

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)**

REPORTABLE
REVIEW CASE NO. GSH(2) 73/2004

In the review matter between:

THE STATE

And

W.J.

JUDGMENT DELIVERED ON 17 AUGUST 2005

DLODLO, J

- 1) This matter came before me by way of special review. The accused in this matter faces a charge of rape allegedly committed against his daughter, a minor. On 3 September 2004 the trial started before the Regional Court Magistrate Ms E. van Zyl. The complainant broke down consequent to being emotional at the initial stage of her evidence in chief resulting in the trial not being proceeded with. On the ground of certain allegations the bail initially granted in this matter was withdrawn. It was contended that the accused had contravened the bail conditions. It appears both from the letter written to the Registrar of this Court as well as the arguments presented before the Magistrate in an application by the State to have the matter referred to this Court for special review, that some prosecuting officials conducted consultations with the complainant whilst she was still under oath presenting evidence in chief.
- 2) Both the prosecution and the defence were in agreement that consultation of the complainant at that stage by the prosecuting authorities created a

perception that justice was not seen to be done and that the conduct of the prosecuting authorities amounted to an irregularity. In their view such an irregularity is so serious that it must be taken to have vitiated the proceedings before the trial Court. The Presiding Magistrate made an order as follows:

“Om die redes soos reeds volledig op rekord geplaas is, gaan die Hof dan op hierdie stadium die saak op spesiale hersiening na die Hooggeregshof stuur dat die Hooggeregshof ‘n aanduiding gee of die onreëlmatighede so grof is dat dit die verrigtinge nietig verklaar en ook dat die Hooggeregshof ‘n aanduiding gee of daar ‘n nuwe de novo verhoor gelas kan word of wat verder met die saak moet gebeur.”

- 3) It is common cause though that the complainant was still at an embryonic stage of her evidence in chief. The complainant before the conclusion of the evidence in chief essentially remains the prosecution’s witness. It must never be encouraged that prosecutors be at liberty to consult with their witnesses who have been sworn in and are busy giving evidence in chief because this remains irregular. But this irregularity is not so serious that it should be elevated to the status of having an effect of vitiating the proceedings. There is good and understandable reason how it came about that the prosecution consulted with the complainant in *casu*. My views would ordinarily be different if the complainant had finished testifying in chief and the defence was already busy with cross-examination.
- 4) Indeed Hiemstra in his work, *Suid Afrikaanse Strafproses* (6th edition) revised by Kriegler and Kruger correctly

sets out the true legal position, namely:

“alleen ‘n onreëlmatigheid wat werklik ‘n regskening tot gevolg gehad het, in teenstelling tot potensiële benadeling, regverdig tersydestelling.” (Sien **S v Gaba** 1985 (4) SA 734 (A))

- 5) Similarly in **S v Burns and Another** 1988 (3) SA 366 CPD, this Court held that the High Court had the power to interfere by way of review with untermiated proceedings in a Magistrate’s Court but that this power will only be exercised in rare instances where grave injustice might otherwise result or where justice might not be attained by other means. (See also **Ismail and Others v Additional Magistrate, Wynberg, and Another** 1963 (1) SA 1 (A))
- 6) In the result therefore I hold that the irregularity complained of in the instant matter does not necessitate the setting aside of the proceedings with its consequent starting of the matter *de novo* before other Court officials.
- 7) Consequently I make an order that the matter be proceeded with before the same Presiding Officer as if nothing had happened. Any of those prosecuting officials is quite entitled to proceed with the matter. I hasten to add that this decision is not in future to be used as precedent to encourage prosecutors to consult with witnesses who are under oath and are busy testifying.

I agree.

FOURIE, J
