



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

High Court appeal case number: A150/2023

Magistrate's Court case number: A315/2022

Magistrate's Court appeal number: 6/2022

DPP reference number: 10/2/5/3-50/23

In the matter between:

BRANDON SIEBRITS

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 8 SEPTEMBER 2023

VAN ZYL AJ:

Introduction

1. On 30 November 2022 the appellant, Mr Siebrits, was convicted in the Strand Magistrate's Court on a count of housebreaking with the intent to commit a crime unknown to the State.¹

¹ The appellant had also been charged with two other offences (malicious injury to property, and possession of a dangerous weapon), but no evidence was led by the State in relation thereto and the appellant was thus discharged on those charges pursuant to section 174 of the Criminal Procedure Act, 1977.

2. The appellant is not unknown to the criminal courts. He has fourteen previous convictions, the majority of which relate to housebreaking and theft. Taking his record into account, the magistrate sentenced the appellant to 3 years' direct imprisonment. He is currently in custody.
3. The appellant had legal representation throughout the trial, and pleaded not guilty to the charge upon which he was subsequently convicted. He appeals to this Court upon leave having been granted by the magistrate's court.

The issue on appeal

4. In the application for leave to appeal the appellant raised various grounds in relation to both conviction and sentence. Leave was granted principally because the magistrate was of the view that the appellant should have been found guilty of housebreaking with intent to steal and theft, instead of housebreaking with intent to commit a crime unknown to the State.
5. A reading of the record reveals, however, that there is essentially one issue that requires consideration. This is the role played by the presiding officer in the course of the trial. The application for leave to appeal frames the issue as follows:
 - a. *"The Honourable Magistrate erred in entering the arena and subjecting the Appellant to cross-examination."*
 - b. *"The Honourable Magistrate erred in assisting the state to prove its case, by cross-examining the Appellant, as opposed to asking questions in clarification."*
 - c. *"The Honourable Magistrate erred in acting beyond the scope of his powers, in that he proceeded to enter the arena and assisted the state in discrediting or trying to discredit the Appellant whilst tendering his evidence."*

d. *“The Honourable Magistrate erred in not sufficiently taking into consideration that the Appellant has a right to exercise his right to a fair trial, which includes testing the evidence of the state case and disputing the allegations against him.”*

6. The magistrate, in granting leave to appeal, did not agree that anything had been amiss in relation to his conduct during the trial. That this complaint was raised comes as no surprise, however, when regard is had to the record.
7. In terms of section 35 of the Constitution of the Republic of South Africa, 1996, every accused has the right to a fair trial. One of the elements of a fair trial is an objective presiding officer.
8. A presiding officer is obviously not a mere figure-head. He or she is entitled to pose questions where necessary:²

“According to the well-known dictum of Curlewis JA in R v Hepworth 1928 AD 265 at 277 ,... ‘A criminal trial is not a game . . . and a Judge’s position . . . is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.’

Inter alia a Judge is therefore entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case. ... And for that purpose ... he may put the questions in a leading form – ‘simply because the reason for the prohibition of leading questions has no application to the relation between judge and witness.’”

9. The Court’s powers in this respect are, however, not unbridled. In *Dalindyebo*

² See *S v Rall* 1982 (1) SA 828 (A) at 831A-F.

v S³ the Supreme Court of Appeal stated the issue as follows:

“A judge should refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. As Lord Greene MR observed in Yuill v Yuill (1945) 1 All ER 183 (CA) at 189B, if he does indulge in such questioning- ‘he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation’.”

10. In the present case, a substantial portion of the appellant’s evidence in chief was “conducted” by the presiding officer. Under cross-examination by the State, the Court again interjected, and effectively took over the cross-examination until the State confirmed that there were no further questions. The Court continued to question the appellant nonetheless. Page upon page of the record reflects an exchange between the Court and the appellant. The questioning is, from the outset, in the nature of cross-examination, with scathing remarks interjected by the Court, such as:
- a. *“Verstaan u nie die vraag nie or praat ek nie reg nie?”* when the appellant struggles to answer.
 - b. *“Hoekom het u nie so gesê nie?”* in debating with the appellant what the meaning of one of his explanations was.
 - c. *“Nee, dis nie reg so nie, ...”* in response to an explanation by the appellant.
 - d. *“Watter reg het u dan om vir mense te vra waar is die mense van die*

³ 2016 (1) SACR 329 (SCA) at para [25], with reference to *S v Rall supra*; and see *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E: “... the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts”.

huis as u nie eens die mense ken nie?” in answer to evidence given by the appellant.

- e. *“Wat het ek nou vir u gevra? Wat het ek nou vir u gevra?”*in answer to a response upon the Court’s question.
- f. *“Wie is dan nou die getuie, meneer, ek?”*
- g. *“Hoekom moet ek die vraag herhaal?”*
- h. *“You know, I cannot understand why the state does not follow it up by saying the accused is not answering the question.”*
- i. *“Het u vir u prokureur gesê [the State witness] lieg oor die tyd?”*
- j. *“Ek wil nie hê u moet luister nie. U moet antwoord.”*
- k. *“Meneer, die vyfde keer vra ek nou vir u. Hoe weet u wat ek gaan vra?”*
- l. *“... vind u dit nie vreemd dat mense wat nie vir mekaar ken nie, nou sommer wil kom lieg oor iets wat hulle gesien het?”*
- m. *“Dit maak nie sin nie. Stem u saam met my?”*
- n. *“Kom ek vra vir u so. Die staat, sien ek, het nie ge-worry om vir u die vraag te vra nie. Is die rede hoekom mnr. Basedene vir u daar binne in die huis gesien het, nie eintlik omdat u die setup daar van daai huis so lekker ken nie? Dis hoekom u daar gegaan het, daai tyd van die dag, want u het geweet die Miss gaan nie daar wees nie. U het geweet hoe maklik dit is om in daai huis te kom. Is dit nie so nie?”*
- o. *“U weet glad waar die hond is...”*

p. *“Hoe kan dit nie so wees nie? U het dan geweet. U het dan vir ons gesê waar die Pitbull is. Nogal nie enige hond nie, u weet sommer dis ‘n Pitbull ook. Is dit nie so nie?”*

11. There are many more instances of questioning that offends one’s sense of fairness. In fact, even during the questioning of the State’s witnesses the Court posed numerous questions, including (by way of example) questioning in the following vein:

“Court: In actual fact, if we take that evidence, the person that you saw, who we now know is the accused – you saw him literally inside the house.

Mr Basedene: That is correct, sir.

Court: Am I correct?

Mr Basedene: Yes.

Court: In essence, when you say what you heard initially is the movement in the house, inside the house is now confirmed from what you saw when you were there at the door when the accused person came towards you.

Mr Basedene: Yes.

Court: Am I correct?

Mr Basedene: That is correct, sir.

Court: And you did not bump into the accused because you found it funny or whatever. Your evidence is simply that you saw that as a way to protect yourself ...”

12. The impression that is created upon a reading of the lengthy exchanges between the Court and the appellant, as well as the exchanges with the other witnesses, is that the Court had made up its mind as to the appellant’s guilt at an early stage of the proceedings. The Court knew that the appellant was, at the time of the trial, in custody as a sentenced prisoner, the prosecutor having mentioned this fact prior to the calling of the State’s second witness. The gist of the questions posed by the Court throughout was that the appellant was not telling the truth, and that he must have committed the offence in question.

13. The Court thereafter proceeded effectively to take over the State’s argument:

“Court: You are saying that [Mr Basedene’s) evidence is satisfactory in all material respect.

Prosecutor: Yes, Your Worship, that is correct, satisfactory...[intervenes]”

Court: And therefore the state proved its case beyond a reasonable doubt.

Prosecutor: Yes, Your Worship, and then furthermore, Your Worship, the accused places himself at the scene, Your Worship. He later testified that he went to the ... [intervenes]

Court: And the accused’s version is not reasonably possibly true.”

Prosecutor: Yes, Your Worship... There is no motive for the witness, Mr Chad Basedene, to lie. He does not even know this accused. He says that he does not know the accused, Your Worship, so ... [intervenes]

Court: We all know that....”

14. The record speaks for itself.
15. The State concedes that the magistrate actively took over the role of the prosecution in the leading of the evidence presented. The concession is eminently sensible in the circumstances of this matter.
16. A consideration of the evidence given by the appellant shows, moreover, that he was consistent in his explanations. His version is corroborated in important aspects by the State witnesses, for example that:
 - a. The owner of the house, Ms Gouws, was not at home at the time. She and the appellant knew each other because she used to give him food when he asked for it.
 - b. The security gate was open.
 - c. Ms Gouws’s cat jumped out of the window.
 - d. The appellant came out of the porch area and moved towards Mr Basedene.

- e. Mr Basedene went back to his car, got in and drove straight at the appellant.
 - f. Mr Basedene knocked the appellant with his car, and thereafter chased him down the road.
 - g. The appellant was eventually arrested by the police.
17. The State concedes that there were no inherent improbabilities in the appellant's version. As a result of the presiding offer's intervention during the trial, the appellant was convicted on a charge that the State had failed to prove beyond a reasonable doubt. In these circumstances, the appellant's conviction cannot be upheld on appeal. For this Court to do so would amount to a further miscarriage of justice.

Order

18. In the circumstances, I would propose that an order be granted as follows:
- a. **The appeal is upheld.**
 - b. **The appellant's conviction on 30 November 2022 on a charge of housebreaking with intent to commit a crime unknown to the State is set aside.**
 - c. **The sentence of three years' direct imprisonment imposed upon the appellant on 30 November 2022 is set aside.**
 - d. **The appellant is to be released immediately, unless he is being held on another charge.**
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P. S. VAN ZYL AJ

I agree and it is so ordered.

C. M. FORTUIN J

Appearances:

N. Kunju for the appellant (instructed by Legal Aid South Africa)

E. M. van Wyk for the respondent (Director of Public Prosecutions, Western Cape)