Reportable
Case No 409/2001

In the matter between:

CARL CHRISTO HALGRYN **Appellant**

and

THE STATE **Respondent**

Coram: HARMS, BRAND JJA and HEHER AJA
Heard: 15 MAY 2002
Delivered: 30 MAY 2002

Subject: Criminal law – right to a fair trial – right to own counsel.

JUDGMENT

HARMS JA/

HARMS JA:

[1] The appellant was found guilty on a count of murder and two of attempted murder, and in effect sentenced to twenty years' imprisonment. He applied after some lapse of time for leave to appeal against both conviction and sentence but the trial Judge, Stegmann J, refused the application on the ground of a lack of prospects of success. The matter rests there since no subsequent application for leave to appeal was made to this Court.

[2] The appellant also applied for leave to lead further evidence (s 316(3) of the Criminal Procedure Act 51 of 1977). The further evidence consisted of a number of statements made by state witnesses and on which they had been cross-examined but which were not handed in as exhibits. Although at the time of the application the statements were not produced, counsel for the appellant informed the Court below what they contained. Stegmann J

analysed the statements and considered what effect they could have had on the Court's judgment; he concluded that it had not been shown that the new evidence could reasonably lead to a different verdict. The application was consequently turned down and the appellant likewise took no further steps to pursue that avenue.

[3] The third application to the Court below was one for special entries under s 317 of the Act. The section provides that if an accused thinks that any of the proceedings in connection with or during the trial are irregular or not according to law, the accused may apply for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law. The court must make the special entry unless it is of the opinion that the application is not made bona fide; or that it is frivolous or absurd; or that the granting of the application would be an abuse of the process of the court. If the entry is made, the accused has a

right of appeal to this Court. Stegmann J concluded that he was bound to make the special entries because it could not be said that the application was not made bona fide or that it was frivolous or absurd or that the granting of the application would have been an abuse of the process of the court. *Cf S v Xaba* 1983 (3) SA 717 (A) 733D.

[4] Before us we had yet a further application. It firstly asked for condonation for the late filing of the notice of appeal. This we granted when the appeal was called. It then asked for addition to the appeal record of what is referred to as the 'Applicant's Application for Leave to Appeal'. It is a strange document, signed by an advocate, Mr C. The introductory part contains the different applications referred to earlier but the bulk of the document consists of argument and unsworn factual allegations by Mr C. Since this document was before Stegmann J, we admitted it as part of the

record on the understanding that the factual allegations therein are not evidence.

[5] The first special entry raises the question whether the trial Court failed to afford the appellant a fair opportunity to instruct counsel fully on his defence. These are the facts. The indictment was served on 30 July 1998 on the appellant (who was on bail), setting the trial date for 1 March 1999. On the appointed date counsel, Mr M, instructed by an attorney, appeared and apparently informed the Court that the appellant had not taken steps to organise his defence in good time. Mr M applied for a postponement of the trial. That was refused and Mr M withdrew. The case stood down to the next morning, March 2, when Mr S (an attorney) appeared. He requested a postponement for a week in order to enable the appellant to brief counsel, Mr F, who was not immediately available. Although Stegmann J pointed out to Mr S that the version conveyed by him differed from that told to the

Court the previous day by Mr M and that there was nothing on oath justifying a postponement, Mr S did not attempt to rectify matters but indicated that if the postponement were not granted he, too, would be obliged to withdraw. During his argument it transpired that the appellant did not have the means to obtain legal representation. The Court refused the application for postponement, requested Mr S and the prosecutor to assist the appellant in obtaining legal aid from the Legal Aid Board as a matter of urgency and stood the matter down to later in the day, provisionally until 14:00.

[6] The Legal Aid Board instructed an advocate, Mr H, to appear on the appellant's behalf. The record does not reflect when the Court reconvened but if regard is had to the fact that the first adjournment after the trial had begun was at 11:15 the next day, March 3, it has to follow that the trial did not begin during the previous afternoon. This is confirmed by the

appellant's original application for leave to appeal, in the form of a letter of 19 March 1999 under his hand, in which he stated that the trial began on the morning following the direction to obtain legal aid.

[7] The special entry is, however, based upon an affidavit of 17 September 1999 by the appellant in support of his applications to lead further evidence and for the special entries. There he stated that Mr H arrived at court at 14:50 on 2 March, that the trial commenced without any consultation, and that the first occasion he had to consult with Mr H was after the first adjournment. That statement is palpably false. When Mr H appeared for the first time, he informed the Court that the accused is bilingual but prefers the case to continue in English. He told the Court that the accused relied on self-defence; he settled the formal admissions and obtained the accused's signature thereto and his cross-examination of the

first witness indicates that he had obtained instructions from the accused. All this happened before the first adjournment.

[8] Stegmann J was called upon some two years after the event to make the special entry. He, unfortunately, did not record the facts with reference to his bench book (the record of the proceedings was not available at the time) and accepted at face value the allegations in the affidavit. We, on the other hand, have before us a certified copy of the proceedings. There is no application to correct it and there is no good reason to doubt its correctness; on the contrary, appellant's present counsel, Mr Miller, accepted its correctness. The appeal has consequently to be decided disregarding the unacceptable parts of the appellant's affidavit.

[9] It is well to be have regard to the exact terms of the special entry: whether, once Mr H was briefed by the Legal Aid Board to defend the appellant, the Court failed to afford the appellant a fair opportunity to

instruct counsel fully on his defence. The right to a fair trial includes the right to have adequate time to prepare a defence (s 35(3)(b) of the Constitution). What amounts to adequate time is a factual question, depends upon all the circumstances and cannot be answered *in abstracto*. Assuming that Mr H had met the appellant for the first time at about 3 pm, did Mr H have sufficient time to prepare for the trial? Mr H, the person in the best position to judge, apparently thought that he had. He never asked for the case to stand down. He never requested more time. He had a fairly simple case: the only issue was whether the appellant had acted in self-defence. He knew what the appellant's version was and he never once put to a witness something in conflict therewith. He had read the statements of the state witnesses and (subject to what is stated later) was able to cross-examine them. Contrary to what the appellant also said in his affidavit, Mr H did consult further with him and even applied for the recall of a witness on the

instructions of the appellant. In the course of the cross-examination he applied for and was granted the opportunity to take further instructions.

[10] One has to agree with Mr Miller, who, in response to a question from the Bench, submitted that the nature of the case was such that a few hours of preparation would have been sufficient. This is especially so since the appellant had no witnesses and had all the material relative to the prosecution and his defence available. But, says counsel, the Court below, by not granting the postponements sought, deprived the appellant of the right to be represented by a legal practitioner of his choice.

[11] Assuming that this argument may be advanced in spite of the terms of the stated case, it does not have the necessary factual substrate. The Constitution has two provisions which are relevant to the argument: the right to choose a legal representative and to be represented by that person (s 35(3)(f)), and the right to have a legal representative assigned by the state

and at state expense if substantial injustice would otherwise result (s 35(3)(g)). Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations (*R v Speid* (1983) 7 CRR 39 at 41). It presupposes that the accused can make the necessary financial or other arrangements for engaging the services of the chosen lawyer and, furthermore, that the lawyer is readily available to perform the mandate, having due regard to the court's organization and the prompt despatch of the business of the court. An accused cannot, through the choice of any particular counsel, ignore all other considerations (*D'Anos v Heylon Court (Pty) Ltd* 1950 (1) SA 324 (C) 335 *in fine*, 1950 (2) SA 40 (C), *Lombard en 'n Ander v Esterhuizen en 'n Ander* 1993 (2) SACR 566 (W) 571i-572b), and the convenience of counsel is not overriding (*cf Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T)).

[12] In this case the appellant's right to choose counsel was of little practical value: he did not have the means to employ counsel and was unable to make any alternative arrangements during the ten months at his disposal since service of the indictment. In this regard *R v McCallen* (1999) 59 CRR 189 is distinguishable. The Court was not informed that he would within reason be able to obtain the necessary funds to brief the person of his choice. Under the circumstances the Court, properly, insisted that the appellant receive legal aid. If a legal representative is assigned by the state, the accused has little choice. The accused cannot demand that the state assign to him counsel of his choice. That does not mean that he may not object to a particular representative, but the grounds upon which it can take place are severely limited. Conflict of interest is one and incompetence may be one, but one has to act on the assumption that a duly admitted lawyer is competent. In this case the appellant did not object to the appointment of Mr

H and it does not appear that he had any grounds for doing so; on the contrary, after conviction he even instructed Mr H to note an appeal on his behalf. It follows that the reliance on the right to a specific counsel is misplaced.

[13] The second special entry raises the question whether Mr H failed to conduct the appellant's defence properly. In this regard four grounds are relied upon.

[14] The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. *Cf S v Majola* 1982 (1) SA 125 (A) 133D-E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be

objective, usually, if not invariably, without the benefit of hindsight. *Cf S v Louw* 1990 (3) SA 116 (A) 125D-E. The court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect (*cf R v Matonsi* 1958 (2) SA 450 (A) 456C as explained by *S v Louw supra*).[1] The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in Strickland v Washington 466 US 668 at 689:

[1] These citations predate the Constitution and are referred to on a comparative basis only since they may require some qualification.

‘Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.’

Not everyone is a Clarence Darrow or F E Smith and not every trial has to degenerate into an O J Simpson trial.

[15] Turning to the facts, one of the allegations that the defence was improperly conducted is based on the fact that Mr H, without instructions from the accused, introduced a ‘defence’ based upon the theory that certain of the prosecution witnesses had been motivated by a racist prejudice against white men, something which the appellant had never alleged to be a feature of his defence.

[16] The appellant, a white male, visited a tavern. Some black males, including the deceased and the complainants, sat outside drinking. The

appellant went outside and fired the shots that gave rise to the different charges. His version was that the blacks had attacked him without any motive and that he shot in self-defence. The State's version was that he, without provocation and after making racist remarks, fired the shots. In the course of their evidence the complainants explained why they sat outside – they were not allowed inside. The appellant suggested no motive for the attack on him. If counsel, through cross-examination, would be able to establish a plausible motive, it could have strengthened the probability of the appellant's version of an unprovoked attack. Mr H, understandably, probed the possibility of whether or not the attack on the appellant was motivated by a resentment of the racial discrimination perpetrated on the victims. This the witnesses denied. Mr H, it is important to note, never suggested that this theory was part of his instructions. The Court, in its judgment, dealt with this motive and came to the conclusion that it can be discounted. The Court,

it is further important to note, did not make an adverse finding against the appellant because of the line of cross-examination. It follows from this that there is no basis for holding that probing this possibility is indicative of a failure to conduct the defence properly; it rather indicates that counsel under difficult circumstances acted prudently and in the interests of his client.

[17] A further ground is that the Mr H did not understand the statements of the prosecution witnesses; the reason being that they were in Afrikaans and Mr H, on his own admission, has a limited knowledge of Afrikaans, how limited we do not know except that he requested the services of the court interpreter in cross-examining. There is, however, no reason to assume that he was unable to understand the statements. According to the appellant's affidavit, he brought the alleged contradictions in the statements to Mr H's attention. The thrust of Mr Miller's argument before us is rather that Mr H

failed to cross-examine the prosecution witnesses fully or properly on the statements.

[18] That proposition is closely linked to the remaining grounds, namely that Mr H failed to cross-examine the prosecution witnesses on the contents of their statements, that he failed to hand the statements in as exhibits, and that he failed to point out the contradictions between the evidence of the witnesses and their previous statements. They can all be dealt with as one.

[19] The first problem with this leg of the appellant's case is that it is incorrect to suggest that Mr H failed to cross-examine the witnesses on their statements. That he did. It appears from the record that these contradictions were immaterial, and the decision not to pursue the cross-examination and not to prove the statements seems eminently reasonable. The second problem is that we do not have the statements and are unable to determine whether there were other material discrepancies that could have had an

effect on the outcome of the trial. It is not sufficient for counsel to state that there are discrepancies. If we nevertheless approach the matter as Stegmann J did by accepting counsel's version of the discrepancies, the position is that the learned Judge assessed the statements and came to the conclusion that the disclosure of the discrepancies and the proof of the statements would not have made any difference to the outcome of the case. Mr Miller did not suggest that Stegmann J erred in this assessment of the possible impact of the statements on the case. It is consequently unnecessary to revisit the facts. Once his finding is unassailable, it has to follow that counsel's decision not to cross-examine further and not to prove the statements cannot be faulted.

[19] Having read and reread the record we are satisfied that the appellant had a fair trial and that his complaints are without substance.

The appeal is dismissed.

L T C HARMS
JUDGE OF APPEAL

AGREE:

BRAND JA
HEHER AJA