

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**



CASE NO. AR76/2015

In the matter between:

NICK LONGANO

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

STEYN J

Introduction

[1] The appellant was charged before K Pillay J, in the KwaZulu-Natal Local Division, Durban High Court, with one count of murder in that he killed his partner of eight years on Sunday the 1st August 2010 at the flat shared by them as a couple. He was convicted by the court *a quo* and sentenced to fifteen (15) years'

imprisonment. The appellant appeals against the conviction and sentence with leave granted by the court *a quo*.

[2] In order to properly understand the issues that arise in this appeal it is necessary to briefly set out the background facts and chronology of the events before the court *a quo*. The appellant relied, in main, on the defence of non-pathological criminal incapacity. On appeal the grounds of appeal were not only focussed on the misdirection by the trial Judge in dealing with the facts and the law but also on the following irregularities that occurred during the trial. Mr Scheltema SC on behalf of the appellant submitted that the following irregularities were so gross that it vitiated the findings of the court *a quo*:

- (a) The trial Judge's refusal of the application to recuse herself on 5 September 2012;
- (b) The court calling the witness, Willows, in terms of s 186 of the Criminal Procedure Act 51 of 1977 ("the Act") without inviting submissions from the parties to address the court on the regularity of the procedure; and
- (c) The trial court's ruling to allow the prosecutrix to cross-examine the witness Willows.

An additional ground was raised by Mr Scheltema namely that the trial Judge had ruled that reasons for her refusal to recuse herself would be delivered, however the court in its judgment did not furnish any reasons for the decision not to disqualify herself.

Background

[3] This appeal was initially set down for hearing on 31 March 2016 but was not heard due to an incomplete record. The transcript of the proceedings of 5

September 2012¹ reveal no ruling or any reasons for dismissing the recusal application. The appellant subsequently filed a supplementary volume to Volume 11, which shows that the trial Judge issued the following ruling:

'PILLAY J This is an application for the recusal of the Court from these proceedings on the basis that an expert, whose report was handed to the Court with full knowledge about the parties and which report was used to cross-examine the defence expert witnesses, was not called as a witness by the State.

The defence contends that the contents of the report are prejudicial to the accused. Therefore, the accused has a reasonable apprehension of bias in the sense that the Court would be subliminally at least prejudiced by the contents of the report.

Both parties made extensive submissions for and against my recusal. I had earnest consideration and come to the conclusion that this application is without substantial merit and is accordingly REFUSED.

The reasons for that refusal will be furnished during the course of my judgment when this case is finalised. I have seen the report which has now been handed in by the defence and forms an exhibit in these proceedings. I am of the view that it is essential for the just decision of this case to call this witness. In doing so, I invoke the power bestowed on this Court in terms of section 186 of the Criminal Procedure Act.'²

[4] The complete record was placed before the Full Court when the appeal was heard on 23 May 2016.

[5] Ms Moosa, on behalf of the respondent, submitted that the fact that the court had sight of the report prepared by the expert Willows who was not called by the State to testify is not in itself prejudicial to the appellant's case and should not be regarded as a gross irregularity that vitiated the proceedings in its entirety. Ms Moosa, albeit reluctantly, conceded in argument that the witness Willows' evidence was not necessary for the just administration of the case. The respondent placed reliance on s 322(1) of the Act which requires of this court in the instance of any

¹ See Vol II at 1019.

² See Supplementary Vol II at 1018L to 1018M.

irregularity to be satisfied that a failure of justice has resulted from such irregularity before setting aside any conviction.³

[6] For purposes of this judgment I intend dealing with the irregularities first, since a positive finding may be determinative of the outcome of the appeal. If the appeal fails on the procedural grounds i.e. the irregularities, then the merits of the conviction and the sentence imposed will be considered.⁴

Ad irregularities

[7] Before dealing with the irregularities as they presented themselves in the case it is necessary to consider the consequences of any irregularities. It is trite that ‘no conviction or sentence shall be set aside and altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from said irregularity or defect’.⁵ In *S v Langa*⁶ different classes of irregularities were listed and distinguished the one from the other. For the sake of completeness I shall repeat the different categories since they remain relevant to this case:

‘In *S v Moodie*, the *locus classicus* on procedural irregularities, Holmes JA stated:

“(1) The general rule in regard to procedural irregularities is that the court will be satisfied that there has in fact been a failure of justice if it cannot

³ Section 322(1) of the Act provides as follows:

‘(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –

- (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
- (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
- (c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of 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 the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.’

⁴ Cf *S v Moodie* 1961 (4) SA 752 (A) at 760G-H.

⁵ See s 322 (1)(c) of the Act.

⁶ 2010 (2) SACR 289 (KZP).

hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.

- (2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is *per se* a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted if there has been no irregularity.
- (3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity.”

In defining the concept of “failure of justice” the court stated as follows:

“As to the meaning of “failure of justice”, the Afrikaans text has to be considered because the 1944 and 1955 Acts were signed in Afrikaans. The former uses the word “regskending” and the latter contains the expression “geregtigheid nie geskied het nie”. All these linguistic variants harmonise in meaning when one bears in mind what was said by De Wet JA, in *Rex v Rose* 1937 AD 467 at 476-7:

“Now the term justice is not limited in meaning to the notion of retribution for the wrongdoer: it also connotes that the wrongdoer should be fairly tried in accordance with the principles of law.”

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”

Further at 756E:

“This is a sound general test which works well in most cases of irregularity. But it is not an exclusive test, and the Courts have more than once recognised that in an 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 foregoing test.”⁷

(Footnotes omitted.)

⁷ See *S v Langa* at 295c-296b. Also see *S v Naidoo* 1962 (4) SA 348 (A) at 354D-F:

‘But irregularities vary in nature and degree. Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as *per se* to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits and the accused can be re-tried in terms of sec. 370 (c) of the Criminal Code. That was the position in *Moodie’s* case, in which the irregularity of the deputy sheriff remaining closeted with the jury throughout their two hour deliberation was regarded as so gross as to vitiate the whole trial.

On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses.’

The classification of irregularities has developed to include an irregularity that results in an unfair trial. In my view it is best to refer to it as a constitutional irregularity or illegality. In *S v Jaipa*⁸ Van der Westhuizen J stated it as follows:

‘Therefore a failure of justice must indeed have resulted from the irregularity for the conviction and sentence to be set aside. In construing when an irregularity had led to a failure of justice, regard must be had to the constitutional right of an accused person to a fair trial. If an irregularity has resulted in an unfair trial, that will constitute a failure of justice as contemplated by the section and any conviction will have to be set aside. Whether a new trial may be commenced against the accused will also require a constitutional assessment of whether that would be a breach of the right to a fair trial or not. The meaning of the concept of a failure of justice in s 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial.’⁹

The test for reasonable apprehension of bias

[8] The recusal application before the court *a quo* was based on the fact that the presiding Judge should have disqualified herself from hearing the matter since she was in possession of evidentiary material, the Willows Report, in circumstances that established a reasonable apprehension of bias and that her impartiality was compromised by being in possession of evidential material that would not form part of the evidence before court.

[9] The Constitutional Court has defined the test of apprehension of bias in *President of the Republic of South Africa and Others v South African Rugby Football Union & others*:¹⁰

‘The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The

⁸ 2005 (4) SA 581 (CC).

⁹ *Ibid* at 596F-597B.

¹⁰ 1999 (4) SA 147 (CC).

reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour....'¹¹

The SARFU test was considered and developed in *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Ltd*¹² to the point where the Supreme Court of Appeal in *S v Shackell*¹³ classified the test as one of 'double reasonableness'. Brand AJA, as he then was, held:

'Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal, but the apprehension must also be reasonable.'¹⁴

In *S v Dube & others*¹⁵ the court held that where the disqualification is based on a reasonable apprehension, like in the present matter, the court has to make a normative evaluation of the facts to determine whether a reasonable person faced with the same facts would entertain the apprehension. Importantly it was held that a judicial officer should not only conduct a trial with an open, impartial and fair mind but that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused.¹⁶ It is necessary to evaluate the proceedings before the court *a quo* in order to decide whether the appellant had a reasonable apprehension to believe that the presiding Judge would no longer be impartial. I shall now turn to the proceedings.

[10] During the course of the trial a number of experts were called by the defence. The defence witnesses were confronted with parts of the Willows report. Mr Willows is a psychologist who was requested on behalf of the State to draft a report.¹⁷ The prosecutrix stated to the court during her cross-examination of the defence witness, Ms L Roux:

¹¹ *Ibid* at 177B-E.

¹² 2000 (3) SA 705 (CC).

¹³ 2001 (4) SA 1 (SCA).

¹⁴ *Ibid* para 20.

¹⁵ 2009 (2) SACR 99 (SCA).

¹⁶ *Ibid* para 7.

¹⁷ See *infra* para 13 for details of the report.

‘MS MOOSA I know what my learned friend is going to say and I am basing this on what Mr Clive Willows who will testify on behalf of the State will say.

MR SCHELTEMA So I can conclude, because I’ve got my client’s interests at heart here, that this statement is not based on literature, but based on a report of another psychologist?

PILLAY J Ja.’¹⁸

(My emphasis.)

There was therefore no doubt that the State placed reliance on the report of Willows in its cross-examination and that the State would call this witness in support of its contentions.

[11] The record shows further that the prosecutrix promised that she would make the report of the witness Willows available to the court upon conclusion of her cross-examination of the defence’s expert. It was however never placed on record how the report was handed to the learned trial Judge nor was the report handed in during the proceedings in court. Counsel for the defence in his application for the recusal of the presiding Judge placed the following on record:

‘We were not involved in that process so I can’t comment, but it seems from the record that by the next morning the Friday morning, the 20th, M’Lady and her assessors were already in possession of this report. Whether it was handed to M’Lady in chambers or through her registrar I don’t know, but it doesn’t really matter.

Judge : I don’t know how it came to me, to be honest.’¹⁹

It is necessary to consider what was said by the prosecutrix when she opposed the recusal application regarding the report since it clarifies how the report came into the possession of the presiding Judge:

‘MS MOOSA M’Lady, it was – throughout the proceedings it was in fact the intention of the State to call Mr Willows as a witness. At the time that Professor Schlebusch and Dr Roux testified it remained the intention of the State to call Mr Willows as a witness. He was in fact in attendance at court on 20 April 2012 which was the last day on which this matter was heard prior to

¹⁸ See Vol 8 at 798 lines 17 to 22.

¹⁹ See Vol 10 at 952 lines 9 to 19.

yesterday, and that was confirmed by my learned friend. On the morning of 20 April 2012 a copy of his report was handed to Your Ladyship's registrar, and that was at the request of the Court, and that had been placed on record the day before by the Court. Whether that reached the Assessors or not I am unable to say, my last contact was with the registrar.'²⁰

(My emphasis.)

[12] During the recusal application the learned Judge indicated that the report was handed to her by her registrar but placed it on record that it was never handed to the assessors. Mr Scheltema submitted that the report ought to have been handed in as an exhibit and since it was not before the court as an exhibit, the defence elected to hand it in so as to demonstrate the prejudicial effect of the report on the accused's case. In determining the reasonableness of the accused's apprehension it is imperative to consider the content of the report.

[13] The report of Willows²¹ constitutes 10 pages and it is not necessary to repeat it in detail. The introduction and conclusion of the Willows report will suffice for purposes of this judgment:

'1. Introduction

The State has charged Nick Longano (the accused) with the murder of Vinoba Naidoo (the deceased). Mr Longano has raised the defence of Non Pathological Incapacity. The Prosecutor for the State requested a professional opinion from the Psychologist regarding the psychological characteristics of this particular mental and behavioural phenomenon.

...

...

...

11. Application of Theory to Facts.

In such matters as this before the court, it is important to evaluate the narrative of the accused and other witnesses, in the light of established facts.

²⁰ See Vol 10 at 988 lines 16 to 25.

²¹ See exhibit "Y" of the record for the entire report.

A conclusion of a state of temporary non pathological capacity would depend on the factual response to a number of crucial questions, the answers to which this psychologist does not know at the time of writing.

- 11.1 The accused has been separated for 21 days, why would he experience the “rejection” as so overwhelming on the day of the incident?
- 11.2 Was the alleged attack by the deceased of such violence as to pose a real physical threat or danger to the accused.
- 11.3 If the couple were involved in a conflictual argument, at which point was the threat perceived to be of such inordinate strength as to cause a change in consciousness?
- 11.4 With the identified frailties of his personality, is the accused not a person who is prone to having limited emotional control when responding to criticism or perceived threat?
- 11.5 Was such behavioural expression a recurring problem within the relationship, or in his response to other emotional demands? And if so, did such behaviour contribute to the decision of the deceased to terminate the relationship?
- 11.6 Was the description of the automotive behaviour suggestive of poor judgment and minimal control and was it haphazard in nature? Did it imply sustained concerted effort or was it random?
- 11.7 Was the accused able to recall certain features of the incident in the short term, immediately after the incident, even if these cannot be currently recalled?
- 11.8 The possible influence of his medication on his behaviour is not a field in which I have experience or knowledge. Questions as to the possible influence of such medication should be directed toward those specialised in the field. It is presumed that some of the medication was recommended in order to help him feel “calmer”, and it would be important to understand whether or not such medication may induce the opposite effect.’²²

(My emphasis.)

[14] On 10 April 2012 the witness Willows was identified as an expert witness who would testify on behalf of the State. The defence witnesses Roux and Schlebusch were confronted in cross-examination with some of the opinions expressed in the Willows report. The defence highlighted this fact to the court:

²² See pages 1590 and 1598-1599.

'May I furthermore place on record that before we led the evidence of the two experts who testified on behalf of the accused, a report was made available by the prosecution of a clinical psychologist, one Clive Willows. This report was dated 2 April 2012 and faxed to the instructing attorney in this matter on 10 April 2012 and we were given to understand that this person would be the professional to be relied upon by the prosecution in dealing with the psychological aspects relevant in this matter. M'Lady, I can therefore place on record that thus far we had led the evidence of the two experts in the face of the information supplied to us in the form of the report of Clive Willows and we dealt with the evidence also in the light of that report. This morning there was a development in that we were given a report emanating from Mr Clive Willows which contained an addendum to the first report, although essentially it is still the same report, but in an addendum Mr Willows deals with certain pertinent questions which appear to be relevant, in his view, in the application of theory to the facts. Now we have not really considered those questions. Some of them we could have in part, but there was no proper evaluation of those questions one by one when we dealt with our experts.'²³

[15] The defence in its application made it clear that the conduct of the learned Judge was not criticised but rather the conduct of the State.²⁴ What is evident from the record is that on the day that the report found its way to the presiding Judge, the State still intended calling Willows as a witness. The State has made it abundantly clear to the defence that whatever report is compiled on behalf of the State contains information important to the State's case. That much was stated by Ms Moosa on 20 April 2012, when she said:

'I do not undertake to give him any information beyond that and I say that because that report ought to – if the State intends calling this witness, that report will contain the information which the State intends to elicit from that witness. It should therefore, from that report, be evident what issues are in dispute and what aren't or where that professional differs from the evidence that has already been led by the defence experts. I don't see the need to provide the defence with an affidavit in which I set out the various areas of dispute.'²⁵

(My emphasis.)

[16] The recusal application was triggered by the State's decision not to call Willows to testify. On 3 September 2012 the prosecutrix placed on record that the

²³ See Vol 8 at 815 line 16 to 816 line 8.

²⁴ See Vol 10 at 938 lines 20 to 24.

²⁵ See Vol 8 at 819 lines 2 to 10.

State intended calling Dr Dunn and not Mr Willows. At this stage of the proceedings the presiding Judge had been in possession of Mr Willows' report for a period of four months. The defence was of the view that the Willows report was prejudicial to the case of the accused and that it was not neutral, this fact was acknowledged by the presiding Judge. The defence submitted that the report raised pertinent questions in relation to the conduct of the appellant which appeared to be aimed at influencing the court.

[17] The presiding Judge was also acutely aware that there could be a perception that she could have discussed the report with her assessors. The following interchange between the court and counsel bears testimony to this fact:

MR SCHELTEMA About what is a reasonable perception. Now maybe the other thing is a person in the shoes of the accused may very well have a perception that the contents of this report was discussed, because there may be a perception that there was no reason as to why not to discuss it.

PILLAY J The perception has to be reasonable, Mr Scheltema.

MR SCHELTEMA It's based on the perception that the prosecutor informed ... [intervention]

PILLAY J Otherwise we'll have a situation where any perception will have to lead to a recusal. Perception has to be reasonable.

MR SCHELTEMA Reasonable.

PILLAY J And you say it's a value judgment or a value question.

MR SCHELTEMA M'Lady, the accused may have a perception based on what the prosecutor said, namely that she will hand ... [intervention]

PILLAY J Yes.

MR SCHELTEMA ... this report to the Court. To the Court. And he may have a perception that there is simply no reason as to why not to discuss this report at least in the light of the evidence given, because the evidence needs to be discussed. The cross-examination of Roux needs to be discussed.

PILLAY J I accept that.²⁶

(My emphasis.)

²⁶ Vol 10 at 971 lines 1 to 19.

[18] That Willows was not a neutral witness is apparent from an evaluation of his report and the conclusions reached by him in the report. The trial court relied on the evidence of Willows when it made certain adverse findings against the defence witnesses Roux and Schlebusch. The court held:

'Willows conceded that determining the level of consciousness involves a very intricate and complex process. However, Willows was concerned that Roux and Schlebusch's conclusions on the accused's level of functioning was done without important collateral information. In fact he stated that Roux's description of the accused's personality did not give him a consistent picture. He gave examples where in relation to interpersonal functioning she states that the accused presents as shy and withdrawn. Then in another instance she says he conforms socially. Willows pointed out various other aspects which tend to contradict her findings.'²⁷

Later in the judgment the court measures the conduct of another defence witness Dr Howlett against the conduct proposed by Mr Willows.²⁸

[19] The conduct complained of is not that there was actual bias on the side of the presiding Judge or that such bias was established. The issue is whether the appellant reasonably believed at the time of the recusal application that the Judge would no longer bring an impartial mind to the matter after having considered the content of a report that was aimed at supporting the State's case against him. The appellant is furthermore entitled to be informed of the Judge's reasoning and her consideration of the law and its application to the facts when the recusal application was decided. The failure to provide such reasons for the specific order is irregular given the earlier ruling of the court that it would be provided. Had the Judge given reasons for her dismissal of the application then the appellant would have been informed of the court's conclusion and the reasons why it reached the conclusion it did, given the said circumstances.

²⁷ See Vol 18 at 1727 lines 20 to 25 to 1728 lines 1 to 3.

²⁸ See record Vol 18 at 1741 lines 1 to 5.

[20] In my view the integrity of the trial court was compromised when the State submitted evidentiary material to the Judge which should not have been given to her if the witness was not going to testify. It cannot be disregarded that the presiding Judge was aware of information favouring the State's case. The Willows report was not a neutral piece of evidence. Even if it had been neutral, it was improper to hand a document to the presiding Judge without calling the witness. Once the information was given to the Judge there had to be an apprehension that the court would not be able to disabuse its mind from the report. In an adversarial process the perception was created that the State had an advantage since it shared a document with the Judge that is favourable to its case.

[21] *R v Matsego & others*²⁹ the court dealt with the fairness of the trial in circumstances where information was divulged to the assessor. Centlivres CJ held:

‘In my opinion the learned Judge should not after reading the affidavit of the assessor concerned, have proceeded with the trial It is essential in the interests of the proper administration of justice that an assessor should retire from the case as soon as it is proved that he has been given information detrimental to the accused which has not been proved in evidence, for nothing should be done which creates even a suspicion that there has not been a fair trial.’³⁰

In my view once the court's impartiality was compromised, how unfortunate it might have been, it is the end of the enquiry as to the apprehension of bias. Impartiality serves to protect the integrity of our judicial system and should never be compromised. What complicates this matter is that the trial Judge believed that the witness Willows' testimony was essential to the case. The calling of this witness caused a procedural conundrum.

[22] I shall now turn to the court's conduct in invoking s 186 of the Act during the trial.

²⁹ 1956 (3) SA 411 (A) at 417H-418A. The court placed reliance on *R v Mabaso* 1952 (3) SA 521 (A) at 525F-G.

³⁰ *Ibid* at 418A-B.

The calling by the trial court of the witness Willows

[23] The court on 5 September 2012 exercised its discretion to call the witness Willows in terms of s 186 of the Act.

Section 186 of the Act provides as follows:

‘Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.’

(My emphasis.)

[24] The trial Judge’s calling of the witness Willows must therefore be assessed against the backdrop that the report of this witness was in her possession for a lengthy period and that the report formed part of the evidential material that the State intended to place before the court. The court *a quo* gave the following reason for invoking section 186 of the Act:

‘I have seen the report which has now been handed in by the defence and forms an exhibit in these proceedings. I am of the view that it is essential for the just decision of this case to call this witness. In doing so I invoke the power bestowed on this Court in terms of section 186 of the Criminal Procedure Act.’³¹

The court also relied on the dictum of *R v Hepworth*³² which effectively dealt with a judicial officer’s duty to administer justice. The decision however to call Mr Willows was exercised immediately after the court dismissed the recusal application that was based on the fact that the Judge had sight and knowledge of a report that should not have been in her possession if the State was not calling the specific witness. It has been argued before us that the trial Judge simply had no other reason for calling

³¹ See record at 1018 M lines 8 to 12.

³² 1928 AD 265.

Willows other than to avoid the dilemma of having to recuse herself. The trial Judge did not give reasons as to why the evidence of Willows was essential or necessary. Whether he was essential has to be decided on the cold record.

[25] In *S v Gabaatholwe & another*³³ the court interpreted what 'essential to the just decision of the case' means and held:

'... the Court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.'³⁴

[26] The assessment of whether evidence is essential is primarily left to the presiding Judge and courts of appeal will only interfere with the Judge's exercise of discretion on very limited grounds.³⁵ Importantly a court of appeal would give consideration to the reasons of exercising a discretion and whether those reasons are substantial. In *R v Joannou*³⁶ the court relied on *Evans v Bartlam*³⁷ and Lord Wright's approval of English authorities that a discretion 'must be exercised according to common sense and according to justice and if there is a miscarriage in the exercise of it, it will be reversed'. The principle in my view would be that a court of appeal would be entitled to interfere with a discretion wrongly exercised, if it resulted in a miscarriage of justice.

³³ 2003 (1) SACR 313 (SCA).

³⁴ *Ibid* para 6.

³⁵ *Ibid* para 8. Also see *R v Zackey* 1945 AD 505 at 510; *S v Seheri en Andere* 1964 (1) SA 29 (A) at 33 and *S v B and Another* 1980 (2) SA 946 (A) at 953A-F.

³⁶ 1957 (4) SA 385 (FSC) at 386E.

³⁷ 1937 AC 473.

[27] In *S v Gerbers*³⁸ the court issued a word of caution to presiding officers exercising judicial discretion and it is necessary to repeat it especially since the trial court placed reliance on Hepworth's case:

'There is obviously potential tension between the need to fulfil the role of a judicial officer as described in Hepworth's case *supra* and the need to avoid conduct of the kind which led to the characterising of the judicial officer's behaviour in cases such as *S v Rall* 1982 (1) SA 828 (A) as irregular and resulting in a failure of justice. Nonetheless, it remains incumbent upon all judicial officers to constantly bear in mind that their *bona fide* efforts to do justice may be misconstrued by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial passivism and undue judicial intervention, they must ever strive to do so.'³⁹

[28] In my view it is not necessary to address the ground that the State was permitted to cross-examine Willows in detail since it is without merit. Once the witness was called by the court, he was regarded as the court's witness and both parties, State and defence, had a right to cross-examine him. I believe the criticisms levelled against the court's decision to permit such cross-examination must be rejected. Section 166(2) of the Act regulates the procedure that both parties may cross-examine a witness that is called by the court. It gives recognition to the broader concept of a fair trial and in my view there is nothing on record that supports the appellant's contention that the court did not exercise its discretion judicially. Both parties were equally granted leave to cross-examine.

[29] Lastly, reasons for a decision are vitally important to any litigant. Without reasons a litigant is deprived of the knowledge of how conclusions were reached. Undoubtedly in this matter where the accused had a reasonable apprehension that the presiding Judge was likely influenced by a report that she had in her possession, the reasons became vitally important to him. This court is in the invidious position to evaluate the conduct of the presiding Judge without giving consideration to the reasons that swayed her to the finding of not disqualifying herself. Moreover the court exercised its decision to call Willows, shortly after the recusal application was

³⁸ 1997 (2) SACR 601 (SCA).

³⁹ *Ibid* at 607b-c.

launched without substantiating the importance of Willows' testimony. Given the defence of non-pathological incapacity and Willows' reservation of giving an opinion on the possible influence of the medication used by the appellant, it is impossible to determine why the court considered him as an important witness. The respondent conceded that Willows' evidence was not necessary.

[30] The irregularities of the presiding Judge not to recuse herself, to call a witness not essential for the just decision of the case, and to not give reasons for any of the rulings, cumulatively in my view constitute gross irregularities that resulted in a failure in justice. It vitiated the proceedings to the extent that the conviction and sentence need to be set aside without reference to the merits of the case.

[31] Accordingly the appeal succeeds and the conviction and sentence are set aside. It remains the prerogative of the prosecuting authority to decide whether or not the accused will be recharged.

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STEYN J

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MOODLEY J

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BEZUIDENHOUT J

Appeal heard on : 23 May 2016
Counsel for the Appellant : Mr GP Scheltema SC
Instructed by : Larson Falconer Hassan Parsee Attorneys
Counsel for the State : Ms N Moosa
Instructed by : The Director of Public Prosecutions
Judgment handed down on : 25 October 2016