IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 411/98

In the matter between:

KUTETE HLANTLALALA	First Appellant
NOPOJANA MHLABA	Second Appellant
SIBAYA HLANTLALALA	Third Appellant

and

N Y DYANTYI NO	First Respondent
THE ATTORNEY GENERAL, TRANSKEI	Second Respondent

CORAM : Mahomed CJ, Van Heerden DCJ, Olivier JA, Madlanga and Mpati AJJA

HEARD : 26 August 1999

DELIVERED : 28 September 1999

Criminal Procedure - Trial - The accused - Legal representation of - Accused unrepresented - Entitlement to be informed of right to apply for legal aid.

JUDGMENT

MPATI AJA

MPATI AJA :

[1] The question for determination in this appeal is whether an irregularity occurred in the appellants' criminal trial by reason of an alleged failure by the magistrate to inform and explain to them their legal rights and, if so, what effect such irregularity had on the outcome of the trial.

[2] The three appellants were convicted in the magistrate's court at Cofimvaba, in the erstwhile Transkei, of theft (a contravention of s 132 of the Transkei Penal Code, Act 9 of 1983) and each sentenced to undergo a period of imprisonment of four months. Subsequent to their trial they instituted review proceedings in the court *a quo, inter alia,* for an order setting aside the criminal proceedings on grounds of certain alleged irregularities. The court *a quo* declined to grant the order sought for the setting aside of the criminal proceedings, but granted leave to the appellants to appeal to this Court against such refusal.

[3] The alleged grounds of irregularity relied upon and as can be extracted from

the appellants' founding affidavit are the failure by the Magistrate to inform the appellants of or to explain to them:

1. their right to legal representation, including their entitlement to apply to the Legal Aid Board, or other institutions, for legal assistance prior to the commencement of the proceedings;
2. their right to access to the contents of the police docket;
3. their right to request further particulars to the charge;
4. the nature and effect of pleading to the charge and the right to remain silent;
5. the meaning of the offence with which they were charged;
6. the purpose of cross-examination of witnesses during the trial and the consequences of their failure to do so;
7. their right to call witnesses;
8. their right to address the court after close of the defence case.

[4] It was contended on behalf of the appellants that these omissions by the magistrate constituted gross irregularities in the proceedings at common law; alternatively that this Court, in developing the common law in terms of the Constitution, should hold that the alleged failures

constitute gross irregularities. In the further alternative it was contended that the alleged irregularities constituted a direct violation of the appellants' constitutionally guaranteed right to a fair trial. In each case the irregularities were such as to vitiate the proceedings, so it was contended.

[5] Although a number of alleged grounds of irregularity have been raised, I propose to deal first with what I consider to be the main complaint, as per counsel's submissions, *viz.* the magistrate's alleged failure to inform the appellants of their right to legal representation and, if necessary, to deal with the other grounds thereafter. The appellants alleged in their founding affidavit that the magistrate failed to inform them of their right to apply for legal aid, or to be supplied with legal representation at State expense where substantial injustice would otherwise result. The magistrate's response to these allegations was that the appellants' trial was fair "as all (their) rights were explained to them". She also stated that the appellants "did not need a legal representative as they said they have got no money" and that they "never indicated that they needed a state attorney other than that they have got no money to pay for a lawyer". The latter part was in response to the appellants' allegation that in view of the seriousness of the charge preferred against them they should have been informed of their fundamental rights and should

have been afforded legal representation at State expense. It seems clear to me from the magistrate's responses that the appellants were indeed not informed of their basic rights.

[6] In my view, this matter can be disposed of on common law grounds. In this respect a clear distinction should be drawn between the right of an accused to be informed of his entitlement to legal representation, more particularly the right to apply to the Legal Aid Board for assistance, and to be afforded an opportunity to seek such representation, and the right to obtain legal assistance at State expense. The common law acknowledges the former and the Constitution the latter. Indeed, this distinction has received statutory recognition (see amendment to section 3 of the Legal Aid Act 22 of 1969, introduced by section 1(a) of the Legal Aid Amendment Act 20 of 1996). What has been violated in the present case is the first-mentioned right. In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A) Nicholas AJA, having listed the rules formulated and implemented by our Courts and which have been evolved for the assistance of undefended accused, said (at 382C-H):

> "Another rule, not included in this list, was laid down in *S v Radebe; S v Mbonani* 1988 (1) SA 194 (T) by Goldstone, J, Van der Merwe J concurring. The learned Judge referred at 194H-195D to a number of cases which he said 'are but examples of a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place'. He said

(at 196F-I):

'If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation *per se* or the absence of the suggested advice to an accused person *per se* will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances.'

S v Radebe has been followed in most Provinces and, in the case of *S v Mabaso and Another* 1990 (3) SA 185 (A) at 203D-G, Hoexter JA expressed his entire agreement with the passage just quoted."

[7] That an irregularity occurred in the present case is manifest, having regard to the statement of the law by Nicholas AJA as quoted above.

[8] The crucial question to be answered is what legal effect such irregularity had

on the proceedings at the appellants' 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. (See *S v Radebe* 1988 (1) SA 194 (T) at 196I; *S v Mabaso and Another* 1990 (3) SA 185 (A) at 205D-E; compare also *S v Shikunga* 1997 (2) SACR 470 (NmSC) at 483i).

[9] In the last-mentioned case, which was quoted with approval in *S v Smile and Another* 1998 (1) SACR 688 (A) at 691f-i, it was said that the essential question to be asked is whether the verdict has been tainted by such irregularity. In *S v Rudman* (at 391I) Nicholas AJA, having assumed that an irregularity had occurred at the trial, held that it was for the appellant "to show that a failure of justice resulted from the irregularity". An irregularity could be said to result in a failure of justice whenever there had been "actual and substantial prejudice to the accused".

(See *S v Ramalope* 1995 (1) SACR 616 (A) at 621f-g and the cases there cited.) Thus no failure of justice will result if there is no prejudice to an accused and, by the same token, there will be no prejudice if the accused would in any event have been convicted, irrespective of the irregularity. (*S v Davids; S v Dladla* 1989 (4) SA 172 (N) at 193E.) Transposing this test to the present matter, the question is whether it can be said that the appellants would inevitably have been convicted had the magistrate not committed the irregularity (of omitting to inform them of their basic rights).

[10] Nicholas AJA laid down in *S v Rudman* (at 391I), that the appellant (in that case) could show that a failure of justice resulted (from the magistrate's failure to inform the appellant of his right to apply for legal aid) by, for example, "submitting to the Court of appeal and to the magistrate for his comments an affidavit setting out that he was unaware of his rights, and that if he had been informed of them he would have tried to secure representation, at least through the Legal Aid Board".

In casu the appellants do not specifically state in their founding affidavit that had they been informed of their right they would have exercised it by applying for legal aid. But it is apparent from other allegations made in the founding affidavit that had they been so informed they probably would have exercised their right to apply for legal aid.

[11] The appellants were charged with theft of green mealies and pumpkins with an alleged estimated value of R7 320,00. The version of the State was that the appellants entered onto a field allegedly made available to the complainant by a certain Chief Ngangomhlaba Matanzima and reaped the complainant's mealies and pumpkins without his consent, thereby committing theft. It appears from the evidence that there was a dispute regarding ownership of the land on which the mealies and pumpkins in issue were. The evidence reveals that on the day of the alleged theft the appellants and the complainant had attended a hearing at the Regional Authorities Court, where the question of ownership of the said land,

which, according to the appellants, was owned by their late father, was to be adjudicated upon. It appears that the issue was not resolved on the day in question and it was upon their return from the Regional Authorities Court that the appellants were alleged to have committed the theft.

[12] In essence, then, the appellants have alleged that they were unable, in the absence of legal representation, to establish their defence at the trial. They claimed that they were dispossessed of their land and alleged that "(a)t the heart of the matter is the lawfulness of our dispossession of land upon which the alleged offence occurred and the lawfulness of the alleged title of that land of one Ngangomhlaba Matanzima, who, in turn, leased it to the complainant ...". As I have already mentioned, on the day in question the appellants had gone to the Regional Authorities Court for resolution of the question of ownership of the land on which the alleged theft occurred. That at the trial the appellants claimed a right to the land is borne out by the fact that in his testimony the first appellant said the

following:

"I entered my own field and reaped",

and:

"I had a right to reap the mealies any time I wanted."

The following also appears from the record:

"Q After that resolution (at the Regional Authorities Court) you decided to go to the mealie field of the complainant.

A Correct, but according to my rights."

[13] From the aforegoing it seems to me that the appellants were raising a defence, though not eloquently articulated, that they were entitled to reap from the land, as it was theirs, alternatively that they were *bona fide* of the view that they were acting lawfully and thus not with the intention to steal. In my view, a legal representative would have properly formulated the appellants' defence and would have cross-examined the state witnesses in accordance with such a defence. A

reading of the record reveals that although the appellants cross-examined the witnesses called by the state, such cross-examination was not at all pointed in any direction. This is not surprising as the first appellant is only semi-literate, having progressed to standard 5 at school, while the second and third appellants are completely illiterate. They never put their defence to the witnesses and were never advised to do so by the magistrate, who was required to assist them in formulating their questions, clarifying the issues and properly putting their defence to the state witnesses. *(S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 368 (E) at 378D-E and the cases there cited.) Not surprisingly, their failure to put their defence to witnesses counted against the appellants in the end. The magistrate says in her reasons for judgment:

> "In their cross-examination they concerned themselves with things that were not important, not directing their questions on the offence charged. Hence they were asked as to why didn't they deny or challenge the evidence led in their response they said they have forgotten or made a mistake."

This statement underlines the fatal effect of the irregularity committed by the magistrate.

[14] The court *a quo* placed strong reliance on the absence of "administrative machinery rendering free legal services" in the former Transkei and held that the magistrate's failure to inform the appellants of their right to "free legal services" bore no significance in that the appellants "would not have received such services because they did not exist in the former Transkei".

[15] To my mind this is an irrelevant consideration. South Africa became a unitary State on 27 April 1994 and as from that date full South African citizenship was conferred also upon those who were, until then, citizens of so-called independent or self-governing states. The reasoning that the appellants would in any event not have received "free legal services" because of the absence of administrative machinery for that purpose is untenable and cannot be proffered as

an excuse to deny a section of the South African society, merely because they happen to be in a particular area, of rights otherwise enjoyed by the rest of the country. Further, there is no evidence that, if approached, the Legal Aid Board would not have appointed a legal representative for the appellants.

[16] In view of the conclusion I have reached regarding the fatal nature of the irregularity committed by the magistrate, a consideration of the other irregularities raised by the appellants becomes unnecessary. It also becomes unnecessary to consider counsel's arguments based on the Constitution.

[17] The appeal succeeds. Paragraph 2 of the order of the court *a quo* is set aside and in its stead is substituted the following:

> "The applicants' convictions and sentences are set aside".

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L MPATI
ACTING JUDGE OF APPEAL

Concur:
Mahomed CJ
Van Heerden DCJ

Olivier JA
Madlanga AJA