/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE:
CASE NO: A534/2005

UNREPORTABLE

In the matter between:

PETER LETSOPE DIALE	1ST APPELLANT
JUSTICE VETSHE	2ND APPELLANT
And	
THE STATE	RESPONDENT

JUDGMENT

JOOSTE, AJ

The appellants stood trial in the regional court at Thabazimbi on a charge of robbery with aggravating circumstances. They both pleaded not guilty, but were convicted. The first appellant was sentenced to fifteen years imprisonment and the second appellant to seventeen years imprisonment. They appeal against both conviction and sentence, with leave of the court *a quo*.

Both appellants were initially represented by the same attorney in the court *a quo*. During the evidence in chief of the second appellant, the attorney withdrew from the latter's case sighting contradictory instructions. This happened under the following circumstances as appears from page 51 line 15 to page 52 line 13 of the record:

> "ONDERVRAGING DEUR MNR. VISSER: Dankie edelagbare. Meneer op Maandag 8 Maart hierdie jaar is u gearresteer is dit korrek? -- Ja.
>
> Sê vir die hof wat het gebeur wat aanleiding gegee het dat u gearresteer is? -- Ek was by Northam in die dorp.
>
> Hoe laat was dit gewees? -- In die omgewing van 07:00 in die oggend.
>
> Goed wat gebeur toe? -- Ek het toe vir beskuldigde 1 teëgekom. Beskuldigde 1 was in besit van 'n radio bandspeler.
>
> Was beskuldigde 1 in besit daarvan? -- Ja beskuldigde 1.
>
> Edelagbare op hierdie stadium sal ek moet onttrek. Heeltemal teenstrydig met my instruksies. Ek het ook met beskuldigde (tussenbei).
>
> HOF: Ek gaan verdaag dat u net eers met beskuldigde 1 konsulteer.

> MNR. VISSER: Ook gesien in die lig van die pleitverduideliking wat beskuldigde 2 gegee het edelagbare.
>
> HOF: U hoor nou wat sê u prokureur?
>
> BESKULDIGDE 2: Hy kan onttrek edelagbare ek sal myself verdedig.
>
> HOF: Dankie u word dan verskoon.
>
> MNR. VISSER: Dankie edelagbare ek onttrek dan van beskuldigde 2 edelagbare."

It should be noted that first appellant's version as appears from his plea-explanation was that he knew nothing about the robbery but that he met the second appellant in Northam where the latter had a radio with him. He then walked with the second appellant who sold a radio. The second appellant's version according to his plea-explanation was that he was in Northam at around 07:00 when he saw a white plastic bag lying under a tree. He picked up the bag and found a radio therein. He then met the first appellant who accompanied him when he sold the radio.

The second appellant continued his evidence in chief and at the close thereof it was permitted by the magistrate that the attorney who withdrew cross-examines the second appellant. At one stage the court

made the comment that it has now become a difficult situation whereupon the attorney responded:

> "Dit raak nou moeilik."

Notwithstanding this and the magistrate's comment that he thought that the attorney should merely put the first appellant's version to the second appellant, the attorney continued to extensively cross-examine the second appellant. He ended off by putting the following to the second appellant:

> "So meneer ek gaan dit aan u stel dat hoekom u saam met beskuldigde 1 gegaan het dit wat u radio gewees. U was in besit van die radio."

> "En u is die persoon wat die radio by die klaer geroof het uit sy trok uitgetrek het meneer."

There is no doubt in my mind that serious regularities occurred *in casu*. Firstly, it is surely prejudicial to an accused person where his defending attorney openly tells the court that the story advanced by the accused conflicted completely with the instructions given to him.

Secondly, the fact that Mr Visser was permitted to continue to defend the first appellant. He should have withdrawn on behalf of both appellants. Second appellant continued to give evidence clearly implicating and putting the blame on the first appellant. It was put thus by ERASMUS J in *S v Moseli en 'n Ander* (1) 1969 1 SA 646 (OPD) 649A:

> "Om genoemde redes sal 'n Hof nie toelaat dat dieselfde advokaat twee beskuldigdes met materieel botsende belange in 'n halssaak verdedig nie of voortgaan om een, afgesien van sy of hul houding, te verdedig nadat sodanige belange aan die lig gekom het nie."

Thirdly, Mr Visser was permitted to cross-examine the second appellant, his erstwhile client. In similar circumstances, BEADLE, CJ stated the following in *R v Chisvo and Others* 1968 3 SA 353 (R,AD) 354E-H:

> "The Court irregularly, in my opinion, allowed him to do this. He then proceeded to cross-examine the eighth appellant. This, I think, was irregular. Having once accepted the brief to defend the eighth appellant it was irregular for his counsel to then act against him in the same

> case, which was the effect of what Mr Taylor was doing. ... It was quite impossible for Mr Taylor not to have been influenced in his cross-examination of the eighth appellant by confidential information he had acquired at conferences with the eighth appellant when he was acting for him. Information acquired by counsel in the cause of conferences with their clients is confidential and strictly privileged and should not be divulged to the prejudice of their clients, nor should counsel make any use of it at any time against their former clients, even if they renounce their agency."

An irregularity *per se* of course does not vitiate proceedings unless it appears that the failure of justice has in fact resulted from such irregularity. However, as was stated by BOYSEN J in *S v Mathe* 1996 (1) SACR 456 at 459I-460A:

> "Once an irregularity sufficiently connected with the trial has been shown to exist, a failure of justice will be held to have occurred if the irregularity constitutes so gross a departure from the established rules of procedure and the requirements which the fundamental principals of law and justice lay down for proceedings that the accused cannot be

> said to have had a fair trial. In that event the conviction is set aside despite the presence of convincing evidence which might be present to the effect that the accused is guilty."

In my view the irregularities in this matter are associated with the trial in a degree imperilling the basic concept that the accused must be fairly tried.

The question of course arises whether the case of the first appellant should be dealt with in the normal course or whether there has not possibly been prejudice to him as well. There might not have been a proper testing and weighing of the version of one accused as against the version of the other accused. The evidence might also not have been as fully ventilated and critically examined in the trial as should have been done. In the circumstances I am of the view that there must have been prejudice to the first appellant as well, his case possibly not having been advanced as fully and without an inhibition as it ought to have been by the attorney defending him.

I am therefore of the view that the conviction and sentences of both appellants cannot stand.

The following order is made:

1. The conviction and sentences of the first and second appellants are set aside.

2. The case is referred back to the Director of Public Prosecutions for him to take such steps as he deems fit in the circumstances.

F J JOOSTE
ACTING JUDGE OF THE HIGH COURT

I agree

W L SERITI
JUDGE OF THE HIGH COURT

A534/2005

HEARD ON: 5/06/2006
FOR THE APPELLANTS: ADVD L PHAHLANE
INSTRUCTED BY: THE LEGAL AID BOARD
FOR THE RESPONDENT: ADV B T MOELETSI
INSTRUCTED BY: MESSRS
DATE OF JUDGMENT: 5/06/2006