

SOUTH AFRICA / JUDGMENT

S v Klaas (CA & R 69/08) [2010] ZAECGHC 56; 2011 (1) SACR 630 (ECG) (5 March 2010)

[2010] ZAECGHC 56

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.M. Roberson, L.T. Sibeko

CASE / FILE NUMBER

CA & R 69/08

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE,
GRAHAMSTOWN)

Case

No.: CA & R 69/08

Date

Delivered: 05/03/10

In

the matter between:

THE
STATE
vs
ZANDISILE
KLAAS
REVIEW

JUDGMENT

ROBERSON J:

The appellant was convicted in the Magistrate's Court, East London, of two counts of assault and sentenced to 12 months

imprisonment on each count, the sentences to run concurrently. He appealed to this court against the convictions and sentences but on the day on which the appeal had been set down for hearing, his legal representative was absent and the appeal was struck from the roll. However we had concerns about the fairness of the trial, as a result of certain remarks made by the magistrate

during the proceedings, and invoked this court's inherent powers of review. In a helpful and prompt response, Advocate Marais of the office of the Director of Public Prosecutions informed me that the State abided the decision of the court.

The record reflects that the appellant was initially represented by an attorney, Mr. Gabelana, but on 23 November 2007 the magistrate recorded "attorney absent – no reasons given, accused cannot get him on phone – warned that matter will proceed without attorney if he fails to appear". The case was postponed to 7 December 2007 and the trial was held on that day. The appellant was not legally represented at his trial. The putting of the charges to the appellant and his pleas of not guilty were not mechanically recorded and the mechanical recording only commenced after he had pleaded. In a covering memorandum to the record, the magistrate said as follows:

"A verbatim reconstruction of the initial discussion on 7th December 2007 is not possible, as I have no recollection of the actual words used."

The absence of any legal representative was discussed between the court and the accused. The state did confirm that they had not been contacted by any attorney.

The accused informed the court that he had not contacted his previous attorney. He confirmed that he was aware of his rights, which had been explained. He stated that he had decided to conduct his own defence. (See also the courts contemporary remarks in this regard on page 23 of the record.)"

The complainants in the two charges were police officers. In the first count it was alleged that the appellant had assaulted the complainant by grabbing her by the neck whilst wielding a knife, throttling her and causing her to believe he would stab her. In the second count it was alleged that he had advanced on the complainants while wielding a panga and threatening to assault them with the panga. The appellant was invited to indicate the basis of his defence and stated as follows:

"Me and my girlfriend had an appointment to go and have some meals at Vincent. As I was on my way to Vincent I blacked out in the taxi. Upon my arrival at Vincent I was there at Klippers, a fish and chips place. And inside of me was something that was making me uncomfortable of which I didn't know what it was. Upon my arrival at Klippers I hit my girlfriend with a fist on the forehead. And then this thing that was inside of me said that I must continue to assault her, but I ran off instead. I ran home. As I arrived home, it said I must switch off the lights and I switched them off. Then there was a knock and I went to open, and it seems that it was police. And it said I must assault them. I didn't assault them, but there was a confrontation between me and the police and it started there. Then I locked the burglar gate because I didn't want them to enter. They wanted me to come out because I assaulted my girlfriend who was in Vincent and I was there. And I didn't want to go out. Then I was shot whilst I was inside the house. That is how far I can remember."

The magistrate's immediate response to this statement was as follows:

"Okay, well I least (sic) I know now why Mr. Gabelana didn't show up."

The trial then proceeded. During his judgment, when convicting the accused, the magistrate also said:

“The accused’s attorney, clearly having decided that discretion was the better part of valour, left the accused to decide to undertake his own defence.”

[4] In view of the fact that the fairness or otherwise of the trial as a result of the magistrate’s remarks, was not one of the grounds of appeal, the magistrate was requested to comment on our concerns. His response was as follows:

“I would have to admit that the remarks appear to reflect a degree of scepticism that was unfortunate, although they were directed in essence at the behaviour of the attorney. In the light of the defense (sic) advanced I am sure the Judge will understand this and I do not wish to comment on the merits of the matter here, but the decision must rest in the hands of the Honorable (sic) Judge.”

[5] In *S v le Grange and others*

[2008] ZASCA 102; 2009 (1) SACR 125 (SCA), Ponnann JA said at paragraph [21]:

“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 order and security depend. Fairness and impartiality must be both subjectively present and objectively

demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean ‘a departure from the standard of even-handed justice which the law requires from those who occupy judicial office.’ In common usage bias describes ‘a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.’”

[6] If one considers the remarks of the magistrate in the light of the above passage it is very clear in my view that the appellant did not have a fair trial. The initial remark after the plea explanation could only be interpreted as an expression of disbelief of the appellant’s defence, before any evidence at all had been heard. What the magistrate effectively said was that he had already made up his mind that the appellant’s version would be rejected and that he was guilty. In my view this expression of actual bias and disbelief rendered the subsequent proceedings a complete sham and a nullity. There was no point in carrying on with the trial. An accused cannot be said to have had a fair trial when the presiding officer

states at the outset that he is not going to believe the accused's version. The remark made during judgment confirmed the magistrate's earlier expression of disbelief.

- [7] In my view it is irrelevant that the trial was otherwise conducted apparently fairly, that the convictions were justified by the evidence and that the sentences were suitable. The conduct of the magistrate vitiated the entire proceedings.

In *S v le Grange* (supra) the trial court had engaged in lengthy questioning of the accused. Ponnann JA said at paragraph [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."

In the present matter the appellant's right to a fair trial was fundamentally violated and the proceedings must be declared invalid.

- [8] I add that I consider the magistrate's conduct in making the remarks that he did, to be most unfortunate, not only because of the bias displayed but also because such remarks lower the dignity of the court, undermine the seriousness of a trial, and have the potential to undermine the public's confidence in the courts. In addition, an accused having to undertake his own defence after his attorney fails to appear, is not a matter for humour.

Order

- [9] The following order is made:

The convictions of the appellant and the sentences imposed are set aside.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

SIBEKO AJ:

I agree.

L.T. SIBEKO

JUDGE OF THE HIGH COURT (ACTING)

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