REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: **A130/03**
DATE: **25 FEBRUARY 2005**
DIVISION: **2**

In the appeal between:

SHAHEEN ISMAIL Appellant

and

THE STATE Respondent

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

1] This appeal is about whether or not, in a jurisprudential regime of a constitutional democracy, the Appellant can be said to have received a fair trial, given the "irregularities" pointed out in argument by his legal representative, Mr Khan. It is about, in the first instance, whether the Appellant's right, in the words of a Canadian Court,[1] "to present full answer and defence" was violated when the Court *a quo* summarily excluded evidence that had been led before it,

1 See ***R v Seaboyer*** [1991] 2 SCR 577

being excerpts of evidence given by two witnesses before another Court, on the basis only that the trial before it was *de novo* and the evidence before another magistrate who had to recuse himself was consequently inadmissible.

2] In the second instance, the appeal is about whether the conduct of the Magistrate in the Court below, Mrs Van Der Merwe, amounted, in the words of the Court ***S v Mbeje***,[2] "to an outright denial of *audi alteram partem* rule". (See also ***S v McKenna***;[3] ***S v Zingilo***.[4]) In the Court below, Mrs Van Der Merwe excluded, in her judgment, evidence which had been given before her colleague, Mr Mangweni (Mangweni), before the matter was tried by her. Mangweni had recused himself. However, - which is a critical point in this appeal, - Mrs Van Der Merwe had allowed, earlier on, transcripts of evidence led before Mangweni before he had recused himself, to be handed in. She allowed cross-examination to be conducted with regard thereto. However, when she was giving judgment, she ruled that the entire evidence would be excluded, doing this without giving the Appellant the opportunity to be heard on whether or not such evidence should be excluded.

3] If it is so that by, firstly, allowing the evidence to go in, and secondly, ruling, only in her judgment, without giving the Appellant the opportunity to be heard, Mrs Van Der Merwe acted irregularly, the question would be whether such irregularities were so gross as to have vitiated the proceedings in which they occurred. If this Court is satisfied that indeed the irregularities were so fundamental an intrusion into the Appellant's rights to a fair trial that it can be said in effect there had been no fair trial, then this Court will have come to the

2 1996 (2) SACR 252 (N)
3 1998 (1) SACR 106 (C)
4 1995 (9) BCLR 1186 (O)

conclusion that the irregularities fall into the exceptional category of gross irregularities which were identified by the late Mahomed CJ in ***S v Shikunga & Another***.[5] In the ***Shikunga*** case, the late Chief Justice Mahomed identified an exceptional category of gross irregularities, characterising these irregularities to be so inconsistent, in their grossness, with the proper administration of justice and the dictates of public policy that the only appropriate remedy is to set aside any decision tainted thereby. It seems to me that such a finding, valid as it would be for a review, would, ***a fortiori***, find resonance with an appellate court which we now are.

FACTUAL BACKGROUND

4] The Appellant was charged with murder in the Regional Court sitting in Parow. The allegation was that on the 22nd March 1997, and at the Oriental Plaza, in the district of Cape Town, he shot and killed one, Mansur Davids. At his trial, he was initially represented by Adv King and after conviction (and in the appeal before us) he was represented by his attorney, Mr Khan. He entered a plea of not guilty on the 12th November 1998 and a detailed written plea explanation in terms of Section 115 of the Criminal Procedure Act, 51 of 1977 (the Act) was handed into Court. His plea was that he killed Mansur in self-defence, and that there was therefore no unlawfulness in his conduct.

5] The State, in seeking to discharge its onus of proving its case beyond a reasonable doubt, adduced the evidence of several witnesses, to wit, Sedick Chrsitiaans, Gaironesa Khan (about whom later), Dr Christopher Robert Eades,

5 1997 (2) SACR 470 (NmS)

Inspector Pieterse, Ursula Mclean and Sergeant Botha. The Appellant testified under oath, and the only evidence he called further in his defence was that of Professor Jurie Nel.

6] Whilst it is not the purpose of this judgment to traverse in any measure of detail the facts of this case, given the view I take of the issues, it is appropriate to ventilate the following facts. It would appear that on this 22nd day in March 1997, there was a sharp exchange of words between the Appellant, who runs a business at the Oriental Plaza, and Christiaans. Christiaans claimed that he had gone to the Appellant's business. According to Christiaans, the Appellant began to swear at him. According to the Appellant, it was Christiaans who came and swore at him and was very aggressive and even tried to hit him. Both the Appellant and Christiaans are ***ad idem*** that one Mohammed intervened, taking Christiaans out of the Appellant's shop.

7] Christiaans claimed in his evidence that whilst he was walking away, he heard the Appellant say, "I will shoot him!", whereupon, sensing this as a threat, he went back to the Appellant and challenged him to a duel with firearms – a gunfight typically reminiscent of scenes in B-rate Western movies, except that this was not a movie. Evidence shows that Mohammed again intervened and led Christiaans away. At this stage Mansur got on to the scene. According to Christiaans, Mansur asked both the Appellant and Christiaans to act as men and fight with fists. The Appellant (who had in the interim cocked his firearm) testified that Mansur not only swore at him, but also lunged at him and hit him on the shoulder, whereupon he moved further behind the counter, where the deceased grabbed him. Christiaans would only say that Mansur had only endeavoured, without success, to grab the Appellant.

8] The evidence of the State, through Christiaans, and that of the Appellant, differs at the critical stage that followed hereafter. Christiaans testified that at this stage, the Appellant had shouted to Mansur, “Hit me! Hit me! Hit me!”, whereafter Appellant drew out his firearm, aimed at and shot Mansur. According to him, Mansur was not armed, had not grabbed the Appellant by the collar and his life was not in danger. On the other hand, the Appellant testified that Mansur had grabbed him, whereupon he went for his firearm in order to defend himself, and a shot went off.

9] Mclean, whose workplace is opposite Appellant’s business, testified that she could see the Appellant’s counter from her workplace. She had heard arguments between the Appellant, Mansur and Christiaans, characterised by swearing by all three of them. According to her, Mansur, standing at about 1.5 to 2 metres from the Appellant was swearing at the Appellant who was swearing back during which period she heard the Appellant say, three times, “Hit me!”, and then thereafter, there was a gunshot.

10] Khan’s evidence was more or less to similar effect as that of Christiaans and Mclean, particularly that of Mclean. The other critical evidence of the State was that of Inspector Pieterse, who testified that it was impossible to fire a shot with the kind of weapon in this incident, without applying pressure to the trigger. This evidence was obviously called by the State to refute any claim by the Appellant that “a shot just went off”.

11] Another critical evidence sought to be relied upon by the State was that of Dr Eades, who testified that his post mortem examination of Mansur, the deceased,

showed that the cause of death was a gunshot wound to the neck and consequences thereof. He had also testified that he had also not found any residue or tattooing inside or outside the gunshot wound. This led him to the conclusion that the deceased's had not been a "contact" or "near contact" gunshot wound. The State sought, on the basis of his finding, to argue that this medical finding served to compliment the three witnesses' version that the deceased was not as near to the Appellant as the latter claimed. By parity of reasoning, the State sought to persuade us that the killing was in cold blood, because the deceased, unarmed as he was, had not presented a threat to the Appellant, the nature of which could have justified an apprehension in his mind that his life was so much in danger that the only way to escape it would be for him to resort to what turned out to be lethal and fatal shooting of Mansur.

CRITICAL *RES GESTAE* BEFORE AND DURING THE COURT PROCESS

12]I think this should be an appropriate stage, against the background of this evidence which was given before Mrs Van Der Merwe (the Court ***a quo***), to state that prior to the trial being conducted before her, the Appellant had appeared before another Magistrate, Mangweni aforementioned. Christiaans and Khan had testified before Mangweni before he recused himself. After Mangweni had recused himself, - the reasons for him so recusing himself are not really material for purposes of this judgment – the trial commenced ***de novo*** before Mrs Van Der Merwe, with Christiaans and Khan again leading evidence.

13]As indicated earlier in this judgment, when Christiaans and Khan began to testify before Mrs Van Der Merwe, by consent between the parties, transcripts of the evidence which they had earlier led before Mr Mangweni were allowed to be

handed in as exhibits to be relied upon by the Appellant's lawyer not only as evidence of what they had said before Mangweni, but also to lay the basis for the legal representative of the Appellant, cross-examining them on the basis thereof.

14] During cross-examination of Christiaans and Khan, the Appellant's lawyer referred to the evidence led by these witnesses at the previous hearing before Mangweni, pointing out to a number of inconsistencies and contradictions. They were called upon to explain these contradictions, some of which were quite critical. The State, and properly so, raised no objections to the transcripts being presented and being handed in as exhibits, and the witnesses being examined on the evidence they had given previously. There is strong authority for this.[6]

15] As earlier indicated, the State raised no objections to this evidence being led, neither did the Magistrate herself disallow, as at the time that it was being introduced for purposes of cross-examination, the statements from Khan and Christiaans. In ***S v Mafaladiso & Andere***,[7] the Court considered the calling, examination and refutation of witnesses' statements, and a prior statement. The Court set out the judicial approach to be applied to such circumstances. The Court pointed out that the contradictions between two witnesses' evidence or the contradictions of versions of the same witness's evidence, should be investigated not to prove which version is correct but to satisfy itself that the witness could err due to the defective recollection of the witness or the dishonesty of the witness. The Court was careful to state that the mere fact that it was evident that there are self contradictions must be approached with

6 See ***S v Sexwale & Others*** (2) 1978 (2) SA 628 T; ***S v Pietersen*** 2002 (1) SACR 330 (C) and the very recent judgment in ***S v Pitout*** 2005 (1) SACR 571 (B)
7 2003 (1) SACR 583 (SCA)

caution by the Court.

16]Firstly, the Court ought to carefully determine what the witness actually meant to say on each occasion so as to determine if there is an actual contradiction and the extent thereof. Secondly, it must be borne in mind that not every error by witness and every contradiction and deviation affect the credibility of the witness unless they are material. In such circumstances, the judicial officer bears the task to weigh up the previous statement against (***viva voce***) other evidence and to decide whether it is reliable or not, and to decide whether the truth has been told despite any shortcomings.

17]The point, however, remains, that it is settled law that provided a proper basis has been laid for the introduction of transcripts of evidence led at previous hearings and/or evidence contained in previous statements, such statements are permissible to be introduced into evidence in an ongoing trial. In this case, as we have indicated, the question never even arose since the evidence before Mangweni was allowed to go in by consent between the State and the Appellant's lawyer, with the apparent tacit approval of, and/or concurrence by the presiding officer Mrs Van Der Merwe. She had accepted the exhibits and had made no comment thereon, until the time that she handed down the judgment.

18]In her judgment, Mrs Van Der Merwe held that excerpts of the evidence of Christiaans and Khan in respect of their testimony before Mangweni, were inadmissible as the trial before her was a trial ***de novo***. I am in respectful disagreement with the learned Magistrate. This Court, in ***State v Chabulla & Andere***,[8] in dealing with the position of statements made during bail

8 1999 (1) SACR 29 (C)

proceedings, held that the interests of justice could only be determined with reference to honest evidence which led to the determination of the truth. A person, who, during a bail application, relied on statements which contradicted what he proposed to say at his trial, could not appeal to reasonableness for protection against the revelation of inconsistencies between his evidence during the bail application and his evidence at the trial. That would amount to unilateral protection of his interests against the opposing interest of the State and of the administration of justice.

19]The Court held that it would also create a real opportunity for accused persons to mislead a court during bail applications, with evidence designed to secure an advantage without fear that they would later be confronted with prior evidence, should it be in conflict with what was advanced by them at the trial. Such evidence should be admitted, the Court held, subject to the Court establishing whether such evidence was relevant for the purposes of the trial and that it was admissible against the Accused in terms of the ordinary rules of the law of evidence.

20]In principle, there is no difference between the above scenario and one in which a Court has to consider the evidence of the witness who had given sworn testimony at an earlier trial, such as was the case when Christiaans and Khan testified before Mr Mangweni. They had given sworn testimony in that Court. The mere fact that the trial now commenced ***de novo*** did not make their evidence irrelevant. On the contrary, their evidence was relevant. There is not a principle in law that militates against their evidence being admitted simply because proceedings had commenced ***de novo***. The issues were the same issues as had been dealt with in a previous trial. Witnesses for the State had the

same, if not, **more** reason to be shown to be testifying in a way that is not intended to mislead a court by testifying more or less in the same way before a court in which proceedings were starting ***de novo*** as they had testified in a previous trial.

21]For Mrs Van Der Merwe to have held that the excerpts of evidence of Christiaans and Khan in respect of their testimony before Mangweni were inadmissible was a gross irregularity, in my view. It was prejudicial to the Appellant, and it does not augur well for the proper administration of justice. It cannot stand. If it was Mrs Van Der Merwe's intention to exclude the evidence of Christiaans and Khan in respect of their testimony before Mr Mangweni, assuming that she could have done so, the time for her to have done so would have been at the time that the record was handed into Court, or during the cross-examination of Christiaans and Khan or at any time prior to the handing down of her judgment.

22]It is clear that Mrs Van Der Merwe was under the erroneous belief that if a Magistrate recuses himself or herself halfway through a trial, the proceedings until the time of recusal are void. The evidence before a Magistrate is evidence which does not simply disappear because the Magistrate has recused him or herself. It is evidence that has been led under oath and is no different from an affidavit filed by a party which is open to be tested.

23]The evidence which Christiaans and Khan had given previously was open to be used to test the evidence which they gave before Mrs Van Der Merwe. There are no grounds upon which the previous evidence should have been excluded, and the ones that Mrs Van Der Merwe gave in the course of her judgment are at variance with the legal position. The fairness of the trial was seriously

compromised by Mrs Van Der Merwe's decision not to admit the evidence given before Mangweni. The manner in which this was done further compounded the wrong.

24]As stated already, at the time when Appellant's lawyer cross examined Christiaans and Khan, with regard to the evidence they had previously led before Mangweni, the State did not object to reference being made to the evidence led before Mangweni nor did the Magistrate hold such reliance on previous evidence to be improper. No concerns were raised by the Court, which appears to have gone on to number the excerpts which were handed in as exhibits. At no stage was there ever an indication whatsoever by the Court that it considered the handing in of the record of the proceedings before Mangweni, or the cross-examination on the basis thereof, as being problematic. Van Der Merwe had not called upon the State or the Appellant's Counsel to argue whether the previously led evidence before Mangweni should be admitted or not, for purposes of testing the reliability thereof. There was quite clearly a legitimate expectation on the part of the Appellant that such a prejudicial decision as was taken by the Magistrate, to exclude what actually was critical evidence for their defence, would be taken in circumstances where they would have been called upon to make representations as to whether or not such evidence could be excluded.

25]In a constitutional democracy, in whose jurisprudential regime everyone has the right to administrative action that is lawful or reasonable and procedurally fair, the right to be heard before any decision detrimental to one's rights and interest can be taken, is so fundamental that courts of law, far from trampling on such a right, are enjoined by that very Constitution, in Section 7 thereof, to respect, protect, promote and fulfil the rights enshrined in our Constitution. The

Magistrate should not have denied an accused person an opportunity to address her on whether or not the evidence before Mangweni, and evidence of cross-examination on the basis thereof, ought to have been excluded. By denying the Appellant that opportunity, she committed an irregularity so gross that it falls within the exceptional irregularities identified by Mahomed CJ in the ***Shikunga*** case (***supra***).

26] Indeed, the question was posed by us to Mr Solomons, for the State, as to whether it can ever be said that the accused had received a fair trial when such a fundamental right had been violated in such a far-reaching fashion by a Magistrate. The State conceded that the conviction, in the circumstances, cannot stand. We think that it was a concession properly made by the State, and on that basis alone, it becomes unnecessary to deal with the merits of the case. We agree with the State that on the basis of the two grounds raised so far in this judgment, the conviction of the Appellant should be set aside.

27] However, there is a further, and in our view, critically important basis on which this conviction could not stand because it does not pass muster of proper scrutiny. In his grounds of appeal and in heads of argument placed before us, but particularly also in the hearing of the appeal, Mr Khan, on behalf of the Appellant, raised a third and more critical basis on which we should uphold the appeal. This related to the refusal by Mrs Van Der Merwe to allow cross-examination of Christiaans with regard to his and the deceased's violent disposition.

28] The Appellant had testified that unlike both Christiaans and Mansur, both of whom are fairly big people, he was himself physically challenged. He claims to

be small in stature. He had reason to consider both Mansur and Christiaans to be violent people. He had sought to place before the Court not only evidence of his state of mind before and at the time he executed the fatal shot that killed Mansur, but also evidence of why he had reason to believe that his life was in danger. He had sought to cross-examine Christiaans on whether, he, Christiaans had not informed the Appellant, that he had shot someone before. Given that Christiaans had challenged the Appellant to a gunfight outside his shop before the deceased, Mansur, had arrived, the relevance of this evidence, which the Magistrate dubbed as hearsay, is manifest.

29]Mr Khan argued that this cross-examination should have been allowed, as it would constitute a fair basis for an inference to be drawn as to the state of mind of the accused at the time that he executed the fatal shot. Disallowing cross-examination that sought to bring out this kind of evidence was irregular. When the Appellant also sought to give evidence to the effect that he was scared of Christiaans because Christiaans had told him that he had killed a 17-year old youth, the Magistrate ruled that such evidence was hearsay. In our view this was an extraordinary ruling which amounted to a gross irregularity which so seriously prejudiced the Appellant that the only conclusion we can come to, as we do, is that there was a failure of justice.

CONCLUSION

30]Courts of law have held that the principle of proof beyond a reasonable doubt is one of the cornerstones of the proper administration of criminal justice. Proof beyond a reasonable doubt itself presupposes a fair trial. A fair trial is one in which the Court, as the arbiter of justice, gives opportunity to both sides to

present their cases as best as they know how, and in the best possible way. The State always bears the onus of proof. Society expects our courts to be fair to both accused persons as well as to the State in its endeavour to present a case that is without blemishes. Certainly, in some instances, our courts will rather allow the guilty to go free, than allow the innocent to be wrongfully convicted. In this case we are satisfied that the Appellant's rights to have a fair trial as entrenched in Section 35(3) of the Constitution have been violated in all or more of the ways that have been indicated in the course of this judgment. We consequently come to the conclusion that the appeal succeeds and that the conviction and sentence of the lower court should be set aside.

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NTSEBEZA AJ

I CONCUR, AND IT IS SO ORDERED:

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WAGLAY J

Date of Hearing: 14 OCTOBER 2005

Date of Judgment: 21 DECEMBER 2005

For the Appellant: **MR KHAN**

MR KHAN & ASSOCIATES
CAPE TOWN

For the Respondent: **ADV SOLOMONS**

CAPE TOWN