IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR321/2019

In the matter between:

HAIG BRANDON BOTES Appellant

and

THE STATE Respondent

This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(*a*) of the Superior Courts Act 10 of 2013. This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for hand down is deemed to be 13:00 on 11 September 2020.

ORDER

On appeal from: Regional Court, Durban (sitting as court of first instance):

1. The appeal is upheld.
2. The convictions and sentences imposed on 8 November 2013 are hereby set aside.

JUDGMENT

Chetty J (Balton J concurring):

[1] The appellant, who was accused two in the trial court, was charged along with Jeremy David Drenett with two counts of robbery with aggravating circumstances in which the State alleged that both accused unlawfully and intentionally assaulted

Penelope Tolmay and Clive Steed at their home in Winston Park, Hillcrest on 18 May 2012, while in possession of firearms, a knife and a baton during the course of the incident. During the course of the robbery the complainants were dispossessed of cash in their wallets, a cellular phone and various household items including watches and jewellery. Both accused pleaded not guilty and the State led the evidence of five witnesses, and the accused gave evidence in their defence. The trial court found both accused guilty as charged and sentenced them both on 8 November 2013 to 15 years' imprisonment, with both counts taken as one for the purpose of sentence. The appellant applied for leave to appeal in respect of conviction and sentence. That application was only brought on 9 July 2019 due to various difficulties facing the appellant, including a lack of resources. The court a quo granted condonation for the late filing of the application for leave to appeal. After hearing submissions from the appellant's counsel, the court a quo granted leave to appeal against conviction only. Leave against sentence was refused. This appeal is only concerned with the convictions on both counts of robbery with aggravating circumstances.

[2] The facts of the matter, as summarised by the court a quo in its judgment, are that the appellant and his co-accused met a group of three males at a bar in Durban. Accused one (Drenett) testified that he intended to visit the home of the complainants and he together with the appellant, as well as the three unknown persons whom they met at the bar, travelled to the home of the complainants on the night of 18 May 2012. Once they reached the home of the complainants, Drenett said that he was surprised when the men who accompanied him suddenly pulled out firearms, at which stage he fled the house, only to return a short while later to pick up his friend, the appellant, whom he had left behind. According to the appellant he simply accompanied Drenett to the house of the complainants, and was oblivious as to what unfolded.

[3] This is in contrast to the evidence presented by the complainants, who testified that the appellant was present at their house, armed with a baton and standing near a doorway. He stood watch while the remaining persons inside the house proceeded to ransack the premises. Drenett, who was well-known to the complainants as he had once lived on their property, was placed on the scene by a private security officer who testified that on the night in question he noticed a motor

vehicle parked outside the home of the complainants. The vehicle was occupied. The security guard, Mr Dludlu, was unable to gain access to the property using his remote control, and contacted his control centre for assistance. Whilst waiting at the premises, he was approached by Drenett, who informed him that he was a client of the complainants. Drenett also used a remote control to open the driveway gate into the complainant's property. Dludlu also noticed three men in the complainants' yard. He testified that Drenett then drove off from the property of the complainants, however not before Dludlu noted the registration number of the vehicle in his pocketbook.

[4] The version of the appellant is that he had accompanied Drenett from Margate, where they both live, to Durban on the day in question as Drenett had told him that he intended seeing a few people who owed him some money. At a local bar in Durban, they met three other men, whom he had not met before. These gentlemen then accompanied the appellant and Drenett in the latter's car, on their way to the house of the complainants. According to the appellant he believed that these men had come along for a ride. Once they arrived at the house of the complainants, the appellant's new acquaintances pulled out weapons and forced him to accompany them to the house, where he was given a baton and told to keep an eye out for dogs on the property. He did not deny being at the house at the material time when the complainants were made to lie on the floor while the assailants ransacked the house. The appellant denies having assaulted or robbed anyone on the night in question and says that he accompanied the men who carried out the robbery out of fear for his life. He denies that he participated in the robbery at all, and that he was forced to stand guard on the instructions of the men who perpetrated the robbery. According to the appellant, throughout the incident, Drenett was not at the scene but waited in the car outside. Following the incident, the appellant and Drenett returned by car to Margate, without reporting the incident to the police.

[5] The court a quo rejected the versions of both the appellant and Drenett as being improbable and false beyond reasonable doubt. It convicted them on both counts, concluding that both had come to Durban from Margate with the intention of committing the robbery.

[6] Mr Viljoen on behalf of the appellant submitted, both in the application for leave to appeal and in his heads of argument, that the conviction of the appellant followed on a breach of his rights to a fair trial in terms of section 35(3) of the Constitution, particularly those in section 35(3)*(f)* and *(g)* which entrenches the right of an accused to a fair trial, which includes the rights:

'(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. . . .'

[7] For reasons which follow, I do not propose to evaluate the facts in the matter at any length. The trial commenced on 17 September 2013 with the incident giving rise to the charges against the appellant having taken place on 18 May 2012, which is approximately 16 months apart. When the trial commenced, the charges were put to the appellant. At this stage, Mr Sigcawu informed the court that he was not in a position to represent the appellant and sought permission to withdraw as the appellant's attorney of record. The explanation tendered by the attorney is that the appellant failed to attend an appointment which had been arranged with his attorney. The magistrate then enquired whether the appellant failed to keep the appointment or whether the fault was with the attorney in not being present at the appointed time. The following interchange between the magistrate, Mr Sigcawu and the appellant is relevant to the issues before this court on appeal:

> 'Mr Sigcawu:He kept it your worship, he came but he decided to leave before me reaching the office as I was in court.
>
> Court : Mr Botes, why didn't you stay there the whole day, you were supposed to go keep an appointment why didn't you go and keep the appointment the last time?
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> Accused 2 :Your honour I had made an appointment for 10:00. I was there, I waited for two hours, because I stay in Port Shepstone and that I had arranged transport get back. I had waited my maximum period, I had to be turned back I still had to …(Intervention)
>
> Court : No need to argue. If the consultation took over two hours what would have happened then? .. I am just trying to understand will reason that you only allocated two hours because you don't know how long the consultation would have taken place.

Accused 2 : Your honour we spoke to him over the phone and he said he could only be there after 14:00 which would have been four hours which would have been too long for me.

Court : So basically you decided to go back because of your own transport?

Accused 2 : that is correct

Court : So unfortunately legal aid application to withdraw granted. You are on your own.'

[8] Following the above discussion, the court a quo granted permission for the appellant's attorney to withdraw. The prosecutor then proceeded to hand over certain statements to the appellant. It is not clear from the record what these statements refer to. I would assume that the statements would have been those furnished by the State to the defence stating the witnesses which the State intended calling. The record does not give any indication of an opportunity being granted to the appellant to study the statements, nor whether he was given an opportunity to reflect on the decision made by the magistrate to grant his attorney permission to withdraw from the proceedings. As the magistrate pointed out to the appellant, he was indeed 'on his own'. He pleaded not guilty to the charges. The magistrate, recognising that the appellant was now unrepresented, afforded him an opportunity of addressing the court in terms of section 115 of the Criminal Procedure Act 51 of 1977. The appellant explained that he had accompanied his co-accused to the complainant's house, without any intention of stealing any item. He stated that he was 'forced into a situation that he could not handle', after which 'things went bad'. The trial court then forged ahead with the proceedings, calling the complainants, including Ms Tolmay. The magistrate, in fairness, explained in some detail to the appellant that he had the right to cross-examine the witness and to put questions to her that would advance his defence. After listening to the evidence of the second State witness, Mr Harrison, the appellant informed the court that he had no questions for this witness.

[9] Following the evidence of Mr Harrison, the appellant then engaged in the following discussion with the magistrate :

'Court : Yes, what is it that you want to say, Mr Botes?

Mr Botes :your honour I would just like to address the court as early on I had been sitting down, I been thinking. I feel that what happened earlier on about my attorney

walking out on me, I feel that I am not capable to do this case on my own and I only have a standard seven and feel that in this instance, it will prejudice against me and I have heard that there is a confession and I don't feel that I will be able to defend myself properly.

Court : the point is, what do you want to do? Do you want to get your own attorney now, do you want to apply for legal aid again?

Mr Botes : I would like put on record that I would like to at least have a chance to get another lawyer.

Court : but the point is you had one attorney from legal aid you didn't want to keep that appointment because of time constraints on way you stay. The matter has now started, what makes you believe that you are going to keep that appointment and not delay the matter any further? That is the reason I proceeded. The witnesses are here, the matter was set for trial you can't keep delaying [the] matter because you choose not to keep appointments and not wait for the attorney. This is coming from 2012. How long do you think you are going to get an attorney? Application for you to have an attorney, unfortunately I do not believe it will serve any purpose given the fact that it was your own fault that you didn't want to keep the appointment and stay for Mr Sigcawu. I think you are wasting time so I'm not going to allow you that indulgence so unfortunately your application is refused. Proceed.'

[10] The trial continued without the appellant being represented. He failed to put any questions to the third witness, the private security guard, Mr Dludlu. Mr Harrison, who had previously testified, was recalled by the prosecution. Again, the appellant had no questions for this witness.

[11] Proceedings were then adjourned to 15 October 2013, which day it is reflected that Mr Sigcawu was now again on record as representing the appellant. There is nothing in the transcript which indicates how this came about, nor is there any enquiry from the magistrate as to how the appellant succeeded in persuading his attorney to re-enter the proceedings. In respect of the second count against the appellant, relating to the property unlawfully taken from Mr Clive Steed, by agreement of the parties, the complainant's statement was handed into court in terms of section 213 of the Criminal Procedure Act. His evidence was presumably dispensed with on the basis that he was unable to identify either of the accused persons as being at the scene of the robbery.

[12] In contrast to the approach of the court when the appellant sought an adjournment in order to instruct an attorney, when Mr Sigcawu re-entered the proceedings the court was satisfied in granting an adjournment to him and to the attorney acting on behalf of Drenett. Proceedings were then adjourned to 29 October 2013, with the court warning the appellant to make use of the opportunity to consult with his attorney. The matter then resumed on 29 October 2013, with the evidence of Drenett. Mr Sigcawu thereafter cross-examined Drenett, putting forward the version of the appellant. The appellant thereafter gave evidence after which judgment was delivered. In the sequence of the evidence which was led, it is important to note that after his re-entry to the proceedings, Mr Sigwacu had the opportunity to fully cross-examine three of the State's witnesses who were recalled to testify. These witnesses were pivotal to the State's case and included Mr Dludlu, Ms Tolmay and Mr Harrision. A reading of the record indicates that the cross-examination was superficial at best and no application was made to re-examine the witnesses.

[13] In light of the above, two issues arise which are central to the determination of this appeal. The first is whether the failure to postpone the matter after the withdrawal of the appellant's legal representative was a material irregularity; and the second is whether the failure of the appellant's legal representative to properly cross-examine certain witnesses constituted a material irregularity. In *S v Khoali* 1990 (1) SACR 276 (O) the legal representative also withdrew, and the magistrate immediately proceeded with the matter. At 278g-h, the reviewing court found that the magistrate erred in proceeding with the trial without enquiring from the appellant whether he wished to appoint another attorney or whether he would be conducting his own defence.

[14] In the present case, the magistrate permitted the appellant's attorney to withdraw from the matter, leaving the appellant 'on his own'. No enquiry was conducted by the magistrate into the appellant's ability to conduct his own defence nor was any opportunity afforded to him to reflect on his predicament and to make an election as to how he wished to proceed. These views were echoed in *Mafongosi v Regional Magistrate, Mdantsane & another* 2008 (1) SACR 366 (Ck) para 31:

> '[31] It accordingly follows that there is merit in the applicant's complaint that she was subjected to an "instant trial", and not afforded an opportunity of preparing fully for her defence when the court decided to proceed with the trial without her having legal representation. He was also wrong to assume that the applicant was aware of the charges against her. He should have sought clarification from her in this regard.'

See also *Hewitt v Regional Magistrate &another (NW as interested party)* [2015] 3 All SA 183 (KZP) para 101 where the following was also stated:

> '[101] It is trite that upon the withdrawal of the accused legal representative from the case, the court should ask the accused whether he wishes to have an opportunity of instructing another legal representative; and if he does not seek an opportunity, he should be asked whether he is ready to undertake his own defence.' (References omitted.)

[15] It is not clear from the record whether or not the appellant was aware that his legal representative would withdraw on the day of the hearing, as his attorney, Mr Sigcawu, makes no reference to having informed the appellant of his application to withdraw, prior to it being made at court. No enquiry was conducted by the court to ascertain whether the appellant knew that his attorney would be withdrawing. On the basis of what is contained in the record, the appellant had no prior knowledge that he would be unrepresented at the trial. In terms of section 35(3)*(b)* of the Constitution an accused has the right 'to have adequate time and facilities to prepare a defence'. See also *Van Niekerk v Attorney-General, Transvaal, & another* 1990 (4) SA 806 (A) at 808F-G where this right was recognised in pre-Constitution times:

> 'He is entitled to a reasonable time within which not only to prepare for trial (including the obtaining of legal representation) but also to assess and weigh his position.'

See for instance *S v Manale*2000 (2) SACR 666 (NC) at 671f-i where the accused terminated the attorney's mandate on 25 August 1999 and after a further postponement, the matter was to proceed on 21 December 1999. The court held that the accused had ample opportunity to secure a legal representative before the trial commenced, and accordingly found that there was no irregularity in that regard.

[16] Although the failure on the part of the magistrate to enquire from the appellant whether he wished to secure the services of another attorney amounted to an irregularity in my view, it must be borne in mind that not every irregularity results in an unfair trial, as was stated in *S v May* 2005 (2) SACR 331 (SCA) para 7:

> '[7] However, as this Court has previously said in *Hlantlalala and Others v Dyantyi NO and Another*, 'the crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellant's trial. What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not *per se* result in an unfair trial necessitating the setting aside of the conviction on appeal.' In addition it must be shown that the conviction has been tainted by the irregularity - that the appellant has been prejudiced.' (Footnotes omitted.)

[17] Mr Meiring for the State submitted that it was unclear why counsel withdrew at the trial, shortly after the charges were put to the appellant. A reading of the record makes it clear as to what transpired – the attorney failed to honour his appointment with the appellant, and instead of being available at 10h00 on the day, indicated that he would only be available at 14h00 that afternoon. The appellant was unable to wait that long as he relied on public transport to return to his home in Port Shepstone. Counsel for the State conceded in his written submissions that it was not desirable for the matter to have proceeded thereafter as the appellant had a right to be represented at his trial. However, in an attempt to retreat from this concession, Mr Meiring contended that the appellant was not prejudiced as he knew what issues to place in dispute, particularly as he did not challenge the evidence of the witnesses who placed him at the scene of the robbery, where he guarded the door with a baton. In assessing whether or not there was any prejudice to an accused, in *May (supra)* para 8 the court stated:

> '[8] Whether or not prejudice has resulted from the lack of legal representation is really a question that can be determined only by having regard to the whole trial, and the way in which it was conducted by the judicial officer; and the ability, as shown during the course of the trial, of the accused to represent himself adequately; and to whether the evidence adduced has led justifiably to the conviction and sentence.'

These views were repeated in *S v Shiburi* 2018 (2) SACR 485 (SCA) para 13 where the court held:

> '[13] It must be emphasised that the application of the rule regarding legal representation is context-sensitive. In any given situation, the enquiry is always whether an accused's fair-trial right has been infringed.' (References omitted.)

[18] The duties of a presiding officer in assisting an unrepresented accused have been summarised in *S v Lekhetho* 2002 (2) SACR 13 (O) para 9-11 as follows:

> '[9] There rests a duty on a judicial officer conducting a criminal trial to treat an accused even-handedly and courteously and to avoid creating perceptions of bias or impatience with the accused. (See *S v Gwebu* 1988 (4) SA 155 (W); *S v Philemon* 1997 (2) SACR 651 (W); *S v T* 1990 (1) SACR 57 (T) at 58.) In *S v Abrahams and Another* 1989 (2) SA 668 (E), Kroon, J said the following at 670:
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> > 'Courteous treatment of witnesses and accused persons is, after all a facet of the maxim that justice must be seen to be done.'
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> Showing courtesy to an accused person has got nothing in common with maudlin sympathy for the accused, to adopt the language of an eminent jurist, but a lot to do with the constitutional imperative of a fair trial.
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> [10] It is settled that there rests on the judicial officer a duty to explain to the unrepresented accused the various procedural rights that the accused has in the conduct of his or her trial and when necessary to assist him/her in the exercise of such rights. (See *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T) and *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v Van Wyk NO and Another* 1989 (3) SA 368 (E).) The explanation must be such that the accused understands the content of the right.
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> > 'To let him know of that right, yet not how to exercise it when he has no idea and starts running into trouble, is not of much use. Mere lip service to the duty is then paid.'
>
> *Per* Didcott J in *S v Hlongwane* 1982 (4) SA 321 (N) at 323C - D. …
>
> [11] The right to cross-examination is one such important right. Failure to explain it and to assist the unrepresented accused when necessary in its exercise is an irregularity. (See *S v Modiba* 1991 (2) SACR 286 (T); *S v Khambule* 1991 (2) SACR 277 (W); *S v Raphatle* 1995 (2) SACR 452 (T)).'

See also *S v Rudman & another; S v Mthwana* 1992 (1) SA 343 (A) at 381D-382C.

[19] Despite his failure to inform the appellant of his rights to be represented following the withdrawal of his attorney, it bears noting that the magistrate did assist the appellant throughout the trial. (See the record at page 4 lines 5-11; page 5 lines 1-3; page 27 lines 2-16; page 28 lines 24 to page 29 line 25; and page 33 line 15 to page 34 line 6.) However, when the Mr Harrison testified, the , other than enquiring from the appellant whether he had any questions for the witness, simply accepted a response from the appellant that he had no questions for the witness, however when the appellant attempted to raise an issue with the magistrate, he was abruptly cut

off. The appellant at a later stage proceeded to ask for a postponement to seek legal representation, which was refused by the magistrate, without fully hearing the appellant or enquiring from the prosecutor or the attorney for accused one whether they had any objections to the postponement.

[20] A postponement to obtain legal representation should not be dismissed out of hand. See *S v Makeleni* 1991 (1) SACR 299 (Tk) at 300e. It is pertinent to point out that after their arrest, the appellant and his co-accused first appeared in the Pinetown Magistrates' Court on 24 May 2012 when the matter was remanded. The record reflects that the case was transferred to the Durban Regional Court on 1 March 2013. The trial commenced on 17 September 2013. There is nothing in the record to indicate what prejudice would have been suffered either by the State, or accused 1 or indeed the court, had a postponement been granted to the appellant. In contrast, when the prosecutor later applied for a postponement, no input is sought from the appellant whether or not he agrees to the postponement. A discussion on the matter takes place only with the legal representative of the first accused. This in my view clearly reflects the uneven footing that the appellant experienced during the course of the trial. I do not suggest that this was done deliberately or consciously. The unintended consequence however was that the appellant was effectively excluded from providing any input in the application, in circumstances where his earlier application (pertaining to a crucial aspect of the right to representation) was refused out of hand.

[21] In my view, the failure by the learned magistrate to safeguard the appellant's rights to legal representation, constituted a misdirection entitling this court to interfere with the convictions. There is some attempt by the State to contend that the return by Mr Sigcawu mid-way through the trial on 15 October 2013, after three State witnesses had testified, was enough to satisfy the right of the appellant to a fair trial. I do not agree for reasons that appear below. No enquiry was entered into by the court as to how this came about. What in my view is crucial is that despite being represented, the attorney made no attempt to apply to recall the witnesses who had testified at the time when the appellant was unrepresented.

[22] It was contended by Mr Viljoen that to the extent that the appellant was prejudiced by not being legally represented at the commencement of the trial, this prejudice could have been ameliorated by his attorney recalling witnesses. Counsel submitted that the attorney's failure to act accordingly was 'negligent' and that he 'simply went through the motions' to finalise the matter as quickly as possible.

[23] To determine whether or not incompetence by a legal representative rendered the trial unfair, the SCA in *S v Halgryn* 2002 (2) SACR 211 (SCA) para 14 laid down the following test:

> '[14] The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. Compare *S v Majola* 1982 (1) SA 125 (A) at 133D - E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Compare *S v Louw* 1990 (3) SA 116 (A) at 125D - E. The Court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect (cf *R v Matonsi* 1958 (2) SA 450 (A) at 456C as explained by *S v Louw supra*)). The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in *Strickland v Washington* 466 US 668 (1984) at 689:
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> > "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."
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> Not everyone is a Clarence Darrow or F E Smith and not every trial has to degenerate into an O J Simpson trial.' (Footnotes omitted.)

[24] In *S v Tandwa & others* 2008 (1) SACR 613 (SCA) at 620h-621b the main question which needs to be answered is whether the accused received proper representation:

> 'The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. Incompetent lawyering can wreck a trial, thus violating the accused's fair trial right. The right to legal representation therefore means a right to competent representation - representation of a quality and nature that ensures that the trial is indeed fair.When an accused therefore complains about the quality of legal representation, the focus is no longer, as before the Constitution, only on the nature of the mandate the accused conferred on his legal representative, or only on whether an irregularity occurred that vitiated the proceedings - the inquiry is into the quality of the representation afforded.' (Footnotes omitted.)

[25] In determining the severity of the incompetence, the court in *S v Mafu & others* 2008 (2) SACR 653 (W) paras 24-25 held as follows:

> [24] The idea of being represented by a legal adviser cannot simply mean to have somebody stand next to one to speak on one's behalf. Effective legal representation entails that the legal adviser act in the client's best interests, saying everything that is needed to be said in the client's favour and calling such evidence as was justified by the circumstances in order to put the best case possible before the court in the client's defence. Implicit in the rights entrenched in s 35(3)*(f)* of the Constitution is the concept that legal assistance to the accused person must be real, proper and designed to protect the interests of the accused. The legal representative has an obligation to conduct the case in the best interest of the client while still ensuring that the inherent duty towards justice is maintained. In order to be able to conduct a trial in such manner the legal representative has to acquaint him- or herself with the charges, the facts with which the accused is confronted and, more importantly, the version of the accused. The principles just set out accord with the concept of the right to effective legal representation in an open and democratic society. In similar vein are the remarks of Justice Blackmun in *Burger v Kemp* 483 US 776 (1987) at 800:
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> > "The duty of loyalty to a client is 'perhaps the most basic' responsibility of counsel and 'it is difficult to measure the precise effect on the defence of representation corrupted by conflicting interests".
>
> [25] In my opinion, the gravity of O'Marjee's incompetency in failing to (i) make himself *au fait* with the defence of the appellants; (ii) put such defence in full to the

> State witnesses; and (iii) challenge and cross-examine the State witnesses either effectively or at all, constitutes a gross irregularity of such monumental proportions that it went 'to the very ethos of justice and notions of fairness'.' (Footnotes omitted.)

[26] The failure by the appellant's attorney to cross-examine the witnesses must be measured against the evidence provided by the witnesses, and the fact that the appellant's version was not put to all the witnesses. There is a strong enough suggestion, when having regard to the record, to conclude that the appellant, although represented in the latter stages of the trial, was not competently represented. It is perhaps easy with hindsight to be overly critical of Mr Sigcawu, without being privy to what may have been discussed with the appellant at the time when he (Mr Sigcawu) re-entered the trial. As the authorities state, a legal representative must advance the best interests of his or her client at all times. The decision whether to recall the State witnesses was a matter which the attorney must of necessity have applied his mind to, before he re-entered the trial. It was not a decision he would have had to make spontaneously. I assume that he would have consulted with the appellant before he reappeared in the trial on 15 October 2013. The decision of the attorney not to recall the witnesses who testified while the appellant was unrepresented, in my view, fell short of the standard to act in the best interests of his client.

[27] In light of these shortcomings, I am satisfied that it is not necessary to traverse the evidence of the witnesses in the trial, or the evidence of the appellant. The appellant's rights to a fair trial were breached in circumstances that amounted to a misdirection. In *S v Zuma & others* 1995 (2) SA 642 (CC) Kentridge AJ writing for the Court, referred to his dissenting judgment in *Attorney-General v Moagi* 1982(2) Botswana LR 124,184 where he said:

> "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.

In *Zuma* the Court stated that :

> '[16] That *caveat* is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision 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

> '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.'

[28] Accordingly, the following order is made:

1. The appeal is upheld.
2. The convictions and sentences imposed on 8 November 2013 are hereby set aside.

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CHETTY J

Appearances:

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