FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 054/2004

PARTIES: XHANLISILE MDYOGOLO v THE STATE

REFERENCE NUMBERS -

- Registrar: CA&R 844/03

DATE HEARD: 10 DECEMBER 2004

DATE DELIVERED: 27 JANUARY 2005

JUDGE(S): LEACH AND MILLER JJ

LEGAL REPRESENTATIVES –

Appearances:

- for the State/Applicant(s)/Appellant(s): L CONLYN
- for the accused/respondent(s): B BOSWELL
- M EUIJEN

Instructing attorneys:

- Applicant(s)/Appellant(s): DIRECTOR OF PUBLIC PROSECUTIONS
- Respondent(s): GRAHAMSTOWN JUSTICE CENTRE

CASE INFORMATION -

- Topic: AS PER SUMMARY

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO.: CA&R 844/03

In the matter between:

XHANLISILE MDYOGOLO Appellant

and

THE STATE Respondent

JUDGMENT

LEACH, J:

The appellant, who was legally represented, was tried in the regional court on a charge of robbery with aggravating circumstances. Convicted as charged, he was sentenced to 20 years' imprisonment under the provisions of s 51(2)(a)(i) of the Criminal Law Amendment Act No. 105 of 1997. He appeals now to this Court solely against his conviction.

It was contended on behalf of the appellant that he had not enjoyed a fair trial, *inter alia*, as the magistrate had prevented him from giving instructions to his legal representative during the course of proceedings. From a reading of the record, it certainly appears that the magistrate quickly took issue with the appellant for interrupting the course of proceedings in order to give

instructions to his attorney. Early on in the trial, the attorney found it necessary to ask the magistrate for leave to obtain brief instructions from the appellant and, on two occasions, the magistrate adjourned to enable this to happen.

The State then called a witness by the name of Mfeni, whose evidence commenced as early as page 14 of the typed record. An inspector in the South African Police Service, he was called to testify that he had been present when the appellant had been arrested and that he had been advised of his rights at that time. His evidence in chief covers less than a page of the transcript and the cross-examination of the witness was equally short, it being put by the defence attorney that the appellant would dispute that he was informed of his rights at that time. After this terse cross-examination came to an end, the appellant indicated that he wished to say something to his attorney. The magistrate refused this request, saying the following:

> "Mr Mdyokolo, you're making me tired now with your interruption of the court proceedings. This is your attorney, he is running the case as he feels it is best in your interest. Now I've indulged in your interruptions with every witness up to now. I've adjourned the court so that you could give him further instructions. This is at an end now. I'm not going to have my court interrupted by you any further."

The next witness was the investigating officer who, *inter alia*, testified as to how it had come about that the appellant was taken to give a confession to a magistrate. Again, after relatively terse cross-examination had ended, the appellant complained through the interpreter that the magistrate was not

allowing him to give instructions to his attorney in regard to the evidence that had been led. The magistrate asked the attorney whether he wanted to have anything to say in this regard and the attorney requested an indulgence to find out what was troubling the appellant. The record then reads as follows:

> "COURT: And this continual interruption of my court proceedings when he wants to instruct you with new instructions all the time, anything to say in that regard?
>
> MR PANGO: With due respect, Your Worship. Your Worship, I've informed the accused about the court proceedings, that the court must not be stopped for him to give instructions. So he must give me all the instructions so that the court can proceed uninterrupted, Your Worship. And he agreed on that, Your Worship.
>
> COURT: And the case has stood down for half an hour and then again for another ten minutes for this to take place, for him to give you further instructions.
>
> MR PANGO: Your Worship, with due respect, I have informed him that that is not allowed in terms of the court, the court must not be interrupted, Your Worship. And I'm of the view that he's also aware of that fact, Your Worship.
>
> COURT: Thank you. Your application is denied, sir."

This episode was followed by another police witness being called who also testified briefly about how the appellant was taken to the office of the magistrate to make his confession. Again, after relatively terse cross-examination and the witness being excused from the witness box, the appellant appears to have attempted to speak to his attorney. The record then reads as follows:

> "COURT: Sir, you are not just going to speak to your attorney again like this. I'm going to warn you, if you're going to interrupt my proceedings again, I'm going to … (intervention).

ACCUSED: (Inaudible).

COURT: I am going to have you removed from the court and I'll proceed in your absence, Do you understand that? (**Accused continuously speaking whilst Court addresses him**). Mr Pango, I'm going to adjourn once more. You're going to explain to your client the position. If he interrupts my court again, I'll have him removed and we'll proceed in his absence. Does he understand that?

MR PANGO: As Court pleases.

COURT: The Court will adjourn for a short while."

After this the magistrate who minuted a confession from the appellant, was called to testify. At the end of his evidence, the State's case was closed. The appellant was called to testify, *inter alia* in regard to the confession and whether it had been freely and voluntarily made – something which he denied. He was disbelieved and was, in due course, convicted and sentenced.

Justice must not only be done, it must be seen to be done and, in that regard, it is fundamental for a judicial officer to appear to be completely fair and unbiased in every respect. Accordingly, notwithstanding the irritation that a magistrate feels where proceedings are continuously interrupted by an accused wishing to give instructions which should really have been given previously, the judicial officer must maintain his cool headedness – *S v Tyebela* 1989 (2) SA 22 (A) at 32H-J. There should certainly be no suspicion that the defence is being hampered in its cross-examination – *S v T* 1990 (1) SACR 57(T) at 59.

There seems to me to be no doubt that the magistrate should have kept his irritation in check and should have allowed the attorney to consult briefly with the appellant on the occasions that he refused to indulge him. Such refusal, and the threat to remove the appellant from the court, were not only uncalled for but may certainly have created an impression of a lack of objectivity. This conduct may, in itself, constitute sufficient irregularity to justify nullification of the proceedings but, for the reasons that follow, it is unnecessary to reach any final decision on that issue.

What is of paramount importance is the fact that the magistrate, in convicting the appellant, relied heavily upon the confession that he made to a magistrate. It was clear from the outset that the appellant contended that this confession was not admissible against him as, so he averred, it had been made under duress, after he had been assaulted, and despite being denied a legal representative and, so he alleged, once he had been told what to say. The magistrate recorded on the document that the appellant had indeed alleged that he had been assaulted but, for some unknown reason, he made no further enquiries from the appellant as to when, where, how or by whom he had been assaulted. He also failed to make any pertinent enquiries as to whether this assault had led to him deciding to make the confession. I therefore have my extreme reservations as to whether in fact the confession was admissible, but it is unnecessary for present purposes to reach any final decision on that issue which was, in any event, not fully argued before this

Court.

More importantly, despite the appellant indicating from the outset that the confession had been made under duress, no trial within a trial was held. Instead the magistrate merely allowed the evidence relevant to the confession to be led together with all the other evidence as part of the State's case. This seems to me to have been a fatal irregularity. Where the admissibility of a confession is in issue, the only way in which the evidence relevant thereto can be placed before court is by way of a trial within a trial. In *R v Wong Kam-ming* [1980] AC 247 (PC) at 261 B-C Lord Hailsham, in a passage regularly approved in this country, said :

> "(A)ny civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the defendant should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement."

In *S v De Vries* 1989 (1) SA 228 (A) at 233 H-I Nicholas AJA, after having referred to the above passage, said the following:

> "It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. . . .

> In South Africa (the enquiry) is made at a so-called "trial within the trial". Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt. (See *R v Dunga* 1934 AD 223 at 226.)"

Similarly in *The Director of Public Prosecutions, Transvaal v Viljoen* (unreported SCA case no. 411/03) delivered in the Supreme Court of Appeal on 2 December 2004, a matter in which a trial within a trial had not been held despite the existence of a factual dispute as to whether a fundamental right of the accused had been breached prior to the making of the confession, Ponnan AJA, in giving the unanimous judgment of the court, said:

> "In the present case the facts were not common cause and the dispute in this regard had to be resolved before a ruling could be given as to the admissibility of the confession. In order to resolve the dispute the parties had to be given an opportunity to adduce such evidence as they wished to adduce in respect of the factual issues. In these circumstances the judge *a quo*'s view that the factual dispute could not be resolved by way of a trial within a trial but nevertheless had to be decided there and then makes no sense.
>
> The issue arose during the course of a criminal trial and had to be dealt with in terms of the provisions of the Criminal Procedure Act which prescribes the manner in which evidence is to be adduced. There was, therefore, at that stage, only one way to resolve the factual dispute and that was by way of a trial within a trial. A trial within a trial is, as the phrase indicates, a trial held while the main trial is in progress in order to determine a factual issue separately from the main issues. Such a procedure is not unfair to an accused. On the contrary, it is a procedure that evolved in the interests of justice and in fairness to the accused.
> ……
>
> The considerations which require that a trial within a trial be held to determine whether a confession had been made voluntarily apply with equal force when the admissibility of a confession is disputed on the ground that it had been obtained in violation of other fundamental rights of the accused and when the relevant facts are not common cause between the parties.
>
> Apart from considering it inappropriate to resolve the issue as to whether

> there had been a breach of the appellant's fundamental rights to be informed of his right to legal representation and to remain silent, by way of a trial within a trial, the judge *a quo* also considered it inappropriate to determine these issues together with the issue as to whether the appellant acted freely and voluntarily. He held that these issues, being constitutional issues, had to be decided separately from any other issues. Why he thought that challenges to the admissibility of a confession on constitutional grounds could not be dealt with at the same time that other challenges to its admissibility were being dealt with is not clear to me. I can think of no reason why all the factual issues relating to the admissibility of a confession should not be dealt with at one trial within a trial. As far as I know that is the common practice in the courts of first instance. In any event the judge *a quo* would seem not to have realised that to compel a person to make an admission or to plead guilty is an even more serious violation of a constitutional right than a failure to inform a person of his right to remain silent or to be legally represented."

The failure to hold a trial within a trial procedure in the present case placed the appellant in a position where, if he wished to challenge the evidence which had been led against him, it was necessary for him to get into the witness box to testify. In doing so, he was exposed to cross-examination in regard to all issues relevant to the issue of guilt. On the other hand, if a trial within a trial had been held, he would not have been exposed to such general cross-examination, and the issue would solely have been whether the confession had been freely and voluntarily made. His right to silence enshrined in the Constitution was therefore fundamentally breached by the magistrate's failure to hold a trial within a trial. As was observed by Clayden ACJ in *Chitambala v The Queen* [1961] R&N 166 at 169 -170, quoted with approval in the *Wong Kam-ming* case, *supra* at 257F:

> "In any criminal trial the accused has the right to elect not to give evidence at the conclusion of the Crown case. To regard evidence given by him on a question of admissibility as evidence in the trial itself would mean either that he must be deprived of that right if he wishes to properly contest the

> admissibility of a statement, or that, to preserve that right, he must abandon another right in a fair trial, the right to prevent inadmissible statements being led in evidence against him … To me it seems clear that deprivation of rights in this manner, and the changing of a trial of admissibility into a full investigation of the merits, cannot be part of a fair trial."

Bearing this in mind, the failure to hold a trial within a trial was an irregularity fatal to the proceedings: see – *S v Mofokeng* 1992 (2) SACR 261 (O). In the light of this, as well as the magistrate's failure to allow the appellant to give instructions to his attorney and his threat to remove the appellant from the court, there can be no doubt that the appellant did not enjoy a fair trial. The appellant's conviction and sentence must therefore be set aside.

However, it seems to me that it may well be that the appellant is in fact guilty of the offence with which he was charged. That offence was a severe one and it would not be in the interest of justice for the appellant to go free if he is in fact guilty, merely because the magistrate did not conduct a fair trial. However, in terms of s 324(c) of the Criminal Procedure Act, where a conviction and sentence are set aside by this court on the ground of a technical irregularity or defect in the procedure, proceedings may be instituted *de novo* before the magistrate. In the present circumstances, it would not be unfair for it to be ordered that the appellant be tried afresh before another magistrate, and I understood counsel for both sides were of the view that in the event of the appeal succeeding and the conviction and sentence being set aside on the basis of the trial having been unfair, that would be the appropriate order to make.

In the result, the appeal succeeds and the conviction and sentence are set aside. It is further ordered that the appellant is to be tried *de novo* before another magistrate.

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L.E. LEACH
JUDGE OF THE HIGH COURT

MILLER, J:

I agree.

_____
S. MILLER
JUDGE OF THE HIGH COURT

SUMMARY

Trial – accused prevented from giving instructions to his legal representative – not only unreasonable, but may have created impression of lack of objectivity.

Confession – admissibility thereof – must be determined at trial within a trial – failure to do so led to accused being cross-examined on matters relevant to his guilt before it was determined whether confession was freely or voluntarily made – right to silence fundamentally breached – constitutes fatal irregularity – conviction set aside on technical grounds – proceedings to be instituted *de novo* before different magistrate.