IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Review Case No. SLH 117/2007
Magistrate"s Serial No. 21/2008
High Court Ref. No. 08650

In the review matter between:

THE STATE

vs

TURNER ADAMS **ACCUSED**

REVIEW JUDGMENT DELIVERED ON 22 AUGUST 2008

DLODLO, J

[1] This matter served before me by way of Special Review. The Accused had pleaded not guilty to three (3) counts to wit Rape, Assault with intent to do grievous bodily harm and Kidnapping. He exercised his Constitutionally enshrined right to remain silent. The State proceeded to prove its case in the normal way. Upon closure of the State's case, the Accused testified in his defence. On 17 March 2008 (after the defence case had been closed as well) the proceedings were adjourned to 31 March 2008 for purposes of enabling the parties to address the Court and for Judgment. On 31 March 2008 the prosecution placed it on record that the case was on the roll for Judgment. The Magistrate immediately

thereafter proceeded to deliver Judgment. The Judgment comprises of no less than nine (9) pages. The Magistrate convicted the Accused of Rape and acquitted him of the remaining charges. Without any interruption of any nature, the prosecution proceeded to prove the Accused' previous criminal record and the latter confirmed and/or admitted the correctness of the history contained in his previous criminal record. Thereafter the proceedings stood down for a moment. It would appear that during this moment the Accused' defence attorney, Ms May, brought it to the Court's attention that she had not been given an opportunity to address the Court prior to Judgment. This I deduced from the following observation made by the Magistrate when the proceedings resumed:

"Omdat die prokureur nou besef het dat sy nie betoog het nie, gaan die Hof nou die saak stuur na die Hooggeregshof toe, om die uitspraak ter syde te stel. Net die uitspraak. Net die uitspraak en dan die saak terug te stuur, dan vir die Staat en die verdediging geleentheid te gee om te betoog. Verstaan u dit?.....Dis korrek."

[2] It is on the aforementioned basis that the matter found its way to this Court. The Acting Regional Court Magistrate (Wynberg) in his minute admits that this constituted what he called *"a procedural irregularity"* and requested as aforesaid, that the Judgment portion of the proceedings be set aside and that the matter be referred back to him in order that he affords the State and the defence the opportunity *"to deliver their closing argument and thereafter proceed to judgment taking into consideration the arguments of the State and the defence."*

From the onset I deem it opportune to set out the provisions of section 175 of the Criminal Procedure Act 51 of 1977 as amended. This section provides:

"175 (1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the Court.

(2) *The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave from the court, reply on any matter of fact raised by the accused in his address."*

[3] The provisions of the aforequoted section of the Criminal Procedure Act *per se* make it abundantly clear that failure to allow the defence and the prosecution an opportunity to address the Court prior to Judgment is an irregularity. The only question that remains to be answered is the nature and extent of such an irregularity. Differently put, does such an irregularity result in the failure of justice? Further differently put, does such an irregularity so "poison" the proceedings such that one can say it has succeeded in vitiating the proceedings? In this short Judgment I endeavour to answer this remaining question. As early as in 1953 in ***R v Phike*** (1953) 2 All SA 31 (O) an almost similar factual scenario presented itself before Van Blerk J. In that matter an accused who was legally represented was charged with theft. Having pleaded not guilty, he was, however, found guilty and sentenced accordingly. The proceedings, however, showed that when the accused closed his case without calling defence witnesses, the Magistrate simply proceeded and pronounced the accused person guilty without having afforded both the defence attorney and the prosecution an opportunity to address the Court. Van Blerk J observed as follows:

> ***"Die vraag bly dan oor of deur in die eerste instansie die prokureur die geleentheid te ontneem om die Hof toe te spreek hier nie 'n onreëlmatigheid plaasgevind het wat op 'n regskending uitgeloop het nie en hier dink ek moet die prokureur se latere rede vir weiering om die hof toe te spreek nie die beskuldigde beswaar nie. Op feite is hierdie geval te onderskeie van die in Rex v. Cooper, 1926, A.D. 54, waar die beskuldigde bewus van sy regte die kans laat verbygaan het om die Hof se aandag betyds op die versuim te vestig. In die onderhawige geval blyk dit of die uitspraak verrassend skielik***

gevolg het, op die mededeling dat die beskuldigde sy saak sluit en kom die feite meer ooreen met die van Rex v. Malherbe, 1931 O.P.D. 99, waar dit toe beslis was dat die versuim 'n growwe nalatigheid was. Kyk ook O'Connell v. Attorney-General and Magistrate of Pretoria, 1930 T.P.D. 9; Rex v. Msibe, 1945 (2) P.H.H. 194.

Ek is van mening dat die onreëlmatigheid hier wel op 'n regskending uitgeloop het omdat die implikasies daarvan moeilik te voorsien is en onbepaalbaar is. Die skuldigbevinding en vonnis word nietig verklaar en die saak word terugverwys om de novo deur 'n ander magistraat verhoor te word."

[4] The fact of the matter is that section 175 (1) of the Criminal Procedure Act provides for prosecution and the defence to address the Court at the conclusion of all the evidence as aforementioned. In the instant matter the parties were not invited to address the Court. Concomitantly, the parties were not afforded the right to make submissions to the Court on the merits prior to the Accused being convicted. Liebenberg J in ***S v Kwinda*** 1993 (2) SACR 408 (V) considered a matrix of pre-constitutional decisions and concluded thus:

"The failure to afford an accused the opportunity to address the court before judgment is a grave irregularity which will result in setting aside of the proceedings unless it is clear that the accused was not prejudiced thereby or that the failure was due to his own fault or where it is clear that he waived his right of address. The judicial officer must afford the accused the opportunity to address the court by enquiring from him whether he wishes to avail himself of his right to do so and must record the response of the accused."

[5] I fully align myself with the above quoted sentiments. Patel J in ***S v Tshabalala*** (2002) JOL 10220 (T) at page 4 introduced a constitutionally sound approach to this procedural irregularity when he observed as follows:

> ***"[5] Undeniably the Constitution is the supreme law. Section 2 provides that any law or conduct that is inconsistent with the Constitution is invalid. Section 8(1) provides that the Bill of Rights, which is the cornerstone of our democracy, applies to all laws and also binds the judiciary. Section 39(2) enjoins the promotion of the spirit, purport and objects of the Bill of Rights. These are the constitutional injunctions admonishing the reconfiguration of the law. Therefore, the starting point in automatic or special review matters, under sections 304 and 304A of the Criminal Procedure Act, is to determine whether there is an infringement of a constitutional right. If such an infringement occurred then it is necessary to determine the extent of the infraction and whether it is of a serious nature. This apporach is conducive to "transformative adjudication" and supports the development of constitutional jurisprudence."***

[6] It is very true that section 35 (3) of the Constitution Act 108 of 1996 forms the bedrock of the right to a fair trial. Inherent in the right to a fair trial is that criminal trials must be conducted in accordance *"with the notions of basic fairness and justice"*. See: ***S v Zuma and Others*** 1995 (2) SA 642 (CC) paragraph 16 at 652 F; ***S v Ntuli*** 1996 (1) SA 1208 (CC) at 1209B. It is an accepted and established fact that fair trial proceedings *"guarantee that issues are well and fully argued by the parties who have a stake in its outcome."* See: ***Borowski v Canada*** [1989] 47 CCC 3d 1 at 13. Even though there is no express provision under section 35 (3) of the Constitution entitling an accused person to address the Court at the

conclusion of all evidence but it is and remains one of the most fundamental rights of the accused person to be heard before any decision affecting him or her is taken by the Court. See ***S v Tshabalala*** *supra*. This is not only an expression of the *audi alterem partem* rule, but it is also an integral component of the right to adduce and challenge evidence embodied in section 35 (3) (i) which presents itself for argument meriting consideration, analysis and assessment by the judicial officer. See: ***S v Mbeje*** 1996 (2) SACR 252 (N) at 257h.

[7] The Court is duty bound to invite the parties to address it on the merits by affording them an opportunity to do so. The address by each party on the merits is and remains an important final act of participation on their part towards the determination of the accused person's culpability. It is an opportunity afforded as of right to the parties to influence the trial Court's decision. The parties have a right to persuade the Court. The right to participate in the proceedings is a fundamental principle the denial of which is per se an infringement irrespective of the prospects of success. I am in full agreement with Patel J in ***S v Tshabalala*** *supra* that the Court's failure to comply with the provisions of section 175 (1) of the Criminal Procedure Act constitutes an infringement of the Accused' right to a fair trial in that the proceedings are not in accordance with the formalities, rules and principles of procedure. See also: ***S v Zuma*** *supra* at 652B-C. Whenever there is an infringement of the right to a fair trial, the review would succeed, unless the reviewing Judge or Court finds that the right complained of was reasonably and justifiably limited in terms of law of general application contemplated in section 36 (1) of the Constitution. See: ***S v Zingilo*** (1995) 9 BCLR 1186 (O) at 1189A-G.

[8] In my view, the delivery of Judgment and the subsequent conviction of the accused person without affording both his attorney and the prosecution the opportunity to address the Court most certainly

compromised the fairness of the trial to the detriment of the accused person. A Judgment founded on a substantially unfair procedure must surely be void. Such a Judgment is no Judgment at all and it is without legal efficacy. See: ***Honourable MM Corbett, Writing a Judgment*** (1995) 115 SALJ 116 at 117. The magistrate asked that only the Judgment portion of these proceedings must be set aside and the matter referred back to him in order that he gives the Defence and the Prosecution an opportunity to address him prior to him delivering a Judgment. I do not agree. In my view, the grievous error committed in these proceedings tainted the whole case. In any event, even if his request was valid and could be acceded to,how on earth can it be expected of a defence Attorney to endeavour to persuade a Presiding Officer differently when the latter had already taken and announced his decision on the matter? The adage that justice must not only be done but it must also be seen to be done is very powerful in our legal system and deserves protection and adherence at any cost.

[9] It is my finding that in the instant matter the irregularity is so grievous that it vitiated the proceedings. I obviously do not agree with the Magistrate that this is a matter where only the Judgment portion of the proceedings should be set aside and that he should be afforded an opportunity to further have a hand in this matter. Accordingly the proceedings in the instant matter are hereby set aside. It is ordered that the matter be tried *de novo* before a different magistrate.

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DLODLO, J

I agree.

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TRAVERSO, DJP