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|------------------------------------|-------|
| Reportable:                        | YES / |
| NO                                 |       |
| Circulate to Judges:               | YES / |
| NO                                 |       |
| Circulate to Magistrates:          |       |
| YES / NO                           |       |
| Circulate to Regional Magistrates: |       |
| YES / NO                           |       |

## IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

High Court No: 103/07

Case No: 647/07

Delivered: 20/06/2008

In the matter:

**THE STATE**

*and*

**FRANS MALOME GOEIEMAN**

**Accused**

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### REVIEW JUDGMENT

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***BOSIELO AJP***

- 1] In the seminal judgment of **S v Zuma and Others** 1995(1) SACR 568 (CC) at p579 paragraph 16, **Kentridge AJ** charted a new and salutary approach to criminal trials and appeals when he stated that:

“[16] That caveat is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire  
*'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'*.”

*A Court of appeal, it was said (at 377)*

*'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'*

*That was an authoritative statement of the law before 27 April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."*

I am in respectful agreement with this illuminating dictum.

- 2] The accused was charged and convicted of assault with intent to cause grievous bodily harm in the Magistrate's Court, Olifantshoek. He was sentenced to imprisonment for six (6) months wholly suspended on suitable conditions.
- 3] When this matter came for review in terms of section 302 of the **Criminal Procedure Act 51 of 1977** (CPA) **Mokgohloa AJ** had serious misgivings as to whether the proceedings were in accordance with justice. She sent a query to the magistrate setting out her query. The magistrate has since responded and maintains that the proceedings were proper and in accordance with justice. The magistrate requests that the conviction and sentence be confirmed.
- 4] I regret to state that I do not agree with the magistrate. A perusal of the transcript will reveal three gross irregularities committed by the magistrate during the trial which in my view vitiate the entire proceedings. To my mind the nature of the irregularities is such that it cannot be said that the accused received a fair trial. I now proceed to deal with the three irregularities.
- 5] It is clear from the transcript that after the charge was read to the accused, the accused was confused as to whether he was pleading guilty

or not guilty. In his desperate but ill-advised attempt to prove his innocence, he proceeded to put a full version before the court. Instead of stopping him and fully and clearly explaining the procedure provided for in section 115 of the CPA to him and in particular his right to remain silent, and not to make any admissions, the magistrate allowed and even encouraged the accused to give a lengthy statement or version under the guise of a plea-explanation. It is patently clear that the accused, whom the record shows that, he had only progressed up to Standard 2 in his scholastic career, was at sea. Understandably, he could not have understood and appreciated the legal implications of what was happening. Rather disturbingly the accused was made to speak out when he did not know that he did not have to. To my mind, the accused was wrongfully denied of the procedural safeguards provided for in section 115 of the CPA. In the same breath, it needs to be borne in mind that Section 35(3)(h) of the Constitution guarantees an accused the right to remain silent during the proceedings. In order not to render this fundamental right nugatory, it is imperative that an accused be fully informed of his rights in terms of Section 115. In particular he/she requires to be advised in clear terms that he/she is not obliged to make any statement or admissions. In my view, it is inimical to if not subversive of the accused's right to a fair trial for an unwary accused to be hoodwinked into disclosing his/her defence against his/her wishes, like it happened *in casu*.

- 6] Furthermore, a careful perusal of the record shows clearly that the accused did not know how to cross-examine state witnesses. When it became clear to the accused that he was floundering and not making any progress in his attempts to cross-examine the complainant in particular, he threw in the towel and intimated that he required a legal representative. Quite inexplicably this innocuous request by the accused, elicited a rather curt and dismissive response from the magistrate. This is what the magistrate said:

“Hof: Nee meneer, vra die vrae. U het gesê u wil self praat.”

Needless to say that faced with such a response, the accused kow-towed and proceeded to flounder in his aimless cross-examination which had no effect whatsoever.

- 7] Section 35(3)(f) of the Constitution provides in clear and express terms that every accused person is entitled to a fair trial, which includes the right to choose and be represented by a legal practitioner and to be informed of this right. Section 7(2) of the Constitution commands, in peremptory

terms that the state must respect, protect, promote and fulfill the rights in the Bill of Rights. Manifestly Section 35(3)(f) is such a right. The fact that the accused had elected, at the commencement of the trial to conduct this own defence, does not *per se* mean that he had forfeited his right to a legal representative. An accused person retains his/her right at any stage of trial to change his/her mind and to engage a legal representative. Experience teaches us that there is a plethora of facts and circumstances which might influence an accused person to change his/her mind to engage a legal representative during a trial. In fact this case best illustrate some of the events or causes which might influence an accused to opt for legal representation. In *casu*, the accused opted for legal representation when he realized that his efforts to discredit and break, the complainant down were not bearing any fruits. To my mind, the refusal by the magistrate to allow the accused to engage a legal representative was unjustified. Clearly, this decision had the effect of unjustly denying the accused his fundamental right to a legal representation. It follows logically in my view that it cannot be said that the accused had a fair trial.

- 8] What compounds the problem even further is that at the close of the defence case, the magistrate proceeded to give judgment without having given neither the state nor the accused the opportunity to address the court on the merits of the case. The right of the state and the accused to address the court after all evidence has been adduced but before judgment, is embodied in section 175(1) and (2) of the CPA. Although the section is couched in discretionary terms, it is an established and salutary practice which is deeply entrenched in our criminal justice system that every accused person should be afforded an opportunity to address the court on the merit before judgment unless the accused waives such a right. To my mind the failure by the magistrate to allow the accused the right to address the court on the merits of the case denied the accused the opportunity to try and persuade the court to accept his version by inter alia, pointing out weaknesses or defects in the state's case; improbabilities, contradictions and inconsistencies which might have been there in the state's case or even impugning the credibility and demeanor of state witnesses etc. Clearly the importance of an address on the merits of the case is self-explanatory. The prejudice which the accused suffered is self-evident. It follows that the accused was denied the right to a fair trial. See *S v Mabote en Andere* 1983(1) SA 745 (O) ; *S v Kwindu* 1993(2) SACR 408 (V).

- 9] It is unfortunate that, the admitted evidence tends to support the state's case against the accused. It may therefore appear, at face value, that the conviction of the accused was justified. However, one can never know what might have happened were the irregularities referred to not committed. See **S v Shabangu** 1976(3) SA 555 (A) at 558 F-H. I have found ample support for my view in the dictum by **Kriegler J** in **S v Makhandela** 2007(2) SACR 620 (WLD) at p630 c-d where he articulated the correct legal position as follows:

“Now, since the advent of the constitutional endorsement and expansion of an accused's right to legal representation as an element of the right to a fair trial (under S35(3)(f) and (g), the comprehensively fatal effect of the denial of this right is all the clearer. Where, as in this case an accused person duly elects to be legally represented ... but is wrongly denied such right, there can be no fair trial. The relative strength of the prosecution case or weakness of the defence is irrelevant. So, too, is the complexity or gravity of the case or the ability of the accused to make a competent defence. I therefore find it unnecessary to enquire any further.”

- 10] To my mind, the sort of irregularities committed by the magistrate are so serious and gross that they go to the core or kernel of a fair trial. In the circumstances and given the seriousness of the irregularities, I am unable to find that the proceedings herein were conducted in accordance with “those basic notions of fairness and justice” as propounded by Kentridge AJ in the Zuma case. Fairness and justice demand that these proceedings be set aside.

- 11] In the result and for the foregoing reasons, I find that the accused did not have a fair trial and consequently the conviction and sentence are set aside.**

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**L O BOSIELO**  
**ACTING JUDGE PRESIDENT**  
**Northern Cape Division**

**I concur**

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**F E MOKGOHLOA**

**ACTING JUDGE  
Northern Cape Division**