

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A546/2006

DATE:

14 NOVEMBER 2008

5 In the matter between:

CHRISTOPHER THIBANE

versus

THE STATE

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JUDGMENT

SLABBERT, AJ:

15 The appellant stood trial for murder in the Regional Court,
Parow, before Presiding Officer Dr Samela. It was alleged
that he had murdered the deceased by shooting him several
times. His petition for leave to appeal against his conviction
was granted by Their Lordships Desai and Davis.

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He pleaded not guilty and his defence was one of an alibi. He
made certain formal admissions, the import of which was
misunderstood by the magistrate, which in turn, in my view, led
to various misdirections and irregularities. These admissions
25 were noted in terms of Section 220 of Act 51 of 1977, and they

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related to the cause of death as being gunshot wounds, the correctness of the post-mortem report, the absence of further injuries to the deceased and the deceased's identity.

5 The State's case is very simple and without going into great detail, the broad picture is the following. The deceased was sitting in Thembas Spaza Shop, Langa, enjoying some chips and a Coke, while others were drinking and playing pool. The appellant, accompanied by friends, entered the shop, but he
10 then left it. The deceased asked one, Belinda, to go out and see what the appellant was up to. The appellant came back into the tavern and fired several shots at the deceased with what was described as a pistol similar to that used by the police. The deceased had stood up and attempted to shield
15 himself with an empty beer crate. He had also tried to hide under the pool table, but it was too low to the floor and he reverted to the protection of the beer crate. The appellant went outside and from a window he fired more shots at the deceased who was still inside the tavern. The number of
20 shots fired varies from witness to witness.

Apart from this disparity, there are other difficulties relating to the facts of the case, but in view of the conclusions that I have come to relating to the fairness of the trial itself, I will not deal
25 with or make any final judgment on the merits of the State's

and defence's respective cases.

The admissions made by the appellant in this case are made every day in the criminal courts in order to shorten the proceedings, but it is important to remember what the admissions do not cover. For instance, the admission of the cause of death and the correctness of the post-mortem report did not absolve the State from:-

- 10 (a) Proving the events leading up to and including the actual shooting and that it was the appellant who did the shooting that caused the death of the deceased.
- 15 (b) Identifying the firearm if possible from the bullet recovered from the deceased, as well as from the many empty shell casings and embedded bullets in the wall of the shebeen, and reconciling these items with the weapon used by the appellant.
- 20 (c) Proving the other elements of the crime of murder.

See in general the cases of S v Groenewald, 2005(2) SACR 597 (SCA) at 605c and 606c, and S v Seleke, 1980(3) SA 745 (AA) at 755A - D.

The witnesses who would prove these disputed facts would be liable to be cross-examined by the defence and the admissions did not prevent the defence from probing the credibility of witnesses or otherwise testing the State's case outside the parameters of the admissions. The magistrate clearly thought that these admissions rendered certain cross-examination by the defence to be, in his words, "a futile exercise", and he disallowed it. His attitude can be illustrated by the following examples:-

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1. A State witness, Princess, said that she had seen the firearm, which was apparently similar to that used by the South African Police. Mr Geze, the attorney appearing for the appellant, asked her to describe the firearm and she said it had a magazine, prompting the magistrate to say to her, "So that's a pistol, hey?" Mr Geze continued with his cross-examination about the firearm. The magistrate queried the defence on its cross-examination relating to the firearm and Mr Geze said, "We are testing her observation powers". The magistrate stopped further cross-examination on this point, because he said that the appellant had admitted that the deceased had died from gunshot wounds and that, "It is a waste of time to go into such details, and you don't have to go into greater details because there is also an admission".

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5 In my view this was a clear misdirection. The defence was an alibi, and though it was common cause that the deceased had died from gunshot wounds, the defence was entitled to probe the veracity, credibility and observation powers of the State witnesses who had testified that it was the appellant who had shot the deceased with a particular firearm.

10 2. Arising from the description of the firearm, further misdirections arose. This related to the ballistics report. This case cried out for a ballistics report. Up to ten shots or more had been fired inside and outside the tavern. A pistol similar to that used by the police had allegedly been the weapon. Only one bullet had been recovered from the body of the deceased and the tavern must have been littered with empty shell casings and bullets embedded in the wall and floors and ceiling. The question also arises as to whether there was more than one shottist or not. This possibility is not far-fetched. Witnesses had said that the deceased and the Appellant and his friends were enemies with each other. When the Appellant had come back the second time and had started shooting, some of his friends had remained outside, almost surrounding the place, with some

standing at the window, and this was apparently the same window from which the appellant had later allegedly fired more shots at the deceased. Any request for such a report would thus be most reasonable, if not essential. According to the post-mortem report, a bullet had been found in the body of the deceased, but the type and calibre thereof is not on record. The defence had asked for the ballistics report in order to determine whether this bullet was fired by the firearm described by the witnesses, namely the pistol I have referred to. The magistrate's attitude to this was extraordinary and can be summarised as follows: the cross-examination was irrelevant, because the defence was "a bare denial", and they were now in effect, "disputing that a pistol was used, so it means something else was used and Mr Geze should not play with words". It is clear from this quotation that the magistrate had his facts all wrong. The defence was not "a bare denial", it was an alibi. Furthermore, the defence was not disputing that "something else was used", it was merely testing the witness, which it was entitled to do. The prosecutor chimed in, saying that the defence's request "is a very funny request". What the basis of this remark can be is not clear from the record. He then said that the State has no ballistic evidence, but the magistrate ignored this

and he said following:-

5 "COURT: To me it's a very strange request from the defence on the basis that the defence, for example, they deny totally everything that they were ever there, and that is why I'm saying also then that there was this alibi that was raised by the defence, so that is why now it's very interesting at this juncture now the defence all of a sudden wants to find out now the connection between the pistol and the bullet that was found within the body, and that is why I said for what relevance, because at the end of the day what they will say, I mean these were not explained, they were saying it was just a firearm that's similar to the one that was used by the police and we are talking about the lay person."

10 The language is not very coherent, but I have quoted directly from the record.

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The prosecutor continued to almost harangue the appellant about this when he gave evidence:-

 "I don't know whether you are in a position to explain why you wanted to see if there's a report about the gun or the bullet, are you in a

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position to explain why you wanted that report? --- Yes.

Please explain?

COURT: I can't hear you, sir, please speak up. --- In evidence here in court one said there were seven shots, in the statements one said that there were seven shots and one said there were 13 and one said there were nine."

In the context this actually seems to be a reply by the accused justifying why he wanted the ballistics report. The record does not reflect that, but the context reflects that it must have been the appellant saying this.

"PROSECUTOR: But I still don't understand why you wanted the report?"

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Now this is extraordinary. As I've said before, this case cried out for a ballistics report and the attitudes of the magistrate and the prosecutor are very difficult to understand and I find it disturbing. The resultant misdirections and irregularities in interfering with essential and reasonable cross-examination, as well as querying the defence's motives in asking for the ballistic report, cannot in my view be compatible with a fair trial.

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25 It is important to remember that it is not only the

magistrate who must ensure that there is a fair trial, the prosecutor also has this duty. Furthermore, his duty is not to secure a conviction at all costs. The prosecutor's hostile attitude in court can be gleaned from the fact that the appellant twice referred to the prosecutor's manner of cross-examination and to his credit the magistrate did at one stage say to the prosecutor, "Please control yourself". Prosecutors should be reminded of their duties and obligations by reading the following authorities: Du Toit's Commentary on the Criminal Procedure Act, at page 1 - 4G, and 1 - 4O, and the authorities there cited; as well as S v Gidi, 1984(4) SA 537 (CPD).

- 15 3. One of the tried and tested methods of probing a witness' veracity is to confront him or her with his or her written statement given to the police. All of us operating in the criminal justice system know that the police rely on signed affidavits for their investigations and prosecutors rely on those same affidavits when drafting their indictments. However, a cross-examiner must first lay a basis before he or she can cross-examine such a witness on their statement. See such cases as S v Jeggels, 1962(3) SA 704 (C), and S v Pitout, 2005(1) SACR 571 (BD) at 576b to d. Mr Geze attempted to lay such a
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5 basis, but he could not even get out of the starting block, as he was thwarted therein by the magistrate and a most unhelpful and almost obstructive prosecutor. For instance, the witness, Princess, had said that her statement had been handwritten, but the defence only had an unsigned typed statement. The attorney asked for the original statement from the prosecutor. The prosecutor then said he also only had a typed copy. The magistrate then criticised the defence for not ensuring that, when he asked for further particulars, he had the original in his possession. The magistrate then ruled:-

15 "I cannot allow Mr Geza to cross-examine on that document, it really does not have any basis."

20 The criticism of the defence is misplaced, in my view. Instead of berating the defence, the magistrate should have instructed the prosecutor to produce the signed original forthwith. The defence's cross-examination on this aspect then obviously just fizzled out.

25 Mr Geze then tried to obtain the witness' comments about what the investigating officer had said in his statement. This type of cross-examination is usually

provisionally allowed, especially in the case of an investigating officer, who is normally one of the State's witnesses, and who is quite often called last to tie up any loose ends and to wrap up the case. However, the magistrate disallowed this cross-examination as, in his view, it would amount to commentary on hearsay evidence. The magistrate seems to have overlooked the provisions of Sections 3(1) and 3(3) of Act 45 of 1988 which allows for the admission of hearsay evidence.

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When the State witness Maqoboze gave evidence, he said that he had signed his statement, but he had not read it. The defence tried to put contradictory portions thereof to the witness, but the magistrate disallowed it, saying:-

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"Mr Geze, does the defence really cross-examine on this flawed document, really?"

These interferences with cross-examination are contrary to an accused person's rights to adduce and challenge evidence enshrined in Section 35(3)(i) of the Constitution, as well as the provisions of Section 166(1) of Act 51 of 1977, where it specifically deals with the

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cross-examination of witnesses. See also R v Nomtwana, 1961(4) SA 174 (ECD) at 176A - B, S v Ismail, 2006(1) SACR 593 (C) at paragraphs [28 to 29], S v Moggaza, 1984(3) SA 377 (C) at 385H. In R v Ntshangela, 1961(4) SA 592 (AA) and 59 (AG), the following was said of a witness who was being cross-examined on his credibility:-

"Enige vraag wat op sy geloofwaardigheid betrekking kon gehad het was dus ter sake en toelaatbaar."

4. When the appellant gave evidence, the magistrate indulged in some inappropriate conduct that, seen cumulatively, is also not compatible with a fair trial in my view. For example, after the magistrate had asked only six questions about appellant's age, place of birth, etcetera, he snapped at him:-

"Please answer me, don't waste my time."

when the appellant hesitated about where he had been born. This irritable reaction was uncalled for and was wholly unwarranted.

When the appellant gave evidence in mitigation of sentence, the magistrate cross-examined him on the merits of the case when he asked:-

5 "What do you think made the witnesses come to court and lie about you committing such a serious crime?"

10 He also grilled him on why he had not called his mother as a defence witness, extracting evidence that seems to be dangerously close to breaching the attorney/client privilege, and a short extract from the record will illustrate this point:-

15 "Your lawyer said to you you must call your mother, he wanted to call her to come?"

Answer:-

20 "He asked me who I'm going to call and I said I'm going to call my mother because I was with her.

 So it was your attorney who said you must call her?

25 The accused's reply is inaudible. The Court goes on:-

“Just listen, listen to my question, did Mr Geze tell you not to call your mother to come and testify? --- It was a surprise to me.

So what you are telling the Court is that Mr Geze advised you not to call your mother to come and testify. My question is, did Mr Geze say to you when you said you wanted to call your mother to come and testify and Mr Geze said, ‘Don’t call your mother’, is that what he said to you? --- No, he didn’t say that, Your Worship.

So why do you lie about Mr Geze? --- I’m not lying, no, Your Worship, I’m not lying, it’s just the fact that because my mother is sick...”

further reply is inaudible.

See the following cases in respect of the attorney/client privilege, S v Nkato, 1990(4) SA 250 (AD) at 255 - 256, S v Boesman, 1992(2) SASV 389 (OK).

The defence then called the appellant’s mother in

mitigation of sentence, and the magistrate then indulged in a rambling question of 1½ to two pages long. He did the same to the deceased's mother. It is not clear how these witnesses were supposed to answer such a long question.

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It is realised that these possible misdirections took place during the sentencing phase, and that they are perhaps not all that significant at that stage of the proceedings. However, in my view they all go onto the scale in order to determine the cumulative effect of the misdirections and irregularities on the trial as a whole.

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This same consideration applies to the prosecutor questioning the social worker about prejudicial allegations of gangsterism. Gangsterism would obviously normally be relevant to sentence, but the prosecutor prefaces his question by saying, and I summarise the quotation:-

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"I am not putting it as a fact or anything, I'm just wanting you to comment about an allegation that the accused may be a gang member?"

25 I think that this vague and unfounded sort of prejudicial

questioning should not have been allowed without a factual basis, and not mere speculation, having first been made.

5 5. Although there is no appeal against the sentence, the magistrate was quite obsessed with appellant's lack of remorse, which in turn was directly related to his alibi, and there are many references in the record that illustrate this. One extract from the record was
10 addressed to the appellant's mother who was giving evidence in mitigation:-

"But your son has got a hard heart, he doesn't
believe in that, he doesn't show any
15 remorsefulness and he believes in his innocence and he says, despite the fact that there were this overwhelming evidence against him, 'I don't care', he's shown that attitude in this court, he still believes what he said was true. That's the problem that one
20 encounters here."

Now this misdirection resulting in an over-emphasis of this feature is but another aspect that is put onto the scale to determine whether the appellant had had a fair
25 trial or not. See the following cases which directly

relate to this type of over-emphasis of a sentence: S v Mohale, 1974(1) SA 110 (T) at 111F - H; S v Koekemoer, 1973(1) SA 909 (N) at 912A - C.

5 6. A last example of the irregularities occurred after the Court had asked the first State witness some questions about threats to the witness. This was after State and defence counsel had finished their examination of the witness and the Court then asked some questions. He then invited the parties to "ask any follow-up questions". This is the normal procedure followed by a presiding officer. When Mr Geze said that he had one question, the magistrate said:-

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15 "Now on what? You can't ask something that is new, you can't come here with something new."

20 So Mr Geze remained silent. But then the prosecutor was immediately after this outburst allowed, without objection or comment by the magistrate, to re-examine the witness on the very issues raised by the magistrate. This seemingly biased behaviour in favour of the prosecution, combined with the irritable attitude towards the defence attorney, contributed to the perception of an

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unfair trial, especially as his ruling was incorrect. It is common practice that new issues can be raised with the leave of the Court.

5 In my view the cumulative effect of the misdirections and the irregularities have resulted in a failure of justice. See S v Magalane, 1991(1) SACR 627 (W) at 635f, S v Kekane, 1991(1) SACR 618 (T) at 619g.

10 It was put thus by Van der Westhuizen, J in S v Jaipal, 2005(1) SACR 215 (CC) at [39]:

15 "In terms of Section 322(1) of the Criminal Procedure Act, a Court of Appeal may 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'. 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 has 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

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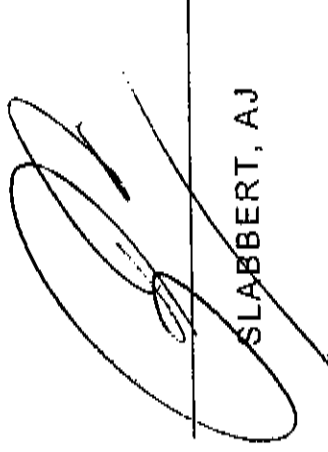
contemplated by the section and any conviction will have to be set aside."

5 In the light of this conclusion, there is no necessity to consider the merits of the case and the Director of Public Prosecutions may feel free to prosecute the appellant *de novo* if he so wishes. See in this regard the classic cases such as S v Moodie, 1961(4) SA 752 (A), and 1962(1) SA 587 (A). Also S v Naidoo, 1962(4) SA 348 (AD) at 354D.

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I would thus make the following order: the appeal SUCCEEDS
AND THE CONVICTION AND SENTENCE ARE SET ASIDE.

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SLABBERT, AJ

20 I agree and it so ordered.

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CLEAVER, J