WINNING AT ALL COSTS TOO COSTLY

S v Rozani; Rozani v Director of Public Prosecutions, Western Cape 2009 1 SACR 540 (C)

It is universally accepted that the prosecutor represents the community generally at the trial of an accused person:

> "Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one" (Deane J in *Whitehorn v The Queen* (1983) 152 CLR 657 663-664).

1 Introduction

The role of the public prosecutor is one to be respected. Members of society expect to enjoy lives free of violence, theft and other criminal violation; in return, they surrender the exercise of "vengeance" and vigilantism to the state. The public prosecutor (*inter alia*) is entrusted with the duty of ensuring that justice is served in bringing transgressors to book. The public prosecutor thus has the onerous task of ensuring that the rights of victims are served and given a voice, but at the same time doing so in a manner which upholds the basic tenets of a free, fair and just society.

The duty and role of the defence attorney (state appointed or otherwise) is much the same. He or she is expected also to serve justice by giving his or her client (paying or *pro bono*) the best service and defence he or she is capable of. Obviously, this does not mean conjuring up or "manifesting" a defence. But he or she must, at the very least, prevent his or her client from pleading guilty to an offence where one was not committed.

The recent decision in *Rozani* (2009 1 SACR 540 (C)) makes it evident that the fulfilment of such goals and ideals is not easy.

The legal profession has gained a rather dubious reputation, attracting epithets such as "con-artist", "shyster", "opportunist" and "shark", amongst others (Public Perception of Lawyers www.abanet.org/litigation/lawyers/publicperceptions). The perception that individuals join the profession only to make a "quick buck" has stuck and the case at hand certainly seems to show this, reflecting not only a callous disregard for justice, but also what is blatant incompetence on the part of both the prosecutor and the defence attorney. Reading the facts of the matter, one wonders about the general standard of lawyers entering the profession – one cannot but marvel at the farcical aspect of the facts in *Rozani*.

The main objective of practitioners within a criminal justice system should not be to win at all costs, but rather to ensure that justice is served. The facts leading up to the review in *Rozani* reflect the prosecutor's need to chalk up wins and the defence attorney's need to meet fee targets at whatever cost:

> "It is the overriding duty of the prosecuting authority, not to 'win' convictions, but to see to it that justice is done: this may, of course, include the acquittal of accused persons whose guilt cannot be proved beyond reasonable doubt. A prosecutor is expected at all times to act in a manner which is responsible and fair to the accused, and to be candid and open with the court. Hence it is said that it is the duty of a prosecutor to place all the material before the court which is at his disposal, provided that it is relevant and admissible. Fortunately, this normally happens" (*Rozani supra* 549J-550A).

The decision and remarks from the bench form a sobering commentary on the state of the criminal courts and the pursuit of justice in South Africa. While the level of crime in this country bolsters the need to convict criminals, this provides no excuse for disregarding the basic tenets of justice.

2 Facts

The matter was heard in the regional court where the accused pleaded guilty to two counts of rape and one count of attempted rape. This he did in terms of a section 112(2) (of the Criminal Procedure Act 51 of 1977) statement drafted by his defence attorney. The accused was found guilty based on the admission in his plea statement that he had had non-consensual sexual intercourse with the complainant, a minor.

The matter was brought on review to the Cape Provincial Division of the High Court. The founding affidavit stated that he (the accused) had never penetrated the complainant and that he had never instructed his attorney that he had penetrated her; further that his attorney had never asked him if he had done so and merely assumed that sexual intercourse had occurred between the complainant and the accused. The crux of his review application was that he had pleaded guilty to something which was not a crime (the offence having been committed prior to the passing and implementation of the Criminal Law Amendment Act 105 of 1997).

It transpired at the review application that the prosecution had in its possession as evidence a J88 Form confirming that no sexual penetration by the penis of the accused into the vagina of the complainant had occurred on any of the three occasions in question, with the district surgeon confirming that the hymen of the complainant was intact and that she was still virginal. This, it appeared, had deliberately (by both the prosecutor and the defence attorney – *Rozani supra* 549F-550D) been withheld from the purview of the court. Also, there had been a further failure of justice at the hands of the defence attorney who allowed his client to sign two formal admissions in which he admitted to having had "sexual intercourse" with the complainant, showing no regard for the fact that one of the definitional elements of the crime of rape was penetration as described above. The attorney further failed to bring to the court's attention the existence of the J88 Form. All of these circumstances could have resulted in the bench asking the relevant

questions and thus the plea being changed to "not guilty" in terms of the procedure set out in section 113(1) of the Criminal Procedure Act.

3 Issue

The matter which the court had to decide was whether the failure of the prosecutor and the defence attorney to disclose the existence and content of the J88 Form to the magistrate constituted a gross irregularity.

4 Procedure in terms of section 112

Section 112(1)(b) of the Criminal Procedure Act is a procedure *in favorem innocentiae*. The questioning by the court is meant to elicit whether or not the accused actually pleads guilty to all the essential elements of the offence, and whether or not he or she offers some explanation (defence) for his or her behaviour. The possibility exists that the accused might, in fact, have a valid defence – this is particularly so in the case of an undefended accused.

Because the procedure is *in favorem innocentiae*, it becomes necessary for the accused to answer questions from the bench:

> "(A)n accused person cannot require that a plea of guilty be accepted without at the same time accepting the obligation to answer questions. A right to continue to remain silent is inherently incompatible with a plea of guilty" (*S v Damons* 1997 2 SACR 218 (W) 224g-h).

This automatically forces one to consider the accused's right to remain silent and whether the sentiment expressed above amounts to a violation of such privilege. It is submitted that in light of the procedure and purpose of section 112, questions (and the answers of the accused) are necessary to protect the accused from wrongful conviction. Where an accused is informed of his or her right to remain silent before he or she pleads and then refuses to plead, the trial will continue as though he or she had in fact pleaded not guilty. In that situation there is no prejudice suffered by the accused as the onus rests with the state to prove his or her guilt. There is, however, the need for questioning when an accused puts up a statement in terms of section 112(b). The case at hand is evidence of the need for questions from the bench.

The travesty of justice in this case lies in the fact that the accused was represented; he had an attorney, and one might assume that said attorney would have informed him of his rights, defences, and whether or not he should plead guilty. It is not the court that erred as it is justified in relying on its officers – in this case the defence attorney and the prosecutor – to know the law; it their duty to ensure that accused persons are dealt with fairly in terms of substantive and procedural aspects of the law (*Rozani supra* 547E-G).

That having been said, it behoves us to consider what the ambit of the questioning from the bench ought to be. It must first be accepted that the procedure created by section 112 essentially introduces an inquisitorial approach to a system that is based on an accusatorial one (http://www.chr.

up.ac.za/centre_publications/constitlaw/pdf/27-Criminal%20Procedure.pdf). So, in light thereof, although questioning is expected, the least amount of questioning from the bench is encouraged. Ideally, the accused should be encouraged to give a free-testimony account of what happened and the questions from the bench "should be as few as possible, and preferably only those necessary to (a) elucidate what the accused has volunteered and (b) to canvass any allegations in the charge not mentioned by the accused and ... (c) to confine the accused to the relevant details" (*S v Mkhize* 1981 3 SA 585 (N) 586H). What the court always bears in mind is that the questioning required by section 112 is to test the guilty plea.

But what is the situation where a section 112(2) statement is handed up to the court? What should the ambit of the questioning be in that regard? The main purpose of a written section 112(2) statement is to state the formal admissions regarding the charge laid against the accused and to set out the factual basis for his plea (*S v Hlangothe* 1979 4 SA 199 (B) 201 (B)). Questioning from the bench is nevertheless encouraged, the purpose being to once again test the validity of said plea (*S v Cele* 1990 1 SACR 251 (A)). It is possible that such questioning could result in the section 112(2) plea being rejected, and a not guilty plea being entered in its stead.

Upon questioning, the court must determine whether the section 112(2) statement justifies a conviction. In this task, the court essentially assesses whether what is contained in the statement might constitute a viable defence to the charge (*S v Drayer* 1991 1 SACR 498 (NmS) 502g). This is done, not only through questioning the accused, but also through the presentation of other evidence before the court, including witness testimony and – as in the case at hand – the J 88 Form or any other relevant document (in *S v Chetty* 2008 2 SACR 157 (W) it was a cheque).

5 Findings

The court had to determine whether there had been impropriety on the part of any of the officers of the court, that is, the magistrate or the prosecutor and/or defence attorney. This was necessary because of the procedure of questioning by the bench as dictated in section 112(2). The court found that the questioning by the magistrate in the circumstances had been adequate, and in fact, to have probed deeper or further into the matter would have had the undesired and unintended result of the court descending into the arena. The court justified this finding on the fact that the J88 Form, which was known to and available to both the prosecutor as well as the defence, was not brought to the attention of the court:

> "Understandably, in the light of the fact that the existence and content of Dr Mayne's J88 form had been withheld from her, and of the clear, unequivocal and unqualified admissions of 'sexual intercourse' contained in exhibit B (the s 112 statement), the magistrate did not question the applicant on the subject of penetration of the complainant: she was presumably satisfied that the term 'sexual intercourse', as used by the applicant in exhibit B, bore and was intended by the applicant to bear its ordinary, everyday meaning. The magistrate cannot be faulted for this" (*Rozani supra* 547E).

The court then looked at the conduct of the prosecutor and whether her failure to disclose the J88 Form amounted to a gross irregularity. The accused's statement contained admissions that he twice had sexual intercourse with the complainant while the prosecutor had in her possession a J88 Form from a district surgeon declaring the complainant to be *virgo intacta*. The prosecutor had to be aware of the import of this form and of the fact that the magistrate was ignorant thereof (*Rozani supra* 549F).

The court held the following in this regard:

> "The conduct of the prosecutor in acting as she did in this regard was reprehensible and irregular. She was, in effect, *deliberately withholding from the magistrate vital expert information pointing to the possible absence of one of the essential elements of the two rape charges*, *viz* penetration of the complainant. In doing so she was, in my opinion, taking improper advantage of the applicant's admission that he had had 'sexual intercourse' with the complainant, the correctness of which admission, in the light of the medical evidence reflected on the J88 form, must, to the knowledge of the prosecutor, have been at least open to some doubt. Worse still, she was insulating the magistrate from that doubt, and thereby precluding an alteration by the magistrate of the plea to one of not guilty in terms of s 113(1) of the Criminal Procedure Act" (*Rozani supra* 549F (author's own emphasis)).

The court then turned its attention to the conduct of the defence attorney, who at the very least, ought to have been vigilant of his duty to actually defend his client. Again, the court was deliberate in its comments on his behaviour, saying that he mitigated the reprehensibility of the prosecutor's silence (*Rozani supra* 549H). The court further described the conduct of the defence attorney as "startlingly incompetent, if not shocking", (*Rozani supra* 550D) stating further:

> "It seems that he became aware of the existence and content of the J88 Form at some stage before the applicant was sentenced, for he mentioned to the applicant's employer, Mr Hockley, 'something to the effect that the district surgeon's report showed the complainant to be a virgin'. Yet he allowed his client, the applicant, to sign two statements in terms of s112(2) of the Criminal Procedure Act, exhibits A and B, in both of which he formally admitted having had 'sexual intercourse' with the complainant on two separate occasions" (*Rozani supra* 550D).

The court pronounced the conduct of the defence attorney as being a "most regrettable aspect of the trial, and a sad commentary on the calibre of the legal representatives who are sometimes appointed by the Legal Aid Board to defend indigent persons on serious charges in the criminal courts" (*Rozani supra* 550H).

Consequently, the court set the convictions on the 1st and 2nd counts of rape aside.

6 Conclusion

The role of the prosecutor is not only to prove the accused's guilt beyond a reasonable doubt, but also and – perhaps more importantly – to ensure that no innocent person is wrongly convicted. He or she must assist the court in arriving at the truth in a way that ensures *justice* is served. This means that although there is a need for prosecutions to be successful (in that

blameworthy individuals are punished for their reprehensible conduct and behaviour), this goal must still be achieved within the dictates of law, policy and fairness.

In carrying out that function "it behoves him neither to indict, nor on trial to speak for conviction except upon credible evidence of guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance" (per R R Kidston QC, former Senior Crown Prosecutor of New South Wales, in "*The Office of Crown Prosecutor (More Particularly in New South Wales)*" (1958) 32 ALJ 148).

The defence attorney must present a case (where possible) that showcases the innocence of his or her client. After all, he or she is a player in an adversarial system, and is expected to, through arguments in court and researching and examining the evidence before him or her (*inter alia* his or her client's version, witness statements and any other documentary evidence at his or her disposal) exercise this duty through his or her legal expertise and with a measure of empathy. A vigilant defence attorney should not take the charges nor the police reports or even medical evidence presented by experts, at face value. He or she should go through each with a fine-tooth comb in an effort to give his or her client the best defence. In the case before us, the travesty was that the defence attorney clearly failed in this duty, more so where he allowed his client to plead guilty to an offence when clearly the evidence and the client's own account presented a different case, an obvious defence.

The lesson here is a severe one. Members of the profession need to practise their calling with the dignity and the expertise it requires.

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