

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

Case no. CA&R 66/2018

Date heard: 12/12/18

Date delivered: 14/12/18

Reportable

In the matter between:

Wildridge Peter Colouhoun Galt

Appellant

and

The State

Respondent

JUDGMENT

Plasket J:

[1] The appellant was convicted, in the Magistrate's Court, King William's Town, of negligent driving, an offence created by s 63(1) of the National Road Traffic Act 93 of 1996. He was sentenced to a fine of R2 000 or six months imprisonment suspended for four years. He appealed, with the leave of the court below, against his conviction. The State conceded the appeal on the basis that the appellant's trial had been unfair. We set aside the appellant's conviction and sentence, and undertook to furnish reasons in due course.

[2] The appellant was initially represented by a legal representative. He apparently lost faith in his legal representative and decided to defend himself in his trial. Not surprisingly, he ran into difficulties during the course of the trial. The crux of this appeal, in large measure, concerns the way in which the magistrate conducted himself when the appellant did not know how to proceed.

[3] Section 35(3) of the Constitution provides that everyone has the right to a fair trial. That right includes the right to be represented by a legal practitioner of an accused person's choice¹ and to be legally represented 'at state expense, if substantial injustice would otherwise result'.² The corollary of the right to legal representation is the right to represent oneself.

[4] In *S v Nkwanyana & others*,³ Nestadt JA said that while an accused has a common law fundamental right to legal representation, 'he also has a fundamental right to represent himself'. And, in *S v Khanyile & another*,⁴ Didcott J held:

'Like most rights, the right to representation is capable of being waived. Once it is forgone willingly and with a true understanding of things, what is more, the waiver is accomplished. Foisting a lawyer on somebody determined to do without one then infringes his rights. For the right to conduct his own defence, should he so wish, is no less essential to a fair trial than the right to be represented.'

[5] The effect of an accused deciding to represent himself or herself, and the duties it creates for the presiding officer, were commented on by Milne JA in *S v Tyebela*:⁵

'There is a further general factor which must be borne in mind. Generally speaking, the length of a criminal trial increases substantially if the accused declines to accept the services of counsel and conducts his own defence. He is quite entitled to do so but it substantially increases the burden on the trial Judge. The Judge is then in the invidious position of being an arbiter and, at the same time, an adviser of the accused because he must explain the rules of procedure and evidence to the accused. In these circumstances, it is a human failing if the Judge gives way to irritation when confronted with the situation that the accused declines to accept the services of *pro deo* counsel. That it is a failing, however, admits of no doubt . . .'

[6] A criminal trial is not a game and a presiding officer is not a mere umpire. He or she is 'an administrator of justice' whose duty is not only 'to direct and control proceedings according to recognised rules of procedure but to see that justice is done'.⁶ That duty has special significance when an accused is unrepresented. Generally speaking, an unrepresented accused will have little to no knowledge of procedure and the law of evidence and little, if any, forensic skills. As a result, the

¹ Section 35(3)(f).

² Section 35(3)(g).

³ *S v Nkwanyana & others* 1990 (4) SA 735 (A) at 738E.

⁴ *S v Khanyile & another* 1988 (3) SA 795 (N) at 811B-C.

⁵ *S v Tyebela* 1989 (2) SA 22 (A) at 31D-E.

⁶ *R v Hemsworth* 1928 AD 265 at 277.

law places obligations on a presiding officer to actively assist an unrepresented accused in order to ensure that his or her trial is fair.⁷

[7] The presiding officer's duty, in such a case, includes controlling the production of evidence and preventing the admission of inadmissible evidence;⁸ informing the accused of his or her right to cross-examine every State witness and to explain to the accused the nature and purpose of cross-examination in a meaningful way;⁹ and accommodating the accused's inability to cross-examine by assisting him or her (by, for instance, helping to formulate his or her questions) and by questioning some State witnesses himself or herself (for instance, experts or witnesses concerning identification).¹⁰

[8] The record discloses a disturbing failure on the part of the magistrate to comply with his enhanced duties to ensure a fair trial when an accused is unrepresented. In the first place, he was pointedly hostile to the appellant because he had opted to defend himself and used this fact as an excuse, it seems to me, to be decidedly unhelpful. This became clear early in the proceedings when the prosecutor wanted to hand in a sketch map – and this before he had called the witness who had drafted it. The magistrate asked the appellant if he objected to the sketch map being handed in and, when he said that he contested its accuracy, the record continues as follows:

Court: The question is, do you have any objection for that acceptance of this?

Accused: Am I – if I – I do not understand the procedure.

Court: That is why you need a lawyer. That is why you need an attorney. You see now you are stuck and you do not understand what you have to do now.

Accused: I can ask the . . . (intervention).

Court: Because I have not to assist you how to conduct the proceedings.

Accused: If I accept these plans does it mean I cannot challenge anything in it? Because it shows me turning from within the road and I . . . (intervention).

Court: You see the lawyer was going to say we will provisionally accept this and you are going to . . . (indistinct).

⁷ Steytler *The Undefended Accused* at 61.

⁸ Steytler *The Undefended Accused* at 140; *S v Nkosi* 1980 (3) SA 829 (A) at 845C; *R v Noorbhai* 1945 AD 58 at 74-75; *R v W* 1947 (2) SA 708 (A) at 717.

⁹ Steytler *The Undefended Accused* at 142-143; *Sitole v R* 1959 (1) PH H82 (N) at 177; *Field v S* 1967 (2) PH H308 (N) at 583; *S v Mkhise* 1986 (2) PH H105 (W) at 183.

¹⁰ Steytler *The Undefended Accused* at 144-151; *S v Khambule* 1991 (2) SACR 277 (W) at 280g-282b; *S v Kibido* 1988 (1) SA 802 (C) at 804H-J; *S v Sebatana* 1983 (1) SA 809 (O) at 812G-813A; *S v Rall* 1982 (1) SA 828 (A) at 831C.

Accused: I cannot hear you. Can I not come closer?

Court: You must please get a Legal Aid attorney to assist you otherwise this trial is not going to – I do not think it is in your best interest that you conduct your own defence, you need somebody to assist you in the proceedings. As I am looking at the things right now you will need somebody to assist you, you have to go back to Legal Aid and make a re-application otherwise we cannot proceed with you, I do not think it would be . . . (intervention).

Accused: May I ask one question, if I accept this plan can I not say it does not show when I give my evidence . . . (intervention).

Court: It is not the court procedure that you have to ask the Court and then the Court has to answer you. That is why I am saying you need an assistance of Legal Aid attorney.

Accused: Your Worship, I am sorry I do not know the procedure, but I do wish to defend myself. I wish to ask the witnesses questions myself.

Court: It is difficult, now you are asking me questions of which you are not supposed to do that.

Accused: I do not know the . . . (intervention).

Court: That is the reason, if you do not know you need someone who is legally trained to assist you, you are going to tell him the whole story, and then he knows very well how to present the case before Court.

Accused: Mr – Your Worship I did tell an attorney my case and he was supposed to tell me the court date, he told me a wrong court day, he told me a Saturday. I asked him to please let me know the correct date, I heard nothing from him, I had to go myself to find the correct date.

Court: That does not have any relevance to what we are dealing with right now.

Accused: No, it explains why I do not have – why I would rather defend myself. All I am asking is for you or somebody to tell me the consequence of admitting this document. Does it mean I cannot challenge it or does it mean it is just like other evidence, it can be challenged, that is all I ask.

Court: Mr Wildridge I think it is wise that you get a lawyer, otherwise we cannot . . . (indistinct).

Accused: Your Worship I truly believe that I can defend myself if I know the consequence of admitting . . . (intervention).

Court: Well, do not ask me questions please.

Accused: I won't ask you.

Court: Don't ask me anything what to do.

Accused: No, I am sorry if I asked you questions when I should not have. I do not understand . . . (intervention).

Court: Do you have any objection for the acceptance of this document that the State made an application for the handing in to court?

Accused: I would like to object yes, Your Worship.'

[9] When the first State witness had given his evidence in chief, the Magistrate gave the appellant an explanation of sorts in respect of cross-examination. He told him that he could put questions to the witness to 'dispute whatever fact you do not agree with in his testimony' and that 'you may as well reveal your side of the story and tell the witness what actually happened on the day in question'. This explanation apprised the appellant of the bare minimum of the purpose of cross-examination and, it seems to me, was inadequate.

[10] When the prosecutor objected to a question that the appellant had put to a witness, on the basis that 'it is hearsay which is not taking this Court anywhere on the case', the magistrate simply asked the appellant: 'What is your reply to the objection?' No explanation of the basis of the objection was given by the magistrate and he did not even explain to the appellant what hearsay evidence was. The magistrate did not ask the appellant whether he intended calling the expert witnesses whose opinions he had referred to in the question. This may have resolved the objection. He did not advise the appellant that it would be necessary to call them if he wanted to establish what they had said in their affidavits.

[11] The magistrate also failed to assist the appellant, and was unhelpful and hostile, when he wished to rely on a photograph of the scene of the accident, which incidentally had already been shown to two State witnesses. When the appellant referred to the photograph in his evidence in chief and wanted to hand it to the magistrate, the record proceeds as follows:

Court: It is not accepted, it is not complying with the requirements laid down by the law for the acceptance of the photograph.

Accused: How do I – I do not understand, what must I do to have it accepted Your Worship? I do not know. It is a photograph which I could show the witnesses, can I not show you as well?

Court: For acceptance, you see here are the key (?) I did not accept this as evidence to stand because it does not comply with the requirements sought by the Court.

Accused: Well . . . (intervention).

Court: So if you want that to be accepted by the Court you have to lay down foundations which are required by the law of evidence for the acceptance of those photographs.

Accused: And I am afraid I don't know what these requirements are, can you tell me what they are?

Court: Well I cannot be representing you as an attorney to tell what requirements you should meet.

Accused: Your Worship I understand in . . . (intervention).

Court: And to convince the Court as to why those photographs to be accepted.

Accused: I understand from the Constitution Your Worship that I do have a right to defend myself.

Court: Yes you do have the right, but I am not – I cannot stand to represent you.

Accused: So I cannot find out how to have these photos submitted, that is it.

Court: Mr Galt please let us not make a dialogue. You are leading evidence and I am telling you I am not accepting it because it does not comply with the requirements, you have to lay down the foundations for the Court to accept the photographs in your hand.

Accused: Then I will do it verbally Your Worship, if I may . . .'

[12] It is clear from the passages from the record that I have quoted that the magistrate expressly disavowed his duty to assist the unrepresented appellant, and told him in no uncertain terms not to seek his assistance. In this respect he committed an irregularity that prejudiced the appellant in the conduct of his defence and rendered the trial unfair.

[13] There is a further feature of the trial that rendered it unfair. When the appellant was cross-examined by the prosecutor, the magistrate allowed him to interrupt the appellant repeatedly so that he was prevented from replying to questions properly and fully. This, taken with the passages I have quoted above is indicative of hostility towards the appellant on the part of the magistrate (with the prosecutor not far behind) and, at the very least, the creation of an apprehension in the mind of a reasonable person that the magistrate was not even-handed and fair.

[14] Mr Els, who appeared for the State, conceded the appeal as he could not support the conviction in the light of the magistrate's conduct. That was a correct and proper course to take as a State Advocate or prosecutor acts not as a partisan participant in the proceedings, entitled to pursue a conviction at all costs, but as a representative of the State and the community at large, and in the interest of

justice:¹¹ the State Advocate or prosecutor is, as Lansdown, Hoal and Lansdown said more than 60 years ago, 'a minister of truth'.¹²

[15] Mr Els and the appellant signed a document drafted by Mr Els consenting to an order setting aside the appellant's conviction and sentence on the basis that he had not had a fair trial. We then made an order to that effect.

[16] These, then, are our reasons for the order we made setting aside the appellant's conviction and sentence.

C Plasket

Judge of the High Court

I agree.

N Mtshabe

Acting Judge of the High Court

APPEARANCES

For the appellant:

In person.

For the respondent:

D Els

Office of the Director of Public
Prosecutions, Grahamstown

¹¹ Steytler *The Undefended Accused* at 135.

¹² Lansdown, Hoal and Lansdown *Gardener and Lansdown: South African Criminal Law and Procedure* (6 ed) Vol I at 384.