

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

High Court Reference No.: **0501468**
Case No.: **A233/05**
Magistrate's Serial No.: **62/05**

In the matter between:

THE STATE

and

**RIAAAN ISAACS
BRANVILLE FRANSE**

Accused No. 1
Accused No. 2

REVIEW JUDGMENT: 26TH JANUARY 2006

WAGLAY, J.

1. The two accused in this matter were charged with housebreaking with the intent to steal and theft. They were also charged with using a motor vehicle without the consent of the owner. They stood trial in the Magistrate's Court, Mossel Bay.
2. Neither of the accused was legally represented and on 22 April 2005 both pleaded guilty to the charges referred to above. After questioning by the Magistrate in terms of s 112 of Act 51 of 1977 (the Act), accused 1 (Riaan

Isaacs) was convicted of both charges. Accused 2 (Branville Franse) was convicted on the second charge. The plea of guilty of accused 2 on the first charge was altered to one of not guilty in terms of s 113 of the Act.

3. The State did not thereafter call for a separation of trials and the trial proceeded. The State called accused 1 as its witness.
4. Accused 1 (Isaacs) indicated that he was willing to testify and was doing so freely and voluntarily. After being led in chief by the prosecutor, he was cross-examined by Accused 2.
5. After accused 1 testified the State closed its case and accused 2 then testified in his defence. No further evidence was led. The Court *a quo* then convicted accused 2 on the first charge.
6. Two days later both the accused were sentenced and the record was then prepared for submission to this court for review in terms of s 302(1) of the Act.
7. It appears that the Magistrate entertained some doubts about the correctness of the procedure that had been adopted and attached a letter accompanying the record in which he stated the following:

“In nabetragting mag dit op die oog af lyk asof ‘n onreelmatige

prosedure gevolg is deurdat die hof die Staat toegelaat het om beskuldigde 1 as 'n getuie te roep."

8. The Magistrate then proceeds to discuss s 157 of the Act. Section 157(2) of the Act provides that:

"(2) Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused."

9. The Magistrate correctly points out that separation of trials lies in the discretion of the presiding judicial officer. It does however appear to be an established practice that there should be a separation of trial where one or more accused plead guilty and the plea of guilty is accepted and entered by the Court whilst the other(s) accused plead not guilty. (See in this respect: *S v Ntuli & Others* 1978 (2) SA 69 (A); *S v Ndwandiwe* 1970 (4) SA 502 and Hiemstra: *Suid-Afrikaanse Strafproses* 6th ed at page 412).
10. In the circumstances of this case, especially since both accused were unrepresented, I believe that the Court should *mero motu* have ordered a separation of trials, notwithstanding the fact that no request for separation was forthcoming.

11. The more important issue however is whether the Court should have allowed the State to call accused 1 to testify against accused 2. The fact that accused 1 was prepared to testify against his co-accused is not a relevant consideration. What is relevant is whether he is a competent witness for the prosecution.
12. In *Ex Parte Minister of Justice: In Re Rex v Demingo and others* 1951 (1) SA 36 (A) at 36G, the Court held that:

“A person who pleads guilty to a joint charge and who, after separation of trials is convicted but has not been sentenced, can be called by the Crown as a witness against an accused charged jointly with him in the first instance”.

Where therefore, the prosecution seeks to rely on evidence of an accused who has pleaded guilty to a joint charge and has been convicted but has not been sentenced to testify against his co-accused, there must be a separation of trials before such an accused is a competent witness for the prosecution.

13. The position of an accused as a witness in his own trial (with or without co-accused) is also regulated by s 196 of the Act. Subsection (2) of s 196 provides as follows:

“The evidence which an accused may, upon his own application, give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused.”

14. Section 196(2) thus clearly provides that an accused cannot be a witness for the prosecution, but that if he decides to testify in his own defence, his evidence is admissible against any of his co-accused. (See *Hiemstra op cit* at page 488).
15. In this matter, since there was no separation of trials, the State called accused 1 to give evidence in connection with a trial in which he is an accused. The State could not call him as a witness and the Court *a quo* should not have allowed him to testify as a witness for the State.
16. A further issue is whether the basic right of the accused to a fair trial was affected to such a degree by this irregularity that it cannot be said that justice was done. In allowing accused 1 to testify as a prosecution witness, the court became a party in exposing at least against accused 2, to severe prejudice. This I am satisfied constituted a miscarriage of justice.
17. Although it was irregular to allow accused 1 to be called by the prosecution as a witness, he suffered no prejudice as he was convicted on

his plea and his conviction and sentence can therefore be confirmed.

18. In the premises I make the following order:

- (a) The convictions and sentences of accused 1 are hereby confirmed.
- (b) The convictions and sentence of accused 2 on both counts are hereby set aside and the cases against him must start *de novo* before a different Magistrate.

WAGLAY, J.

I agree.

LE GRANGE, AJ.