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

CASE NO: CA&R 39/2015
Date heard: 7 October 2015
Date delivered: 25 November 2015

REPORTABLE

In the matter between

JOHN BOOYSEN
Appellant

And

THE STATE
Respondent

Appeal against convictions for house breaking with intent to steal and theft and assault – district court trial magistrate presiding at bail application – following conviction magistrate transferring matter to regional court for sentencing in terms of s 116 of Criminal Procedure Act – regional court magistrate confirming trial in accordance with justice and sentencing appellant to 5 years' imprisonment on first count and 6 months' imprisonment on second count. Proper approach to prior engagement of presiding officer in bail hearing considered – *Held* that trial magistrate's prior hearing of bail application an irregularity which ordinarily vitiates trial proceedings upon application of test for apparent bias based on reasonable suspicion – nature of bail proceedings such that pressing officer likely to acquire knowledge of facts and circumstances of case against accused which may prejudice accused at trial – acquisition of such knowledge founding a reasonable suspicion of bias which disqualifies presiding officer from hearing trial – *In casu* district magistrate himself considering his further involvement in trial not in the interests of justice and stating same in open court –

thereafter proceeding to hear trial – such conduct rendering proceedings a nullity – regional court adopting incorrect approach to determining that proceedings in accordance with justice in terms of s 116 – finding amounting to misdirection – appeal upheld.

JUDGMENT

GOOSEN, J.

1. The appellant was convicted in the district court at Aberdeen on 16 April 2015 on charges of housebreaking with intent to steal and theft and common assault. Following his conviction the state proved certain previous convictions. Upon proof of these the district court magistrate formed the view that the likely sentence would exceed that court's sentencing jurisdiction and accordingly transferred the matter to the Regional Court in terms of section 116 (1) (b) of the Criminal Procedure Act, 51 of 1977(the CPA). When the matter came before the regional court submissions were made by the parties and thereafter the court certified the proceedings as being in accordance with justice, as required in terms of s 116, and proceeded thereafter to sentence the appellant. The appellant was sentenced to 5 years' imprisonment on the first count and 6 months' imprisonment on the second. The appellant sought and obtained leave to appeal against his convictions. He was granted bail pending the finalisation of his appeal.

2. The essential basis upon which leave to appeal was granted was that another court might come to a different conclusion in respect of the finding that the proceedings in the district court were in accordance with justice. The reason for this is that the magistrate in the district court had presided over a bail application involving the appellant prior

to presiding as the trial court. The basis upon which the appeal was prosecuted was that the regional court had erred in certifying that the proceedings were in accordance with justice inasmuch as the facts established that the prior engagement of the trial magistrate in the bail application vitiated the appellant's right to a fair trial.

3. The heads of argument filed on behalf the appellant, strangely, make only passing reference to this critical aspect and instead were premised on submissions in respect of the merits of the trial court's conviction of the appellant. The respondent's heads of argument make no reference at all to the issue. In argument before us both counsel appeared to accept that the fact that the same magistrate presides in a trial as presided in a prior bail application does not *per se* constitute an irregularity amounting to a failure of justice and that this court should accordingly have regard to the evidence heard by the trial court in establishing whether there had been a failure of justice. The approach adopted by counsel is unfortunate since there is in fact disagreement in the authorities as to the proper approach to adopt in a matter such as this. This court was therefore required to decide the appeal without appropriate assistance by the parties' legal representatives.

4. When the matter came before the regional court submissions were advanced by the then legal representative of the appellant which were directed to persuading the court that the proceedings before the district court were not in accordance with justice. The thrust of those submissions, contained in the record, was directed to certain discrepancies in the evidence and contradictions between the state

witnesses. It was thus a challenge to the merits of the conviction by the district magistrate. The court drew the legal representatives' attention to the fact that the district magistrate had indicated at the conclusion of the bail hearing in which he had presided, when the matter was to be postponed for purposes of trial, that he did not consider it appropriate that he should hear the trial by reason of the fact that he had become privy to certain evidence and that it was therefore not in the interests of justice that he should hear the case.

> HOF: Het u die laaste bladsy van die borg aansoek gelees wat die Landros sê bladsy 17? Wat hy hier sê kan ons die saak uitstel vir mnr Koopman die ander Landros wat in my plek gaan aflos wanneer ek op verlof is, want ek het nou feite aangehoor van die saak van [onduidelik] weghardloop het and al daardie goeters. Dit is nie in belang van geregtigheid dat ek al daardie feite aangehoor het om nou die verhoor ook te doen nie en dan doen hy die verhoor.

5. The regional court magistrate was here referring to the record of the bail proceedings. That record was plainly part of the record before the regional magistrate but has not been incorporated in the appeal record. We initially considered that the appeal could not be disposed of in the absence of that record but, for the reasons which will become apparent hereunder, the facts as they are disclosed on the record relating to this aspect are sufficient in order to dispose of the appeal.

6. In response to the court's query the appellant's legal representative took instructions and then informed the court that the appellant was represented by a different legal representative at the stage of the bail application and that his new legal representative at trial was plainly not aware of the district magistrate's earlier comments. It was also

indicated that the appellant had noted that it was the same magistrate but that he relied on his new legal representative.

7. Having considered the various submissions the regional court came to the conclusion that the proceedings were in accordance with justice. This was based on consideration of both the merits of the matter as well as the issue relating to the bail application having been heard by the same magistrate. In respect of this latter aspect the court pointed out that in rural areas there is a shortage of magistrates and that magistrates are trained to disabuse their minds of evidence which might emerge during a bail application when dealing with a subsequent trial of the matter. On this basis the magistrate concluded that no prejudice could result. The court expressed the view that practical considerations militated against requiring that trial magistrates should in no way be involved in hearing bail applications in matters which came before them. The magistrate accordingly concluded that the proceedings were in accordance with justice.

8. The first question that arises is whether the approach adopted by the regional court magistrate in deciding the issue is correct and, furthermore, whether the regional magistrate misdirected himself in relation to the particular facts which were relevant in determining whether the proceedings in the district court were in accordance with justice.

9. In S v Thusi and others[1] Magid J found that the fact that the same magistrate as heard the bail application presided at the trial did not *per se* vitiate the proceedings. That matter came before the full court

[1]2000 (4) BCLR 433 (N)

by way of a special review following the referral of the matter from the district court to the regional court in terms of section 116 of the CPA. The court considered the effect of section 60 (11B) of the CPA in terms of which a record of the bail proceedings, subject to certain exclusions, forms part of the trial court's record. The section provides as follows:

> (a) In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether – (i) the accused has previously been convicted of any offence; and (ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.
> (b) Where the legal adviser of an accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.
> (c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.
> (d) An accused who willfully –
> (i) fails or refuses to comply with the provisions of paragraph (a); or
> (ii) furnishes the curt with false information required in terms of paragraph (a),
>
> shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

10. Relying on the finding of the Constitutional Court in S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat [2] to the effect that there

[2] 1999 (7) BCLR 771 (CC) at 820E. This matter involved a number of challenges to the validity of provisions of s 60 of the CPA, including a challenge to s 60(11B) (c) which provides that the record of bail proceedings is admissible in evidence against an accused at the subsequent trial. The Constitutional Court conducted a careful analysis of the section and came to the conclusion that the provisions do not impugn the rights enshrined in s 35 of the Constitution.

is no conflict between s 60(11B) and the Constitution, the court came to the conclusion that:

> *Prima facie*, therefore, there can be no objection to the Magistrate who hears an application for bail presiding at the trial of the accused who so applied. In my view, however, if in the course of a bail application an applicant for bail discloses, as he is obliged to do, that he has relevant convictions or charges pending against him, there is every objection to the same Magistrate both hearing the bail application and presiding at the trial, for in that event the accused's right to a fair trial might well be compromised.[3]

11. It was noted in that matter that the accused had informed the magistrate that he had no previous convictions. On this basis the court concluded that since no prejudicial information had been disclosed his right to a fair trial was not compromised.

12. A similar approach was adopted in S v Hlati[4] by a differently constituted full court of the same division. In that matter a bail application was brought before the trial magistrate during the course of the trial. In the bail application it was disclosed that the accused had previous convictions. The question that arose was whether the fact that the magistrate had acquired knowledge of previous convictions prior to the conviction of the accused amounted to a failure of justice.

13. The court approached the matter on the basis that s 60(11B) specifically sanctions the bringing to a court's attention during bail proceedings that the accused has previous convictions. Thus while a trial magistrate's knowledge of an accused's previous convictions might constitute an irregularity, such irregularity did not necessarily

[3] Thusi at 437G-H
[4] 2000 (8) BCLR 921 (N)

amount to a failure of justice. The test to be applied is that set out in S v Moodie[5]. Based on this the court concluded as follows:

> In my view the irregularity is not one which *per se* amounted to a failure of justice. As pointed out the admission of the accused's previous conviction was procedurally correct and sanctioned by section 60(11B) (a). The fact that the magistrate did not recuse himself thereafter in my mind did not vitiate the proceedings. As remarked by the magistrate in the passage quoted earlier in this judgment, he is trained to evaluate evidence and distinguish between admissible and inadmissible evidence. This happens on a daily basis in our courts when presiding officers hear evidence in a trial within a trial which is later held to be inadmissible. Knowledge of the facts revealed in the trial within a trial are highly prejudicial to the accused but it is accepted that the presiding officer had disabused his mind from these facts when deciding upon the guilt or innocence of the accused. Furthermore the evidence against the accused was so overwhelming that no reasonable person, applying the tests laid down by the Supreme Court of Appeal in *Roberts'* case (*supra*) could have believed that the magistrate was influenced by bias caused by his knowledge of the previous conviction in convicting the accused.[6]

14. The reference in this passage is to S v Roberts[7]. It appears to me to be misplaced. That matter concerned the question as to the disqualification of a judicial officer who had discussions with the prosecutor in the absence of defence counsel prior to sentencing of the accused. The Supreme Court of Appeal, dealing with the reasonable suspicion of bias test, set out four requirements[8], namely (a) there must be a suspicion that the judicial officer might, not would, be

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[5] 1961 (4) SA 752 (A) at 758E where it was held:

> "…the following rules may be stated in regard to irregularities
> (1) The general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.
> (2) In an exceptional case, where the irregularity consists of such a gross departure from the established rules of procedure that the accused has not been properly tried, this is *per se* a failure of justice and it is unnecessary to apply the test whether a reasonable Court would inevitably have convicted if there had been no such irregularity.

Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity.

[6] Hlati at 928D-G.

[7] 1999 (4) SA 915 (SCA)

[8] At 924E – 925C

biased; (b) the suspicion must be that of a reasonable person in the position of the accused or litigant; (c) the suspicion must be based on reasonable grounds; and (d) the suspicion is one which the reasonable person would, not might, have.

15. It is not immediately apparent what this test for apparent bias would have to do with a situation where the "overwhelming evidence" to which reference is made in Hlati is only presented after circumstances arise which would satisfy the test for a reasonable suspicion of bias. It cannot be correct that the existence of a reasonable suspicion of bias is to be determined on the basis of an evaluation of the merits of the case against an accused person who contends for such reasonable suspicion.

16. The decision Hlati as well as that of Thusi has been subjected to trenchant criticism in S v Bruinders[9]. In a detailed judgment Sher AJ examined the legal principles applicable to the issue of prior involvement in a matter in which a judicial officer presides. The judgment points out that courts in several jurisdictions, including South Africa, have consistently held that the disqualification of the presiding officer is not based solely upon establishment of actual bias. Perceived or apparent bias in the mind of the reasonable member of the observing public is sufficient to disqualify a presiding officer from hearing a matter in which he or she had prior involvement (cf. S v Roberts[10]; Council of Review, South African Defence Force, and others v Mönnig and Others[11]; BTR Industries South Africa (Pty) Ltd and Others v

[9] 2012 (1) SACR 25 (WCC)
[10] At 923B-C
[11] 1992 (3) SA 482 (A)

Metal and Allied Workers' Union and Another[12]; President of the Republic of South Africa and Others v South African Rugby Football Union and Others [13]).

17. It is this approach, according to Bruinders, which must inform determination of the issue as to the effect of the trial court having previously presided over a bail application.[14] The court examined the nature of bail proceedings and the evidence relevant to the factors to be considered by a bail court.[15] It is not necessary to set out that analysis here. It suffices to highlight the fact that a court hearing the bail application is required to take into account variety of factors and therefore to consider evidence or information relating, *inter-alia*, to the applicant's character, propensity to commit offences as well as his or her relationship to witnesses and the complainant. Evidence must also be considered as to the manner in which the offence was committed. Previous convictions for relevant offences and pending charges are but one aspect which an accused is obliged to disclose to the court hearing the bail application.

18. The court in Bruinders therefore concluded that because of the nature of bail proceedings a court hearing the bail application could potentially form an unfavourable impression of an accused person[16]. A reasonable member of the observing public would, having regard to the nature of the proceedings in a bail application consider that the presiding officer in those proceedings might be prejudiced against an

[12] 1992 (3) SA 673 (A)
[13] 1999 (4) SA 147 (CC) at par 48
[14] At par 78
[15] At par 58ff
[16] At par 75

accused person in subsequent trial proceedings where the same person presides. The reasonable suspicion of bias therefore would arise *ipso facto*[17] by virtue of the fact that the same magistrate presided at the bail hearing.

19. The court in Bruinders therefore concluded as follows:

> For these reasons, in my view, it is inimical to an accused's constitutional right to a fair and impartial trial for him or her to be tried by the same presiding officer who has previously presided over a bail hearing at which the various factors and considerations outlined above, have been traversed. This will be especially (but not only) be the case in opposed bail applications. Even in the course of an informal application for bail made by the accused, without opposition from the State, it is not inconceivable that the court may become privy to information pertaining to the accused's personal character – such as information pertaining to his previous convictions or to his disposition to violence or to commit crime – or to other information, which may subconsciously prejudice and accused in the mind of the court.[18]

20. Turning to the approach adopted in the Thusi and Hlati matters the court said the following:

> In my view, the approach adopted in *Thusi* and *Hlati* is not only cynical, but also not in accordance with the well-established approach laid down by the Supreme Court of Appeal and the Constitutional Court in matters such as these. The latter has held that where apparent bias was found to be present in such measure as to have caused a reasonable, objective and informed observer to apprehend that the court would not bring an impartial mind to bear on the case, the proceedings lost their integrity. (Footnotes omitted)

21. I find myself in agreement with this criticism. It is a view which has also been expressed by the full court of Gauteng North in S v Nkuna[19] where the court said:

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[17] At par 75 (p45 b); par 79
[18] At par 77
[19] 2013 (2) SACR 541 (GNP) at 543a-c

> In *S v Bruinders* it was observed that a judicial officer fails to uphold the Constitution that requires him to apply the law impartially, if he allows his reasoning to be affected by bias. The appearance of bias may be enough to vitiate the trial in whole or in part. The very fact that the appellant knew that the magistrate, who presided over the trial, knew of his previous convictions was enough to create a reasonable apprehension on his part that the magistrate would not be impartial. The approach in *Bruinders* marked a departure from *Hlati* where the court had found no irregularity in a case where the magistrate proceeded with the trial after she was apprised of the accused's previous convictions. I prefer the reasoning of the court in *Bruinders*. My respectful view is that once the circumstances create the perception of bias, a judicial officer becomes disqualified from presiding any further. Failure to recuse herself or himself under those circumstances, renders the proceedings a nullity, irrespective of the merits of the case.
> (Emphasis added)

22. In both Thusi and Hlati the court confined consideration to the fact that s 60 (11 B) made provision for the bail court to receive evidence of previous convictions. It was accepted that the record in bail proceedings, save for exclusion of such evidence, forms part of the trial proceedings. On this basis it was accepted that there could in principle be no objection to the same magistrate dealing with a bail application and a trial. However, although provision is made that the bail record forms part of the trial record this does not mean that evidence which is otherwise inadmissible at trial but which may be admissible during a bail hearing is thereby rendered admissible. Such evidence is to be excluded at trial in accordance with the principles of a fair trial.[20] It is worth observing here that the duty cast upon a trial court to ensure that inadmissible evidence is excluded in order to ensure that the trial

[20] Dlamini (fn2 above) at par [99] & [101] where the Constitutional Court specifically held that the record in bail proceedings is neither automatically excluded nor included in the evidentiary material at trial. Courts are under a duty to exclude evidence that would impair the fairness of the trial. See also S v Basson 2007 (1) SACR 566 (CC) at par [107] and [112] – [116].

is fair, reflects the inherent risk of a breach of the right to a fair trial where otherwise inadmissible and prejudicial evidence is received and appraised for one purpose by a presiding officer and the same presiding officer is thereafter precluded from receipt and appraisal of the same evidence. This conflict is highlighted in both Thusi and Hlati where it was accepted that knowledge of previous convictions may compromise an accused's right to a fair trial. Yet in the Hlati matter such prior knowledge was dealt with on the basis that the trial magistrate was trained to disabuse his or her mind of such knowledge.[21] In neither of these cases was consideration given to the accused's perception and what impact that would have upon the proceedings. Nor was consideration given to the perception of members of the public.

23. In the Hlati matter it was accepted that the trial magistrate, notwithstanding his having gained knowledge of facts which may prejudice the accused, was not obliged to recuse himself.[22] It appears that in that matter there was no request that he should do so. That being so the court appears to have approached the matter on the basis that actual bias would have to be established in order to find that the irregularity which had arisen resulted in a failure of justice.

24. The approach appears to discount a reasonable perception of bias on the part of a reasonable, objective and informed member of the public as a basis upon which a presiding officer is disqualified. It could for

[21] Hlati at 928E
[22] Hlati at 926E, where the court remarked that the administration of justice would fall into disrepute if in every instance in which a bail application is brought before the trial magistrate that magistrate was obliged to recuse himself as trial magistrate because of having heard the bail application.

example hardly be suggested, if Hlati is to be followed, that an accused who previously applied for bail before the trial magistrate has a reasonable perception of bias given the magistrate's exposure to prejudicial information about her, since such objection will be met by the statement that a magistrate is trained to disregard facts which are irrelevant or otherwise inadmissible. This approach, in my view, is untenable and flies in the face of established authority.

25. For these reasons I find myself unable to agree with the approach favoured by Thusi and Hlati and I find myself in support of the approach advocated in Bruinders and Nkuna. Where a bail application involving formal consideration of the numerous factors set out in s 60 of the CPA is heard, the presiding officer at the bail application will ordinarily be disqualified from hearing the subsequent trial of the accused person. I use the term 'ordinarily' advisedly because there may be circumstances where the existence of a reasonable suspicion of bias either cannot be sustained on the facts[23] or reliance upon such an alleged reasonable suspicion of bias is precluded in the interests of justice because of the circumstances in which the claim arises, e.g. if the trial court proceeds in circumstances which would give rise to a reasonable suspicion of bias and those circumstances are not brought to the presiding officer's attention. This, indeed, is what underlies the approach to the belated challenge to a failure to recuse in Bernert v Absa Bank Ltd[24]. Similarly in S v Majikazana[25] where the Supreme Court

[23] Cf. the example referred to in Bruinders (at par 83) where a bail application is formally moved by agreement in circumstances not involving the presentation of evidence which is potentially prejudicial to an accused.
[24] 2011 (3) SA 92 (CC) at par 74
[25] 2012 (2) SACR 107 (SCA)

of Appeal held that actual bias as evidenced by close scrutiny of the record of proceedings would have to be established.

26. The decision in Majikazana is distinguishable from the present matter. In that matter the trial judge had previously presided in a bail appeal brought by the accused. The appeal court accepted that the appellant's legal representatives must have been aware of this fact at trial but elected not to raise the issue. The court held:

> It seems to me that where, as in the present matter, no application was made for the trial judge's recusal before or during the proceedings and the judge never entertained the question of his or her recusal, actual bias would have to be proved for an appeal, based on a special entry, to succeed. In those circumstances the convicted accused's weapon would be the record of the proceedings and the reasoned decision of the presiding officer which allow for close scrutiny for any evidence of bias.[26]

27. This approach is akin to the approach in testing for a failure of justice arising from an irregularity as set out in Moodie's case.[27]

28. The question that arises in the present is, on the facts, a reasonable suspicion of bias on the part of the accused person and / or members of the public could have arisen by reason of the magistrate having presided at the bail hearing. We know that the magistrate presided over an opposed bail application in which evidence was presented. Although the record of that bail application is not part of the record on appeal , what is on record is the magistrate's own opinion expressed at the conclusion of the bail hearing that by virtue of him having acquired knowledge of certain facts it would not be in the interest of justice for him to preside at the trial. For reasons that are unknown the

[26]At par [13]
[27]See fn 6 above

magistrate did not recuse himself from presiding at the subsequent trial notwithstanding his prior statement. These facts were before the regional court when it considered whether the trial proceedings had been in accordance with justice.

29. The fact that the magistrate indicated that he did not consider himself qualified to preside over the subsequent trial would, it must be accepted, have created in the mind not only of the accused person but also any member of the observing public, the perception that the magistrate was signaling reasonable and acceptable grounds to justify his disqualification by recusal from further engagement in the proceedings involving the accused.

30. The subsequent failure to recuse himself in circumstances where such recusal was required rendered the further proceedings a nullity (see S v Roberts[28]; SARFU[29]; S v Nkuna[30]). It matters not that the accused did not assert his reasonable apprehension of apparent bias. The fact that the accused did not do so is in any event explained when regard is had to the fact that there was at that stage a different legal representative acting for the accused who had no knowledge of the magistrate's expressed views.

31. This brings me to the certification of the proceedings as being in accordance with justice in terms of s 116 of the CPA. The regional magistrate was aware of the relevant facts and furthermore aware of the duty which rested upon the district magistrate to recuse himself in

[28] (See fn 11 above) at 923B-C
[29](See fn 14 above) at par 48
[30] At 543a-c

the circumstances. He however adopted the view that the magistrate would have disabused his mind of knowledge of any such facts as would prejudice the accused and accepted, on that basis, that the proceedings were in accordance with justice. No regard was had to the fact that the magistrate had himself established a basis for disqualification and had failed to recuse himself. In both of these respects the regional magistrate erred and accordingly the certification that the proceedings were in accordance with justice cannot stand. The conviction of the appellant was tainted by irregularity that vitiated the proceedings.

32. The effect of the irregularity is that the proceedings were vitiated for apparent bias and, that there remains neither a conviction nor acquittal on the merits and the appellant may consequently be re-tried in terms of s 324 of the Criminal Procedure Act.[31]

33. In the result I make the following order:

The appeal is upheld and the conviction and sentence of the appellant is set aside.

G. GOOSEN

JUDGE OF THE HIGH COURT

[31] S v le Grange and others 2009 (2) SA 444 (SCA) at para 30

MGXAJI, AJ.

I agree.

S. L. MGXAJI

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Appellant
Adv. H Charles
Grahamstown Justice Centre

For the Respondent
Adv. D Els
Director of Public Prosecutions