CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 21/04

SHANE JAIPAL Applicant

versus

THE STATE Respondent

Heard on : 16 November 2004

Decided on : 18 February 2005

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction

[1] This application for leave to appeal against a decision of the Supreme Court of Appeal (the SCA) deals with the constitutional right of an accused person to a fair trial. It poses the question whether the presence in an office, occupied by the assessors, of the state advocate on a daily basis, the investigating officer from time to time, and a state witness occasionally, where they were seen by members of the public, renders criminal trial proceedings irregular to the extent that a conviction and

sentence must be set aside.[1] It does so against the background of practical difficulties such as case backlogs and insufficient facilities in criminal courts.

The facts and the proceedings in the High Court

[2] In the early afternoon of 21 October 1997 Mrs Argentina Pento Loutsaris, a 39 year old widow, was brutally attacked in Island View Road in the suburb of Bluff in Durban. Petrol was poured over her and she was set alight. She died shortly afterwards. The state charged the applicant in this matter, 42 year old Mr Shane Jaipal, with murder.

[3] The trial took place in the Durban High Court (the High Court) before Squires J and two assessors. Because of a shortage of accommodation in the High Court building, facilities were made available in the Pinetown Magistrate's Court.

[4] The trial commenced on Monday 12 June 2000. The applicant, as the accused, was legally represented and pleaded not guilty to the charge. His defence was that of an alibi: At the time of the attack he was at the University of Transkei in Umtata. The state called 15 witnesses, including the son of the deceased, and closed its case on Thursday 15 June. When the defence case was due to start, counsel for the applicant requested a postponement until Monday 19 June. On 19 June the applicant and another six defence witnesses testified. Two of these, Ms Sethuntsa and Mr Panday, gave evidence in support of the applicant's alibi. Mr Panday's evidence was based on

[1] The application is based on a special entry, the wording of which appears in para 13 below.

Telkom records of telephone calls. The evidence of the two witnesses took the state by surprise. An application to reopen the state's case in order to lead evidence in rebuttal was granted. On 23 June 2000 Mr Grobbelaar, a Telkom employee, testified and produced a document which destroyed Mr Panday's evidence. The proceedings were adjourned to Tuesday 27 June 2000.

[5] On 27 June − the eighth day of the trial − counsel for the applicant applied for a special entry to be made in terms of section 317 of the Criminal Procedure Act 51 of 1977. He submitted that the proceedings had been irregular and not according to law, because the two assessors had been sharing an office with the prosecutor, the investigating officer, and the son of the deceased, during adjournments and recesses, including in the mornings before the court started as well as tea times. He added that the deceased's son was the state's most important witness. According to counsel, it did not bother him because he knew "how things work now and then on circuit", but he had been approached on many occasions by members of the public who, because they had observed what had been happening, were very concerned and did not "understand how the law works". These included family members and friends of the applicant. Eventually counsel was approached by his client, who instructed him to bring the application. He stressed that he was not submitting that the assessors actually discussed the case with any of the other people in the office.

[6] The prosecutor informed the court that he did not have an office of his own and that the office occupied by the assessors was the only one from where he could make

telephone calls. He had called state witnesses to make practical arrangements, but had not discussed the case with them in the presence of the assessors. He submitted that the situation was unfortunate, and that a prosecutor in "a case of this magnitude" needed an office of his own, with a telephone. It was an exaggeration to say that he had been seen in the same office as the assessors, the investigating officer and the deceased's son every day. The investigating officer accompanied him, because he was in possession of the telephone numbers of witnesses. The deceased's son might occasionally have stepped into the office after he had testified. He submitted that the application was frivolous and an abuse of the procedure of the court.

[7] The judge asked counsel for the applicant whether he wanted to apply for the recusal of the assessors. Counsel assured the court that he was not applying for their recusal.

[8] The judge indicated that he needed time to consult with the assessors and reserved his decision. He allowed the prosecutor to continue to lead evidence in rebuttal of the alibi evidence. This evidence rebutted the evidence of Ms Sethuntsa and the evidence of Mr Panday. The court thereafter recalled several witnesses. The proceedings were adjourned to Durban for judgment, which was delivered on 25 July 2000.

[9] For the determination of this matter it is not necessary to deal with the High Court's detailed analysis of all the evidence and legal arguments. The High Court

concluded that it was overwhelmingly clear that Mr Panday had falsified the purported Telkom document on which his evidence was based. It furthermore found that Ms Sethuntsa's evidence did not support the alibi as to the specific day of the attack. The circumstantial evidence presented established beyond a reasonable doubt that it was the applicant who had attacked the deceased. The High Court found the applicant guilty as charged and subsequently sentenced him to 20 years imprisonment.

[10] The applicant then applied for leave to appeal to the SCA and at the same time for the special entry to be made. Leave to appeal was granted by the High Court and the special entry was noted as sought. Regarding the special entry, the shortage of accommodation in the Durban High Court and Pinetown Magistrate's Court buildings was mentioned by the judge in his unreported judgment. Whereas there was office space available for assessors (in what was essentially the office of the judge's registrar, shared by the recording apparatus operator and on one occasion by a defence witness), the absence of office space for the prosecutor was the real problem. He had nowhere to leave his documents and bags and to make telephone calls.

[11] The judge stated that it was not alleged, and indeed specifically disavowed, that anything had been said by the assessors to the prosecutor or vice versa about any aspect of the trial during those moments of "enforced proximity". During the visits the assessors would merely continue with whatever they were privately doing and take no interest in or notice of the intrusion.

[12] The judge concluded as follows:

> "While the situation was not desirable, it seems to have been really unavoidable. There was simply insufficient space for what is ideally desirable. And it was the same in an earlier sitting of the High Court in the same court in May and will be the same for the foreseeable future until the present backlog of awaiting trial prisoners is reduced.
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> But to the public, who might not realise the reason for a representative of the prosecution being in the same small room as members of the Court, it could be thought that there was some possible connection or control on the part of the assessors with the State. Although I have no doubt whatever that it had no such effect, I do not think it can be said that the application is frivolous and therefore the special entry will be made as requested."

[13] The contents of the special entry represent the factual basis on which this matter has to be determined. The special entry reads as follows:

> "That the proceedings in the trial of the accused are irregular and not according to law, in that the State Advocate, on a daily basis, the investigating officer with him from time to time and one of the State witnesses with both of them on isolated occasions, had been present in the same office accommodation being used by the assessors, both before the commencement of court proceedings and/or during court recesses or adjournments, and were so seen by members of the public attending the trial."

[14] Bail was granted to the applicant, pending the appeal, and the operation of the sentence was conditionally suspended. The High Court took the special entry into account in this decision.

The SCA

[15] In considering the special entry and the possibility of bias, the SCA stressed the importance of the judgment of this Court in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*.[2] In that case it is stated that the perception that is relevant is a perception based on a balanced view of all the material information. The SCA concluded as follows in its unreported judgment:

> "[12] . . . In the instant case the material information on which public perceptions would be based would include the statements made by counsel for the appellant and the State Advocate when the application for the special entry was originally applied for. A thoughtful and objective observer, informed that no discussion about the case in fact took place between the assessors and the State Advocate, the investigating officer and the deceased's son and that their presence in the office used by the assessors was due simply to the need for certain telephone calls to be made to State witnesses, without anything being said about the case itself, would, I am satisfied, not lose confidence in the legal system and in particular its functioning in the case in which the appellant was being prosecuted.
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> [13] This approach to the matter renders it unnecessary for me to decide whether, if the statements to which I have referred had not been made in open court when the special entry was originally applied for, it was open to the appellant to persist in his application for the special entry after he had been convicted when he had through his representative specifically declined to ask for the recusal of the assessors after he became aware of the facts giving rise thereto. In this respect the facts of this case differ from all the cases where irregularities which formed the subject of special entries were complained of on appeal and where the irregularities in question were only discovered after conviction. It is also unnecessary to consider whether on the facts of this case the special entry was correctly made or what the position would be if, although the public were not informed of the true facts underlying the alleged irregularity, the appellant is to be regarded as having waived his right to rely thereon.

[2] 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC). See para 43 below for a quotation from this judgment.

> [14] In all the circumstances I am satisfied that the appeal based on the alleged irregularity set forth in the special entry must fail."

[16] As to the merits, the SCA analyzed the evidence and the High Court's findings and concluded that the proven facts lead to only one reasonable inference, namely that it was the applicant who had poured petrol over the deceased and set her alight. The appeal based on the merits was therefore also dismissed.

[17] The applicant then applied to this Court for leave to appeal against the decision of the SCA on the special entry only. The respondent opposed the application. The same two counsel who appeared in the criminal trial and who argued the appeal in the SCA represented the parties in this Court.

Parties' submissions; the law; the questions to be answered

[18] According to the applicant, his right to a fair trial, which is guaranteed in section 35(3)[3] of the Constitution, was violated by the alleged irregularity.

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[3] S 35(3) states:

> "Every accused person has a right to a fair trial, which includes the right—
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> (a) to be informed of the charge with sufficient detail to answer it;
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> (b) to have adequate time and facilities to prepare a defence;
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> (c) to a public trial before an ordinary court;
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> (d) to have their trial begin and conclude without unreasonable delay;
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> (e) to be present when being tried;
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> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

[19] Several sections of the Criminal Procedure Act deal with irregularities. Section 317[4] provides for a special entry of an irregularity or illegality. Section 318 states that if a special entry is made on the record, the person convicted may appeal against the

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(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court."

[4] S 317 states:

"(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court; and

(2) . . .

(3) . . .

(4) The terms of a special entry shall be settled by the court which or the judge who grants the application for a special entry.

(5) . . . ."

conviction on the ground of the irregularity stated in the special entry. Section 322 then deals with the consequences on appeal of an irregularity. A court of appeal may allow the appeal if it thinks that the judgment of the trial court should be set aside.[5] When criminal proceedings are set aside because of an irregularity, the question arises whether the accused can be tried again on the same facts. The possible institution of new proceedings when a conviction is set aside is dealt with in section 324.[6]

[20] The participation of assessors in criminal trials is provided for in section 145.[7] Section 146[8] deals with the reasons for the decisions of a court, and section 147 deals with the death or incapacity of an assessor, which is not relevant here.

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[5] S 322(1) states:

> "In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may—
> (a) 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; or
> (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
> (c) 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."

[6] S 324 states:

> "Whenever a conviction and sentence are set aside by the court of appeal on the ground—
> (a) that the court which convicted the accused was not competent to do so; or
> (b) that the indictment on which the accused was convicted was invalid or defective in any respect; or
> (c) that there has been any other technical irregularity or defect in the procedure,
> proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings."

[7] S 145 states:

[21] Before this Court it was submitted on behalf of the applicant that he did not have a fair trial, because the irregularity referred to in the special entry was of such a nature that it amounted without more to a failure of justice. Counsel for the applicant

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"(1)(a) Except as provided in section 148, an accused arraigned before a superior court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.
(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.
(2) Where an attorney-general arraigns an accused before a superior court—
(a) for trial and the accused pleads not guilty; or
(b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge,
the presiding judge may summon not more than two assessors to assist him at the trial.
(3) No assessor shall hear any evidence unless he first takes an oath or, as the case may be, makes an affirmation, administered by the presiding judge, that he will, on the evidence placed before him, give a true verdict upon the issues to be tried.
(4) An assessor who takes an oath or makes an affirmation under subsection (3) shall be a member of the court: Provided that—
(a) subject to the provisions of paragraphs (b) and (c) of this proviso and of section 217 (3) (b), the decision or finding of the majority of the members of the court upon any question of fact or upon the question referred to in the said paragraph (b) shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court;
(b) if the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he may for this purpose sit alone;
(c) the presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he may for this purpose sit alone.
(5) If an assessor is not in the full-time employment of the State, he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor."

[8] S 146 states:

"A judge presiding at a criminal trial in a superior court shall—
(a) where he decides any question of law, including any question under paragraph (c) of the proviso to section 145 (4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision;
(b) whether he sits with or without assessors, give the reasons for the decision or finding of the court upon any question of fact;
(c) where he sits with assessors, give the reasons for the decision or finding of the court upon the question referred to in paragraph (b) of the proviso to section 145 (4);
(d) where he sits with assessors and there is a difference of opinion upon any question of fact or upon the question referred to in paragraph (b) of the proviso to section 145 (4), give the reasons for the decision or finding of the member of the court who is in the minority or, where the presiding judge sits with only one assessor, of such an assessor."

contended that the fact of assessors sharing office space with the prosecutor and others is as gravely irregular as the closeting of jury members in a room where a deputy sheriff was present in *S v Moodie*.[9] Therefore the proceedings should be set aside, before the issue of proof beyond a reasonable doubt is even reached and the applicant could be tried anew. It was furthermore argued that criminal trials are held in public and that justice must not only be done, but be seen to be done. It must be manifest to all those interested in a trial − and in particular to the accused and his or her family and friends − that the relevant judicial officers conduct the trial fairly, impartially and with open minds. The appearance of bias may vitiate a trial wholly or in part. Appearances and perceptions are relevant, because the public need to have confidence in the impartiality, fairness and independence of courts.

[22] Counsel for the applicant agreed that there was no indication on the record that any discussion of aspects of the case took place between the assessors and any of the persons using the office. He also made it clear that the integrity of the assessors was not being questioned. He furthermore agreed that the question whether a failure of justice occurred and whether the applicant had a fair trial should be judged at the end of the proceedings, in view of all the evidence and the reasoned judgment of the court. To this he added that the findings of the High Court and the SCA on the analysis of the evidence could not be criticized.

[9] 1961 (4) SA 752 (A). This matter is discussed below in para 45.

[23] Counsel for the state argued that the appeal related only to the evaluation of the facts by the SCA and did not raise a constitutional issue. He also submitted that the application for leave to appeal had no prospects of success and ought to be refused. By not applying for the recusal of the assessors, the applicant either accepted that a failure of justice did not occur, or waived his rights in that regard. In his oral submissions to this Court counsel for the state conceded that the situation was not ideal and could have been handled differently, but persisted that it was clear to everyone that nothing improper happened. Should the proceedings be set aside, it might be very difficult if not impossible to have a new trial, in view of the long time that has lapsed and the large number of witnesses involved.

[24] The following questions thus have to be dealt with: (1) Does the application deal with a constitutional issue? (2) Did an irregularity occur in the High Court proceedings? (3) If so, did it result in a failure of justice and render the trial unfair and should the conviction and sentence therefore be set aside? (4) In the event of this being the case, could the applicant be charged again on the same facts? In order to answer these questions, the meaning of the guarantee of a fair trial in section 35(3) of the Constitution has to be analyzed, as also the contents of the provisions of the Criminal Procedure Act regarding irregularities and appeals, and then applied to the facts of this matter. The role of assessors is particularly relevant. The explanation given as to the practical difficulties with accommodation also requires attention.

A constitutional matter?

[25] The applicant is not simply seeking to attack the factual findings of the SCA, as argued by the state. He avers that the appearance of bias or lack of impartiality on the part of the assessors as members of the trial court resulted in a failure of justice and the violation of his right to a fair trial. Questions about bias, the apprehension of bias, a lack of impartiality and the recusal of judicial officers are constitutional matters.[10] This application deals with a constitutional matter.

The right to a fair trial

[26] Section 35(3) of the Constitution states that every accused person has a right to a fair trial.[11] The basic requirement that a trial must be fair is central to any civilized 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,[12] and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness.[13] The importance and universality of the right to a fair trial is evident from the fact that it is recognized in key international human rights instruments.[14]

[10] See *S v Basson* 2004 (6) BCLR 620 (CC) at paras 18-24 and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 30. This application is distinguishable from *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[11] See n 3 above for the wording of s 35(3).

[12] See ss 10 and 11 of the Constitution.

[13] See s 1 of the Constitution.

[14] See article 10 of the Universal Declaration of Human Rights, article 14(1) of the International Covenant on Civil and Political Rights, article 6(1) of the European Convention for the Protection of Human Rights and article 7(1) of the African Charter on Human and Peoples' Rights.

[27] Section 35(3) mentions 15 aspects of the right to a fair trial. The role of assessors, or contact between members of a court and members of the prosecution, police or public is not expressly mentioned, but the list is not exhaustive. In one of its early judgments, this Court expressed itself as follows in the words of Kentridge AJ in *S v Zuma and Others*[15]

> "The right to a fair trial conferred by [section 25(3)] is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire
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> > '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'.
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> A Court of appeal, it was said (at 377),
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> > '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".'
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> That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

[15] 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16. Kentridge AJ referred to s 25(3) of the interim Constitution, the predecessor of s 35(3).

[28] In *Sanderson v Attorney-General Eastern Cape*[16] Kriegler J, referring to *Zuma*, again emphasized 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."[17]

In *S v Dzukuda and Others; S v Tshilo*[18] Ackerman AJ referred to the concept of substantive fairness mentioned in *Zuma* and said:

> "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 subrights, some of which have been specified in the subsection and others not. The right to a fair trial is a 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)

He continued:

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[16] 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 22.

[17] Id at para 23.

[18] 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 9.

> "At the heart of the right to a fair criminal trial and what infuses its purpose is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused."[19] (footnotes omitted)

[29] The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. It 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.

[30] In the context of the irregularity alleged to have occurred in this case, the right to a fair trial must be understood in conjunction with the constitutional imperatives that the courts are independent and that they must apply the law impartially and without fear, favour or prejudice,[20] that no person or organ of state may interfere with the functioning of the courts,[21] and that organs of state must assist the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[22]

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[19] Id at para 11. In *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC) at para 9 Yacoob J also stated that "the purpose of s 35(3), read as a whole, is to minimise the risk of wrong convictions and the consequent failure of justice".

[20] S 165(2) of the Constitution.

[21] S 165(3).

[22] S 165(4).

[31] The fairness of a trial is threatened if a court is not independent, does not apply the law impartially, or does not function free from interference. Inappropriate contact by a judicial officer with any of the parties in a trial, or with witnesses, outside the formal court proceedings and especially in the absence of the parties on the other side, cannot be conducive to the fairness of the trial. The principle that justice must not only be done but also be seen to be done is well known, and has been recognized by this Court as at the heart of a fair criminal trial.[23]

The Criminal Procedure Act

[32] The Criminal Procedure 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.[24] Because criminal proceedings are aimed at ensuring a fair trial, section 35(3) of the Constitution is of primary importance when interpreting the Criminal Procedure Act. [25]

Assessors

[23] See the quotation from *S v Dzukuda* in para 28 above.

[24] S 39(2) of the Constitution states:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[25] De Waal and others *The Bill of Rights Handbook* 4 ed (Juta & Co, Landsdowne 2003) at 585 point out that s 35(3) entrenches basic norms of criminal procedure, but does not replace ordinary rules and principles of criminal procedure. Statutory and common law rules of criminal procedure apply, but must comply with the Constitution.

[33] In terms of section 145 a judge in the High Court may hear a case with one or two assessors.[26] The assessors have to be people who, in the opinion of the judge, have experience in the administration of justice or skill in any matter which may be considered at the trial.[27] Before an assessor hears any evidence, he or she has to take an oath or make an affirmation, administered by the judge, to give a true verdict upon the issues to be tried, on the evidence placed before him or her.[28]

[34] An assessor is a member of the court. When a judge hears a matter with two assessors, the decision or finding of the majority of the court on factual issues is the decision or finding of the court. Two assessors may thus overrule the judge on factual questions. When only one assessor sits with the judge, the decision of the judge is the decision of the court in the event of a difference of opinion. The judge alone decides questions of law, or any question as to whether a matter constitutes a question of law or of fact.[29]

[35] The judge must give reasons for the decision or finding of the court, whether he or she sits with or without assessors. In the event of a difference of opinion, the judge must also give the reasons of the member of the court who is in the minority, or of the assessor if the judge sits with only one assessor.[30]

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[26] S 145 of the Criminal Procedure Act is quoted in n 7 above.

[27] S 145(1)(b).

[28] S 145(3).

[29] S 145(4).

[30] S 146(b) and (c).

[36] The importance of the role of assessors lies not only in their participation in judicial decision making based on their experience in the administration of justice or their skills in specific matters which may have to be considered at the trial. The participation of assessors in criminal trials allows for the involvement in the court system of persons other than judges. Assessors do not have to be magistrates or even lawyers. They may be lay persons, as long as they have the required experience and skills, at least in the opinion of the judge. In principle assessors, if chosen carefully, could represent a significant degree of community involvement in the judicial process.[31]

[37] As members of the court, assessors have to be as impartial as the judge. Bias on the part of assessors, or interference with them in the performance of their judicial functions, will be irregular.

Irregularities

[38] Section 317[32] provides that an accused who thinks that any of the proceedings in connection with or during a trial are irregular or not according to law, may apply for a special entry to be made on the record by the presiding judge, especially in a case

[31] See for example Richings "Assessors in South African Criminal Trials" 1976 *Criminal Law Review* 107; Van Zyl Smit & Isakow "Assessors and criminal justice" 1985 *SA Journal on Human Rights* 218; Bekker "Assessore in Suid-Afrikaanse Strafsake" in Strauss (ed) *Huldingingsbundel vir W A Joubert* (Butterworths, Durban 1988) at 32; Van Zyl Smit "The compulsory appointment of assessors" 1979 *SA Law Journal* 173; Van Zyl Smit "The compulsory appointment of assessors reassessed" 1984 *SA Law Journal* 212. The participation of assessors in criminal trials was sometimes debated within the context of calls for the re-introduction of the jury system in South Africa in debates preceding the constitutional drafting process. See for example Rood "A return to the jury system?" October 1990 *De Rebus* 749.

[32] See n 4 above for the wording of s 317.

where the alleged irregularity does not otherwise appear in the record.[33] In practice the terms "irregular" and "not according to law" have been regarded as synonymous.[34] Courts have ruled that an irregularity is an irregular or wrongful deviation from the formalities and rules of procedure aimed at ensuring a fair trial.[35]

[39] The alleged irregularity stated in the special entry is a ground of appeal, which has to be dealt with by the relevant court of appeal. In terms of section 322(1)[36] the 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 had 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 contemplated by the section and any conviction will have to be set aside. Whether a new trial may be commenced against the accused will also require a constitutional assessment of whether that would be a breach of the right to a fair trial or not. The meaning of the

[33] See for example *S v Xaba* 1983 (3) SA 717 (A) at 728D, *S v Alexander and Others* (1) 1965 (2) SA 796 (A) at 809C-D and *S v Pretorius en 'n Ander* 1991 (2) SACR 601 (A), as well as the discussion by Kriegler and Kruger *Hiemstra Suid-Afrikaanse Strafproses* 6 ed (Butterworths, Durban 2002) at 887 and onwards and Du Toit and others *Commentary on the Criminal Procedure Act* (Juta, Cape Town 1997) at 31−15 and onwards.

[34] Kriegler and Kruger Id at 888.

[35] *The State v Mofokeng* 1962 (3) SA 551 (A) at 557; *S v Cooper and Others* 1977 (3) SA 475 (T) at 476B-C; *S v Ramovha en 'n Ander* 1986 (1) SA 790 (A) at 795H; *Sefatsa and Others v Attorney-General, Transvaal, and Another* 1988 (4) SA 297 (T).

[36] See n 5 above.

concept of a failure of justice in section 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial.

Bias and recusal

[40] The importance of the impartiality of assessors has always been recognized by our courts.[37] In *R v Solomons*[38] the fact that information detrimental to the accused, which had not been presented in evidence, had been communicated to assessors was found to be irregular. It was decided that in such a case the verdict had to be set aside, unless the court was satisfied that no failure of justice had in fact occurred. The conviction and sentence were indeed set aside. Earlier in *R v Mabaso*,[39] which was cited with approval in *Solomons*, it was decided that assessors who had access to inadmissible evidence should retire from the court.[40] In *R v Matsego and Others*[41] it was held that an assessor should retire from a case as soon as it is proved that he has been given information which has not been presented in evidence and which is detrimental to the accused. Influencing an assessor outside the formal proceedings of a trial could thus indeed be an irregularity resulting in a failure of justice.

[37] See Du Toit and others n 33 above at 31−18E.

[38] 1959 (2) SA 352 (A).

[39] 1952 (3) SA 521 (A).

[40] The case was decided under the old Criminal Procedure Act 31 of 1917. Decisions on the admissibility of evidence had to be decided by the judge alone.

[41] 1956 (3) SA 411 (A) at 418A-B.

[41] As stated above, the applicant in this matter relies on the negative perception created by the events involving the assessors. In *S v Roberts*[42] it was held that a discussion between the magistrate and a prosecutor in the absence of the accused's counsel, after the accused had been convicted and the court had adjourned, was irregular. If the discussion occurred before conviction, there could be no question but that the conviction would be fatally irregular; as it happened the sentence was in this case set aside. Howie JA stated that it was settled law that not only actual bias disqualifies a judicial officer from presiding or continuing to preside over judicial proceedings. He furthermore stated as follows:

> "In what is seen to be done, appearances play a varied role in the fulfilment of the need for fairness. The appearance of justice is not enough. Justice must not simply seem to be done. On the other hand the appearance of bias may be enough to vitiate the trial in whole or in part.
>
> That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other: *R v Maharaj* 1960 (4) SA 256 (N) at 258B-C. That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more, the setting aside of the sentence."

[42] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[43] this Court dealt with an application for judges of the Court to recuse themselves, on the basis of a reasonable apprehension that they would

[42] 1999 (4) SA 915 (SCA), especially at 922D-G, 923B-C.

[43] See n 10 above.

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 the judge may be biased, acts in a manner inconsistent with section 34 of the Constitution and in breach of the requirements of section 165(2) and the prescribed oath of office.[44] The test for recusal on the ground of perceived bias was "apprehension of bias" rather than "suspicion of bias".[45] As to the nature of the judicial office the Court mentioned that, in applying the test for recusal, courts have recognized 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."[46] (footnote omitted)

[43] As to the undeniable importance of perceptions of independence, this Court stated the following in *Van Rooyen*:[47]

> "That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen*
>
> . . .

[44] Id at para 30.

[45] Id at paras 36-38.

[46] Id at para 41.

[47] See n 2 above at paras 32-34.

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 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*

. . .

The High Court adopted this test. I agree that an objective test properly contextualised is an appropriate test for the determination of the issues raised in the present case. The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. As a United States court has said,

> 'we ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person'." (footnotes omitted)

Application of the law to the facts of this case

[44] The judge in the High Court described the situation in this matter as "undesirable". He was correct. The prosecutor submitted that the situation was "unfortunate". He too was correct. The presence of the prosecutor, the investigating officer and a witness for the state in the office used by the assessors during the trial

not only constituted an undesirable and unfortunate situation, but indeed an irregularity. It is irregular for a prosecutor, police officer or witness involved in a case to be in the office occupied by an assessor in that case, in the absence of the legal representative of the accused. The events in this case constitute a series of irregular incidents. They were irregular, because they do not represent what one would regularly expect in a properly conducted criminal trial. They deviate from the norm and ought not to happen.

[45] According to the applicant the irregular proceedings constituted without more a failure of justice. The case of *Moodie*,[48] relied heavily upon by counsel for the applicant, is however distinguishable from the present situation. The fact that the deputy sheriff was closeted in the jury room with the members of the jury during their deliberations, but took no part in the discussions, was found to be an irregularity of such a nature as to amount per se to a failure of justice. In the present context the differences between assessors and juries are substantial and compelling. Assessors as members of the court determine questions of fact with the judge and their reasoning is made public. They are people with experience in the administration of justice or skill in any matter to be considered at the trial. On the other hand, the decision of a jury is that of the jurors, arrived at after a discussion. In the deliberations of juries each juror should be free to express any view. No juror should be inhibited by the presence of any person who is not a sworn-in member of the jury, who may be in a position to disclose to the judge or to anyone else what a juror has said. Of special importance is

[48] See n 9 above. On jury systems, see Vidmar (ed) *World Jury Systems* (Oxford University Press, Oxford 2000).

the fact that juries do not furnish reasons for their decisions. A reasoned decision allows for close scrutiny of the conclusions reached in view of the evidence presented and the influence of irregularities on a decision are more likely to be detected than in the case of a finding reached in secrecy.

[46] The applicant also submits that a perception of bias resulted in a failure of justice. As stated earlier, perceptions of the legal system and its processes are relevant. These would include not only perceptions formed by an accused and those close to him or her, but also the perceptions of complainants, their family and friends, or the general public. What is at stake is not only the possibility that the assessors in a situation such as the one that prevailed in this case may have received information or participated in discussions on the trial. The appearance of closeness between the assessors and the prosecution, the suspicion that they may be on the same side in a criminal justice system as adversarial as ours, may be damaging indeed. One could imagine assessors being subtly or not so subtly influenced by, for example, the sad appearance or angry attitude of the deceased's son, or the way in which the prosecutor spoke to certain witnesses. As stated above, contact between judicial officers and one party to the trial in the absence of the other does not accord with the ideals and imperatives of independent courts that function impartially and free from any interference. However, the factual events which occurred during the trial and the reasoning in the judgment of the High Court are important.

[47] First, when counsel for the applicant raised the issue in his initial application for the special entry to be made, an explanation and an assurance were immediately given by the prosecutor: The situation resulted from a shortage of office space and no discussions with or in front of the assessors took place. The explanation was given in court, where the applicant, his family and friends and members of the public who were interested in the proceedings could hear it. The explanation is part of the record.

[48] Secondly, counsel for the applicant did not dispute the material aspects of the explanation. He furthermore did not request the recusal of the assessors, even when the judge invited him to do so. It is not necessary to go into the question whether he waived any rights on behalf of the applicant, or whether rights could indeed be waived. Factually the conduct of counsel, in the presence of his client who had just instructed him to apply for the special entry, indicates that he decided that it was not necessary to ask for recusal. He accepted that the assessors would continue and he did so in open court after the situation had been raised and debated. The inference has to be that there was no reasonable apprehension of bias.

[49] The contact between the assessors and others was undesirable, unfortunate and irregular. However, in view of this Court's judgment in *Van Rooyen*[49] it is clear that a balanced view of all material information in this case would not result in a reasonable perception of bias and injustice on the part of a thoughtful and objective observer. The finding of the SCA on this aspect is clearly correct.

[49] See n 2 above.

[50] In addition to the above, and as far as the possibility of actual bias or interference is concerned, it is clear that actual bias on the part of the assessors would have resulted in a failure of justice and an unfair trial. However, there is nothing on the record indicating that the assessors were influenced in any way by the proximity of the prosecutor and others and in any way biased. Counsel for the applicant specifically stated that he was not submitting that the assessors were involved at all in the discussion of the case. He refrained from criticizing any aspect of the reasoning and conclusions of the High Court and the SCA as to the evidence and the applicant's conviction. The evidence of the one state witness who was indeed seen in the office, the son of the deceased, played no role in the findings of the SCA.

Conclusion

[51] It cannot be said that a failure of justice occurred and that the applicant did not have a fair trial in accordance with notions of basic substantive fairness and justice. There is no need to set the proceedings in the High Court aside. Thus the question of a new trial does not arise.

[52] This conclusion follows from the specific facts of this case. Similar irregular proceedings may under other circumstances well result in a different finding and a setting aside of a conviction or sentence. Therefore a note of concern and caution has to be expressed on two points.

[53] The first relates to the status of assessors in our criminal justice system. As stated above, assessors have considerable power and could play an important role in the functioning as well as the legitimacy of criminal courts. Their dignity, status and needs must be respected by all those who interact with them in the performance of their judicial duties. Assessors must also be aware of the significance of their role and act accordingly. It is apparent that the two assessors were allocated space in a small office, which was primarily controlled by the judge's registrar, and that they were largely ignored by those who used the office.[50] Apparently they also did little to assert themselves or to protect their impartiality. This less than respectful and responsible approach seems to be systemic, rather than attributable to the personal attitude of any of the individuals involved in the case. It is not acceptable.

[54] The second flows from the High Court's remarks that the situation regarding the insufficient office space was not desirable, but that it had been the same in an earlier sitting of the court and that it would be the same in the foreseeable future until the backlog of awaiting trial prisoners is reduced. The statement by counsel for the applicant about his knowledge and apparent acceptance of the less than ideal circumstances of circuit courts[51] also indicates that insufficient facilities are not uncommon as far as criminal courts are concerned. The prosecutor rightfully

[50] In response to questions counsel for the state indicated that one would in such a situation ask the permission of the judge's registrar to use the telephone, and would be very hesitant to approach the judge himself with such a request, but that the permission of the assessors would not necessarily be asked and was in fact not asked.

[51] Above at para 5.

complained about the fact that no private office or telephone was available to him at all.

[55] For the state to respect, protect, promote and fulfil the rights in the Bill of Rights,[52] resources are required. The same applies to the state's obligation to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.[53] The right to a fair trial requires considerable resources in order to provide for buildings with court rooms, offices and libraries, recording facilities and security measures and for adequately trained and salaried judicial officers, prosecutors, interpreters and administrative staff.

[56] Few countries in the world have unlimited or even sufficient resources to meet all their socio-political and economic needs. In view of South Africa's history and present attempts at transformation and the eradication of poverty, inequality and other social evils, resources would obviously not always be adequate. However, as far as upholding fundamental rights and the other imperatives of the Constitution is concerned, we must guard against popularizing a lame acceptance that things do not work as they ought to, and that one should simply get used to it. Naturally the relevant authorities must attempt to see to it that facilities are provided as far as possible. Furthermore, all those concerned with and involved in the administration of

[52] S 7(2) of the Constitution states:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[53] S 165(4) states:

> "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

justice − including administrative officials, judges, magistrates, assessors and prosecutors − must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances. Responsible, careful and creative measures, born out of a consciousness of the values and requirements of our Constitution, could go a long way to avoid undesirable situations. (Counsel for the state for example conceded that more prudent steps could have been taken in this case.) To compromise the right to a fair trial may in principle be as dangerous as to cancel or postpone democratic elections because of a lack of facilities or resources. This is all the more so in view of concerns about crime and the need for the satisfactory conclusion of criminal trials in South Africa.

[57] Because these remarks need to be brought to the attention of the relevant authorities responsible for the administration of criminal justice and the training of judicial officers and prosecutors, I regard it as useful to direct that this judgment be referred to the Director General of the Department of Justice, the Judges President of the High Courts, the Magistrates' Commission, the National Director of Public Prosecutions and the Director of Justice College.

[58] The applicant relied on his rights in terms of the Constitution and the Criminal Procedure Act. He brought a constitutional matter linked to issues of considerable public significance, such as the circumstances under which criminal proceedings sometimes take place, to the attention of this Court. It is in the interest of justice for this Court to hear the matter. The application for leave to appeal must be granted. For

the reasons set out above, the appeal must however fail and the decision of the SCA must be upheld.

Order

[59] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The Registrar of the Constitutional Court is directed to furnish copies of this judgment to –
   (a) the Director General of the Department of Justice;
   (b) the Judges President of the High Courts;
   (c) the Magistrates' Commission;
   (d) the National Director of Public Prosecutions; and
   (e) the Director of Justice College.

Langa ACJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J and Yacoob J concur in the judgment of Van der Westhuizen J.

For the applicant:	CJ Snyman instructed by Tomlinson Mnguni James.
For the respondent:	S Manilall instructed by the Deputy Director of Public Prosecutions, KwaZulu-Natal.