CASE NO. SA

4/96 IN THE SUPREME COURT OF NAMIBIA

In the matter between

ABIUD JOSEPH KANDOVAZU APPELLANT

versus

THE STATE RESPONDENT

CORAM: MAHOMED, CJ, et MTAMBANENGWE, AJA, et GIBSON, AJA Heard on: 1997.07.01 Delivered on: 1998.02.10

JUDGMENT:

GIBSON, AJA: This is an appeal against the decision of the High Court upholding the conviction of the Appellant and another man by the Magistrate Court sitting at Oshakati. Leave was granted by a Judge of the High Court, other than the Judges who heard the original appeal.

The facts were that the Appellant a Sergeant in the Namibian Police Force together with a Junior Officer who is not involved in this appeal were charged with an offence of bribery. They were both convicted and sentenced to pay a fine of $3000-00 or 12 months imprisonment.

During the trial the defence lawyer applied to have prosecution witness statements which had not been made available to the defence. Defence Counsel relied on the case of *S v Nassar, 1995 2 SA 82* which had just been heard

at the High Court. In the *Nassar* case the High Court had issued a declaratory order

which included the order that the State should provide the defence with a copy of all

witness statements in its possession relating to the charges contained in the indictment.

The magistrate refused to order disclosure on the State's objection. The Learned Magistrate said he was not bound by the decision in the *Nassar* Case. He reasoned that the rule in R v *Steyn* 1954 (1) SA 324 upholding docket privilege still applied. He referred to Article 140(1) of Constitution of Namibia.

Upon appeal to the High Court the High Court decided that it was unnecessary to go into the correctness or otherwise of the position adopted by the learned trial magistrate.

In one of the grounds in the notice for leave to appeal the appellant states that.....

> *"they (the learned Judges in the High Court) failed to held (sic) that the learned Magistrate's Noa 's (sic) refusal to order the state to let the appellant have access to the statements of the witnesses contained in the Police docket was an irregularity per se. alternatively an irregularity which prejudiced the appellant in the conduct of his*

case".

The appellant further states in the notice,

"*.... their Lordships erred in: finding (in essence) that the appellant had a fair trial, whereas in the circumstances of the case (including the fact that appellant's application to have access to the statements of the State witnesses was dismissed), the appellant was deprived of a fair trial as envisaged in*

Article J 2 of the Constitution of the Republic of Namibia: ...."

During all the three hearings the state maintained the same attitude. It opposed the application in the Magistrate's Court, it supported the decision of the Magistrate before the High Court. And, before this Court, Miss Schultz who appeared for the Respondent vigorously opposed the appeal and submitted that the learned Magistrate was not wrong in refusing to order the disclosure of State witness statements to the defence.

Miss Schultz referred to Articles, 13S (2) (a), 140 (1) and Article 80(2) of the Namibian Constitution.

She submitted that the continuity of the laws existing before Independence in Namibia remained in force until repealed or amended or until declared unconstitutional, that since no interpretation of the law on the right to a fair trial had been made by a competent Court at the time of the hearing the learned magistrate was bound to follow the laws in existence at the time.

Article 13S 2(a) of The Constitution says,

"The laws in force immediately prior to the date of Independence governing the jurisdiction of Courts

within Namibia, the right of audience before such Courts, the manner in which procedure in such Courts shall be conducted and the power and authority of the Judges. Magistrates and other judicial officers, shall remain in force until repealed or amended by Act of Parliament, and all proceedings pending in such Courts at the date of Independence shall be

continued as if such Courts had been duly constituted as Courts of the

Republic of Namibia when the proceedings were instituted.

Article 140(1) states,

"Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court".

Article S0(2) proclaims,

"Hie High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts".

I do not agree with the arguments advanced by state Counsel. It seems to me that the submissions have missed out the substantial but quiet revolution on the Common law rule of blanket docket privilege. The State also appears to have failed to grasp the basic principles governing the

interpretation of a Constitution, which principles have been enumerated in this Court, in South Africa, and other jurisdictions round the world.

It has been said in those numerous decisions. " that the Constitution is not simply

a statute which mechanically defines the structures of government and the governed.

It is a *"mirror reflecting the national soul" the identification of the ideals and aspirations of a nation; the articulation of the values bonding it's people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."*

:S v Acheson 1991 (2) SA 805 at 813 B - C

Another approach to interpreting Constitutional provisions is set out in: The Government of Republic of Namibia v *Cultura 2000,* 1994 (1) SA 407 at 418 where Chief Justice Mahomed cautioned against *"givmg to Constitutional provisions, rigid and artificial interpretation "* and said,

> *"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and*

aspirations of the nation."

It seems to me that if heed is paid to the arguments of State Counsel regarding the meaning and effect of Articles 138 (2)(a) and Article 140 (1) of the Constitution the result would be to negate the creative spirit and dynamism in the constitution. In that reading there is a danger of giving a too narrow, rigid and artificial interpretation to those provisions. If that is allowed to happen it is my opinion that the fundamental rights and freedoms bestowed on all persons in Namibia from the time the constitution came into effect will be stultified in their purpose and, the natural development of the

Culture of fundamental rights and freedoms stunted in its growth.

The issue here is the meaning of a fair trial and whether or not that constitutional guarantee can live side by side with the blanket docket privilege that the state enjoyed under the common law.

Article 12 (l)(a) has a wide and all embracing purpose in my view. It provides,

> *"In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided...."*

Article 12 then sets out some instances of a fair trial that fall within that umbrella.

For example, at Article 12(l)(e) it says,

> *"All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial "*

The expression *"facilities for preparation and presentation of their defence"* referred to in the Article

above must go beyond the physical facilities in which to prepare the defence. It must include in my opinion, information to be presented as part of the defence case.

It would be difficult to hold that adequate facilities for preparation and presentation of the defence case within the meaning of Article 12(l)(e) were given when the

facilities provided did not give the defence the opportunity to examine the State witness statements in an appropriate case unless a case were made out by the party seeking to withhold the information.

The issue raised by the facts in this case is whether the Learned Magistrate should have deferred to a future interpretation by the High Court of the meaning of the words 'a fair trial' envisaged by the Constitution.

Mr Heathcote who appeared for the appellant has submitted that in the circumstances of the case, the Learned Magistrate erred in not ordering the State to hand over the statements to the Appellant, and for the following reasons: that it has now authoritatively been decided that the effect of the Constitution of the Republic of Namibia, and particularly Article 12(l)(a), and (e) thereof, is that the State cannot rely on a blanket docket privilege.

See in this regard:

S v *Nassar, supra, S* v *Scholtz* 1996 2 SACR, 426 *& Shabalala and others v Attorney General of Transvaal and other,* 1995 2 SACR 761

He also rightly submitted that the State had to show, on a

balance of probabilities, that the Appellant was not entitled to have access to the witness statements.

In my view the attitude of the State is not easy to justify given the specific injunctions proclaimed by Article 5 of the Constitution.

Article 5 says,

> " *Tlie Fundamental rights and freedoms enshrined in this Chapter (Chapter 3) shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed."*

It is clear from its language that Article 5 does not distinguish between the categories of judicial officers who are enjoined to respect the fundamental rights and freedoms. Nor, does Article 5 require the Lower Courts to defer to the High Court in enforcing the fundamental rights and freedoms.

However a distinction is made between the jurisdiction of the Courts in the Constitution. Article 25(2) states that,

> *"Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they*

require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient ".

The expression competent Court is not defined in the Constitution. I agree with Hannah. J that the expression can only mean the Court that has jurisdiction to adjudicate upon claims involving a complaint that a fundamental right has been

infringed. As the learned Judge observed, a magistrate Court is a creature of Statute

and is limited in the exercise of its jurisdiction, either civil or criminal, to what is spelt

out in its enabling statute, namely the Magistrates Courts Act, No. 32/44: claims

falling under Article 25(2) or the Constitution are beyond its powers: *S* v *Heidenreich*

1996 2 BCLR 197 (NmH).

This however does not end the matter. Because and in terms of Article 5 of the Constitution the Magistrates Courts, like the High Court is bound to respect the fundamental rights bestowed on all persons by the Constitution. The right to a fair trial spelt out in Article 12(l)(a) is no exception.

Therefore the Magistrate's Court is required to ensure that the proceedings comply with *"the notions of justice and basic fairness " S v Zuma & others* 1995 2 SA 642 at 652.

The opinion is most persuasive.

So what is the effect of a decision refusing the disclosure of state witness statements to the defence?

In the case of *Shabalala and others* v *Attorney General of Transvaal and Another* 1995 2 SACR 761 (cc) at 7S3 F Mahomed, DP of the Constitutional Court (as he then was) had this to say:

> " *These arguments are clearly not without merit, but they must be weighed against the compelling objection that, if the claims of the State in justification*

of non-disclosure are not subject to judicial adjudication, an accused person might wrongly be refused access to statements and documents which accused legitimately needs for his defence. There is therefore the danger of an unfair trial."

I agree with Mr Heathcote that the effect of the magistrates refusal without insisting on the State's justification of the claim to object to the production of the witness statements was to deprive the appellant of A fair trial within the meaning Article 12 (l)(a) of the Namibian Constitution. Therefore that refusal breached the accused's fundamental right to a fair trial.

Granted that the trial Court was guilty of a breach of the appellant's right to a fair trial what is to happen to the decision convicting the accused in the light of that irregularity. Does a quashing of the conviction necessary follow?

This question was extensively investigated in a recent, as yet unreported judgment of the Supreme Court in the matter of *Shikunga v The State,* SC 6/95.

In that case the Supreme Court was considering whether S217(l)(b)(ii) of the criminal procedure Act, Act 51/77 contravened the Constitution. Section 217 (l)(b)(ii) shifts the burden of proof onto the accused to prove that a confession made to a magistrate

and reduced by him to writing is freely and voluntary made by the accused.....*"if it*

appears from the document in which the confession is contained that the confession was made freely and voluntary".

Having held that S217(l)(b)(ii) contravened Articles 7, 12 of the Constitution Mahomed, C.J. who wrote the judgement of the Court posed the question whether the conviction of the appellant could be sustained given the irregularity.

In tackling that question the learned Chief Justice stated

> "... *There appears to be a tension between two important considerations of public interest and policy in the resolution of this problem. The first consideration is that accused person who are manifestly and demonstrably guilty should not be allowed to escape punishment simply because some constitutional irregularity was committed in the course of the proceedings, but in circumstances which showed clearly that the conviction of the accused would inevitably have followed even if the constitutional irregularity relied upon had not been committed. (This is exactly what transpired in the present case. Although the confession was admitted in terms of section 217(l)(b)(ii) the trial court was able to correctly justify' the conviction of the second accused without any reliance on the confession). There is however a competing consideration of public interest involved. It is this: the public interest in the legal system is not confined to the punishment of guilty persons, it*

extends to the importance of insisting that the procedures adopted in securing such punishments are fair and constitutional and that the public interest is prejudiced when they are not.

The courts in various countries have repeatedly addressed themselves to the tensions contained between these two different considerations.

South African authority at common law

There is considerable learning about this question in decisions from South African courts which were of application of Namibia before its own independence. The approach that has been adopted in assessing the effect of an irregularity in terms of the common law is one that asks essentially whether or not a failure of justice has resulted from the irregularity or defect. To this effect two categories in relation to trial irregularities or defects have been delineated (as set out in *The State* v *Moodie* 1961 (4) SA 752 (A) at 756D-F); a general and an exceptional category:

A. General category:

In *S* v *Tuge* 1966 (4) SA 565 (A) at 56SB the court articulated the test as follows: the question is *"whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond a reasonable doubt."* (The *Tuge* approach was accepted by the AD in *S v Mnyamana and Another* 1990 (1) SACR 137 (A) at 141;

and *S* v *Mkhise; S* v *Mosia; S* v *Jones; S* v *Le Roux* 19S8 (2) SA 868 (A) at 872 A-B). (This formulation of the test is a development of the general test in *Moodie (supra)* which stated that a failure of justice occurs if the court cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.)

B. Exceptional category:

In *Moodie's case (supra)* the court stated that an irregularity can be of such a
nature as to amount to a failure of justice *per se,* and to be so held, without

applying the general test. The court in *Moodie* stated further that whether an irregularity can be classified as falling within the ambit of the general or the exceptional test depends on the nature and the degree of the irregularity. This was elaborated on in *Mkhise (supra)* where the court stated that in order to decide whether an irregularity falls into the exceptional category the enquiry is whether the nature of the irregularity is so fundamental and serious that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred."

In non constitutional matters, therefore the Court asks whether the irregularity is of a general or exeptional category. On reaching this conclusion the learned Chief Justice turned to consider the effect of a breach of the fundamental rights and freedoms entrenched in the constitution.

To decide this issue the learned Chief Justice examined authorities in the Commonwealth, (Canada, Jamaica,

Australia) and the United States of America, and went or

> *"But even if it is assumed that the breach of every consitutional right has the same effect on a conviction which is attacked on Appeal, it does not follow that in all cases that consequence should be to set aside the conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial Court."*

The learned Chief Justice then concludes,

> *"that the test proposed by our common law is adequate in relation both to*

consitutional and non-constitutional errors."

What has to be looked at, as the learned Chief Justice, observes is *"the nature of the irregularity and its effect."* If the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial then a failure of justice *per se* has occured and the accused person is entitled to an acquittal for there has not been a trial, therefore there is no need to go. into the merits of the case at all.

Elsewhere in this judgment I have indicated with the benefit of recent decisions, such as, *S v Nassar, S* v *Scholtz, S* v *Heinderich, S v Shabalala & Others,* that the order refusing disclosure of Police witness statements to the defence was tantament to a denial of the right to a fair trial to an accused person. As a result there is no doubt that there has been a miscarriage of justice that negates the core of a fair trial. In the result the accused must be acquitted without investigating the merits.

Therefore the conviction must be set aside.

It is ordered accordingly.

GIBSON, AJA

MAHOMED, GJ

I agree

MTAMBANENGWE, AJA

ON BEHALF OF THE APPELLANT	*ABV* HEATHCOTE
INSTRUCTED BY	H BARNARD & CO
ON BEHALF OF THE RESPONDENT	ADV SCHULTZ