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The Oscar Pistorius trial has been the most sensational and dramatic televised trial since the OJ Simpson trial almost 20 years ago. In Judge President Mlambo's groundbreaking and somewhat controversial decision, he decided to grant permission to media houses to broadcast the trial live on radio and television. Parts of certain court cases have been televised in South Africa before, but this judgment is the first ruling of its kind in our country. Mlambo's judgment is now a leading precedent for broadcast access to criminal trials around the world.

Judgment of Mlambo JP: The law

The application to broadcast the trial was brought by Eyewitness News, eNCA and MultiChoice, which announced its plans to launch a dedicated 24-hour TV channel. They sought permission to do this through audio, audio-visual and photographic means. Pistorius and his legal team steadfastly opposed any form of coverage sought by the applicants, contending that it would infringe his right to a fair trial.

Judge Mlambo observed that important constitutional rights had to be weighed up against each other. This was the right of an accused person and the prosecution to a fair trial on the one hand (section 34). On the other hand was the freedom of expression rights of the press and media (section 16), which includes the freedom to receive and disseminate information and ideas, as well as the open justice principle. Mlambo then held that in balancing these competing rights, he had to ensure that the interests of justice are upheld in terms of section 173 of the Constitution, which states that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. He then undertook a balancing exercise to give expression to the constitutional rights at play.

Mlambo emphasised the principle of open justice, which asserts that court proceedings are public. This ensures openness, accountability and public understanding. He further remarked that this openness ensures that the citizenry know what is happening and remain informed. Further, it allows people to discuss, endorse, criticise, applaud or castigate the conduct of the courts. He remarked that such free and frank debate about judicial proceedings promotes impartiality, accessibility and effectiveness. Mlambo held that, within allowable limits, it is in the public interest that the goings-on during the trial be covered to ensure that a greater number of persons in the community, who have an interest in the matter but are unable to attend these proceedings due to

geographical constraints, are able to follow the proceedings wherever they may be. He further held that enabling a larger South African society to follow first-hand the criminal proceedings, which involved a celebrity and international icon, would go a long way towards dispelling the negative and unfounded perceptions about the justice system, and would inform and educate society regarding the conduct of criminal proceedings.

Judge Mlambo in ordering that the trial be televised, imposed a number of conditions to ensure that broadcasters would not interfere with the proceedings. This included that Judge Masipa would specifically direct when recording should start and when it should stop; no recordings were allowed when the court was not in session; the cameras had to be installed in such a way that they did not interfere with proceedings and were as unobtrusive as possible; no extreme close-ups were allowed to be taken of anyone; and witnesses giving evidence were not to be televised (unless they consented).

The effects that broadcasting the Oscar trial had on the court proceedings

Positive effects

There was a broad public demand for greater access to the court. The High Court could never have accommodated the vast masses of people wanting access to the courtroom - televising the trial ensured everyone's right to access to court. Televising the trial educated South Africans on the workings of the court and the criminal justice system in general. The transparency in the criminal procedure in court enhanced public confidence. The South African police may have let the criminal justice system down with their alleged contamination of the crime scene and irregular obtaining of evidence, but, this in its own way enhanced transparency as it showed that the public is also exposed to things gone wrong in a trial. The increased transparency also enabled the public to express their views on the verdict reached by Masipa and whether it reflected their values. Society was only able to form these opinions because it was able to follow the trial in detail and scrutinise the evidence. Televising the trial also had the benefit of reflecting our legal justice system in a positive light to foreigners of South Africa. This eradicated the myth that South Africa is a backward country and that South Africa's judicial arm is corrupt.

Negative effects

Televising the trial had a definite mental impact on many of the witnesses and Pistorius himself, making them more nervous when testifying. It has been argued that the presence of cameras and the broadcasting of all testimonies put Pistorius and many of the witnesses under a lot of additional emotional strain. Pistorius's legal team argued that it added to his distress, especially under cross-examination.

It is argued that both Gerrie Nel and Barry Roux adopted a technique of intimidation when cross-examining and also "played to the gallery" because of the presence of cameras. It has been suggested that these techniques were used to draw public attention. The trial also raised serious safety concerns. There have been reports that Judge Masipa received numerous death threats after her controversial culpable homicide verdict. Many of the witnesses and experts who testified at the trial were also subject to public attack due to their testimonies. It is argued that some of the witnesses and experts adjusted their testimonies after watching and hearing other witnesses and

experts testify on television.

Masipa, in her verdict, raised the serious concern of witnesses being influenced by watching the trial on television and hearing others give evidence before them. She remarked that she was of the view that the probability is that some witnesses failed to separate what they knew personally from what they had gathered from radio and television. It has further been argued that this contributed towards Masipa discarding a lot of the witness testimonies in her judgment as she found some of the testimonies to be unreliable.

It has been argued that the graphic pictures of the crime scene, of a bloodied Pistorius and the picture of Reeve's fatally wounded head (allegedly accidentally shown) were inappropriately broadcast on television. Witnesses were allegedly scared away at the outset of the trial when they came to learn that the trial was being televised. Pistorius's defence team alleged that potential key witnesses refused to testify after Mlambo's order that the trial be televised.

There has been a sea of divided opinion as to whether criminal trials in South Africa should be televised with strong arguments for both sides. The Lord Chief Justice Lord Thomas, head of the judiciary and President of the Courts of England and Wales, said that he is "troubled" by the Oscar trial and has ordered a review before deciding if cameras should have any further access to his courtrooms. Not all judges agree. The President of the Supreme Court in the UK, Lord Neuberger, said recently that while the OJ trial "may have been a lesson in how not to do it", he had found that the recordings of the Pistorius trial were "impressive" and found that it made a strong case for trials to be televised in the future. He said that video is merely the modern extension of enabling the public into the courts.

The writer is of the opinion that, although there are strong cons in televising trials, the pros of broadcasting are significant and certainly outweigh the cons. Especially in a country like South Africa, televising trials will go a long way in advancing our democracy, open justice and transparency. The level of openness stemming from live broadcasting is positive, and facilitates a better understanding of the criminal justice system.

With specific reference to the Pistorius trial, the writer is of the view that Pistorius's right to a fair trial was evenly balanced with the right to freedom of expression and the right of the public to know. The restrictions attached to media access in Mlambo's judgment ensured that both justice and public interest were served.

Media applications would need to be scrutinised by judges on a case-by-case basis when deciding on whether to televise a specific case. As long as there are strict conditions imposed on the televising of a trial, as was done by Mlambo, live broadcasting of trials may be the way forward and we can expect to see more of it in the future.

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