Medical negligence and criminal responsibility – when the court infringes on a medical practitioner's rights to a fair trial

By Dr Llewelyn Gray Curlewis

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The application for leave to appeal in *S v Van der Walt* 2020 (2) SACR 371 (CC) was served before the Constitutional Court (CC) against the judgment of the Mpumalanga Division of the High Court. The facts were as follows: Dr D, an obstetrician and gynaecologist was convicted by the regional court of culpable homicide. The basis was that he acted negligently in the care of his patient, the late P, after she had given birth, and that this negligence caused her death. Dr D was sentenced to five years' imprisonment. He unsuccessfully appealed to the High Court against both the conviction and sentence. The Supreme Court of Appeal (SCA) refused special leave to appeal, which resulted in the application in the CC. Regarding the conviction, Dr D contended that the way the regional court handled the trial infringed on his rights to a fair trial, more specifically, his constitutional right as an accused to adduce and challenge evidence as protected under s 35(3)(*i*) of the Constitution. Regarding the sentence, Dr D submitted that the sentence was 'shockingly inappropriate' and an infringement of s 12(1)(*a*) of the Constitution. The challenge regarding a 'fair trial' is based on three grounds. First, the regional magistrate decided on the admissibility of various pieces of evidence for the first time in the judgment on conviction. In essence, when the applicant elected not to testify, he did so without knowing the full ambit of the case. The state's evidence comprised of the evidence of three witnesses and numerous exhibits. Dr D assumed that each exhibit – except for those whose admissibility he contested – was admitted as it was handed in. Surprisingly, the regional magistrate pronounced on the admissibility of all the exhibits, when he was handed down judgment on the conviction and admitted some exhibits, but not others. The crux of the matter is that the non-admission of some of the exhibits meant that the evidence elicited through their cross-examination was also rejected, a fact, which Dr D came to know only at the stage of conviction. The applicant complained that this was at odds with the law (*S v Molimi* 2008 (3) SA 608 (CC); *Ndhlovu and Others v S* [2002] 3 All SA 760 (SCA) at para 18).

The second ground was that by relying on the evidence of one Dr T, also an obstetrician and gynaecologist and an expert witness by the state, the court *a quo* conducted its own research and relied on medical textbooks not referred to in testimony. Dr D contended that, because textbooks were not presented as evidence, he was denied an opportunity to challenge them, which was an alleged contravention of his s 35(3)(*i*) rights.

Thirdly, Dr D submitted that he was convicted without there being any evidence regarding an essential element of the relevant offence, namely, causation.

On sentence, the applicant submitted that a doctor convicted of an offence arising from professional negligence cannot be treated like, for example, a driver whose negligent driving resulted in someone's death. He contended that in society doctors play a special role (a right enshrined in s 27(1)(*a*) of the Constitution). A just sentence, therefore, required that imprisonment only be imposed in the most serious cases of negligence, which must be determined in accordance with the views of the medical profession.

Decision of court

The court rejected the argument by the state that once the applicant had contested the admissibility of certain exhibits, the magistrate interrogated the admission of all other exhibits applying legal requirements for admission and that the findings therefore appeared to have been correct. The court also rejected the state's argument that the applicant was aware of the adverse consequences in failing to testify, in that 'the *prima facie* case of the State would be left to speak for itself'. The fact that this issue was raised and decided on appeal and taken into account, made no difference. The contention by the state that the High Court, having done so, correctly concluded that – even with that evidence – the state had nevertheless proved its case beyond a reasonable doubt, was also rejected.

The second point regarding the references to the literature was not proven and the state's contention that this merely fit in with the factual evidence of the expert witness, Dr T, and that it was this evidence, which was the basis of the finding of guilt, was also unsuccessful. The state's argument being that the applicant elected not to testify, and that the expert testimony of Dr T was not disputed and thus constituted *prima facie* evidence of the applicant's negligent conduct, also did not succeed.

The third point in argument by the state, that the evidence of Dr T was sufficient in establishing causation, and that the correct test was applied, was also rejected.

Relating to sentence, the state's submission that the court *a quo* exercised its discretion properly and must therefore stand, was conceded.

• Jurisdiction and leave to appeal

The pronouncement on admissibility at the stage of conviction and the reliance on medical literature not proved in testimony implicated Dr D's right to a fair trial. The right to a fair trial embraces a concept of substantive fairness, which is not to be equated with what might have passed muster in courts before 1996 (*S v Zuma and Others* 1995 (2) SA 642 (CC) at para 16; *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593 (CC) at para 29). It is broader and more context-based than pre-constitutional notions of trial fairness, which was based on non-compliance with formalities (*S v Steyn* 2001 (1) BCLR 52 (CC) at para 13). In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 133 Ackermann J said:

'[I]t is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources – political, social, economic and human. … One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it.'

Not all procedural irregularities are, therefore, sufficiently serious as to constitute an infringement of this right. In *S v Mdali* 2009 (1) SACR 259 (C) at para 10, for example the court held that a magistrate's failure to allow an accused to call a particular witness, was serious and vitiated the proceedings. The principles of admissibility must not be confused with the probative value of evidence. If proceedings are found not to be in accordance with justice, the accused's right to a fair trial (his right to adduce and challenge evidence), is grossly violated.

The Constitution requires all criminal trials or criminal appeals to give content to 'notions of basic fairness and justice' (see the *S v Zuma* case at para 16). The court must determine what types of irregularities are sufficiently serious to undermine fair trial rights. *In casu,* the irregularities alleged by the applicant are to be of a nature that is impermissible and vitiated the fairness of the trial. The CC refrained from engaging the issue regarding causation, since it merely deals with settled principles.

In the application for leave to appeal against the sentence, reliance was placed on constitutional jurisdiction only. Mention was made of an arguable point of law of general public importance. Since this was not substantiated, *in casu,* nothing needs to be said about it. In the absence of any other constitutional issue, the CC will not entertain an appeal on sentence merely because there was an irregularity, there must be proof of a failure of justice (*Bogaards v S* 2012 (12) BCLR 1261 (CC) at para 42). The notion that doctors must receive special punitive treatment, lest s 12(1) be infringed, is without any basis. No reason exists for an exception to be made where doctors are found to be guilty of causing the death of patients. The court, *in casu,* with reference to the jarring analogy of drivers who kill people as a result of negligent driving, finds that those that die at the hands of doctors who act negligently are terminally denied the most important right, namely, the right to life. The law demands a higher standard of care from doctors, where the conduct complained of relates to the area of expertise (*Mukheiber v Raath and Another* [1999] 3 All SA 490 (A) at para 32, with reference to *Van Wyk v Lewis* 1924 AD 438 at 444). Leave to appeal against the sentence was refused.

• Fair trial

The right to a fair trial must instil confidence. Proceedings in which little respect is recorded to the fair trial principles have the potential to undermine the fundamental adversarial nature of judicial proceedings (see the *S v Molimi* case at para 42). An accused is not at liberty to demand the most favourable possible treatment under the guise of the fair trial right (*S v Shaik and Others* 2008 (2) SA 208 (CC) at para 43). A court's assessment of fairness requires a substance over form approach (*S v Jaipal* 2005 (4) SA 581 (CC) at paras 27-8; *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A)).

• Admissibility

A timeous ruling on the admissibility of evidence is crucial. It sheds light on what evidence a court may consider. This enables an accused to make an informed decision on whether to close his case or not. Without a timeous ruling, which will act as a procedural safeguard, on all evidence that bears relevance to the verdict, an accused may be caught unawares, when he can no longer do anything (see the *Ndhlovu* case at para 18) with reference to s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988. For a fair trial, the applicant must know what the case against him is and not be ambushed by the late pronouncement on the admissibility of the exhibits. Nobody can guess with any degree of accuracy what impact evidence – if tendered – might have had on the outcome of the matter (see also *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1969] 2 All ER 274 at 274; *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) at para 45; HWR Wade *Administrative Law* 6ed (Clarendon Press 1988) at 533-4).

• Medical literature

It is trite that an expert witness may rely on information in a textbook (*Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569G-H). *In casu,* the state argued that the medical literature was provided by the expert assessor who assisted the regional magistrate to confirm the evidence of Dr T, similarly in the way that a court may refer to case law or academic sources in a judgment. The literature did not introduce new or different evidence, but merely confirmed the evidence of the expert. Dr D countered this submission by arguing that the judgments made it plain that the regional magistrate did rely on the literature. The court favoured this submission. Whether the applicant would have been able to challenge the textbook evidence successfully is irrelevant and the question was whether the applicant had the opportunity to challenge it. The reliance on unproved medical literature infringed the applicant's s 35(3)(*i*) right.

Conclusion

It was ordered that the conviction must be set aside. The concomitant effect is that the sentence must also fall away. Arguably, if the sentence automatically falls away, as it does, it was not necessary to determine the application for leave to appeal against the sentence. This is correct, however, to avert the same argument being raised, if the applicant were again convicted and a sentence, he considered excessive was once again imposed, the court deemed it prudent considering the order handed down. A court of appeal is entitled to make such 'other' orders as justice requires (s 322(1)(*c*) of the Criminal Procedure Act 51 of 1977). The applicant's conviction was not set aside on the merits, but as a result of the irregularities. The Director of Public Prosecutions may decide whether the applicant should be re-arraigned. In my mind, the CC correctly applied the principles of the law of evidence.

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