THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO 690/06

In the matter between

THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE **Appellant**

and

PAUL KILLIAN **Respondent**

CORAM: **HOWIE P, FARLAM, MTHIYANE, HEHER et PONNAN JJA**

Date Heard: **6 November 2007**

Delivered: **30 November 2007**

Summary: **A criminal trial is not unfair, fundamentally or at all, simply because the prosecutor also interrogated the accused at an earlier statutory inquiry at which the latter was denied the right to silence and the right against self-incrimination**

Neutral Citation: This judgment may be referred to as DPP, Western Cape v Killian [2007] SCA 169 (RSA)

HOWIE P

HOWIE P

[1] The issue in this appeal is whether a criminal trial is unfair, to the extent of being entirely vitiated, because the person who officiated as prosecutor also interrogated the accused in an earlier statutory inquiry, the provisions regulating which denied the interrogatee the right to silence and the right against self-incrimination.

[2] The first respondent, whom, for convenience, I shall call the respondent, was convicted and sentenced in a regional court in respect of one count of fraud and 23 counts of theft. Apart from appealing against his convictions and the various sentences imposed he also instituted review proceedings. The appeal has yet to be heard.

[3] The review application came before Motala and Bozalek JJ in the Cape High Court. The learned Judges allowed the application but granted leave for this appeal. (Also cited as respondents were the trial magistrate and the Minister of Justice and Constitutional Development but they did not participate in the proceedings in either court.)

[4] The interrogation was conducted in terms of the Investigation of Serious Economic Offences Act 117 of 1991 (the Act) which was

subsequently repealed.[1] Section 5(6) empowered the Director of the Office for Serious Economic Offences to summon to an inquiry anyone believed to be able to furnish information on the subject of the inquiry. The provision denying the right against self-incrimination was contained in s 5(8)(a) and the right to silence was effectively denied by s 5(10)(b) and (c) which, on pain of prosecution, compelled the interrogatee to be sworn (or to affirm) and 'to answer fully and to the best of his ability' any question lawfully put. Section 5(8)(b) provided that no evidence regarding any questions and answers at such an inquiry was admissible in criminal proceedings (save, of course, if the charge were one of statutory perjury or of contravening s 5(10)).

[5] In the court below and in the respondent's heads of argument the constitutionality of those provisions was challenged. That challenge was abandoned on appeal. Also advanced in the respondent's heads of argument but not pursued in oral argument on appeal were, firstly, submissions purporting to assess the impact of the aforementioned provisions of the Act on the fairness of the interrogatee's subsequent trial and, secondly, submissions based on a line of American cases beginning with *Kastigar v*

[1] The repeal was effected by the National Prosecuting Authority Act 32 of 1998 which replaced the Act, enacting similar provisions to those involved here.

United States[2] which constitute authority for the proposition that neither direct nor derivative use may be made of evidence obtained at an inquiry such as that which was involved here. It is consequently unnecessary to evaluate those submissions for present purposes. Obviously the implications of compulsory testimony at the inquiry are the same even if the prosecutor is entirely unconnected with the interrogation and the Constitutional Court, in *Ferreira v Levin NO*[3], declined to follow the *Kastigar* line of authority in so far as derivative use is concerned.

[6] At the inquiry the respondent was represented by counsel, Mr R Goodman. The person who conducted the inquiry was Mr T Estié, a member of the office for Serious Economic Offences.

[7] Mr Estié compiled a report concerning the inquiry. It concluded with a recommendation that the respondent be prosecuted on a multiplicity of charges including those on which he was eventually convicted. The recommendation was accepted.

[8] Pursuant to the recommendation the respondent was criminally charged. The prosecutor at the trial, Mr P Snyman, was briefed with a copy

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[2] 406 US 441 (1972).
[3] 1996 (1) SA 984 (CC) paras 104, 106-9, 133-140, 141-5 and 146-153.

of the report and a transcript of the inquiry evidence, including that of the respondent. The respondent was represented throughout the trial by Mr R McDougall, SC. During the trial Mr Snyman fell ill. Because a substitute other than Mr Estié would have required considerable time to become sufficiently acquainted with the case, the prosecuting authority decided, in order to avoid prejudicial delay to the respondent, to assign the continuation of the prosecution to Mr Estié. The latter completed the State case and cross-examined the respondent when he testified in his defence.

[9] In his founding affidavit in support of the review the respondent claimed that the trial was unfair for the following reasons:

‘19.1 I had no right to refuse to answer any question at the interrogation. If I had refused, the person who had to decide if I must furnish an answer to such question was the person asking the question, Advocate Estié. He was both “the judge and jury”. No independent arbitrator was appointed to whom I could have appealed to stop Advocate Estié eliciting answers from me unfairly.

19.2 I was the target of the inquiry conducted by Advocate Estié. I was called upon to answer the questions of Advocate Estié after the matter had been fully investigated by him. As can be seen from the record of such interrogation, the questions put to me were not aimed at investigating the facts but were aimed at eliciting in detail, and did elicit in detail, my defence to the charges. Such information extracted from me guided the

prosecution in the presentation of its case and in the cross-examination of myself during the criminal trial.

19.3 I had to answer the questions posed to me without having knowledge or sight of the evidence against me and without having had legal advice on such evidence. Numerous admissions were extracted from me during the interrogation, which admissions were made without full knowledge of the facts and which then carried a criminal sanction if I later wanted to amend or change such admissions.

19.4 During my cross-examination at the trial, evidence obtained during Advocate Estié's inquiry and not presented during the State case was put to me by Advocate Estié, unfairly I submit. I refer in this regard to the cross-examination relating to what Mr Hewat is purported to have said to Advocate Estié.

19.5 When Advocate Estié cross-examined me during the criminal trial, I understood that he was questioning me with the full knowledge of what had transpired during the inquiry and with the knowledge of the answers he had extracted from me. His understanding of my defence case was unique as he knew in advance what the answer to his question would be. Furthermore, because I had given answers at the inquiry without knowing the full ambit of the evidence, such answers were also not full and complete. I was faced however with the dilemma during cross-examination at my trial that if I changed my evidence at all I would be faced with criminal sanctions and my credibility would suffer. I believe that the Regional Magistrate's findings on my credibility resulted from my dilemma.

19.6 I submit that my interrogation by Advocate Estié was geared towards a prosecution and as I was the pioneer of the scheme that was the subject of his inquiry I

was therefore more than a suspect; I was the person against whom the State was building a case. The search and seizure of all my documents, the fact I was called in for questioning right at the end of the investigation and the type of questions posed to me, prove this.'

He went on to say in the next paragraph:

'20. The issue of Advocate Estié becoming a prosecutor in the matter was never raised or discussed with me during the trial by my then counsel or attorney.'

[10] Counsel for the respondent at the inquiry raised no objection or complaint during the interrogation that the questions, or the manner in which they were put, were unfair.

[11] When Mr Estié took over the prosecution no objection was raised against his doing so. Nor was any objection made at the start, or even at any time during, the respondent's cross-examination, either with regard to Mr Estié's role as prosecutor or in relation to the content or manner of his questioning.

[12] When, during the trial, Mr Estié sought to cross-examine the respondent on evidence at the inquiry given by someone not called as a witness in the trial, Mr McDougall successfully objected to that line of

questioning. The respondent was accordingly protected from any potential unfairness inherent in what was sought to be put.

[13] The trial magistrate made credibility findings adverse to the respondent but despite the latter's assertions in para 19.5 of his founding affidavit[4] it has not been demonstrated, or alleged (other than the belief referred to in the last sentence of para 19.5), that any of such findings were the product of cross-examination based on the respondent's inquiry evidence or attributable to Mr Estié's knowledge of such evidence.

[14] In observance of the prohibition in s 5(8)(b) of the Act against direct use of the inquiry evidence in the trial, there was indeed no such use. Nor, bearing in mind the *dicta* in *Ferreira v Levin NO*[5] concerning derivative use subject to the trial court's role in determining the fairness of such use, was there any derivative use made, or even sought to be made. That is to say, no evidentiary derivative use. What the defined issue may well be said to encompass (and I shall revert to this) is whether there was what one might call non-evidentiary derivative use, in so far as Mr Estié was able, with knowledge of the inquiry evidence, to shape his cross-examination as far as

[4] See para 9 above.
[5] 1996 (1) SA 984 (CC) para 153.

possible to attack the respondent's credibility and thereby to defeat his defence.

[15] The court below found in the respondent's favour that it was grossly irregular for the prosecution to have had a transcript of the respondent's inquiry evidence and for Mr Estié to have conducted part of the prosecution case. In the court's view those features vitiated the trial and the respondent's failure to object relevantly during the criminal proceedings was clearly due to his ignorance that they were irregularities. The reasoning of the court *a quo* is illustrated by the following passage in its judgment:

'In my view, those two factors, cumulatively at least constituted irregularities which rendered the trial unfair. It does not require much imagination or experience to appreciate the immense advantage gained by a prosecutor who has in his or her possession the sworn statement or testimony of an accused or who has previously interrogated that person in relation to the same subject matter. My conclusion is reinforced by the fact that the prosecuting authority, despite its opposition to this application, appears to share my view. Annexed to applicant's replying affidavit is an affidavit by Mr W Hofmeyer the Deputy Director of Public Prosecutions in charge of the Asset Forfeiture Unit. In countering a challenge to the constitutionality of section 26(6) and 27 of the Prevention of Organised Crime Act , No 121 of 1998, which Act provides for a process similar to that created by the impugned provisions of ISEO and the NPAA, he said the following:

"Firstly, the purpose is not to use information acquired from these affidavits as evidence against the deponent in a criminal case, except in cases of perjury. For this reason, the Unit has a policy in terms of which disclosures obtain pursuant to chapter 5 proceedings are strictly withheld from the criminal investigation and prosecution teams. This is demonstrated by the inclusion of paragraph 1.20 in the Order of 13 July 2001 and generally in all other restraint orders. I repeat that undertaking herein."' (Underlining by the court below)

[16] An accused person has a constitutional right to a fair trial.[6] The word 'includes' in the first line of s 35(3) of the Constitution indicates that fairness extends beyond the specific matters listed in the subsection. Fairness

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[6] Section 35(3) of the Constitution reads:
Every accused person has a right to a fair trial, which includes the right -
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed to this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has preciously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court
Subsection (5) adds:
Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

must be substantive, not just procedural.[7] It therefore entails more than the 'formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.[8] It was the breach of those formalities, rules and procedures which the legislature had in mind in enacting the provision in s 309(3) of the Criminal Procedure Act 51 of 1977[9] (and its precursors) and in referring in the proviso to an 'irregularity'. Long-established case law based on the proviso has distinguished between an irregularity which vitiates the whole trial and one which may yet leave proof of guilt sufficiently established. In the present case what we are concerned with is not, strictly, whether there was an irregularity within the meaning of the Criminal Procedure Act but whether there was, constitutionally speaking, unfairness to the respondent in the fact that Mr Estié acted as prosecutor and, if so, whether such unfairness was so fundamental that the trial verdict cannot be allowed to stand. This is the issue I have endeavoured to formulate in para [1] above.

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[7] *Schabir Shaik v The State* (unreported) Constitutional Court case 86/06 para 45; [200] JOL 20751(CC)

[8] *S v Zuma* 1995 (2) SA 642 (CC) para 16, citing *S v Rudman* 1992 (1) SA 343 (A).

[9] Section 309(3) reads:

'The provincial or local division concerned shall thereupon have the powers referred to in section 304(2), and, unless the appeal is based solely upon a question of law, the provincial of local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.'

[17] Turning to that issue, and beginning with the findings and reasons of the Court below, counsel for the respondent did not rely in this court on the prosecution's possession of the inquiry record, or the suggested ignorance on the part of the respondent or on the Asset Forfeiture Unit's alleged policy. Counsel's approach was understandable.

[18] As to the prosecution's possession of the inquiry record, the Act's primary objective was the investigation and prosecution of serious economic crimes. It would have been illogical and self-defeating, to say the least, having obtained an inquiry report recommending criminal proceedings, to have withheld the report and the inquiry record from the prosecutor. The latter would surely have required to be fully briefed so as to make the optimum permissible use of available evidence and to determine where to look for further evidence. Presentation of the prosecution case was inevitably (and sufficiently) subject to the bar against direct use of the inquiry evidence and, further, subject to the trial court's control of the use of derivative evidence in general and derivative use of the accused's inquiry evidence in particular. By those measures fairness in the ensuing trial was adequately capable of achievement. The prosecution's mere possession of the inquiry record has not been shown to have prejudiced the fairness of the trial in fact.

[19] In so far as the suggested ignorance of the respondent is concerned regarding the alleged irregularities which the court below found to have occurred, this was not something which the respondent alleged in his founding or replying affidavits. What he said was that Mr Estié's taking over the prosecution was not raised or discussed with him by his legal advisors. He did not say it was a matter which never occurred to him to raise with them or, more specifically, that it was a matter the implications of which he was unaware.

[20] Then, as regards the alleged policy of the Asset Forfeiture Unit, this was a subject which was raised for the first time in the respondent's replying affidavit. It was therefore not canvassed as an issue in the review proceedings. What motivated the alleged policy one does not know. As far as one can judge the alleged policy might have been influenced by the intention to avoid a prosecutor's potential direct or derivative use of an accused's evidence obtained under statutory, pre-trial, measures which could have had the effect of applying pressures affecting, or possibly affecting, its trial admissibility. If so, the considerations influencing the policy would have been the same as those potentially relevant to fairness in the instant

case. In that event they add nothing to the issue. If they were based on other considerations, they cannot assist.

[21] Of the reasons of the court below there remains the matter of Mr Estie's dual role of initial interrogator and subsequent prosecutor. As I have indicated, it is that that has given rise to the issue for decision in this court.

[22] The court below referred to the 'immense advantage' to the prosecutor of, inter alia, having personally conducted the prior interrogation. It is not clear, on the facts of this case, how Mr Estié was in a better position (an unfairly superior position, one has to say) than Mr Snyman, in having conducted the inquiry. The only possible advantage one can envisage is that, although not apparent from the transcript, Mr Estié would have been aware (if they existed) of instances when the respondent appeared plainly uncomfortable or at a loss when specific issues were canvassed, so that those could be concentrated upon in cross-examination. However, it is not readily conceivable that the respondent would not himself have remembered such occasions and therefore have been in a position to brief counsel to object accordingly. In all other respects Mr Estié would not have been able to make any better non-evidential derivative use of the inquiry proceedings than Mr Snyman.

[23] It is true that cases might occur in which the accused is unable to afford legal representation at either the inquiry[10] or the trial but that is no argument in favour of an absolute ban on a dual role. The case of *Ferreira v Levin NO* makes it clear that derivative use is not absolutely excluded but is subject to the trial court's rulings according to what is fair. What applies to evidential derivative use must, in my view, apply equally to non-evidential derivative use. It follows that in the case of the envisaged impecunious accused a trial court would be obliged to exercise extra vigilance to ensure the maintenance of the required fairness.

[24] Counsel for the respondent called in aid certain passages in the recent Constitutional Court judgment in the case of *Schabir Shaik v The State*[11] more particularly in paras 51 to 68. In my view they do not assist the respondent. The prosecutor in that case did not interrogate the accused at a prior statutory inquiry (under the National Prosecuting Authority Act). The court was therefore not called on to decide whether fulfilment of the particular dual role in issue here would *per se* have involved a trial unfairness to the accused. If anything, the judgment seems to indicate that

[10] Now in terms of the National Prosecution Authority Act – see footnote 1.
[11] See footnote 7.

the determination of unfairness would depend on other, factual, considerations, not simply on the fact of the dual role.

[25] As counsel for the respondent developed his argument before us, the thrust of it appeared to be that Mr Estié's earlier role as interrogator robbed him of the impartiality or lack of bias required of a prosecutor. That seems to me also to raise an *ad hoc* issue of fact and not to compel a universal conclusion of procedural law. In paras 65 to 68 of the Constitutional Court judgment in the *Shaik* case[12] it is explained that additional knowledge and understanding which a prosecutor obtains in an investigatory position cannot amount to bias or prejudice. Rather, having regard to case law, what one would look for to establish a prosecutor's lack of impartiality would be, for example, the waging of a personal vendetta, impairing the conduct of the proceedings and the dignity of the court, or using the same office as the trial judge's assessors.

[26] Counsel for the respondent also referred us to an unreported High Court review case[13] involving a series of prosecutions under prison regulations, where the same person gave prosecution evidence in one case and prosecuted in another. The caveat was understandably expressed in the

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[12] See para 24 above.
[13] *GR Els v FS Gericke and others,* Cape Provincial Division, judgement delivered on 23 December 1963.

judgment that care should be taken to avoid the impression that a prosecutor is biased towards the accused. One would readily agree. However bias is not *per se* to be inferred from Mr Estié's dual role in this case.

[27] To the extent that the determination of what is fair or unfair in a particular case may depend on the accused's subjective view of the proceedings or their surrounding circumstances, one cannot expect a court in the absence of objection by the accused to guess what that view is if there are no facts or circumstances which should reasonably prompt the court to inquire and investigate. Of course there is no onus on an accused in this regard and there can be no waiver of the right to a fair trial. At the same time the absence of a defended accused's objection to the prosecutor's involvement or the prosecutor's cross-examination is a factor which can reasonably induce the court to infer that the accused has no intention to allege prosecutorial unfairness. No such intention was evinced in the present case. This is no doubt why counsel for the respondent was driven to submit that fulfilment of the dual role of interrogator and prosecutor was axiomatically unfair.

[28] Counsel sought to base that submission on cases such as *S v Moodie*[14] and *S v Mushimba*.[15] The former involved the deputy sheriff of the court concerned being secluded with the jury, and the latter involved an illegal breach of the accused's attorney and client privilege. Both cases constitute very obvious examples of circumstances which rendered the respective trials fundamentally unfair procedurally at the times at which they were decided and which would render them substantively unfair now. The question remains whether the prosecutor's dual role in this case created a substantive unfairness *per se*. Neither precedent nor principle persuades me that it did. Whether fulfilment of that dual role does involve or bring about substantive unfairness in an ensuing criminal trial will be a matter to be decided on the facts of each case by the trial court. Unfairness does not flow axiomatically from a prosecutor's having had that dual role.

[29] The appeal must consequently succeed and the order of the court below ought to have been one dismissing the application. Counsel for the appellant asked for cost in both courts. Because the respondent sought to enforce his constitutional right to a fair trial, and the issue in both courts was whether that right had been infringed, I think that he should not be made to

[14] 1961 (4) SA 752 (A).
[15] 1977 (2) SA 829 (A).

pay the costs. It seems to me that this approach is consonant with constitutional litigation and jurisprudence.

[30] The appeal is accordingly dismissed. The order of the court below is set aside and substituted by the following:

'The application is dismissed.'

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

FARLAM JA
MTHIYANE JA
HEHER JA
PONNAN JA