IN THE HIGH COURT OF SOUTH AFRICA

(**WITWATERSRAND LOCAL DIVISION**)

Case No 52/2004

JPV 2004/0036

In the matter between:

THE STATE

vs

PUTTER, Peter John

J U D G M E N T

E M DU TOIT AJ: Delivered 2005 11 30

[1] It will be recalled that we convicted the accused on all 9 counts on which he was arraigned before us, viz kidnapping five young girls, indecently assaulting four of them, and raping the fifth, being a girl under the age of 16 years.

[2] In our country child abuse is regarded as a serious offence by the public and by the Courts. Furthermore, the Legislature has in s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part I of Schedule 2 thereto prescribed a sentence of imprisonment for life for rape where the victim is a girl under the age of 16 years, unless the Court is satisfied that

substantial and compelling circumstances exist which justify the imposition of a lesser sentence. In the interests of justice it is therefore imperative that, in considering sentence, the Court have regard to all relevant circumstances, that the accused be given every opportunity of adducing evidence in mitigation of sentence, and that the State also be entitled to present evidence, including eg so-called "victim impact reports".

[3] On 20th July this year, after the accused had been convicted on the last two counts, Mr *Karam*, who appeared for him, sought an adjournment of the case in order to enable him to present evidence in mitigation of sentence. As I understood him, he wanted to obtain a probation officer's report and was also considering calling a psychologist and/or a psychiatrist to give evidence. Ms *Loots*, who appears for the State, indicated that she, too, intended leading evidence. During ensuing informal discussions Counsel were *ad idem* that it would take some considerable time to obtain the requisite evidence and that the earliest date on which the matter could conveniently continue was 7th November 2005. They were also of the view that the sentencing proceedings would require at least a week. In the result the case was postponed until Monday 7th November 2005 and the rest of the week reserved for the hearing. I prevailed on the assessors to continue to assist me during the sentencing proceedings.

[4] Meanwhile on 26 October 2005 the Judge President sent the

following circular to all Acting Judges:

"PART HEARD MATTERS

1. Please let me have, urgently, a list of:
   1.1 all your part heard matters, and if postponed to a particular date,
   1.2 the date thereof.
2. As it may not be assumed that you will necessarily be acting next year, please
   2.1 endeavour not to have part heard matters when the term ends;
   2.2 do not postpone any matter to a date unless discussed with me or the Deputy Judge President;
3. Please note that attempts will have to be made to hear and finalise all part heard matters during the coming recess period.

. . ."

[5] Before the matter was called on 7th instant Mr *Karam*, accompanied by Ms *Loots*, as a matter of courtesy advised us in Chambers that the accused had just dispensed with his services and that he would therefore seek leave to withdraw from the case. He also mentioned informally that, despite his best efforts, the probation officer's report was not ready yet and that she had advised him that it would still take a considerable time to complete.

[6] When the matter was called Mr *Karam* formally advised me that that morning, shortly before the Court sat, the accused advised him that he wished him to withdraw from the matter as he felt prejudiced by various

discussions Counsel had had with the State pertaining to his statement in terms of s 112 of the Criminal Procedure Act 51 of 1977 ["the CPA"] which led to the withdrawal of certain charges against him. The accused thereupon told me that he felt he had been "misrepresented" by his legal representative and confirmed that he wished to dispense with his services. In the circumstances I granted Mr *Karam* leave to withdraw.

[7] The accused thereupon requested the appointment of another legal representative to represent him at State expense. Ms *Loots* kindly undertook to make the necessary enquiries and put the accused in touch with the Legal Aid Board ["the Board"], whereupon the matter was adjourned until the following morning.

[8] On 8th November Mr *Miller*, as a matter of courtesy, appeared on behalf of the Board, and not the accused, and advised me that the Board had discussed the matter intensely and that finally it had been decided to accede to the accused's request for the appointment of a second Counsel. He stated that Counsel would have to have a record typed of all the proceedings thus far, that would obviously take a little while, and of course prepare, consult and so on. I at some stage reminded Mr *Miller* of the arrangement that, when an accused has a record transcribed, both the Court and the State are entitled to free copies thereof, to which he agreed. He asked that the matter be postponed to a date suitable to the Court early

in 2006, and added that the Board would then find Counsel who was available on whatever the date might be. In his view the sentencing proceedings would require more than a week.

[9] During the ensuing discussion further circumstances were raised, including the prospect of leading expert evidence and obtaining a probation officer's report as envisaged by Mr *Karam*, Ms *Loots*' intention of also calling witnesses, her unavailability before 21 February 2006, and her view that a week would suffice for the hearing. Counsel were *ad idem* that the matter could not proceed until after 21st February 2006. Since the matter could clearly not be heard this term or during recess and inevitably had to be postponed until next year, I referred to the Judge President's circular and adjourned in order to informally determine the earliest suitable dates for the continuation of the matter and then, in terms of the circular, to discuss such dates with the Deputy Judge President.

[10] Having discussed the matter, the week from 6th to 10th March 2006 was duly agreed upon as being the first suitable period for the resumption of the matter, and I immediately fully apprised the Deputy Judge President of the position. I record that as I understand it the Deputy Judge President allocates Judges for duty in the Criminal Courts while the Roll Planner in the Directorate of Public Prosecutions is solely responsible for the criminal roll.

[11] The Deputy Judge President had a pressing engagement and told me that he would get his Clerk to telephone me when he was ready for me. When I had heard nothing by 12:45 I returned to Court, advised the accused of the position and adjourned the matter until the following day. I again saw the Deputy Judge President early the following morning and was told that he would see me when he returned from Court. I requested Mr *Miller* to remain in attendance until 14:00, and when I had heard nothing by then the matter was by agreement adjourned until Wednesday 16th instant.

[12] I was thereafter advised that the Deputy Judge President had, without reference to me and without my knowledge, and contrary to the arrangement with Mr *Miller*, taken a hand in the matter and directed the transcription of the record at urgent rates and at State expense. I may mention that to the knowledge of the Deputy Judge President I had a few weeks previously considered it necessary and had directed a similar transcription in another case. However, as I later told the Deputy Judge President, his intervention in this respect in my respectful view was uncalled for.

[13] I subsequently also learnt that the Deputy Judge President, again without reference to me and without my knowledge, caused enquiry to be made from my Clerk as to the name of Counsel who appeared for the

accused, had thereupon summoned Mr *Mille*r to his Chambers and directed the Board that this case had to be concluded during the present term and the coming recess and that Counsel was to be instructed accordingly, which was done.

[14] In my experience this directive constituted an unprecedented interference with my judicial independence and in the circumstances was in my opinion calculated to prejudice not only the accused but the administration of justice.

[15] Furthermore, the limiting of Counsel's brief in my respectful view violated the accused's constitutional rights to legal representation in the independent professional opinion of Counsel, without his being inhibited by any time or other constraints. In my respectful view both the directive to the Board and the resultant instruction to Counsel were irregular and might well found a special entry in terms of s 317 of the CPA.

[16] By Wednesday 16th instant I had still received no tiding from the Deputy Judge President. We were however informed that Counsel had been briefed by the Board and he was invited to attend an informal discussion before Court commenced. He confirmed the aforesaid terms of his brief, and then to my shock indicated that he would probably not be adducing any evidence on behalf of the accused, without as yet even

having consulted with him. But in any event, in my *prima facie* view the envisaged evidence of a probation officer and possibly that of a psychologist and/or psychiatrist may well be considered to be desirable in the interests of justice, whether adduced by the accused or not.

[17] I thereupon had the embarrassing experience of having to introduce the accused to his Counsel in open Court. I explained to the accused that I had still not heard from the Deputy Judge President and by agreement adjourned the matter until Friday 18th instant. Later that day I again troubled the Deputy Judge President with the matter, and was informed that the Judge President wished to discuss it and would probably be in Johannesburg the following day.

[18] On Thursday 17th instant I was summoned from Court to a meeting with the Judge President and the Deputy Judge President during which my opinion that the sentencing proceedings in the present matter could not be heard in the present term or the coming recess was questioned. I reiterated the reasons initially explained to the Deputy Judge President and in addition voiced my concerns as regards the aforesaid intervention in the case by the Deputy Judge President. I was thereupon unexpectedly told that the Deputy Judge President was dissatisfied with my services, which included my handling of the present case and apparently not disposing of it during the present term, and that he would not be requesting my

reappointment next term. The Judge President, who initially directed that this matter commence on 15 December 2005, at the conclusion of the meeting told me ~~said~~ that I would be furnished with the dates on which the matter would be heard. I suggested that s 275(2) of the CPA might provide the solution to the problem.

[19] S 275(2) of the CPA provides -

> "(2) Whenever—
>
> (a) a judge is required to sentence an accused convicted by him or her of any offence; or
>
> (b) . . .
>
> and that judge is for any reason not available, any other judge of the provincial or local division concerned may, after consideration of the evidence recorded and in the presence of the accused, sentence the accused or, as the case may be, take such other steps as the former judge could lawfully have taken in the proceedings in question if he or she had been available.".

[20] In the interests of transparency I duly advised my assessors and Counsel of the above-mentioned developments at the meeting and by agreement the matter was adjourned until 09:30 on Wednesday morning 23rd instant in anticipation of the dates to be furnished.

[21] On Monday 21st instant I in writing *inter alia* pointed out to the Deputy Judge President that I was again embarrassed by having to further adjourn the matter until Wednesday 23rd for clarification as to the

continuation thereof. I received the following reply:

"1. I reconfirm that I will not be asking the Judge President to appoint you as an acting judge for the first term of 2006. It is further confirmed that you do not need a further appointment as an acting judge to complete matters which are part heard before you.

2. The matter of Putter is part heard before you and you are at liberty to determine a date to which to postpone it, bearing in mind the need to dispose of it as expeditiously as possible. To this end this office has already assisted you by obtaining a record of the transcript on an urgent basis and securing the commitment of the Legal Aid Board to appoint counsel who is available to deal with the matter and dispose of it without undue delay.

3. The Director of Public Prosecutions should be contacted to make a court room available to you to finalise part heard matters during recess."

[22] I point out that I still have not been furnished with dates for the hearing of the matter, but am now at liberty to determine a date, presumably during the recess, to which to postpone it.

[23] With further reference to the letter I respectfully point out that the Deputy Judge President told me at the meeting that he would not be requesting my reappointment next term, and not that he would not be asking the Judge President to appoint me as an Acting Judge. In my respectful opinion the learned Judge President does not have the power to appoint Acting Judges.

[24] I further respectfully disagree with the view that I do not need a

further appointment as an Acting Judge to complete matters which are part heard before me. I was appointed an Acting Judge by the Minister of Justice and Constitutional Development in terms of s 175(2) of the Constitution, which appointment has currently been extended to 2 December 2005. In my opinion the Minister has the duty, after consulting the Senior Judge concerned, to appoint Acting Judges eg for a stated period or for defined duties such as presiding over a commission or a specified trial until the conclusion thereof. My appointment has been extended for a stated period and when it comes to an end on 2 December my judicial powers will lapse and I shall revert to being an advocate of this Court and return to the Bar. In this regard it is noteworthy that other Acting Judges have been placed on the recess duty roster with mention of their part heard matters, whereas neither my name nor a part heard trial I had adjourned to a date during recess appears thereon.

[25] On Wednesday 23rd instant the accused was not in Court and in his absence I merely announced receipt of the letter from the Deputy Judge President, and not dates for the hearing, and again adjourned the matter until Friday 25th instant. On that day, too, the accused again did not come to Court and I again adjourned the matter *in absentia* until this morning.

[26] Having given the matter anxious consideration, I am of the opinion that the aforesaid intervention in the matter and pronouncement by the

Deputy Judge President as regards my unsatisfactory services have rendered my position as presiding Judge in the matter untenable and that to continue to so preside would be contrary to my oath of office.

[27] In the premises I am of the opinion that the interests of justice will best be served if I declare myself to be unavailable for sentencing the accused as contemplated in s 275(2) *supra* of the CPA, which I hereby do.

[28] The matter is therefore adjourned to 5 December 2005, being the first day of recess, for sentence by another Judge in terms of s 275(2) of the CPA, and the assessors are discharged from further duty. I again thank them for their invaluable assistance during the trial and for their willingness to assist me in the sentencing proceedings.

E M DU TOIT
ACTING JUDGE OF THE HIGH COURT

L M Loots for the State
H A Knopp for the accused