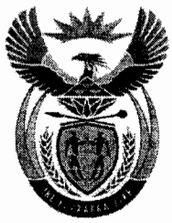


IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE, CAPE TOWN)

"REPORTABLE"

REVIEW CASE NO. WS04/2004
MAGISTRATE'S SERIAL NO. 3/2009
HIGH COURT REF. NO. 1080

In the matter between:

THE STATE

And

JOHN MBEZI **ACCUSED**

REVIEW JUDGMENT DELIVERED ON 26 MARCH 2010

DLODLO, J

[1] This matter was brought to me to be reviewed in terms of Section 24 (1) (c) of the Supreme Court Act 59 of 1959 as amended. It is common knowledge that Section 24 as a whole circumscribes the grounds upon which proceedings in the Magistrate's Court can be brought before the High Court in order that they are reviewed. This deals with the inherent jurisdiction of the High Court. Proceedings falling within the purview of Section 24 are other than those dealt with in terms of Section 304 of the Criminal Procedure Act 51 of 1977 as amended ("the Criminal Procedure Act"). The latter section deals with those matters that have come to be known as "Special

Reviews" in legal circles. The instant matter was sent on review in that (although not yet finalized) in the view of the Presiding Magistrate a gross irregularity has been committed.

[2] Two (2) accused persons faced attempted murder charge before the Regional Court. They are John Mbezi and Lendy Wagner (respectively referred to as Accused 1 and 2). The accused persons were both legally represented. The charge was put to the accused persons and they both pleaded not guilty. On their behalf certain plea explanations were made in terms of Section 115 (2) of the Criminal Procedure Act. The State proceeded to prove its case by calling one James Meni as the only witness. The witness testified in chief and was duly cross-examined by the legal representatives of accused 1 and 2. After certain admissions in terms of Section 220 of the Criminal Procedure Act were made, the State rose to close its case.

[3] Mr. Bezuidenhout who represented accused 1 called the accused to the witness stand to testify in his defence. Mr. Bezuidenhout noticeably had difficulty in leading the accused in that it did appear that he and accused 1 did not properly understand each other. This the Magistrate noted, but Mr. Bezuidenhout struggled on until he came to the end of the evidence in chief. The resultant cross-examination by the prosecution put it beyond anybody's doubt that accused 1 either did not hear the questions or he did not understand them at all. All this happened despite the fact that services of a Court interpreter were employed. The prosecution was having his "feed" on this accused person when the Magistrate *mero moto* indicated that he

was of the view that accused 1 did not understand or even hear the prosecution. Mr. Bezuidenhout then brought it to the notice of the Court that he himself struggled to communicate with accused 1 even during consultation prior to the trial.

[4] It was common cause that accused 1 even had a hearing aid put in one of his ears. It became apparent that the possibility was strong that accused 1 never heard and understood the proceedings from the beginning. A lengthy discussion ensued involving the Court, Prosecutor and Mr. Bezuidenhout. From this discussion it also emerged that Mr. Bezuidenhout was also a qualified psychologist. The proceedings halted as the solution was sought. At the insistence of the Magistrate, the Prosecutor sought help from Tygerberg Hospital. Accused 1 seemingly was examined and a report was prepared. Mr. Van Niekerk was called to testify about the said Report. The Report was an audiogram audiology. Mr. Van Niekerk did not purport to be an expert, but he testified that he worked for the National Institute for the Deaf in Worcester.

[5] His capacity is that of a communications facilitator, meaning that he facilitates communication between hearing people who experience hearing loss. This is what accused 1 was experiencing. Explaining his expertise, Mr. Van Niekerk testified that his work entails sign language interpretation to the deaf people with hearing loss and who are sign language proficient. He also interprets for people who do not use sign language, but have the skill of speech reading. He has nine (9) years practical experience of doing lip speaking/interpreting. Mr.

Van Niekerk told the Court that the instant matter was very different in that accused 1 was not sign language proficient nor does he have speech reading skills. Consequently Mr. Van Niekerk had to approach the National Director of DEAFSA for advice on how to proceed in this matter. The advice given was that he should bring along a deaf person i.e. born deaf. This Mr. Van Niekerk did, but the lady he brought along attempted to no avail to communicate with accused 1.

[6] Mr. Van Niekerk, however, could communicate with accused 1 by using lip speaking skills. Accused 1 would, however, merely nod his head or just answer what he would want to hear. Mr. Van Niekerk would alternate i.e. he would use his voice and not use it and he found that accused 1 understood both on a 50/50 basis. This moved Mr. Van Niekerk to a conclusion that accused 1 does indeed face communications barriers and Mr. Van Niekerk requested an audiogram. The communications barriers were very obvious despite the fact that accused 1 was using a hearing aid. Mr. Van Niekerk then testified about the audiogram. He found accused 1 to be suffering hearing loss of approximately seventy (70) decibels in the right and seventy five (75) decibels in the left ear. In Mr. Van Niekerk's testimony, to communicate with accused 1, one has to be very patient, speak slow, using simple words. The longer the word, the harder it is to read on the lips. According to Mr. Van Niekerk, one needs to make sure that accused 1 understands; the best is to stand in front of him and to ensure that he looks at your face. Only five (5) letters of the alphabet can be read on the lips – the rest is guesswork.

[7] When Mr. Van Niekerk was asked specifically if accused 1 would be able to relate to what was said in Court, his answer was "not at all." Asked if accused 1's condition was of a permanent nature, he answered that "yes, sensory neural deafness cannot be cured." According to Mr. Van Niekerk, the audiology report stated that accused 1 was involved in an accident at the age of twelve (12) years and he suffered the present hearing impairment. Asked by the Court whether Mr. Van Niekerk was able to tell the Court whether accused 1 has been following the proceedings until this stage, the answer that Mr. Van Niekerk gave was that he doubted that very much because accused 1 suffers 75 decibels hearing loss, he cannot hear speech. According to Mr. Van Niekerk, the majority of spoken language is not understood by accused 1.

[8] The Magistrate put a statement to Mr. Van Niekerk that the Court observed that some of the answers accused 1 gave were totally irrelevant to the questions asked and needed to know why that was the case.

Mr. Van Niekerk simply answered thus: *"...misunderstanding the question, thinking he was answering what was asked or merely just guessing what was asked."*

Mr. Van Niekerk castigated the hearing aid saying it only hears from the microphone. Even though Mr. Van Niekerk is not an expert (he never claimed to be one) it is very clear that he has sufficient knowledge on the subject matter at hand. He also has years of experience to his credit. I do not have doubts about his evidence. The

trial Court also heeded the danger of proceeding with a matter the proceedings of which were possibly not heard and understood by the accused concerned.

[9] Our Constitution guarantees every accused person a right to a fair trial. Another right which is constitutionally enshrined is a right to be tried in your language or the language you best understand. This particular accused has a clear disability as far as hearing is concerned. If the accused did not hear what was testified in his own case, how can one even start talking about understanding the proceedings? One first hears before one understands. I salute the Magistrate for having been so alert that he detected that accused 1 has a particular problem. I say so because other Presiding Officers would have accepted that he answered irrelevantly merely because he is a lying witness.

[10] Section 35 (3) (k) of the Constitution Act 108 of 1996 provides as follows:

"Every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language." The recognition accorded to the specific protection of language rights reflects a distinct appreciation of the place of language in the construction of both personal and community identity. Cumulatively, language rights protect the right to communicate effectively. See **South African Constitutional Law – The Bill of Rights** (by **Cheadle Davis and Haysom** – 2nd edition 2007 page 25-2). The learned authors also quoted **Coward and Ellis**

– Language and Materialism: Development in Semiology... and the Theory of the Subject 1977 at 79 where the following appears:

"Language and thought are inextricable ...thought conceptualises through language...language makes thought possible, thought make language possible."

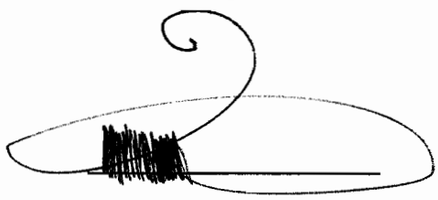
[11] In the instant matter a reasonable attempt was made to ensure that the provision of Section 35 (3) (k) is not contravened in that proceedings were interpreted for accused 1. But, this was nullified by the established fact that he in any event, never heard the proceedings in his own case. Understanding only comes to the fore once one has heard what has been said. Therefore, clearly accused 1 did not have a fair trial at all. In a Canadian case, namely, ***Société des Acadiens du Noveau – Brunswick Inc v Association of Parents for Fairness in Education*** [1986] 1 SCR 549 at 577 Beetz J is on record as having concluded as follows:

"The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights...It belongs to the category of rights which in the Charter are designated as legal rights."

I fully align myself with the above sentiments. This applies in full force in the instant matter. I am aware that Section 35 (3) (k) of the Constitution has been the subject of judicial pronouncement in cases such as ***Mthethwa v De Bruin NO and Another*** 1998 (3) BCLR 336 (N) and ***S v Matomela*** 1998 (3) BCLR 339 (CK). It suffices to

mention that what is in issue in the instant matter is not at all what was in issue in the two (2) cases I have just mentioned *supra*. What is in issue in the instant case is purely a question of hearing which is obviously inextricably linked to what one understood or must have understood. It does appear in the instant case that accused 1 heard and understood very little of the proceedings in which he was the accused.

[12] In the instant matter there was most certainly a failure of justice. The proceedings were "poisoned" by the fact that they were never heard and understood by accused 1. These proceedings fall to be set aside.
In the circumstances the matter is hereby reviewed and the proceedings are set aside. It is ordered that the proceedings may be started *de novo* at the discretion of the Director of Public Prosecutions provided that the apparent disability of accused 1 is taken care of. Should the proceedings be instituted anew, it is not desirable and advisable that they be presided over by the same Magistrate.



DLODLO, J

I agree.

FORTUIN, AJ