



**REPORTABLE**

CASE NO: SA 29/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**Appellant**

and

**S S H**

**Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and HOFF JA

**Heard:** 3 July 2017

**Delivered:** 19 July 2017

**Summary:** The trial judge in this case recused herself when it became apparent to her that the respondent (the accused), being tried before her, was in the meantime convicted of another unrelated and undisclosed offence. The judge invited counsel to address her on whether or not she should recuse herself. Although invited to do so, the accused did not express a view whether or not the judge should recuse herself. It is clear from the record that the offence the accused was apparently convicted of was

never disclosed to the judge. Prosecuting counsel did not support the judge's recusal but the accused's counsel did, hence the appeal by the State.

The trial judge concluded that her knowledge of the accused's status as a convict made her uncomfortable and that it infringed on his right to a fair trial as contemplated in Art 12(1) of the Namibian Constitution; that her discomfort in presiding in the matter caused the accused to entertain a reasonable apprehension that she would be biased against him.

On appeal, court *held* that there is in our law no absolute rule that merely upon becoming aware that an accused is a convicted criminal the trial judge must recuse himself or herself. A recusal will be justified if it becomes apparent to the trial judge that the previous conviction has a striking similarity to the case before court or the conviction in question appears proximate in time and place to the one before the trial judge. The guiding principle must always be the imperative to avoid potential prejudice to the accused.

Court further *held* that the notion that knowledge of an accused's conviction, regardless of its seriousness or similarly, has the effect of rendering a trial inherently unfair is one that cannot be supported. The considerations which weigh heavily in a jury system do not find application in Namibia where professional judges and magistrates try facts and are guided by (a) what is admissible evidence and (b) a very high standard of proof (beyond reasonable doubt) in a criminal trial.

The court further held that the trial judge misdirected herself and the recusal was not justified in the circumstances of this case. The appeal succeeds and the case remitted to the trial judge to finalise the trial.

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## APPEAL JUDGMENT

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DAMASEB DCJ (SMUTS JA and HOFF JA concurring):

[1] The State, as appellant in these proceedings, was granted leave by the High Court to appeal against the trial judge's *mero motu* recusal from pending criminal proceedings. The main reason for the judge recusing herself was the fact that she became aware, during the respondent's (the accused's) appearance before her during a continuing trial, that he was convicted of a crime. The rationale proffered for the recusal is that the judge's knowledge of an accused's conviction of a crime, before the court pronounces itself on the guilt of the accused, is prejudicial to his or her case and constitutes a fatal irregularity which offends the right to fair trial by an 'independent, impartial and competent court' as guaranteed under Art 12(1)(a) of the Namibian Constitution. At the time that the trial judge recused herself, the prosecution had led most of the witnesses and only the DNA results were being awaited before the defence case opened.

### Background and proceedings *a quo*

[2] The accused had pleaded not guilty to charges of housebreaking with the intention to steal, housebreaking with the intention to rob and robbery, and two counts

of contravening s 2(1)(a) of the Combating of Rape Act, 2000 (Act 8 of 2000) - rape. When the trial commenced on 28 May 2013, the accused was released on bail on these charges but was kept in custody awaiting trial in another matter. During pre-trial and at the commencement of the trial, the accused wore civilian clothes but at the trial-within-a-trial and during subsequent court appearances, he was brought to court in prison garb. This alerted the trial judge that the accused was no longer trial awaiting but a convicted offender serving a prison term. Upon so becoming aware, the presiding judge directed the Correctional Service officers to facilitate that the accused in future be brought to court in civilian clothing.

[3] The court *a quo mero motu* addressed the propriety of the accused being brought to court in prison attire with both counsel. She was advised by State counsel that it was for security reasons. On 28 July 2014, the learned judge intimated in open court in the presence of the accused that his continued appearance before court in prison clothing constituted an irregularity that would cause her to *mero motu* recuse herself. Counsel were then invited to address the court on the issue.

[4] Prosecuting counsel submitted that the manner in which the accused came to court did not constitute an irregularity justifying the judge's recusal. Counsel pointed out that it was not in the interest of the State or the victims to suspend the proceedings given the resources already spent and the expectation that the matter be finalised promptly. As regards the apprehension of bias, counsel stated that the judge, because of the judicial oath to do justice impartially and without bias, should be able to disabuse

herself of any possibility of bias and that such a presumption cannot be negated by the mere fact of the accused appearing in prison attire.

[5] Counsel on behalf of the accused, however, emphasised the impropriety of the practice of prisoners being brought to court in prison garb. She argued that the court *a quo* indicated its view on the matter ie that it cannot be expected of presiding officers to ignore such evidence and not to draw any inference therefrom and that such inferences compromise the accused's right to be presumed innocent until proven guilty beyond reasonable doubt. Counsel therefore supported the judge's recusal. Both counsel substantially relied on the same reasoning in this appeal and I see no productive purpose in repeating the arguments on appeal. I will, however, where necessary, make reference to concessions and novel arguments made during oral argument on appeal.

#### Basis for the decision on recusal

[6] The court *a quo* correctly pointed out that ss 89, 197 and 211 of the Criminal Procedure Act, 1977 (Act 51 of 1977) (the CPA) limit the admission of evidence of an accused's previous conviction(s) before a conviction and to admit same may constitute an irregularity. She accepted that such irregularity does not *per se* vitiate the proceedings or automatically oblige a presiding officer to recuse himself or herself (*S v Maputle & another* 2003 (2) SACR 15 (SCA)). The trial judge pointed out that because of the improper disclosure, she laboured under the perception, to the prejudice of the

accused, that he is a person of bad character, a consideration which compelled her to recuse herself.

[7] The court *a quo* emphasised that although the mere appearance of the respondent in prison attire did not deny the respondent a fair trial, she was concerned about the accused's apprehension about the impartiality and fairness of the trial. According to the trial judge, the accused's continued attendance in court in prison attire, aggravated by the Correctional Service officials' failure to adhere to the court's order to have the accused brought in civilian clothing, highlighted his previous convictions to his prejudice. The court *a quo* further reasoned that, because of the improper disclosure, the accused might form the view that the court will not give him a fair trial, undermining his right to be presumed innocent until proven guilty. The trial judge at para 15 of her judgment stated that:

[15] Inasmuch as it may be argued that the court has a duty to sit in a matter and that it ought to be in a position to disabuse its mind; it cannot ignore the accused's perceived apprehension that the court may not be unbiased. I have on a number of occasions remarked on the clothing of the accused and it is evident that I have placed some emphasis on this fact. My reasons for doing so is not relevant when I consider whether or not to recuse myself. The accused, under the circumstances of this case, has reasonable grounds to believe that I would be biased and his apprehension that I would not be able to disabuse my mind from the fact that he has been previously convicted of an offense, is to my mind reasonable. I am mindful of the interest of the State but in this instance and on the facts of this case, it is my considered view that it would be right and proper for me to recuse myself.' (Emphasis supplied.)

[8] The learned judge therefore took the view that the accused being brought to court in prison attire constituted an irregularity that vitiated the proceedings. According to her, a slight possibility of bias would create reasonable grounds to believe that the court would not be impartial and that there were, therefore, sufficient and reasonable grounds by the accused for the apprehension of bias.

[9] The trial judge recused herself and ordered that the matter be heard *de novo* before another judge. Counsel for the appellant brought an application for leave to appeal to the Supreme Court in terms of s 316A, read with s 316 of the CPA. The court *a quo* granted the State leave to appeal.

### The appeal

#### *Grounds of appeal*

[10] The State does not support the judge's *mero motu* recusal and impugns the conclusion reached by the trial judge that the appearance of the respondent in prison garb is a fatal irregularity which goes to the roots of his right to fair trial. It is stated that the judge ignored the principle that a reasonable apprehension of bias must be based on clear facts sufficient to negate the presumption of judicial impartiality. Crucially, the State maintains that the court *a quo* misdirected itself in failing to strike a balance between the competing interests of the State and those of the respondent.

### *Submissions on appeal*

[11] Mr Shileka appeared for the appellant and Ms Mugaviri for the respondent. Mr Shileka emphasised that the recusal by the trial judge was not merited. Counsel submitted that the trial judge misdirected herself by holding that there was a reasonable apprehension of bias on the part of the accused in the absence of clear facts which would negate the presumption of impartiality of a judge. He argued that the possibility of bias is negated by two factors. Firstly, there was no formal recusal application, secondly, even with her knowledge of the accused's convictions, the trial judge ruled in his favour to exclude alleged confessions after a trial-within-a-trial.

[12] Although Ms Mugaviri conceded that no formal application for recusal or a complaint was made by the accused for the recusal of the trial judge, she maintained that the fact that the trial judge now knows that the accused is a convicted prisoner is prejudicial to his case and there is a reasonable apprehension that the trial judge would be biased against him.

### Evidence of bad character generally impermissible

[13] Evidence of a previous conviction is admissible only after conviction in terms of s 271 of the CPA. Proof of previous convictions during trial is, in general, prohibited in an accusatorial system of criminal justice because of the highly prejudicial effect it has on the mind of the trier of fact. The CPA in ss 89, 197 and 211 seeks to protect an accused against evidence of bad character because the bad character of an accused,

if revealed, may potentially negatively influence a trier of fact.<sup>1</sup> Courts must therefore guard against the admission of inadmissible, irrelevant and prejudicial evidence.

[14] In terms of s 211 of the CPA it is only where the fact of a previous conviction is an element of an offence with which an accused is charged that evidence of past bad character is admissible. Section s 89 compliments s 211 and prohibits any allegation in any charge sheet that an accused was previously convicted of an offence. Section 197 provides that, as a general rule, an accused may not be asked questions which tend to show that he or she is person of bad character.

[15] The mischief sought to be addressed by these provisions of the CPA will be undermined if the authorities are permitted to cause an accused person to appear in court in prison garb and in so doing reveal that he or she has a previous conviction and is a person of bad character. The undesirable practice was considered in *S v Mthembu & others* 1988 (1) SA 145 (A) where the court deprecated it. Smalberger JA observed at 154 that 'the extent of the influence which inadmissible evidence or prejudicial information which comes to light during a trial may have on the subconscious mind of a presiding officer cannot be measured and the need exists to guard against anything irregular or untoward happening at a trial which has the potential for prejudicing an accused person'.

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<sup>1</sup> *S v Dominic* 1913 TPD 583.

[16] Cachalia J adopted the same approach in *S v Maputle* 2002 (1) SACR 550 (W) and emphasised that there can be no doubt that evidence or information regarding an accused's status as a convicted prisoner which comes to light prior to or during the course of a trial is potentially prejudicial to an accused because of the highly prejudicial effect it may have on the mind of the trier of fact. The court stated at 553B-D that:

'The practice of allowing accused persons to appear in court in prison garb is strongly condemned and judges have in the past not hesitated to recuse themselves when an accused person has appeared before them either in prison clothing or in chains. The reason for this is that the court may draw an inference that he is a man of bad character. (Footnotes omitted).

In the case of *Estelle v Williams* (1976) 425 US 501, the United States Supreme Court explicitly recognised the danger that the accused's appearance in prison attire may have on the judgment of a juror. It went on to hold that an accused may not be compelled to stand trial in identifiable prison clothing. Brennan J (dissenting at 518 and 519) sets out succinctly how the right to a fair trial and the presumption of innocence is compromised by the appearance of an accused person in prison clothing as follows:

"When an accused is tried in identifiable prison garb, the dangers of denial of a fair trial and the possibility of a verdict not based on the evidence are obvious.

Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt. Jurors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact he poses a danger to the community or has a prior criminal record; a significant danger is thus created of corruption of the fact finding process through mere suspicion. The prejudice may only be subtle and jurors may not even be conscious of its deadly impact, but in a system in which every person is presumed

innocent until proved guilty beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk. Jurors required by the presumption of innocence to accept the accused as a peer, an individual like themselves who is innocent until proved guilty, may well see in an accused garbed in prison attire an obviously guilty person to be recommitted by them to the place where his clothes clearly show he belongs. It is difficult to conceive of any other situation more fraught with risk to the presumption of innocence and the standard of reasonable doubt.

Trial in identifiable prison garb also entails additional dangers to the accuracy and objectiveness of the fact finding process. For example, an accused considering whether to testify in his own defense must weigh in his decision how jurors will react to his being paraded before them in such attire. It is surely reasonable to be concerned whether jurors will be less likely to credit the testimony of an individual whose garb brands him a criminal. And the problem will most likely confront the indigent accused who appears in prison garb only because he was too poor to make bail . . .”

These persuasive remarks must however be considered against the background of the jury system in the United States. In our legal system trained judicial officers are expected to, and often do disabuse their minds of prejudicial information about an accused which may inadvertently come to their attention. . . . In the United States while the practice of accused persons appearing in prison garb has met with judicial disapproval the courts have held that such an accused is required to show prejudice before a conviction can be overturned. (See *Hall v Cox* 324 F Supp 786 (WD Va 1971); *McFalls v Peyton* 270 F Supp 577 (WD Va 1967).

While there can therefore be no doubt that the practice of an accused person appearing in prison attire is irregular and must be disapproved of in the strongest terms, the question that this Court must ask is whether the irregularity has prejudiced the accused in a way which has resulted in a failure of justice. (Underling for emphasis.)

[17] This decision was confirmed by the Supreme Court of Appeal in *S v Maputle & another* 2003 (2) SACR 15 (SCA) at 15E-G where the court stated:

‘Even under the new constitutional dispensation it remains untenable to argue that simply because a judicial officer has been made privy to information prejudicial to an accused, the accused has not received the fair trial which the Constitution of the Republic of South Africa Act 108 of 1996 guarantees. Section 35(5) contemplates that the admissibility of evidence which will be prejudicial to the accused will be adjudicated upon by the trial court. In the process the nature of the evidence could well become known to the court. Yet the section does not contemplate that in such a case the trial is automatically rendered unfair.’

#### When is recusal warranted?

[18] There are two circumstances in which a judge must recuse himself or herself. The first is where the judge is actually biased or has a clear conflict of interest and the second is where a reasonable person, in possession of the facts, would harbour a reasonable apprehension that the judge is biased.<sup>2</sup> The protection of the constitutional principle of judicial impartiality imposes on the judge the duty to recuse if a reasonable person would have a reasonable apprehension that the judge is biased.

[19] The test of reasonable apprehension of bias was authoritatively stated in *S v Munuma & others* 2013 (4) NR 1156 (SC). Strydom AJA at 1160H-I clarified that the correct test is the ‘reasonable suspicion test’: the test for the recusal of a judge is ‘whether a reasonable, objective and informed person would on the correct facts

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<sup>2</sup> O'Regan K & Cameron E .2011. *Judges, Bias and Recusal in South Africa*. In Lee (ed) *Judiciaries in Comparative Perspective*. Cambridge: Cambridge University Law Press, p 346-360.

reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case'. (See also *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC) at 769 and *Lameck v The State* (SA 15/2015) [2017] NASC (19 June 2017), paras 50 - 54).

[20] The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. An impartial judge is a fundamental pre-requisite to a fair trial and a judicial officer should recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer was not or will not be impartial. The position is the same in South Africa: *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 48 and *South African Commercial Catering and Allied Workers Union & others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at 714A.

[21] In order to justify a recusal, either at the instance of a litigant or the judge recusing herself or himself *mero motu*, it must be demonstrated that the apprehension is that of a reasonable person based on reasonable grounds.

[22] The presumption of a judge's impartiality is not easily dislodged and requires cogent or convincing evidence or reason to rebut the presumption of judicial impartiality. A judge has a duty to hear a case unless the test for recusal is met.

### Analysis and disposal

[23] Whether or not the appearance of an accused in prison attire will taint the fairness of a trial will depend on the facts of the case. Prison authorities are warned to be alive to the courts' concern about exposing the fact that a prisoner on trial has previous convictions. In order to protect an accused against possible bias because he or she is a convicted person, it is improper and undesirable for prison authorities to bring an accused to court in prison garb. Where that injunction is not followed, a trial judge may, if the circumstances justify, recuse himself or herself *mero motu*. A recusal should not happen if its sole or dominant purpose is to 'teach the authorities a lesson' for not obeying the injunction. If, because of surrounding circumstances in which the accused's status as a convicted prisoner comes to light, there is a genuine concern that he or she might not get a fair trial, *mero motu* recusal may be justified.

[24] There is in our law no absolute rule that merely upon becoming aware that an accused is a convicted criminal the trial judge must recuse himself or herself. I can think of an obvious case where recusal might be justified: If it becomes apparent to the trial judge that the previous conviction which improperly comes to light has a striking similarity to the case before court or the conviction in question appears proximate in time and place to the charge against the accused standing trial. The guiding principle must always be the imperative to avoid potential prejudice to the accused.

[25] I have no doubt that in the present case the trial judge acted out of the purest of motives but approached the matter on wrong principle. In the first place, although

specifically invited to express a view on whether or not the judge should recuse herself, the accused chose not to do so. As already shown, even in a jury system the test for recusal where an accused's status as a convict is disclosed, is prejudice.

[26] The trial judge's finding that the accused harboured a reasonable apprehension of bias was therefore not justified. Secondly, the learned judge presided in the matter even after she became aware that he was a convicted prisoner and, after a trial-within-a-trial, ruled in his favour in a contentious interlocutory matter. One would have thought that if ever there was justification for recusal that should have occurred the very first time the presiding judge became aware of the accused's status. It is apparent from the record that had the prison authorities heeded her direction when first given, she would have been content to proceed to preside in the matter. Why would the judge's knowledge of the accused' previous conviction not have had the effect on her subconscious which she was concerned about, just because the authorities did not heed her order?

[27] An even more weighty consideration is the fact that nowhere on the record was it apparent what the accused became convicted of. For all we know, he could have been convicted of a failure to pay maintenance or not paying a traffic fine. It stretches the bounds of reason to suggest that knowledge of such a conviction would negatively influence the mind of a judge against an accused charged with rape and robbery.

[28] The notion that knowledge of an accused's conviction, regardless of its seriousness or similarity, has the effect of rendering a trial inherently unfair is one that cannot be supported in our jurisdiction. The serious consequences of such an approach is demonstrated by the facts of this case: There are only three judges in the Northern Local Division, of whom only two preside in criminal matters. Can one safely assume that the remaining judge is not aware of his colleague recusing herself and the reason why? If the trial judge's reasoning is followed through to its logical conclusion, special arrangements and resources must be deployed to have the matter heard by a judge who bears no knowledge at all about the matter. I do not think that is practical or justified by the circumstances of this case.

[29] The considerations which weigh heavily in a jury system do not find application in Namibia where professional judges and magistrates try facts and are guided by (a) what is admissible evidence and (b) a very high standard of proof (beyond reasonable doubt) in a criminal trial. Given the rather neutral nature of the disclosure of the accused's conviction, his indifference to whether or not the judge should recuse herself, and the judge's demonstrated fairness towards him in the conduct of the trial even after she became aware of his conviction, the prejudice to the accused is, at worse, *de minimis* as to merit disregard.

[30] I am therefore satisfied that on the facts of this case a *mero motu* recusal was not justified and would accordingly allow the appeal.

Order

[31] In the result, the following order is made:

1. The appeal succeeds and the order of the High Court is set aside.
2. The matter is remitted to the High Court, Northern Local Division, for continuation of trial before Tommasi J.

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**DAMASEB DCJ**

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**SMUTS JA**

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**HOFF JA**

APPEARANCES

APPELLANT:

R Shileka (with him E E Marondedze)

Office of the Prosecutor-General, Oshakati

RESPONDENT:

G Mugaviri

Instructed by the Directorate of Legal Aid, Oshakati