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IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

High Court Review Case No: 30/08
Magistrate Case No: 1149/2007
Date delivered: 2008-04-22

In the review matter of:

THE STATE

versus

JENINE VAN STADEN

ACCUSED

Coram: MAJIEDT J *et* OLIVIER J

JUDGEMENT ON REVIEW

MAJIEDT J:

1. *“When the case and the available evidence are considered, I have a distinct feeling of unease about the proceedings”.*

These are the remarks of the Regional Magistrate to whom this matter had been forwarded for sentence in terms of the provisions contained in s116(1)(a) of the Criminal Procedure Act, 51 of 1977 (*“the Criminal Procedure Act”*). The Regional Magistrate has

forwarded this matter for review in terms of s116(3) of the Criminal Procedure Act to this Court, since he harbours grave reservations regarding the correctness of the conviction herein. I share the Regional Magistrate's sense of unease and also his reservations with regard to the correctness of the conviction; in fact I am of the view that for the reasons which follow, the conviction has not been in accordance with justice and it ought to be set aside.

2. The accused had been convicted in the District Court on a charge of assault with intent to do grievous bodily harm. The matter was referred to the Regional Court for sentence due to the very serious nature of the injuries sustained by the complainant (he had lost his right eye as a consequence of the assault on him).
 3. Upon perusing the record of the proceedings herein, one is extremely troubled by the manner in which this matter has been conducted. Generally speaking, the prosecutor was hopelessly inept, the defence attorney failed dismally to represent the interests of his client and the attempt by the trial Magistrate to elucidate the perplexing and confusing morass of evidence before him, culminated in a travesty of justice against the accused.
 4. The versions advanced by the State and the Defence (insofar as it is possible to extract some comprehension from the proceedings on record) are mutually destructive. On the State's version, the complainant had been drinking with friends at a tavern and the accused was also present. According to the complainant, he did
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not know the accused at all. The accused had joined their group, since she appeared to be known to some of the accused's companions present there at the tavern. They later left the tavern and some of the people in the complainant's company went home. The accused thereafter requested the complainant to accompany her to her aunt's place where she was going to sleep that night. On their way a male friend of the accused joined them and accompanied them on the journey to the accused's aunt's house. Upon arrival at their destination, the accused requested the complainant to wait outside while she and the said male friend disappeared around the house. They returned after about five minutes or so and the accused said they should leave there. According to the complainant he was walking in front when he was suddenly struck by a bottle on his shoulder and thereafter stabbed with a broken bottle in the right eye. This was done by the accused. According to the complainant, he was also pelted with stones by the accused's companion. After this assault the accused and her companion fled the scene.

5. The accused's version is diametrically opposite to that of the complainant. In the explanation of her not guilty plea, her attorney merely tendered a bare denial. In her evidence she denied that she was ever at the tavern with the accused, and she denied that she had been in the company of him or his friends during that evening in question, or that she had ever assaulted him. She indicated that she was at home at the time of the incident in
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question.

6. The manner in which the evidence of both the complainant and the accused were led by the prosecutor and the defence attorney respectively, leaves much to be desired. The Magistrate had to intervene on countless occasions during the complainant's evidence in chief to clarify matters and to direct the prosecutor to lead the evidence more sensibly and more logically. Furthermore, cross-examination of the prosecutor and the defence attorney of respectively the accused and the complainant, were quite poorly done. In the end, the evidence before the Magistrate initially consisted of these two mutually destructive versions of the complainant and the accused.
 7. After a number of postponements, the evidence having been concluded and judgment having been reserved, the State applied at the continuation of the proceedings for leave to call a further witness. This application was granted on the basis that the accused had apparently relied on an alibi as defence, which defence was never disclosed previously. The State then called a witness who was in the company of the accused on the night in question. This witness was pathetic, to say the least. He testified that he remembered going to a tavern and that he had become so drunk that he cannot recollect anything subsequently. The Magistrate quite correctly held in his judgment that he could not place any reliance whatsoever on this witness's evidence.
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8. After the prosecutor and the defence attorney had again addressed the trial court on the merits of the matter, the proceedings were adjourned and judgment reserved. On the resumption of the matter, the Magistrate decided to call a witness in terms of s186 of the Criminal Procedure Act, namely the police officer who had arrested the accused. It is not immediately clear to me why the Magistrate decided to call specifically the arresting officer on the issue of the accused's alibi. Such a step would normally presuppose some knowledge on the Magistrate's part that the specific witness would be of some assistance in the matter. On the other hand it may, of course, be the proverbial shot in the dark. Be that as it may, it is a somewhat puzzling aspect.
 9. The arresting officer, constable Van Wyk testified that she had taken up the investigation by interviewing the complainant, who had indicated to her that he knew the accused by sight and knew where she lived. They then proceeded to the accused's aunt's house, but did not find her there. While driving in the township to follow up information on another docket which constable Van Wyk was carrying, the complainant suddenly pointed out at a taxi rank the accused who was seated there. According to constable Van Wyk she approached the accused and confronted her with the complainant's allegations that the accused was the person who had assaulted the complainant by stabbing him with a broken bottle in the right eye. Constable Van Wyk testified further that the accused replied that she knows that she has been drinking with the
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complainant, but that she did not assault the complainant. At this point the complainant, who was still present, again insisted that it was in fact the accused who had assaulted him. Thereupon the accused was arrested by constable Van Wyk. At no stage was the accused informed of her constitutional rights, in particular of her right to remain silent, prior to her disseminating the aforementioned information to constable Van Wyk.

10. The trial Magistrate convicted the accused largely as a consequence of the evidence introduced by the s186 witness, namely constable Van Wyk. In his judgment the trial Magistrate says the following:

“I must admit that if the court only had the version of these two people (and here the trial Magistrate is referring to the complainant and the accused), the court would have had doubts as to whether the accused was guilty or not. It is so because the accused pleaded an alibi and did not have the duty of proving her alibi. Hence the court decided in order to have a clear picture, called this witness – that is an independent witness – the officer who went to arrest the accused. The accused person, the evidence of this witness was not challenged whatsoever. As such, it remained intact. It was never challenged despite of the serious allegation that has been said by the accused. I want to quote again a very important aspect on the evidence of this witness. I quote,

‘The accused said she had drinks with the complainant, but never assaulted the complainant.’

If you match or compare this evidence with the evidence of the accused – the accused who said in her evidence, I know nothing about this case, I do not know the complainant – those two version

are at the extreme ends of the universe, but strangely enough the defence never challenged the witness who put the accused on the scene.”

11. It is correct, as the Magistrate indicates in the preceding extract from his judgment, that the evidence of constable Van Wyk was never challenged at all by the attorney appearing for the accused. This is extremely puzzling and disconcerting, but is actually par for the course as regards the defence attorney’s generally poor handling of the accused’s defence in this matter.
12. An aspect pertinently raised by the Regional Magistrate who had sent this matter for review, is whether the fact that the accused had not been informed at all of her right to remain silent and of the consequences of not remaining silent, had not rendered the trial unfair. In his reply to the request for reasons on this aspect, the District Magistrate responded that, since the accused had not provided self-incriminatory information, this breach of her fundamental right to remain silent did not in fact render the trial unfair.
13. Section 35(1)(b) of the Constitution, Act 108 of 1996 (*“the Constitution”*) enshrines an accused person’s right to be informed promptly of the right to remain silent and the consequences of not remaining silent. Section 35(5) provides as follows:

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would

render the trial unfair or otherwise be detrimental to the administration of justice.”

14. These rights to silence are a natural consequence of the fundamental presumption of innocence contained in the Bill of Rights in the Constitution. In this regard Kentridge AJ put it as follows in **S v Zuma and others 1995(2) SA 642 (CC)** at par. 33:

“....that the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt Reverse the burden of proof and all these rights are seriously compromised and undermined.”

15. In considering whether a trial is rendered unfair by unconstitutionally obtained evidence, the question of prejudice to the accused is of substantial relevance. See in this regard

S v Soci 1998(2) SACR 275 (E) at 294;

S v Lottering 1999[12] BCLR 1478 (N).

16. The nature and degree of the prejudice will determine whether the admission of evidence will lead to an unfair trial. See **S v Nombewu 1996(2) SACR 396 (E)** at 421 – 422.
 17. As a general rule, self-incriminating evidence derived from an accused person and obtained in violation of his or her rights under the Bill of Rights, would be more likely to result in a finding that its admission would render the trial unfair than would the production of
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real evidence obtained in violation of the accused person's rights. See in this regard the *dictum* of Heher AJA in **S v Myeni 2002(3) All SA 599 (A)** at 616 F-G. In the Canadian decision of **R v Collins 28(1987) CRR 122** at 137 it is stated thus:

“Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, ***the accused is conscripted against himself through a confession or other evidence emanating from him.*** The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.”

(the emphasis is mine)

18. The relevant factors to be considered in determining whether the admission of unconstitutionally obtained evidence will be detrimental to the administration of justice, are not circumscribed. The exclusionary clause contained in s35(5) of our Constitution corresponds very closely with the Canadian exclusionary clause, thus our Courts often rely on Canadian authority in seeking an answer to the question as to which factors ought to be considered in deciding whether the evidence would otherwise be detrimental to the administration of justice. From the Canadian case referred to above, namely **R v Collins**, the following factors may be extrapolated:

- a) The nature of the evidence obtained (for example real,
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already extant evidence or incriminating evidence derived from the accused himself/herself);

- b) The importance of the right, derived from the Bill of Rights, that has been infringed;
- c) The seriousness of the infringement;
- d) The nature of the infringement (i.e. was it deliberate, or unplanned and in good faith);
- e) Did the infringement take place in circumstances of urgency or necessity?
 - f) Would it have been easy to obtain the evidence without infringing the rights of the accused under the Bill of Rights?
- g) The gravity of the offence;
- h) Was the evidence essential to prove the State's case?
 - i) The availability of other remedies.

19. In their work **Law of Evidence** (loose leaf publication), Schmidt and Rademeyer at 1-24 thereof, in a discussion on the provisions contained in the Bill of Rights which affect the admissibility of evidence, express the view that the most important provisions in the Bill of Rights for the exclusion of constitutionally inadmissible evidence are those that deal with the accused's right to remain silent and the requirement that he/she must be informed of this right and of the consequences of not remaining silent. I share this view. As indicated above, this particular right lies at the cornerstone of the fundamental principle of a presumption of innocence which is enshrined in the Bill of Rights. An accused

person cannot be expected to prove the State's case for it. This, essentially, is the rationale behind this constitutional principle.

20. In the present matter, I have no doubt whatsoever that the accused was gravely prejudiced by the admission of this unconstitutionally obtained evidence emanating from constable Van Wyk. While it may appear at first blush that the information given by the accused is not self-incriminating, ultimately and on a conspectus of all the evidence, it is indeed the case. The Magistrate rejected the accused's version solely by reason of the fact that her version that she was at home and not present at the tavern in the accompany of the complainant and his friends, contrasted sharply with the version given by her to constable Van Wyk, namely that she was in fact drinking with the complainant on the day in question. Put differently, the Magistrate convicted the accused on the strength of evidence that she had in fact, as the complainant had testified, been in the company of the complainant as corroborated by the accused's response to constable Van Wyk's confrontation. This unconstitutionally obtained evidence therefore formed the only basis for the accused's conviction. I have already earlier in this judgment quoted in full the extract from the trial Magistrate's judgment in which he had indicated (correctly so in my view) that on the respective versions of the complainant on the one hand and that of the accused on the other, he would not have been able to convict the accused. Understood in the context of this matter as a whole, it therefore means that the evidence of constable Van Wyk
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proved to be decisive in the end for the conviction of the accused.

21. Quite apart from the aforementioned fundamental problem regarding constable Van Wyk's evidence, there are a number of other difficulties which I have with her evidence. These are:

21.1 Constable Van Wyk's testimony that the complainant had informed her that he knew the accused by sight and knew where she stayed, is in direct contrast with the complainant's own testimony that he did not know the accused at all and that he had met her on the day of the incident for the first time. This evidence was confirmed under cross-examination. This is obviously a material contradiction.

21.2 The evidence proffered by constable Van Wyk that the accused said that she remembered drinking with the complainant contains no reference whatsoever to date or place. In other words, there is no indication at all that this drinking with the complainant had occurred on the evening in question at the tavern.

21.3 Related to par. 21.2 *supra*, is the further troubling aspect that the trial Magistrate engaged in extensive leading questioning of constable Van Wyk and eventually got her to confirm that the accused had admitted "*having been with the complainant the previous day or the previous night*". This was not the evidence which the constable had given at first. Furthermore

and in any event, the incident could not have occurred on the previous day or previous night, given the fact that the complainant had spent at least one day in hospital after the assault during which time his right eye was removed.

21.4 The fact that, as I have said, these aspects, *supra*, were not canvassed at all under cross-examination by the defence is most disconcerting.

21.5 A further fundamental omission occurred when the trial Magistrate failed to grant the State and defence an opportunity to consider re-opening their respective cases after the evidence of constable Van Wyk. It is axiomatic that this failure also caused the accused substantial prejudice.

22. In the premises, therefore, it seems to me that, given the substantial prejudice suffered by the accused with the reception of the unconstitutionally obtained evidence, she was prejudiced to the extent that her trial was rendered unfair. In applying the guidelines outlined in the **Collins** matter, *supra*, taking into account the nature of the evidence obtained (self-incriminating evidence emanating from the accused), the importance of the right to remain silent, the seriousness of the infringement and the nature thereof, the fact that it was not necessary for the infringement to take place due to circumstances of urgency and necessity and that it would have been easy to obtain other evidence without infringement of the accused's rights, the admission of such evidence would also be

detrimental to the administration of justice.

23. The question that next arises is what is the effect of the accused's attorney's failure to object to the admission of this potentially damning evidence. The failure to object to inadmissible evidence does not make it automatically admissible. In a criminal trial, such as the present one, an accused person can raise the point on appeal (or as is the case here it could be considered on review by us) despite his/her failure to object during the trial. See in this regard generally:

S v Bondi 1962(4) SA 671 (A)

S v Dlova 1986(3) SA 248 (NC) at 251 F-H

Consequently, the failure by the accused's attorney to object to the introduction of this unconstitutionally obtained evidence as regards its inadmissibility, is not fatal for a decision on review.

24. In the premises therefore, for the foregoing reasons, I am of the view that the accused has had an unfair trial and that the conviction should be set aside accordingly.
25. I issue the following order:

The accused's conviction of assault with intent to do grievous bodily harm is hereby set aside.

**SA MAJIEDT
JUDGE**

I concur.

**CJ OLIVIER
JUDGE**
