



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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
12/04/2017 DATE	 SIGNATURE

CASE NO: A423/2015

DATE: 12/4/2017

IN THE MATTER BETWEEN:

NZEYIMANA DJUMA

1st Appellant

MORISHO MINANI

2ND Appellant

FIDEL BYAMO

3RD Appellant

And

THE STATE

Respondent

JUDGMENT

KOLLAPEN J:

1. The appellants were all convicted and sentenced as follows in this Court (functioning as the Mpumalanga Division) on the 8th of August 2013:

- Murder – Life imprisonment
 - Robbery with aggravating circumstances – fifteen years' imprisonment
 - Possession of unlicensed firearm – 1 year's imprisonment
 - Possession of ammunition - 1 year's imprisonment
2. Leave to appeal against conviction and sentence was granted by the trial Court.
 3. The only basis upon which the appellants challenge their conviction and sentence is what they characterise as the appearance of bias on the part of the Presiding Judge insofar as it related to his refusal to recuse himself from the trial of the appellants. At the hearing of this appeal, counsel for the appellants in response to questions from the Bench, indicated that this was the only basis upon which the conviction was attacked and that in particular no challenge was being advanced in respect of the merits of the conviction.
 4. The recusal application took place against the following background:
 - i) The appellants were initially arraigned with two other co-accused and at the commencement of the trial, the two co-accused pleaded guilty, and were convicted and sentenced to, *inter alia*, life imprisonment;
 - ii) Shortly after the guilty pleas of the appellants' former co-accused were tendered, and in contemplation of a separation of trials being ordered, a lengthy exchange occurred between counsel and the Bench about the issue of whether in the event of the trials being separated, the same Judge who had convicted the appellants' co-accused should preside in the trial of the appellants;
 5. While the State offered no objection to the presiding judge continuing to sit in the separated trial, counsel for the appellants objected and urged the judge to recuse himself.

6. In refusing to recuse himself, the learned Judge accepted that while it is normal following a separation of trials, that the trial of those who pleaded guilty is conducted before a different judicial officer to the one who recorded the guilty plea, he was of the view that he was not precluded from presiding over the trial of the appellants and in support of such a stance indicated that:
 - i) The guilty pleas of the appellants' co-accused was not evidence against the appellants and a judicial officer was required to consider separately and independently the evidence against the appellants. In this regard the learned Judge pointed out that judges on a regular basis admit confessions (which may have details of the involvement of the co-accused) which are not admissible against a co-accused, but judges are not expected to recuse themselves simply on account of this;
 - ii) The presiding Judge was concerned about the long time that the appellants had been in custody and he was keen to finalise the trial without further delays;
 - iii) The presiding Judge was approached at a coffee shop by a witness who was 82 years old, who expressed the hope that the case would be finalised without further delay.
7. Counsel for the appellants all took the stance that the learned Judge should recuse himself as the appellants would be prejudiced by him continuing to preside over the separated trial largely on account of the plea of guilty which their co-accused had tendered, where, in such pleas, the appellants were implicated.
8. The trial of the appellants then proceeded before the same Judge and the appellants were convicted and sentenced as set out above.

Analysis

➤ The law , the right to fair trial , bias and the test for bias

9. The right to a fair trial is constitutionally guaranteed if one has regard to Section 35(3) of the Constitution. It is the hallmark of a fair and just process in the determination of guilt or innocence that accused persons enjoy. At the same time the right is given content to and operationalised in the context of the facts and circumstances of each case in the determination of whether a trial was fair or not.

10. In *S v LE GRANGE AND OTHERS 2009 (1) SACR 125 (SCA)* at 140e-f the following remarks capture the essence of fair trial:

‘A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be ‘manifest to all those who are concerned in the trial and its outcome, especially the accused.’ The right to a fair trial is now entrenched in our Constitution. As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by s 35(3) of our Constitution. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour and prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State.’

11. Similar sentiments were expressed in *S v TYEBELA 1989 (2) SA 22 (AD)* at 29G-H to the following effect:

‘It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial... This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires.’

12. As I understand the stance of the Appellant, it is that the failure by the trial Judge to recuse himself resulted in the trial of the Appellants being unfair in that the conduct of the learned Judge before the commencement of the trial bore the appearance of bias.
13. The Constitutional Court in *S v BASSON 2007 (1) SACR 566 CC* (at 590b) affirmed the proposition that ‘The impartiality of a judicial officer is crucial to the administration of justice. So too is the perception of his or her impartiality.’ The Court went on to add that in this regard it was not necessary for a litigant who complained of bias to establish a real likelihood of bias, it being sufficient to demonstrate a ‘reasonable apprehension of bias’.
14. Before dealing with the test to be followed in the determination of whether a reasonable apprehension of bias existed, the Court set out the following core principles within which the issue should be adjudicated and they include:
 - a) There was a presumption in our law against partiality of a judicial officer and this was largely based on the recognition that legal training and experience prepare Judges to determine where the truth may lie in the face of contradictory evidence;
 - b) The presumption of impartiality is not easily dislodged and cogent and convincing evidence was necessary in order to do so;
 - c) That fairness required a judge to be actively involved in the management of the trial, to control proceedings and to ensure the proper utilisation of resources and thus a supine approach was not justifiable.

15. Against the backdrop and the operation of the above principles the Court affirmed the test for bias as laid down in *PRESIDENT OF THE RSA v SOUTH AFRICAN RUGBY FOOTBALL UNION v SARFU* 1999 (4) SA 147 CC in the following terms:

‘The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. 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. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.’

16. Could it then be argued that the fact that the trial judge also presided over the trial of the Appellants co-accused and convicted them on a plea of guilty which in its detail implicated the Appellants, gave rise to a reasonable apprehension of bias? In addition could it be said that the clear intimation by the trial judge expressing a desire to finalise the trial as opposed to postponing it was a factor in informing such a reasonable apprehension of bias and finally could it be said that the views of an aged witness with regard to finalising the trial, which were conveyed to the judge and which he placed on record, was also a factor in contributing to the reasonable apprehension of bias?
17. While it may often happen in practise that following a separation of trials different judicial officers deal with the different separated trials, this is not a

requirement and in *S v Somciza* 1990 (1) SA 361(A) the Court approved the stance taken in *R v T* 1953 (2) SA 479 (A) that a judicial officer who sat in the trial of an accused who pleaded guilty, was not precluded from presiding in the trial of the remaining accused. In *SARFU* (supra) it was assumed that judicial officers on account of their experience and training would 'disabuse their minds of any irrelevant personal beliefs or predispositions'.

18. In addition judicial officers in criminal trials are often required to admit confessions where a co-accused is implicated. Such a confession does not constitute evidence against other co-accused and judicial officers in those situations are expected to disabuse themselves of the contents of a confession in so far as it may relate to others. It is largely accepted that this practise does not lend itself to a reasonable apprehension of bias and so it can hardly be contended that the facts *in casu* should do so.
19. Accordingly on this aspect of the challenge, it can hardly be said that the mere fact that the trial judge presided over both trials would give rise to a reasonable apprehension of bias in the mind of a reasonable, objective and informed person.
20. With regard to the other two legs on which the challenge is advanced they both in a sense relate to the desire of the trial judge to manage and finalise the trial, without undue delay as well as the expressed wish of a witness. Given the role of the judge in managing the trial to which reference has been made, it can hardly serve as a foundation for bias when such a view is expressed. On the contrary such a stance is consistent with what should be expected of judges in ensuring the proper management of a trial. Finally the views of the witness with regard to her desire to finalise the trial may well have coincided with those of the judge but that is hardly remarkable or noteworthy. All things being equal, most witnesses wish to have an efficient trial just as most accused do and just as all judges do. I can accordingly find nothing untoward in these

assertions and in my view they do not serve to advance the case for the Appellants.

21. In the circumstances, I must conclude that there existed no basis for the trial judge to have acceded to the application for his recusal and the appeals against conviction must fail.

Sentence

22. In argument Counsel for the appellant conceded that the trial court's approach to sentencing was beyond reproach and that there was no basis laid for interference by this Court. Such a concession was correctly made in my view and is in fact supported by the facts of the matter and the circumstances of the Appellants. The finding that no substantial and compelling circumstances existed to justify a departure from the minimum prescribed sentence is accordingly unassailable.

23. The appeal against sentence must accordingly also fail.

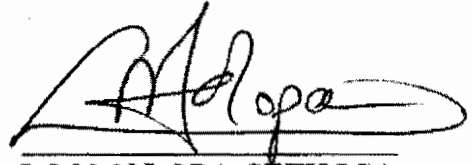
ORDER

24. In the circumstances I would propose the following order:

- The appeal against conviction and sentence is dismissed.

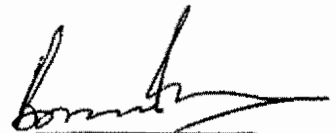

N KOLLAPEN
JUDGE OF THE HIGHT COURT

I AGREE,

A handwritten signature in black ink, appearing to read 'L M Molopa', written over a horizontal line.

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I AGREE,

A handwritten signature in black ink, appearing to read 'T J Raulinga', written over a horizontal line.

T J RAULINGA
JUDGE OF THE HIGHT COURT

IT IS SO ORDERED.

A423/2015

HEARD ON: 17 February 2017

DATE OF JUDGMENT:

APPEARANCES:

FOR THE APPELLANT:

Adv. T R Malanguti

INSTRUCTED BY:

Pretoria Justice Centre

FOR THE RESPONDENT:

Adv. A J Fourie

INSTRUCTED BY:

The Director of Public Prosecutions