



In The High Court of South Africa
(Western Cape Division, Cape Town)

In the matter between:

CASE: A458/2015

JAN GERRIT CROWTHER

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT DELIVERED ON 11 MARCH 2016

GOLIATH, J:

[1] The appellant was convicted in the Regional Court Albertinia on one count of theft. On 15 January 2015 was sentenced to 3 years imprisonment. With the leave of the court *a quo* the appellant appeals against conviction only.

[2] The appellant was not legally represented in the court *a quo* and appeared in person throughout the duration of the trial. The main grounds of appeal are three fold namely.

- (i) The learned Magistrate failed in his duty to assist the appellant during cross-examination of State witnesses which resulted in a violation of the appellant's fair trial rights.
- (ii) The learned Magistrate misdirected himself in finding that the State had proved all the elements of the charge.
- (iii) The learned Magistrate misdirected himself in finding that the appellant's version was not reasonably possibly true.

[3] The right of an accused to a fair trial is entrenched in Section 35(3) of the Constitution of the Republic of South Africa 108 of 1996 which requires a criminal trial be conducted in accordance with the notions of basic fairness and justice. It is alleged that the Magistrate committed certain irregularities which vitiates the trial. Generally speaking, an irregularity or illegality in proceedings at a criminal trial occurs whenever there is a departure from formalities, rules and principles of procedures which the law requires. (See **S v Rudman and Another**; **S v Mthwana** 1992 (1) SA 343 (A) at 387 A-B; **S v Ntuli** 1996 (1) SA 1207 (CC) at 1208 H – 1209 C and **S v Felthun** 1999 (1) SACR 481 (SCA) at 485 g-h).

[4] It is well established that there are two categories of irregularities in criminal trials. Firstly, the kind which is of so gross a nature that it *per se* vitiates the proceedings, and secondly, the kind which requires the court to assess the evidence and consider whether, on the evidence and findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt. (See **S v Moodie** 1961 (4) SA 752 (A) at 758 E-H; **S v Mushimba and Others** 1977 (2)

SA 829 (A) at 834 F-H; **S v Mnyamana and Another** 1990 (1) SACR 137 (A) at 141 and **S v Maputle and Another** 2003 (2) SACR 15 (SCA) at 18 h-i para 6.)

[5] The presiding Magistrate was obliged to ensure that the appellant received a fair trial. An unrepresented accused places an additional burden on the presiding officer in that various procedural aspects need to be dealt with great circumspection. In **S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO** 1989 (3) SA 368 (E) the court dealt comprehensively with the role of a judicial officer at the trial of an undefended accused. For the present purposes the following rules are relevant:

- “1. At all stages of a criminal trial the presiding judicial officer acts as a guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights – the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence – in a comprehensible language to explain to him the purpose and significance of his rights (378 A-B).”
2. During the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the state witnesses (378 C-D).
3. Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question- not cross-examine- the witness on the issue so as to reduce the risk of a possible failure of justice (378 E-F).”

[6] In **S v Sebatana** 1983 (1) SA 809 (O) the court remarked as follows regarding the court's duty to assist an unrepresented accused during cross-examination:

“Experience has repeatedly taught that, particularly in the case of illiterate and untutored Black accused, they may put a few irrelevant questions to a State witness, or no questions at all, and then subsequently give evidence which conflicts with that of the State witness in material respects. This may be the result of ignorance about the true nature and purpose of cross-examination, notwithstanding an explanation by the magistrate of the accused's “rights” in that connection. The presiding officer in such a case has a duty to assist the accused in presenting his defence by way of cross-examination by, for example, expressly asking him whether he agrees with each material allegation made against him by a State witness. In this way it should in most instances rapidly become clear which evidence is disputed, and the presiding officer can himself put the necessary question or contention to the State witness. This would at least give the accused the impression that he is being fairly treated during the trial.”

[7] In **S v Lekhetho** 2002 (2) SACR 13 (O) at para [10] and [11] the court emphasized the duty of the presiding officer to explain the accused's right to cross-examination as follows:

“[10] It is settled that there rests on the judicial officer a duty to explain to the unrepresented accused the various procedural rights that the accused has in the conduct of his or her trial and when necessary to assist him/her in the exercise of such rights. (See *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T) and *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v Van Wyk NO and Another* 1989 (3) SA 368 (E). The explanation must be such that the accused understands the content of the right.

‘To let him know of that right, yet not how to exercise it when he has no idea and starts running into trouble, is not of much use. Mere lip service to the duty is then paid.’

Per Didcott J in *S v Hlongwane* 1982 (4) SA 321 (N) at 323C-D. Nor can such duty be delegated to the interpreter. (See *S v Kester* 1996 (1) SACR 461 (B) at 473.)

[11] The right to cross-examine is one such important right. Failure to explain it and to assist the unrepresented accused when necessary in its exercise is an irregularity. (See *S v Modiba* 1991 (2) SACR 286 (T); *S v Khambule* 1991 (2) SACR 277 (W); *S v Raphatle* 1995 (2) SACR 452 (T).”

[8] It is clear from the record that the presiding Magistrate did not explain to the appellant the purpose of cross-examination or how he should conduct cross-examination, nor did the court assist him meaningfully to present his case. The appellant did not question the witnesses in any manner resembling cross-examination. The appellant did not cross-examine the complainant at all. When the appellant attempted to cross-examine Brent Botha with regard to the sale of a specific trailer to him, the Magistrate interjected and said:

“Meneer Meneer, asseblief. Dit gaan nie nou oor al die trailers in die wêreld nie. Dit gaan nou hier oor ‘n spesifieke trailer. U moet vrae vra oor hierdie getuie se getuienis, nê.”

[9] The Magistrate appeared impatient with the appellant in his efforts to present his version to the witnesses and provided no assistance to put the appellant’s defence to the witnesses. In fact the Magistrate completely lost sight of the fact that he was dealing with an undefended accused. This is clearly illustrated when the

court addressed an attorney, Ms Van Den Heever in court during trial proceedings. The appellant then had to remind the court that he is unrepresented.

[10] The prosecutor's cross-examination of the appellant also centred on the reasons why appellant did not dispute the evidence of witnesses. In my view it is unfair to cross-examine an undefended accused on his failure to cross-examine and put his version to witnesses in circumstances where he received no assistance from the court.

[11] It is also disconcerting that the appellant was not given access to witness statements prior to the commencement of the trial. The accused did not cross-examine the complainant and was not assisted by the court in this regard. The court enquired from the appellant whether he had received the statements after the testimony of the complainant. It was then established that the appellant did not receive the complainant's statement at that stage. The appellant is entitled to have access to the contents of the docket and ought to have been given the opportunity to study its contents prior to the commencement of the trial. There was a duty on the Magistrate to stand the matter down to allow the appellant adequate opportunity to reconsider his decision not to cross-examine the witness after familiarising himself with the contents of the docket. There was accordingly a duty on the Magistrate to remedy the irregularity to minimize possible prejudice to the appellant. Access to the docket is a basic right of an accused, the denial of which can result in an unfair trial. (See **Shabalala and Others v Attorney-General of Transvaal and Another** 1995 (12) BCLR 1593.)

[12] The appellant was in a close relationship with the complainant's ex-wife Jacoba Tessner and attended to electrical work at complainant's residence on her instructions. He was driving her vehicle when he entered into negotiations with Brent Botha regarding the sale of a trailer. According to the complainant he received information from his ex-wife that he should try and locate his missing trailer at the residence of Brent Botha. Thereafter he went to Botha where he found his trailer.

[13] The appellant denies that he had sold the complainant's trailer to Botha, but avers that it was a different quad trailer. This is denied by Botha who insisted that he never bought a quad trailer from the appellant. However, Jacoba Tessner confirmed that according to her knowledge two trailers were sold to Botha. With regard to the merits, one can never know what effect a properly conducted defence would have had on the ultimate result.

[14] I am satisfied, on the reading of the record of proceedings that the failure to ensure that the appellant had access to the docket prior to the commencement of the trial, as well as the failure of the Magistrate to adequately assist the accused, resulted in substantial injustice and that a failure of justice did indeed occur. This prejudiced the appellant in the presentation of his case and it therefore vitiates the entire trial. The conviction cannot be allowed to stand.

[15] In the result the following order is made:

[1] The appeal is allowed.

[2] The conviction and sentence are set aside.

GOLIATH, J
Judge of the High Court

I agree.

WEINKOVE, AJ
Acting Judge of the High Court