

SOUTH AFRICA / JUDGMENT

**S v Louw (70/88) [1990] ZASCA 43; 1990
(3) SA 116 (AD); [1990] 4 All SA 703 (AD)
[1990] 4 All SA 703 (AD) (30 March 1990)
[1990] ZASCA 43**

COURT

Supreme Court of Appeal

BEFORE

Hoexter, Vivier, Kumleben, Goldstone, Nienaber

CASE / FILE NUMBER

70/88

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FREDERICK JACOBUS GIDEON LOUW AppellantandTHE**STATE Respondent****Case No. 70/88****IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION**

In the matter between:

FRÉDERICK JACOBUS GIDEON LOUW AppellantandTHE
STATE RespondentCORAM: HOEXTER, VIVIER, KUMLEBEN, JJA et
GOLDSTONE, NIENABER, AJJA

HEARD: 20 March 1990 DELIVERED: 30 March 1990

JUDGMENT

HOEXTER, JA

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HOEXTER, JA This criminal appeal from the Witwatersrand Local Division ("the court a quo") is the sequel to the conviction of the appellant by an additional magistrate in Johannesburg ("the trial court") on a charge of assault with intent to do grievous bodily harm. The facts are the following.

During the month of September 1985 a Mr Alfred

Khasu ("the complainant") worked as a truck driver for Checkers Stores at its City Deep distribution centre. The complainant was then 52 years old and he had been in the employ of Checkers for almost twenty years. A firm known as Shield Security provided security services for Checkers. Shield Security had an office at Brixton ("the Brixton office"); and one of its area managers was the appellant. The appellant was a man aged 35 years.

At about 3 pm on Thursday 26 September 1985 a3

security official at Checkers Stores, City Deep, took the complainant to the Brixton office where the appellant took him into custody. The complainant so remained in custody at the Brixton office until the afternoon of Friday 27 September 1985. While in custody the complainant was questioned at length by the appellant in regard to alleged thefts of video-cassette recorders at the distribution centre of Checkers; and the complainant ultimately signed a statement prepared by the appellant. The statement was incriminatory of the complainant. On the afternoon of Friday 27 September 1985 the appellant took the complainant and the statement to the Kenilworth Police Station. There the complainant was questioned by a major in the South African Police ("the police officer") who was in charge of the detective branch at Booysens. The police officer considered that there was insufficient evidence against the complainant and he declined to detain him as a suspect in

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connection with the alleged thefts. The police officer released the complainant but told him to return to the police station on the following Monday. On the night of Friday 27 September 1985 the complainant was treated at the casualty section of the Baragwanath Hospital from 7 pm until midnight. On the following morning at 11.30 am the complainant was examined by a private medical practitioner, Dr N H Motlana. From Dr Motlana's examination it appeared that the complainant had been the victim of a vicious physical assault in the course of which multiple injuries had been inflicted upon him. The notes made by Dr Motlana to record his findings at the time described the assault upon the complainant as a "savage" one. In consequence of his injuries the complainant stayed away from his work for a month. Upon his return to work the complainant went to the Brixton Police Station and laid a charge of assault. The

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complainant identified the appellant as his assailant; and he alleged that the assault had taken place during his period of custody at the Brixton office. In due course the appellant was charged with the crime of assault with intent to do grievous bodily harm. It is a disturbing feature of the whole matter that the appellant was charged in a district magistrate's court. The gravity of the case was such that the appellant should have been prosecuted in the regional court.

The appellant consulted an attorney who briefed

an experienced advocate to represent him at his trial. The trial began on 8 December 1986, that is to say, more than fourteen months after the assault upon the complainant. The appellant's attorney also attended the proceedings. The appellant pleaded not guilty and his counsel informed the magistrate that the defence wished to make no statement in terms of sec 115 of the Criminal Code.

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The first State witness was the complainant. At the close of his evidence in chief he was cross-examined at length. The cross-examination of the complainant was interrupted by the adjournment of the proceedings until 2 March 1987. At the resumed hearing on that date the complainant stood down as a witness and the evidence of Dr Motlana (the only other State witness) was interposed. Thereafter the complainant again took the witness-stand; and once again he was cross-examined at length. The State then closed its case. A brief summary of the complainant's evidence in chief will suffice. He testified to two separate and sustained assaults upon him by the appellant at the Brixton office. The complainant told the trial court that the appellant, having made him sit on a chair, handcuffed his wrists and sealed his mouth with masking-tape. The

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appellant urged the complainant to tell the truth. Wielding a sjambok the appellant struck the complainant repeatedly on the back of his head. These blows were not very hard. The complainant denied any knowledge of the thefts. The first assault lasted from 3 pm to 6 pm on the Thursday afternoon. The appellant then departed and the complainant was left in the charge of somebody else. The appellant reappeared in the very early hours of Friday 27 September. The second assault took place between the hours of 3 am and 6 am on that morning. During the second assault the complainant was no longer handcuffed and his lips no longer sealed; but the appellant struck him all over his body. Again the complainant protested his innocence. At the end of the second assault the appellant wrote out a statement and procured the complainant's signature to it. The contents of the statement was false and the complainant signed it because he had been beaten.

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Thereafter the complainant was left alone until about 3.30 pm when the appellant took him to the Kenilworth Police station. There he was questioned and told to return on the following Monday. The complainant did not tell the police officer interrogating him that he had been assaulted. The complainant said that he had suffered much pain both during and subsequent to the assault. He had to rest at home for a month before he was able to resume his work at Checkers. The tenor of the cross-examination of the complainant by the appellant's counsel may be shortly noticed. With a view to destroying his credibility and reliability as a witness the complainant was subjected to a vigorous and protracted cross-examination. The cross-examination was, however, of a somewhat general nature. True enough, the cross-examiner put it to the complainant that while in custody at the Brixton office the complainant

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had not been assaulted at all by the appellant. Indeed,

the suggestion made to the complainant was:-

"You were assaulted later by some person or persons unknown to me, perhaps robbed - I don't know."

For the rest counsel betrayed a marked disinclination to put to the complainant any part of the appellant's version as to the treatment of the complainant during an illegal detention lasting some 24 hours. While terse suggestions were made to the witness as to what had not taken place during this time, no real inkling was given as to what, on the appellant's version, had in fact happened.

Dr Motlana told the trial court that at the time

of his examination of the complainant on 28 September 1985

the complainant was in excruciating pain. He was groaning

and he was able neither to sit nor stand. On his back the

complainant had been hit with a sjambok or a stick so that

linear bruises and abrasions formed "one massive continuous

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mass with extensive subcutaneous bleeding," The complainant's whole back, from the cervical spine to the lumbar vertebra, was "one massive haematoma." The complainant suffered exquisite pain over the lumbo-sacral joint. The complainant's upper arms showed massive continuous bruising. On the complainant's scalp there were general areas of bruising, abrasions and swelling. Both hands and wrists were grossly swollen; and the wrists showed bruising and deep abrasions.

The sole defence witness was the police officer

who had interrogated the complainant at the Kenilworth Police Station on 27 September 1985. He told the trial court that he recalled his interrogation of the complainant through an interpreter.

He also remembered his decision not to detain the complainant because of the inadequacy of the evidence against him. The witness found it difficult, however, to say how long the questioning of the complainant

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had lasted. He said that it could have been between 10 and 20 minutes. The complainant did not complain to him that he had been assaulted; and the witness did not observe any outward signs of an assault upon him. Asked to describe the appearance of the complainant at the time of his interrogation the witness said that the complainant had shown fear and extreme nervousness.

In his judgment on the merits of the case the

magistrate carefully reviewed all the evidence before him. In weighing the case as a whole the trial court bore in mind the testimony of the police officer. It considered that the police officer had probably concentrated his attention on the matter of the appellant's allegations against the complainant rather than the latter's physical condition. The trial court concluded that the police officer's failure to observe outward signs of injury on the part of the complainant did not necessarily sustain an

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inference that at the time the complainant had been uninjured. The trial court recorded its impression that the complainant had been a good and consistent witness whose evidence was corroborated by the medical evidence. From the appellant's failure to testify the magistrate properly drew an inference adverse to the defence. The magistrate, quite correctly, found it unprofitable to

indulge in conjecture. He rejected out of hand the hypothetical possibility conjured up by the appellant's counsel which supposed that, having emerged hale and hearty from his detention at the Brixton office, the complainant might shortly thereafter have been set upon and beaten up by some party or parties unknown - the assault moreover being of such a nature that it caused, inter alia deep abrasions and bruising of the appellant's wrists. Accordingly the trial court found the appellant guilty as charged. Having been convicted the appellant testified briefly in mitigation of sentence. His evidence was confined to a description of his personal circumstances.

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The trial court then dealt with the matter of sentence. Having described the assault upon the complainant, with perfect accuracy, as "n venynige aanranding" the magistrate proceeded to impose a sentence which was, in my view, totally disproportionate to the seriousness of the offence. The appellant was sentenced

- (1) to payment of a fine of R1000 or, in default of payment, six months imprisonment and (2) six months imprisonment conditionally suspended for a period of five years.

On 13 March 1987 the appellant's attorney filed a

notice of appeal against the appellant's conviction by the trial court. Of the three grounds of appeal set forth therein only one adverted to the appellant's failure to testify at the trial. This ground of appeal read as

follows:-

"1. The learned magistrate erred in attaching undue weight to the accused's

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failure to give evidence."In due course the appellant's appeal was set down for hearing in the court a quo on 30 November 1987. At the end of September 1987, and by notice of motion to the Attorney-General ("the first notice of motion"), the appellant intimated that at the hearing of the appeal he would seek leave to adduce certain further evidence. The further evidence sought to be led related to records of the Baragwanath Hospital in regard to treatment received thereby the complainant on 27 September 1985, and a report allegedly made by the complainant to a member of the hospital staff as to the time at which he had sustained his

injuries. The appellant filed a supporting affidavit.

In para 3 thereof the appellant referred to the fact that

he had not testified at his trial. Para 3 reads:-

"The facts relating to my trial and the appeal appear largely from the record and this Honourable Court will observe from the same that

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Counsel who represented me, Advocate M Hannon, elected to close my case without calling me as a witness. The basis and reasons for his so doing will, I am advised, form portion of the argument to be addressed to this Honourable Court in this matter. However it is apposite for me to say only that I had desired to testify in the matter and was fully prepared to do so. I was not consulted on the decision to close my case without actually testifying."

On 25 November 1987 the Attorney-General gave notice to the registrar of the court a quo and to the appellant's attorney that in the event of the dismissal of the appellant's appeal the Attorney-General would apply for an increase of the sentence imposed by the trial court. On 27 November 1987 a further notice of motion ("the second notice of motion") was filed on behalf of the appellant. In the second notice of motion the appellant signified his intention of applying at the hearing of the appeal in the court a quo for an order setting aside the conviction and sentence and remitting the matter to the trial court -

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" for the hearing of evidence on behalf of the accused and the continuation of the trial."

In para 2 of his supporting affidavit to the second notice of motion the appellant said the following:-

"2. I wish to amplify the allegations set out in paragraph 3 of my founding affidavit annexed to the Notice of Motion already filed on my behalf.

2.1 As pointed out in my previous affidavit it was always my desire to testify. My advocate and attorney were both fully aware of this fact. 2.2 I was not consulted by my advocate or my attorney on this decision to close my case without me giving evidence and when this was done it came as a complete surprise to me. 2.3 I never gave any instructions to that effect and still wish to give evidence. 2.4 I was unaware of the fact that I could object to or take over the conduct of my trial or that I could terminate counsel's mandate under the circumstances.

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2.5 I believed, that as counsel was my representative, that I was irrevocably bound by what had transpired and it is only now, during consultation with my legal advisers in regard to the further developments in this matter, that I was informed that the failure to consult me or to allow me to testify constituted an irregularity. 2.6 I respectfully submit that my failure to testify played a vital part in the Honourable Magistrate's decision to convict me of the offence as charged. 2.7 I verily believe that if I am given the opportunity to testify and to have my version put before the Trial Court that an acquittal will result if my version is not rejected."

At the close of argument on the appeal in the

court a quo KRIEGLER, J (in whose judgment LEVY, AJ concurred) made orders (1) dismissing the application for the relief claimed in the first notice of motion;

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(2) dismissing the application for relief claimed in the second notice of motion; (3) dismissing the appeal against the conviction; and (4) increasing the sentence by substituting for the sentence imposed by the magistrate a sentence of imprisonment for 18 months. At a later date the court a quo granted the appellant leave to appeal to this Court against (a) the refusal by the court a quo of the relief claimed in the second notice of motion (setting aside of the conviction and sentence and the remittal of the matter to the trial court for the hearing of the appellant's evidence) and (b) the sentence of 18 months imprisonment. Subsequent to the granting of leave to appeal, and on 22 June 1988, notice was given that at the hearing of the appeal in this Court the appellant would apply in terms of sec 22 of the Supreme Court Act, 59 of 1959, for leave to adduce the evidence of the accused and also the

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evidence of four other persons named in the notice. I shall refer to this application as "the sec 22 application". Counsel who appeared for the appellant at his trial did not appear for the appellant on appeal. Both in the court a quo and in this court the appellant was represented by Mr Kruger. In this court it was common cause between Mr Kruger and Miss Borchers, who argued the case for the State very ably, that at the trial counsel for the appellant closed the defence case without prior consultation with the appellant as to the desirability or otherwise of keeping the appellant out of the witness-stand. In support of the sec 22 application there is an affidavit by the appellant's attorney in which he states, inter alia, that during the cross-examination of the police officer he sat next to defending counsel. After the

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cross-examination of the police officer counsel informed the attorney that he intended to close the defence case without leading any further evidence for the reason that: "...there was no case for the Appellant to meet." Thereupon, so deposed the attorney, he replied that he would abide counsel's judgment. The criteria with reference to which this Court will decide whether or not to order the further hearing of evidence have been discussed in a number of cases. See *Rex v Carr* 1949(2) SA 693 (A); *Rex v de Beer* 1949(3) SA 740 (A); *R v van Heerden and Another* 1956(1) SA 366(A); *R v Weimers and Others* 1960(3) SA 508 (A); *S v De Jager* 1965(2) SA 612 (A); *S v Swanepoë* 1983(1) SA 434 (A). The basic approach may be summed up by saying that before fresh evidence will be received in a criminal appeal the circumstances must be exceptional. In *Rex v Carr* (supra) GREENBERG, JA said at 699:-

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"it must be emphasised that the inadequate presentation of the defence case at the trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage. However serious the consequences may be to the party concerned of a refusal to permit such evidence to be led the due administration of justice would be greatly prejudiced if such permission were lightly granted."

In addition, before a conviction and sentence are set aside in order that further evidence may be heard, certain initial requirements must be satisfied. For purposes of the present appeal it is necessary to refer to no more than the very first of these initial requirements: there must be offered some explanation which the court regards as reasonably sufficient to account for the fact that the evidence in question was not given at the trial.

In the instant case the explanation for the

failure to lead the evidence in question is simple. The appellant's counsel, well knowing that the appellant was

ready, willing and able to testify in his own defence,

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deliberately decided not to call the appellant as a witness. But the explanation is not reasonably sufficient. It is palpably deficient. The discretion and duty of counsel in regard to the calling of witnesses,

including the accused, and in regard to the conduct of the case where the accused wishes to act contrary to his counsel's advice, were considered by this Court in *R v Matonsi* 1958(2) SA 450 (A). At 456 A/C SCHREINER, JA remarked:-

"I have found no Roman Dutch or South African authority which supports the view that the accused in a criminal case can question his counsel's conduct of the trial and claim relief because counsel 'prevented' him from giving evidence. The opposite view was indicated in *R v Muruven*,

1953(2) SA 779 (N), though BROOME, JP, refrained from deciding that the rule that the litigant is bound by what his representative does is entirely inflexible. Such Roman Dutch writers as I have consulted emphasise the importance and high status of the advocate and I see no reason to doubt that his authority over the conduct of the case which he had been instructed to fight on behalf of a client was quite as full as that of the English barrister

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(cf. *Klopper v van Rensburg*, 1920 E D L 239 at p 242). The English cases show that, in general, trials cannot be conducted partly by the client and partly by counsel. Once the client has placed his case in the hands of counsel the latter has complete control and it is he who must decide whether a particular witness, including the client, is to be called or not."

In the instant case the absence of a reasonably sufficient explanation for the failure to lead the evidence of the appellant at the trial represents a fatal flaw both in the application to the court a quo for the relief claimed in the second notice of motion, and in the sec 22 application addressed to this Court. It follows that KRIEGLER, J, rightly dismissed the application based on the second notice of motion; and that the sec 22 application before

this Court must likewise fail.

The rule that an accused is bound by what his

counsel does is not an inflexible one. In *Matonsi's* case

(supra) it was held that the trial court's verdict could

not be challenged on appeal since the appellant had taken

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no steps at the trial to withdraw his counsel's mandate -

"...and expressed no disagreement with the conduct of his case until after the verdict had been given." (at 457 E/F).

Matonsi's case was distinguished in *S v Majola* 1982(1) SA125 (A). In *Majola's* case the accused expressed disagreement with the conduct of his case by his counsel during the trial itself. The facts were these. The accused was represented by pro deo counsel at his trial on a charge of murder. He was not called as a witness. After he had been convicted of murder he was asked by the trial judge whether he wished to say anything before

sentence was passed. It then transpired that the accused had never been asked by his counsel whether he wanted to

testify on the merits of the charge. The trial judge accordingly did not pass sentence, but suo moto granted the

accused leave to appeal. This Court set aside the

conviction and referred the case back to the trial court.

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What had happened during the trial in the Majola case appears sufficiently from the following remarks in the judgment of TROLLIP, AJA (at 133 D/F):-

"Here, due to a bona fide misunderstanding by appellant's counsel of his duty towards his client, appellant was not afforded the opportunity of discussing, considering and deciding whether or not to testify in his own defence, and of terminating the mandate of his counsel if, contrary to his wishes, the latter insisted that he should not testify. That constituted an irregularity in the proceedings. I agree that Matonsi's case is therefore distinguishable on the facts. That the irregularity resulted in a failure of justice is amply borne out by the facts that the Court a quo, in convicting the appellant, relied heavily and repeatedly on his failure to testify and the appellant was aggrieved by not having been afforded the opportunity of testifying." (Emphasis supplied). In the course of his argument counsel relied

heavily on the Majola case. Having due regard to the unusual facts of that case and to the particular facts of

the present appeal, the decision in the Majola case cannot,

I consider, assist the appellant. On the limited facts

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available to us it may be assumed, for the purposes of argument, that the failure of counsel to consult with the appellant before closing the defence case represented an irregularity. Even on that assumption, however, there can be no question of a failure of justice unless at the time the appellant was aggrieved by counsel's decision. For the reasons undermentioned I am impelled to the conclusion that the appellant was either satisfied with counsel's decision or, if indeed he inwardly experienced dissatisfaction therewith, that the appellant nevertheless acquiesced therein. Counsel's decision to close the defence case was announced at the trial on 2 March 1987. On that date the proceedings were adjourned until 9 March 1987 for judgment. Neither the appellant nor his attorney suggests that during this week the slightest disagreement with counsel's decision was voiced. After conviction the appellant

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testified in mitigation. Had he been dissatisfied with counsel's conduct of the case he could have said so under oath. He made no complaint to the magistrate. It will be recalled, moreover, that the first notice of motion was filed more than six months after the trial had ended. The tenor of the applicant's supporting affidavit thereto (jurat 22 September 1987) is significant. While it affirms the appellant's preparedness and willingness to take the witness-stand at the time of the trial it nowhere contains any disavowal or repudiation of counsel's decision not to call his client as a witness. It nowhere suggests that if upon due consultation counsel had advised his client not to testify the appellant would have rejected such advice. Indeed, the affidavit foreshadows

argument in the pending appeal to justify counsel's decision. The very first unequivocal complaint of an "irregularity" on the part of counsel is to be found in the appellant's

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supporting affidavit (jurat 27 November 1987) to the second notice of motion. This affidavit, however, was made after the Attorney-General had given notice that in the event of the dismissal of the appeal he would seek an increase in sentence - a communication very likely to inspire melancholy meditation on the part of the appellant upon where, in the pending appeal, the shoe would be likely to pinch. In my opinion it has not been shown that any failure of justice resulted at the trial from counsel's failure to consult with the appellant before closing his case when he did. It remains to deal with the appellant's appeal against the sentence of 18 months imprisonment imposed by the court a quo. It is clear that it was not legally competent for the court a quo to substitute for the sentence imposed by the magistrate a sentence exceeding the

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penal jurisdiction (12 months imprisonment) of a district magistrate's court. It was common cause between counsel that in so doing the court a quo had misdirected itself. It follows that the sentence of 18 months imprisonment cannot stand. Having regard to all the circumstances of the case it appears to me that a fitting and proper sentence would be one of imprisonment for twelve months. The following orders are made:-

- (1) The appeal against the refusal of the court a quo to grant the appellant the relief claimed by him in his notice of motion dated 27 November 1987 is dismissed.
- (2) The appellant's application to this court in terms of sec 22 of Act 59 of 1959 is refused.
- (3) The appeal against the sentence of 18 months imprisonment imposed by the court a quo succeeds. For the sentence imposed on the appellant by the

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magistrate the following sentence is substituted:- "The accused is sentenced to imprisonment for twelve months."

G G HOEXTER, JA

VIVIER, JA) KUMLEBEN, JA) GOLDSTONE, AJA) Concur NIENABER, AJA)

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