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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: CA & R 33/2025

Reportable: **YES** / NO

Circulate to Judges: **YES** / NO

Circulate to Regional Magistrates: **YES** / NO

Circulate to Magistrates: **YES** / NO

In the matter between:

EMMANUEL TERTIUS OCTOBER

Appellant

and

THE STATE

Respondent

Neutral citation: *October v The State* (CA&R 33/2025) 31 October 2025

Coram: STANTON J et TYUTHUZA AJ

Heard: 08 September 2025.

Delivered: 31 October 2025.

Summary: *Appeal against conviction of sexual assault – Alternatively that the sentence of five years imprisonment be substituted with a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 (“the Act”) – Whether trial court erred in dealing with s 299A of the Act prior to conviction – Whether trial court erred in unilaterally cancelling bail – Whether trial court erred in dismissing the appellant’s application for recusal – Cancellation of bail not in accordance with s 68 of the Act – Irregularities resulted*

in an unfair trial – Reasonable apprehension of bias established – Appeal against conviction upheld – Order granted in terms of s 322(1)(c) of the Act.

ORDER

1. The appeal is upheld.
 2. The order of the Regional Court, Sutherland, is set aside and replaced with the following:
 - 2.1 The appeal against the conviction is upheld and, as a consequence, the conviction and sentence are set aside.
 3. The matter is referred to the Director of Public Prosecutions, Northern Cape, to decide whether the appellant should be re-arraigned.
 4. In the event that the appellant is re-arraigned, the trial must be before a different Regional Magistrate.
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JUDGMENT

Stanton J

Introduction:

[1] The appellant was charged with one count of contravening s 5(1), read with s 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ (sexual assault). He is alleged to

¹ 32 of 2007.

have unlawfully and intentionally committed an act of sexual assault against the complainant (LB), a 12-year-old girl, by touching her vagina on 09 April 2022 at Sutherland in the Regional Division of the Northern Cape.

[2] The appellant, who was legally represented at the trial, pleaded not guilty to the charge proffered against him, but did not provide a plea explanation. He was convicted on 15 September 2023; and on 01 November 2023, he was sentenced to seven years' imprisonment, of which two years were suspended for five years on condition that he is not again convicted of sexual assault during the suspension period.

[3] The trial court dismissed the appellant's application for leave to appeal, but he was granted leave to appeal on petition directed to the Judge President of this Division.

The grounds of appeal:

[4] According to the appellant's notice of appeal against the conviction and sentence, the trial court erred in:

- 4.1 Dismissing the appellant's application for recusal;
- 4.2 Being unreasonably biased against the appellant;
- 4.3 Dealing incorrectly with s 299A of the Criminal Procedure Act 51 of 1977 ("the Act");
- 4.4 Unilaterally remanding the appellant in custody whilst he was on bail;
- 4.5 Not handing down a balanced sentence;

4.6 Not considering all the available sentence options; and

4.7 Not sentencing the appellant to correctional supervision in terms of s 276(1)(h) or s 276(1)(i) of the Act.

[5] It is not necessary to traverse the evidence, as the grounds of appeal pertain to the question whether the appellant was afforded a fair trial or not. The chronology of the events is, however, relevant.

[6] The appellant was arrested on 10 April 2022 and released on bail. His first appearance in the regional court was on 05 September 2022. The State led three witnesses, namely the complainant, Ms. J d[...] B[...] (LB's aunt), and Mr. FM B[...] (LB's father). At the end of Mr. B[...]’s evidence, and before the State closed its case on 31 March 2023, the trial court informed Mr. B[...] that he has a right to make representations to the Parole Board when the appellant’s parole is considered. On 11 May 2023, the appellant’s wife testified as the first witness for the defence, after an application was made for her to testify before the appellant. The appellant then indicated that he would not testify in his own defence. However, after 10 minutes, he changed his mind and decided to testify. The appellant’s attorney requested that the matter stand over to 12 May 2023 for the appellant’s evidence. The postponement was granted, but the trial court ordered the appellant to be taken into custody; and that he be transferred to Calvinia to be examined by a medical doctor. It is common cause that the appellant had not transgressed his bail conditions and attended court at all relevant times. At 13h00 on 12 May 2023, the appellant’s attorney applied for him to be released. On 31 May 2023, the appellant filed a written application for the recusal of the magistrate, which was refused. The appellant closed his case without him giving evidence.

The test on appeal against conviction:

- [7] In *Rex v Dhlumayo and Another*,² the Appellate Division ruled that the ambit of interference in factual and credibility findings by the trial court is constrained on appeal due to the reason that, unlike the trial court, the appeal court has no live experience of the actual trial. The court held that it will not disturb the factual findings of a trial court unless the latter had committed a misdirection.³ We must therefore be satisfied that the ground(s) for appeal exists.

Fair trial:

- [8] The Act is the key piece of legislation which regulates the process of criminal trials. Its provisions must be interpreted to promote the 'spirit, purport and objects of the Bill of Rights'.⁴ Because criminal proceedings are aimed at ensuring a fair trial, s 35(3) of the Constitution is of primary importance when interpreting the Act.

- [9] The Constitutional Court in *S v Jaipa*⁵ highlighted that the right to a fair trial lies at the heart of a civilised criminal justice system, observing that:

'Section 35(3) of the Constitution states that every accused person has a right to a fair trial. The basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness.'⁶

² 1948 (2) SA 677 (A) at 705.

³ *Ibid* at 706.

⁴ See s39(2) of the Constitution of the Republic of South Africa, 1996.

⁵ 2005 (1) SACR 215 (CC); 2005 (5) BCLR 423 (CC)

⁶ *Ibid* para 26.

[10] *S v Zuma and Others* (“Zuma”)⁷ is of assistance on the nature of irregularities that render a trial unfair in a constitutionally impermissible manner, where Kentridge AJ held:

‘The right to a fair trial conferred by that provision [section 25(3)] is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. 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 27th April 1994. Since that date section 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.’

[11] In *S v Molim*⁸, Nkabinde J had this to say:

‘[T]he right to a fair trial . . . “has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.” . . . More importantly, proceedings in which

⁷ [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (1) SACR 568 (CC); 1995 (4) BCLR 401 (CC) para 16. [Kentridge AJ referred to s 25(3) of the interim Constitution, the predecessor of s 35(3) of the Constitution of the Republic of South Africa, 1996].

⁸ [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (2) SACR 76 (CC); 2008 (5) BCLR 451 (CC) para 42.

little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.'

- [12] In *Sanderson v Attorney-General, Eastern Cape*⁹ Kriegler J, referring to *Zuma (supra)*, again emphasised the significant break from the past and the need to conduct criminal trials in accordance with open-ended notions of basic fairness and justice, and stated that a narrow textual approach was likely to miss important features of the fair trial provision. He proceeded as follows:

'The central reason for my view . . . goes to the nature of the criminal justice system itself. In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial.'¹⁰

- [13] In *S v Dzukuda and Others; S v Tshilo*,¹¹ Ackermann J referred to the concept of substantive fairness mentioned in *Zuma* and said:

' . . . an accused's right to a fair trial under s 35(3) of the Constitution is a comprehensive right and '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'. Elements of this comprehensive right are specified in paras (a) to (o) of ss (3). The words "which include the right" preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a

⁹ [1997] ZACC 18; 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC) para 22.

¹⁰ *Ibid* para 23.

¹¹ [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC); 2000 (2) SACR 443 (CC) para 9.

comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified *elements* of the right to a fair trial, the specified elements being those detailed in ss (3).' (Footnotes omitted.)

[14] The Constitutional Court in *S v Van der Walt* ("*Van der Walt*")¹² stated that:

'An accused is not at liberty to demand the most favourable possible treatment under guise of the fair trial right. A court's assessment of fairness requires a substance-over-form approach. The State correctly submits that the question is accordingly whether the Regional Magistrate committed irregularities or deviated from the rules of procedure aimed at a fair trial, and, if so, whether they were of the kind to render the trial unfair.' (Footnotes omitted.)

[15] I next deal with the appellant's complaints in the light of the jurisprudence discussed.

Section 299A of the Act:

[16] After LB's father testified during the State's case, the trial court, pursuant to the provisions of s 299A of the Act, informed the complainant's father that he can participate in the parole proceedings if the appellant is convicted. The learned Magistrate stated:

'Now in terms of our law, Section 299 of the Act is now to be informed that if, and it all depends, hence it is a big if, the court were to convict the accused, the chances are that it is a direct imprisonment term, the kind of sentence that is to be imposed. Now in that process, the court takes into account that it does happen quite often at the correctional facility that the people who are serving their sentences at times are considered as being due for an earlier release on

¹² [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) para 23.

parole. Now in that instance you are too entitled as a complainant because the child is your child, and you are the adult. Here you have the right to participate in the consideration of that earlier release on parole. You can either be approving of that earlier release on parole or be opposed to that earlier release on parole. Of course, to exercise your right, you need to be notified by the investigating officer who will be in touch with the developments of the case. It is therefore of importance to make the point that should you change your address, maybe in the near future, you notify the investigating officer of the case as to what your latest address is, understand. Simultaneously, then an order is made to yourself, Mr. Sass, the prosecutor here, to make an endorsement in the diary of the docket to let the investigating officer know that indeed the court did explain the provisions to the complainant for an active participation, if this particular scenario pans out.'

[17] The legal representative on behalf of the appellant immediately took issue with the Magistrate's proceedings in terms of s 299A of the Act. The following exchange transpired between the appellant's legal representative and the trial court.

'Ms. Muller: Your Worship, with all due respect may I ask is this the normal procedure that a witness such as this is warned at this stage before a conviction?

Court: That is why I say if. It is a normal procedure because I have the duty of informing the complainant of their right of participation.

Ms. Muller: No, I am just worried because it created the impression now that he may end up in jail and that parole may not ... [intervenes]

Court: That is why I say if. Please now I said if, there is a big if. It all depends on the evidence and if there is a conviction and take into account the nature of the crime and the kind of sentences that are normally punishable in this instance.

Ms. Muller: Is it not more appropriate stage to speak to this witness in this way at the end, when a conviction is already there.

Court: Where will this witness be for me to speak with?

Ms. Muller: He is living in this town, Your Worship.

Court: No, I do not like it like that. I am sorry, Ms. Muller.

Ms. Muller: Okay.

Court: The court, if it needs to be again in future you have an issue please take me either on appeal or review in the matter.'

[18] Section 299A of the Act regulates the right of a complainant to make representations in certain matters with regard to placement on parole, on day parole, or under correctional supervision. It stipulates, in part:

'(1) When a court sentences a person to imprisonment for-

. . .

(d) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; . . .

it shall inform-

- (i) (the complainant; or
- (ii) in the case of murder or any other offence contemplated in paragraph (a), any immediate relative of the deceased, if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.'

[19] Mr. H Steynberg, on behalf of the appellant, submitted that s 299A is unambiguous as a court shall only inform the complainant of the provisions when a court convicts an accused and sentences the offender

to a term of direct imprisonment, and consequently, if the sentence is not a term of direct imprisonment, s 299A is not applicable.

[20] The first question for determination is whether the manner in which the trial court dealt with s 299A infringed on the appellant's right to a fair trial.

[21] I agree that a trial court bears the obligation, in respect of complainants or their relatives falling within the ambit of s 299A(1), to inform them of their rights under s 299A concerning the making of representations should the sentenced offender subsequently be considered for parole. It follows that s 299A must be invoked by the sentencing court; thus, a precondition for its invocation is that the trial court must first determine the guilt of the accused and impose a sentence of imprisonment for the specified offences contemplated in that section. In *S v Nxumalo*¹³, the Court made the following observation regarding s 299A of the Act:

'Section 299A . . . underlines the philosophy of restoring the rights of victims and clearly recognises that victims have the right to be informed of an offender's parole consideration. More importantly, they have the right to make representations with regard to an offender's parole decision. Despite this statutory recognition, these rights remain hollow and non-existent unless the prosecution service ensures that victims are present at court when an accused is sentenced to imprisonment on one of the categories of crime as per s 299A(1)(a) to (g).

The aforesaid section recognises formally that victims have fundamental rights that should be upheld throughout the criminal justice process. Courts are obliged to inform the victims of these categorised crimes of this right. As much as courts are compelled to inform victims of their right to make representations, the implementation of this section causes a practical problem, since presiding officers are not in control of the victims' details that testified before them. It is the office of the DPP that has such details and who should give meaning to the rights

¹³ (CCD6/2017) [2018] ZAKZDHC 48 (22 October 2018) para 4 – 6.

of the victims listed in s 299A and who has a duty to develop a policy that gives effect to the legislation. . . .

In this matter, the sentencing of the accused was delayed because no arrangement was made by the State to have the victims present at the sentencing phase. Both the victims were present at the next date of sentencing and have been informed of their s 299A rights.'

[22] It is further clear from the foregoing that it is only when a sentence of direct imprisonment is the *only* appropriate sentence, that the sentencing court must inform the complainant or his or her relatives (the "victims") of their rights in terms of s 299A of the Act. It is apposite, for purposes of the present appeal, to mention that the offence of sexual assault the appellant stood accused of, does not carry a prescribed minimum sentence of direct imprisonment.

[23] I, however, align myself with the dicta in *Van der Walt* that a court's assessment of fairness requires a substance-over-form approach. In view of the trial court's caveat that s 299A would be applicable only if the appellant is found guilty; and sentenced to direct imprisonment, I find that the irregularity or deviation from s 299A was not of such an import to render the trial unfair. (My emphasis underlined.)

Unilateral remand of the appellant in custody whilst he was on bail:

[24] The appellant's second qualm is that the unilateral cancellation of his bail amounted to an unfair trial.

[25] It is prudent to include the complete relevant part of the record pertaining to the cancellation of the appellant's bail herein, to place the matter into perspective. According to the record, on 11 May 2023, after the appellant's wife gave evidence, the following transpired:

'Ms Muller: Your Worship, during the break between 2 and half past 2, the accused informed me that he is shivering and he is in a state of shock, and he is in no way able to give evidence. I do not know, I spoke to him regarding the fact that if we can postpone until tomorrow maybe, if he feels better, at that stage, but at this stage, he says to me he does not want to go on and he has asked me to close his case.

Court: I must ask you Mr October, stand up sir, Do you confirm these submissions made?

Accused: Yes.

Court: So this is the defence case?

Ms Muller: Correct, your Worship.'

[26] The matter was briefly stood down to enable the prosecution and the defence to prepare their closing arguments. On resumption, the following occurred:

'Ms Muller: Before the adjournment, the accused indicated that he is no state to give evidence and that he rather wishes to close his case. Just thereafter, he called me again and said to me, if it is possible for the case to be postponed until tomorrow, he will then elect to give evidence....My submission is, your Worship, that of the Court could grant us this postponement until tomorrow, in order for him to try and recoup himself and get into a state where he can give evidence properly, because he is shivering as he is standing there. I spoke to him personally, I saw him shivering. He is in no state at this stage. So, all that I can say is, I do not have medical evidence to confirm that, I can just say what I saw and what he told me.

Prosecutor: Your worship, the State or my worry is, on the previous appearance, if the Court can recall, after the State closed its case,

it was also postponed because the accused was not feeling well and shivering.... We cannot postpone the case each and every time because he is not well to proceed.

Ms Muller: Your Worship, it was not himself, it was his child that was sick, that he had to take to hospital.'

[27] The matter was postponed until 12 May 2023, but the trial court, without an application by the prosecution, ordered that the appellant should be detained overnight; and taken to the district surgeon for a medical examination and treatment; and an assessment to determine whether he is fit to stand trial the following day.

[28] During her ruling, the trial court *inter alia* made the following remarks:
'Now if again the Court were to listen to the accused who is seriously coming across as one, nervous or sickly or having some issues at home, such that the Court must give way for him, this is problematic.' (My emphasis underlined.)

and

'Because tomorrow, I do not know if again, he is not going to say he is tired or he is not in a mood to testify. Now one of the fairness of the criminal proceedings under section 35 of the Constitution, I doubt if it is about the mood or the feelings of the accused.' (My emphasis underlined.)

and

'Date of tomorrow is 12 May 2023 for the defence case maybe, I am not sure. It shall all depend on the accused, because whimsically he decides in whatever way, but I respect whatever the case may be.' (My emphasis underlined.)

[29] Section 68(1) of the Act regulates the circumstances and conditions for the cancellation of bail in the following manner:

'Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that-

- (a) the accused is about to evade justice or is about to abscond in order to evade justice;
- (b) the accused has interfered or threatened or attempted to interfere with witnesses;
- (c) the accused has defeated or attempted to defeat the ends of justice;

(cA) the accused has contravened any prohibition, condition, obligation or order imposed in terms of-

- (i) section 7 of the Domestic Violence Act, 1998;
- (ii) section 10(1) and (2) of the Protection from Harassment Act, 2011;or
- (iii) an order in terms of any other law,

that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;

- (d) the accused poses a threat to the safety of the public, a person against whom the offence in question was allegedly committed, or any other particular person;
- (e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;

(eA) the accused has not disclosed that-

- (i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;

- (ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or
- (iii) an order in terms of any other law,

was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force;

(eB) the accused has not disclosed or correctly disclosed that he or she is or was, at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;

(f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or

(g) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.’

[30] Our Constitution jealously safeguards an accused person’s rights to personal freedom. The object of bail is aptly expressed by the Court in the matter of the *President of the Republic of South Africa v Zuma and Others*:¹⁴

‘Is there any material harm? It was argued that the harm of appearing in a criminal court on 19 January was not material. This contention misses the point. The harm lies not in the temporary inconvenience of physically attending a hearing, if only for a formal postponement. The critical harm concerns a fundamental constitutionally guaranteed right to personal freedom. That value, which is foundational to our constitutional order, may never be treated lightly. Our

¹⁴ 2023 (1) SACR 610 (GJ) para 17.

history instructs us that it is a matter of pride that South Africans value and assert their freedom above all other considerations in the face of whatever adversity they chance upon. Our law must guard that right and its exercise unreservedly.'
(My emphasis underlined.)

[31] The *onus* is upon the State to satisfy the court on a balance of probabilities that there are sufficient grounds for the cancellation of bail in terms of s 68 of the Act.¹⁵

[32] I am guided by the judgment of *Matitwane v Regional Court President and Another*¹⁶ where the High Court, in a review application on similar facts, set aside the regional court magistrate's unilateral cancellation of the bail, and confirmed that:

'It is apparent that the cancellation of the bail of the applicant was not in line with the provisions of section 68(1) of the CPA. There was no application that was brought before the court and no evidence under oath was led which justified the cancellation of bail. The presiding regional magistrate acted wholly *mero motu* without being authorised by any legislation to take the step in the manner in which she did. It is trite law that a magistrates' court is a creature of statute and, in the absence of an enabling statute, the actions of the presiding regional magistrate were grossly irregular.'¹⁷

[33] In my view: (a) the absence of an application by the prosecution to have the appellant's bail cancelled; and (b) the fact that no evidence was led under oath to establish any of the jurisdictional circumstances set out in s 68(1) to justify the cancellation of the appellant's bail; is of such an import that it violated the appellant's constitutional right to freedom, which renders the appellant's trial unfair.

¹⁵ *S v Nqumashe* 2001 (2) SACR 310 (NC) para 17.

¹⁶ [2017] ZANWHC 71; [2018] JOL 39670 (NWM); [also reported as *S v Matitwane* 2018 (1) SACR 209 (NWM)].

¹⁷ *Ibid* para 12.

The appellant's application for recusal:

[34] Despite my findings in paragraph 33, I deem it necessary to briefly deal with the application for the recusal of the magistrate.

[35] According to the appellant's written application, any reasonable person in his position would have a suspicion that the magistrate might be biased and impartial. The grounds in terms of which the recusal was sought are twofold: (a) the magistrate's incorrect application of s 299A of the Act, and thereby creating the impression that the appellant had already been found guilty; and (b) the irregularity with regard to s 68(1) of the Act.

[36] The appellant submitted under oath that:

36.1 He has always adhered to his bail conditions;

36.2 He would have attended to the medical clinic on his own accord to receive treatment to calm himself down;

36.3 He was not allowed to fetch warm clothes from his house, despite the horrific cold weather conditions;

36.4 Whilst being examined by the district surgeon, he was subjected to a humiliating drug test, which had a negative result;

36.5 He does not suffer from any mental or psychiatric condition;

36.6 He was kept in a cell with criminals; and he feared for his life; and

36.7 At 13h00 on 12 May 2023, Ms. Muller placed it on record that he is still in custody and had not received anything to eat.

[37] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁸, (“SARFU”), the Constitutional Court dealt with an application for the judges of the court to recuse themselves, on the basis of a reasonable apprehension that they would be biased against the applicant. The Court found that a Judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such a judge may be biased, acts in a manner inconsistent with s 34 of the Constitution and in breach of the requirements of s 165(2) and the prescribed oath of office.¹⁹ The test for recusal on the ground of perceived bias was ‘apprehension of bias’ rather than ‘suspicion of bias’.²⁰ As to the nature of the judicial office, the Court mentioned that, in applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes; and concluded as follows:

‘The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of Judges’ impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased.’²¹

[38] As to the undeniable importance of perceptions of independence, the Constitutional Court stated the following in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*:²²

‘That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The

¹⁸ 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC).

¹⁹ *Ibid* para 30.

²⁰ *Ibid* para 38.

²¹ *Ibid* para 41.

²² 2002 (8) BCLR 810 (CC); 2002 (5) SA 246 (CC); 2002 (2) SACR 222 (CC) paras 32 – 33; see also *De Lange v Smuts NO and Others* (1998) (3) SA 785 (CC); 1998 (7) BCLR 779 para 69.

reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen*²³ where Le Dain J held that:

“Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.”

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.

When considering the issue of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack of impartiality:

“the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal . . . that test is ‘what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude’.”

This test was approved by the Court in *Valente* as being appropriate for independence as well as impartiality. It is also similar to the test adopted by this Court in [SARFU]...

- [39] Further, the Constitutional Court in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*²⁴ emphasised the second aspect of the test, stating that:

²³ (1986) 24 DLR (4th) 161 (SCC) at 172.

²⁴ [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) para 13.

'The second in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality - a distinction the *SARFU* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, "a mind open to persuasion by the evidence and the submissions of counsel"; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.'

[40] In my view, the trial court's unilateral cancellation of the appellant's bail creates a reasonable apprehension of bias. Furthermore, it is clear from the record, and Ms. Muller argued, that the trial court did not grant her an opportunity to address the court before the bail was cancelled. This decision was clearly biased because the *audi alteram partem* rule was not adhered to. Further, the premature invocation of s 299A, despite the Magistrate's emphasis on 'if' and my finding that it does not of itself render the trial unfair, does, however, create an impression that the Magistrate did not have an open mind to the appellant's case. This becomes apparent when the evidence in the record is viewed holistically wherein the trial court, during the recusal application, acted in a derogatory way thus bolstering the perception of a closed mindset towards the submissions of the appellant's legal representative by *inter alia*:

40.1 Persisting that there is no law that a trial court should only proceed with s 299A after sentencing an accused to direct imprisonment, remarking that it is merely the appellant's legal representative's understanding of the section and stating; 'And now what about also very same rights of the people concerned to have that explanation be it heard in court and explained by the same court' (*sic*);

40.2 Blindly defending the cancellation of bail on the assumption that the appellant would not have been able to stay in Calvinia to attend to a medical appointment at the clinic on his own; and

40.3 By laughing whilst being addressed by the appellant's legal representative.

[41] I am persuaded that the failure of the regional magistrate not to recuse herself resulted in a failure of justice as it vitiated the trial.

[42] In the circumstances, the applicant's conviction must be set aside. The concomitant effect of this is that the sentence must also fall away. The appellant's conviction is not set aside on the merits. It is set aside on the basis that the trial court committed irregularities whose nature was such that the applicant's right to a fair trial was infringed.

[43] Section 322(1)(c) of the Act provides that '[i]n the case of an appeal against a conviction or of any question of law reserved, the court of appeal may . . . make such other order as justice may require: provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.' In *S v Balatseng*,²⁵ Mogoeng JP held that the power of a court of appeal to order a trial *de novo* in terms of s 322(1)(c) of the Act, without an agreement between the parties, is open to doubt.

[44] Because the conviction is not set aside on the merits, justice requires that the matter be referred to the Director of Public Prosecutions, Northern

²⁵ 2005 (2) SACR 28 (B) para 22.

Cape, to decide whether the appellant should be re-arraigned. In the event that the applicant is re-arraigned, the ensuing trial must be before a different Regional Magistrate.

[45] In the result, the following order is made:

1. The appeal is upheld.
2. The order of the Regional Court, Sutherland, is set aside and replaced with the following:
 - 2.1 The appeal against the conviction is upheld and, as a consequence, the conviction and sentence are set aside.
3. The matter is referred to the Director of Public Prosecutions, Northern Cape, to decide whether the appellant should be re-arraigned.
4. In the event that the appellant is re-arraigned, the trial must be before a different Regional Magistrate.

STANTON J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur

TYUTHUZA AJ
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

On behalf of the appellant:

Adv H Steynberg

On instructions of:

Legal Aid SA

On behalf of the respondent:

Adv S Smith

On instructions of:

The NDPP