IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO. A 1105/2005
DPP REF NO. JAP 2006/0014
DATE OF HEARING: 31 JANUARY 2008

In the matter of:

MAFU, EDWARD Appellant 1

MLAMBO, PETER Appellant 2

SIBANDA, NDABA Appellant 3

Versus

THE STATE

JUDGMENT

C.J. CLAASSEN J

[1] This criminal appeal raises the following questions:

1. Was the legal representative acting on behalf of the appellants in the court *a quo* incompetent and, if so, whether such incompetency led to a failure of justice; and

2. Did the presiding regional court magistrate descend into the arena

and if so, whether such conduct led to a failure of justice?

THE BACKGROUND FACTS

[2] The 3 appellants, respectively aged 25, 21 and 23 years, are Zimbabwean citizens. They were charged in the regional court, Johannesburg, with one count of robbery with aggravating circumstances. The State alleged that firearms were used on 24 July 2002 to assault and rob Mbombo Katumbai of a cell phone, passport and cash. It is further alleged that the robbery took place around 8 o'clock at night in a spaza shop owned by Rachel Masango who is from Zambia.

[3] The record shows that the three appellants were originally defended by Mr. Gideon who appeared on their behalf on their first appearance in the regional court on 29 July 2002. Thereafter a Ms Mazibuko appeared on their behalf for a while and then Mr. O'Marjee took over their defence as from 10 February 2003.

[4] The trial commenced on 23 June 2003 before a regional court magistrate, Mr. Machobane. The trial was postponed 7 times and ultimately completed on 13 July 2004. Judgement was handed down on 19 July 2004. All three appellants were convicted as charged and each was sentenced to 13 years imprisonment.

[5] In all, five witnesses testified. The State called two witnesses i.e. Masango and Katumbai and for the defence, each appellant testified. The typed record of the evidence in the court *a quo* runs to 84 pages, each page consisting of 25 typed lines.

THE EVIDENCE

[6] For the State both Masango and Katumbai testified that on the evening of the robbery, Katumbai and two other customers were in Masango's spaza shop when the three appellants entered the shop. Appellant 1, while standing at the door, drew a firearm and held up the three customers as well as Masango. He ordered the 2nd and 3rd appellants to search the customers and Masango for belongings and cash. After taking cell phones from the customers, including one from Katumbai, and cash from Masango, the appellants fled. Two days later Masango saw the three appellants walking past the spaza shop during day time. She contacted Katumbai and asked him to come and confirm that she had correctly identified the three persons as being the robbers. He came and confirmed her identification whereafter they called the police. The police arrived and Masango identified the three appellants while they were still walking down the street. The police and Masango then followed and the appellants were arrested near the Yeoville police station.

[7] Katumbai testified and confirmed the events in the spaza shop on the night of the robbery as stated by Masango. He also confirmed that Masango called him to assist in the identification of the appellants as they walked past the spaza shop two days later. He followed the police vehicle on foot and saw that the appellants were arrested near the Yeoville police station. Katumbai in addition described the appellants' respective clothing worn by them on the night of the robbery. He also identified them by their differing heights and the complexion of each appellant.

[8] The evidence of the three appellants was to the effect that, on the day of their arrest, they had gone to a scrap yard in Yeoville and bought a spare part called a "tie rod end". Appellant 1 bought it for R70-00. He was not given an invoice by the spare parts dealer. The tie rod end is, according to appellant

No. 3, an L-shaped rod, round and approximately 15 to 20 cm long. They walked past the spaza shop towards Brixton where they were to fix a motor vehicle belonging to the 1st appellant. The 3rd appellant was a mechanic who had fixed cars for the 1st appellant in the past and the 2nd appellant was the cousin of the 3rd appellant. On their way they were arrested by the police. The police searched them and confiscated the tie rod end from appellant 1. He was not given a receipt therefore by the police. All three denied any knowledge of the robbery in the spaza shop two days earlier. Their defence in this respect was an alibi. Appellant No. 1 was apparently on that particular day in Pretoria whereas appellants 2 and 3 were at their respective homes at the time when the robbery allegedly took place.

THE COMPETENCY OF APPELLANTS' LEGAL REPRESENTATIVE

[9] Leaving aside the interjections by the court and the prosecutor, the effect of the cross-examination by O'Marjee of the 1st state witness, Masango, boiled down to the following:

> "You have already given partly (sic) evidence in your case? – It is correct.
>
> Now this robbery that took place was a spaza shop is that correct? – Yes it is correct.
>
> Now in your evidence at the beginning of your evidence you said there was light in the shop but you could not see properly, that is what you said? - Correct.
>
> Now which accused was standing by the door of the spaza shop? - The first one. That is accused No. 1.
>
> Who is the one that searched you? - The 2nd one.
>
> Now in your evidence you said also you recognized them but you were not sure, that is what you said in your evidence. Is that correct? - I was sure, I was sure.
>
> **Accused 1, 2 and 3 will say they never robbed you?** - I do not agree.

> Accused 1, 2 and 3 were arrested here near the Yeoville police station? – Yes.
>
> Did you see these accused before this particular day? - The day of robbing was, that is the day I first see them.
>
> Your worship I have no further questions." (Emphasis added)

[10] It will be noted from this short and very ineffective questioning of the main state witness, that O'Marjee failed to put the alibi defences to Masango. He merely put it to her that the appellants would say that they did not rob her. Also, no mention was made of the reason why the three appellants walked past the spaza shop on the day of their arrest. No mention was made of the spare part which was bought for R70 and found in their possession and confiscated by the police. Masango was present when the appellants were arrested and could have confirmed that the police confiscated and object from Appellant 1. If so, such evidence could have corroborated their defence as to why appellant 3, a mechanic, was in their presence on that day. Such evidence would have gone a long way to rebut the inference to be drawn that they were in one another's company because they were a gang of robbers who acted together.

[11] When cross-examining the 2nd state witness, Katumbai, O'Marjee asked him about the lighting in the spaza shop, how many police officers arrested the appellants and whether he was sure of his identification of the accused. It was again put that the accused will say that they never came to the spaza shop. He further questioned Katumbai about the street light outside the spaza shop and then concluded the cross-examination as follows:

> "Accused will say they did not take part in the robbery. – I disagree,
>
> I put it to you that you have wrongly identified them. – **Not different those ones who we saw passing or those who were involved on robbery**.

Your worship no further questions." (Emphasis added).

Once again the cross-examination was totally ineffective and nothing of the appellants' version was put to the 2nd state witness. As will appear later in this judgment, the court *a quo* seems to have been influenced by the testimony of this witness that the 3 robbers were all together on the day they passed the shop.

[12] Now, it is elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and to inform such witness that other witnesses will contradict him or her so as to give such witness fair warning and an opportunity of explaining the contradiction and defending his or her own character. It is grossly unfair and improper to let the witness's evidence go unchallenged in cross-examination and afterwards argue that he or she must be disbelieved.[1] Failure to put an accused's version to a state witness will generally be taken to mean that the accused accepts the version of the state witness. This much is trite and constitutes a basic and elementary forensic skill which has to be learnt and mastered by the most junior of defending counsel. In fact it is one of the first things taught in any course on trial advocacy. The whole purpose of proper cross-examination is to illicit from the opposing witness facts which are beneficial to the case of the cross-examiner's client and to put such client's opposing and contradictory version to the witness. It was said in **S v P** 1974 1 SA 581 (RA) at 582 E – G as follows:

> **"It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses** and it is certainly not a reason for not doing so that the answer will almost certainly be a denial. The Court was entitled to see and hear the reaction of the witnesses to the vitally important allegation that the appellant was not even in possession of red sandals on the

1 See **Small v Smith** 1954 3 SA 434 (SWA) at 438 E – G.

> two occasions he was alleged to have worn them at the river. Quite apart from the necessity to put this specific allegation there was, in my opinion, a duty to put the general allegation that there had been a conspiracy to fabricate evidence". (Emphasis added).

[13] The above principles of putting an accused's version to the state witnesses are equally applicable in the case where the defence to be raised is one of an alibi. There are basically three considerations why it is important for defending counsel to put an alibi defence to the state witnesses:

1. The court is entitled to see and hear the reaction of the state witnesses when they are told that the accused, which they have identified as the perpetrator, was in fact elsewhere and could not have committed the crime. It will notify the witnesses that their identificatory evidence is placed in dispute, thus giving them an opportunity of explaining why and how they were able to identify the accused before court. This consideration is all the more important in the present case because of a certain insecurity evidenced in the testimony of Masango regarding the identification of some of the appellants. Her evidence in chief elicited the following response regarding her ability to make a reliable identification:

> "Ja, there was light but you know I could not see nicely, but there was light.
> ……
>
> No, I am trying to say the other two ones; I am still confused whether they were there or not there."

. She was also willing to drop the charges against the appellants which is consistent with her identification being suspect.

2. It is also important for the court to know that the defence which will be raised, should the accused testify, will in fact be one of an alibi. Once a court is apprised of the fact that the defence will be an alibi, the whole question of identification comes acutely to the foreground in the court's duty to evaluate the evidence and the credibility of the witnesses. Proper and timeous notification of an alibi defence, places the court on guard to ensure that the cautionary rule applicable to identificatory evidence will be complied with.

3. It is also important for the prosecution to know that such a defence will be raised. Not only must the fact that the defence will be an alibi, be raised but the specifics thereof should also be disclosed in order for the prosecution to verify the correctness or otherwise thereof. This should be timeously done in order for the prosecutor to give instructions to the investigating officer to do the necessary investigations in order to supply the prosecutor with facts which will enable him or her to cross-examine the accused when once he or she testifies regarding the specifics of his or her whereabouts on the day when the crime was committed.

[14] All of this is necessary in order for the court to properly adjudicate the accuracy or otherwise of the state witness's identification of the accused and that of the contrary version, i.e. the accused's alibi. These procedural duties resting on defending counsel are important because of the law applicable to the adjudication of alibi defences. It is trite that an accused bears no onus of proof to establish the truthfulness of an alibi defence and at best it carries only a temporary onus of rebuttal depending upon the quality of the State's

incriminating evidence.[2] Once a court accepts that an alibi defence might reasonably be true it follows that the prosecution's evidence is mistaken or false.[3]

[15] As indicated above, O'Marjee failed to put the alibi defence and its specifics to the two state witnesses, but more importantly he also failed to lead the appellants in chief on their whereabouts at the time when the robbery allegedly took place in order to establish their alibi defence. This conduct on the part of O'Marjee is inexcusable and breaches the very rudimentary duties of counsel when defending an accused. Because appellant No. 1 was not led in chief on the details of his alibi defence, the prosecutor, quite rightly, did not cross-examine him in that regard. However, when appellants 2 and 3 testified, the prosecutor elicited under cross-examination for the first time that they had asked appellant 1 where he was on the day when the robbery allegedly took place. In response thereto they testified that appellant 1 stated he was in Pretoria. Furthermore, although O'Marjee failed to lead appellant 2 and 3 in chief on their alibi defence, such defence was in fact elicited by the prosecutor under cross-examination. In the aforesaid circumstances a court would generally be entitled to disbelieve the alibi defences raised in such a cursory fashion. Whether or not a court will do so will depend on whether defending counsel may have made a mistake in failing to raise the alibi defence in cross-examination of the state witnesses and/or in leading the accused in chief in regard thereto. If, for example, defending counsel was told by the accused of the alibi defence and its specifics and defending counsel fails to raise it then, of course, the mistake lies with defending counsel and not the accused.

[16] In the present case O'Marjee's failure to put the appellants' case was dealt with in cross-examination as follows:

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2 See **S v Majiami en Andere** 1999 1 SACR 204 (O) at 209g – 210b.

3 See **R v Hlongwane** 1959 3 SA 337 (A) at 340 H; **S v Liebenberg** 2005 2 SACR 355 (SCA).

1. He failed to put the version of the appellants in regard to - (i) their reason for walking past the spaza shop; (ii) their possession of the tie rod end and (iii) the confiscation thereof by the police. Of course, when the prosecutor cross-examined appellant 1 in this regard it was put in no uncertain terms that the appellants' testimony in this regard constituted "new evidence". The evidence of appellant 1 in this regard is recorded as follows:

> "Sir, do you agree with me that the issue of you being in possession of a motor vehicle part and going to Brixton to fetch a car which had had a breakdown earlier on is something new? - **It is nothing new.**
>
> I put it to you that your defence attorney never put that version to the state witnesses - In **my statement I did indicate this.**
>
> Which statement are you referring to Mr. Mafu? - **The statement which my lawyer is in possession of.**
>
> I put it to you that Mr. O'Marjee has more than 20 twenty years experience as an attorney and he would not have forgotten such important information, such a version, if you told him that version. – **I did tell him.**
>
> What happened to the motor vehicle part which you had in your possession when you were arrested? - It was taken by the police.
>
> What did they do with it? - They kept it and they said when I am released I can come to the police station to fetch it.
>
> Does Mr. O'Marjee know about that? - I would not know.
>
> Why would you hide that away from your legal representative? The old man is supposed to keep you out of prison but you hide away some information from him? - **I never hid anything.**
>
> ….
>
> COURT: The question is, you never told the attorney that you were going to repair or fix a motor vehicle otherwise the attorney would

have said so to the witnesses so that the witnesses can reply. That is where the difference lies. You see the point the prosecutor is pressing on. Do you understand? - Yes I understand.

So what are you saying now, did you tell the attorney that way, you did not tell the attorney that way? **- I did tell him."** (Emphasis added)

2. In regard to the failure by the 2nd appellant to testify in chief about his alibi defence the cross-examination of the prosecutor was recorded as follows:

"CROSS-EXAMINATION BY PROSECUTOR:

Sir, where were you on 24 June (sic: "July") 2002 at about 20:30 in the evening? – I do not remember where I was on that day.
…..

COURT: Also that part that where he was on that day, it was never put to the state witnesses so that the witnesses can reply. Do you understand? – Yes. When the police say that these are the people who have pointed you out as the robbers, I told them that when I knock-off from work I do not get out of the house. I just go into the house.

PROSECUTOR: So what you are saying now is that you were in the house on the 24th at about 20:30 because you do not move out of the house? – I remember telling them that because when I knock-off duty I will be tired.

OK Sir – I just sit at home.

…….

OK Sir, do you agree with me that the story of the vehicle part and buying a part at the scrap yard and going to Brixton to fetch a motor vehicle, **it is something absolutely new? – I do not agree.**

OK, do you agree with me that it is very strange that the first time you meet accused 1 you get into trouble? – It does surprise me.

Did you ask him where were you the day in which they said this robbery took place, you ask him, accused 1, because you meet this man for the first time you get into trouble and it is alleged that you were involved in the robbery with him? Did you ask him where were you that time? – Yes I asked him.

What did he tell you? – **He said he was in Pretoria."** (Emphasis added)

3. The failure by appellant No. 3 to deal with the alibi defence was dealt with by the prosecutor in cross-examination as follows:

"PROSECUTOR: OK, 24 July where were you? – I should think I was at home.

Why do you think so? – Because usually I am at home.

……

Do you agree with me that that fact was never put to any of the state witnesses, that you are a mechanic, you were walking, you were on a street to go and do your job as a mechanic? – **We did say this but I would not know** maybe they did not write it or place it in our statements.

You agree with me that it was never put to the state witnesses? – I cannot dispute this **but the point is I did mention it.**

Did you ask the other two accused gentlemen where were you on 24th July? – Yes I asked them.

What did accused 1 tell you? – Yes, **accused 1 said he was in Pretoria.**

Accused 2? – **He said he was in the house.**

What did he say he was doing in the house? – I did not ask what he was doing in the house.

Do you agree with me that you are saying, you and accused 2 are saying, accused 1 was in Pretoria during the robbery yet we had the opportunity to be told his side, he did not tell that to the court? – Yes I do agree.

OK sir after realising that your version is not being put to the witnesses what did you do? – What did I tell him?

That you are a mechanic you were going to repair accused 1's motor vehicle? – **Yes I told this**.

…….

Sir I put it to you that the three of you decided on a version to come and present to the court today something new. You decided on the version after the closure of the State's case. – We did not do nothing. We did not do such thing. **We know nothing about court and we do not know what to say or what not to say.**

I further put it to you that Mr. O'Marjee would have put your version if it were the version you gave him because already he gave a version to this court that you were walking on the street when arrested. Not walking going to do something. – **We did tell our first lawyer, not this one, that we were going to fix a car in Brixton.**

So in fact what you are telling the court is that Mr O'Marjee did not know about the fixing of a motor vehicle, another attorney was told about that version, is that correct? – **We assumed that he had full instructions because the previous lawyer told us that this one will be taking over.**

…..

OK I am talking about Mr. O'Marjee. So you did not tell him about that I mean that old man seated there, who is defending you. – He did not ask me. The first or the one who was sent to me is the one who asked me.

Accused 1 said no he told Mr. O'Marjee the version. Who between the two of you is telling the truth? – I am telling the truth because it was not Mr O'Marjee who was there when we were being asked these questions.

So your colleagues who are blaming it on Mr. O'Marjee are in fact wrong. They were supposed to blame the other man. – **Yes because this lawyer is not the one who asked us the question, it was the first one."** (Emphasis added)

[17] What is paramount, is the fact that O'Marjee never disputed the fact that he was told of their full defence by the appellants. If the statements made by the appellants did not disclose their full defence, O'Marjee would have been at liberty to disclose such fact to the court. Doing so, would have protected his reputation as an "experienced attorney". He failed to do so and, on the contrary, it appeared form his closing address to the court that the appellants indeed did

disclose their entire defence to him. He stated the following in argument:

> "The point is the argument was that, why did your attorney not put that version to the witness about the spare parts? If it was necessary to put the version then the attorney would have put the version and **if the attorney in his own discretion decided not to put the version it is of insignificance really.** The version that is put to the witnesses was accused will say he did not rob you. That is the version whether I still have got to add a few extra pieces to say he was walking with a spare part or he was not walking with the spare may be **insignificant**. So by not putting that version does not destroy the credibility of the accused and obviously I run a practice where I have got other articled clerks. **They may have taken a statement and I am now continuing the case as the other witness said, but be that as it may, according to accused 1 he did tell me about it but if a version is put or not put does not necessarily, especially this type of version, destroy the credibility of the accused."** (Emphasis added).

[18] In my opinion the aforesaid submission by O'Marjee constitutes a shocking admission of incompetency and lack of appreciation of his procedural duties when defending a client in court. According to O'Marjee the failure to put an accused's version to state witnesses is "insignificant"! He admitted that he decided, exercising his own discretion, not to put the appellants' version to the state witnesses regarding their alibi defence and their version as to what transpired on the day of their arrest. By doing so, he implicitly admitted that he was told of their version but simply decided for no apparent reason or logic, not to put the full defence version to the state witnesses. In so doing O'Marjee breached the very elementary, rudimentary and crucial duty to his clients as acting as their defence counsel. Furthermore, the aforesaid submission seems to indicate that his articled clerks took statements from the appellants containing their full version. The only reasonable inference to be drawn from the submission made to court by O'Marjee, is that he had not fully acquainted himself with the contents of such statements, nor did he properly consult with the appellants prior to the commencement of the case. This would also constitute a fundamental breach of duty by O'Marjee to his clients. His aforesaid submission also contains the admission that appellant 1 indeed told

him about his version but that he for some undisclosed reason failed to put the version to the state witnesses. On this aspect defending counsel has no discretion. It is obligatory to put to state witnesses the essence of the defence case and in a case where the defence is an alibi, the obligation to do so is, for the reasons set out above, even more stringent. Counsel for the defence is not a judge of his client's version. Whether or not counsel believes such version, he or she is obliged to put it to the state witnesses.

[19] At this juncture it is apposite to refer to the case of S **v Manicum** 1998 2 SACR 400 (NPD). Judgment in that matter was delivered by Broome DJP and concurred in by Booysen J. In that case there were two conflicting versions propounded by the State and defence respectively. The prosecutrix was apparently inexperienced and failed to cross-examine the accused either adequately or at all. At 405c the Court approved a statement by Hoffmann and Zeffertt in "*The South African Law of Evidence*" 4th Edition at 461 where the learned authors stated that a failure by a party to cross-examine a witness may preclude him from disputing the truth of that witness's testimony:

> "Such a failure, especially by a prosecutor in criminal proceedings may often be decisive in determining the accused's guilt".

The Court held that the conduct of the prosecutrix constituted incompetence to such an extent that it was not possible to conclude that the accused's version was false beyond a reasonable doubt[4].

[20] The court concluded with a very apposite statement:

> "But if the prosecuting authorities wish to let inexperienced prosecutors loose on the public they must be prepared to pay the price of seeing possibly guilty persons being acquitted, a price which, I may say, at this time in our history, is one which society cannot afford to pay. Not only does it favour the criminal

4 See **S v Manicum** *supra* at 406a.

> to an unreasonable extent, but it also frustrates the efforts of the over-strained police force and tends to lower their morale. Also, it understandably causes the law-abiding majority to lose confidence in the system of criminal justice. Furthermore, it is a waste of the Court's time and competence to allow prosecutions to fall into the hands of incompetent inexperienced prosecutors. At the time when the rule of law cries out to be supported, this state of affairs is to be deplored."

[21] I am in respectful agreement with the aforesaid statement. To the extent that it applies to incompetent prosecutors, I would venture to suggest that it would equally apply to incompetent defence counsel. Where incompetent defence counsel is let loose on the public, the same results may follow. Convictions based on solid evidence presented by state witnesses, may have to be set aside due to the fact that the incompetency of defending counsel caused a failure of justice with the concomitant result that law-abiding complainants may justifiably criticize the criminal justice system. Incompetent prosecutions and incompetent defences, will equally lead to the unfortunate results referred to in the judgment by Broom DJP.

[22] It is necessary to remind oneself of the Constitutional imperatives applicable to a situation like the present. Section 35(3)[5] provides as follows:

> "35(3) Every accused person has a right to a fair trial, which includes the right –
>
> …..
>
> (f) to choose, and be represented by, **a legal practitioner**, and to be informed of this right promptly;
>
> ……
>
> (i) to adduce and **challenge** evidence**;"** (Emphasis added).

[23] In para [14] of his judgement in **S v Halgryn** 2002 2 SACR 211 (SCA),

5 Constitution of the Republic of South Africa, Act No. 108 of 1996.

Harms JA illuminated the constitutional right to legal representation as follows:

> "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…. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend on 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 hind sight….. The Court must place himself 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…. 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."

[24] The idea of being represented by a legal adviser cannot simply mean to have somebody stand next to one to speak on one's behalf. Effective legal representation entails that the legal adviser acts in the client's best interests, saying everything that is needed to be said in the client's favour and calling such evidence as was justified by the circumstances in order to put the best case possible before the court in the client's defence.[6] Implicit in the rights entrenched in section 35(3)(f) of the Constitution is the concept that legal assistance to the accused person must be real, proper and designed to protect the interests of the accused. The legal representative has an obligation to conduct the case in the best interest of the client while still ensuring that the inherent duty towards justice is maintained. In order to be able to conduct a trial in such manner the legal representative has to acquaint him- or herself with the charges, the facts with which the accused is confronted and more importantly, the version of the accused.[7] The principles just set out accord

6 See **Beyers v Director of Public Prosecutions**, **Western Cape and Others** 2003 1 SACR 164 (C) at 166j – 167a.

7 See **S v Charles** 2002 2 SACR 492 (E); **S v Mofokeng** 2004 1 SACR 349 (WLD) at 355 h-j.

with the concept of the right to effective legal representation in an open and democratic society. In similar vein are the remarks of Justice Blackmun in **Burger v Kemp** 483 US 776 (1987) at 800:

> "The duty of loyalty to a client is 'perhaps the most basic' responsibility of counsel and 'it is difficult to measure the precise effect on the defence of representation corrupted by conflicting interests'".

[25] In my opinion the gravity of O'Marjee's incompetency in failing to (i) make himself au fait with the defence of the appellants; (ii) put such defence in full to the state witnesses; and (iii) challenge and cross-examine the state witnesses either effectively or at all, constitutes a gross irregularity of such monumental proportions that it went "to the very ethos of justice and notions of fairness."[8]

[26] In the circumstances of the present case the conviction of the appellants was largely based on the failure to put the defence version to the state witnesses. This is evident from the written reasons of the magistrate in the court *a quo*, the relevant portions of which read as follows:

> "The court then, will take the evidence of the three accused witnesses in one. The court listened and looked at the manner in which the accused were giving evidence in the witness stand. The court gained the impression that they were not impressive as witnesses in the witness box. The reason is that they were evasive and hesitant even in answering simple questions put to them by the State prosecutor. However, the court is aware that merely looking and listening at the manner in which a witness gives evidence in the witness box does not necessarily mean that that witness is telling the truth.
>
> The court must move to other aspects as the probability and improbability of a witness' evidence given in the witness box before the court can come to a conclusion because if the court disregards that, the court will then be misdirecting itself….. The court looked and weighed the evidence of the three defence witnesses being the three accused. The court finds that there are material discrepancies in their version. For instance, in a first instance they did not instruct the attorney in whole in the sense that there is new evidence that each one of them brought forward when cross-examined by the

8 See **S v Matladi** 2002 2 SACR 447 (T) at 452e.

> State prosecutor. Upon being asked why was that so, they could only say that they did tell their attorney thereof but they differ on this aspect because accused 3 said that they told the previous attorney but accused 1 and 2 maintained that they did tell Mr. O'Marjee being the second attorney in this case. The court also looked at the aspect of the light in the spaza shop as compared to the aspect that the three accused said they were not there in the spaza shop. They could not have been the people that robbed the spaza shop. The court came to conclusion that being at the distance of 3 metres in the shop, accused 1 pointing everybody with the firearm, accused 2 and 3 being the people that searched the people in the shop and with that electric light in the shop….(sic).
>
> The two state witnesses could not have made such a grievous fault that they see other people and they take them to be the accused and it is all a question of mistaken identity. The court therefore finds the following to have been proven by the State:
>
> 1. That indeed on 24 July 2002 the three accused robbed the complainant in the spaza shop of Mrs. Rachel Masango and also robbed the other people who were customers of Mrs. Rachel Masango and also robbed Mr.Katumbai who is State witness 2.
>
> 2. The court rejects the evidence of the defence as being false and without any foundation. The court therefore finds the three accused guilty as charged."

[27] The court *a quo* gave no examples of the appellants being evasive and/or hesitant in answering simple questions. Upon reading the record there were none. The court *a quo* could not therefore have rejected the appellants' version because of evasiveness or hesitancy in their evidence. In any event, the court cautioned itself not to rely too much on the aforesaid basis for the rejection of the defence version, and rightly so.

[28] The court *a quo* then moved to the probabilities but fails to deal with any probabilities. The magistrate thereafter referred to "material discrepancies in their version". The only discrepancy relied upon in the judgment flowed from the failure to put their version to the state witnesses. The court *a quo* seeks to establish a so-called discrepancy in the fact that appellant no. 3 confirmed that their version was put to the first attorney whereas appellants 1 and 2 told

O'Marjee of their version. This does not constitute a discrepancy. O'Marjee himself submitted that statements were taken by his clerks. Whether Mr. Gideon and/or Ms Masibuko were clerks in O'Marjee's employ is not apparent from the record. Be that as it may, all three appellants alleged that their version was in fact disclosed in full in statements made to one or other of their legal representatives. It is a basic duty of a succeeding defending counsel to obtain such statement, consult with the clients and eradicate all possible misunderstandings in order to ensure that he or she is in a position to render a competent defence. As indicated above, this O'Marjee did not do.

[29] Ultimately, the reasons of the magistrate indicated that he was of the view that the state witnesses could not have made a mistake and therefore the defence version must be rejected as false beyond reasonable doubt. It is trite law that, that is not the proper way of adjudicating a criminal trial.

[30] In my view, the incompetency of O'Marjee caused a failure of justice to such extent that the appellants were not afforded a fair trial as entrenched in section 35(3) of the Constitution. That being the case, it is unnecessary for me to consider the additional ground of irregularity referred to at the beginning of the judgment i.e. whether or not the presiding magistrate descended into the arena and thereby caused a failure of justice. However, should I be wrong in holding as I did above in regard to the first irregularity, I express my views in regard to the second irregularity for purposes of guidance to magistrates in future.

DESCENDING INTO THE ARENA

[31] Leaving aside the court's interjections, the record shows that the evidence of appellant No. 1 was recorded within the space of 35 typed lines i.e. approximately 1½ page. The cross-examination of appellant No. 1 by the

prosecutor comprised 66 typed lines i.e. approximately 2½ pages. Thereafter the presiding officer questioned appellant No. 1 at length. The questions and answers of the court comprise no less than 131 typed lines i.e. approximately 5½ pages. Most of the areas covered by the presiding officer constituted mere repetition of the ground which had already been covered by the prosecutor in his cross-examination of the 1st appellant. For example, in answer to the prosecutor, appellant No. 1 stated that he did not know the name of the policeman who confiscated the spare part nor did he receive a receipt therefore. The presiding officer repeated questions in regard to these matters. Appellant No. 1 answered the prosecutor's questions in regard to O'Marjee's failure to put the defence version. The presiding officer deemed it necessary to cover this ground again but unfortunately he did so in a very undignified manner and in a manner which amounted to cross-examination. An extract of the record in this regard reads as follows:

> "The prosecutor says there is not a receipt there to support your story that when you are arrested you were having a part of a motor vehicle to go and fix the vehicle. **That is very important in this case.** There is nothing there. Now the question is did you have such a part? The question is did the police make such a receipt, that is the question. That is, **you are saying they did, they did so and them saying we know nothing about that, it is news to us. Now how must a court believe you on this aspect?** – I did give them.
>
> There is nothing in the docket and this other aspect, prosecutor saying this attorney Mr. O'Marjee, he is a long time attorney in this Johannesburg Bar. **I was not even a prosecutor or even an interpreter when I got to know him as a lawyer. I know him a long way**. Now the question is how can Mr. O'Marjee omit to put to witnesses such important facts if indeed you told your attorney everything? You just say I told him, I told him, now you are blaming the lawyer now, **but unfortunately for you** we know this lawyer a long way. It is an experienced lawyer. **You only come from Zimbabwe you do not know this lawyer. I see now there goes one of the retired regional court magistrates just taking his briefcase going out, Mr. Van der Merwe. He will tell you that Mr. O'Marjee is an experienced attorney. Now you come from Zimbabwe and you tell us that this attorney Mr. O'Marjee is making such grievous mistakes. Answer, answer, I am waiting for an answer** – I did tell him.

> He just, right, there is another point the court wanted to find out. You heard that, you said you heard, you told him but he did not put that version to the witnesses, that is what you said. Now the court wanted to ask you if it is so. You are an adult of 25 years. Why did you not say but why do you not put this version? I told you about this version because you heard you are aware you did not put that version. Can you answer that question? If it is a difficult question say so. – I did not know the way he operates.
>
> No do not run away, it is not, I did not ask you, you know the way. I took it from you. I was listening as the magistrate. You said you are aware he did not put that version. Now an intelligent person of 25 years hearing that the lawyer is not putting across what he said he must put across. Is it not logical that you tell the lawyer, listen you did not put this and this to this. I listen, what is your reason, what is your explanation? You do not have to go to university, you do not have to pass standard two. It is your reason, common sense approach. **There is no reply must I pass on or are you afraid of the lawyer like you are afraid of the police?** – I do not understand the question.
>
> The question is straight. There is nothing difficult of that. You say prosecutor is pressing you in a corner. You reply, yes but he did not put that version to the witnesses. You said so. Right, now the question comes, if you say you did not hear him asking that version why did you not say but now my lawyer, my attorney, why do you not tell these people one to three? Why do you not ask him that because you are aware he is not putting that version and we are talking about two aspects that he did not ask the witnesses, and you are aware he is not asking those question and you do not say but why do you not ask these questions? Now you understand what the court is asking you? – Yes now I understand.
>
> Now reply then why did you not do so? - I did tell him everything but I was not aware whether he would get to that point." (Emphasis added).

[32] Not only did the presiding officer ask the questions in a most convoluted and repetitive manner, but he also stated, as if it was a proven fact, that the witness failed to explain his entire defence to his legal representative. From what was stated earlier in the first section of this judgment, it is entirely clear that a full explanation was in fact given to a legal representative. He also accepted as proven that the police would say that no receipt was issued, whereas no such evidence was tendered. It is clear from the protracted manner in which the presiding officer attempted to explain himself and pose the questions, that it confused the witness and that the presiding magistrate was

cross-examining the witness and not attempting to clarify matters. He was adding additional pressure to that which the prosecutor had already imposed on the witness in an attempt to obtain an explanation why O'Marjee failed to put the defence version to the state witnesses. It is quite obvious that he had already made up his mind to disbelieve the 1st appellant on this issue because of his view of O'Marjee's alleged competence and expertise and never considered the possibility that the fault lay with O'Marjee and not the appellant. His conduct in mentioning the fact that the appellant comes from Zimbabwe was totally uncalled for and out of place. It can only lead to a perception in the mind of the appellants that the magistrate was prejudiced in a xenophobic manner towards them as foreigners. And the reference to an ex colleague leaving the court room is, at best, a form of clowning which is in breach of his duty to maintain the proper dignity and decorum of a court. Magistrates must at all times run their courts in accordance with the dictates of judicial decorum and dignity.

[33] The evidence in chief of appellant No. 2 was concluded within the space of 23 typed lines i.e. less than a page. The prosecutor's cross-examination of appellant No. 2 lasted 39 typed lines of questions and answers i.e. approximately 1½ page. Thereafter the presiding officer questioned appellant No. 2 in the following manner:

> "COURT: Clarification by the court. Now the court listened, you are saying that what accused 1 had, it is a long piece of iron? – Yes.
>
> Did you listen to what he said today, what type of a part he had today when he was in the box? – Yes I heard what he was saying.
>
> You agree he never said a long piece of iron, he never said that. You heard he did not say that, **yes or no**? – He never said that.
>
> **So you and him today are telling the court two different stories is that not so? If you want to say yes, say yes, if you want to say no, say no**. – I am

talking about the piece I saw him, iron piece I saw him carrying.

Now tell me if you were the magistrate today, one say "itzenbende" another one says a round part. Who would you believe now? Which one would you believe? If you were the magistrate like I am the magistrate, they are talking about the same thing but they are talking different things, what would you say? You do not want to answer let me also **test** you. Now choose between you and accused 1. Who is telling the court lies? Between you and accused 1, who is telling the court lies on this aspect? I know it is a difficult thing you do not want to say you are telling lies and you are afraid of accused 1 to say accused 1 is telling lies but unfortunately you have to choose. If you are telling lies, say I am telling lies. If accused 1 is telling lies say he is telling lies. – Accused 1 was mistaken when he said the iron part is round. It is a long iron part.

So he was not telling lies, he was just mistaken. What do you say? – Yes.

It is a beautiful way of putting it. You do not want to say a man is lying. Is that not so? You do not want to answer that one. It is a difficult question is that not so? This magistrate is asking difficult questions, is that not so? – That is correct.

The cruel magistrate. Thank you, go back there." (Emphasis added).

[34] One thing is certain, the questions by the court were not for clarification but intent upon trying to pressurise the appellant into saying things the court wanted him to say. First of all, it is wrong for a presiding officer to limit a witness to answering only "Yes" or "No".[9] Secondly, he misled the witness by suggesting that his testimony was different to that of appellant 1's testimony in regard to the shape of the spare part. The record shows that appellant No. 1 was not called upon to give a description of the length of the spare part at all. Nor did he say the iron was round. Appellant No. 1 merely described it as a "tie rod end" which is used somewhere on the wheels of a motor vehicle. There was therefore no conflict between the evidence of appellant No. 1 and appellant No. 2 in regard to the shape of this particular spare part. Thirdly it is wrong for a presiding magistrate to refer to the words used by a witness testifying in his home language which is understood by the presiding officer

9 See **S v Greyling** 1991 2 SACR 233 (N) at 239g and 240d.

and then refer to something which was apparently not transcribed into the record. In any event, appellant No. 3, who is a mechanic, confirmed that the spare part is in fact round and not square or flat. The tenor of the presiding officer's questioning was in the nature of cross-examination to "test" the witness and not merely to clarify obscure matters. Furthermore, he was sarcastic about the questions he posed to the witness. The questions were not difficult to answer and were in fact answered. The magistrate was, however, verbose and put his questions in a convoluted and long-winded manner, which exacerbated the confusion rather than elucidating the evidence.

[35] The evidence in chief of appellant No.3, was a mere 28 lines of the typed record i.e. just more than one page. The prosecutor cross-examined shortly, which was typed within the space of 53 lines of the record, i.e. just more than 2 pages. Thereafter, in typical fashion, the presiding officer proceeded to ask long-winded and repetitive questions recorded on 4½ pages of the record i.e. approximately 115 lines. Again he raised the subject whether the spare part was round or not and again misled appellant No. 3 as to what appellant No. 1 had to say about the shape of the spare part. He also misled the witness in regard to what appellant No. 1 had said in regard to how he knew appellant No. 2. A typical example of his cross-examination of appellant No. 3 is the following extract:

> "Now the court wants to, you heard the complainant say you three are the people that robbed them. You heard that? – Yes I heard him (sic) say that.
>
> I hear the prosecutor ask, but gentlemen, now, if really the complainant saw you, I mean you are saying on the other hand we did not do it. I mean, **why would the complainant who do (sic) not know you and the witnesses, why would they just come and tell lies about you.** Now it is your opportunity to answer? Prosecutor went on and say(sic) the witnesses give a role which each one of you play. They say accused 1 had a firearm accused 2 and 3 were searching them. There was a customer who was also searched. - I cannot say how they pointed us out but I am surprised about what they are saying.

> You say you were at home accused 2 at home, accused 1 in Pretoria but all three of you they are connecting you to the same incident. The question is how come? – Because they saw us walking together the three of us on the day we were arrested maybe they just, it was a matter of mistaken identity." (Emphasis added).

[36] The aforesaid type of questioning is a typical line of cross-examination adopted by prosecutors when cross-examining an accused person. It is improper for a presiding officer to ask this type of question in the fashion aforesaid, because it amounts to cross-examination intended to establish the accused's mendacity.

[37] Although a presiding officer is sometimes obliged to ask questions of witnesses, it is important to guard against conduct which could create the impression that he or she was descending into the arena of conflict or that he or she was partisan or had pre-decided issues which should only be decided at the end of the trial. Nor should a presiding officer put attacking propositions to an accused. Such conduct can create the impression that the presiding officer is acting as a cross-examiner, associating himself with the State's case against the accused.[10] Although putting lengthy questions to an accused is *per se* relatively a neutral factor, the more important aspect is the manner of questioning. An irregularity will occur when questions are put to an accused so belligerently or intimidatingly or so repetitively or confusingly as to amount to judicial harassment[11].

[38] In my view the questioning by the presiding officer of the appellants, was intimidating, hostile, repetitive and engineered to entrap the appellants in order to get the appellants to admit that they were guilty of the offence as charged.[12] The manner in which the questions were asked, amounted to judicial

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10 See **S v Maseko** 1990 1 SACR 107 (A) at 118c – f.

11 See **S v Gerbers** 1997 2 SACR 601 (SCA) at 608 g-i.

12 See **S v Kekana** 1999 1 SACR 618 (T) at 621h - i; **S v Msithing** 2006 1 SACR 266 (N); **S v Mathabathe** 2003 2 SACR 28(T); **S v Matthys** 1999 1 SACR 117 (C).

harassment. In my view, his conduct created an impression that he was not impartial, fair or open-minded and amounted to the presiding officer taking over the prosecution of the appellants. He did not guard against his own actions or personal opinions and whims.[13] In my opinion, the aforesaid conduct of the presiding magistrate constituted an unjustified descent into the arena and he became "blinded by the dust of battle".

[39] The question then arises whether or not the irregularity in the present instance of descending into the arena, constituted a failure of justice. The test to be applied by courts has been laid down in **S v Felthun** 1999 1 SACR 481 (SCA) at 485h – 486b where the following was said:

> "Generally speaking, an irregularity or illegality in the proceedings at the criminal trial occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated and conducted. The basic concept ….is that an accused must be fairly tried…..
>
> As to the question whether there has been a failure of justice, this Court has in a number of decisions recognized that in an exceptional case the irregularity may be of such a kind that it *per se* results in a failure of justice vitiating the proceedings…. Where the irregularity is not of such a nature that it *per se* results in a failure of justice, the test to be applied to determine whether there has been a failure of justice is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no resultant failure of justice".

[40] In my opinion, the entire defence case was affected by the magistrate's irregular conduct in descending into the arena. Each of the appellants was unduly cross-examined and harassed by the presiding officer. In each case the impression was created that the magistrate was not fair, impartial and open-minded.

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13 See **S v Mabuza** 1991 1 SACR 636 (O); **S v Aspeling** 1998 1 SACR 561 (C).

[41] As far as the state case is concerned, it would be impossible to say what the outcome would have been, had the defence version been properly put to the two state witnesses. If the evidence of the two state witnesses are viewed in isolation, it would seem as if the case against the appellant is strong on the merits. However, it must be appreciated that the cross-examination by O'Marjee of the two state witnesses amounted, in effect, to no cross-examination at all. On the other hand, the defence witnesses were cross-examined by both the prosecutor and the presiding officer at length. In my opinion that leads to a result that doubt is cast as to the fairness of the trial.[14] I am therefore of the view that the irregularity arising out of the presiding officer descending into the arena is such that it rendered the trial *per se* unfair, thus causing a fundamental failure of justice.

CONCLUSION

[42] Even if it would be correct to say that the two irregularities discussed above, independently viewed, would not be sufficient to constitute an irregularity which vitiated the proceedings, I am of the view that the cumulative effect of the two types of irregularities which occurred in the court *a quo*, were sufficient to justify the conclusion that indeed a failure of justice occurred.[15] I am therefore of the view that the irregularities which occurred in the court *a quo* are sufficient to justify the conclusion that the entire proceedings in the court *a quo* are vitiated thereby.

The following order is made:

The convictions and sentences imposed by the court *a quo* on all three the appellants, are set aside and the appellants are acquitted of all

14 See **S v Tilo** 2006 2 SACR 266 (NC).
15 See **S v Magalane** 1999 1 SACR 627 (W).

charges.

DATED AT JOHANNESBURG ON THIS 14th DAY OF FEBRUARY 2008.

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C.J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

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N. F. KGOMO
ACTING JUDGE OF THE HIGH COURT

Counsel for the appellants: Adv. S.I. Roothman
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Counsel for the respondent: Adv. Mothibe

The case was argued on Thursday 31 January 2008