

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)

Case Nr: 306/2005

Date delivered: 10 /03/2006

In the matter:

STATE

versus

JAFTA M

Coram: Kgomo JP et Molwantwa AJ

JUDGMENT ON REVIEW

KGOMO JP et MOLWANTWA AJ

1. This is a review matter which came before us whilst **Tlaletsi J** who initially dealt with it was out on circuit. The accused appeared before an acting District Magistrate who convicted him on his plea of guilty on a charge of driving a motor vehicle on a public road whilst the alcohol concentration in his blood exceeded 0.24 milligrams per 1000 milliliters to with 0.88 milligrams per 1000 milliliters. This is a contravention of Section 65 (5) (a) of Act 93 of 1996. The accused was sentenced to R1 000,00 or, in default of payment, to undergo 6 (six months) imprisonment.
2. **Tlaletsi J** was not satisfied with the circumstances under which the accused pleaded guilty and directed the following query to the Magistrate:

“1. I note that it was the choice of the accused to have legal representation in his trial. After the adjournment for him to consider the advice of the Magistrate not to have a legal representative because he is pleading guilty, the issue of legal representation has not been entertained again nor was he asked what his decision regarding legal representation was. Has this conduct not denied the accused his right to legal representation, and if so, what is the effect thereof on the trial. Is the fact that the accused now has a previous conviction not on its own prejudicial to him?

2. *On what basis and at what stage did the Magistrate form an opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount of R1500,00?"*

3. Unfortunately, or is it fortunately, the Magistrate's contract has expired and was no longer available to respond to Tlaletsi J's query. The record shows that the accused applied for legal aid but this was turned down. The reason for this disqualification is not apparent from the record. The accused when notified through the prosecutory that his defence would not be funded by the Legal Aid Board intimated to the Magistrate that he will endeavour to secure private funding and asked for a postponement for one month. In future the Legal Aid Board must furnish documentary proof that legal aid has been denied to an accused. It is undesirable for the court to rely on the mere *ipse dixit* of a prosecutor who, after all, represents the very, this is not so much an issue of calling the honesty or integrity of the prosecutor into question, but it has more to do with the principle that justice must also be seen to be done. We would expect the Legal Aid Officer who considered the application to state in broad outline why legal aid funding has been denied. This will enable an accessed person to make an informed decision on whether he should appeal against the decision to a higher authority or to take the decision on review or to abide the decision.

4. Instead of granting the postponement, which was an eminently reasonable request in the circumstances, or at least determining the accused ability to secure the funds within the foreseeable future, this is what happened:

"Hof: Mnr Jafta war is u prokureur?"

Beskuldigde: Ek vra uitsteldatum tot na die einde van die maand toe...

Hof: Wat beoog u om te pleit in die aangeleentheid?

Beskuldigde: Skuldig

Hof: Hoekom kan ons nie voortgaan met die saak nie en dit klaarmaak vandag nie?

Beskuldigde: Geen antwoord.

Hof: Kan ons nie die saak vandag klaarmaak nie? As u beoog om skuldig te pleit wat sal u rede wees om die saak uit te stel tot die einde van die maand?

Beskuldigde: Vir my eie prokureur Agbare.

Hof: Wat gaan jy maak met 'n prokureur as jy skuldig pleit, het jy 'n prokureur nodig?

Beskuldigde: Geen antwoord.

Hof: Die saak kan maar afstaan vir twee minute. Dink maar mooi daaraan."

5. When the trial resumed the court asked the accused: *"Watter besluit het u nou geneem"*. He responded: *"Ek gaan skuldig pleit Edele"*. The

prosecutor proceeded to put the main charge and its alternative to him. The accused, true to his undertaking, pleaded guilty but to the alternative charge referred to in par 1 (above). On the enquiry by the Magistrate to the prosecutor the latter intimated that he accepts the plea of guilty on the alternative charge. There was no questioning in terms of Section 112 (1) (b) of the Criminal Procedure Act, 51 of 1977. The query by Tlaletsi J therefore makes good sense.

6. On the basis discussed hereinbefore the accused was convicted and sentenced. Legal representation is a fundamental right entrenched in the Constitution in the form of Section 35 (2) (b) and (c) thereof which provide:

“(2) Everyone who is detained, including every sentenced prisoner, has the right-

- a)
.....
- b) *To choose, and to consult with, a legal practitioner, and to be informed of this right promptly;*
- c) *To have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”*

7. In **Shabalala & Others v Attorney-General of Transvaal & Another** 1996 (1) SA 725 (CC) at 740H-741G whereat **Mahomed DP** (as he then was) said the following:

“[28] The fact that the Constitution contains, in material respects, a fundamental commitment to human rights and is not merely a contemporisation and incremental articulation of previously accepted and entrenched values shared in our society, is illustrated by the approach of the Appellate Division in the cases of **S v Rudman and Another; S v Mthwana** 1992 (1) SA 343 (A). **Nicholas AJA**, giving the judgment of the Court, rejected the suggestion that recourse could be had to the principle of a 'fair trial' to justify the finding that an indigent accused person who did not have the means to pay for his or her own defence was entitled to be provided with legal representation, if necessary, at the expense of the State. (**S v Davids; S v Dladla** 1989 (4) SA 172 (N) at 178C-E) He stated that none of the authorities relied on in the case of **S v Davids**. (**S v Dladla** 1989 (4) SA 172 (N) at 178C-E)

'when viewed in their contextual setting, afford any support for the

*learned Judge's basic premise that the touchstone in a procedural appeal is whether the trial was unfair . . . The Court of Appeal 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". The enquiry is whether there has been an irregularity or an 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 . . . ' (**Rudman's** case supra n 46 at 376j-377C)*

*[29] The basic distinction made by **Nicholas AJA** is between an attack made on behalf of an accused person on the general ground that his or her 'right to a fair trial' was breached and an attack on the narrow ground that certain specific rules and formalities which were entrenched in the law were not satisfied. The latter attack was held to be competent. The former was not. It is precisely this distinction which is affected by s 25(3) of the Constitution, which expressly guarantees to every accused person the right to a fair trial. If such a fair trial is denied to an accused it can found a competent attack on any ensuing conviction. The accused is not limited to an attack on any specific rules and formalities entrenched in the Criminal Procedure Act. The Constitution imports a radical movement away from the previous state of the law."*

See also **S v Pienaar** 2000 (2) SACR 143 (NC) at 158j-160f.

8. The Magistrate acted grossly irregularly in advising or influencing the accused that because he believed he was guilty and prepared to tender such a plea therefore he can dispense with legal representation. Further, to allow the accused a mere two minutes or even only a few days to make up his mind on whether, in the light of the magistrate's ill-considered advise, he still requires the assistance of an attorney is grossly unreasonable, irregular and unfair. On this basis alone the case ought to be set aside.
9. The conviction ought to be set aside for another reason. The Magistrate ought to have established by means of questioning him whether he fully appreciated what was meant to drive a motor vehicle on a public road with the alcohol content in his blood exceeding the legal limit, as described in the charge sheet. The Magistrate should also through this method of interview have tried to establish whether the accused admitted all the elements of the offence preferred against him.

10. We are satisfied that the accused, for the foregoing reasons, did not receive a fair trial and that the conviction and sentence ought to be set aside.

Order:

- 1. The conviction and sentence of the accused are set aside.**
- 2. If he has paid the fine imposed on him or part thereof same must be refunded to him.**

F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

BC MOLWANTWA
ACTING JUDGE
NORTHERN CAPE DIVISION