THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 595/2012

Not Reportable

In the matter between:

LEON SMITH **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Leon Smith v The State* (595/2012) [2013] ZASCA 38 (28 March 2013)
Coram:	Nugent, Shongwe JJA, Schoeman AJA
Heard:	5 March 2013
Delivered:	28 March 2013
Summary:	Criminal Procedure – leave to appeal against a refusal of leave to appeal – right to a fair trial as a ground for leave to appeal.

ORDER

On appeal from: North Gauteng High Court (Claassen J) sitting as court of first instance.

The appeal succeeds and the following orders are made:

(1) The order refusing leave to appeal is set aside and replaced with an order granting the appellant leave to appeal to the North Gauteng High Court against his conviction and sentence on the count of theft in addition to his conviction and sentence on the other charges.
(2) The Registrar is directed to forward a copy of this judgment to the Magistrate's Commission and to the President of the Regional Court for Benoni.

JUDGMENT

SCHOEMAN AJA (NUGENT AND SHONGWE JJACONCURRING)

[1] The appellant was convicted in the regional court sitting at Benoni of one count of theft of a motor vehicle; one count of contravening s 8(3)*(c)*(iii) read with s 23 of the Credit Agreements Act 75 of 1980 in that he failed to inform Bankfin of the name and the address of the person in whose possession the motor vehicle was that was subjected to an instalment sale agreement; and two

counts of perjury. He was sentenced to seven years' imprisonment in respect of the theft; two years' imprisonment in respect of the contravention of the Credit Agreements Act; and one years' imprisonment each on the perjury charges. It was ordered that the other sentences were to run concurrently with the sentence imposed in respect of the theft charge.

[2] In terms of the provisions of s 309B of the Criminal Procedure Act 51 of 1977 the appellant applied for leave to appeal against the convictions and the sentences imposed. The magistrate granted leave to appeal against all the counts except count one: the theft of the motor vehicle. Although not expressly stated it can be taken that the leave was granted against both conviction and sentence in each case. The appellant applied to the Judge President of the North Gauteng High Court for leave to appeal against the conviction and sentence in respect of the count of theft in terms of the provisions of s 309C of the Criminal Procedure Act. The application was refused by Claassen J in chambers in June 2006. In March 2012 he granted leave to appeal to this court against that refusal. The inordinate delay does not call for comment for present purposes.

[3] Shortly before this appeal was to be heard Mr *Omar* – who represented the appellant in the regional court and throughout the appeal process – gave notice that this court would be asked to set aside the proceedings in the regional court on the grounds that the appellant had been denied a fair trial. He submitted that although the merits of the convictions are not the subject of the appeal we nonetheless have inherent power to intervene where a patent injustice comes to our attention.

[4] The inherent power to regulate this court's own processes derives from s 173 of the Constitution. It reads:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[5] The issue that is now raised before us does not concern the mere process of this court. It is a matter that goes to its substantive jurisdiction. It has already been held by this court in *S v Khoasasa*[1] that it does not have jurisdiction to entertain an appeal from the order of a magistrate before an appeal has been dismissed by a high court. In that case Streicher JA said:[2]

'Geen jurisdiksie word aan hierdie Hof verleen om 'n appél aan te hoor teen 'n skuldigbevinding en vonnis in 'n laer hof nie. Dit is eers nadat 'n appél vanaf 'n laer hof na 'n Provinsiale of 'n Plaaslike Afdeling misluk het dat 'n beskuldigde met die nodige verlof na hierdie Hof appél kan aanteken.'[3]

[6] It is thus not open to us at this point to consider whether the appellant was indeed denied a fair trial, and if not, whether that was fatal to the convictions. Nonetheless, in my view we are entitled to take account of the complaint that is now raised in considering whether leave to appeal should be granted, notwithstanding that it was not raised as a ground for appeal before the court below.

[1] *S v Khoasasa* 2003 (1) SACR 123 (SCA).
[2] Para 12. See, too, *S v Kriel* 2012 (1) SACR 1 (SCA) para 11, *Matshona v S* [2008] 4 All SA 68 (SCA) paras 4–6.
[3] Para 12.

[7] To be successful in this appeal the appellant must satisfy us that he has realistic prospects of success on appeal: 'there must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'[4] Two grounds are now raised upon which it was submitted that an appeal might reasonably succeed and I deal with each in turn.

Theft was not proved

[8] The charge sheet alleges that the theft was committed 'on or about the period 25 May 2001 to 11 November 2002' and that the motor vehicle alleged to have been stolen was at that time the property or in the lawful possession of Bankfin and/or Mrs Tromp.

[9] The common cause facts are that the appellant entered into a written instalment sale agreement with Maps Cars CC[5] on 16 October 2000 in terms of which he purchased a Toyota Hi-Lux for an amount of R101 000, payable in 53 monthly instalments. In terms of clause 3 of the agreement Maps Cars CC retained ownership of the motor vehicle until the full purchase price had been paid. Subsequently Maps Cars CC ceded their right, title and interest arising from the agreement to Bankfin. The appellant's attorney admitted on his behalf that this cession took place, but no evidence was led as to when such cession took place.

[10] On 25 May 2001 the appellant reported to the police at Delmas that the motor vehicle had been stolen. On 31 May 2001 a person was apprehended and

[4] *S v Smith* 2012 (1) SACR 567 (SCA) para 7.
[5] In the record of the proceedings the seller of the motor vehicle is referred to both as 'Mayet' and 'Mayets'. This is the description of the seller in the written instalment sale agreement.

the motor vehicle was found and returned to the appellant. Charges against the arrested person were withdrawn in July 2001. On 29 June 2001 the appellant again reported to the police, on this occasion at Springs, that the motor vehicle had been stolen. A week later the appellant withdrew the allegation.

[11] Mr *Omar* attempted to show during cross-examination of one Mrs Tromp, an employee of Bankfin, that Bankfin was not the owner of the motor vehicle at the time it was alleged to have been stolen. The magistrate dismissed this line of cross-examination by saying:

'No no let us not argue about those technicalities. If I say ownership put it in averted commas.'

[12] In *Hearn & Co (Pty) Ltd v Bleiman*[6] Ogilvie Thompson J discussed the passing of ownership and stated that ownership does not pass by the 'mere declaration of intention', but by delivery. In *Barclays Western Bank Ltd v Ernst*[7] it was held that if ownership were to pass in a case such as the present, the law required that the person who was to hold the article concerned on behalf of the intended new owner had to be in control thereof, or have the right to control, when the owner of the article ceded his rights in respect thereof to the intended new owner. There is in the instant matter no documentary or viva voce evidence as to when the instalment sale agreement was ceded to Bankfin. There is thus a reasonable possibility that another court may find that the state failed to prove that the motor vehicle was the property or in the lawful possession of Bankfin at the time the alleged theft took place.

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[6] *Hearn & Co (Pty) Ltd v Bleiman* 1950 (3) SA 617 (C) at 625B-D.
[7] *Barclays Western Bank Ltd v Ernst* 1988 (1) SA 243 (A).

Unfair trial

[13] Even before the present constitutional dispensation, it has been a principle of our law that an accused person is entitled to a fair trial and this 'necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires.'[8]

[14] Every accused has the right to a fair trial in terms of s 35(3) of the Constitution. What exactly that right encompasses has not been circumscribed. In *S v Dzukuda ; S v Tshilo*[9] it was set out as follows.

'It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution.'

[15] In *S v le Grange* [10] it was stressed that it is essential that a judicial officer who presides should not ask questions during the trial in a manner that does not subjectively and objectively demonstrates his impartiality:

'It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social

[8] *S v Tyebela* 1989 (2) SA 22 (A) at 29.
[9] *S v Dzukuda ; S v Tshilo* 2000 (2) SACR 443 (CC) para 11.
[10] *S v Le Grange* 2009 (1) SACR 125 (SCA) para 21.

order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer.'

And at para 13:

'Where the offending questioning sustains the inference that in fact the presiding judge was not open-minded, impartial, or fair during the trial, this court will intervene and grant appropriate relief. . . . In such a case the court will declare the proceedings invalid without considering the merits.'

And at para 27:

'In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality.'

[16] In *S v May*[11] Lewis JA discussed the role of a presiding officer and the effect, if any, of an irregularity:

'Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become an irregularity.'

[17] In *S v Rall*[12] Trollip AJA set out the standards expected of a presiding officer when he or she poses questions of witnesses. The most important aspect is that justice must be done. But, it must also be seen to be done:

'He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.'[13]

[11] *S v May* 2005 (2) SACR 331 (SCA) paras 28-29.
[12] *S v Rall* 1982 (1) SA 828 (A) at 832A—833A.

Furthermore, a presiding officer should not descend into the arena or question any witness, including the accused, 'in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility'.[14]

[18] The transcribed record in the instant matter reveals that the magistrate was rude to the prosecutor, the witnesses, the appellant, and Mr *Omar*. She interfered with the presentation of the case, she did not accord the officers of the court, the witnesses or the appellant the dignity and the respect that they are entitled to, and it is the exception that a witness was able to testify without interjections by the magistrate, which were often derogatory and insulting and sometimes nonsensical. In one instance a witness had barely been sworn in before the magistrate intervened, without even one question having been posed by the prosecutor. An exchange took place between the magistrate and the defence under the guise of 'saving time', which takes up ten pages of the record.

[19] The record is replete with abrasive and inappropriate interventions by the magistrate and I use only the following as examples. I quote verbatim her words as recorded

(a) when addressing the prosecutor:

'COURT: Okay Mr . . . I know English is not your first language but you have got to loose word lost. Because when we loose things because it is out of our control.

PROSECUTOR: Lost your worship.

COURT: Ja you loose it. You want that charge sheet to be amended to not include the word loose or lost.

. . .

[13] At 831H-832A.
[14] At 832F—G.

COURT: Well let me put it to you this way. If I loose you in the crowd I cannot be blamed for it sir.

PROSECUTOR: Sure.

COURT: Oh for crying …draw it threw Mr . . . . Loose the lost in your charge sheet. The word is ridiculous. It is not part of any criminal law annexure. You parted with it.'

. . .

'COURT: Mr . . . do not be ridiculous. In this world we live in where every person is dishonest and half of us do not even have shadows because I think we live in the underworld do you think that a bank will be able to exist if you do not have contact details?. . . .'

COURT: Yes Mr . . . did you bring your, with the greatest deference did you bring your thoughts with you to court? Are you nervous?

PROSECUTOR: No

COURT: But then please sir. Please this has been a long day and I do not have the time. You know it is just as good as you asking me whether I am white. What do you think will be the answer? I do not know Mr . . . after some of these reports. You know and I do not care actually. Please do not ask stupid questions.'

(b) when addressing a witness:

'COURT: You said you then called the police? Sir you know what? Please do not indulge in verbal diarrhoea. Did you call the police yes or no? – It is correct so your worship'.

(c) when addressing the appellant:

'HOF: Nee, nee, nee moenie so baie praat nie. So u bel nie die polisie nie? –Nee edelagbare. Hoekom nie, verstand gaan stilstaan? Nee hoekom bel u nie die polise nie Mnr. Smit? – Edelagbare toe ek vir Cremer sê ek soek my voertuig terug toe sê Cremer vir my kyk hierso hy sal reel dat Moonsamy my voertuig terugbring.

En u glo vir Cremer? – Wel hy is klaar, hy het klaar sy mond verby gepraat so ek glo hy sal my help om die voertuig terug te kry

Mnr. Smit die beskuldigde laat ek iets in u midde laat, u weet naïwiteit hoort nie in 'n hofsaal nie. Dit is nie deel van die werklikheid nie. Volg u wat ek vir u sê? – Nee.

Mens kan net om dit sag te stel, daar is 'n punt van "stupidity" waarop jy nie verby kan gaan nie. Dan is jy sertifiseerbaar, verstaan u, dan hoort u nie in hierdie saal nie. Ek sê nie u nie.

Ek sê net 'n mens moet oppas dat mens nie partykeer verby 'n punt verby wil gaan wat mens so wansinig onnosel is dat dit nie aanvaar kan word as redelik moontlik waar nie – (onhoorbaar) agbare.'

(d) when addressing the accused's legal representative:

'COURT: Mr Omar please sir. I sometimes feel that you think this court either does not read evidence does not understand evidence and do not have a brain. What purpose will it serve? I am just as aware as you are there is a difference in the totals. I will deal with that if I have to. I can assure you.

OMAR: As the court pleases thank you.

COURT: I am not one of the courts that you have to spoon-feed sir. The prosecutors are with me a long time. Please do not draw my attention to a contradiction if you will not get something else out of it because I can assure you at the end of the day maybe I suffer from a superiority complex but I can assure you I will get more contradictions out of the record on average than any attorney or any prosecutor. So please you do not have to go into that. I am well aware of that.'

[20] In my view there is indeed a reasonable prospect that a court on appeal might find that the manner in which the trial was conducted denied the appellant a fair trial, and that the irregularity was sufficient to vitiate the proceedings.

General

[21] We are not called upon to decide whether the appellant was indeed denied a fair trial, and if so, what consequences should follow, and we do not do so. But whatever conclusion a court of appeal might reach in that regard, trials should not be conducted as this trial was conducted, and steps ought to be taken to avoid its recurrence. We were referred to two instances in which the manner in which this magistrate conducted trials was of sufficient concern to the high

court to warrant it referring the matter to the Magistrate's Commission.[15] In *Ndlangamandla* Pienaar AJ, when referring to the conduct of this particular magistrate, said:

'This is a situation that cannot be allowed to continue and thereby bring the administration of justice into disrepute. It is clear, to say the least, that although the presiding magistrate had been admonished by this Court in the past, the magistrate continues to ignore such admonishments in a manner contemptuous of this Court. Such contemptuous conduct cannot be sanctioned by this Court.'

[22] We do not know whether, and if so to what effect, any remedial steps have been taken by the Magistrate's Commission, but we consider it appropriate that the present case be brought to its attention, for it to consider taking steps to avoid a recurrence. We intend also bringing it to the attention of the Regional Court President for consideration to be given to whether the magistrate should be hearing trials in the interim.

[23] The appeal succeeds and the following orders are made:

1. The order refusing leave to appeal is set aside and replaced with an order granting the appellant leave to appeal to the North Gauteng High Court against his conviction and sentence on the count of theft in addition to his conviction and sentence on the other charges.
2. The Registrar is directed to forward a copy of this judgment to the Magistrate's Commission and to the President of the Regional Court for Benoni.

[15] *T Ndlangamandla v State* (Unreported judgment of the North Gauteng High Court, Pretoria, Appeal number A857/2009 delivered on 14 July 2010); *State v Phiri* 2008 (2) SACR 21 (T).

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I SCHOEMAN

ACTING JUDGE OF APPEAL

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