REPORTABLE COVERSHEET

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No.: A130/2011

In the matter between:

JORDAN BLAKE PHILIPS Appellant

and

THE STATE Respondent

Judgment by	:	SABA, AJ
For the Appellant	:	ADV. P MIHALIK
Instructed by	:	N HASSAN & ASSOCIATES
For the First Respondent	:	ADV. B HENDRY
Date(s) of Hearing	:	FRIDAY, 20 MAY 2011
Judgment delivered on	:	FRIDAY, 03 JUNE 2011

[REPORTABLE]

REPUBLIC OF SOUTH AFRICA

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

Coram: Hlophe, JP et Saba, AJ

CASE NO: A

In the matter between:

JORDAN BLAKE PHILLIPS

and

THE STATE

Judgment delivered on this 3rd day

SABA, AJ

[1] This is an appeal against sentence
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Coram: Hlophe, JP et Saba, AJ

CASE NO: **A130/11**

In the matter between:

JORDAN BLAKE PHILLIPS Appellant

and

THE STATE Respondent

Judgment delivered on this 3rd day of June 2011

SABA, AJ

[1] This is an appeal against sentence imposed by the magistrate sitting in Cape Town on 5 March 2010. The appellant was charged with the contravention of Section 65(1) (a)/ (b) read with Sections 1, 65(3), 65(4), 65(8), 65(9), 69(1), 73 and 89 of the National Road Traffic Act 93 of 1996 ("The Act") – in that on 21 July

2009 he drove a motor vehicle at Kloofneck Street, Cape Town while under the influence of intoxicating liquor.

[2] The facts giving rise to this appeal may be summarized as follows:
On 19 January 2010, the appellant, who was assisted by a legal representative, Mr Mihalik, pleaded guilty to driving a motor vehicle while under the influence of intoxicating liquor and in contravention of section 65(1)(a) of the Act. He was convicted on his plea of guilty. Appellant was sentenced to three years correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977. With the leave of the court a quo granted on 13 April 2010, the appellant now appeals against sentence.

[3] The events leading to the arrest of the appellant are in the main not in dispute. On 21 September 2009 the appellant drove a Volkswagen Polo at Kloof Nek Drive, a public road in Cape Town while under the influence of intoxicating liquor and his car collided with an oncoming vehicle. In mitigation of sentence, it was placed on record that the appellant was a 21 year old first offender who, shortly after his release from custody in connection with this case, submitted himself to a therapeutic programme concentrating on substance abuse. Appellant was an in patient at Stepping Stones Rehabilitation Centre for four weeks. The matter was then postponed for Correctional and Probation Officer's reports to be obtained. On 5 March 2010 both reports were completed and available before Court. The Probation Officer had recommended that a fine should be imposed; whereas the Correctional Officer had recommended a sentence of Correctional Supervision in terms of section 276(1)(h) of the Criminal Procedure Act.

[4] The following excerpt is the essential part of what happened before sentence was imposed:

> "Court : I take it that you are in receipt of the probation officer's and the correctional officer's reports, the copies of which you received Mr Mihalik?

Mr Mihalik : Yes, indeed Your Worship, I confirm my appearance on behalf of the accused today. I have the probation officer's report and the correctional officer's report. I have no questions for the various witnesses.
Court: And you have no objection to those being handed up as exhibits?
Mr Mihalik : *I have no objection to that, Your Worship, thank you. I'd like to address Your Worship on it thereafter, though.*
Court: Both reports accepted as part of the record marked exhibits E and F respectively".(Italics added)

[5] The record then reveals the following:

"REPORTS BY PROBATION OFFICER AND CORRECTIONAL OFFICER ADMITTED AS EXHIBTS E AND F RESPECTIVELY.

SENTENCE

Mr Phillips, your sentence is as follows: that's three years' correctional supervision in terms of section 276(i)(h) of the Criminal Procedure Act 51 of 1977". The sentence imposed was in line with the Correctional Officer's recommendation.

[6] It is clear from the above passage that the magistrate failed to give Mr Mihalik an opportunity to address the Court on the contents of the probation and correctional officer's reports before imposing sentence.

[7] The issue to be determined is whether the magistrate's failure to afford Mr Mihalik an opportunity to address the court before imposing sentence, even though counsel for the appellant had specifically stated that "he would like to address the [Court] on it thereafter", amounts to a gross violation of an accused's right to a fair trial.

[8] Section 35 (3) of the Constitution provides that, every person has a right to a fair trial, which includes, inter alia, the right to legal representation and the right to adduce and challenge evidence. In **S v Tshabalala [2002] JOL 10220 (T)** Patel J at page 4 stated the following:

"Section 35(3) of the Constitution forms the bedrock of the right to a fair trial.

Inherent in that right is that criminal trial must be conducted in accordance 'with notions of the basic fairness and justice' (**S v Zuma and others 1995(2) SA 642** paragraph [16] at 652F; **S v Ntuli 1996 (1) SA 1208 (CC)** at 1209B. Fair trial proceedings 'guarantee that issues are well and fully argued by the parties who have a stake in its outcome' **(Borowski v Canada [1989] 47 CCC 3d at 13)**".

[9] I can only reiterate what Yekiso J said in **S v Muller and Others 2005 (2) SACR 451 CPD** at 457c-e:

> "[15] The right to a public trial is not limited to access to criminal proceedings by the ordinary members of the public, as also the media. The accused is given the right to a public trial to ensure that justice is seen to be done. The right to a public trial would include a right to participate fully in the proceedings, be it by way of adducing and challenging evidence, or by way of addressing court on the merits of the case after the conclusion of evidence. It would include a right to participate meaningfully in the conduct of the trial from the pleading stage of the proceedings up to the pronouncement of verdict.
>
> At page 458a-c, the learned Judge emphasized the importance of the right to address court at the conclusion of evidence when he said:
>
> "The right to address court at the conclusion of evidence is of such fundamental nature as not to be departed from unless expressly waived by the parties".

[10] I fully endorse Yekiso J's sentiments. In casu Mr Mihalik did not expressly waive his client's right to address the court on the reports of the probation officer and the correctional officer. Mr Mihalik specifically reserved the right to address the Court on the said reports. Where such a request had been made to address the Court but same was not heeded by a judicial officer, that, in my respectful

view, constitutes gross irregularity. It can never be said that in such case the accused person had a fair hearing. This is so because the right of the legal representative to address the Court is not just a useless formality. Such right is so fundamental to the right to be heard fairly such that failure to accede to such a request is grossly irregular.

[11] In his heads of argument, Mr Mihalik, counsel for the appellant referred us to the case of **S v Mtolo 2009 (1) SACR 443 (OPD)** where the accused who had been referred to a treatment centre, was not given an opportunity to challenge the evidence led at an enquiry held in terms of s22 of Prevention and Treatment of Drug Dependency Act 20 of 1992. At page 446f-h, Musi J said the following:

> "In this matter the accused was not given any say in the matter. His voice was taken away completely. When the prosecutor intimated that the accused said that he had a drug dependency problem he was not asked to verify that information. When the probation officer's report was handed in the contents thereof were not read to him. He could therefore not object to anything that was written in the report. When the letters from Aurora and Magaliesoord were handed in he was not informed by the magistrate why he was rejected. The probation officer's report that was sent to Swaartfontein was not handed in. No reason therefore was given. Swaartfontein's letter of acceptance and the conditions of acceptance- there were many- were not explained to him.....".

At paragraph [9], the learned Judge made the following finding:

> "'The negation of the accused's right to challenge the evidence presented before sentencing rendered the whole sentencing process unfair and was therefore a serious misdirection".

[12] I am in respectful agreement with the finding of the court in Mtolo. In the Mtolo case, the probation officer's reports and letters from the treatment centres

rejecting the accused were not read to him before a decision to take him to Swaartfontein Treatment centre was made. In casu Mr Mihalik for the appellant had an insight into the probation and correctional officer's reports. However, he was not given an opportunity to address the court on the contents of both reports before sentence was imposed.

[13] Counsel for the state, Ms Hendry, in her heads of argument stated the following:

> "Whilst a denial of an opportunity to challenge evidence will indeed vitiate the proceedings, it is arguable whether a denial of the opportunity to comment should vitiate the proceedings. This is especially so in light of the fact that counsel for the appellant had on a previous occasion had the opportunity to address the court. Nothing appears now to have been overlooked in the reports."

I am unable to agree with Ms Hendry on this point. In fact her argument is untenable to say the least.

[14] The magistrate totally ignored the provisions of section 175 (1) of the Criminal procedure Act 51 of 1977, which are as follows:

> "After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court".

In De Beer NO v North-Central Local Council and South-Central Local Council 2002 (1) SA 429 (CC) at 439G, the Constitutional Court said the following about the purpose of the fair hearing component in section 34 of the Constitution:

> "A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interprete legislation and rules of court, where it is reasonably possible to do so, in a way that would render

the proceedings fair"

[15] After gaining insight into the probation and the correctional officers' reports, it cannot be speculated what Mr Mihalik would have added to the submissions he made in mitigation of sentence. The fact that the recommendations of the probation and correctional officers' were different, (a fine and correctional supervision in terms of section 276(i)(h) of the Criminal Procedure Act, respectively), was reason enough to afford Mr Mihalik an opportunity to address the court and persuade it on the type of sentence that would be suitable for the appellant.

[16] The constitutional right of the accused to a fair hearing must be real and not illusory. The accused person has a right to a proper and effective hearing. (See S v Halgryn 2002(2) SACR 211 SCA at 216h). Failure to allow Mr Mihalik an opportunity to address and or challenge what was contained in the reports before sentence was imposed was a serious irregularity which resulted in a failure of justice. It resulted in the magistrate not taking into account all the factors pertaining to sentence.

[17] Notwithstanding the irregularities highlighted above and according to the submission made by Mr Mihalik at the hearing of this application, the appellant has undergone a rehabilitation programme for thirteen weeks as an in and out patient at Stepping Stones Rehabilitation Centre. In the circumstances, I am of view that the appellant has already served his sentence pursuant to the order of the court a quo and therefore, further punishment is unwarranted.

[18] In the result, the following order is proposed:

(1) Appeal against sentence succeeds;

(2) Sentence imposed by the court a quo is set aside and substituted with the following sentence;

'Accused is sentenced to thirteen weeks correctional supervision in terms of section 276(1)(h)'

The substituted sentence is antedated to 19 July 2010.

SABA, AJ

I agree and it is so ordered.

HLOPHE, JP