

SOUTH AFRICA / JUDGMENT

Ubisi and Others v S (A539/2012) [2016] ZAGPPHC 500 (29 June 2016)

[2016] ZAGPPHC 500

COURT

North Gauteng High Court, Pretoria

BEFORE

A.A. Louw, P. Mngqibisa-Thusi, P.M. Mabuse

CASE / FILE NUMBER

A539/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION.PRETORIA

Case number: A539/2012

Not

reportable

Not

of interest to other judges

Revised.

29/6/2016

In

the matter between:

POWER

UBISI First

Appellant

GIVEN

MABELANE Second

Appellant

TLAPELO

MASUKU Third

Appellant

and

THE

STATE Respondent

Heard:

8 NOVEMBER 2015

Delivered:

29 JUNE 2018

JUDGMENT

A. A. LOUW J

Introduction

- [1] The appellants were convicted on charges of robbery, three counts of kidnapping and possession of a firearm with intent to commit an offence or to resist arrest in the regional court sitting at Mhala. They were sentenced to an effective term of forty five (45) years imprisonment on 17 April 2010. The trial magistrate granted the appellants leave to appeal both on conviction and sentence. The appellants eventually conducted their own defence during the trial, it seems after their funds had dried up.
- [2] The incident occurred in October 2005. The appellants appeared in the regional court for the first time in February 2007. The matter was postponed 28 times at the request of the appellants or their legal representative. Initially the accused were legally represented. On the date of trial, their legal representative withdrew from the proceedings. The state opposed an application for further postponement. The magistrate refused a further postponement and ordered that the trial proceed in the absence of their legal representative. The accused refused to participate in the proceedings and closed their case without testifying.
- [3] In fact the case was postponed for 30 times. Of this only two postponements can in any manner be attributed to the state. The

demeanour of the accused in court was totally obstructive. Except for the fact that none of them testified, they also actually refused to cross-examine the four state witnesses. Some of them even refused to plead and the magistrate had to note a plea of not guilty in the case of the second and third appellants.

Ad conviction

- [4] The evidence of the state witnesses was not challenged by the appellants. The third appellant and Lelo Sibambo are childhood

friends. Lelo Sibambo also knew the first appellant prior to the day of the incident. He testified that they brought the complainant's

vehicle to his premises. The appellants were in possession of a stolen vehicle less than 48 hours after the robbery.

- [5] Two firearms were recovered at the same place where the vehicle was recovered by the police with the assistance of the first appellant. Patricia Godi identified the second and third appellant in the dock as the robbers. The appellants did not dispute the evidence of any state witness. The appellants did not testify in their defence.

- [6] The court stated the following regarding assessment of circumstantial evidence in *S v Reddy and others* 1996 (2) SACR 1 (A) at p 8 C-D:

“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. There are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the

proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn.’”

- [7] The state witnesses made a good impression on the trial magistrate and, in the absence of any further evidence, they were correctly

convicted.

Absence of legal representation

- [8] I nevertheless deem it necessary to say something about the fact that the court eventually had to proceed with a trial on serious charges where the accused were not represented.

- [9] It has been decided in *S v Halgryn* 2002 (2) 211 (SCA), that right to legal representation is not absolute right and subject to reasonable limitation.

- [10] In *S v Moyce* 2013 (1) SACR 131 (WCC), the court held that the appellant was ducking and diving, keeping the court guessing as to his next move in his next appearance, and whether he would opt to have a legal representation. The court held further that such conduct is an abuse of the constitutional right to legal representation. In *S v Moyce supra*, the trial court postponed the case for trial 6 times in a period of 8 months. This matter has been in the regional court for trial from February 2007 until April 2010 when the magistrate decided to refuse a further postponement.

- [11] In *Magistrate Pangarker v Botha and Another* 2015

- (1) SA 503 (SCA), the court held that repeated postponements for legal representation and application for recusal constituted transparent and dishonest strategies to obtain further postponement. The Supreme Court of Appeal held that the presiding officer did not commit an irregularity by proceeding with a trial in the absence of the applicant party.

- [12] Guided by the above authorities and the appellants' conduct during the trial, I am convinced that the magistrate was correct in refusing a postponement.

The sentence

- [13] All three appellants got the same sentence namely on charge 1 - 15 years' imprisonment for robbery, in respect of charges 2, 3 and 4 each appellant got five years' for kidnapping and lastly counts 5 and 6 were taken together for the purpose of sentencing namely five years was imposed therefore for possession of the firearms.
- [14] In my view the magistrate erred in not ordering that any of the sentences be served concurrently. Especially this is so as it all happened, so to say, on the same date and place.
- [15] Counsel for the state submitted that a sentence in the region of 20 years will strike the necessary balance between the interests of the community and the personal circumstances of the appellants whilst still keeping in mind the fact that these are all serious offences. I say this because all the accused are relatively youthful, in their twenties and that an effective period of imprisonment of 45 years I find to be shockingly inappropriate.
- [16] The appeal therefore succeeds in part and the following paragraph is to be added at the end of the sentences:

"In the case of all three appellants it is ordered that the sentences on counts 2, 3, 4, 5 and 6 run concurrently with the sentence on count 1."

A.A. LOUW

Judge of the High Court

I agree

P. MNGQIBISA-THUSI

P.M. MABUSE

For the Appellant

: ADV. KRIEL

Instructed by

: LEGAL AID

For the First Respondent : ADV. L.A. MORE

Instructed by

: THE NDPP

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