(Judgment reportable) **Case No 548/97**

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

CARL ROBERTS Appellant

and

ADDITIONAL MAGISTRATE FOR THE DISTRICT OF JOHANNESBURG, MR VAN DEN BERG First Respondent

THE ATTORNEY GENERAL OF THE WITWATERSRAND Second Respondent

CORAM: VIVIER, HOWIE JJA, and MPATI AJA.

DATE OF HEARING 19 August 1999

DATE OF DELIVERY: 3 September 1999

Recusal - Appearance of bias - Amplification of test - Judicial Officer's conduct after conviction vitiating whole trial.

J U D G M E N T

/HOWIE JA:. . .

HOWIE JA:

[1] The question in this appeal is whether irregularities which occurred in the course of the appellant's criminal trial after he had been found guilty vitiated not only the sentence but all the proceedings.

[2] He was convicted in a magistrate's court of assault with intent to do grievous bodily harm and sentenced to a fine and suspended imprisonment. By reason of alleged irregularities in the post-conviction proceedings and alleged misdirections in the judgment on conviction he took the matter to the High Court at Johannesburg on both review and appeal. The review application was dealt with and the appeal postponed. The relief sought on review was the setting aside of the conviction and the sentence. The Court *a quo* (Van der Merwe and Schwartzman JJ) found the alleged irregularities to have occurred. However, understanding the appellant's counsel to have conceded that they did not warrant the setting aside of the conviction, the Court focused its attention solely on their effect on sentence. It concluded that the sentence was indeed vitiated and ordered *i a* that the application directed at the conviction be dismissed, that the sentence be set aside and that the matter be remitted for sentence afresh by a different magistrate. In seeking leave to appeal against

this result the appellant contended that the Court below had erred in not finding the entire trial to have been vitiated. The leave application came before Heher and Schwartzman JJ and was granted.

[3] The material upon which the question in issue must be decided consists of the trial record and the affidavits comprising the review application. The relevant facts and circumstances which emerge are these. On the evening of 30 November 1994, and in the parking lot of a steakhouse in a Johannesburg suburb, two incidents occurred involving the appellant and the complainant. The complainant was in the company of the lady who by the time of the trial had become his wife, and her sister. Having had their evening meal, they were on the point of leaving. The sister had come in her own car and before driving away she handed the complainant a hacksaw which she had borrowed from him earlier. As the three of them were standing conversing before departure, the appellant came out of the steakhouse where he was having supper and passed them on his way to fetch cigarettes from his car. Whether he rushed rudely between them, as the complainant testified, or whether, as he himself said, he bumped into the complainant accidentally, one or other event triggered the first incident. Each man swore profusely at the other and a short while later the complainant hit the appellant with the

hacksaw. According to the complainant he was standing with the hacksaw in his hand trying to get into his car to leave. The appellant came towards him and pushed his wife out of the way. In frightened reaction he struck the appellant once on the shoulder with the back of the hacksaw. He denied the allegation put to him by the attorney then appearing for the appellant that he had struck the appellant multiple
blows on the back and on his neck or that he had done anything to provoke the attack.

[4] The other material witness for the prosecution was the complainant's wife. She testified that after the appellant pushed her aside he hit out at the complainant who retaliated by striking the appellant several times with the hacksaw. Both she and the complainant said that after being struck the appellant turned and ran away into the steakhouse. She denied the allegation put on his behalf that while running away he had been chased by the complainant through the car park. It is therefore implicit in the prosecution evidence that the appellant was struck by the complainant from the front.

[5] The appellant's version of the first incident was that after the exchange of abuse he pushed the complainant (not the wife) who reacted by striking him a blow with the hacksaw. The appellant turned and ran. The complainant then chased him around the parking area continuously hitting him from behind with the hacksaw. As a consequence he sustained numerous cuts to the back of his head and on his back and in support of this allegation he claimed to have a doctor's report confirming the existence of such wounds. (As will appear presently there was indeed such a report available.) Eventually he eluded the complainant and ran into the steakhouse. There he met his uncle who was one of the family party with whom he was having supper and he reported to the uncle what had occurred.

[6] The second incident followed very shortly afterwards and it was this occurrence which was the subject of the charge. The detail is unimportant for present purposes. It suffices to say that the

appellant and the uncle went out and encountered the complainant in the car park. The latter was struck a number of fist blows and fell to the ground. The prosecution case was that the appellant and his uncle perpetrated this attack on the complainant and that while he lay on the ground they persistently kicked him. The appellant's case was that he took no part in the assault. He said his uncle struck the complainant a number of fist blows but did nothing to complainant on the ground. It was not in dispute that as a result of the second incident the complainant had, by the time of the trial, lost the sight of his right eye, with only the uncertain prospect of possible surgical restoration.

[7] The appellant's attorney did not call medical evidence to substantiate the existence of his alleged wounds. Instead he called the appellant's mother. She testified that on the following day she saw eight or nine cuts on his back and a bruise on one of his shoulders.

[8] From this brief summary it will be apparent that the issue of guilt was essentially one of credibility. In resolving it the magistrate believed the complainant and his wife and rejected the appellant's evidence. Although in the normal course a review does not usually entail consideration of evidential detail or factual findings, it is nonetheless necessary in this particular instance, in order to provide the required perspective for what follows, to refer, as I have done, to aspects of the evidence and also to point to some of the trial court's credibility conclusions. In the interests of maintaining a logical sequence it is appropriate to turn to those conclusions now.

[9] The magistrate referred in his summary of the facts to the appellant's and his mother's evidence as to injuries on his head and back but failed to state whether he accepted it or, if he did, what significance he attached to it. However, his acceptance of the evidence of the complainant and his wife without reservation would seem to indicate that he disbelieved or at least disregarded the injury evidence. This despite the fact that the mother's testimony was not rejected and despite the support which it afforded for the appellant's allegation that he was struck more than a few times and, what is more, struck from behind while being pursued by the complainant. Plainly, the injury evidence is inconsistent with the prosecution evidence and the latter cannot explain it.

[10] As regards the appellant's evidence the magistrate said that he —

> "(gave) the impression . . . of a person who is very agile. He is fit. He does not sustain any kind of physical setbacks. He was quick spoken and very witty and he answered the questions asked by the prosecutor snappy and fast forward."

[11] Making due allowance for the fact that English was not the magistrate's mother tongue and for the inevitable pressures of delivering *ex tempore* judgments in the course of a busy day, it is nevertheless far from clear what this passage was intended to convey apart, perhaps, from the apparent finding that the appellant was conspicuously articulate. The appellant sought to establish that he did indeed suffer "physical setbacks" during the first incident. Conceivably, however, the reference to agility was a preface to a later passage reading as follows (the reference being to the first incident):

> "(The complainant) being already agitated by the verbal abuse fight, surely at that stage would have encountered a fight to the extent that you would have had injuries to your face part or your body part but the injuries sustained <u>according to you</u>, and which were left were injuries to the back of your body.
>
> Being to the back of your body the court has to take note that you were agile enough at that moment that if (the complainant) lunged at you he would not

have been able to strike a blow to the front of your body." (My emphasis.)

The magistrate then proceeded to find, on the strength of other considerations, which I need not discuss, that the complainant did not chase the appellant through the car park. It must follow, therefore, that he rejected the allegation that the injuries (if they were sustained at all) were inflicted in the circumstances alleged by the appellant. That being so, the passage just quoted could mean one of two things: either that any injuries would probably have been inflicted from the front and therefore the injury evidence was untrue or that the appellant was able to evade each successive blow from the front by deftly turning his back and that was how he came to be injured. The appellant's inferred readiness to remain on the spot to go on risking repeated blows with the hacksaw certainly conjures up an extraordinary picture but apart from that the passage in question either fails to explain the injuries or explains them on a basis unacceptably at odds with the prosecution evidence.

[12] The hacksaw assault - for this is plainly what it was on the appellant's case - was obviously a highly relevant prelude to the second incident and it is remarkable that the defence attorney did not put the contents of the medical report to the complainant and his wife or call the doctor concerned so as to emphasise the number of injuries and, by doing so, to establish the number of blows struck by the complainant. I consider, therefore, that consequent upon conviction the appellant was entitled to feel aggrieved at the magistrate's approach to the matter of the first incident. I think he would also

have harboured the understandable incentive, by reason of what he was found to have done to the complainant, to show as clearly as possible what the complainant had done to him.

[13] In these circumstances it is not altogether surprising that subsequent to the conviction, when the case was postponed for some four months, the appellant terminated the services of his erstwhile attorney and engaged another attorney, and counsel, for the resumption.

[14] When the case continued, counsel called a general practitioner, Dr Lamberti, who had examined the appellant on the day following the incidents in issue. Counsel had not yet elicited the examination findings when the magistrate said that he was not busy with "the trial proceedings" and that he did not think that the evidence had any effect on mitigation. He nevertheless allowed the evidence to continue for a while but soon afterwards, still in evidence-in-chief, he stopped the proceedings. In his affidavit in the review application the appellant alleges that up to that stage the magistrate displayed displeasure at the calling of the doctor and disinterest in what he had to say. In describing the stopping of the proceedings, the appellant alleged:

> "the Magistrate exclaimed 'Just hold there, please stop', forcefully switched off the recording device, jumped up exclaiming loudly 'Right, that is it, that is it' and rushed out of Court."

No affidavit by the magistrate was filed. The prosecutor who appeared in the case after the resumption (she did not appear in the matter up to that stage) swore an affidavit which offers no denial of those allegations.
All she can say is that she cannot remember the magistrate's alleged displeasure and disinterest.

[15] Some minutes later the magistrate returned and the hearing of the doctor's evidence proceeded to completion. It is not denied that the magistrate bore the continuation with noticeable irritation. The thrust of the medical evidence was that the appellant exhibited eight fresh separate abrasions; two were on the back of the

neck, five on his back and one on the anterior aspect of the top of the left shoulder; and each abrasion indicated a separate blow.

[16] Counsel for the appellant then applied for an exercise of the magistrate's discretion to recall the complainant, obviously wishing, one necessarily infers, to cross-examine him *inter alia* on those aspects of the medical evidence which are of patent significance relative to the first incident. The record shows - and this is not denied by the prosecutor - that the magistrate denied counsel the opportunity to complete argument on the matter and refused the application without reasons. The appellant goes on to allege that while counsel attempted to argue the application the magistrate switched off the recorder and maintained an intimidating stare at counsel for some minutes, refusing in silence repeated requests for the machine to be switched on and the matter to resume. The prosecutor's only comment in her affidavit is to describe the magistrate's stare as frustrated rather than intimidating.

[17] Counsel then informed the magistrate that there were material contradictions between the complainant's evidence and his police statement. The magistrate indicated that this was irrelevant and required counsel to continue with the matter of mitigation. Counsel responded by applying for an adjournment so that he could tell the Senior Prosecutor of the prosecution's failure to draw the

contradictions to the magistrate's attention during the presentation of its evidence. When this application was summarily refused counsel sought and was granted an adjournment to consult with the appellant. During the adjournment, and after such consultation, counsel obtained the Senior Prosecutor's agreement to the handing in by consent of the complainant's police statement.

[18] When the hearing resumed the prosecutor informed the court that she was prepared to hand in the statement which, she added, had been available to the defence from the beginning of the trial. The magistrate commented that it should have been handed in before judgment and that the issues pertinent to the judgment had already been dealt with. The appellant says in his affidavit that the prosecutor's tender of the statement annoyed the magistrate to the extent that he again switched off the recording machine and told the prosecutor that he wanted to see her. The two of them then left the courtroom. Counsel was not invited to be present. During this adjournment the appellant saw the magistrate and the prosecutor in a nearby corridor in discussion. The magistrate's attitude towards the prosecutor appeared to be heated and authoritative. The appellant inferred that they were discussing his case and the prosecutor confirms that this was indeed so. When the proceedings again resumed, admission of the statement was refused without the opportunity for argument by counsel and without reasons for the refusal.

[19] The defence responded by applying for the magistrate's recusal on the ground of his private discussion with the prosecutor which, said counsel, had been witnessed by his client, in whom it had engendered misgivings regarding the fairness of the proceedings. The magistrate denied counsel the opportunity to argue the application and refused it without reasons.

[20] In what ensued counsel was confined to arguing mitigating factors on the evidence as it stood, which argument the magistrate heard - according to the appellant - in "bored and disinterested" fashion.

[21] When, immediately after argument, the magistrate gave

judgment on the matter of sentence he described the first incident as merely “an argument and a squabble”, omitting altogether any reference to blows struck by the complainant or their reasonably possible provocative effect relative to the second incident.

[22] Applying the law to these facts, the starting point is that the trial took place while the Interim Constitution (the Constitution of the Republic of South Africa, 1993) was in force and in terms of s 25(3) the appellant was entitled to a fair trial. Vital ingredients of such a trial are that it be held in public (*cf* s 25 (3) (a)) and that, on hallowed authority, justice be done and be seen to be done. In what is seen to be done, appearances play a varied role in the fulfilment of the need for fairness.

The appearance of justice is not enough. Justice must not simply seem to be done. On the other hand the appearance of bias may be enough to vitiate the trial in whole or in part.

[23] That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other: *R v Maharaj* 1960 (4) SA 256 (N) at 258 B - C. That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more, the setting aside of the sentence. Had such a

discussion occurred before conviction in this matter there can be no question but that the conviction would have been fatally irregular: *S v Seedat* 1971 (1) SA 789 (N) at 792 F. In *Seedat*'s case, it may be noted, the vitiating irregularities occurred after conviction but only the sentence was set aside. However, guilt was never in issue because the appellant there pleaded guilty at the start of the trial. There was therefore no basis on which it could have been said that the irregularities tainted the conviction. The case is therefore of no assistance now.

[24] Here, of course, the irregular discussion does not stand alone. It prompted an immediate recusal application and that application brought to the fore the question whether the magistrate's conduct bore the appearance of bias. The Court *a quo* found affirmatively but, as already remarked, it understood the disqualifying effect of such bias to attach only to the sentence.

[25] Bias in the sense of judicial bias has been said to mean —

> "a departure from the standard of even-handed justice which the law requires from those who occupy judicial office."

See: *Franklin v Minister of Town and Country Planning* [1948] AC 87 (HL) at 103, [1947] 2 All ER 289 (HL) at 296 B - C. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be —

> "manifest to all those who are concerned in the trial and its outcome, especially the accused":

see *S v Rall*, 1982 (1) SA 828 (A) at 831 H - 832 A.

[26] It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further "proceedings" a nullity: *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) at 495 B - C; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 9 G.

[27] For too long, however, the legal test for the appearance of judicial bias was uncertain. This was because it was variously and, with respect, at times confusingly stated both here and in England. The way in which the test has now come to be formulated in South Africa can be traced in the following recent pronouncements of this Court.

[28] In *S v Malindi* 1990 (1) SA 962 (A) at 969 G - I it was said:

> "The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v Radebe* 1973 (1) SA 796 (A) and *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case

> or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important. "

[29] Then, *Mönnig*'s case foreshadowed a switch from "likelihood" to "reasonable suspicion" but left the choice of formulation open. At 490 C - G it was said:

> "It may be that this formulation [likelihood of bias] requires some elucidation, particularly in regard to the meaning of the word 'likelihood': whether it postulates a probability or a mere possibility. Conceivably it is more accurate to speak of 'a reasonable suspicion of bias'. Suspicion, in this context, includes the idea of the mere possibility of the existence, present or future, of some state of affairs . (*The Oxford English Dictionary sv* 'suspicion and 'suspect'); but before the suspicion can constitute a ground for recusal it must be founded on reasonable grounds.

It is not necessary, however, to finally decide these matters for, whatever the correct formulation may be, I am satisfied that the Court *a quo* was correct in holding that the court martial did not pose the correct test when deciding the recusal issue (see reported judgment at 875 J - 876 B); and that the circumstances were such that

a reasonable person in the position of second respondent could have thought that

> '. . . the risk of an unfair determination on an issue such as this was unacceptably high'.

(See reported judgment at 881 H - I)"

(The reported judgment mentioned at the end of that extract is the judgment in *Mönnig*'s case of the Full Court of the Cape Provincial Division reported in 1989 (4) SA 866 (C).)

[30] Later, in *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A) it was finally laid down (at 693 I - J)

> "[T]hat in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias."

The Court went on (at 694 A) to approve the statement by the Court *a quo* in *Mönnig*'s case that

> "provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker"

and at 694 J referred to the required suspicion as one which "might

reasonably be entertained by a lay litigant".

[31] Adoption of the reasonable suspicion test in preference to the real likelihood test was confirmed in *Moch*'s case at 8 H - I.

[32] Thus far, therefore, the requirements of the test thus finalised are as follows as applied to judicial proceedings:

(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.

[33] It remains, in my respectful view, to add a gloss in order to clarify one last aspect which could occasion confusion. Is the suspicion referred to one which the reasonable person merely might have or, on the other hand, would have? It will be noted that this Court's formulations and statements to which I have referred employ the words "could" (in *Mönnig*'s case at 490 F) and "might" (in the *BTR* case at 694 A and J). However, the point was one which did not arise for decision and a reading of those judgments, and that of the Full Bench of the Cape Provincial Division in *Mönnig*'s case, reveals clearly enough, I think, that the latter was the source of this Court's word usage. That usage (rather than choice), resulted really from the citation, with approval, of the passages in the earlier *Mönnig* case at 879 B and 881 I in which the phrases "might reasonably be

entertained" and "could reasonably have thought" respectively appear. On analysis, the thrust of those passages is that the test is satisfied if the suspicion of possible bias is reasonably founded. In view of what this Court was deciding it was that feature which prompted the citations in question, not any preference for "might" or "could" above "would". Significantly, there are other passages in the earlier *Mönnig* judgment in which the word "would" is employed when expressing the self same conclusion: see 881 D - E and H. In the circumstances the choice is therefore open.

[34] There can be little doubt that it would detract from the efficacy and decisiveness of the bias test if one were to say that the suspicion concerned is one which the notional reasonable person **might** have. That would be inconclusive. One needs to assess what such person **would** think, not what such person might possibly think. "Might" in that regard, is no more significant than "might not". And, as pointed out in Wade and Forsyth, *Administrative Law*, 7th ed, 482 ". . . if there was no real possibility of bias, no reasonable person would suspect it." Equating, as I think one must, "real" with "reasonable", that comment emphasises that if the suspicion of bias is one based on reasonable grounds the reasonable person **would** have it. If it were not so founded the reasonable person **would not** have it. "Might" has no place in this portion of the formulation in my opinion. One must therefore add to the requirements of the test:

(4) The suspicion is one which the reasonable person referred to would, not might, have.

[35] It is appropriate to observe that in England the House of Lords, in *R v Gough* [1993] AC 646 (H. L. (E.), [1993] 2 All ER 724) has now laid down that the test for apparent bias in relation to all

courts and tribunals (save where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings) is the "real danger" of bias. It is satisfied if there appears to the Court (that is to say, the appellate court later considering or reviewing proceedings below) that there is a "real likelihood, in the sense of a real possibility of bias" which possibility is equivalent to a "real danger" (at 668 B - E and 670 E - F (AC), 735 j - 736 b and 737 j (All ER)). Although comparison with the South African test will show several similarities there are plainly differences. The most effective illustration of that is the fact that counsel for the appellant in *Gough*'s case urged the adoption of what happens to be in virtually all respects the test in this country, having conceded (rightly, so it was held) that there was no room for interference if the real danger test prevailed. He lost his case. More particularly, the real danger test eschews suspicion as one element and the intellectual interposition of the reasonable person as another. It is unnecessary for present purposes to pursue the comparison further. It suffices to say this. In the main speech in *Gough*'s case it was remarked (at 667 H - 668 A (AC), 735 g-h (All ER)) —

> "Since . . . the court investigates the actual circumstances, knowledge of such circumstances as are found by the court

> must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man."

[36] With the greatest respect I venture to say that there is an important distinction between assessing the appearance of bias through the eyes of a trained and experienced judicial officer and assessing it through the eyes of a reasonable person, even with the latter's possessing all the relevant knowledge. Wade and Forsyth (at 483) consider the real danger test more objective than that which involves determining the impression of a reasonable person. Certainly, in eliminating the reasonable observer the real danger test is more direct and no doubt the reasonable person, although required to have reasonable grounds, would necessarily be judged as viewing the events and circumstances from the subjectivity of being, notionally, litigant or accused. However, the real danger test may well do no more than switch one element of subjectivity for another. The members of the court applying that test are by training and experience as judicial officers themselves, better equipped, it is true, to exercise objective judgment than a lay litigant but it is that very training and experience which also give them a subjective position and knowledge

not possessed by the notional reasonable person. They might know that a judicial officer's behaviour and comment unfortunately can, on infrequent occasions, be inappropriate but without any real danger of bias existing. They may more readily, therefore, in a given case regard a danger of bias as not real where the reasonable impression of bias would nonetheless reasonably lodge in the mind of a reasonable person suitably informed. Essentially, the real danger test depends on the view from the Bench; the reasonable suspicion test depends on the view from the dock. This is perhaps best illustrated by a statement in *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139 (CA) in which the Court of Appeal analysed *Gough*'s case. At 152 a-b it was said:

> "(B)y the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias."

Given a choice, the reasonable suspicion test accords better, in my opinion, with the provisions and spirit of the Constitution. It is more conducive to acceptance by the accused or the litigants that proceedings will in the end be fair. And the constraining effect on those presiding over trials and tribunals is salutary.

[37] Turning to the application of the reasonable suspicion

test to
the facts and circumstances of the present case, there can be no doubt that the magistrate's conduct, bearing and utterances from beginning to end of the post-conviction proceedings would have provided the reasonable person in the appellant's position with eminently reasonable grounds to think that the court might be biased. Even by the time the recusal application was made sufficient had occurred to create such impression. That application was therefore wrongly refused and the "proceedings" which followed constituted a nullity.

[38] As to the proceedings prior to conviction, it was argued by counsel who appeared for the State before us that there was nothing which could have created the appearance of bias. The conviction was not infected by the later events and was therefore immune from interference. That contention cannot succeed in my view. The proper approach is to determine whether the reasonable person in the appellant's position would have thought that the suspected bias might have motivated the conviction.

[39] The fact that counsel for the appellant was not entitled after the conviction to canvass the merits anew is not relevant. What he was undoubtedly entitled to do was to canvass issues material to mitigation and provocation by the complainant and the complainant's credibility in that regard were plainly important ones. In that connection the medical evidence served strongly to support the appellant and to contradict the complainant in a vital respect. It cast substantial doubt on the complainant's evidence that he struck only a single blow in fright with the back of the hacksaw and did nothing to provoke the assault he suffered. [40] It is not necessary for present purposes to try to trace procedurally the proper or likely course of proceedings had the magistrate not acted in the irregular manner revealed by the evidence. What is important is that his conduct would, in my view, have caused the reasonable person anxious and reasonable enquiry as to why the appellant's allegation of the hacksaw assault was rejected for no reason, or virtually incomprehensible reasons, in the judgment, and why all attempts thereafter at establishing its occurrence, or at least the reasonable possibility of its occurrence, were persistently dismissed without any reasons save the untenable one that counsel's intended avenues of investigation had nothing to do with mitigation. Of course they did. And although counsel might properly have been confined to canvassing the complainant's credibility in that limited context, there

can be little doubt that if the complainant's credibility suffered in that respect it would, on a reasonable approach, have suffered, or at least been liable to suffer, in other respects as well. The fact that his general credibility would only have been open to attack in an appeal is a procedural consideration which would not have concerned the reasonable person observing the magistrate's post-conviction show of ostensible bias. That person would, in my assessment, have thought that the complainant's credibility was something which the magistrate was seeking, for no good apparent reason, to protect from all criticism. In turn that would have led to the suspicion that the magistrate's post-conviction conduct and attitude was evidence of a possible bias which had persisted throughout the case and only surfaced under the impact of counsel's attempts to canvass the issue of provocation.

[41] It follows that in this case there are circumstances which compel the conclusion that the post-conviction irregularities taint the entire trial and that the conviction cannot be allowed to stand.

[42] The following order is made:

(a) The appeal is allowed.

(b) The order of the Court *a quo* is set aside and substituted by the following order:

"1. The application for review succeeds and the conviction and sentence are set aside.

2. By agreement, no order is made as to costs."

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C T HOWIE

VIVIER JA)
MPATI JA) **CONCUR**