

SOUTH AFRICA / JUDGMENT

S v Mogotsi (A259/15) [2015] ZAGPPHC 239 (28 April 2015) [2015] ZAGPPHC 239

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhafola, Tlhapi

CASE / FILE NUMBER

A259/15

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION: PRETORIA)

CASE NO: A259/15

DATE: 28 APRIL

2015

In the matter

between:

THE
STATE
v
NEO
ABRAM MOGOTSI

JUDGEMENT

MAKHAFOLA, J

INTRODUCTION

[1] This matter was laid before me by way of a special review in terms of Section 304(4) of Act 51 of 1977.

- [2] The accused was tried, convicted and sentenced in the Regional Court in Pretoria. He was sentenced to 15 years imprisonment on count 1: Robbery with aggravating circumstances; to 2 years imprisonment on count 2: possession of car breaking implements. The 2 year imprisonment in count 2 was ordered to run concurrently with count 1 in terms of Section 280 of the Act. He was also declared unfit to possess a firearm in terms of Section 103(1) of Act 60 of 2000. The case was finalized on 04 March 2014.

DISCOURSE

- [3] The learned magistrate was approached, late in November 2014 by Attorney Mkhabela in his chambers who intimated to him that he had been instructed to launch review proceedings on behalf of the accused. The main ground of the review proceedings was that during the trial the accused had been represented by a person who did not possess a right of appearance.
- [4] Subsequent to this representation by Mr. Mkhabela, the Magistrate made his own enquiries which revealed that the position as spelt out by Mr. Mkhabela was correct.
- [5] The matter was re-enrolled. The accused appeared before court per requisition. The accused was then released on warning pending the finalization of the review.
- [6] After reading the record and the Learned Magistrate's memorandum I caused same to be dispatched to the office of the Director of Public Prosecutions for their attention and comment. The matter was attended to by 2 senior state advocates, the most senior who is a silk, is also the Deputy Director of Public prosecutions in Pretoria. They documented a well-researched comment for which I thank them.
- [7] The position of the accused's legal representative during the trial was no better than that of the accused. At best, the accused was competent to appear in persona and represent himself whilst being assisted by the court in his trial.
- [8] A legal representative with no right of appearance caused an irregularity of the trial to the extent that his conduct is inexcusable. The result of this irregularity impacts the core of the justness and fairness of the trial that affects the proper administration of justice.
- [9] The accused's right to legal representation is guaranteed by Section 35(3) of the Constitution Act 108 of 1996. The application and enjoyment of this right was usurped by, the then legal representative by misrepresentation to the accused and the trial court that he was legally competent to represent the accused in court.
- [10] This irregularly apparent in casu, is fatal in nature that would issue substantial injustice if the trial proceedings should be allowed to stand. This irregularity

vitiates the trial.

Vide:

(1) S V Nkosi EN ANDERE 2000 (1) SASV 592 (TPA)

In this case the court discussed the certificate in relation to a candidate attorney and its importance. Of course, this goes without saying that the lack of the certificate results in the lack of the right of appearance.

[11] Any appearance on behalf of an accused by a person who has no right of appearance is Qerse an irregularity. This was expressed in the following cases:

S V Le ROUX 1988(2) SA 868(A)

S V JONES; S V MOSIA; S V MKHISE.

In these cases a pro deo advocate was not properly admitted. All the above cited cases are applicable in this case.

[12] In the present case it is not possible to know the full details regarding the legal representative involved. Both the record of the proceedings and the magistrate's memorandum do not tell if he was a formally admitted advocate, attorney or a candidate attorney. But the crux of the matter is that he lacked the right of appearance required by the Law to represent an accused person in court.

[13] The conduct of the "purported" legal representative is so offensive to justice, that it has caused a wasteful expenditure on the public purse, prejudice to the accused who needs to be retried and the vulnerability of a court of law which was deceived by its "purported" officer. I cannot fathom his intention in the mist of this factual mess.

[14] I have no doubt that the interests of justice will be served if the proceedings are declared to be not in accordance with justice by setting aside the convictions and sentences and order a retrial of the accused.

CONCLUSION

[15] In the result, I pronounce the following order.

ORDER

- 1) The convictions and sentences of the court a quo are set aside;
- 2) The matter is remitted to the Regional Court, Pretoria;
- 3) The trial of the accused shall start de novo before another Regional Magistrate; and
- 4) The officer in charge of enrolling cases, is directed to enrol this matter within 21 days of receipt of this judgment.

KHAMI MAKHAFOLA

JUDGE OF THE HIGH COURT

I concur

VV TLHAPI

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