

SOUTH AFRICA / JUDGMENT

Waggie and Another v S (A363/2002) [2003] ZAWCHC 81 (13 June 2003)

[2003] ZAWCHC 81

COURT

Western Cape High Court, Cape Town

BEFORE

Gassner, Nel

CASE / FILE NUMBER

A363/2002

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: A363/2002

DATE: 13 JUNE 2003

In the matter between:

FAIZEL WAGGIE 1st

APPELLANT ISMAIL EDWARDS 2nd APPELLANT

and

THE STATE RESPONDENT

GASSNER. A J:

[1] The appellants were initially prosecuted in the Wynberg Regional Court in respect of the following charges:

(1) Charges 1 to 3:

Three counts of attempted murder;

(2) Charge 4:

Possession of explosives in contravention of section 28{1} read with sections 1 and 27(l)(c) of the Explosives Act 26/1956;

(3) Charge 5:

Pointing a firearm at a person in contravention of section 39(1)(i) of the Arms & Ammunition Act 75/1969. (This charge was preferred against the second appellant only.)

[2] The appellants both pleaded not guilty in respect of each of these charges. The matter was then part-heard during 1999 and 2000 before the Regional Magistrate, Mr Theron, who died after a postponement on 23 May 2000. On 3 October 2000 the appellants, who were at the time both represented by counsel, Mr Van der Berg, were advised that the matter would have to proceed de novo on 25 June 2001.

[3] On 25 June 2001 the matter proceeded de novo before the Regional Magistrate, Mr Henney. At the commencement of the trial de novo, the appellants were charged with the charges referred above, as well as the additional charge of sabotage (and various additional alternative charges), namely:

(1) Charge 1:

Sabotage in terms of section 54(3)(a) of the Internal Security Act 74/1982 (with certain alternative charges in terms of the Internal Security Act);

(2) Charges 2 to 4:

Three counts of attempted murder (which were substantially the same charges as charges 1 to 3 in the first proceedings), with an alternative charge in terms of section 27(1)(c) of the Explosives Act 26/1956;

(3) Charge 5:

Possession of explosives in contravention of Section 28 of the Explosives Act 26/1956 (which were substantially the same charge as charge 4 in the first proceedings);

(4) Charge 6 (this charge was preferred against the second appellant only):

Contravention of section 39(1)(i) of the Arms and Ammunition Act 75/1969 (which was substantially the same charge as charge 5 in the first proceedings).

The appellants both declined to plead and accordingly a plea of not guilty was entered in respect of each of these charges.

[4] The case against the appellants in the first proceedings and in the de novo trial related to the same incident. On 25 January 1998 two perpetrators, allegedly the appellants, threw a pipe bomb into the charge office of the Lansdowne Police Station. At the time there were three police officers on duty, namely Inspector De Jager, Sergeant Luyt and Inspector Plaatjies. They were the complainants in respect of the charges of attempted murder.

[5] On 18 September 2001 the appellants were each convicted in respect of charges 1, 2, 3 and 4 (i.e. of the main charges), and the second appellant was also convicted in respect of charge 6. The appellants were sentenced to 30 years' imprisonment each, of which ten years was ordered to run concurrently with the prison sentence which they were already serving. The appellants now appeal against both their convictions and their sentences.

[6] The appellants' heads of argument deal with two preliminary points as to why the conviction and sentence in respect of the charge of sabotage should

be set aside:

(1) Firstly, the appellants submit that the prosecutor acted irregularly and contrary to the tenets of fair trial in charging the appellants with the additional charge of sabotage. Inasmuch as they, through no fault of theirs, were required to stand trial *de novo*, they contend that it was unfair to expose them to the jeopardy of charges greater than those on which they were originally arraigned. In support of this argument they rely on a decision of the US Supreme Court in *Blackledge v Perry* 417 US 21.

(2) Furthermore the appellants submit that the Regional

Magistrate "committed a fatal irregularity" by not allowing them to obtain legal representation prior to pleading to the new charge of sabotage.

These grounds of appeal were not contained in the appellants' notice of appeal filed on 1 November 2001. The grounds of appeal which are set out in the appellants' notice of appeal are directed against the Magistrate's finding that the State had proved its case beyond reasonable doubt. They also attack the sentences as being excessive in the light of the misdirections which, it is contended, were to be found in the Regional Magistrate's reasoning.

[7] Although it was intimated in the appellants' heads of argument that supplementary heads would be filed on the "merits", this was only done on 11 June 2003, two days before the hearing of the appeal and well after the respondent filed its heads of argument.

[8] The respondent accordingly, in its heads of argument, asked for the appeal to be struck from the roll on the basis that:

(1) the grounds of appeal set out in the appellants' notice of appeal were not dealt with in the appellants' heads of arguments;

(2) the arguments advanced in the appellants' first heads of argument were not covered by their notice of appeal and consequently the Magistrate has not had an opportunity to deal with these further grounds.

[9] On 11 June 2003 the appellants filed heads of argument in respect of the merits, together with an application for condonation of the late filing thereof. They also seek leave to amend their notice of appeal by introducing the two additional grounds discussed above, and have brought an application for condonation in respect of the late filing of the amended notice. The State opposes these applications.

[10] In terms of High Court Rule 51(4), as read with Cape Court Notice 9, the appellants were obliged to deliver a concise statement of the main points which they intend to argue on appeal, as well as a list of authorities to be tendered in support of each point. The provision of this sub-rule are peremptory and our courts have not been hesitant to strike appeals off the roll where heads of argument were not filed or were not filed timeously. (See *S v Zondo* 1966(2) SA 521 T, *Louw v Louw* 1965(3) SA 750 (ECD). See also *AC Building Services CC v P B & A Personnel Consultants (Pty) Limited*

1992(2) SA 55 (T), where the court refused to consider the merits of an appeal because the appellants heads were not filed and there was no appearance on its behalf.)

[11] As a general rule an appellant is confined to the grounds of appeal set out in his notice of appeal. {See *S v Baloyi* 1991(1) SACR 265 (B), *S v Nel* 1987(4) SA 276 (O) at 279G.} Our courts have been prepared to deal with a new ground of appeal, not set out in the notice of appeal, if this involves a question of law. However this was allowed in instances where the State raised no objection to the new ground of appeal being raised in argument (see *S v Nel* 1987(4) SA 276 (O) at 279F-I), or where the additional ground of appeal involved a crisp point, see *S v Lapi* 1997(2) SACR 272 (O). Although in this matter the new ground of appeal, directed at the introduction of the additional charge of

sabotage, involves a question of law, this cannot be said about the second additional ground raised by the appellants, namely that they were not afforded the opportunity to be legally represented when they were required to plead in respect of the charge of sabotage. In respect of this ground, we feel that the Magistrate ought to have been afforded an opportunity to furnish additional reasons.

[12] Before the application for condonation in respect of the two new grounds of appeal may be granted, the appellants are required to furnish a satisfactory explanation for the late filing of this application and must satisfy this Court that they have a reasonable

prospect of success on the new grounds of appeal. (See *R v L* 1960(3) SA 503 (A) at 505F-G, *S v Nel* 1991(2) SACR 10 (A) at 13b, *S v Aspelinq* 1998(1) SA 561 {C} at 566b.)

[13] For the reasons which follow, it does not appear to us that there is a reasonable prospect of success in respect of the proposed ground of appeal concerning the new charge of sabotage:

(1) The US Supreme Court decision of *Blackledge v Perry* {supra}, relied on by the appellants, is distinguishable from the circumstances of the present matter. *Perry*, a North Carolina prison inmate, was charged with the misdemeanour of assault with a deadly weapon, of which he was convicted in a State District Court. While his appeal was pending in a superior

court, where he had the statutory right to a trial de novo, the prosecutor obtained an indictment covering the same conduct for a more serious offence which carried a far heavier sentence than the misdemeanour of assault.

- (2) The US Supreme Court held that the subsequent indictment on the more serious charge contravened the Due Process Clause of the Fourteenth Amendment, since a person convicted of the misdemeanour in North Carolina was entitled to pursue his right under State law to a trial de novo without apprehension that the State would retaliate by substituting a more serious charge for the original one and thus exposing him to an increased period of imprisonment. It was, accordingly, held that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo.

In coming to this conclusion, the court analysed its earlier decisions in *North Carolina v Pearce*

[1969] USSC 161; 395 US 711, *Colten v Kentucky*

[1972] USSC 130; 407 US 104 and *Chaffin v Stvnchcombe* 412 US 17, from which it appears that the Due Process Clause was not offended by all possibilities of increased punishment upon retrial after appeal. The possibility of an increased sentence, on retrial after an appeal, was only regarded as unconstitutional if there was a realistic likelihood of "vindictiveness against a criminal defendant who attacked his initial conviction on appeal". Thus in *Colten v Kentucky* {supra}, where the court which was to hear the matter de novo was not the one whose original judgment had prompted the appeal, the Supreme Court held that the court hearing the trial de novo was not precluded from imposing a sentence in excess of that imposed in the court of original trial, as "there was little possibility that an increased sentence on trial de novo could have been motivated by personal vindictiveness on the part of the sentencing judge".

- (4) The court in *Blackledge v Perry* (supra) then considered whether there was a realistic likelihood of vindictiveness if a prosecutor was allowed to "up the ante" through a more serious charge when an accused pursues his statutory appeal remedies. On the basis that the State could ensure that "only the most hardy defendants would brave the hazards of a de novo trial", the court held that a person convicted of an offence was entitled to pursue his statutory appeal rights to a trial de novo "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus

subjecting him to stgnificantfy increased potential periods of incarceration". For that reason the court held that it was unconstitutional for the State to bring a more serious charge against Perry prior to the trial de novo.

- (5) In a subsequent decision of the US Supreme Court in *Alabama v Smith* 490 US 794, the court, with reference to various decisions after the Pearce case, also emphasised that "the evil the [Pearce] court sought to prevent", was not the Imposition of "enlarged sentences after a new trial", but "vindictiveness of a sentencing judge".

- (6) In the present matter, in contrast to the case in *Blackledge v Perry* {supra}, the trial had to proceed de novo as a result of the presiding Magistrate's death, which was an unforeseen event beyond the parties' control and not because the appellants were exercising any statutory rights. Consequently the need to guard against the appellants' apprehension that they might be victimised is not a relevant consideration in this matter.

[14] The appellants' prospect of success in respect of the second additional ground of appeal, namely that they were not allowed legal representation when they pleaded to the new charge of sabotage which deprived them of the opportunity of raising the *Blackledge v Perry* (supra) argument, to a large extent depends on whether there was any merit in that line of argument in the first place. For the reasons set out above, we are of the view that there is no substance in the analogy which the appellants attempt to draw with the facts and findings in *Blackledge v Perry* (supra). Consequently, there could not have been any prejudice to the appellants when they pleaded not guilty to the new charge of sabotage, in the absence of legal representation. But, in any event, we are of the view that the Regional Magistrate's decision to refuse a postponement to allow the appellants to appoint a counsel of their choice through Legal Aid did not constitute a misdirection or irregularity. It seems to us, from a perusal of the record and an analysis of the Regional Magistrate's reasons for refusing the postponement on 26 June 2001, that he exercised his discretion judicially and fairly and with due regard to the principles set out in *S v Halgrvn* 2002(2) SACR 211 (CC). We are accordingly of the view that the appellants do not have a reasonable prospect of establishing that the Magistrate committed an irregularity when he required them to plead to the new charge of sabotage in the absence of legal representation.

[15] The application for condonation in respect of the proposed additional grounds of appeal does not explain adequately why these grounds were not contained in the earlier notice of appeal and the reasons for the delay in the necessary application for condonation. This would have involved a relatively simple application by the attorney of record, with no need to peruse the entire record. Inasmuch as we, in any event, are of the view that the appellants do not have a reasonable prospect of success in respect of the two proposed new grounds of appeal, we are of the view that the application for leave to introduce such additional grounds should be dismissed.

[16] This leaves us with the application for condonation of the State filing of the heads of argument on the merits:

- (1) In order to assess this application, we have to be satisfied that the appellants enjoy a reasonable prospect of success on the merits. They have failed to deal with this issue in the notice of application for condonation. Further the appellants' prospects of success on the merits cannot be properly assessed until the State has had an adequate opportunity to deal with the points raised by the appellants in their heads of argument on the merits. (This, unlike the issues raised in the original heads of argument, requires the perusal of the entire record of the proceedings which consists of some 645 pages.)

- (2) It also seems to us that the application for condonation is unsatisfactory. Firstly the financial position of the appellants is not fully set out or confirmed by them in a supporting affidavit. Secondly, the reason as to why the Legal Aid Board refused to fund the appellants' appeal was not disclosed. No documentation from the Legal Aid Board in support of this allegation was attached to the affidavit. Finally, it is not at all clear precisely from which dates the appellants' counsel was prepared to act "as an officer of the court".
- [17] In the light of these difficulties, it seems to us that the appeal should be struck from the roll. This will enable the appellants to bring a properly motivated application for condonation of the late filing of the heads of argument on the merits and allow the State to consider such application. It will also afford the State an opportunity to file heads of argument on the merits of the appeal which would be necessary to assist the Court in deciding whether the application for condonation in respect of the late filing of the heads of argument should be granted, and also to determine the appeal on the merits, if the application for condonation is granted.
- [18] It is accordingly ordered that.
- (1) The appellants' application for leave to introduce additional grounds of appeal is dismissed.
- NEL, J
- (2) The application for condonation in respect of the late filing of the heads of the argument on the merits and the appeal are struck from the roll.

GASSNER, A J

I agree

NEL, J

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