

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

REVIEW CASE NO: 20070177

DATE DELIVERED: 7/5/08

In the matter between:

THE STATE

and

LOYISO SISI

REVIEW JUDGMENT

PLASKET J

[1] The accused in this automatic review, along with two others, was convicted in the East London Magistrate's Court of housebreaking with intent to steal and theft. The accused (who was accused number 3 in the trial) was sentenced to 18 months imprisonment.

[2] A number of queries were directed at the magistrate and an opinion was also sought from the office of the Director of Public Prosecutions. A thorough and most helpful opinion has been furnished by Ms Hendricks and I record here my gratitude to her.

[3] I do not intend traversing all of the issues raised with the magistrate. I shall, instead, focus on one, the right to cross-examine.

[4] The accused's co-accused were represented by an attorney. He was

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unrepresented. When the attorney had cross-examined certain key State witnesses, the magistrate failed to afford the accused the opportunity to cross-examine them. He later tried to remedy this omission. When the accused's co-accused testified, he was also not afforded the opportunity to cross-examine them.

[5] An accused has a fundamental right 'to adduce and challenge evidence'.¹ Section 166(1) of the Criminal Procedure Act 51 of 1977 gives effect to this right by providing that an accused 'may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings ...'.

[6] The effect of a failure by a presiding officer to either explain to an unrepresented accused his or her right to cross-examine or to allow him or her to cross-examine has been dealt with often enough by the courts. In *S v Wellington*,² Franks AJ stated:

'Failure to explain to an unrepresented accused his rights with regard to cross-examination is in my view tantamount to a failure to allow cross-examination. The latter is, of course, a gross irregularity.'

[7] The consequence of such an irregularity is that the accused cannot be said to have had a fair trial.³ The failure to inform an accused of this right and, I would add, a failure to allow cross-examination at all, is 'not merely a matter of form' but is 'clearly a matter of substance and constitutes such a gross departure from established rules of procedure that the accused has not been properly tried and is *per se* a failure of justice'.⁴

[8] I turn now to the proceedings in this case. When the first State witness had been cross-examined by the attorney for accused numbers 1 and 2, the

¹ Constitution, s 35(3)(i).

² 1991 (1) SACR 144 (Nm), 148e.

³ At 148f.

⁴ *S v Raphatle* 1995 (2) SACR 452 (T), 457c-d.

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magistrate said the following to the accused in this matter:

‘Accused number 3 stand. You have heard the evidence of this first State witness. Now, for evidence that does not affect you, you don’t have to ask any questions. But if you want to ask questions about anything you can ask. Do you understand?’

The accused said that he understood and did not want to cross-examine.

[9] He was not given the opportunity to cross-examine the next two witnesses, the first of whom gave damning evidence against him. When the fourth and final State witness had testified in chief, the attorney for accused numbers 1 and 2 decided not to cross-examine the witness. The accused in this matter was asked: ‘Any questions?’ He opted not to ask any questions.

[10] After the State had closed its case, the magistrate raised with the accused the fact that he had not been afforded the right to cross-examine certain witnesses. The record is to the following effect:

‘Court: Accused number 3 please stand. You are not legally represented therefore it is the court’s duty to advise you of the next step in the court trial. Is there any State witness that you want to cross-examine again?’

Accused No. 3: No

Court: The reason the court is asking is because [the] court realised the last time that you were not offered this opportunity.

Accused No. 3: I understand, Your Worship.

Court: So you must not be heard to say “the court did not afford me an opportunity to cross-examine”. Do you understand that.

Accused No. 3: Understood.

[11] It stands out that when the accused was given the opportunity to cross-examine he was never told that he had a right to cross-examine, what its purpose was and what the consequences would be of a failure to challenge evidence that he disputed. Such an explanation was also lacking in the magistrate’s belated attempt to rectify his failure to allow the accused to cross-examine two of the State witnesses.

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[12] In my view, these failings on the part of the magistrate, as well as his further failure to allow the accused to cross-examine his co-accused have resulted in a failure of justice.

[13] The accused's conviction and sentence are set aside.

C. PLASKET

JUDGE OF THE HIGH COURT

I agree:

J. ROBERSON

ACTING JUDGE OF THE HIGH COURT