IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2008-04-18

NOT REPORTABLE

Case Number: A39/06

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS: TRANSVAAL Appellant/Applicant

and

THE MAGISTRATE BENONI MR S TSAGAANE First Respondent

PRISCILLA MEISIE ASSEGAI Second Respondent

JUDGMENT

SOUTHWOOD J

[1] This is an appeal by the state in terms of section 310 of the Criminal Procedure Act 51 of 1977 ('the Act') against decisions on questions of law in favour of the accused, Priscilla Meisie Assegai, the second respondent in the appeal ('the accused'), and an application by the state to review and set aside the acquittal of the accused by the trial magistrate Mr S. Tsagaane, the first respondent ('Mr Tsagaane'), on a

charge of culpable homicide, alternatively, reckless driving in contravention of section 63 of Act 93 of 1996, and for an order that the matter be remitted for trial before a magistrate other than Mr Tsagaane. Mr Tsagaane does not oppose the appeal or the application for review. The accused opposes both the appeal and the application for review and is represented by an attorney and counsel who have filed heads of argument.

Background

[2] At about 14:00 on 5 June 2004 and at the intersection of an off-ramp from the N12 freeway and Kingsway Road, in the district of Benoni, a collision took place between a Mazda sedan with registration MMY809GP ('the mazda') driven by Tanya Janse van Rensburg, and an Ekurhuleni Metro fire-engine with registration PZN167GP ('the fire-engine') driven by the accused. At the time of the collision Morgan Andrew Rees and Kylie Steyn were also travelling in the mazda and firemen Mokoena and Khumalo were also travelling in the fire-engine. As a result of the collision Tanya Janse van Rensburg and Morgan Andrew Rees died instantly and Kylie Steyn sustained fatal injuries from which she died a few days after the collision. The accused sustained serious injuries in the collision but the other firemen did not sustain any injuries.

[3] Kingsway Road connects Springs and Daveyton and runs more or less north-south. It consists of lanes for south to north traffic and for north to south traffic which are separated by an island. The off-ramp from the freeway runs more or less east-west and just before the intersection the road runs slightly uphill. Immediately prior to the collision the mazda travelled from west to east along the off-ramp until it stopped at the stop sign at the intersection and the fire-engine travelled from south to north along Kingsway Road until it reached the intersection where there was a stop sign for traffic in Kingsway Road. At the stop sign in Kingsway Road there are three lanes for traffic, two lanes for traffic travelling south to north and one lane for traffic which intends to turn to the east towards Witbank. Further to the south the road consists of two demarcated lanes for traffic. At all times the fire-engine was travelling in the right hand lane and when it reached the intersection it was still travelling in the right hand lane: i.e. now the middle lane. The mazda was also travelling in the right hand lane and the driver intended to turn to the south towards Springs. After stopping at the stop line the mazda pulled away and after it travelled approximately eight metres into the intersection it was struck side-on by the fire-engine which entered the intersection without stopping. When the fire-engine entered the intersection its siren and warning lights were on. The fire-engine struck the mazda with great force and

its momentum carried the two vehicles some 34 metres across the intersection and onto the island separating the south to north and north to south lanes of Kingsway Road where the fire-engine came to rest on its side with the mazda close by. Tanya Janse van Rensburg and Morgan Andrew Rees were already dead but Kylie Steyn was still alive.

[4] Arising out of this collision the accused was charged in the Benoni regional court with one count of culpable homicide (Tanya Janse van Rensburg, Morgan Andrew Rees and Kylie Steyn), alternatively, reckless driving in contravention of section 63 of the National Road Traffic Act 93 of 1996. The trial commenced on 9 February 2005 and ended on 9 December 2005 when the accused was acquitted.

[5] On 10 January 2006, in accordance with section 310(1) of the Act the Director of Public Prosecutions ('DPP') requested Mr Tsagaane to state a case for the consideration of the provincial division. This was done under cover of a letter from the DPP referring Mr Tsagaane to the relevant sections, rules and case law. When the request in terms of section 310(1) was delivered, Mr Tsagaane was on leave. When he returned from leave he tendered his resignation with effect from 28 February 2006. On 29 September 2006 G. Calitz, the senior magistrate at the Benoni magistrates' court, filed a stated case and on

2 October 2006 the DPP filed a notice of appeal. The notice lists a number of decisions on questions of law that are appealed against.

[6] On 19 January 2006 the DPP launched a review application seeking an order that the acquittal of the accused on 9 December 2005 be reviewed and set aside and an order that the matter be remitted for trial before a magistrate other than the first respondent. Only the accused opposed the application and filed an answering affidavit.

The trial and evidence tendered

[7] On 9 February 2005 the accused pleaded not guilty to the two charges and the following formal admissions were recorded in terms of section 220 of the Act:

(1) On 5 June 2004 and at or near Kingsway Road, within the district of Benoni, a collision took place between a fire-engine with registration PZN167GP driven by the accused and a motor vehicle with registration MMY809GP in which the deceased (i.e. Tanya Janse van Rensburg, Morgan Andrew Rees and Kylie Steyn) were travelling;

(2) As a result of the collision the three occupants of motor vehicle

with registration MMY809GP died, Tanya Janse van Rensburg and Morgan Andrew Rees on the scene and Kylie Steyn about a week later;

(3) The three deceased referred to in the charge sheet were Tanya Janse van Rensburg, Morgan Andrew Rees and Kylie Steyn;

(4) The deceased did not suffer any further injuries subsequent to the collision; and

(5) The deceased died as a result of injuries sustained in the collision.

[8] As a result of these admissions the issues for determination by the court were whether the accused was negligent and whether such negligence caused the collision with the mazda. Any degree of negligence was sufficient for a conviction of culpable homicide. See ***S v Haarmeyer*** **1970 (4) SA 113 (O)** at 117D-G. The alternative charge was relevant only if the court found that the accused's negligence did not cause the collision.

[9] On these issues the state tendered the evidence of the following witnesses –

(1) Ms. Rene Jordaan, an occupational health practitioner, who stopped behind the mazda at the intersection immediately prior to the collision, as an eyewitness;

(2) Mr. Elliot Myeza, a flower seller, who conducted his business on the south western corner of the intersection at the time of the collision, as an eyewitness;

(3) Mr. Raymond Tshabangu, who sold swings from the opposite corner of the intersection, as an eyewitness;

(4) Inspector Jacob Msiza, an accident investigator employed by the Ekurhuleni Metro Police Department, who attended the scene of the collision at about 14:30 on 5 June 2004 and prepared a sketch plan and key thereto of the accident;

(5) Mr. Jean Stephen Kichenbrand, a senior traffic officer, as an expert in the reconstruction of collisions, on the speed at which the fire-engine was travelling when it collided with the mazda;

(6) Inspector Sifiso Henry Madlala who was initially the investigating officer in the matter and who took a warning statement from the

accused on 9 July 2004;

(7) Mr. Jeffrey Joseph Rees, the father of the deceased, Morgan Andrew Reese, who attended the scene of the collision, took photographs and did certain other investigations;

(8) Mr. Jacobus Pieter Verster, an employee of the Ekurhuleni Metro Police Accident Unit, as an expert in the reconstruction of collisions, to testify about distances and the speed at which the fire-engine entered the intersection.

Only the accused testified for the defence.

Judgment

[10] Mr Tsagaane rejected the evidence of Rene Jordaan, Elliot Myeza, Raymond Tshabangu, Jacob Msiza, Jeffrey Rees, Jean Kichenbrand, Jacobus Verster and also rejected the accused's evidence that when she entered the intersection she was travelling at 10 km/h. He then proceeded to analyse the accused's evidence and concluded that she did everything that she was legally required to do when approaching the intersection and that the state had failed to prove that she drove negligently.

The accused's main contention

[11] The accused's main contention is that the evidence did not prove beyond reasonable doubt that the accused was negligent when she drove into the intersection and collided with the mazda. According to the argument, it would serve no useful purpose to consider the appeal or hear the application for review. Even if the proceedings are set aside and the trial takes place *de novo* the outcome is known. The accused did all that can be expected of a reasonable driver before she entered the intersection. This argument was advanced with reference to the accused's own evidence but does not preclude a reference to the evidence which is common cause. Clearly it must be considered before the appeal and the review.

[12] In considering the argument that the accused was not negligent it is important to bear in mind the provisions of section 58 of the Road Traffic Act 93 of 1996. The relevant provisions of section 58 provide –

> '58. Failure to obey traffic sign prohibited -
>
> (1) Subject to subsection (3), no person shall, unless otherwise directed by a traffic officer, fail to comply with any direction conveyed by a road traffic sign displayed in the prescribed manner.

(2) …

(3) The driver of a fire-fighting vehicle …, who drives such vehicle in the performance of his or her duties … may disregard the directions of a road traffic sign which is displayed in the prescribed manner: Provided that –

(a) he or she shall drive the vehicle concerned with due regard to the safety of other traffic; and

(b) in the case of any such fire-fighting vehicle … such vehicle shall be fitted with a device capable of emitting a prescribed sound and with an identification lamp, as prescribed, and such lamp shall be in operation while the vehicle is driven in disregard of the road traffic sign.'

The driver of a fire fighting vehicle does not have absolute right of way and must always drive carefully and when disregarding road traffic signs must drive the vehicle with due regard to the safety of other traffic and have the siren and lamp switched on.

[13] In dealing with identically worded provisions of other Road Traffic legislation the courts have emphasised that even if the driver of a vehicle such as a fire-engine is entitled to disregard the traffic sign the

driver is not entitled to proceed against the traffic sign unless and until the driver has satisfied himself or herself that it is safe to proceed and that by doing so he or she will not endanger other traffic lawfully proceeding across his or her intended line of travel. The courts have also commented that even if the other driver has heard the fire-engine approaching he or she is entitled to proceed with caution and can rely upon the assumption that the driver of the fire-engine, even though entitled to disregard the road traffic sign, would not rush headlong into the intersection and disregard the common law duty of care to regulate his or her movements so as not to collide with traffic lawfully proceeding through the intersection. If the driver of the fire-engine intends to disregard the road traffic sign he or she may do so only after satisfying himself or herself that he or her can do so without colliding with other traffic passing through the intersection – see ***Rondalia Assurance Corp of SA Ltd v Collins NO*** **1969 (4) SA 345 (T)** at 347A-C and E-G; ***S v Phillip*** **1968 (2) SA 209 (C)** at 213G; ***Johannesburg City Council v Public Utility Transport Corporation Ltd*** **1963 (3) SA 157 (W)** at 160B-E and ***R v Marais*** **1946 CPD 261** at 265 and 266.

[14] The accused testified that she was called to fight a veldt fire near an informal settlement. It was an emergency and she was in a hurry to get to the fire. She turned on the fire-engine's siren and warning lights

when she left the Springs' depot. (Two of the eyewitnesses, Jordaan and Myeza, heard the siren and saw the lights for the first time when the fire-engine crossed the stop line and entered the intersection. The third eyewitness, Tshabangu, testified that he had heard only a faint sound earlier. For purposes of assessing the acccused's negligence it will be accepted that the siren and warning lights were on even before the accused reached the intersection.) The accused testified that she drove at about 70-80 km/h and then reduced her speed to about 30-40 km/h when she approached the intersection she had to traverse before reaching the intersection where the collision took place. About one kilometre from that intersection the accused slowed to about 10 km/h and she approached the intersection at that speed. The driver's seat of the fire-engine is situated high above the ground and she had a clear view of the intersection and the traffic there as she approached. She saw the mazda turn down the off-ramp of the freeway and she also saw it come to a halt on the western side of the intersection. She did not know whether it stopped there because of the stop sign or because the driver had seen the fire-engine approaching. She did not keep the mazda under observation as she was obliged to look at all the traffic in and around the intersection. She concluded that it was safe to enter the intersection without stopping at the stop sign and she accelerated. She suddenly saw the mazda directly in front of her. She was not able to brake or swerve to avoid the collision.

[15] Mr Tsagaane correctly rejected the accused's evidence that she reduced her speed to 10 km/h when she was one kilometre away from the intersection and maintained that speed until she reached the intersection. It is so inherently improbable that she would do so that it simply cannot be believed. Furthermore a speed of 10 km/h is totally inconsistent with the mechanism of the collision. The fire-engine struck the mazda almost side-on on the southern side of the intersection and pushed it sideways for almost 34 metres before both vehicles came to a halt, the fire-engine lying on its side. It is overwhelmingly probable that the fire-engine was travelling much faster than 10 km/h when it entered the intersection. A precise speed cannot be determined on the evidence but it is not necessary to make a precise finding. The accused on her own version did not see the mazda pull away from the stop line and enter the intersection. She saw it again when it was right in front of the fire-engine and she could not avoid the collision. The accused therefore did not disregard the stop sign while driving with due regard to the safety of other traffic. She was obliged to make sure that it was safe for other traffic before she entered the intersection: that meant that she had to be sure that the driver of the mazda had seen the fire-engine approaching and intended to give way. On her version the accused did not do this and she was negligent. It was this negligence that caused the collision. As already mentioned if the driver

of the mazda was negligent that does not preclude the liability of the accused for culpable homicide.

Appeal

[16] The DPP purports to appeal against decisions of the regional court in terms of section 310 of the Act. The relevant provisions of the section read as follows:

> '(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law … the attorney-general … may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, insofar as they are material to the question of law.
>
> (2) When such case has been stated, the attorney-general … may appeal from the decision to the provincial or local division having jurisdiction.
>
> (3) The provisions of section 309(2) shall apply with reference to an appeal under this section.'

[17] Section 309(2) provides that an appeal under that section shall be noted and prosecuted within the period and in the manner prescribed

by the rules of court. The relevant subrules provide that –

> '(11) An attorney-general … who contemplates an appeal under section 310 of the Criminal Procedure Act 1977 (Act 51 of 1977), shall within 20 days after the conclusion of the criminal proceedings, in writing request the judicial officer to state a case.
>
> (12)(a) Upon receipt of the request referred to in subrule (11), the clerk of the court shall prepare a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66(1), and then place the record before the judicial officer who shall within 15 days thereafter furnish a stated case to the clerk of the court who shall forthwith transmit a copy thereof to the attorney-general.
>
> (b) The stated case shall be divided into paragraphs numbered consecutively and shall be arranged in the following order:
>
> (i) The judicial officer's findings of fact insofar as they are material to the questions of law on which decision in favour of the accused was given;
>
> (ii) questions of law;
>
> (iii) the judicial officer's decision on such questions on his or her reasons therefore.

(13) The attorney-general … may, within 15 days after the receipt by him or her of the stated case, deliver notice of appeal against the decisions on questions of law.

(14) Every notice of appeal, statement of grounds of appeal, judicial officers statement and stated case filed of record with or furnished to the clerk of the court under the provisions of this rule shall become part of the record.

(15)(a) The clerk of the court shall within 10 days after receipt by him or her of the … notice of appeal delivered in terms of subrule (13), …, transmit to the registrar of the court of appeal the record of the criminal proceedings or the stated case, together with 3 copies thereof.'

[18] The only issues for the court to decide were whether the accused drove negligently and, if so, whether such negligence caused the collision. If so she was guilty of culpable homicide. On the face of it this was a purely factual issue. Nevertheless, on 10 January 2006 the DPP delivered to Mr Tsagaane a request to state a case in terms of section 310(1) of the Act. The DPP did not simply request the magistrate to state a case. He formulated the following questions of law in respect of which the magistrate erred –

(1) A cautionary rule applies to the evidence of an expert witness;

(2) The evidence of an expert witness must be rejected solely because of his 'minimal experience';

(3) The test whether the evidence of an accused person is reasonably possibly true is whether the version 'simply makes sense';

(4) An adverse inference is to be drawn against the state where it investigates a matter while the trial is proceeding at court;

(5) It is incumbent upon the state to prove the making of an affidavit by a witness (for the state) where such witness did not deviate materially from such affidavit; and

(6) A request for an inspection *in loco* is to be refused if or where he (the magistrate) 'can figure the lay out' of the scene to be inspected.

[19] It is clear that the DPP may only appeal upon questions of law. The wording of section 310(1) of the Act makes it clear that the state may only appeal against a decision on a point of law in favour of the accused. Furthermore, the appeal does not lie against decisions which are of academic interest. It has long been accepted that a court of appeal will consider the decision by the magistrate upon a question of

law only if the appeal, if allowed, would affect the conviction of the accused – see ***Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd & Others*** **1958 (3) SA 360 (A)** at 373D-374B: **Du Toit *et al* *Commentary on the Criminal Procedure Act*** 30-60. On a perusal of the record and the magistrate's judgment it is questionable whether the magistrate decided the questions sought to be appealed against, whether the magistrate's decisions related to legal questions and if the court of appeal upheld the appeal, whether this would affect the conviction of the accused. After rejecting almost all of the state's evidence the magistrate found on the accused's evidence that she had not driven negligently. However that is not the immediate problem.

[20] Mr Tsagaane did not prepare a stated case as required by Rule 67. The record is silent as to the attempts made to ensure that he prepare a stated case but obviously he was unwilling to do so. Mr Calitz, the acting senior magistrate at the Benoni magistrates' court, states in an affidavit dated 28 September 2006 that when the DPP requested Mr Tsagaane to state a case he was on leave and that when he returned from leave on the 1st of February 2006 he tendered his resignation. Mr Calitz says that on the same date he, Mr Calitz, handed the request for a stated case to Mr Tsagaane who promised to state a case after he had resigned. On 2 August 2006 when Mr Tsagaane returned to court to complete a part-heard case Mr Tsagaane handed the case back to

Mr Calitz. On 29 September 2006 Mr Calitz purported to state a case in terms of section 310(1) of the Act. The stated case does not comply with this section or the rule. Mr Calitz merely commented very briefly on each decision referred to by the DPP in his request. It is impossible to ascertain from the stated case which decision on a question of law resulted in the accused's acquittal.

[21] The requirements of the Act and rule must be complied with before the court will entertain an appeal. Where the DPP rather than the magistrate formulates the questions of law, that section is not complied with and the court will not entertain the appeal – see ***S v Saib*** **1975 (3) SA 994 (N)** at 995G-H. So too where the magistrate fails to comply in material respects with the requirements laid down for the drawing up of a stated case – see ***S v Petro Louise Enterprises (Pty) Ltd & Others*** **1978 (1) SA 271 (T)** at 276C-F; ***Solicitor-General v Newman: In re R v Newman*** **1949 (4) SA 117 (E)** and ***R v Storm*** **1947 (3) SA 518 (E).**

[22] The DPP attempted to remedy the failure of Mr Tsagaane to state a case by filing the stated case prepared by Mr Calitz and a memorandum prepared by another magistrate Mr A.J.P. Niemand, a magistrate in Johannesburg. The DPP's representative was unable to explain on what precedent or in terms of which section or rule these

documents were placed before the court. It is clear that neither the section nor the rule provides for this.

[23] There is therefore no stated case before this court or decisions of law to be appealed against and the appeal cannot be considered. The appropriate order is that it be struck from the roll.

Review

[24] In terms of section 24(1)(a), (c) and (d) of the Supreme Court Act 59 of 1959 the state seeks to review and set aside the acquittal of the accused by Mr Tsagaane. The relevant provisions of section 24(1) read as follows –

> 'Grounds of review of proceedings of inferior courts.
>
> (1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are –
>
> (a) …
>
> (b) interest in the cause, bias … on the part of the presiding judicial officer;
>
> (c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[25] A review under section 24 of Act 59 of 1959 falls within the first category of reviews identified in ***Johannesburg Consolidated Investment Co v Johannesburg City Council*** **103 TS 111** at 114:

> '… it denotes the process by which, apart from appeal, the proceedings of inferior courts of Justice, both civil and criminal, are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings.'

An aggrieved party to any civil or criminal suit in any inferior Court of Justice, may under Rule 53 oblige the presiding judicial officer to send up the record for review and call upon the other party to the suit to show cause why the proceedings shall not be set aside or corrected. The grounds upon which relief is sought must be shortly and distinctly stated in the application and they must be one or more of the grounds indicated in section 24 of Act 59 of 1959 – see ***Johannesburg Consolidated investment Co v Johannesburg City Council supra*** at 114-115; Rule 53(2); **Erasmus** ***Supreme Court Practice*** Farlam Fichardt Van Loggerenberg A1-69; **Harms** ***Civil Procedure in the Supreme Court*** B-372 to 373.

[26] It is important to bear in mind that an incorrect judgment is not an irregularity; an irregularity refers to the method of conducting the trial and to be gross it must be of such a serious nature that the case was not fully and fairly determined – see ***Doyle v Shenker & Co Ltd*** **1915 AD 233** at 238. In ***Ellis v Morgan: Ellis v Desai*** **1909 TS 576** at 581 the court said –

> 'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the methods of a trial; such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

[27] The DPP seeks to review the proceedings on the ground that –

(1) there were gross irregularities in the proceedings. The first occurred when Mr Tsagaane met the accused's legal representative, Mr Motloung, in his office in the absence of the prosecutor, Ms Dibakwane. According to the DPP's deponent, Jeffrey Joseph Rees, the father of one of the deceased, it is clear that Mr Tsagaane and Mr Motloung discussed the merits of the case and that Mr Tsagaane decided to acquit the accused before any evidence was led. The second occurred when the third state witness, Raymond Tshabangu, was questioned by Mr Tsagaane. After the witness said that he was not able to draw a

sketch plan of the intersection where the collision occurred and indicate the point of impact on the sketch plan, Mr Tsagaane pressed the witness to point out the point of impact on a sketch plan. The witness then pointed out a spot on the wrong side of the road and this resulted in the rejection of his evidence by Mr Tsagaane.

(2) Mr Tsagaane demonstrated bias in his conduct of the case; and

(3) Mr Tsagaane rejected admissible and competent evidence.

Irregularities

[28] If the presiding magistrate had a meeting with the accused's legal representative in the absence of the prosecutor that would be a gross irregularity in the proceedings justifying the setting aside of the proceedings. See ***S v Roberts*** **1999 (2) SACR 243 (SCA)** para 23.

[29] There is a material dispute of fact on the affidavits as to whether such a meeting took place. Mr Motloung on behalf of the accused alleges that there was a meeting between the magistrate, the accused's attorney and the prosecutor. However he states that the purpose of the meeting was to discuss whether the charge sheet was correctly framed as there

was only one charge and Mr Tsagaane considered that because three people had died there should have been three counts of culpable homicide. Mr Motloung states that at no time was he alone with Mr Tsagaane in his chambers.

[30] Since the DPP seeks final relief on notice of motion and there is a material dispute of fact, final relief may be granted only in the circumstances outlined in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634E-635C. In the present case the issue is whether Mr Motloung's allegations or denials are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[31] The transcript reflects that after the charges were put to the accused but before the accused pleaded the court ordered that the matter stand down and said 'Mr Motloung may I see you in chambers'. There was no reference to the prosecutor. The court adjourned and after the adjournment the prosecutor applied to amend the charge sheet by substituting the correct date for the date alleged in the charge sheet. She did not refer to or object to a meeting which had taken place between the magistrate and Mr Motloung in her absence.

[32] In the DPP's founding affidavit Mr Rees states that when the court

adjourned Mr Motloung went to confer with the magistrate. He, Mr Rees, thought it strange that the prosecutor Ms Dibakwane, was not invited to the meeting. He then went to her office and asked why she had not formulated three charges of culpable homicide and pointed out that the charge sheet alleged the wrong date. Ms Dibakwane refused to put three charges but agreed to amend the date. This is consistent with the transcript immediately after the court reconvened. Significantly on his own version, Mr Rees did not question the prosecutor about the meeting which was taking place in her absence. The DPP did not obtain an affidavit by Ms Dibakwane and did not explain this omission. The DPP also did not obtain an affidavit by Mr Peter Trilivas, an attorney who held a watching brief from Mr Rees. The DPP did not explain this omission either.

[33] Mr Motloung's evidence has already been referred to. He clearly and unambiguously denies Mr Rees' evidence and gives a full account of the meeting with Mr Tsagaane and what was discussed. Mr Motloung pertinently refers to the absence of two crucial witnesses to this alleged irregularity and asks the court to draw an inference adverse to the DPP because of the failure to tender the evidence of these two witnesses.

[34] The DPP filed a replying affidavit by Mr Trilivas but no affidavit by Ms

Dibakwane. There is no still no explanation for failing to file an affidavit by the prosecutor. Mr Trilivas states that he held a watching brief from Mr Rees and was present at court when the trial commenced on 9 February 2005 until his services were terminated by Mr Rees on 30 August 2005. He states that when the matter was adjourned on 9 February 2005 he and Mr Rees went to Ms Dibakwane's office while Mr Motloung went to confer alone with Mr Tsagaane. He confirms the correctness of the facts alleged by Mr Rees. Mr Trilivas states that he immediately realised that an irregularity had occurred when Mr Motloung and the magistrate met alone but he, Mr Trilivas, did not mention this to either Mr Rees or Ms Dibakwane. Thereafter, he says, the irregularity slipped his mind and he did not mention this to the prosecutor who took over the case from Ms Dibakwane, not even when she applied for Mr Tsagaane to recuse himself. He realises that this could have been a further ground for seeking the magistrate's recusal.

[35] It is inconceivable that if Mr Trilivas had seen what he says that he would not have pointed this out to his client, Ms Dibakwane and later Ms Pretorius. In short Mr Trilivas' version of the events is so improbable that it cannot be believed. It is striking that Mr Rees does not state that Mr Trilivas accompanied him to see the prosecutor when the court adjourned on 9 February 2005 and that Ms Dibakwane did not enquire whether she was also required to confer with the

magistrate. In the circumstances the court cannot reject the accused's version as deposed to by Mr Motloung and this ground for review cannot be sustained.

[36] A reading of the record reveals that Mr Tsagaane did what the DPP alleges. As will appear later Mr Tsagaane's conduct indicates bias on his part rather than a gross irregularity which would vitiate the proceedings.

Bias

[37] In ***S v Roberts*** **1992 (2) SACR 243 (SCA)** paras 32 and 34 the court stated the following requirements for the appearance of judicial bias:

(1) There must be a suspicion that the judicial officer might, not would be, biased;

(2) The suspicion must be that of a reasonable person in the position of the accused or litigant;

(3) The suspicion must be based on reasonable grounds; and

(4) The suspicion is one which the reasonable person referred to

would, not might have.

[38] On the strength of Mr Tsagaane's conduct of the trial during the evidence of the three eye witnesses, Rene Jordaan, Elliot Myeza and Raymond Tshabangu (i.e. the manner in which he questioned and put propositions to them) the state applied for the magistrate's recusal which was refused. The state then proceeded to tender the evidence of Inspector Jacob Msiza who attended the accident scene and prepared a sketch plan and took photographs; Jean Stephen Kichenbrand who was called to testify as an expert regarding the speed of the fire engine; Inspector Sifiso Madladla to testify about the warning statement which he took from the accused, Jeffrey Rees to testify about his role in the investigation of the collision, the photographs that he took and the measurements he made and his instructions to Mr Kichenbrand to reconstruct the accident and determine the cause and Jacobus Pieter Verster, a member of the Ekurhuleni Metro Police to testify as an expert in the reconstruction of the collision. The last witness was requested to prepare a reconstruction of the collision while the trial was still in progress to bolster the evidence of Kichenbrand.

[39] As already mentioned, save for the evidence of Inspector Madlala, Mr Tsagaane rejected the evidence of all these witnesses. The magistrate

dismissed the evidence of Inspector Madlala on the basis that he, Inspector Madlala, was an investigator who did basically nothing in the case and who did not even know what was happening in the case. Mr Tsagaane concluded that it was not necessary to discuss his testimony. This was a bizarre finding in view of the fact that Inspector Madlala testified, without objection from the accused's attorney, that the accused had freely and voluntarily made a statement to him while in her sound and sober senses. Without objection he read the statement into the record. If admissible the statement would have assisted the court in determining whether the accused's evidence was reliable and whether it showed that she had driven negligently. The court was therefore obliged to consider his testimony and decide whether it was admissible or not.

[40] Mr Tsagaane criticised Jordaan's evidence because, he said, she attempted to give the impression that she is perfect and her observations were very reliable ('good and strong'). He found that she was biased because she tried to convince the court that the accused was in the wrong. He said she could not testify that the fire engine had not reduced speed because she was not travelling in the vehicle. He suggested that her prejudice against the accused was informed by race but did not make a finding in this regard. He found that she and Rees were in cahoots against the accused and that Rees was the real

complainant in the matter. He concluded that Jordaan's evidence could not be relied upon. It was, according to him, full of bias and prejudice against the accused. She did not make a good impression on him and she appeared to have been coached to come and say what she said.

[41] Mr Tsagaane criticised Myeza and Tshabangu because they testified about different things although they saw the same collision. He also criticised them because they differed about how their statements came to be taken and because the person who took their statements was not called to give evidence. He found that they were weak witnesses who told the court what they thought was right and then when cross-examined came up with all sorts of other stories and contradicted themselves so much that the court could not place any weight on their evidence. He found their evidence to be riddled with contradictions and uncertainties. He found that although they denied it they were told what to come and say in court. He found that they could not tell the court how the accident happened. One of them, he said, had a difficulty with where the accused took place. He concluded that their evidence was 'pathetic' and that he could not place any weight on it. Mr Tsagaane found that the three eye witnesses did not corroborate each other in any way and that he had the impression that they were not testifying about the same accident.

[42] These findings and reasons for rejecting the evidence of the three eye witnesses can only be described as bizarre. All three testified that they were present at the time when the collision occurred. All three described the same vehicles involved in the collision and put them in the same streets travelling in the same directions immediately prior to the collision. All three testified how the mazda stopped on the western side of the intersection before proceeding. All three testified how the fire engine approached the intersection from the Springs side, i.e. from the south, how it failed to stop at the stop sign and how it entered the intersection and collided side-on with the mazda. All three testified how the fire-engine pushed the mazda across the intersection until both vehicles came to rest on the island. Not only do these persons corroborate each other but in material respects they agree with the accused's version and the statement she gave to the Investigating Officer Madlala. On reading their evidence it cannot be found that they were coached or told what to testify. There is also no basis for finding that they were influenced by Rees to testify to things that did not happen. In my view there was simply no basis for the criticism of the witnesses. Mr Tsagaane's criticism of Jordaan has no merit. She must have had a view as to who caused the collision and the version put to her by the accused's attorney would not change it. On her own version the accused did not keep a proper look-out and ensure that she did not

endanger other vehicles when entering the intersection. For a witness in such circumstances speed is a matter of impression. Jordaan testified that the fire-engine did not slow down before entering the intersection. She described its speed as fast – clearly not 10 km/h as testified by the accused. There was also no justification for criticising Myeza and Tshabangu. When a witness says he cannot understand a sketch plan and is clearly not well-educated it is wrong to press him to indicate the point of impact on the sketch plan. It is equally wrong to use the wrong reply as a reason to question or reject his evidence.

[43] I agree with the DPP that when the application for recusal was brought the state already had good reason to suspect that the magistrate was not impartial – see ***S v May*** **2005 (2) SACR 331 (SCA)** para 28 and ***S v Rall*** **1982 (1) SA 828 (A)** at 831H-833B. I also agree that Mr Tsagaane's reasons for rejecting the eye witnesses were neither good nor comprehensible and demonstrate bias – see ***S v Roberts supra*** para 40. In my view many of the reasons for rejecting the other witnesses were equally flawed. Mr Tsagaane was not satisfied to merely find that the expert opinions were not persuasive. He suggested that they were biased and prejudiced and were simply intent on satisfying their master, Rees. It is not clear why Verster, an employee of the Ekurhuleni Metro, would be biased against a fellow employee, the accused.

[44] Mr Tsagaane correctly pointed out that the case is factually a simple one. It could and should have been decided on the evidence of the three eye witnesses and the accused and if this could not be agreed evidence of the lay out of the accident scene and the relevant measurements. The rejection of the eye witnesses without good and comprehensible reasons demonstrates bias on the part of Mr Tsagaane. Furthermore it was a rejection of admissible and competent evidence as contemplated by section 24(1)(d) of Act 59 of 1959. In my view this justifies the setting aside of the proceedings.

Order

[45] I The appellant/applicant's appeal is struck off the roll;

II The proceedings in the Benoni regional court under case number A3754/04 in which the second respondent (Priscilla Meisie Assegai) was acquitted on 9 December 2005 of culpable homicide alternatively a contravention of section 63 of Act 92 of 1996 (reckless or negligent driving) are reviewed and set aside;

III The matter is remitted for trial, if the DPP is so advised, before a magistrate other than the first respondent (Mr. S. Tsagaane).

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B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

_____

P.M. MABUSE
ACTING JUDGE OF THE HIGH COURT

CASE NO: A39/06

HEARD ON: 4 February 2008

FOR THE APPELLANT/APPLICANT: ADV. F.C. ROBERTS

INSTRUCTED BY: Director of Public Prosecutions

FOR THE SECOND RESPONDENT: ADV. V.T. SEBOKO

INSTRUCTED BY: Mr Motloung of MSMM Inc

DATE OF JUDGMENT: 18 April 2008