



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Nohour and Another v Minister of Justice and Constitutional Development

From: The Registrar, Supreme Court of Appeal

Date: 26 March 2020

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) dismissed the appeal by the appellants with costs.

The appellants in this case, Mr Vishnu Nohour and Mr Neville Michael, were tried on charges of kidnaping and rape of one RM in the Durban Regional Court. They raised the defence that they had consensual intercourse with the complainant whom they described as a prostitute. The complainant denied that the intercourse was consensual or that she was a prostitute. The appellants were convicted. They unsuccessfully appealed against the conviction in the KwaZulu-Natal High Court. The high court, upon dismissing the appeal proceeded to increase their sentences to an effective period of 7 years' imprisonment. The appellants applied and were granted leave to appeal by the high court to this Court. The appeal was against both conviction and sentence. On 13 May 2003, this Court set aside the appellants' conviction and sentence.

In the court a quo, it is averred that Ms Holzen (the Prosecutor) omitted to disclose facts that were within her knowledge to the appellants and the regional court. The facts she withheld were that the complainant (RM) had admitted to the investigating officer that she was a prostitute; that the investigating officer had witnessed the complainant soliciting and plying her trade as a prostitute and that the complainant's sworn statement which, in accordance with the practice at the time was not in possession of the appellants or their legal representatives, materially differed from her evidence in court. By doing this, the appellants alleged that Ms Holzen breached her common law duty to disclose to the defence any material deviation between the evidence given by the complainant and the contents, statements and information in the docket. Further, they allege that such information would have led to their acquittal.

The appellants pleaded that as a consequence of wrongful conviction they were imprisoned for various periods. They were thereafter subjected to stringent parole conditions until their appeals succeeded. The high court found that the appellants failed to prove that they would not have been

convicted but for the irregularity committed by the prosecutor. Further, it held that the state was not obliged to compensate the appellants on the basis of the *ex turpi causa non oritur actio maxim* (referring to the fact that no action may be founded on illegal or immoral conduct).

This Court was called to determine whether the appellants would have been acquitted if the prosecutor had discharged her common-law obligations and disclosed to the defence material deviations between the complainant's evidence and the contents of the docket. This court held that the prosecutor had a legal duty to disclose material discrepancies. If the prosecutor concerned acted deliberately in omitting or failing to disclose the discrepancies to the court and to the defence, the requirement of *animus iniuriandi* (intention to injure) would be established. On the other hand, if the prosecutor acted negligently, then liability could only arise where the circumstances gave rise to a legal duty to avoid negligently causing harm. Therefore, even if it were to be found that there was negligence herein, the mere fact of such negligence would not make the omission wrongful. The consideration of legal causation or wrongfulness, public policy considerations, infused with the norms of our constitutional dispensation dictated that even if the prosecutor suffered from negligent omission, legal liability could ensue if the harm was foreseeable and was not too remote. The general principle of the law of delict is that loss is recoverable only if it was factually caused by a defendant's wrongful and culpable conduct.

Factual causation in delict is also determined by applying the but-for test. This test asks whether, for defendant's negligent conduct, the plaintiff's harm would not have occurred. If the harm would have 'not' been suffered factual causation is established; if the harm 'would' have occurred anyway, the required causal link is absent. This Court held that the appellants bore the onus of proving all requirements for delict including factual causation on a balance of probabilities. They failed the test for factual causation which is the condition *sine qua non* (without which it could not be). Further, the appellants failed to produce evidence that the prosecutor's conduct 'caused or materially contributed to' the harm suffered. The wrongful act on the part of the prosecution was not proved to be linked sufficiently closely or directly to the loss alleged to have been suffered by the appellants. There was no causal link proved. In the result, this court dismissed the appeal with costs and the '*ex turpi*' principle, accepting that it is part of our law, had no application on the facts of this case. But having regard to the conclusion to which the court came to, nothing more need be said about it.