

*REPORTABLE*  
**IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG**  
**REPUBLIC OF SOUTH AFRICA**

REVIEW CASE NO.: DR 596/2010

**THE STATE**

and

**SONELE PERCIVAL BHENGU**

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**REVIEW JUDGMENT**

Delivered on: October 2010

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**Ngwenya AJ**

**Introduction**

[1] This is an automatic review matter referred to me in terms of the relevant provisions of the Criminal Procedure Act, 1977, as amended (Act No. 1977, “the Act”).

[2] What a fair trial is remains the subject of ongoing debate. Until such time that hard and fast rules are set, especially on procedural matters, the fairness of the trial will always be judged after the event. In my view it should be possible to insist that cases where the accused if convicted is likely to be sentenced to an imprisonment term without the option of a fine or other form of punishment, the accused should be legally represented. If this were to happen, it would to a greater extent abviate this *ex post facto* determination of the fairness or otherwise of the trial.

- [3] There are instances, in criminal trials where an unrepresented accused is no different to a sick patient who decides to operate on himself instead of a surgeon. No doubt a patient who does this cannot be said to be operating on himself but instead hurting himself. An accused who appears in court unrepresented irrespective of the merits of the case starts from a position of disadvantage and prejudice. The more complex the case the greater the disadvantage and prejudice. This cannot be cured by any assistance the court provides. Because in principle my judgment is premised on a point of law, I did not consider it necessary to raise the query with the Magistrate first. In any event the Magistrate had given a full *ex tempore* judgment.
- [4] The facts of this case straddle between the inherent position of disadvantage and the constitutional right of the accused to choose whether he or she wants to be legally represented or not. It is regrettable that sixteen (16) years into the constitutional dispensation this issue remains unresolved. In this regard I find myself in agreement with the sentiments by Didcott J, some twenty two (22) years ago in ***S v Khanyile and Another 1988 (3) SA 795 (N) at 798*** when he said the guidance the magistrate provided to the unrepresented accused was no substitute for the professional help they missed. Quoting the following from Acta Juridica (1965-66) at 70:

*“Of all false and foolish dicta, the most trite and the most absurd is that which asserts that the Judge is counsel for the prisoner.... The Judge cannot be counsel for the prisoner, ought not to be counsel for the prisoner, never is counsel for the prisoner,”*

The learned Judge proceeded thus:

*“With this second sentence I agree fully. A lawyer doing the work confers confidentially with his client and with witnesses whom the client would like to call. Having learnt what each has to say, he advises the client on the line to be taken, on the plea to be tendered, the admissions to be offered, the particular allegations to be disputed. He plans the strategy and tactics he will use in answering these, then executes the plan. He decides what testimony the defence will present and, when his turn comes, he presents it. Mindful in the meantime of his expectations from that quarter, he determines those parts of the prosecutor's case which the defence will challenge, and he proceeds to challenge them. He objects to the admissibility of any evidence questionable on that score. Cross-examining, he does not content himself with clarification and elucidation. He seeks to draw from the witnesses for the prosecution information damaging to it and, where they incriminate his client all the same, to show errors by them in observation and recollection, to demonstrate uncertainty and confusion in their minds, to exploit inconsistencies and improbabilities in their versions, to expose bias and downright lying once such looks likely. And the case for the client he argues at the end, casting on it the best light that the law and the evidence sheds. Hardly any of this can effectively or may properly be done for an accused person by the judicial officer trying him, under the system we have at all events, a system in which the judicial officer is no inquisitor conducting his own investigations but an adjudicator who by and large must leave the management of the trials he hears and the combat waged in them to the adversaries thus engaged. Above all, to quote again from the article I have mentioned, your judicial officer whose role is that functionally detached one '... cannot fling the whole weight of his understanding into the opposite scale against the counsel for the prosecution and produce that collision of faculties which... is supposed to be the happiest method of arriving at the truth'.*

*Where the magistrate did slip was in not telling the men that they were entitled to legal representation if they could get it, and in not offering them the opportunity to obtain it if they wanted one.”*

- [5] To me it is a matter of grave concern that our Constitution which heralded a new order and removed any doubt about the correctness or otherwise of *Khanyile* above and ***S V Radebe, S v Mbonani 1988 (1) SA 191 (T)***, our jurisprudence on this score has not moved far enough to settle the matter in particular under which circumstances should an accused person be represented at the expense of the State. The matter apart from the routine advice to the accused that he or she has the right to legal representation has largely been left to the officials of the Legal Aid Board. How they exercise their discretion is not relevant to court and there is no duty to do so. In any view this cannot remain so forever.
- [6] Like *Khanyile*, the accused in this matter could barely cross-examine the State witnesses. Save to answer questions from the magistrate in his defence case, he barely advances his case any further. In truth, he was merely a stranger in the court room entangled in the legal machinery of the court room drama to swallow him. Indeed the inevitable happened at the end.
- [7] In my respectful view, our courts are once again called upon to pronounce decisively what a fair trial is in so far as the right to legal representation is concerned. Like I said, this will differ from case to case. In the present case the absence of a legal representative for the accused exposed how alienating the court room environment is to an uninitiated person. The trial as a whole objectively adjudged was unfair. This is so because the accused cannot be said to have comprehended what was going on. I do not think one would quarrel with the sentiments of Didcott J, exposed above. If one endorses them, one must naturally agree that the accused in this matter was out of his depth. This, not out of his choice but ignorance. It cannot, therefore be said it was up to him to decide as he

was given a choice to do so. This is no reflection to the judicial officer. He did his best in the circumstances. Only in one instance could he have taken the matter further. The explanation to the accused and perhaps a stronger indication that a legal representative would be best suited to help the accused achieve the objectives of a fair trial.

- [8] Support for the proposition that the court could and can go further than advising the accused of his right to legal representation finds supports both from our Constitution and international instruments. Section 35 of the Constitution reads thus:

*“ (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.*

*(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.*

*(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.” Emphasis added.*

- [9] I also refer to the International Covenant on Civil and Political Rights. Article 14, on certain minimum guarantees to which everyone charged with a crime is entitled to states:

*“3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

- (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[10] Likewise Article 6 of the European Convention on Human Rights has this to say on minimum rights of each person accused.

*“3. Everyone charged with a criminal offence has the following minimum rights:*

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- (b) to have adequate time and the facilities for the preparation of his defence;*
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”* Emphasis supplied

[11] The African Charter for Human and Peoples’ Rights in this vein has this to say: Article 7:

*“1. Every individual shall have the right to have his cause heard. This comprises:*

- (c) The right to defence, including the right to be defended by counsel of his choice;”*

[12] Section 35 (3) of our Bill of Rights reads:-

- “(3) Every accused person has a right to a fair trial, which includes the right-*
- (a) to be informed of the charge with sufficient detail to answer it;*

- (b) to have adequate time and facilities to prepare a defence;*
- (c) to a public trial before an ordinary court;*
- (d) to have their trial begin and conclude without unreasonable delay;*
- (e) to be present when being tried;*
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;*
- (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.” Emphasis mine*

All these rights enumerated above are generally observed. But in my view more could be done to promote and advance them. For the purposes of this judgment I focus on subsection (g), of subsection 35 above.

- [13] In my respectful view the right to a fair trial remains a pipe dream as long as the right to legal representation remains the discretion of the accused person. Our courts have long recognized the right to legal representation. This seems to be the only aspect which is rigorously conveyed to the accused person in most trials. No doubt those who can financially afford to appoint counsel at their costs, will naturally do so irrespective. Those who cannot afford are the people in whose interest these instruments must be read and interpreted. By this I do not mean people who can financially afford are excluded. All I say is that they exclude themselves. I

have already said earlier in this judgment not everybody will necessarily be entitled if he or she cannot afford legal representation to be accorded legal representation at the expense of the State. There must be threshold.

[14] Each case will have to be decided on its own merit. In my view, by way of example, a person who is likely if convicted to be sentenced to an imprisonment sentence without the option of an alternative punishment because of the seriousness of the offence would be one such person where the interest of justice requires that a legal representative of his choice be appointed for him or her at the expense of the State. I note the difference in various instruments. Our Constitution provides that “*where substantial injustice would otherwise result to be provided with a legal representation at State expense.*” The court with the assistance of the State will be able to provide guidance in each instance.

[15] At face value the wording in our Constitution appears to be limiting. However, if read with the provisions of section 35 quoted earlier, it is consistent with other international instruments. These other instruments use the phrases “*if justice*” requires and “*if the interest of justice*” requires. In my judgment section 25 (e) of the Constitution and section 35 (3) (g) of the Bill of Rights must be read subject to the provision of section 35. The net result would be to interpret them in the context of comparable instruments and case law. In so doing the court would be justified in interpreting its constitutional role as not only to advise the accused of his or her right to legal representation but also that of fairness of the trial whereby the interest of justice plays an important and pivotal role in determining whether a legal representative should be assigned to him or not, in instances the accused cannot afford one.



[16] Coming back to the merits of this case. Why do I consider that the accused did not have a fair trial? This is so because, judging by the evidence presented and how the accused dealt with his own defence, it is manifestly clear that this is one matter where a legal representative was needed to represent the accused. The whole process no matter how the accused tried was beyond him. He could not challenge evidence against him even if he wanted to. His cross-examination was no more than a superficial enquiry. As a result of not being legally represented there was a failure of justice.

[17] I note that in anticipation of the constitutional provisions, the government through the Legal Aid Board has created Legal Aid Centres, which are just but law firms owned by the State rendering free legal services to the public. Whether these meet the constitutional requirements for purposes set out above is not a matter that arises here. The fact of the matter is that the unrepresented accused remains vulnerable to mistrial despite the protection by the Constitution. Until the courts play a more active role in deciding who should be assigned legal representation at State expense, as opposed to leaving this to the discretion of the accused, this constitutional imperative would remain but in the statute.

[18] Apart from what I have said earlier in this judgment, I would still have had difficulties with the sentence even if I did not come to the conclusion I have arrived at with respect to the fairness of the trial. The sentence is disproportionate to the crime committed and induces a sense of shock. The accused was twenty four (24) years and a first offender. The court seemed to have over-emphasized one principle over the rest. I take this part of the matter no further

[19] In the light of all the above, I conclude that the accused did not have a fair trial and therefore both conviction and sentence are hereby set aside.

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**NGWENYA AJ**

I agree and it is so ordered.

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**THERON J**