

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Criminal Appeal No. 17/2000
High Court Criminal Appeal No. 227/96

In the matter between:

DINTLE BASUPI

Appellant

and

THE STATE

Respondent

Appellant in Person
Mrs. S. Mangori for the State

J U D G M E N T

Coram: J. H. Steyn JA;
G. Friedman JA
Lord D.B. Weir JA

THE FULL COURT

Appellant and four others were arrested on a charge of armed robbery. On 31 October 1994 they appeared before a magistrate. The prosecutor applied for the taking of the pleas to be postponed and for the accused to be remanded in custody. On the record the following notation appears:

“Court: The charges shall be read to the accused persons but pleas reserved. Secondly all four accused persons shall be remanded in custody for 14 days.”

On 11 November 1994, by which time a further suspect had been arrested, a hearing took place before a magistrate for the purpose of adding the suspect as a sixth accused. Only the sixth accused was present. A separate charge sheet had been prepared for him.

On the record it is recorded:-

“Charge sheet dated 11.11.94 read out to the accused in his own language and not required to plead thereto.”

The court further ordered the prosecutor to prepare a fresh charge sheet encompassing all the accused.

On 14 November 1994 all the accused appeared before the court again. They were all represented by an attorney. The prosecutor informed the court that a fresh charge sheet had been prepared encompassing all the accused and he applied for an amendment to the original charge sheet by deleting the reference to “others not before the court” and substituting the names of the six accused.

The attorney for the accused stated:

“We do not object to the application for the amendment.”

He then proceeded to apply for bail during the course of which he stated:

“We concede that the charge is serious.”

The trial eventually commenced on 8 March 1995. The charge against the sixth accused was withdrawn, and he was called as the first witness for the State.

After three further witnesses had been called by the State, the trial was adjourned. When the trial was resumed on 28 July 1995 the magistrate's attention was drawn to the fact that the accused had not pleaded. According to the record it was the appellant who brought the matter to the magistrate's attention. According to the record the magistrate is quoted as having stated-

"Given that at the commencement of the trial all accused persons were represented by counsel it appears we all overlooked that fact and proceeded on the assumption that a not guilty plea had been tendered by all the accused persons.

I now pose a question to the defence whether had they been called they would have pleaded otherwise. I would also like to find out if there is anything the defence feel prejudiced their clients on proceeding without such a plea as we did."

Mr. Dikgokwane, who was at that stage representing the appellant and accused number 5, responded as follows -

"The second (i.e. appellant) and fifth accused would have pleaded not guilty. In my submission the proceedings this far have not occasioned any prejudice to my clients despite the failure to take a plea."

The attorneys representing the remaining accused responded in an identical manner. The charge sheet was then read over and explained to the accused and each was asked to plead. Appellant stated –

“I plead not guilty”.

The remaining accused likewise pleaded not guilty. The trial then proceeded. Appellant was found guilty and was sentenced to 15 years imprisonment. He appealed to the High Court against both his conviction and sentence.

In arguing his appeal in person before the High Court, appellant raised the point that he had not been asked to plead at the commencement of the trial and that his trial was accordingly a nullity. This submission was rejected by the High Court, but he was given leave to appeal to this Court *inter alia* on that point.

Appellant argued his appeal before us in person and did indeed take this point. Section 141 of the Criminal Procedure and Evidence Act (Cap 08:02) reads as follows:-

“Subject to the provisions of Section 307, the accused shall upon the day appointed for his trial or sentence upon any indictment or summons, appear in court, or if he is in custody he shall be brought into court, and shall be informed in open court of the offence with which he is charged

as set forth in the indictment or summons, and shall be required to plead instantly thereto, except where, there being an indictment or summons and the accused having objected so to plead, the court finds that he has not been duly served with a copy thereof :

Provided that the court may at the request of the prosecution or the accused or of its own motion, postpone the taking of a plea if the court considers this to be necessary in the interests of justice.”

In Gaonyadiwe Mmatli and Another v. The State, Cr. App 17 of 1999, this Court held that the terms of Section 141 were peremptory and that the failure to comply with it was an irregularity which would render a conviction null and void.

Section 141 contains two requirements. Firstly, the accused must be informed in open court of the offence with which he is charged as set forth in the summons or indictment. Secondly, the accused is required to plead instantly thereto unless in terms of the proviso the taking of a plea is postponed. In the present case, according to the record as quoted above, the court ordered the charge to be read to the accused and directed that the taking of pleas be postponed.

Appellant submitted that although the magistrate ordered that the charges be read to the accused, there is nothing on the record to indicate that this was done. He accordingly submitted that the proceedings were a nullity.

Counsel for the State argued that the Court should assume that what the magistrate ordered to be done, was in fact done. i. e. that his order that the charge be read to the accused was carried out. There is something to be said for this argument as defence counsel appears to have been apprised of the contents of the charge sheet. Defence counsel did not object to the amendment to the charge sheet. Moreover, when applying for bail, he conceded that "the charge is serious". Defence counsel would not have agreed to the amendment, nor would he have commented on the seriousness of the charge if he had not been aware of the contents.

On the other hand, it does not follow from the fact that defence counsel was aware of the contents of the charge sheet, that the accused had been informed in open court of the charge against them.

A further difficulty that I have with the State counsel's argument is that where the charge sheet was in fact read to the accused in open court, that was recorded on the record in so many words. Thus when the sixth accused was brought before the court, it appears from the record that :

“Charge sheet dated 11. 11. 94 read out to the accused in his own language...”

Similarly, when the omission was discovered and before the accused were asked to plead, the following appears on the record:

“Charge read over and explained to the accused persons.”

The State has not applied for an amendment to the record to include a statement that the charge was read to the accused pursuant to the magistrate’s order. In the circumstances we propose to deal with this appeal on the basis that this did not occur.

The question which then arises is whether the failure to read the charge to the accused at the commencement of the trial and to record their pleas at that stage, renders the proceedings a nullity.

The present case is distinguishable from the Mmatli case in two respects. Firstly, unlike in casu where the accused were represented by legal counsel, in the Mmatli case the accused were unrepresented. Secondly, and more importantly, in the Mmatli case the charge in respect of one of the counts on which the accused had been found guilty (Count 4) had never been read to the accused at all, nor had the accused at any stage been called upon to plead to that count.

In the present case, when the omission was discovered, the charge was read out and explained to the accused and they pleaded not guilty thereto. Before doing so, however, they indicated that had they been asked to plead earlier, they would have pleaded not guilty. They furthermore, through their counsel, informed the court that they had not been prejudiced by the fact that the trial had proceeded without a plea having been entered.

From the time that the charge was read to them and they pleaded to it, the proceedings were in order and the trial was validly conducted. The State could, at that stage, have re-called the four witnesses who had already testified, to confirm their evidence. It was, however, in our judgment, implicit in the attitude adopted by the defence that it was unnecessary to re-start the trial and to re-call the witnesses, and that their testimony was to be regarded as having been validly given. We say this because if any of the accused or their legal representatives had any concerns about or challenges directed at any of the evidence already given, their disavowal of any prejudice could only mean that they had no challenge to the validity of such evidence.

Although appellant, like his co-accused, confirmed that he had not been prejudiced, in argument before us he submitted that he had been prejudiced as

the attorney representing him at that stage had not been authorised by him to inform the court that the proceedings thus far had not occasioned any prejudice to appellant. He explained that the prejudice he suffered arose from the fact that had the trial been declared a nullity at that stage, he would have asked the magistrate to recuse himself in the event of his being re-tried. His ground for this submission was that the magistrate had during the course of the proceedings shown bias against him.

There is no merit in this argument. Firstly, appellant is bound by the actions taken by his attorney whom he had engaged to represent him. Secondly, there is nothing on the record to support appellant's submission that the magistrate had been biased. Indeed, appellant conceded that he was unable to point to anything on the record in support of this submission. Indeed, if anything, the record shows that the magistrate conducted the proceedings with the utmost impartiality.

In the third place, we point to the fact that at no stage during the proceedings did the appellant raise this concern. Most significantly, he did not do so when his original counsel returned to represent him. Neither did he raise the matter in his grounds of appeal. We agree with counsel for the State that his purported prejudice was an afterthought.

The Appellant's submission that he was prejudiced by the continuation of the trial before the same magistrate is accordingly devoid of substance.

For these reasons we are satisfied that no irregularity vitiating the proceedings in the trial Court occurred because of the manner in which appellant was arraigned and his plea recorded.

The next issue raised by appellant was related to the decision of the magistrate to refuse appellant a postponement when his attorney failed to appear in court.

The facts of the matter are the following:

As indicated above, the trial commenced on the 31st October 1994. It was postponed on many occasions for a variety of reasons, one of which concerned the way in which the attorney Mr. Hilary Naledi had conducted himself whilst representing appellant. On several occasions he failed to appear without any reason or notice. Postponements were sought and granted on each one of the previous occasions. However on the 20th of April 1995 when another application for postponement was sought the magistrate granted a postponement to the 12th and 13th of June 1995. In doing so, the Court said the following:-

“I wish to emphasize to the accused persons and their attorney that on the date set, I expect all to be ready. In the event counsel fails (to appear) the trial might proceed without him.”

On the 12th of June 1995 Mr. T. Naledi did not appear. The court was informed that “he is sick” and another postponement was sought. Counsel for accused No.4 complained and said:

“.... it has become regular that the Naledis fail to turn up and (that) prejudices my client.”

Mr. Gunda, counsel for the State, also opposed the application and in doing so painted a graphic picture of the delays occasioned by the attorney's conduct when he said:

“I have a problem with the way the Naledi's would like to have the Court conduct the proceedings. Earlier on the accused persons had engaged Mr. Hilary Naledi. The same attorney Naledi let them down. The accused persons then moved to Tshenolo Naledi who I am made to understand is not feeling well. I saw Mr. Tshenolo Naledi outside court and he said Mr. Hilary Naledi would take over. Mr. Hilary Naledi tells me that he is engaged in courtroom No.4. The court's time is being taken over and abused by the Naledi's and the State is suffering as well.

I would then urge the court to proceed with the trial. The right to legal representation is not absolute. Accused No.3 has absconded.”

Despite the protestations by the legal representative for accused No. 4 and the state, the Court acceded to the request for a further postponement because of the illness of Mr. T. Naledi, and the matter was once again postponed.

On the 10th of July 1995, the date determined for a further continuation of the trial, the four accused persons then on trial were present; accused No.1 and No.2 (appellant) in person and accused No.4 and 5 represented by their respective attorneys. The record then reads as follows:

“Accused No.1

My attorney Mr. Naledi is sick. He is admitted at the hospital. I ask the Court to postpone the matter. Mr. Naledi (Hilary) advises us that Mr. Naledi who is our attorney would be fine in 30 days. If Mr. Naledi fails to appear, we have to engage another lawyer.

Accused No.2

I share the same sentiments with accused No.1.”

This application for a postponement was opposed not only by counsel for the State but by attorney Komboni for accused No.4. In doing so he said the following:

"I am mindful of the fact that the accused's position is nothing within their control. However the various postponements have seriously prejudiced my client.

On the 9th March 1995 the case was postponed to the 10th March, we could not proceed and it was postponed to the 19th April. On the 19th April it was yet again postponed to 20th April 1995. On 20th the case was postponed to 12th June 1995 as well as the 13th June. On 12th the case could not proceed. The case was postponed to 10th July 1995 which is today. Bearing in mind all the postponement, I was ready with my client to proceed with the trial."

The attorney for the accused No.5 is recorded as saying :

"My client demands that he be tried today or acquitted."

The Court then ruled as follows:

"...I grant the postponement with a strong warning that they secure counsel for the dates I am going to set or else I will proceed with the trial without counsel."

The matter was then postponed to 28th of July and Saturday 29th of July. It was, however, mentioned on the 21st of July. On this occasion appellant informed the Court that he was making arrangements to secure a different attorney.

The matter was called on the 28th of July. All the accused except appellant were represented by counsel. Appellant applied for a postponement because he had not yet succeeded in "withdrawing his money from Mr. Naledi." That application was refused by the magistrate who, in doing so, said the following:-

"While I sympathise with accused 2 for the position he finds himself in, I have weighed the interests of the other accused persons as well as the State and find considerable prejudice suffered by said parties occasioned by such postponements particularly on the same reasons as before. Consequently I am unable to grant the accused No.2 a postponement. Application refused and trial proceeds as scheduled."

When the pleas were taken, it was recorded by the attorney for accused No.5 (Mr. Dikgokgwane) that appellant had engaged his services and that he would act also for him.

The proceedings as recorded above took place. During the continuation of the trial and before Mr. Naledi returned to represent appellant and conduct his defence, two further State witnesses testified, neither of whom implicated appellant.

Appellant's complaint is that the Court's decision to refuse him a postponement in the circumstances set out above was a denial of his right to be afforded adequate time and facilities to prepare for his trial. He urged us to find that the Court should at least have granted him an adjournment "to later in the morning or day" to enable him to brief his counsel of convenience." (Mr. Dikgokgwane)

The short answer to the latter suggestion is that appellant did not ask for an adjournment, but for a postponement. In any event he was occasioned no prejudice during the proceedings whilst his counsel of choice was absent. As we have indicated above, no evidence was adduced during the relevant period implicating him in the commission of any offence. It should in this context be noted that accused No.1 had succeeded in engaging other counsel.

However, as the evidence set out above demonstrates, the Court had granted appellant several postponements which were attributable to the irresponsible and unexplained absences of his counsel. It had also warned him on at least two occasions that the trial would have to proceed without counsel if the latter again failed to appear on an agreed date. It must also be borne in mind that it is not only the prejudice to the appellant that had to be considered by the Court, but also the unacceptability of the delay occasioned by the frequent

postponements and the consequences of such delay on the course of justice. The prejudice suffered by appellant's co-accused was also an important consideration

"Justice delayed is justice denied" is no idle slogan. It is a truism demonstrated time and time again also in this jurisdiction. Only too often cases are postponed because of counsel's convenience or their failure to appear.

In this regard we endorse the comments of Gyeke -Dako in Maphane v. State 1991 BLR 60 at p. 64 where the Court said:-

"...the accused has a right to brief and be defended by counsel at his trial and that he must be given reasonable time in which to do so. However, if he does not avail himself of this right and the opportunity within a reasonable time; if he seeks unnecessary or unreasonable adjournments or if his legal representative fails to appear in Court without making a reasonable effort to get in touch with the Court to explain his absence and seek an adjournment, then, I think the Court is perfectly entitled in the light of Section 10 (1) of the Constitution, which demands expeditious administration of justice, to proceed with the hearing in the absence of the Accused's counsel."

As counsel for the State pointed out in her argument, appellant had been granted four postponements between the period 19th April 1995 and the 28th of July 1995 to procure appropriate representation. The fact of the matter is that appellant did obtain legal representation, although not of his preferred choice. In this regard the Zimbabwean Supreme Court in Paweni and Another v. The Acting Attorney General 1985 (3) SA 720 at p723 per Gubbay JA said the following:-

“The right of choice is an inherent right which every accused possesses and it may be asserted irrespective of the nature or complexity of the proceedings. See *R v Kuruza* 1967 (4) SA 260 (RAD) at 262A. That is a principle of justice which has been recognized and enforced by the Courts long before it became enshrined in the past and present Constitutions of this country. See *R v. Second* 1969 (4) SA 255 (RAD) at 257B. But, as the learned Judge a quo observed, the disability of an accused to procure the services of a specific legal practitioner does not in itself justify the grant of the postponement of his trial. The inalienable right to “a legal representative of his own choice,” does not mean that, if, for one reason or another, it is not convenient for the person chosen to conduct the case on the date set down for hearing, the court has no option but to order that the proceedings be held in abeyance pending his availability. What is protected is the right of an accused to resist a legal

practitioner being foisted upon him even where such services will be rendered to him without charge. He is entitled to choose whom he wishes to represent him, but if his prime choice is unavailable then he is obliged to look further afield and engage someone else. In other words the right of choice is subject always to the practitioner's availability on the trial date."

This statement certainly accords also with our view of the approach to be adopted in matters concerning the right to legal representation.

Mrs. Mangori for the State in her comprehensive heads of argument referred us also to a dictum in **Robinson v. R** 1986 L.R.C. (Court) 405 Jam PC where Lord Roskill held that:

"...their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse... Nonetheless the importance of the decision is that it shows that the right to legal representation is not absolute in the sense that adjournments must always be repeatedly granted to secure legal representation. There are other relevant considerations to be taken into account."

We endorse these views.

For these reasons we find that the challenge of appellant levelled at the procedural irregularity of his trial, cannot be upheld.

No appeal having been directed at the merits of his conviction, the only remaining ground of appeal that has to be considered is an appeal against the severity of the sentence of fifteen years imprisonment passed on appellant. He made no oral submission on this point, being content to rely upon the grounds stated by him in his notice of appeal. He claimed that the sentencing magistrate placed too much weight on the aggravating factors without at the same time having due regard to the mitigating factors, particularly that no death or injury occurred in the course of armed robbery. He further maintained that the sentence was harsh and its length would not do anything to help him reform. More particularly, appellant asked us to consider comparative justice and drew our attention to the judgment of Gittings J, quashing the sentence of fifteen years imprisonment on a fellow accused in the robbery and substituting therefor a sentence of twelve years imprisonment. He argued that as there was nothing to choose between his conduct and that of the accomplice, his sentence should likewise be reduced to one of twelve years imprisonment.

We are prepared to accept for the purpose of this appeal that there was no difference in the level of culpability between these two men as regards the crime for which they were convicted. However, we do not consider that as a matter of principle this Court is under any obligation to reduce the sentence merely because another judge has chosen to do so as regards a co-accused. It is necessary to consider the sentence passed on the appellant on its merits and to ascertain whether there was anything in the reasoning of Gittings J. which would persuade us to adopt the same course as he did.

In our opinion, the sentence passed on appellant cannot be regarded as excessive and we can see no flaw in the magistrate's approach. Appellant was convicted of an armed robbery and this crime carries with it a statutory minimum penalty of ten years imprisonment. The robbery took place at a bank, and as a result P159,000.00 and also some foreign currency were stolen, only a fraction of which has been recovered. Firearms were used for the purpose of threatening the bank staff and these were not recovered. The sentencing magistrate clearly concluded that an exemplary and deterrent sentence was called for, and with that view we agree.

The judgment of Gittings J. reducing the co-accused's sentence does not persuade us that there is any good reason for doing the same. In view of the

parity of culpability as between these two men, we would have been inclined to favour such a course had the reasoning of Gittings J commended itself to us. We are bound to say that it does not. Nowhere in his judgment does he address himself to the serious nature of the crime which demanded that any sentence should be substantially above the statutory minimum. The sole consideration which appealed to him was the desire to avoid passing a sentence which, as he put it, "break" persons. If this sentiment is taken by itself it is unexceptionable, but a sentencing judge has to have regard to all the facts and circumstances pertaining to each case. This was not done. In our opinion a proper approach to the co-accused's part in this extremely serious crime should not have resulted in any interference with the sentence passed by the magistrate. We find, accordingly, no grounds for allowing the appeal against sentence.

Appellant was sentenced for the bank robbery in May 1996. At the time of the commission of this crime, he was on bail facing a charge of car theft and at some time in 1995 he was convicted of this offence and sentenced to 2 ½ years imprisonment. His 15 year sentence was ordered to be served "consecutive to any form of imprisonment which he might be serving." However, the 15 year sentence was ordered to run from 29th October 1994 when he was first taken into custody in connection with the bank robbery. It

appears to us that, notwithstanding the apparent intention of the magistrate, the effect of the backdating of the sentence was to nullify the order that the sentence was to be consecutive. For the avoidance of doubt, we wish to make it clear that the appellant will be entitled to release when his 15 years sentence expires (allowing for remission) and that the date when this sentence begins is 29th October 1994.

For these reasons the appeal is dismissed.

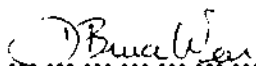
DELIVERED IN OPEN COURT THIS 13th DAY OF JULY 2000.

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 J.H. STEYN
 JUDGE OF APPEAL

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 G. FRIEDMAN
 JUDGE OF APPEAL

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 LORD D. B. WEIR
 JUDGE OF APPEAL