IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A418/2007

DATE: 15 FEBRUARY 2008

In the matter between:

AUBREY OPPEL Appellant

and

THE STATE Respondent

JUDGMENT

JOUBERT, AJ:

[1] The appellant was convicted in the Regional Court at Bellville on 24 June 2002 on charges of murder and theft. He was sentenced to a period of 10 years' imprisonment on the murder count and five years' imprisonment on the theft count. Leave to appeal was granted on 4 May 2007. It is unfortunate that this matter only comes on appeal almost six years after the conviction.

[2] The appellant's main ground of appeal is based upon the magistrate's conduct during the course of the trial. The case against the appellant was based on circumstantial

evidence and the conviction of the appellant was based, to a large extent, on adverse credibility findings made against him by the magistrate. A reading of the record reveals reveals truly shocking behaviour on the part of the magistrate. As will be indicated below he entered into the arena and subjected the appellant to a lengthy and bullying cross-examination. He denigrated and insulted the appellant's legal representative and threatened to hold him in contempt when he, quite correctly, objected to the cross-examination of the appellant by the magistrate.

[3] His attitude throughout demonstrated a degree of arrogance which is unbecoming of a judicial officer. He further, having threatened the appellant's legal representative with contempt, refused to allow him to address the Court regarding his own behaviour. Having made the insulting remark that the legal representative should first read the authorities before addressing him, he thereafter refused to allow him to do so. It is, however, apparent from the magistrate's behaviour that he himself flagrantly disregarded, not only the rules of propriety and etiquette and basic good manners, but ignored that which is set out in the authorities with which he claimed to be familiar.

[4] In S v Thyabela(?) 1969(2) SA 22 A at 29G-30F, Milne, JA stated the following:

> "It is appropriate at this stage to turn to an examination of the second ground on which the application for leave to appeal was founded, namely that the manner in which the trial Judge conducted himself was such that the appellant and Myakiso, his co-accused, had not had a fair trial.

It is a fundamental principle of our law and indeed, of any civilised society, that an accused person is entitled to a fair trial, S v Alexander & Others 1965(2) SA 696 (A) at 809C-D; S v Mushimba en Andere 1977(2) SA 829 (A) at 842B and 844H. This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules or principles or the procedures which the law requires, S v Meyer 1972(3) SA 480 (A) at 481F and S v Raal 1982(1) SA 828 (A)".

In the latter case, Trollip, AJA said at 833:

> '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, see for example S v Meyer 1972(3) SA 489 (A)".

In Meyer's case, Kotze, AJA said at 484D:

"Wanneer 'n geregtlike beampte optree soos hierbo aandui gaan hy, na my mening, redelike perke te buite. Hy skep dan nie die indruk dat die doel van sy ondervraging is om duidelikheid te vind nie. Veel eerder word die indruk gewek dat die geskil vooraf beoordeel word en dat reg en geregtigheid nie geskied nie, Solomon & Another NNO v De Waal 1972(1) SA 575 (A) at 580.

In die onderhawige geval het die optrede van die landdros, volgens my mening, in sy geheel gesien en veral sy gedrag teenoor die appellant terwyl hy getuig het, sulke afmetings aangeneem dat dit nie gesê kan word dat hy vlekkelose onpartydigheid gehandhaaf het nie, Rondalia Versekeringskorporasie van Suid-Afrika Bpk v Leda(?) 1971(2) SA 586 (A) op 589. By gevolg moet bevind word dat hy nie sy funksie as regsspreker na behore uitgeoefen het nie.

Afgesien van die meriete in hierdie saak is 'n bevinding onvermydelik dat die landdros nie deurgaans en onbevange oordeel bewaar het nie, Leda se saak op 589, en dat sy optrede

so ernstig afgewyk het van behoorlik en ordelike regspraak dat die vorige uitspraak ongeldig is".

[5] In such a case the Court will declare the proceedings invalid without considering the merits. In Raal's case it was found that the trial Judge's questioning of the appellant in that case had clearly infringed the limitations set out at 831H-832H of the judgment of Trollip, AJA which constituted an irregularity in the proceedings but that it could not be inferred there from that in fact the trial Judge had been prejudiced against the appellant and had prejudged the case against him, at 834B-C. In this case, however, it was submitted that the conduct of Kruger, AJ sustained the inference that in fact he was not open-minded, impartial and fair during the trial.

[6] It is accordingly our painful duty to examine the record to determine whether this submission is well-founded. I say "painful" because in the words of Kotze, AJA in Meyer's case, *supra*, at 483 *in fin* there is "'n tradisie van geregtelike selfbeheer wat howe in Suid-Afrika met trots nastreef". In S v Raal 1982(1) SA 828 (A), Trollip, AJA stated the following at 833C-834B:

"The application for leave to appeal comprised the criticism of the learned Judge's conduct at the trial to his alleged impermissible or excessive questioning of the appellant. It was submitted that from the very commencement of the trial he descended into the arena against the appellant by manifesting disbelief or at least scepticism of the validity of his defence of self-defence. The appellant's evidence in chief occupies eight pages of the record. Cross-examination by the prosecutor covers 41 pages during which the learned Judge often intervened and questioned the appellant. I estimate those interventions to be in all about 18 pages. Thereafter, and before the re-examination of the appellant by his counsel, the learned Judge proceeded to question him continuously for 34 pages in which he traversed in detail virtually the whole of his version again. But in the main, especially during the continuous questioning covered by the aforementioned 34 pages, the interrogation was tantamount to sheer cross-examination of the appellant in which leading questions were put to discredit him as a

witness. Many of them also conveyed judicial disbelief or scepticism of his evidence on certain material aspects of the alleged self-defence.

I shall not over-burden this judgment with extracts from the record to illustrate the nature of the learned Judge's questioning of the appellant, they would be too numerous and lengthy. It suffices for me merely to say that, in my view, he far exceeded or clearly infringed the limitations mentioned above".

[7] In the present matter, the questions put by the magistrate to the appellant take up some 30 pages of the record. Leading questions were put to the appellant by the magistrate and he was cross-examined. A few extracts which demonstrate the attitude of the magistrate and the manner in which he questioned the appellant will suffice. There are numerous similar examples:

"Dan vra ek nou weer vir u meneer, wanneer het hy gesê dit is sy goed? --- Dit is Donderdag my Edelagbare wat hy gesê het dit is sy goed.

Hoekom het hy dit vir u gesê? --- Ek weet nie, hy het dit net gesê my Edelagbaar.

Ja so hy lieg, hy lieg daaroor nê? --- My Edelagbare ek kan nie onthou dat hy vir my gevra

het nie U Edelagbare, as hy vir my gevra het sou ek mos onthou het".

[8] The treatment of the appellant's representative by the magistrate was equally objectionable:

"MNR GROBBELAAR: Agbare mag ek op hierdie stadium net my beswaar aanteken?

HOF: Meneer, as jy 'n beswaar het dan moet jy dit maar later aanteken.

MNR GROBBELAAR: Sal die Hof my die geleentheid gee om u toe te spreek?

HOF: Gaan dit oor die vrae wat ek aan die getuie vra?

MNR GROBBELAAR: Dit is korrek u is besig om te kruisverhoor...(tussenbeide)

HOF: Ek het die reg meneer, ek het die reg om te vra.

MNR GROBBELAAR: U is besig om te kruisverhoor.

HOF: Nee, ek is nie besig om te kruisverhoor nie.

MNR GROBBELAAR: Ek wil net hê u moet my beswaar aanteken.

HOF: Meneer net 'n oomblik, pasop nou net dat u nie beweeg na minagting vir die Hof toe nie, sit asseblief.

MNR GROBBELAAR: Mag ek u nie nou toespreek nie?

HOF: Nee, sit asseblief.

MNR GROBBELAAR: Mag dit die Hof behaag.

HOF: Kan ek net vir u sê my funksie is om vas te stel wat is die waarheid ek gaan nie eers toelaat dat u vir toespraak, u vir my toespreek daaroor nie. As dit nodig is dan kan u dit later doen op 'n behoorlike wyse deur die regte forum.

MNR GROBBELAAR: So ek mag nie vir u hier toespreek daaroor nie?

HOF: Nee, ek gaan u nie laat, ek gaan nie laat u my toespreek nie meneer daar is niks waaroor u my hoef toe te spreek nie.

MNR GROBBELAAR: Mag dit die Hof behaag Agbare.

HOF: En voordat jy enigsins my wil toespreek nê dan roop, lees u die nodige beslissings oor hierdie aspekte.

MNR GROBBELAAR: Mag ek u toespreek nou daaroor Agbare?

HOF: Nee u kan maar terug gaan meneer". (That is clearly to the accused)

[9] It is clear that the magistrate simply ignored Mr Grobbelaar's last request that he be allowed to address him. The behaviour of the magistrate was not that which one would expect of a judicial officer. Magistrates exercise a very necessary and onerous function, this does, however, not justify the type of behaviour exhibited by the magistrate. Taken cumulatively, the questions put by the magistrate sustain the inference that in fact he was not fair and impartial during the trial. In these circumstances the proceedings are invalid and the convictions and sentences imposed on the appellant cannot stand.

[10] I am of the view that the appeal should be allowed and the conviction and sentence should be set aside.

JOUBERT, AJ

SAMELA, AJ: I agree and it is so ordered.

SAMELA, AJ