IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO. 140039
REPORTABLE

In the matter between:

THE STATE

and

VUYISA MASOKA &
SIYAMTHEMBA MNQAYI

JUDGMENT

ALKEMA J

[1] This is a special review referred to this Court by the Magistrate of Humansdorp in terms of section 24(c) of the Supreme Court Act, No. 59 of 1959 on the ground of gross irregularity of the proceedings. The issue to be decided is whether or not the conduct of the State Prosecutor of Humansdorp on the facts of this case constitute a gross irregularity which encroached on the accused's right to a fair trial in terms of section 34 of the Constitution, and which would justify an order setting aside the proceedings against the accused.

[2] The facts may be summarized as follows: Two accused persons were prosecuted jointly in the Magistrate's Court of Humansdorp on a charge of robbery. Both pleaded not guilty and were represented by the same attorney instructed by the Legal Aid Board, Mr *van Wyk.* Both accused in their plea explanation indicated that they do not deny that the robbery was committed, but they denied that it was them who committed the robbery. Each claimed an alibi and disclosed the names and address of their respective alibis.

[3] Accused No. 2, who is the only subject to this review, identified his witness as one *"Q."* of *[.....]*in *Kwanosamo* whose real name is *T.* but who is also known under various other aliases.

[4] After the State closed its case both accused testified. Accused No. 2 testified, *inter alia*, that he spent the entire evening and night when the robbery was alleged to have been committed, with *T.* watching three films whereafter they went to bed and slept in the same room until his arrest the following morning when the police arrived at the room.

[5] During cross-examination of accused 2 by the prosecutor, it was put to him that the State had obtained a witness statement from *T*. Before the content of such statement was put to accuse 2, Mr *van Wyk* objected thereto. After discussions with both the prosecutor and Mr *van Wyk*, the learned Magistrate put the following information on record:

1. The plea explanation disclosing the name and address of the alibi witness occurred on 3 February 2014;
2. The defence attorney, Mr *van Wyk*, had consulted with the alibi witness *T.* on 4 February 2014;

3. After the aforesaid events the prosecutor requested the investigating officer to trace the witness and obtain a witness statement from him, which the investigating officer did, and he furnished the prosecutor with such statement on 11 February 2014;
4. The State case proceeded without the prosecutor calling *T.* as a witness, and without alerting the defence that it had obtained such a statement, and without it making such statement available to the defence;
5. The prosecutor closed the State case on 10 March 2014 whereafter the two accused presented their evidence;
6. Accused 2 completed his evidence-in-chief on 10 March 2014 when he was confronted by the prosecutor with a statement taken from his own witness.

[6] Based on the above facts, the learned Magistrate sent the case to this Court for Special Review with the recommendation that the entire proceedings relating to accused 2 only be set aside on the ground of gross irregularity in the conduct of the State case by the prosecutor, with an order that the trial should commence *de novo* before another Magistrate without the statement.

[7] Upon receipt of the file I sent the entire record to the office of the Director of Public Prosecutions for its comments and recommendations. I have now received a further report from this office compiled by Mr *Malherbe Marais* on behalf of the Director of Public Prosecutions. The report is thorough, comprehensive and well-researched. My gratitude is extended to Mr *Marais* and the staff of the Director of Public Prosecutions for their assistance and guidance. The report recommends:

1. That the trial proceedings be separated between accused 1 and accused 2 with the trial against accused 1 to be continued and disposed of;
2. That the proceedings relating to accused 2 be set aside on the ground of gross irregularity on the part of the prosecutor in the conduct of the State case;
3. That the Director of Public Prosecutions be called upon to decide whether or not accused 2 should be prosecuted *de novo* before another Magistrate; and if so, that the witness statement of *T.* obtained by the State be removed from the Police docket;
4. That this Court declares the witness statement of *T.* obtained by the State to have been unlawfully and irregularly obtained, and is not to be used or relied on by the State in any subsequent proceedings against accused 2.

[8] I believe the manner in which prosecutors fulfil their functions as prosecutor in a criminal trial, including their code of conduct and ethical norms in prosecuting a case, has now become trite. These are not laws to be found in either the common law or statute law, and there are no provisions in the Criminal Procedure Act 51 of 1977 or any other legislation which govern such code of conduct, as the prosecutor in this case seems to suggest.

[9] Rather, these are mostly unwritten rules having their origin in concepts of justice, fairness, morality and equity. These rules have over many centuries evolved in legal jurisdictions almost all over the world, including South Africa, and have been shaped by the legal convictions of the societies in which they are used. In South Africa, many of the rules

applicable to prosecutors only are formulated in the *"The Code of Conduct for members of the National Prosecuting Authority"* promulgated under section 22 (6) of the National Prosecuting Authority Act 32 of 1998 and published by Government Gazette 33907 of 29 December 2010.

[10] Whereas the *Code of Conduct* referred to above are intended to relate to prosecutors only, the private practitioners in South Africa practising as members of the bar or side-bar or other societies, have their own rules of conduct by which they must abide. It is unnecessary to refer to any of these documents.

[11] There are many examples in our case law were these rules, both written and unwritten, have been applied to prosecutors and private practitioners alike. Where the law regards certain conduct as a gross irregularity, the Court is empowered to set the proceedings aside on review. In this case section 22(1)(c) of the Superior Courts Act 10 of 2013 specifically empowers a High Court to set aside the proceedings of a lower Court if it is found that the proceedings are vitiated by gross irregularity.

[12] The purpose of a criminal trial is not to obtain a conviction at all costs. The duty of a prosecutor is to gather all relevant information and evidence, and then decide whether such evidence is sufficient to result in a conviction. If not, the decision must be made not to prosecute. If the evidence is sufficient, his/her duty is to place all such evidence before the Court. In cases where the accused is represented by counsel or an attorney, the evidence which the prosecutor does not intend to place before the Court must be made available to the accused's legal

representative before the trial commences. In cases where an accused is unrepresented, all such evidence, even evidence pointing to the innocence of the accused, must be placed before the Court.

[13] By the above remarks I do not intend to convey that the role of a prosecutor is both to prosecute the State case and also to defend the accused. A conviction must be sought and argued for firmly and without fear or favour. However, it must be done in an even-handed, open and honest manner always recognizing an accused's right to a fair trial. *See S v Van der Westhuizen* 2011 (2) SACR 26 (SCA).

[14] Flowing from the above principle is the prohibition to interfere with the witness of the opposing party. This is a Rule of Ethics applicable to prosecutors and private practitioners alike, and it operates in both criminal and civil matters. As far as I know, all Societies of Advocates and Law Societies in South Africa have written Codes of conduct applicable to this particular subject and which are binding on its members. These codes are framed in different words and phrases, but all have the same theme in common: no legal representative is allowed to consult or influence or interfere in any way whatever with the opposing party's witnesses. In criminal matters, an accused who interferes with state witnesses may be imprisoned pending trial and bail may be refused. The Rule is as binding on investigating officers and prosecutors who interfere with defence witnesses.

[15] In *S v M* 2003 (1) SA 341 (SCA) the Supreme Court of Appeal had this to say on the topic at 360D:

> *"The freedom of witnesses from interference, whatever side they may take, is a keystone in the temple of justice. Without it the*

structure would disintegrate." See also *R v Wanda* 1951 (3) (AD) 158 at 166H-167C; *S v Hassim and Others* 1972 (1) 200 NPD at 203 H.

[16] In civil matters, a legal representative who interferes with or attempts to influence the opposing party's witness may in appropriate cases face an application to be struck off the roll of advocates or attorneys. As I pointed out, in criminal matters an accused may be refused bail. These measures are indicative of the seriousness with which controlling bodies view a breach of this Rule, and this is not surprising.

[17] To interfere with or attempt to influence a defence witness in a criminal trial, is to comprise the integrity of that witness. And if an accused's witness is compromised, his or her right to a fair trial is equally compromised. If this happens, the evidence becomes worthless and the true facts cannot be ascertained. The entire justice system is then undermined and justice cannot be done.

[18] I have no doubt that the prosecutor in this case is guilty of serious misconduct and she must be duly censured. The accused in question has been deprived of a fair trial and the criminal proceedings against him fall to be set aside. The proceedings against accused 1 remain unaffected and should proceed to finality. The Director of Public Prosecutions must decide whether or not to commence criminal proceedings against accused 2 afresh before another Magistrate. If so, the witness statement obtained by the State from the defence witness, *Tanduxolo*, must be removed from

the police docket and be regarded *pro non scripto*, and he must be disqualified as a State witness.

[19] In these circumstances I make the following order:

1. In the case *S v Masoka* and *S Mnqayi*, Magistrate's Court Humansdorp, Case No.2140/13, the trial between accused 1 and 2 is hereby separated;
2. The trial against accused 1 is to be proceeded with forthwith to its finality;
3. The proceeding against accused 2 be and are hereby set aside in their totality on the ground of gross irregularity;
4. The Director of Public Prosecutions, Grahamstown, is called upon to decide whether or not to re-instate the same criminal charges afresh against accused 2 before another Magistrate;
5. In the event of the Director of Public Prosecutions deciding to re-instate the criminal charges against accused 2 afresh before another Magistrate, then the witness statement obtained from the accused's witness, *T.*, is to be removed from the police docket as is to be regarded as *pro non scripto*, and such witness may not be interviewed or called by the State as a State witness.

_____

ALKEMA J

I agree.

_____

GOOSEN J

Delivered on 17 July 2014