Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REVIEW CASE NO. 0033806

BREDASDORP MAGT. CT. CASE NO. 1089/2002

In the matter between:

THE STATE

and

STEVEN JOORS

REVIEW JUDGMENT

BINNS-WARD AJ:

The accused was convicted by the magistrate at Bredasdorp on a charge of assault with intent to cause grievous bodily harm. He was a first offender. He was sentenced to 12 months imprisonment of which six months was conditionally suspended for five years.

The conviction and sentence proceedings occurred on 29 May 2003. The accused was informed that the case was subject to automatic review and was advised that if he was dissatisfied with the conviction or sentence he could make written submissions within three days to be submitted together with the record to the reviewing judge. According to the J4 form on record, it is certified that the magistrate also informed the accused that the record would be sent to the High Court for review within four to seven days. (The typed transcript of proceedings does not, however, bear out the latter information.)

The typed transcript of the record bears an official stamp endorsement by the clerk of the magistrate's court dated 24 June 2003. This suggests that the transcript had been completed by that date. The J4 form (which is the coversheet under which magistrates submit automatic reviews to the High Court) was signed on behalf of the magistrate on 15 July 2003 (six and a half weeks after the imposition of sentence). Another stamp of the clerk of the court on the record reflects the date 7 August 2003. It is not apparent why that stamp was endorsed on the record. The record was eventually received by the registrar of this court and placed before me on 18 August 2003 (eleven and a half weeks after the imposition of sentence). On 21 August 2003, after conferring with a colleague, I ordered the immediate release of the accused from custody.
The matter was subject to automatic review because of the provisions of s 302 of the Criminal Procedure Act 51 of 1977. Section 303 of the Act provides as follows:

'*The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of section 302 (1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay the same in chambers before a judge of that division for his consideration.*'

The object of the provision for automatic review proceedings is self evident. It is to ensure as far as possible that legally unrepresented convicted persons have been fairly tried and justly sentenced. It is intended to enable remedial steps to be taken expeditiously if the proceedings in the magistrate's court have not been in accordance with justice. In the constitutional context, the provision should be regarded as a measure intended to lend substance to the basic rights now entrenched in s 35(2)(d)[1] and s 35(3)(o)[2] of the Constitution in particular, and to a fair trial in general.

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1 Which provides the right of every detained person, including a sentenced prisoner, to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.
2 Which provides the right of appeal to, or review by, a higher court.

Over the years, several judgments have been reported in which the importance of achieving proper compliance with the provisions of s 303 of the Code (or its statutory predecessor) has been repeatedly stressed.

In *S v Letsin 1963 (1) SA 60 (O)* at 61, Eksteen AJ, as he then was, said the following:

'*In 'n onlangse verslag deur twee lede van die Transvaalse Regbank aan die Regter-President van daardie Afdeling wat in die Augustus 1962 uitgawe van die* ***South African Law Journal*** *gepubliseer is, sê die geleerde Regters die volgende (op bl. 267):*

'One of the important contributions made by South African law to the administration of justice is the system of review as of course, or, as it is more commonly known, of automatic review. . . . When it is borne in mind that at least 90 per cent of the accused persons are either wholly or partially illiterate and that the great majority of them are undefended, the vital importance of the system in the administration of justice in this country becomes apparent.'

Die geleerde Regters gaan dan voort om daarop te wys dat sodra 'n landdros 'n vonnis oplê wat onderhewig is aan hersiening, hy verplig is, ooreenkomstig art. 97 van Wet 32 van 1944, om die beskuldigde in kennis te stel dat hy geregtig is om binne 3 dae na die vonnis enige skriftelike verklarings of argumente in te dien wat dan voor die hersienende Regter gelê kan word. Die notule van die verrigtinge word dan binne die bestek van 'n baie kort tydperk - naamlik binne 1 week - aan 'n Regter van die Hooggeregshof voorgelê vir hersiening, en die Regter het dan baie wye magte om òf die vonnis te bekragtig òf toe te sien dat reg en geregtigheid geskied. Uit die aard van die saak val die klem deurgaans op die spoedige voorlegging van die landdros se vonnis aan 'n Regter vir hersiening, en dit is so omdat dit een van die hoogste roepinge van ons Howe is om toe te sien dat die vryheid van die individu, binne die perke van die reg, gewaarborg sal word. Dit is 'n ingrypende aantasting van individuele vryheid om 'n persoon in die gevangenis te laat aanhou, en dit is die dure plig van die Howe en van elke regterlike amptenaar om toe te sien dat dit slegs sal gebeur met die volle gesag van 'n behoorlike regsproses. Waar die Wet dus voorsiening maak vir die spoedige hersiening van 'n landdros se vonnis, is die regsproses van sy veroordeling en vonnis nie behoorlik voltooi voordat die hersienende Regter òf sy sertifikaat van bekragting van die prosedure uitgereik het nie, òf 'n ander bevel gemaak het nie.

Die landdros is dus verplig om in die uitvoering van hierdie hoë

roeping van ons Howe toe te sien dat die regsproses waarvolgens iemand van sy persoonlike vryheid ontneem word so spoedig moontlik die volle imprimatur van die regspraak verkry, en die indruk moet nooit geskep word dat ons Howe onverskillig staan teenoor die vryheid van die individu nie.'

The principles and jurisprudential philosophy expressed in the above quotation from *S v Letsin* find resonance in the Bill of Rights. See ss 7, 8, 12, 35 and 39 of the Constitution.

See also *S v Mofokeng en 'n Ander 1974 (1) SA 271 (O)*; *S v Raphatle 1995 (2) SACR 452 (T)*; *S v Manyonyo 1997 (1) SACR 298 (E)*; *S v Lewies 1998 (1) SACR 101 (C)* and *S v Hlungwane 2001 (1) SACR 136 (T)*. In the latter case, it was remarked that a failure to comply punctiliously with the provisions of s 303 could result in given circumstances in a delictual liability to the accused by those responsible. I refrain from expressing any opinion in that connection. The question is not necessarily free of difficulty; cf. e.g. *Knop v Johannesburg City Council 1995 (2) SA 1 (A)*: *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)* and *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae) 2003 (1) SA 389 (SCA)*. Obviously, practical and policy considerations would play a material determinative role in giving the answer. In my view, it is more pertinent for present purposes, in the context of ss 302-306 of the Criminal Procedure Act, to consider the effect of a failure to comply with the provisions of s 303 of the Code on an accused's right to a fair trial.
The provisions of s 35(3) of the Constitution set out a number of component rights which are included in the overarching concept of the right to a fair trial. These include the right of an accused person to have his or her trial begin and conclude without unreasonable delay and the right of appeal to, or review by, a higher court. The provisions of s 303 provide in part the statutory machinery that is in place to give effect to the constitutional rights enshrined in s 35(3) of the Constitution. The extent to which the provisions were ignored, with substantial prejudicial effect to the accused in this case, is such that it might in itself have been a factor sufficiently material to exclude any confirmation by this court of the proceedings in the magistrate's court. The provisions certainly bear closely enough on the concept of what is included in a fair trial to beg the question as to what the result should be of so material infringement of the right[3]. In view of the conclusion

3 In Constitutional Law of South Africa (ed. Chaskalson et al, loose-leaf revision service 5, 1999), Criminal Procedure, s.v 'The right to a fair trial', at 27-63, the following is said in this respect: 'It is submitted that the fact of a rights violation, if not justified under the limitations clause, should always

to which I have come on the merits of the conviction in this matter it is not necessary for me to answer the question.
I am nevertheless concerned that so flagrant an infringement of the accused's constitutional rights should not in these circumstances go lightly without practical notice. The evidence suggests that the accused is most probably an unsophisticated person of little education and meagre means. In the circumstances I consider that it would be appropriate to direct that a copy of this judgment be forwarded to the Director of the Legal Resources Centre, Western Cape, for consideration by the Centre as to whether assistance should not be given to the accused to achieve appropriate redress. In doing so, I reiterate that I am not thereby expressing any opinion whatsoever as to the factual or legal premises for such redress, or its actual availability. It is however an issue which bears

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entitle the victim to a remedy. This fact is independent of the question of what to do as far as the trial is concerned, although that question will often be the answer to the remedy problem. A damages claim is always on the cards. It might not be too far fetched to adjust the punishment a guilty person receives in accordance with the degree to which his or her constitutional rights were violated. In this way violations might be treated as serious wrongs inflicted upon the person concerned without entailing the sometimes dubious consequence of completely absolving such a person concerned of the liability to suffer punishment. Of course, disciplinary proceedings for rights violations are not barred by any of this, and may well be a valuable educating mechanism. Fn. See S v Philemon 1997 (2) SACR 651 (W) at 667.'

investigation. This matter seems to afford a practical basis for the investigation to occur. The referral is justified, I think, because in the nature of things persons in the position of the accused in this case are generally unlikely to have the resources to pursue the issue. If the resources were available, it is unlikely that persons like the accused would suffer in silence the unacceptably lengthy delays in bringing their cases to the attention of a reviewing judge. The series of judgments mentioned earlier indicates that repeated enjoinders for proper compliance with the provisions of s 303 of the Code are not in themselves sufficient remedy to those nonetheless affected by continuing non-compliance with the provisions.

I am conscious that it is unusual to direct a referral of the nature proposed. Traditionally referrals of this nature have in general been limited to matters such as referrals to the prosecution or the revenue authorities in respect of matters arising in the course of proceedings which are considered by the presiding judge to merit investigation in the public interest, or of referrals to the governing bodies of the advocates' or attorneys' professions in respect of *prima facie* evidence of delinquency on the part of practitioners identified during proceedings. I see no reason, however, why judicial proactivism should be limited, particularly when it comes to the active fostering of respect for the rule of law and individual's constitutional rights. As Lord Woolf, the Lord Chief Justice of England and Wales, observed recently

during an address to the 13th Commonwealth Law Conference : '*Just as the common law has been evolving with increasing rapidity, so has the role of the common law judge. The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and the defence. The role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice. At the forefront of these new responsibilities is achieving access to justice for those within the judge's jurisdiction.*'[4] Although expressed in the context of the development of the English common law, I can think of no reason why Lord Woolf's description of the evolution of a more proactive judicial role should not apply in the modern South African context.

Turning to the merits of the case.

The only evidence adduced by the State in support of the charge against the accused was that of the complainant. He was not a satisfactory witness.
It appears from the record that his demeanour in the witness box did not impress the trial court. He was admonished by the magistrate at one stage for laughing inappropriately and apparently finding the proceedings to be something of a joke. Under cross-examination by the accused (who was unrepresented), he admitted to having returned to the scene of the alleged assault with a panga. The complainant's evidence in chief had suggested that he had been assaulted by the accused at a shebeen and that after he had been chopped across the palm of his hand by the accused, who was allegedly wielding an axe, he had left to go to his sister's house, whence he had gone to hospital to have his wound attended to. The admission made by the complainant under cross examination that his evidence in chief had not accurately reflected the full story was followed up in questioning by the magistrate. In

4 The full text of the address is available on the Lord Chancellor's Department's website at http://www.lcd.gov.uk/judicial/speeches/lcj160403.htm.

answer to the court's questions it transpired that the complainant had returned with a panga and had confronted the accused and tripped him up. He said that the accused was with another man at that stage. The other man had a dog. According to the complainant the accused and his companion then chased him with the dog. He was unable to explain why he had not mentioned these events earlier. (It was apparent from remarks subsequently made by the prosecutor to the court that this aspect of the complainant's evidence had also not been foreshadowed in the witness's statement to the police.) His explanation to the magistrate was that he had forgotten about these incidents. At the time (some four or so months prior to her giving judgment), the magistrate was (justifiably in my view) not impressed.
The following exchange occurred between the magistrate and the complainant:

'Nou as dit so is, hoekom het u dan nou nie dit vir die aanklaer gesê nie, want u sien die aanklaer was[*sic*, ?vra] *wat het toe van hom geword en u antwoord was, u het hom nie weer gesien nie. U is weg en u het hom nie weer gesien nie, nou kom vertel u vir die Hof hoe u teruggekom het met 'n panga en hom omgetrap het, wat gaan hier aan dat die Hof nou nie alles hoor wat daar gebeur het nie? --- Ja maar ek is, ek vergeet mos party goed mevrou mos man.*

Nou wat vergeet u alles nog meneer? Want u het nou vergeet dat u teruggekom het met 'n panga en die man omgetrap het, dis darem groot goed om te vergeet. --- En na dit toe gaan die polisie bel mevrou.

Nee ek wil nie weet van dit nie, ek wil weet hoe gebeur dit dat 'n mens sulke groot goed vergeet? Verduidelik vir my, want ek verstaan dit nie. Verduidelik maar. --- Toe daardie man my gekap het in die hok mevrou en toe gaan ek uit, toe gaan ek … (tussenbeide)
Moenie herhaal wat u gesê het nie meneer, ek wil weet wat veroorsaak dat u sulke belangrike goed wat u gedoen het, vergeet. Hoe het dit gebeur dat u dit vergeet? Hoekom vergeet u dit? --- Ja ek weet nie mevrou man.
U weet nie? Ag nee los nou maar die boeie, dit raas en dan antwoord u my vraag asseblief, ek wil net u getuienis probeer verstaan. Was u so dronk dat u nie alles kan onthou nie? Is daar fout met u gewees nadat u geslaan is, hoekom vergeet u sulke belangrike goed? --- Nee ek weet nie mevrou.
U weet nie? --- Nee.
Nou wat is daar nog wat u vergeet? --- Niks meer nie. Want dit klink nou vir my, kom ek sal nou vir jou so sê, jy kan alles onthou wat hy gedoen het nè? Antwoord? --- Nee.
Is dit 'n ja of 'n nee, kan jy alles onthou wat hy gedoen het? --- Ek kan nie nog so lekker alles onthou nie.
Maar u vergeet wat u gedoen het. H'm, is dit nou wat hier besig is om te gebeur. Vergeet u wat u gedoen het? --- Ja.
Nou hoekom onthou u wat hy doen, maar u vergeet wat u gedoen het? Dit werk mos nie so nie, jy onthou mos altwee. Meneer antwoord laat ek hoor. --- Nee mevrou. Ek hoor nie. --- Nee.
Nee wat? Nou kom ons begin weer, het jy hierdie man op enige stadium geruk? --- Geruk mevrou?

Ja. Het u geruk aan hom? --- Nee mevrou.
Ja. Het u geruk aan hom? --- Nee mevrou.
Nee? --- Ek het nie geruk … (tussenbeide)
U het darem baie lank gedien daaraan nè? --- Nee mevrou.
Hoekom vat u so lank om daaraan te dink, het u hom geruk of het u hom nie geruk nie? --- Nee ek het hom nie geruk nie mevrou
U het hom nie geruk nie, hoe weet jy dit? --- Nee soos ek mos weer dink mevrou.'

The magistrate's questioning of the complainant with regard to his having pulled at the accused arose out of the version of events put to the complainant by the accused and later confirmed in the accused's own evidence.

According to the accused, the complainant had pulled at him at the shebeen and then confronted the accused with having knocked and spilled the complainant's beer. The accused said that the complainant had refused to accept an apology and had grabbed onto the accused by his chest. As the accused pushed the complainant away, he struck at the accused and cut his chin. The accused surmised that the cut was caused by the glass or bottle in the complainant's hand. The accused then said he punched the complainant and knocked him to the ground. The complainant got up and ran from the shebeen. The accused noticed a small axe lying on the floor and presuming it to have fallen from the complainant's person picked it up and retained it in his possession.

The accused continued that when he subsequently left the shebeen he was attacked by the complainant in the manner described in his cross examination of the complainant. He said that at that stage he and the complainant wrestled together on the ground for some time as he sought to subdue the complainant. He eventually released the complainant when other persons had gathered round. The complainant then ran away. The accused denied having assaulted the complainant with the axe. He suggested that the cut to the complainant's hand might have occurred when the complainant fell after being punched by the accused in the shebeen. The complainant had a glass or bottle in his hand at that stage. He also mentioned that the complainant might have

been injured by the axe during the struggle that occurred later when the complainant returned with the panga. He really was not certain ('*ek weet regtig nie*').

The prosecutor did not make much impression on the accused's evidence in cross examination. The prosecutor's cross-examination takes up approximately 11 pages of the typed transcript.

After the prosecutor had completed his cross examination, the magistrate subjected the accused to detailed and trenchant questioning, which takes up 10 pages of the transcript. I do not think it would be unfair to characterise the manner of questioning by the magistrate as in the nature of cross examination. The accused was subjected by the magistrate to prolonged interrogation. In my view, the questioning was at times conducted in a hectoring and distinctly adversarial manner. The record of the magistrate's questioning of the accused is peppered with '*tussenbeide*' annotations, signifying the magistrate's tendency to cut the accused short, interrupting his attempts to answer her questions. It was put to the accused by the magistrate that he was repeatedly contradicting himself. Some of these propositions were made on a questionable foundation. At one stage the magistrate put to the accused that he said something in evidence, which he had not. When he tried to point out to the magistrate that he had not testified as she maintained, he was rebuffed by a remark that the record would speak for itself. The

magistrate clearly was signifying that she did not accept his denial. The record bears out the correctness of the accused's denial of the magistrate's proposition, but there is nothing to suggest that the recording of the evidence was revisited before the magistrate's extemporary judgment was given immediately after the conclusion of the accused's evidence.

The care that a presiding officer must take not to descend unduly into the arena, particularly in a criminal case, is a duty that has been reiterated again and again. For a trial to be fair, justice must not only be done, but it must also be apparent that it is being done. If the presiding judicial officer in a criminal trial conducts him or herself during the trial in a manner which objectively is inconsistent with impartiality, then justice is not seen to be being done. Cf.
S v Roberts 1999 (4) SA 915 (SCA) at paragraphs [22] and [25]. The extent to which a judge or magistrate may properly intervene by questioning witnesses, including an accused person, is not capable of precise definition. Much will depend on the particular circumstances of the case. The issue has, however, been authoritatively discussed in a number of reported judgments; see e.g. *S v Sigwahla 1967 (4) SA 566 (A);* and *S v Rall 1982 (1) SA 828 (A).*
A useful and detailed recapitulation of the relevant principles expressed in those judgments with an emphasis on their current constitutional implications has recently been made by Southwood J (Kirk-Cohen J concurring) in
S v Mathabathe 2003 (2) SACR 28 (T).
The three broadly stated limitations to judicial questioning formulated by Trollip JA in *S v Rall*, supra, at 831H- 833B, bear setting out again in full:
'*While it is difficult and undesirable to attempt to define precisely the limits within which such judicial questions should be confined, it is possible, I think, to indicate some broad, well-known limitations, relevant here, that should generally be observed (see S v Sigwahla 1967 (4) SA 566 (A) at 563F - H).*

(1) According to the above quoted dictum of Curlewis JA [in R v Hepworth 1928 AD 265 at 277] *the Judge must ensure that "justice is done". It is equally important, I think, that he should ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (see, for example, S v Wood 1964 (3) SA 103 (O) at 105G; Rondalia*

Versekeringskorporasie van SA Bpk v Lira 1971 (2) SA 586 (A) at 589G; Solomon and Another NNO v De Waal 1972 (1) SA 575 (A) at 580H). The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression (cf Greenfiield Manufacturers (Themba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd 1976 (2) SA 565 (A) at 570E - F; Jones v National Coal Board [1957] 2 All ER 155 (CA) at 159F).

(2) A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating or adjudicating upon the issues being fought out before him by the litigants. As Lord Greene MR observed in Yuill v Yuill [1945] 1 All ER 183 (CA) at 189B, if he does indulge in such questioning -

> *"he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."*

See, too, the Jones case supra at 159C - E. Or, as expressed by Wessels JA in Hamman v Moolman 1968 (4) SA 340 (A) at 344E, the Judge may thereby deny himself

> *"the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts."*

The quality of his views on the issues in the case, including those relating to the demeanour or credibility of the witnesses or the accused or the relevant probabilities, may in consequence be seriously impaired (see, eg, R v Roopsingh 1956 (4) SA 509 (A) at 514 - 15). And, if he is sitting with assessors, that may well adversely influence their deliberations and opinions and opinions on the issues.

(3) A Judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility. As Lord Greene MR further observed in Yuill's case supra at 189B - C:

> *"It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the Judge to what it is when he is questioned by counsel, particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial*

matters which are in issue."

It therefore follows that the right duty of a Judge to examine the witnesses or accused in a criminal case is not nearly as extensive as the learned Judge seems to predicate it in the above quoted extract from his judgment in granting leave to appeal.

Now any serious transgression of the limitations just mentioned will generally constitute an irregularity in the proceedings. Whether or not this Court will then intervene to grant appropriate relief at the instance of the accused depends on whether or not the irregularity has resulted in a failure of justice (see the proviso to s 322(1) of the Criminal Procedure Act 51 of 1977). That in turn depends upon whether or not the irregularity prejudiced the accused, or possibly whether or not this Court's intervention is required in the interests of public policy (cf S v Mushimba and Others 1977 (2) SA 829 (A) at 844H). Of course, if the offending questioning of witnesses or the accused by the Judge sustains the inference that in fact he was not open-minded, impartial, or fair during the trial, this Court will intervene and grant appropriate relief (cf, for example, S v Meyer 1972 (3) SA 480 (A)).'

In my view, the magistrate's questioning of the accused undoubtedly transgressed the limitations broadly defined in the aforegoing passage from the judgment in *Rall's* case. The content of the magistrate's judgment, handed down immediately after her questioning of the accused, suggests to me that the degree to which she engaged in an adversarial fashion with the accused affected her overall approach in assessing all the evidence.

The evidence against the accused was that of a single witness. The magistrate was astute to the requirement in the circumstances that the court should have especially careful and cautious regard to the quality of the complainant's evidence to determine whether it afforded a proper basis upon which the accused could be convicted. The question is,

however, whether proper heed was actually had to the cautionary rule.

The complainant's evidence was described in the magistrate's judgment in the following terms:

> '*Die enkelgetuienis van mnr Franklin Visser is op record. Daar is geen rede waarom die Hof nie sy weergawe moet glo nie. Hy is in alle opsigte het hy (sic) 'n redelike goeie indruk geskep, veral sy eie aandeel, sy eie kry van 'n panga na die tyd. Hy ht dit alles erken en daaruit kon die Hof die indruk gekry het dat hy probeer nie om enigiets vir die Hof weg te steek nie. Die besering het hy aan die hof getoon. Die besering het hy die aand opgedoen en hierdie besering staan dan ook die wyse waarop hy die besering sou opgedoen het.*'

There is nothing in the magistrate's reasons which reflects the adverse comments that she made about the complainant's demeanour while he was giving his evidence. There is also no indication in the judgment that the magistrate considered the implications of the complainant's failure to previously mention that *he* had attacked the accused with a panga and the implausibility of his explanation that he had forgotten this. There is no indication in the judgment that the magistrate took account of the complainant having taken a long time to hesitatingly answer the proposition put to him by the magistrate arising out of the accused's questions that the complainant had pulled at the accused in the shebeen. I am left with the distinct impression that in the residual heat of the magistrate's confrontation with the accused, the flaws and weaknesses in the complainant's evidence and demeanour did not enjoy the consideration they deserved.

The magistrate appears to have found objective corroboration for the complainant's evidence in the injury that he sustained. There was no

medical evidence in respect of the injury. The complainant said that the wound to his hand required eight stitches. The scar shown to the court was about 5cm in length. The complainant was not detained in hospital and suffered no disability in the use of the affected hand. I am unable to understand on what basis the magistrate was able to find that the injury corroborated the complainant's version. It seems to me that the occurrence of the injury described could just as well have occurred on the bases postulated by the accused.

In rejecting the evidence of the accused, the magistrate pointed to the conflict between the accused's plea explanation and his evidence. There was indeed a basis for this criticism of the accused's case, but in my view, in the circumstances, it was given inappropriate weight. The record in respect of the plea explanation shows that it was very terse. The record reads as follows in the relevant respect:

> '*Artikel 115 wet 51/1977 en swygreg verduidelik.*
>
> *Wil sê:*
>
> *Ek rand hom nie aan nie. Hy rand my aan. Ek verdedig myself. Ek het hom met 'n byl gekap oor hy my eerste met 'n glas slaan*'

In evaluating whether the conflict relied upon by the magistrate was real or apparent, I consider that the following factors should have been taken into account: that the accused was an undefended and apparently unsophisticated person; that the plea explanation had not been elucidated by questions from the court in terms of s 115(2) of the Criminal Procedure Act, at the time it was given; and that the accused at no stage denied that that complainant had been injured and accepted that the injury may well have been caused by the axe during the struggle when the accused attacked him with a panga. The plea explanation was not a model of clarity, but nothing in it is in

essential contradiction of the accused's evidence. Had the magistrate considered the apparent contradiction to be material, she should at least have raised it with the accused by appropriate questioning during, or at the conclusion of his evidence. Notwithstanding the lengthy examination referred to above, however, the magistrate did not explore the issue at all.

The other basis for the conviction of the accused given in the trial court's judgment was that the accused's version of events was improbable to the extent of being far-fetched. I do not agree. On the contrary, it is beyond dispute that the accused's version of events gave a clearer picture of what actually transpired than did the complainant's evidence in chief. The accused's evidence posited two possible situations in which the complainant could have sustained his injury. Neither of them was inherently implausible and, in my view, neither of them could be said to be not reasonably possibly true. The magistrate's criticism of the accused's failure to satisfactorily explain the detailed mechanics of the tussle between the accused and the complainant when the latter returned armed with a panga to confront the accused was unfair in my opinion. A tussle by its nature is a constantly moving and generally uncoordinated event. The inability of someone involved to subsequently distil the action in a description akin to a choreographic annotation is understandable, especially when it is accepted, as it was, that both the participants were to some degree affected by intoxicating

liquor.

I consider that the magistrate could not properly have been satisfied that the accused's guilt was not proved beyond reasonable doubt.
In the circumstances the following orders are made:

1. The conviction and sentence of the accused are set aside and the accused is acquitted and discharged.

2. The registrar is requested to forward a copy of this judgment to the Director of the Legal Resources Centre (Western Cape) for consideration in accordance with the remarks made above concerning the infringement of the accused's constitutional rights consequent upon the delay in submitting the case on automatic review.

A.G. BINNS-WARD

THRING J:

I agree.

W.G. THRING

November 2003