



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: A25/2018

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/~~NO~~
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
 (3) REVISED ✓

22/7/2019

DATE

SIGNATURE

HEARD ON: 17 APRIL 2019

DELIVERED ON: 17 APRIL 2019

In the matter between:

OUPA ALPHEUS MOLOI

First Appellant

XOLANI JAMES NTSHALINTSHALI

Second Appellant

and

THE STATE

Respondent

JUDGMENT

MOHLAMONYANE AJ:

INTRODUCTION:

[1] The First Appellant (Accused no 3 in the Court a *quo*) and the Second Appellant (Accused no 4 in the Court a *quo*) were charged with and

convicted of the crime of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, no 51 of 1977 (*“the CPA”*) read with sections 51(2), 53 and Schedule 2 of the Criminal Law Amendment Act, no 38 of 2007. They were each sentenced to undergo imprisonment of ten (10) years.

THE RELEVANT FACTS:

- [2] On 17 July 2015 the two Appellants appeared with two others, Accused nos 1 and 2 in the Regional Court sitting at Sebokeng. Except for the First Appellant, the rest of the accused were on bail. From what the learned Regional Magistrate indicates on record, on 17 July 2015 the two Appellants and the other co-accused were represented by lawyers. On the latter date the case was postponed for trial to 10 November 2015. The matter was in effect set down for trial for three (3) consecutive days, viz., 10, 11 and 12 November 2015.
- [3] On 10 November 2015 the two Appellants and the other co-accused appeared. Accused no 1 was represented by Mr Museze and Accused no 2 by Mr Landman. Mr Mumba, who was representing the two Appellants, was absent. It is apparent from the record of proceedings that these three dates were arranged with the three legal representatives representing the Appellants and the other two co-accused. For completeness sake, the relevant portion of the record reflects the following:

"On 17 July 2015, they appeared before me and their legal representatives. By practice, I do not give lawyers dates for trial. They are the ones who give me dates of trial, as their diaries allow them to be in my Court on the given date. It is a result of that that I was given three dates, that is to say this matter was set down for three dates.... To give us those dates that we are going to do the matter and the next thing you do not pick (sic) up in Court, you are doing a great injustice and putting the Department of Justice into disrepute. That means we must go on a working day, we must lock, close the Court doors and go and play golf".

- [4] The abovementioned remarks were made by the learned Regional Magistrate castigating the absent Mr Mumba. He expressed a very strong sentiment about the "*great injustice*" being perpetrated by Mr Mumba, who failed to make an appearance in Court after dates were arranged as set out above.
- [5] I can safely presume that the learned Regional Magistrate held a very strong view that the Department of Justice was being put "*into disrepute*" because the Chief Justice had set out norms and standards for judicial officers, which were, in a sense, trampled upon if an arranged trial cannot potentially be proceeded with as a result of the absence of a legal representative. I say this because the learned Regional Magistrate felt obliged to refer to the guidelines to judicial

officers as published in a Government Gazette. The subheading of the guidelines is capped "*Finalisation of all matters before a judicial officer*". In the record the learned Regional Magistrate quotes the relevant paragraphs verbatim. I do not deem it necessary to quote them in full in this judgment. Suffice to mention that in a nutshell, the guidelines require of judicial officers to attempt to finalise criminal cases as speedily as possible in the circumstances. They also urge judicial officers to cause accused persons to plead to a charge(s) within three (3) months from the date of first appearance. Lastly, judicial officers are urged to strive to finalise criminal matters within six months after the accused has pleaded to the charge.

- [6] In the proceedings of 10 November 2015 it was the Prosecutor who informed the learned Regional Magistrate that the Appellants' legal representative was absent. In part, the Prosecutor's report went thus:

"Your worship Mr Mumba, who is not before Court, ... indicated to the Public Prosecutor ... this morning ... that accused 3 and 4, they did not pay him his fees, ...":

- [7] It was clear that the legal representative did not appear because he was not placed in funds by the two Appellants. The question that remained was as to whether the trial should proceed without the two Appellants not being legally represented. I will immediately hereunder deal with the right to legal representation.

THE RIGHT TO LEGAL REPRESENTATION:

[8] At the outset I quote in full the relevant portions of section 35 of the Constitution of the Republic of South Africa, Act no 108 of 1996 ("the Constitution").

"35(3) Every accused person has a right to a fair trial, which includes the right –

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly".

[9] The learned Regional Magistrate was acutely aware of this entrenched right in our Constitution. He retorts as follows from the record:

"I am aware that the two accused concerned, three and four, they have got a right in our constitution, namely the right to legal representation, but that is not the only right in that constitution. There are other rights as well".

In an attempt to justify his point of view the learned Regional Magistrate places reliance on the reported case of *S v Saule*, 2009(1) SACR196 (CKHC). The learned Regional Magistrate commented thus regarding *S v Saule*:

"...where it was indicated that an accused's right to choose a legal representative was not absolute, but subject to

reasonable limitations, and that makes sense, as I am saying there are other rights as well. That is not the only right, and therefore it cannot be absolute".

- [10] I have had occasion to read the relevant portions of the case of *S v Saule*, referred to in the preceding paragraph. Briefly, the case was an appeal against both convictions and sentences by a magistrate. In the course of dealing with the merits of the case, the issue of the right to a fair trial and the right to legal representation arose. The Court stated the following in paragraph 21:

"It is necessary to clarify that an accused person's right to legal representation of his choosing is not unfettered. Although a person must be afforded a reasonable opportunity to exercise this right it does not mean that a Court is compelled to grant a number of postponements for this purpose. At some stage the refusal of further postponements would certainly be justified and the trial could then proceed without the accused being legally represented. Needless to say, this will depend on the circumstances of each case and it would be ill-advised to prescribe when this may occur. In the circumstances of the present matter, however, this stage had clearly not been reached".

The Court went on:

"[22] The denial to the appellant of a reasonable opportunity to secure the presence of his legal representative was an irregularity that rendered the trial unfair. See S v Manguanyana 1996(2) SACR283 [E]; and S v Philemon 1997 (2) SACR 651 (W).

"[23] The regional magistrate's refusal to grant the appellant a postponement or, at the very least, a brief adjournment was not based on substantial grounds. He manifestly did not exercise his discretion properly. The decision was prejudicial to the appellant and this court is, in the circumstances, competent to intervene and required to do so. It follows that the convictions and sentences must accordingly be set aside. See S v Dangatye (supra) at 23f -g; S v Shabangu 1976 (3) SA 555 (A); and S v Maduna en 'n Ander 1997 (1) SACR 646 (T)".

- [11] After placing reliance on the Saule case, the learned Regional Magistrate was of the view that he had given the Appellants sufficient time, more than three months to be precise, to prepare their case. He was also of the view that even if there was, for example an issue of changing attorneys, the three months or so afforded the Appellants was sufficient to sort that out. I disagree. This is a clear misdirection on the part of the learned Regional Magistrate, because the Appellants were not afforded an opportunity to find an alternative legal representative. The Court inquired from the Second Appellant as to what his lawyer has told him as he was given a chance to call him.

The Second Appellant intimated that his attorney had informed him that he would be available the following day, which was on 11 November 2015.

[12] It has to be borne in mind that the case was set down for three days. Despite having indicated that the Appellant's attorney would be available on the following day, the learned Regional Magistrate ruled that the case be proceeded with, which was done.

[13] In his heads of argument, the legal representative appearing for the Appellants submitted that the Appellants did not receive a fair trial because their section 35(3) constitutional rights were infringed, by denying them the opportunity to be legally represented. In this regard he referred to *S v Lusu*, 2005 (2) SACR 538 (EC), in which Plasket J (Froneman J concurring) made the following comment at paragraph 11:

"The right to legal representation is a right that is central to the fairness of criminal trials. Kroon J, in S v Manguanyana, held that this right was 'an integral part of our legal system', and the 'cornerstone of a civilised system of justice'".

At paragraph 12 of the judgment the following appears:

"The purpose of the right to legal representation is explained as follows by Professor Steytler:"

'The right to a lawyer is an essential feature of the right to a fair trial as lawyers play a critical role in ensuring that the accusatorial system, the foundation of a fair trial in the common-law tradition, produces a just result. In an adversary system a court's decision rests primarily on the evidence and arguments advanced by the parties and the system is predicated on the assumption that parties will protect their own interests through their vigorous participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision.

Because effective participation requires legal knowledge and courtroom skills, accused need the assistance of lawyers who have such knowledge and skills. With the constitutionalisation of criminal procedure, the need for legal assistance is even greater; not only is a fair trial likely to emerge through skilled participation, but other constitutional rights, such as privacy, can also be vindicated through the criminal process'.

- [14] He made further reference to *S v Sibisi* 2005 (2) SACR 645 (WLD). In fact, this judgment of the Full Court, per Kriegler AJ, Kuny AJ and Whiting AJ (as they then were) was concerned with two appeals from trials in the regional court in which the appellants were not legally represented. The Court remarked thus:

"And where an accused wishes to obtain legal representation at State expense but his application to the Legal Aid Board has apparently been unsuccessful, it will be essential that the presiding officer should pursue the question whether 'substantial injustice' would result if the accused were not provided with legal representation at his trial at State expense".

- [15] The last one the Appellants' legal representative referred to in support of his argument is *S v Mafika* 2016 (1) SACR 623 (FB). In this case, the legal representative of the accused withdrew at the outset of the trial and accused requested legal representation since he did not understand the charge. The magistrate pressed ahead with the case and insisted that the charges be put to the accused. It was held that despite repeated requests from the accused for legal representation the magistrate ignored the constitutional imperatives contained in section 35 of the Constitution.
- [16] In his heads of argument the Respondent's counsel, in opposition to the Appellants' contention that they did not receive a fair trial, referred to *S v Halgryn* 2002 (2) SACR 211 (SCA). He submitted that the Appellants' right to legal representation is not an absolute right, but is subject to reasonable limitations. In Halgryn's case, the appellant was assigned a legal representative by the State at the insistence of the Court *a quo*. Pertinent hereto are the following comments by Harms JA

(as he then was) Brand JA and Heher AJA (as he then was); concurring.

"If a legal representative is assigned by the State, the accused has little choice. The accused cannot demand that the State assign to him counsel of his choice. That does not mean he may not object to a particular representative, but the grounds upon which it can take place are severely limited". (at 216 d-e).

[17] In the book, *The Bill of Rights Handbook* 6th ed, by Iain Currie and Johan de Waal, the learned authors stated the following:

"The influence of the Bill of Rights on the criminal justice system has been significant. It provides grounds for reviewing both the substantive and procedural content of the intricate web of laws shaping criminal justice as well as provide remedies for breaches of the Constitution".

[18] I now revert back to consider the conduct of the learned Regional Magistrate. After ordering that the trial should proceed, the Prosecutor put the charge to the four accused to which all four pleaded not guilty. The date was 10 November 2015, the first day of trial. Both Appellants elected to remain silent by not disclosing the basis of their defences. So too the other two accused. On the same day, the first state witness was called who testified. After accused nos

1 and 2's legal representatives had cross examined the witness, the First Appellant was requested to cross-examine the witness. From the record, by the learned Regional Magistrate, the following emerges:

"Any cross-examination?"

ACCUSED 3: I do have questions but I do not have a lawyer.

COURT: So what you are saying is you do not have a lawyer, and therefore you are not cross-examining this witness.

ACCUSED 3: Correct".

COURT: Thank you sir. Sit down... Cross examination by accused 4?

ACCUSED 4: Yes".

- [19] After the exchange the Second Appellant commenced with his cross-examination of the first state witness. Both Appellants elected not to cross-examine the second state witness, who gave damning and incriminating evidence against them.
- [20] At the stage when the First Appellant (Accused No 3 in the Court a quo) indicated that he wished to cross-examine but did not have a lawyer, one's sense of justice dictates that the learned Regional Magistrate ought to have stopped the proceedings and insisted upon the Appellants being provided with legal representation at State expense, as clearly set out in the Halgryn case, *supra*. In this regard,

the learned Regional Magistrate misdirected himself such that the Appellants, who were facing a very serious charge, were prejudiced.

[21] On the facts, Halgryn case is distinguishable to the present case. Halgryn was provided with a legal representative by the Legal Aid Board, whereas in *casu* no such legal representation was provided.

[22] Reliance by the learned Regional Magistrate on the Saule case, referred to *supra*, is misplaced. In Saule, the trial had already been delayed for extended periods, when the appellant terminated the mandate of the attorney appointed by the Legal Aid Board. In *casu*, that was not the case because had the learned Regional Magistrate allowed the postponement, it would have been for the first time he did so.

[23] The learned Regional Magistrate over-emphasised the guidelines by the Chief Justice at the expense of dispensing justice and affording the Appellants a fair trial, as required by the Constitution, which is the supreme law of this country.

[24] I, at this stage, pause to state that, with the view I take of the matter, it is unnecessary to deal with the merits of the charge.

[25] Having given consideration to the law and then prevailing circumstances of the Appellants' case, it is my view that the Court *a quo* did not exercise its discretion properly. As leave to appeal has been granted, by petition, against both the convictions and

sentences of both Appellants, I reach the conclusion that the Court a quo had misdirected itself and committed a fatal irregularity by allowing the trial to proceed whilst the Appellants were legally unrepresented. As a result, such misdirection amounted to a failure of justice.

[26] I propose that the following order be made:

26.1 The appeal is upheld and the convictions and sentences imposed pursuant thereto are set aside.

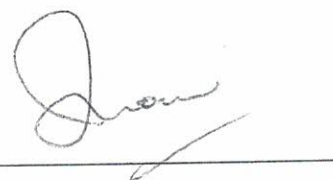
26.2 The concomitant order declaring both Appellants unfit to possess firearms is similarly set aside.



M. D. MOHLAMONYANE

[Acting Judge of the High Court of
South Africa,
Gauteng Division, Pretoria]

I agree.



J. W. LOUW J

[Judge of the High Court of
South Africa,
Gauteng Division, Pretoria]

APPEARANCES:

For the Appellants : Mr M. B. Kgagara

For the Respondent : Adv GJC Maritz