



**IN THE HIGH COURT OF SOUTH AFRICA.
GAUTENG DIVISION, PRETORIA.**

CASE NO: A120/2019

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

DATE
7/10/2024

SIGNATURE
N V KHUMALO

**MAGCINANDILE MTATSI
VELILE SIGEVENI**

**FIRST APPELLANT
SECOND APPELLANT**

AND

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 7 October 2024.

JUDGMENT

CORAM: KHUMALO N V J and MOILA AJ

Introduction

[1] The Appellants, Magcinandile Mtasi (the 1st Appellant") and Velile Gigaveni ("the 2nd Appellant") are, with leave granted on petition to the Judge President, appealing against their conviction on 19 July 2018 by the Regional Court sitting at Oberholzer on three counts of robbery with aggravating circumstances. They were each sentenced to 15 years imprisonment per count. The sentences were to run concurrently.

[2] The Appellants were Accused 1 and 3 In the trial court and both duly represented by Ms Erwee. They were together with Mr. Ncizinyathi who was Accused 2 and duly represented by Mr Ramabulana charged with having robbed each of the Complainants in the three counts of their property that include, a laptop, cellphones and a wallet.

[3] Accused 2 pleaded guilty to all three counts, whilst the Appellants pleaded not guilty to all three. However, following the enquiry in terms of s 113 of the Criminal Procedure Act 56 of 1977 ("the Act") on Accused 2's statement in terms of s112 of the Act, the trial court accepted his plea of guilt only in respect of count 3 and entered a plea of not guilty on count 1 and 2. He had admitted to having alone robbed the Complainant in Count 3 of his laptop and that the 1st and 2nd Appellant were not involved. In respect of count 1 and 2 he said he bore no knowledge in relation thereto.

[4] Subsequent to the acceptance of Accused 2's plea on count 3 and his s 112 statement in explanation thereof, the learned magistrate convicted and immediately sentenced Accused 2. The trial proceeded against all three, with Accused 2 being tried only on count 1 and 2 and the Appellants on all three.

[5] The Appellants' legal representative consequently applied for separation of trials arguing that the Appellants won't have a fair trial as the learned magistrate had sight of the evidence pertaining to what had happened and his mind clouded. Notwithstanding the state being amenable to the separation, the trial court refused the Application, referring to the matter of *S v T* 1953 (2) SA 479 (A).

Factual Matrix

[6] On the date of the incident the three complainants were walking home coming from a tavern when they encountered three assailants who robbed them of their

belongings, a laptop, two cellphones and a wallet. The assailants were allegedly armed with a beer bottle, a firearm and a knife. The laptop was later recovered from Accused 2 who was pointed out to them by the 1st Appellant. The Complainants reported the matter to the police and the Appellants were arrested. The court a quo based on the evidence of the three complainants and the police found that the state proved the Appellants's guilt beyond reasonable doubt in all three counts.

Grounds of appeal

[7] The Appellants' grounds of appeal are stated to be the following, that :

[7.1] The Court erred in convicting them by failing to analyze the evidence of the state witnesses properly.

[7.2] The Court did not correctly consider the improbabilities inherent in the state's version.

[7.3] The complainants on counts 1, 2 and 3 could not correctly give a description of which assailants took which actions and what they were armed with, in that they contradicted each other as follows:

[7.3.1] Ms. Nkosi pointed out the 1st Appellant and Accused 2 as the only assailants who attacked her with a bottle. She insisted that she saw him face to face.

[7.3.2] Mr. Tyaphile ("Jack") Complainant in count 1 contradicted Ms. Nkosi by saying that her version is not correct; the 1st Appellant and also Accused 2 assaulted him. The 1st Appellant had something that resembled a firearm. Ms Nkosi was assaulted by the 2nd Appellant with a bottle. He testified that they approached the police that morning but did not tell them they knew the 1st Appellant.

[7.3.3] Mbongeni said Ms. Nkosi was rather attacked by the 1st Appellant, who had a knife. The 2nd Appellant tried to hit him instead with a bottle, and took his phone and laptop.

[8] The judgment deals with the totality of the evidence that was before the court a quo and the legal points raised in the Appellants heads of argument rather than with the grounds of appeal *ad seriatim*.

Evidence led

By the State

[9] The state's first witness was Jack Tyaphile, the Complainant in count 1 ("Jack"). His testimony was that he and the other two complainants were walking from the tavern, when they encountered the Appellants and Accused 2. The 2nd Appellant had a knife, Accused 2 a beer bottle, and the 1st Appellant was holding something that resembles a firearm. They caused him to fall, and Accused 2 kicked him. They took his two cell phones. Accused 2 hit Mbongeni, Complainant on count 3 with a bottle and hit Ms Nkosi, the Complainant on count 2 on her head with a bottle. He knew the 1st Appellant. The 1st Appellant pointed out Accused 2, who returned the stolen laptop.

[10] Under cross-examination, he stated that he was put down by the 2nd Appellant and Accused 2 took his wallet. They approached the police for assistance shortly after the incident. He however could not answer why he did not tell the police that morning that they knew the 1st Appellant. He confirmed that when the laptop was recovered, the police were not there.

[11] Ms Nkosi whose full name is Nicole Nkosi, testified that she was with Thulani that is Jack and Mbongeni, walking from the tavern and going home at 2:00 am when the three approached them. Two of them went to Mbongeni. Accused 2 tripped her, and she fell. He pinned her down and took her money and phone. Mbongeni and Jackie ran away. The person who robbed her was Accused 2. She was able to recognize him because they were face to face.

[12] Mr. Mbongeni, the Complainant in count 3 testified that he was with the other Complainants coming from a tavern when three people emerged. One put Jack on the ground. The other one was holding Ms Nkosi. Accused 2 approached him and tried to hit him with a beer bottle but he blocked. That person took his cell phone and laptop. Ms Nkosi was attacked by the 1st Appellant, who had a knife. The 2nd Appellant

attacked Jack. They went to look for the suspects the next day because he knew the 1st Appellant. The 1st Appellant referred them to Accused 2. His laptop was recovered at Accused 2's place. The police were not there when the laptop was recovered.

[13] Under cross-examination, he denied that the 1st Appellant was in the police van shouting that Accused 2 must give them the laptop.

[14] According to Constable Nonnie Sontyali ("Sontyali") on 3 April 2015, whilst she was on duty patrolling with her colleague, they were stopped by Jack who was with the other two complainants, Ms Nkosi and Mr Bhengu. They reported that they encountered the three Accused in the early hours of the morning when they were returning from the Tavern. The three robbed them of a cell phone, money, and laptop. The 1st Appellant took them to Accused 2's place where a laptop was retrieved. The Appellants and Accused 2 were then arrested.

[15] According to the second police officer, Zinzile Pomphe, he was patrolling with Sontyali when they met the two complainants and two accused (that is the 1st and 2nd Appellants). The complainants reported that the 1st and 2nd Appellants robbed them of their cellphones, money, and laptops. The two Appellants took them to the third person, Accused 2. On arrival, they called Accused 2 and enquired about the laptop. Accused 2 fetched it and gave it to them. The three accused were arrested and taken to the police station.

[16] He under cross-examination stated that he could not remember who said the laptop was with Accused 2, but he confirmed that they found the laptop at Accused 2. Accused 2 gave it to him personally. He later changed and said Accused 2 gave it to the Complainant then the complainant gave it to them.

By the Defence

[17] The 1st Appellant testified and called his brother and his friend as witnesses. He testified that he was seated with two ladies at the tavern until 2:00 a.m. He left the tavern with the ladies. He denied robbing the three complainants. The following day, the Complainants came to his house demanding from him items they said were stolen. Unfortunately, he could not assist.

[18] His friend Vukile Gangqongqo testified that the 1st Appellant was his friend. He saw him that night seated with two ladies at the tavern. He left around 1:00 am. The 1st Appellant came to his place around 2:10. He opened for him, and they slept together.

[19] The 1st Appellant's brother Mapela Mtatsi confirmed that on the 3rd of April 2015, his brother, the 1st Appellant did not sleep at home. In the early hours of the morning, people came looking for him, threatening to burn their houses and damage their windows. They left. They came back again the next day at 10:00 a.m. He then took them to where the 1st Appellant was. These people had weapons like sticks and golf sticks with them.

[20] The 2nd Appellant also testified that he was drinking with his friend and younger brother in the Tavern. They all three left the Tavern and went to sleep. He did not meet the Complainants. The Complainants were not known to him. He only knew them by sight. The next day, the two Complainants came to his place. They told him that they were looking for a laptop. He knew nothing about the laptop. They left. They later came with the police. The 1st Appellant and Accused 2 were already inside the police van. Police asked about the laptop. He told them that he knew nothing about the laptop. He was then arrested.

Legal framework

On joint and separation of trials

[21] Section 155 of the Act reads:

“(1) Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants the same offence or any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.

[22] Whilst s 156 reads:

"Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court the evidence admissible at the trial of one of such persons will, in his opinion also be admissible as evidence at the trial of any other such person or such persons."

[23] The Act however in s 157 (2) of the Act provides for the separation of trials. It reads:

"When two or more persons are charged jointly, whether with the same offence or with different offences, the court may, at any time during the trial, upon the application of the prosecutor or 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."

[24] In *S v Tshamano and Another*¹ the court confirmed that the decision to direct a separation of trials involved the exercise of a discretion. A court of appeal would be reluctant to interfere with the exercise of that discretion, unless it was convinced that the trial court committed an irregularity or misdirection of such kind, or acted so unreasonably or improperly, that its decision was vitiated thereby.

[25] It was however emphasised in *S v Bapela and another*² that the court should be very cautious before deciding an application for separation in a summary fashion where there are differing pleas from different accused. It is rather compelled to take cognisance of the fundamental overarching constitutional requirement that the Accused be given a fair trial.³ Therefore should a joint trial encroach upon this right, joinder must be ended, either by separation or by withdrawal. It has therefore become standard practice when some accused plead guilty and others not guilty, for the court to order separation and complete the trial of those who have pleaded guilty,

¹ 1998 (1) SACR 359 (V)

² 1985 (1) SA 236 (A)

³ s 35 (3) of the Constitution Act 108 of 1996.

Analysis

[26] In *casu* the Appellants agree that it was in the interest of justice to prosecute the Appellants and Accused 2 in a joint trial. However argue that on tendering different pleas, the circumstances changed and indeed the court was required to carefully weigh the significance thereof when exercising its discretion in the Application for separation of trials that was appropriately brought after the conviction of 2nd Accused on his version.

[27] The trial court indeed decided the Application summarily without weighing the facts properly and the consequences of its refusal wisely, particularly as Accused 2 only incriminated himself and not the 2 other Accused. He in fact exonerated the Appellants in that he denied that there was any involvement by the other two in count 3, with respect to Mbongeni's laptop, alleging to have committed that offence on his own. The version was accepted by the trial court upon which it immediately convicted and sentenced Accused 2, a separation or withdrawal of Count 3 against the Appellant was for that reason inevitable.

[28] After accepting the version of Accused 2 and convicting him, the trial court could not have proceeded to try the Appellants on the same offence in count 3, as the Appellants will have to be found guilty on a different version or facts in the same trial. If the court *a quo* wanted to continue against the 2nd Accused in the same trial, then after convicting and sentencing the 2nd Accused on that version, the charge against the Appellants on count 3 should have been withdrawn or the Appellants acquitted on count 3. The continuation with a trial against the Appellants on count 3 as well as their consequential conviction was a serious or a gross misdirection by the court. It therefore cannot be said that it exercised its discretion judiciously. The prejudice suffered by the Appellants evident, the conviction cannot stand.

[29] In *S v Witbooi*⁴ Accused 3 had pleaded guilty whilst Accused 1 and 2 had pleaded not guilty to a charge on stock theft. Accused 2 incriminated himself and both his co-Accused during questioning by the court in terms of section 115 of the Act. The court convicted Accused 3 after questioning him in terms s 112 (1) (b) of the Act. The

⁴ 1994 (1) SACR 44 (CK).

joint trial proceeded. Accused 1 and 2 were then also convicted. On review, it was held that non-separation caused prejudice to 1 and 2. Although the facts in *Witbooi* are slightly different to those in *casu* in that in *Witbooi*, Accused 3 also incriminated his co-accused whilst in *casu* Accused 2 actually exonerated the Appellants. The acceptance of Accused 2's version on count 3 and conviction thereon was consequently fatal to the state's case against the Appellants in count 3.

[30] The significance of *Witbooi* is that Heath J and Claasen J did not find the magistrate to have erred due to failing to separate the trial of Accused 2 from that of the other two accused simply on the basis that his defence, as disclosed in his plea explanation, tended to incriminate his co-accused. The court, however found that the failure of the magistrate to separate the trial of Accused 3 from the other two accused, after he had been convicted, prejudiced them and amounted to a failure of justice⁵. Accused 1 and 2's conviction was as a result set aside.

[31] In elucidating the point further, the court in *Witbooi* referred to the case of *S v Ntuli & Others*⁶, the effect of which was that there would not have been any substantial prejudice from the failure by the court to separate the trial of Accused 2 from that of 1 and 3, but that the failure of the court to separate the trial of Accused 3 who had pleaded guilty and his version accepted, from the trial of Accused 1 and 2 obviously prejudiced them. The reason appears at page 51(f) of the judgment where the court said that the magistrate in convicting Accused 3 in *Witbooi*:

"against the background of his replies and the questioning by the magistrate in terms of section 112 (1)(b) amounts to an acceptance, not only of all the elements of the offence, but at the same time an acceptance of his version that he had slaughtered the ox with the assistance of accused 1 and 2 and that he had in fact informed accused 1 and 2 that he had stolen the ox."

[32] This court cannot ignore the above, even if it is scantily raised by the Appellants in its grounds of appeal and summarily dealt with in the heads of argument. It is indeed trite that a court of appeal will only interfere if satisfied that the trial court's exercise of

⁵ At Paragraph 51

⁶ 1978 (2) SA 69 (A) at page 73 (B)

its discretion amounted to such a gross misdirection that it resulted in a failure of justice that deprived the Appellant of his or her right to a fair trial,⁷ which is the case in this matter. The court a quo grossly misdirected itself, failing to use its discretion wisely, as it could not on the same trial accept the version of Accused 2 solely incriminating himself on count 3, and still let the trial proceed against the Appellants on the same count.

The issue of common purpose

[33] Emanating from the facts, the issue of common purpose was raised as to whether the Appellants could be convicted on common purpose. That question could not arise in as far as count 3 is concerned as the version that exonerates the Appellants was already accepted by the court. The Respondent's allegation that it would not have accepted Accused 2's plea of guilty and explanation had it been given an opportunity to respond, cannot be to the prejudice of the Appellants. It rather confirms the learned magistrate's gross misdirection in handling the whole matter. Although the prosecution could have nonetheless pointed out its dissatisfaction with the facts proffered in Accused 2's s112 statement, notwithstanding the court's inclination to accept them.

[34] In relation to counts 1 and 2, there was never any indication that the state would rely on the doctrine of common purpose as was confirmed by the learned magistrate. It is trite that at the beginning of the trial, there should be certainty on the case the accused is supposed to meet, the charges being clear, so that the accused can decide on how to plead. This was confirmed in *S v Ndaba*,⁸ decided prior to the 1996 Constitution. The state in *Ndaba* had omitted to allege in the charge sheet or in the summary of substantial facts that it will rely on common purpose, and the court stated that:

"I am satisfied that the allegation of common purpose has to be made by the state in the indictment, or at least in the summary of substantial facts furnished to the accused."

⁷ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706). *S v Francis* 1991 (1) SACR 198 (A) at 204E

⁸ 1981 (3) SA 803 (C) at para 102

[35] Section 144(3) of the Act provides in peremptory terms that the accused person shall be provided with an indictment which shall be accompanied by a summary of substantial facts of the case, which in the opinion of the attorney general, are necessary to inform the accused of the allegations against him". The state cannot rely on the fact that the charges against the Accused could be inferred from the remarks it made at the beginning of the trial. s 35 (3) (a) of the Constitution is explicit that "Every accused person has a right to a fair trial, which includes the right to: (a) be informed of the charge with sufficient detail to answer it." Having not been furnished with sufficient details of the charge, indeed prejudiced the Appellants as it violated their right to a fair trial. Under the circumstances a finding therefore of the Appellants' guilt on the basis of common purpose resulted in a gross travesty of justice. Moreover as the court relied on the incongruent evidence of the Complainants. It therefore warrants the setting aside of the convictions.

[36] On the remaining grounds of appeal on the conviction on charges in count 1 and 2, the version proffered by the state and that of the Appellants at the trial are opposed to each other. This court has to determine, as a court of appeal, whether the Appellants were correctly convicted in respect of each of the convictions.

[37] It is trite law as confirmed in *R v Dlumayo supra* that a court of appeal's powers to interfere with the findings of fact of a trial court are limited and should be slow in the absence of material misdirection, to interfere with the findings of fact of the trial court. In evaluating factual disputes in a matter one is enjoined to consider the evidence in its totality, consider the credibility of all the witnesses, their reliability and lastly the probabilities.⁹

[38] Furthermore, the basic principles of criminal law and the law of evidence apply. The first principle is that in criminal proceedings, the state bears the onus to prove the accused's guilt beyond a reasonable doubt¹⁰. If the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the Appellant's

⁹ *Stellenbosch Farmers' Winery Group Limited and another v Martell et Cie and others* 2003 (1) SA (SCA) para 141-15E

¹⁰ *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Jackson* 1998 (1) SACR 470 (SCA)

conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false.¹¹

[39] It is also imperative for the court to evaluate all the evidence, and not to be selective in determining what evidence to consider. As Nugent J (as he then was) stated in *S v Van der Meyden*¹² at 450 that:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

[40] In *S v Mafaladisa en Andere*¹³ the court pronounced as follows on the assessment of contradictions and inconsistencies in witness's evidence that:

"Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings." (At 593e - 594h.)

[41] In count 1, the Appellants have raised the fact that Jack alleged that he was attacked by Accused 2 who was in possession of a knife. The 1st Appellant who was in possession of something resembling a firearm, searched him, took his cell phone

¹¹ *S v Sithole and Others* 1999 (1) SACR 585 W at 590

¹² 1999 (1) SACR 447 (W)

¹³ 2003 (1) SACR 583 (HHA)

and a wallet. Whilst in Count 2 Ms Nkosi testified that the person who robbed her was accused 2. He tripped her and she fell. He pinned her down and took her money and phone. She was able to recognize him because they were face to face. Mbongeni and Jack ran away.

[42] However Mbongeni's evidence was that Ms Nkosi was attacked by the 1st Appellant, who was holding a knife. Jack on the other hand was actually attacked by the 2nd Appellant, whilst he was approached by Accused 2 who tried to hit him with a beer bottle, took his cell phone and laptop.

[43] It is not clear if Accused 2 was armed with a beer bottle or a knife, cause he is alleged to have at the same time and place used a knife against Jack whilst using a beer bottle against Mbongeni. According to Mbongeni it is the 1st Appellant who was actually armed with a knife, and had attacked Ms Nkosi. Jack's evidence in the meanwhile is that it was Accused 2 who was armed with a knife and had attacked him, which is contrary to the evidence already accepted in count 3 upon which Accused 2 was convicted, that he was armed with a beer bottle and had only attacked Mbongeni. Jack's further evidence that he was then robbed of his cellphone and wallet by the 1st Appellant who was carrying a firearm was also contradicted by Mbongeni's evidence that Jack was attacked by the 2nd Appellant.

[44] Due to the apparent contradictions and inconsistencies in the state witnesses' evidence on who exactly amongst the three attacked Jack in Count 1 and Ms Nkosi in count 2 and if there was such an attack, with what weapon, their evidence cannot be relied upon. They were very poor witnesses. Jack in count 1 said he was attacked by Accused 2 armed with a knife and robbed by 1st Appellant who was armed with a firearm. According to Mbongeni the person who attacked Jack was the 2nd Appellant armed with a knife and Ms Nkosi was attacked by 1st Appellant also armed with a knife. In count 2 Ms Nkosi stated that she was attacked by Accused 2. Although there is really nothing to hold against the Appellants, Accused 2 seems to be alleged to have been the common denominator, but the evidence on how he is alleged to have committed these crimes discrepant, therefore cannot be relied upon. The state's witnesses definitely could not be found to be credible witnesses. Their evidence highly unreliable.

[45] The Complainants version, differed on material aspects on how the whole incident unfolded. It is sensible that they would have struggled with the recollection of who participated in the alleged robbery and was doing exactly what at the time it happened, taking into consideration that they have been drinking for the better part of the night. They left the tarven in the early hours, being under the influence of alcohol.

[46] Furthermore the state's evidence was that Jack approached the police shortly after the incident. Even though he said he had recognised the 1st Appellant during the robbery he did not inform the police about such crucial information, and could not explain his deliberate omission when given a chance to do so under cross examination. Therefore the likelihood of Appellants being present and not to have participated at all is not ruled out as the court had to find them guilty on the basis of common purpose.

[47] On the other hand the police officers were also of little assistance, in that they contradicted the version of the Appellants on how the laptop was retrieved from Accused 2, alleging to have been present when the laptop was found. It is unlikely that the police were there as the Complainants failed to tell them that they know the 1st Appellant and where to find him. The Complainants denied the version of the police and also that the 1st Appellant is the person who took the police to Accused 2's place where they found the laptop. There is therefore no certainty as to where and who was there. In any case Accused 2 confirmed to have solely been responsible for the charge in relation to the laptop and his version accepted. It therefore stands.

[48] The Complainants, also failed to provide answers about their contradictory statements and questions posed in relation thereto. Significantly the inconsistencies are on material aspects, rendering their evidence unreliable. There was therefore no credible evidence before the court upon which the court could have made a finding of guilt against the Appellants also in respect of count 1 and 2. The allegation that the finding of the laptop corroborates the Complainants evidence is misguided as that relates to Count 3 and has already been admitted to by Accused 2 that he indeed on his own robbed Mbongeni of the laptop, a version accepted by the court.

[49] It is of no consequence that the version of the Appellants was a bare denial. They alleged to have been at the tavern and thereafter went to sleep. In order for the

Accused's version to be scrutinised there must at least be a prima facie proof of guilt against them, therefore a case to which they need to answer. In *S v Shackell*¹⁴, the court said:

"In view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide whether to accept that version."

[50] In a case like this, were there was lack of corroboration but serious contradictions on the material aspects of the trial, that is on facts relating to the execution of the offence, seemingly confusion reigning as to what exactly was the state's evidence, it cannot be said that the state proved the appellant's guilt beyond reasonable doubt.

[51] The refusal of Appellants' Application for separation of trials, and subsequent failure to withdraw the charge against them on count 3 compromised the right of the Appellants to a fair trial, leading to a wrong prosecution sufficient to vitiate the proceedings. The trial was certainly not in accordance with notions of basic substantive fairness and justice. Furthermore the Appellants conviction based on common purpose on the face of significant inconsistencies that were on evaluation of all the evidence evident in all material aspects of the state's case, was also a travesty of justice and cannot stand.

[52] In the premises, the appeal succeeds, and the conviction of the Appellants is to be set aside.

[53] The following order is therefore made:

1. The appeal is upheld;

¹⁴ 2001 (4) SA 1 (SCA)

2. The order of the Regional Court is set aside and replaced as follows:
The appeal against conviction is upheld, and as a consequence the conviction and sentence of the Appellants are set aside.



KHUMALO N V J

JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

I concur:



MOILA AJ

ACTING JUDGE, HIGH COURT
GAUTENG DIVISION, PRETORIA

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