, would have decided."

Tindali, J.A. referred in his judgement to the similar decision of the House of Lords in Stirland v. Director of Public Prosecutions (1944) A.C. 315, especially at p. 321 The same test was applied by the Court of Appeal. in Botswana in Attorney General v. Mcagi , 1981 (1) B. L. R. I. at pp. 19 and 40.

In The State v. Moodie, 1961(4) S.A. 752 (AD), at p.756, Holmes, J.A. referred to Patel's case and other decisions and said this:-

"In interpreting the proviso and seeking a test to apply, this court has decided in a series of cases that it will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity ... This is a sound general test which works well in most cases of irregularity. But it is not exclusive test, and the courts have more than once recognised that in a exceptional case an irregularity can be of such a nature as per se to amount to a failure of justice, and to be so held, without the necessity of applying the aforegoing test."

In S. v. Tugs, 1966(4) S.A. 565 (AD), however, the South African Court of Appeal expressed the view (per Holmes, J.A. at p. 568) that:-

"... The time is appropriate to discard as unnecessary the views of a notional reasonable trial court ... In other words, the test is simply whether the court hearing the appeal considers, on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no resultant failure of justice."

The court was careful to add the following rider:-

"I am not here dealing with those exceptional cases where the irregularity or defect is per se of such a nature and degree as de jure to vitiate the whole trial. In such cases it would obviously be a failure of justice to alow the verdict to stand."

The new test has since been applied by the South African



Court of Appeal in numerous cases: see, for instance, S. v. Mpopo, 1978(2) S.A. 424 (AD), at p.427, and the authorities there cited.

The statutory previsions to which I have referred contain procedural safeguards which are of great importance to accused persons, and especially to accused persons who are not legally represented and who are unacquainted with judicial procedure. They must, as Schreiner, J.A. said in R. v. Sibia (supra), be maintained "without relaxation". Having regard to the recent experience of this court, and to the fact that most persons who are accused of criminal offences before the courts of this country are undefended and unacquainted with court procedure, and to the fact that in a large number of criminal cases the services of an interpreter have to be employed, I consider that the time has come for this court to re-state the rules which must be observed by all criminal courts. The rules are these:

(1) At the close of the prosecution case, the presiding judicial officer himself must explain to an undefended accused person the various courses open to him, namely -

(a) That he may give evidence on bath or make an unsworn statement from the dock;

(b) That if he decides to make an unsworn statement from th dock, he may not be cross-examined or questioned by the court (save for the purpose of elucidation), but that generally evidence on oath carries more weight than an unsworn statement from the dock;

(c) That he may remain si lent if he so wishes, but that if he does so, an inference may be drawn against him if the evidence adduced

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by the Crown is sufficiently strong; and

(d) That whatever he himself does, he may call i other witnesses in his defence, if he wishes to do so.

(2) Although section 174(5) of the Act refers merely to "the proper officer of the court" (an expression which is not defined in the Act). I consider that the proper officer of the court, for this purpose, is the presiding judicial officer and not the interpreter, still less counsel for the Crown. If, as often happens, the services of an interpreter have to be employed, the presiding judicial officer must himself give the above explanation of the accused person's rights and instruct the interpreter to interpret it in full to the accused.

(3) The presiding judicial officer must then enquire from the accused person (if necessary through the interpreter) what he wishes to do.

(4) All the above must be properly recorded. In the present case, the record on appeal contains a laconic and inaccurate statement that "accused rights explained". When the matter came to be investigated before this court, it emerged that the trial judge" had not informed the appellant that he was at liberty to call other witnesses in his defence. It is in the highest degree inconvenient for this court to be called upon to investigate matters of this kind when it hears criminal appeals. The rights of the -appellant, as it turned out, were not in fact properly explained to him. Whatever the practice of the South African courts may have been in 1947, or may be now,

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I consider that henceforth it should be a firm rule of practice in all criminal courts in this country that both the explanation of the accused's rights and the response of the accused should be duly and properly recorded.

(5) If, as happened in the present case, an undefended accused tells the trial court, after having had his "rights" explained to him, that he "did not have time to contact (his) attorney", the presiding judicial officer must ask the accused whether he desires an opportunity of obtaining legal representation. It is, indeed, imperative that the accused should be asked, at the very outset of the trial, whether he wishes to be legally represented.

(6) At the conclusion of all the evidence in a criminal trial, the presiding judicial officer must invite the accused person to address the court and ensure that that invitation and the response of the accused person to it are duly recorded. This is the legal right of the accused person, even although he may already hove given evidence in his own defence and even although the presiding judicial officer may think that the accused person can have nothing further to say.

Insistence upon the due observance of these procedural safeguards may, at first blush, be thought to be unduly burdensome and formalistic: but the history of this very case seems to me to show that that is net so. The appellant was undefended. The trial court aid not explain to him that he had the right to call witnesses in hsi defence. Nor did the trial court have due regard to the appellant's statement that he "did not have time to contact (his) attorney". Nor did the trial court give the appellant

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any opportunity to address the court after all the evidence had been led. In McNabb v. United States (1943) 318 U. S. 332, at p. 347, Frankfurter, J. remarked that "the observance of procedural safeguards" has not been unimportant to the history of liberty. In my judgement, the procedural safeguards to which I have referred must be strictly observed and enforced by all criminal courts in this country.

It is quite clear that there were several irregularities in the proceedings before the trial court and that a failure of justice has in fact resulted therefrom, within the meaning of the proviso to section 327 of the Criminal Law and Procedure Act, No.67 of 1938. It is impossible for this court to speculate what would have happened if, at the close of the Crown case, the trial judge had informed the appellant of his right to call other witnesses and to obtain legal representation, or if, at the end of the whole case, the trial judge had given the appellant an opportunity to address the court. Nor is it necessary to do so. Nor go I think it necessary to express any opinion about the new test which was propounded by the South African Court of Appeal in S. v. Tuge (Supra). This question was not debated before us.

On 27th March, 1985, this court allowed the appeal of the appellant and set aside his conviction and sentence." Our reasons for doing so are set out in this judgement.

The President of this court has seen this judgement and authorises me to say that he agrees with it.

R.S. WELSH

JUDGE OF APPEAL

I agree.

I. ISAACS

JUDGE OF APPEAL

I agree

L. de V. VAN WINSEN

JUDGE OF APPEAL