

No 120/88

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MZWANDILE GQEBA

First Appellant

WHANTO SILINGA (passed away 10/12/87)

Second Appellant

LUNDI WANA

Third Appellant

THEMBINKOSI PRESSFEET

Fourth Appellant

MZWANDILE MNINZI

Fifth Appellant

MONDE TINGWE

Sixth Appellant

THOZAMILE BACELA

Seventh Appellant

and

THE STATE

Respondent

CORAM: E M GROSSKOPF, STEYN, JJA et F H GROSSKOPF AJA

HEARD: 16 May 1989

DELIVERED: 24 May 1989

J U D G M E N T

E M GROSSKOPF, JA.

Fourteen accused were charged with murder before KROON J and two assessors in the Eastern Cape Division. After a protracted trial, in the course of which one of the assessors was discharged, the remaining members of the court gave judgment. In the result some of the accused were acquitted, some were convicted of murder, and some were convicted of assault with intent to do grievous bodily harm. Seven accused who had been convicted of murder applied to the trial judge for leave to appeal. Six of these accused had been sentenced to death after no extenuating circumstances had been found. The seventh was younger than eighteen years old when the offence was committed. The trial judge, in the exercise of his discretion, sentenced this accused to twenty years' imprisonment. Leave was granted to the applicants to appeal to this court against conviction, sentence, or both. One of them has since died, and there are consequently six appellants before us.

In addition to the above-mentioned application for

leave to appeal, the applicants applied to the trial judge in terms of section 317 of the Criminal Procedure Act, no 51 of 1977, for the making of a special entry of an alleged irregularity. This application stemmed from the discharge of one of the assessors, to which I referred above. The trial judge granted the application.

The appeal on the merits as well as on the special entry was called on 16 May 1989. Mr. Soggot, who appeared with Mr. Luitingh and Mr. Naidu for the appellants, applied in limine for a postponement of the appeal on the merits. The application was supported by an affidavit by the appellants' attorney and was based on the grounds that the appellants' counsel had not had sufficient time to master the lengthy record. In the special circumstances of this case the application was granted. The appeal on the special entry was, however, heard on 16 May. The present judgment is confined to that appeal.

The special entry, as formulated in the judgment of the

trial judge granting the application, reads as follows:

- "1. Prior to the commencement of the trial, the presiding Judge was of the opinion that in the event of a conviction and having regard to the circumstances of the case, the sentence of death might be imposed or might have to be imposed.
2. The presiding Judge accordingly, and in terms of section 145(2) of Act 51/1977 summoned two assessors to his assistance, namely Messrs D De V van Rensburg and R P Barnes.
3. The trial commenced with the presiding Judge being assisted by the said two assessors.
4. During the trial and while the trial-within-a-trial concerning the admissibility of certain extra-judicial statements made by certain of the accused was in progress, one of the assessors, Mr D de V van Rensburg, requested the presiding Judge that he be discharged. The reasons for such request were those set out earlier in this judgment.
5. By virtue of those reasons, the presiding Judge, after consultation with and with the concurrence of counsel, both for the defence and for the State, who had been apprised by the presiding Judge of the said reasons, in terms of section 147(1) of the Act, formed the opinion that Mr van Rensburg was unable to act as assessor and discharged him and directed that the trial proceed before the remaining members of the Court.
6. The accused contend that the discharge of the said assessor and the direction referred to in paragraph 5 constituted an irregularity."

In paragraph 4 of the special entry it is stated that the reasons for the assessor's request to be discharged are set out earlier in the judgment. This earlier passage reads as follows:

"One morning during the course of the trial, and while the trial-within-a-trial was in progress, Mr van Rensburg requested a private consultation with me and advised me as follows: He had an only child, a daughter, who was married to a professional man practising in Aliwal North. During 1986 the daughter's medical advisors had diagnosed that she had contracted cancer in one of her legs. She had undergone certain treatment and it was then thought that the cancer had been contained. That proved not to be the case and the cancer reappeared which necessitated the medical advisors having recourse to the amputation of the leg at the level of the hip. Again it was thought that the cancer had been contained. This operation, if my memory serves me correctly, had been performed late in 1986. However, complications subsequently developed and, at the time Mr van Rensburg spoke to me, his daughter had been summoned to Bloemfontein for urgent medical consultations and further treatment. Because of other family exigencies Mr van Rensburg was the only family member for whom it was practical to accompany his daughter to Bloemfontein. That was in any event the wish of his daughter and similarly it was Mr van Rensburg's wish to be at his daughter's bedside while she was in hospital. Mr van Rensburg added that the doctors were uncertain as to the future prognosis in relation to his daughter's condition, but had intimated

to him that there was cause for pessimism. I should add that Mr van Rensburg was clearly distraught and I do not think that he would object if I record that he in fact broke down in my chambers. He accordingly requested that I relieve him of his duties as an assessor in the trial to enable him to be with his daughter. On my enquiry, he was unable to venture any estimate of when he would again be available to continue the trial or what the prospects were that he would be so able in the foreseeable future, nor was he in any position to offer any guarantee that at any resumed hearing he would not again find himself in the same situation where he would be obliged to ask for his discharge.

I summoned counsel, both for the defence and for the State, to my chambers and advised them of the substance of my conversation with Mr van Rensburg and that, subject to any submissions they might wish to make, it seemed to me that the circumstances were such that I should invoke the provisions of section 147 of the Act and opine that Mr van Rensburg had become unable to act as assessor and that I should direct that the trial proceed before the remaining members of Court.

Counsel, both for the defence and for the State, were unanimous and unhesitatingly of the view that in the circumstances that would be the proper procedure to follow. I ordered accordingly."

For the sake of completeness I should also quote the contemporaneous passage in the record dealing with Mr. van Rensburg's discharge. It reads as follows (Mr. Gyanda and Mr. Meiring represented the defence and the State respectively):

"COURT: Mr Gyanda, Mr Meiring, I have advised counsel in chambers of certain developments relating to the continued ability of one of my assessors to act as an assessor in this matter, namely Mr van Rensburg. I do not propose in open court to set out in detail the developments which have occurred, save to state this, namely that on compelling personal compassionate grounds Mr van Rensburg is unable to continue to act as an assessor during this trial, and that is the ruling which I make in terms of Section 147 of the Criminal Procedure Act, and I further direct in terms of that section that the trial will proceed before the remaining members of this Court.

MNR MEIRING: Soos die Hof behaag, U Edele.

MR GYANDA: As the Court pleases.

MNR MEIRING: Mag ek miskien net van die Staat se kant af sê dat ons wens die Geagte Assessor alle sterkte toe.

MR GYANDA: The same goes from us, M'Lord.

COURT: Thank you. The Court will adjourn to reconstitute.

COURT ADJOURNS

ON RESUMPTION:

COURT: Mr Meiring, Mr Gyanda, I should have mentioned earlier that the rulings which I made are with the concurrence of counsel.

MR GYANDA and MR MEIRING: That is correct.

COURT: As they conveyed to me in chambers."

The crisp question for decision is whether Mr. van Rensburg's discharge, and the continuation of the trial before the remaining members of the court, were authorized by section

147(1) of the Criminal Procedure Act. This provision reads as follows:

"(1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct

- (a) that the trial proceed before the remaining member or members of the court; or
- (b) that the trial start de novo, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor."

We have not been referred to any case, nor have I been able to find one, in which this section has been interpreted in a respect which is helpful for present purposes. It is also common cause that the history of the provision - as to which, see S v. Baleka 1988(4) SA 688 (T) at pp. 691 F to 692 C - offers no guidance. The matter must therefore be approached on principle.

The expression "becomes unable to act as assessor" in the sub-section is rendered as "onbekwaam raak om as assessor op te tree" in the signed Afrikaans text. The word "unable" is defined in the Shorter Oxford Dictionary as "not able to do something specified; unequal to the task or need, incompetent,

inefficient." "Onbekwaam" is defined in the Verklarende Handwoordeboek van die Afrikaanse Taal (HAT) by Odendaal and others, as "sonder kundigheid; onbedrewe, ongeskik." And in the context of sec 147(1) the inability must relate to the assessor's functioning as an assessor. To use the Afrikaans term, the section applies where, in the opinion of the trial judge, the assessor is "onbekwaam" to perform his duties as an assessor. It would be difficult to delineate the exact limits of this concept, but fortunately it is not necessary to do so in the present case. In argument it was common cause that inability arising from physical or mental disability would be covered, and Mr. Soggot accepted that emotional stress, if severe and prolonged enough, might render an assessor unable to act as such within the meaning of section 147(1). On the other hand, it seems clear that the mere desire of an assessor to be discharged, however pressing his reasons may be, would not amount to inability to act. The main question argued before us was consequently what exactly the grounds for Mr. van Rensburg's

discharge were.

On the face of it the answer to this question seems clear. In paragraph 4 of the special entry the learned judge records that Mr. van Rensburg requested the presiding judge that he be discharged. He then adds that "the reasons for such request were those set out earlier in this judgment". He continues by stating, in paragraph 5, that "by virtue of these reasons" he formed the opinion that Mr. van Rensburg was unable to act as assessor. The position was, therefore, that the reasons advanced by Mr. van Rensburg for requesting his discharge were also the reasons which caused the learned judge to form the opinion that Mr. van Rensburg was unable to act as assessor. These reasons were set out in a passage from the judgment which I have quoted above. I do not propose repeating the whole passage. The crucial sentence is: "He accordingly requested that I relieve him of his duties as an assessor in the trial to enable him to be with his daughter". By reason of the tragedy which had occurred in his family, Mr. van Rensburg wanted, for

practical and emotional reasons, to be with his daughter. In the circumstances the learned judge, with the concurrence of counsel for both parties, granted his wish. The grounds upon which they acted were aptly described by the learned judge as "compelling personal compassionate grounds". However understandable the attitude of the trial judge was, his ruling was, in my view, not based on any opinion regarding Mr. van Rensburg's ability or "bekwaamheid" to carry on his duties as assessor. He clearly considered that Mr. van Rensburg's pressing commitment elsewhere constituted an inability to act as assessor. In my view this placed an untenably wide meaning on the word "unable" or "onbekwaam" as used in section 147(1) of the Act.

It has been suggested that there is room to find that the true reason for Mr. van Rensburg's discharge was that, in the opinion of the trial judge, he was unable to perform his duties as an assessor by reason of his emotional state. It goes without saying that his daughter's condition must have caused Mr.

van Rensburg great distress, but it does not follow that such distress would have disabled him from attending to his duties. He himself did not indicate this, and the only passage in the judgment which bears on his emotional state is the following sentence: "I should add that Mr. van Rensburg was clearly distraught and I do not think that he would object if I record that he in fact broke down in my chambers". It seems clear, however, that this sentence does not form any part of the reasons given by Mr. van Rensburg for wishing to be relieved from his duties, and accordingly also not of the reasons influencing the trial judge to accede to his request. In the context it was merely an observation by the learned judge to emphasize the depth of feeling with which Mr. van Rensburg made the request. Even if it is accepted that at the moment when Mr. van Rensburg was requesting his discharge he might have found it difficult to carry on with the trial, there is nothing to suggest that he could not have composed himself quite soon. And it is significant that in attempting to find out when Mr. van Rensburg

would again, in the words of the learned judge, be "available" to continue the trial, the learned judge was concerned with the probable course of the daughter's condition and not with Mr. van Rensburg's emotional state.

To sum up, it seems clear that the learned judge considered that Mr. van Rensburg's understandable wish to be with his daughter in hospital by itself rendered him unable to act as an assessor. In my view this reflected a misconception of what is meant by "unable" or "onbekwaam" as used in sec 147(1).

It follows, in my view, that the learned judge's ruling was not authorized by the section. After Mr. van Rensburg's discharge the court was accordingly not properly composed, and its findings cannot stand. The fact that the accused consented to the continuation of the trial before two members of the court cannot affect this conclusion. See R v. Price 1955(1) SA 219 (A) at p. 223 D.

The result thus reached may be regarded as unsatisfactory in the circumstances of the present case but

cannot, in my view, be avoided. The correct composition of the court is always a matter of importance, but particularly so in a case like the present where the trial judge summoned two assessors to his assistance in terms of section 145(2) of the Act because he was of the opinion that a sentence of death might be imposed. In the result six death sentences were in fact passed. This is pre-eminently the type of case in which the legislature intended that the trial judge should be assisted by two assessors. See R v. Mati 1960(1) SA 304 (A) at p. 306 D-F and S v. Malinga 1987(3) SA 490 (A) at p. 498 D-J. And, although section 147(1) of the Act does permit, even in a case to which section 145(2) applies, that a trial may in certain circumstances continue without one of the assessors, these circumstances should, in my view, not be extended beyond those clearly falling within the language of section 147(1).

The appeal is accordingly allowed, and the convictions and sentences of the appellants set aside.

E. M. Grosskopf
E M GROSSKOPF, JA

F H GROSSKOPF, AJA Concur

CG

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Appellant no 6

THOZAMILE BACELA

Appellant no 7

and

THE STATE

Respondent

CORAM: E M GROSSKOPF, STEYN, JJA. et F H GROSSKOPF, AJA.HEARD: 16 May 1989DELIVERED: 24 May 1989J U D G M E N TSTEYN, JA.

I have had the benefit of reading the judgment of my colleague, E.M. Grosskopf, JA. I differ from him only on his interpretation of the relevant facts and of the learned judge's decision. In my respectful opinion those facts clearly demonstrate that by virtue of severe emotional stress which, by all indications was going to last for an indefinite period of time, the assessor, Mr van Rensburg, became "unable to act as assessor" within the meaning of sec 147(1) of the Criminal Procedure Act, no 51 of 1977, and that the learned judge actually so found.

The ability to pay proper attention to the proceedings is essential for the due performance of an assessor's task. The word "unable" is defined in The Oxford English Dictionary (Vol XI) as: "Not able, not having ability or power, to do or perform (undergo or experience) something specified (chiefly of persons)." Should an assessor become incapable of paying such

attention he would, whilst such inability lasts, be unable to act as an assessor.

In the light of our common human nature the facts indicative of Mr van Rensburg's inability to pay such attention at all times relevant to the present matter are in my respectful opinion so clear that they in reality speak for themselves.

This was a case of a father and a daughter (an only child) who were deeply attached to each other. Their joint and urgent desire that he should be at her bedside and his distress at her travail, which distress caused him to break down, testify most eloquently to the great depth of that mutual attachment. The medical prognosis indicated that her affliction could by then very well have become mortal. The primary source of Mr van Rensburg's distress was obviously his daughter's serious condition. It was as obviously the cause of his urge to be at her bedside so as to comfort her and

support her spiritually. There was nobody else who could do so. His enforced absence from her bedside whilst she was in that condition would clearly have deepened his distress and would unquestionably have caused his thoughts to be constantly with her. His continued presence on the bench under such circumstances would have been merely physical and juridically useless (or even harmful) as his mind would inevitably have been elsewhere. During her stay in hospital he had to be with her. He could, therefore, not sensibly have resumed his assessorial duties whilst her condition required his presence at her bedside. How long he would have had to be with her was then quite uncertain. There was no indication that he would have been able to resume his said duties in the then foreseeable future. The trial had by then already lasted for weeks and would clearly still have continued for a long time. No useful purpose would consequently have been served by an adjournment.

The danger that such a step would be of no avail was too clear. There was in fact no indication whatsoever that Mr van Rensburg would have been able to compose himself "quite soon". On the contrary, it was clear that he would not have been able to compose himself at all should he have been required to absent himself from his daughter's bedside whilst her condition required his presence. The attitude of all concerned makes it clear that they considered that to be the case. And counsel wished him well.

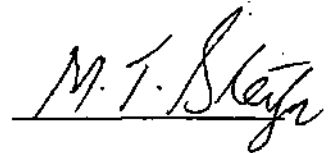
The passage in the judgment referring to Mr van Rensburg's distraught condition and to his breaking down, may not in so many words refer to the reasons expressly given by Mr van Rensburg for wishing to be relieved of his duties, but his condition, as described, taken with the other facts set out by the learned judge in conjunction therewith, clearly demonstrate the actual reasons for his request. Mr van Rensburg's emotional

state and his daughter's condition were, in my respectful estimate, inseparably linked. The expression "compelling personal compassionate grounds" used by the learned judge, cannot in any way detract from the nature and effect of the facts relevant to the question of Mr van Rensburg's ability or inability to continue acting as an assessor. The learned judge was not giving judgment in a contested issue, and possibly did not choose his words as carefully as he would otherwise have done.

In my respectful estimation the learned judge did not misconstrue the section. Nor did he discharge Mr van Rensburg irregularly. He did so properly because Mr van Rensburg was, and would indefinitely have been, unable to act as an assessor. After his discharge the court was consequently still properly composed. By virtue of what was said above as to the stage in the trial at which Mr van Rensburg was discharged, I am also of the respectful opinion that no fault can be found with

the learned judge's decision to proceed with the trial.

The appeal on the special entry should consequently be dismissed.

A handwritten signature in dark ink, appearing to read 'M. T. Steyn', is written over a horizontal line.

M T STEYN, JA.