

Circulate to Magistrates: Yes / No

Reportable: Yes / No Circulate to Judges: Yes / No

IN THE HIGH COURT OF SOUTH **AFRICA**

(Northern Cape Division)

Case no: **CA&R 44/04**

Date heard: **11/11/2004**

Date delivered: **10/12/2004**

In the appeal of:

CHRIS MATROOS

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MajiedtJ et Musi, AJ

REASONS FOR JUDGMENT

MAJIEDT J:

1. In the as yet unreported judgment of **J J Kok v The State** CA&R 93/2003, delivered on 22/9/2004 by Kgomo JP (with which I had concurred), the learned Judge-President referred to remarks enunciated by Kriegler J at an international conference where the latter had appealed for restraint from Judges in criticising magistrates' judgments. Kgomo JP also alluded to the fact that the Judges of this Division have taken the aforementioned appeal to heart.

I fully subscribe to these observations, ever mindful of the often difficult circumstances under which magistrates, both in the District and Regional Courts, perform their

tasks. One is particularly hesitant to nitpick *ex post facto* about trivialities with the benefit of hindsight. Not only is criticism apposite in this case, but it concerns a judgment of the very same Regional Magistrate who had presided in the **Kok** appeal, *supra*, namely Mr C T G Jacobs of Upington.

2. The appellant appeals against his sentence only. His is a so-called “*prison appeal*”, i.e. he has directed a notice of appeal in person from prison. He is being assisted in this appeal by Mr Mayisela of the local Justice Centre. The notice of appeal is considerably out of time and the appellant seeks condonation therefor, alleging that he had lodged his notice of appeal within the requisite time period at Upington prison (he is now incarcerated in Bloemfontein). The appellant infers that the prison

authorities at Uppington had failed to forward his notice of appeal to the Clerk of the Court there.

3. Regard being had to the shocking miscarriage of justice which had occurred in this matter as will appear later herein, I had caused the following notice to be forwarded to both Counsel for the State and Counsel for the appellant after I had initially perused the record:

“1. This appeal is set down for hearing on 11/11/2004. Counsel for the Appellant and for the State are requested to submit supplementary Heads of Argument on the following matters:

1.1 Is this Court on appeal empowered by virtue of its inherent powers of review to consider the merits of the Appellant's conviction as well?

1.2 If so, has the Appellant had a fair trial, given the Regional Magistrate's constant interference during the proceedings, particularly with regard to:

(a) taking over the leading of the evidence in chief of many State witnesses from the prosecutor;

(b) eliciting inadmissible evidence from particularly the witness W. Coetzee, relating to the Appellant's previous assaults on the deceased as well as eliciting an admission allegedly made by the Appellant through blatantly leading questions.

See in this regard:

State v J J Kok, unreported judgment in this Division, under case CA&R 93/2003, delivered on 22/09/2004 (Kgomo JP, Majiedt J concurring) and cases there cited. A copy of the judgement is attached.

2. The supplementary Heads must be delivered to the presiding Judges as follows:

2.1 for the Appellant by no later than Friday 5/11/2004;

2.2 for the Respondent by no later than Tuesday 9/11/2004."

Counsel are *ad idem* that this Court has the inherent power of reviewing the correctness of the appellant's conviction.

See: Secs 19 and 22 of the Supreme Court Act, 59

of 1959, read with sec 309 of the Criminal Procedure Act, 51 of 1977;

Hiemstra, Suid-Afrikaanse Strafproses, 6th ed at 829.

Moreover, Counsel for the State, Ms C G Jansen has, very properly and correctly in my view, conceded in her supplementary Heads of Argument that the appellant's conviction cannot stand, given the numerous gross irregularities committed during his trial. We had consequently issued an order at the hearing as follows:

- “1. The appellant's application for the condonation of the late lodging of his notice of appeal is granted.
2. The appeal succeeds. The appellant's conviction and sentence are set aside.
3. The appellant is to be released forthwith, unless there are other matters pending against him for which he is to be held in custody.”

We had reserved our reasons for the aforementioned

order. These are they.

5. The appellant was charged with the murder of his girlfriend. He experienced problems raising the money required for his defence, with the result that his attorney withdrew. He chose to go it alone at his trial, spurning the offer of legal representation through the Legal Aid Board. The fact that he was unrepresented at the trial is an important consideration when the conduct of Magistrate Jacobs is assessed herein.

- 6.1 Problems arose at the very commencement of the trial and continued throughout. The Magistrate gave a lengthy and detailed explanation to the appellant as to his rights at plea stage, including the right not to give a plea explanation. He failed, however, to explain to the appellant that he also does not have to answer any

questions from the Bench at this stage of the proceedings. This is in itself an irregularity, the impact of which depends upon the facts and circumstances of each case.

See: **S v Evans** 1981(4) SA 52(C) at 58 G – 59 A.

S v Daniels en 'n ander 1983(3) SA 275 (A) at 299 F-H.

6.2 Astonishingly, however, the Magistrate then rode roughshod over the appellant's rights and commenced putting questions to the appellant before he had made an election as to whether he would elucidate his plea of not guilty. This is how it happened:

“Voorsittende beampte: U verstaan die verduideliking wat die Hof vir u gegee het, né? Wil u vir die Hof kortliks sÍ waarom u onskuldig pleit of wil u nie nou al sÍ nie? Kom die Hof vra vir u so. Om nou dit vir ons almal makliker te maak. Die oorledene in die saak, die Lena Jacobs, volgens die klagstaat was sy ook bekend as Sustertjie, het u vir haar geken? Weet u wie sy was?”

6.3 It is trite that an accused has the right to remain silent.

He/she may elect not to give a plea explanation and not to answer any questions.

See, generally: **Hiemstra, SA *Strafproses***, 6th ed. at 324-325 and cases there cited;

Du Toit et al, *Commentary on the Criminal Procedure Act*, at 18-7 to 18-8, and cases there cited.

It must be made clear to an undefended accused that there is no obligation to say anything.

See: **S v Daniels en 'n ander**, *supra*, at 299 F-H.

Steytler, *The Undefended Accused* at 128.

6.4 It is also irregular to question an accused in terms of sec.

115(2) without having first invited the accused to give a plea explanation in terms of sec. 115(1).

See: **S v Philander** 1977(2) PH H 214 (NC).

In my view the same position holds where, as is the case

here, the accused is questioned even before he/she has had the opportunity of making an election on whether to furnish a plea explanation.

7.1 During the course of the evidence in chief of every State witness the Magistrate without fail took over the questioning from the prosecutor. When reading the record, one is intensely aware of the constant drone of the Magistrate's incessant interference – both in the evidence in chief and in the cross-examination of the State witnesses and in the cross-examination of the appellant.

7.2 The most telling of these interferences and what Ms Jansen for the State correctly describes in her Supplementary Heads as *“die grofste onreëlmaticheid”* occurs during the evidence in chief of Willem Coetzee, the deceased's father. He was called by the prosecutor for

the sole purpose of testifying about the identification of the deceased's corpse, since this was not admitted by the appellant (it should be noted that the appellant had earlier indicated in reply to a question by the Magistrate, that he had no knowledge of how the deceased came to meet her death).

The prosecutor's questions on this aspect are to be found from page 34(18) to page 36(10), i.e. just under 2 full pages. The Magistrate then immediately proceeds to question Mr Coetzee concerning the incident itself, a matter which had not even remotely been touched on by the prosecutor. A number of irregularities arise in the course of this questioning, to which I shall make reference separately in due course.

At this juncture it suffices to make the point that the Magistrate had fully assumed the mantle of the prosecutor with the very first witness to be called by the State and things continued much along the same line throughout the trial.

The Magistrate's questioning of Mr Coetzee on the incident itself commences at p38(16) and continues until p48(14), i.e. nearly ten full pages.

Quite significantly, the prosecutor did not ask any further questions in chief after the Magistrate had concluded his lengthy questioning.

7.3 Much the same scenario as the present one had arisen in **S v Mathabathe** 2003(2) SACR 28(T), except that in that case the Magistrate had justified his interference in taking over the leading of the complainant's evidence in chief on the prosecutor's indolence and indifference (which is not even remotely the case here). Southwood J (Kirk-Cohen J concurring) expressed empathy with the Magistrate's dilemma, but set aside the conviction and sentence nevertheless.

At 30a of the said report, Southwood J states that:

"When the presiding magistrate finished leading the complainant the prosecutor had no questions to ask".

The same applies here. Moreover the questioning

concerned matters not covered by the prosecutor at all.

What is even more serious and extremely disturbing, is the nature of the questions which were asked by the Magistrate, to which I now turn.

8. Not only did the Magistrate take over the prosecutor's functions during the examination in chief of Mr Coetzee, but he also elicited inadmissible evidence in an entirely improper manner.

- 8.1 The Magistrate questioned the witness about a conversation which the witness had with the accused.

This evidence reads as follows:

"Voorsittende beampte Goed en u sÍ toe nou vir hom hy moet nou nie lieg nie. Wat sÍ hy toe vir u?

Getuie Mnr W Coetzee: Ja, hy moenie vir my lieg nie. Toe sÍ hy vir my, hy het net die kind twee houe met die belt geslaan. Toe het ek vir hom gevra, 'Nou, hoe kan die kind dood is van twee houe met 'n belt. 'n

Belt kan mos nie 'n mens dood slaat as jy hom twee houe geslaat het nie”.

8.2 Having elicited the aforequoted admission, the Magistrate then put the following blatantly leading questions to Mr Coetzee relating to the voluntariness of the admission:

Voorsittende beampte Toe u nou die nag daar kom, die Saterdagoggend, wat – wat die dogter nou vir u kom roep het, toe u met Chris, met die beskuldigde gepraat het, hoe het hy vir u geklink, nugter of het hy vir u geklink of hy 'n doppietjie ingehad het, hoe het hy vir u geklink?

Getuie Mnr W Coetzee: Hy was nugter.

Voorsittende beampte Was hy nugter. Het u hom al gehoor of gesien as hy dronk is?

Getuie Mnr W Coetzee: Ja.

Voorsittende beampte Maar daardie tyd was hy nugter gewees?

Getuie Mnr W Coetzee: Hy was nugter.

Voorsittende beampte En – en dit wat hy nou ook vir u gesí het, hy het nou die kind net met die belt twee houe geslaan, hy het dit vir u vrywillig gesí, u het hom nou nie gedwing of gefors om dit te sí nie?

Getuie Mnr W Coetzee: Nee, nee.

Voorsittende beampte Hy het dit uit sy eie uit vir u gesí?

Getuie Mnr W Coetzee: Uit sy eie.”

83 The Magistrate then proceeds directly from this irregular conduct to the next, namely attempting to elicit irrelevant and inadmissible character evidence. It reads thus on the record:

“Voorsittende beampte O, erfwerk. Is dit nou net hierdie een keer wat u weet wat die beskuldigde vir haar geslaan het, of is dit maar meer kere wat sy so pakgekry het by hom of weet u nou nie van ander voorvalle?

Getuie Mnr W Coetzee: Nee, nog nooit wat ek gesien het nie.”

Although the reply here was in the negative, the following questioning occurs with the State witness Gert Maasdorp on the same subject:

“Voorsittende beampte Nou hoekom het u dan nie gaan keer nie?

Getuie Mnr G Maadorp: Ek is dan bang, Edelaagbare, om nader te

gaan, dan kan hy vir my mos ook aanrand.

Voorsittende beampte Is die beskuldigde bekend as 'n – as 'n man wat gewelddadiglik kan raak of wat?

Getuie Mnr G Maasdorp: Ja.”

On the next page of the record, the evidence reads as follows (the Magistrate had apparently been interrupted in the course of his questioning):

“Voorsittende beampte Maar – maar, nou was die Hof nog besig, voor ek weer gepla was vir die hoeveelste keer vanoggend, is beskuldigde maar 'n woelige man of nie regtig nie?

Getuie Mnr G Maasdorp: Ekskuus?

Voorsittende beampte Is die beskuldigde, Chris, is hy maar 'n bakleierige, woelerige soort van mens of nie?

Getuie mnr G Maasdorp: Hy is, Edelaagbare, Hy is, Edelaagbare.

Voorsittende beampte O, dit is die wat u vir hom bang was?

Getuie mnr G Maasdorp: Ja, Edelaagbare.”

8.4 It is not surprising therefore that, when the appellant questioned the witness Ms Maasdorp as to why she and her husband (Gert) had not assisted the deceased when

they allegedly saw her being assaulted by the appellant, the Magistrate summarily disallowed the question on the basis that he hears many cases where people who intervene get killed and that the witnesses in this matter were justifiably too afraid to intervene!

8.5 From the foregoing extracts from the record it is abundantly clear that the Magistrate had now fully assumed the role and function of the prosecutor. He merrily continued along this way throughout the trial. The poor unrepresented appellant found himself at the mercy of a presiding officer who proceeded to descend into the arena on the side of the prosecution with great vigour and zeal from the outset and continued to do so throughout the trial. In these circumstances justice and fairness are but mythical illusions, completely absent in these proceedings.

9.1 When the district surgeon, Dr Eksteen, was called to testify, the Magistrate also took over his examination in chief from the prosecutor. It is not necessary to burden this judgment further with extracts from the record – the point is already sufficiently clear ex facie my discussion under par 7.2

supra.

9.2 It is extremely ironic that the Magistrate, at the stage of the proceedings when he was explaining to the appellant his rights after the State had closed its case, said the following to the appellant:

“...Die Hof kan ook vrae aan u stel. U het nou gesien dat ek deurgaans vrae aan van die getuies gestel het. My doel is nou nie om iemand te kruisondervra nie, maar as daar iets is wat vir my onduidelik is of iets waaroor ek groter duidelikheid of helderheid wil kry, dan vra ek vrae aan die getuies. So sal ek ook vrae aan u kan stel”.

The Magistrate’s questioning in this case was hardly for purposes of elucidation, as I have shown.

10. The Magistrate’s improper role in co-prosecuting the State’s case is also evident from the following:

101 He dictated to the prosecutor how she should present the State’s case with regard to the so-

called chain evidence in respect of the deceased's identity:

“Mevrou wil ons (!) nie maar eers begin met die persoon wat die liggaam opgetel het, ensovoorts nie”. (the underlining and exclamation are my own).

102 When certain formal evidence on affidavit relating to for example the taking of a blood specimen from the deceased was to be handed in, the Magistrate discouraged the appellant from asking questions on that aspect as follows:

“U wil nie daaroor vrae vra nie, né?”

10.3 When the witness Gert Maasdorp, like his wife before him, explained that he did not intervene during the alleged assault of the appellant upon the deceased due to fear, the Magistrate *mero motu* placed the following on record:

“Voorsittende beampte Sommer terwyl ek nou so kyk, beskuldigde is ‘n groot, sterk jong man, né. Hy is ‘n bietjie – lyk my hy is ‘n bietjie langer van liggaamsbou as wat u ook is. Die beskuldigde, Chris, hy is ‘n lang, groot, sterk man?

Getuie Mnr G Maasdorp: Ja, Edele”.

10.4 When Mr Maasdorp described the alleged assault upon the deceased, the Magistrate for the umpteenth time intervened as follows:

“Voorsittende beampte Net voor julle nou by die uitsleep kom. U het nou vir ons gesí beskuldigde het haar nou so kruis en dwars met die lyfband geslaan oor die lyf. Hoeveel houe, omtrentso tien of twintig houe of hoe het dit vir u gelyk? Of sal dit minder houe wees wat hy haar met die lyfband geslaan het, met die belt geslaan het?

Getuie Mnr G Maasdorp: Sí maartien.

Voorsittende beampte: Omtrentso tien.

Getuie Mnr G Maasdorp: Tien.”

It comes as no surprise at all that the witness had latched

on to the answer suggested by the Magistrate.

11. The Magistrate also displayed considerable impatience with the appellant's cross-examination, disallowing a number of relevant and permissible questions in the process. This impatience is particularly evident in the numerous instances where the Magistrate had asked of the appellant:

"Verdere 'vrae' or 'enige ander vrae'". This happened on no fewer than six occasions during the cross-examination of Ms Anna Maasdorp.

In **S v Malatji and another** 1998(2) SACR 622(W), at 626 f – g, Cameron J (as he then was) stated:

"Furthermore, a number of times during the cross-examination of the two appellants, the magistrate interposed, apparently out of the blue, with: 'Het u verdere vrae?' This appears to have been a tactic calculated to discourage the continuation of cross-examination. A presiding officer is plainly entitled and obliged to

discourage irrelevant, vacuous, and rambling cross-examination. None of that applied in the present case. The magistrate's interventions were obviously designed to stifle any cross-examination at all. They bespoke a mind closed to the appellants' entitlement to probe the State evidence in order to assert their innocence. They were of such a nature that the appellants were deprived of their elementary right to a fair trial."

The same can be said here. The appellant was hardly afforded any reasonable opportunity to test the State case in cross-examination.

12. The *coup de grâce* as far as the myriad irregularities are concerned, is the Magistrate's zealous assistance to the prosecutor in cross-examining the appellant. The record is replete with such instances and I do not consider it necessary to burden this judgment any further with extracts from the record on this aspect.

13. The need for a presiding officer to exercise patience and to remain impartial, fair and objective is trite.

See, inter alia:

S v Meyer 1972 (3) SA 480 (A) at 484 D – F;

S v Rall 1982 (1) SA 828 (A) at 831 H – 832 A;

S v Moseko 1990 (1) SACR 107 (A) at 118 i – 119 a;

S v Moisoinyane 1998 (1) SACR 583 (T) at 596 j – 597 j

A mere passive role as umpire is, however, not appropriate, for a presiding officer must ensure that justice is done. A balance between improper interference and passive remoteness is therefore called for: See: **S v Gerbers** 1997 (2) SACR 601 (SCA) at 607 a – c.

14. The conclusion is unavoidable that the appellant has not had a fair trial. The numerous irregularities committed at the trial, set forth hereinbefore vitiates the proceedings.

In **Yuill v Yuill** [1945] 1 All ER 183 (CA) at 189 Lord Greene MR aptly put it thus:

“The judge who himself conducts the examination... descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.”

This is so true of the conduct of Magistrate Jacobs in this matter.

15. An extremely worrying feature is that in a number of so-called "*prison appeals*" which have come before Judges of this Division in recent times, Magistrate Jacobs' conduct during the trials has been the central bone of contention and in some instances same has led to the convictions and sentences being set aside **on that particular ground alone** I shall list a number of them shortly. My concerns are the following:

(a) In most, if not all, of these appeals, the appellants had, for reasons unknown, lodged their appeals well out of time with the result that they had been incarcerated for a number of years before their appeals had been upheld. The present appeal is a case in point – the appellant had been convicted on

13 November 2000 and his notice of appeal is dated 21 January 2003. He first appeared in court on 30 July 1999 and had been in custody ever since (the appellant had been remanded in custody throughout his trial which had been characterised by a number of postponements, primarily due to his problems with the payment of his attorney, to which I had alluded earlier in this judgment). Now, more than 5 years later, he is to be released after a successful appeal.

(b) Quite often these “*prison appeals*” are decidedly thin on merit and are presumably inspired by unofficial “*legal advice*” from fellow prisoners informally schooled in the law through their careers in crime.

On that view of the matter, it is somewhat unusual to find that a number of these matters emanating from the trial court of Magistrate Jacobs, are meritorious on the basis of the unfairness of the trials which had been conducted.

It is quite disturbing when one begins to speculate how many other convicted persons languish in jails at this time, having been unfairly convicted by Magistrate Jacobs, but who have not had the benefit of the informal legal advice to which I have referred.

16. Judges and magistrates have an important responsibility to ensure that justice is done in their courts. We are not mere mechanical purveyors of the law – sec 165(2) of the Constitution demands from us that we must apply the provisions contained in the Constitution as well as the law in general *“impartially and without fear, favour or prejudice”*.

One of those constitutional provisions, entrenched in the Bill of Rights, is the right to a fair trial which accused persons have (sec. 35(3)).

This right is afforded any and all accused persons,

regardless of their station in life. It applies equally to prince and pauper, to farmer and farmworker, to haves and have-nots, to the literate and the illiterate, to the mighty and the meek and to the powerful and the powerless.

17. What is to be done in this instance where, as I shall now show, a number of cases before the same Magistrate have been tainted by a plethora of gross irregularities perpetrated by the said Magistrate?

The number and gravity of the irregularities emanating in the present matter should be evident from this judgment and yet I have not touched upon all of them in order not to overburden this judgment.

I venture to suggest, as did Cameron J in **S v Malatji & another** *supra* at 623 j, that “*the Regional Magistrate ... appears to have been a law unto himself in his court*” (in **Malatji** the circumstances were similar in that the

Regional Magistrate in question had also conducted a number of trials in complete disregard of the fundamental tenets of fairness).

18. What follows is a brief synopsis of the irregularities committed in trials before Magistrate Jacobs which had come on appeal recently before Judges of this Division:

- a) I have already referred to the judgment of Kgomo JP in the Kok appeal (see the introductory paragraph of this judgment).

In that matter the Court had on appeal set aside the appellant's conviction and sentence by reason of the gross irregularities committed and the unfairness of the trial. In his introductory remarks, Kgomo JP referred to the **Kok** matter as "*an excellent case study for aspirant magistrates on how not to conduct a criminal trial.*"

The irregularities were:

- (i) Magistrate Jacobs had, as is the case here, taken over the leading of the State witnesses' evidence-in-chief from the prosecutor;
 - (ii) the Magistrate had effectively deprived the appellant from obtaining legal representation after his attorney had withdrawn midway through the trial;
 - (iii) he had interfered unnecessarily with the attorney's cross-examination and with the appellant's cross-examination;
 - (iv) he took judicial cognizance of the evidence of a witness who had testified before him previously – an aggravating feature is that it related to the witness' ability to track a number of footprints, i.e evidence of a highly technical nature;
 - (v) he also failed to assist the unrepresented appellant (qua accused) to advance his defence in a proper manner.
- (b) In **JT Melani v The State**, CA&R 61/04, an unreported judgement in this Division delivered on 03/12/2004, written by Musi AJ (Tlaletsi J concurring)

the Court had similarly set aside the appellant's convictions and sentences on the basis that the appellant did not have the benefit of a fair trial, given the numerous gross irregularities committed during the trial by Magistrate Jacobs. Musi AJ, in finding that the outcome should be the setting aside of the appellant's convictions and sentences, remarked as follows:

"The end result of the regional magistrate's conduct is an injustice to the victims of these crimes."

The same can be said in the present matter.

In the Melani appeal the following irregularities were held to have been committed by Magistrate Jacobs:

- i) The magistrate failed to ensure that the appellant was granted access to state witness' statements which he had requested.

ii) The magistrate couched his explanation of the appellant's rights in terms of sec. 115 of the Criminal Procedure Act in terms which were found to be designed to induce the appellant to disclose the basis of his defence.

iii) The magistrate was found to have deprived the appellant's co-accused of his freedom by revoking his bail *mero motu* and without any adherence whatsoever to the *audi alteram partem* principle (the co-accused's convictions and sentences were also set aside by the Court, exercising its inherent review powers, for the same reasons as that of the appellant's appeal).

iv) The co-accused was effectively denied the right to testify in his own defence, since the magistrate (incorrectly in law) insisted that the co-accused should testify from the witness box – the magistrate erroneously adopted the position that he could not testify from the dock.

v) In my view the most glaring and disconcerting irregularity committed by Magistrate Jacobs

relates to an inspection *in loco*. On count 3 there had been a dispute relating to whether a particular gate had been open on a certain day. The appellant had testified that he ran through an open gate, whilst it was the State's contention that that particular gate was always locked and had been locked on the day in question. In the course of the cross-examination of the appellant, the magistrate interjected, accused the appellant of lying and told the appellant:

“Ek sal vir u gaan wys. Ek sal vir u gaan wys. Uington, daardie omgewing het nie oornag verander of in die afgelope twee of vier of ses jaar nie. U praat leuens sÍ ek dit vir u.”

The magistrate then *mero motu* arranged for an inspection *in loco* to be conducted in this

regard. Subsequent thereto, the magistrate placed his observations on record and also recorded that he had coincidentally parked his vehicle in the same area the previous Saturday and that he had seen that the said gate was locked. He also recorded that he had (deliberately this time) passed that same area the previous day to ascertain certain facts:

“Ek het gistermiddag weer daar verby gery in die area en net gaan kyk, om my te vergewis van sekere aspekte en dit was toe gewees, op ‘n oggend was die hek toe.”

The Court (Tlaletsi J and Musi AJ) found that the magistrate had committed a gross irregularity by importing into the case facts within his own knowledge. He had effectively placed himself in a position where he had become a witness for the prosecution.

vi) The magistrate, as is the case here, was extremely impatient and intolerant of the appellant's cross-examination. He also cross-examined the appellant with great zeal. Ultimately, the Court, as I have stated, set aside the convictions and sentences of both the appellant and his co-accused, since they have not had a fair trial.

19. A further disconcerting aspect is that this magistrate consciously disregard *dictae* of this Court. I refer to some of these:

a) In **S v Snyders**, CA&R 282/2003, unreported judgment of Kgomo JP et Tlaletsi J, delivered on 6 August 2004, the magistrate was urged to structure his judgments in accordance with the format

proposed by Broome DJP in **S v Bhengu** 1998(2) SACR 231 (N) at 234 h-j. In **S v L. Molojwane** Case No RC 64/2003, the same magistrate says the following:

“Hierdie Hof is terdeë bewus van die versoek by verskeie geleenthede deur hulle Edele Regters van die Noord-Kaapse Afdeling van die Hooggeregshof dat die Hof opsomming en uitspraak so kort as moontlik moet maak. Prakties skep dit dikwels vir die Hof probleme ... Daarom verkies ek om die getuienis én die redes so volledig as moontlik te verstrek. Dit is dan makliker vir alle persone op ‘n latere geleentheid om kennis van te neem van wat gebeur het en die redes vir skuldigbevinding.”

- b) In **S v Thando Tom**, CA&R 147/2004, a petition for leave to appeal in this Division, the record reflects that the magistrate had made the following remarks:

“Ek het baie interessant genoeg onlangs in ‘n appél opgemerk dat suster Jansen baie heftig aangevat was deur die Regters omdat sy getuig het nadat sy ‘n klaagster uitgevra het en die

klaagster se storie nie gerym het nie, het sy dit aangeteken en het sy dit later in die hof getuig. Met die grootste respek stem ek nie met daardie benadering saam nie. Suster Jansen is iemand wat baie gereeld in hierdie hof getuig en ek het groot begrip en waardering daarvoor. Omdat daar soveel kanse gevat word, om dit nou sommer prontuit te stel, deur klaagsters wat vertel dat hulle verkrag is, verkies ek dat die dokter of die verpleegkundige suster soos hier wat 'n klaagster ondersoek, as dit reeds vir hulle duidelik is dat daar 'n slang in die gras by wyse van spreke is, dan verkies ek dat hulle dit aanstip, want dit help later die Hof. Die Hof met sy personeel sit jare na die tyd en dan moet iets uitgepluis word. Hierdie persone wat onmiddellik na 'n verkragting met 'n slagoffer, in aanhalingstekens, te doen het, is persone wat werklik groot waarde later vir die Hof kan gee.”

(The “onlangse appél” which the Magistrate referred to is the matter of **S v S** [2004] 1 All SA 344 (NC)).

The Magistrate’s remarks smacks of a contemptuous disregard of the *stare decisis* rule, which is firmly established in our justice system. See:

Ex parte Minister of Safety & Security: In re S v

Walters 2002(4) SA 613 (CC) at 646 D-H.

20. Having regard to the foregoing cases and the present matter, I am of the view that the magistrate's conduct requires the scrutiny of the Magistrates' Commission. I come to this conclusion with considerable regret, since Magistrate Jacobs is in my view not only one of our most experienced, but also one of the most hardworking regional magistrates. He does, however, seem to be going about his work in completely the wrong way. I have, *ex abundante cautela*, shown this judgment to the Judge-President of this Division and he is *ad idem* that the matter should indeed be referred to the Magistrates' Commission.

21. I therefore direct that a copy of these reasons be forwarded by the Registrar to the Magistrates'

Commission.

**SA MAJIEDT
JUDGE**

I concur:

**CJ MUSI
ACTING JUDGE**

FOR THE APPELLANT	:	Adv VN Mayisela
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FOR THE RESPONDENT	:	Adv CG Jansen
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DATE OF HEARING	:	11 NOVEMBER 2004
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OF JUDGEMENT :

JUDGEMENT ON APPEAL: MATROOS v STATE

Case no. : CA&R 44/04

MAJIEDT J, MUSI AJ