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

REPORTABLE

CASE NO. SHF 27/14
MAGISTRATE'S SERIAL NO. 23/2015
HIGH COURT REF. NO. 15 296

In the matter between:

THE STATE

And

DILLON ANTHONY **ACCUSED**

REVIEW JUDGMENT DELIVERED ON FRIDAY, 20 MARCH 2015

DLODLO, J

[1] The above matter served before me by way of special review brought in terms of section 304 A of the Criminal Procedure Act 51 of 1977 as amended. The presiding magistrate requires the intervention of this Court in circumstances where a material error has occurred in his handling of the above criminal trial. He requires that the conviction of the accused be set aside and the matter remitted to himself so that he should again consider the evidence apart from the evidence of a certain witness in respect of whom he made an error.

[2] The magistrate's request is as follows:

"Geliewe kennis te neem dat die betrokke saak voor die Agbare Hersienings Regter geplaas word vir die oorweging van die tersydestelling van die skuldigbevinding weens die volgende redes:

1) *Die Hof het nagelaat om 'n getuie, Granville Sassman, geroep ingevolge artikel 186 van die Strafproses Wet, Wet 71 van 1977 (hierna verwys as die Wet), in te sweer soos verlang deur artikel 162 van die Wet.*
2) *Die Hof het die genoemde getuie se oningesweerde getuienis ook in ag geneem by die skuldigbevinding op 16 September 2014, en dus het die verrigtinge nie ooreenkomstig die reg geskied nie.*

Gevolglik word dit respekvol versoek dat die Agbare Hersienigs Regter die skudlgibevinding ter syde stel. Dat die getuienis van die oningesweerde getuie, Granville Sassman, ook tersyde gestel word. Die Agbare Regter word versoek om dit te oorweeg om daarna die verrigtinge terug te verwys na die hof vir uitspraak op grond van die oorblywende enkel staatsgetuie se getuienis.

Die oorsig word betreur. Ek vra om verskoning oor die ongerief wat die oorsig veroorsaak."

[3] The accused in the instant matte faced a charge of murder (read with the provisions of section 51 (2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997) before the Regional Court. He was legally represented by an attorney, Ms

Naudé. He tendered a plea of not guilty to the charge and thereafter exercised his constitutionally enshrined right to remain silent. Certain admissions were recorded in terms of section 220 of the Criminal Procedure act. The prosecution announced closure of the State case upon completion of evidence by one witness, Paul Johnson. The defence moved an application for the discharge of the accused in terms of section 174 of the Criminal Procedure act. Responding to this application the prosecutor *inter alia* said the following:

"Agbare, ek sal nie sê daar is geen getuienis voor die Hof, wat die Hof die beskuldigde aan hierdie misdryf voor die Hof skuldig kan bevind word nie, of selfs enige bevoegde uitspraak op hom skuldig te kan bevind nie. Daar is wel op die beskuldigde se eie weergawe het die beskuldigde gesê die oorledene het….(tussenbeide).....Hy sê dat die oorledene het hom teen die bors geslaan." In short the prosecution held the view that there was enough evidence before Court to put the accused person to his defence. The section 174 application was dismissed by the presiding magistrate. The defence then proceeded to close its case without leading any evidence. It is at this stage of the proceedings that the magistrate referred the parties to the provisions of section 186 of the Criminal Procedure Act. Acting in terms of the latter section, the magistrate caused one Granville Sassman to be subpoenaed as a witness.

[4] Section 162 of the Criminal Procedure Act provides as follows:

> *"162 (1) Subject to the provisions of section 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a Superior Court, the presiding judge or the registrar of the Court, and which shall be in the following form:*
>
> *"I swear that the evidence that I shall give shall be the truth, the whole truth and nothing but the truth, so help me God."*
>
> *(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so."*

[5] It is plain from the above provisions that in the magistrate's court it is only the magistrate presiding over the matter who is authorised to administer the oath. The requirement is simply mandatory. This is so important such that when proceedings are interrupted by the adjournment, it remains obligatory to merely remind the witness that he or she is still under oath. Section 163 talks to affirmation in *lieu* of oath. In other words when one reads section 162 *supra* with section 163 it becomes apparent that provision is made for different religions. It is very important that all witnesses in the criminal proceedings take the oath or

make an affirmation. ***S v Naidoo*** 1962 (2) SA 625 (A) comes to mind. In that case the interpreter swore in the witnesses but he himself was not sworn in. Consequently the then Appellate Division held that the evidence by witnesses sworn in by such interpreter was not acceptable. It is important to follow the provisions of the Act and not to delegate to anyone else the duty to swear in witnesses in circumstances where it is obligatory that it be done by the presiding officer. Even the prosecutor is not competent to administer the prescribed oath. See: ***S v Bothma*** 1971 (1) SA 332 (C). It is important to note that administration of the oath to witnesses whether it be a criminal or civil case, is essential for the admissibility of the evidence they give.

[6] In the instant matter the witness whose evidence was not under oath is a witness called by the Court in terms of section 186 of the Criminal Procedure Act. One may pose a rhetorical question – why did the magistrate bother to call a witness at all? The answer is simply that the magistrate is so empowered as the administrator of justice. Section 186 and section 167 (relating to the recalling of witnesses by the Court) together give the Criminal Court an inquisitorial role. That must not be condemned but it must be hailed. It is to be borne in mind at all times that a criminal trial is not a game where one side simply must take advantage or claim a benefit out of an omission or an error that came about as a result of the other side. As stated by

Curlewis JA in an old case ***R v Hepworth*** 1928 AD 265 at 277 *"A judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he had not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."*

[7] Section 186 of the Criminal Procedure Act provides that the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such criminal proceedings if the evidence of such a witness appears to the Court essential to the just decision of the case. Having referred to Curlewis JA's remarks in ***R v Hepworth*** *supra*, I hasten to add that whilst the inquisitional role of the Court is to be understood and welcomed, presiding officers must resort to exercising their powers under section 186 rather sparingly. I say so because on the one hand the Court searches for the facts but on the other a perceptibly even handed trial is and remains the goal. Also see **Hiemstra's Criminal Procedure** page 23-15 (commentary). The Court must not place itself in a position where a perception may reasonably arise that it is bending too much in favour of the State to the prejudice of the accused person. I say so in that more often than not such witnesses are those that tend to close the gap in the State case. The bottom line

is that criminal cases must be well investigated and competently prosecuted. That shall render it unnecessary for the Court to resort to the exercise of its powers under section 186 of the Criminal Procedure Act. Of course the section has both discretionary and mandatory components. It is trite that Courts exercise their discretionary powers judicially and reasonably.

[8] The magistrate presiding in the instant matter was thus perfectly within his rights to act in terms of section 186 in order to secure the evidence he thought would enable him to administer justice properly in the case before him. Where he made a mistake is that he then failed or omitted to act in terms of section 162 in respect of this particular witness. I venture to say it is indeed a fatal mistake. For all intends and purposes the evidence of that particular witness, because it is unsworn, is vitiated by that error. It must be regarded as though it never existed. Evidence in criminal proceedings may only be adduced under oath, under affirmation and under warning.

[9] I am concerned that the presiding magistrate requires only that I set aside the conviction of the accused and remit the proceedings to him so that he considers the evidence led in this case afresh without the evidence by the section 186 witness. I mean the magistrate had already pronounced guilt against this accused. If allowed to deal with this matter again in my view, justice may

not be seen to have been done. If say he again convicts the accused, the latter may justifiably think games are being played with him. I mean it does not make sense to an ordinary accused person that he is told the Court finds him guilty of an offence charged and then he hears "*no a mistake has crept into your case we shall send your matter to the High court to set aside your conviction."* When the High court has found the mistake to be so fatal that it is warranting the setting aside of the proceedings the accused must not be faced with a scenario that may place him in a position to think he is "*a ball that is kicked from one side to the other and again to the first side"*. He simply shall not understand what is going on.

[10] In my view, once one grievous error is made by the trial magistrate and this Court finds that error so material that it qualifies to vitiate the proceedings, it is not only a part of the proceedings that shall be affected but the proceedings as a whole. The whole case was poisoned by this material error. If this Court were to set aside the conviction and remit the matter back on the basis proposed by the magistrate that would only mean that we have only expunged from the record of proceedings the evidence by a section 186 witness. The point is that proceedings as a whole have been contaminated by this fatal error. The conviction the magistrate is asking me to set aside in the instant matter, is in truth, *"fruit of the poisoned tree."* The

only correct way of handling the matter is, in my view, to review and set aside the proceedings as a whole and remit the matter back to be tried *de novo* and at the discretion of the Director of Public Prosecution before a magistrate other than Magistrate TR Cloete.

[11] In the circumstances I make the following order:

(a) The proceedings before Magistrate TR Cloete under case number SHF 27/2014 are hereby reviewed and are set aside.

(b) The matter must be tried *de novo* at the discretion of the Director of Public Prosecution before a different presiding officer.

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DLODLO, J

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TRAVERSO, DJP