

Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION: DE AAR CIRCUIT]

JUDGMENT

CASE NUMBER: KS 8/2014

THE STATE

AND

JOHANNES WILLEM DU TOIT

ACCUSED NO 1

GIDEON JOHANNES THIART

ACCUSED NO 2

MERCIA VAN DEVENTER

ACCUSED NO 3

Dates of hearing : 28 October 2014

Date of judgment : 29 October 2014

Phatshoane J

1. Mr Johannes Willem du Toit together with Mr Gideon Johannes Thiart and Ms Mercia van Deventer, accused No 2 and accused No 3, were arraigned on a count of murder. In respect of accused No 2 and No 3, they also face alternative counts pertaining to conspiracy and incitement to commit murder. The State and Mr Du Toit, who was

represented by Mr Van Tonder of the Legal Aid Board, entered into an agreement in terms of s 105A of the Criminal Procedure Act, 51 of 1977, (the CPA). On the basis of this agreement, Du Toit was convicted of murder and sentenced to 22 years imprisonment in terms of s 105A (8) of the CPA.

2. It goes without saying that where, as in this case, a number of accused are arraigned and the Court has convicted one or more of the accused on the strength of their plea and sentenced them, separation of the trials ought to take place in respect of the accused who wish to plead not guilty. This is an established and a prudent rule of practice. See *R v Zonele and Others* 1959 (3) SA 319 (A) at 325D-G. The question of separation of the trials is not in dispute. What is in issue is whether having being privy to the factual background as set out in the Plea and Sentence Agreement of the State and Du Toit I should continue and preside in the trial of accused No 2 and No 3.
3. Adv Cloete, for the State, contended that the trial of accused No 2 and No 3 ought to proceed before me because I have not made any credibility findings against any of the accused. In any event, he argued, even if the trial was to commence de novo before a different presiding officer reference would still be made to the fact that Du Toit, who is to turn a State witness in the case of accused No 2 and No 3, was convicted of the offence with which accused No 2 and 3 are charged. With reference to the commentary under s 157 of the CPA in the Commentary on the Criminal Procedure Act, by Du Toit et al, at 22-48 (Service 52 of 2014) counsel contended that there can be no objection to a judicial officer who convicted an accused who pleaded guilty hearing the case against an accused who pleads not guilty.
4. Mr Cloete contended that should I not preside over the case of accused No 2 and No 3 both the State and the accused would suffer prejudice in that it would depend on the availability of another presiding judge to hear the matter which might not be in a near future. That the accused have been in custody since October 2013, a year ago. That the State has already secured the attendance of its witnesses for the trial. These witnesses would have to be subpoenaed again to attend the trial in the future while I am readily available to hear the matter which has been set down for two weeks.

5. Adv Moeti, for accused No 2 and No 3, in his countervailing argument pressed that accused No 2 and No 3 stand to suffer grave prejudice if their trial is to resume before me because Du Toit, in his agreement with the State, revealed certain ‘dangerous’ evidence which implicates them. He argued that a judicial officer ought not to be apprised of the facts of the case at the commencement of the trial and that accused No 2 and No 3 has apprehension that I will be biased against their cause and therefore I should recuse myself from hearing their case.
6. The proper approach to recusal applications was formulated as follows in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (Sarfu) at 177B-E para 48:

“[48]...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 the 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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

7. In his discussion of the test formulated in Sarfu (supra) Cameron J in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafood Division Fish Processing)* 2000 (3) SA 705 (CC) at 714F-G para 14 stated the following:

“[14] The Court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person

apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts* [1999 (4) SA 915 (SCA)], decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.”

See also the *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) at 79D-E para 91 where the Court held that mere apprehensiveness on the part of a litigant, even a strongly and honestly held anxiety, would not be enough. The question to be answered is: 'what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude.

8. Mr Cloete referred me to *R v T* 1953 (2) SA 479 (A) and *S v Somciza* 1990 (1) SA 361 (A) as authority for the proposition that there can be no objection to a judicial officer who convicted an accused on the strength of his plea hearing the case against an accused who has pleaded not guilty. It is apposite to quote in extenso what the ConCourt had to say about these two decisions in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafood Division Fish Processing)* (supra) at 721E-722C paras 36-38 and 731C-732B paras 69- 71:

“[36] Counsel for the employer relied on the decision of the Appellate Division in *R v T*, in which it was held that 'there is no rule in South Africa which lays down that a Judge in cases other than appeals from his judgments is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case'. In their argument they submitted that *R v T* had been approved in *S v Somciza* [1990 (1) SA 361 (A)] and had been cited in the *Sarfu* judgment. In *R v T* a magistrate who, on uncontested evidence regarding a charge involving a sexual offence had in previous criminal proceedings found one party to the act guilty, thereafter on contested evidence in a second trial, where the prosecution called the previous accused to testify, convicted the other party to the act. It was contended that the magistrate ought to have recused himself from the second trial and that his failure to do so constituted an irregularity vitiating the conviction. The Appellate Division dismissed this contention.

[37] The Court in *Sarfu* cited *R v T* as authority for the proposition that Canadian cases dealing with the presumption that a judicial officer will act impartially in any matter that he or she is called upon to decide were consistent with our law. It was not necessary in *Sarfu* to consider the application of that principle to the facts in *R v T*, and *Sarfu* is not authority for the proposition that the failure of the magistrate to recuse himself in such circumstances would be consistent with the substantive elements of the constitutional right to a fair trial. In any event, for *R v T* still to constitute good law today it would have to survive the test set out above, namely whether the magistrate had already in the earlier trial decided an issue that was 'live and significant' in the second trial. I doubt whether it does.

[38] *R v T* was distinguished in *S v Somciza*, where the Appellate Division held that a magistrate whose decision convicting an accused had been set aside on appeal should not preside at a resumed hearing. Although the accused had not testified in the first proceedings, the magistrate in convicting him had made 'strong credibility findings' in respect of all the State witnesses in which he had accepted the prosecution evidence. Hence:

'However dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate.'

At 731C-732B paras 69-71 the Court proceeds:

[69] We have given careful attention to the comprehensive manner in which Cameron AJ has set out the facts, but on balance, we remain of the view that it would not only be wise for fresh judicial minds to be brought to bear on the case, but that it is also constitutionally necessary.

[70] We agree with Cameron AJ's statement that *R v T* would be unlikely today to constitute good law. The facts of that case (which serve as a reminder of the extent to which the courts in the pre-constitutional era were used to enforce unjust and shameful laws) were, in the language used, as follows: a non-European woman was charged

before a magistrate with permitting a European male to have carnal intercourse with her. The magistrate convicted the female, and thereafter, when the man was charged before him in a separate trial arising from the same facts in which the woman was a witness, the magistrate refused to recuse himself. The Appellate Division held that it could not reasonably be inferred that there was a real likelihood that the presiding magistrate was in fact biased and sustained the decision by the magistrate. Even if one accepts the high threshold laid down by the Appellate Division regarding the cogency of evidence needed to justify recusal, we find the result surprising. In our view, the Appellate Division's decision in *S v Somciza* is more in accord with our present day law. In that matter the Appellate Division, although in a different context, held that however dispassionate a magistrate might feel on re-hearing a case where his decision had been overturned on appeal, the accused was, 'understandably, unlikely to feel complacent about his prospects of receiving a fair trial'.

[71] Ordinary people would say that a Judge should not sit in a matter where she or he has already pronounced on the live and central facts in issue. The saying that not only must justice be done, it must be seen to be done, is a well-worn one, and for good reason. Much of our work involves continuing defence of such simple verities..."

9. To my mind, the proper administration of justice would also entail that the accused should not hold any reasonable apprehension that the presiding judge would be biased against him or her. In *S v Zuma and Others* 1995 (1) SACR 568 (CC) at 579d-e para 16 it was held that the right to a fair trial conferred by s 25(3) of the interim Constitution (the Constitution of the Republic of South Africa Act, 200 of 1993) was much wider than the list of specific rights set out in paras (a) to (j) of the subsection and embraced a concept of substantive fairness. It can safely be said that this would also be case with regard to the rights set out in s 35 of the present day Constitution. The accused's right to a fair trial may not be sacrificed simply because, for practical reasons, it makes sense that a judicial officer who already disposed of the case of one of the accused in terms of s 105A of the CPA is readily available to hear and conclude the case for the remainder of the accused. That situation would be untenable.
10. It is so that the conviction and sentence of Du Toit followed on a plea bargain agreement where I did not make any credibility findings against any of the accused.

What matters the most is whether in considering the plea bargain agreement the Court made a pronouncement on the live and central facts in issue. The answer to this question is certainly in the affirmative. It is important to bear in mind that in terms of s 105A(7) the Court ought to be satisfied that the accused admits the allegations in the charge and that he is guilty of the offence in respect of which the agreement was entered into. It will in the circumstances place me in an invidious position in that I believed in the truth of the averments made by Du Toit whom I have convicted. If discredited under cross- examination that might put me in a conflictual position.

11. For reasons aforesaid I am of the view that it would be proper for another presiding judge other than myself to hear the case in respect of accused No 2 and No 3.
12. In the result:

ORDER

1. The trial of Mr Johannes Willem du Toit is hereby separated from the trial of Mr Gideon Johannes Thiart and Ms Mercia van Deventer, accused No 2 and 3.
2. The trial of accused No 2 and 3 is to commence de novo before a different Judge of this Division.

MV Phatshoane J

Northern Cape Division

For the State: Adv H Cloete (Instructed by the office of the Director of Public Prosecutions)

For Mr Johannes Willem du Toit: Adv A Van Tonder (Instructed by Legal Aid South Africa)

For accused No 2 and No 3: Adv JP Moeti (Instructed by Legal Aid South Africa)

