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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DANIëL SHABANGU ..... Appellant.

and

THE STATE ..... Respondent.

Coram: Jansen, Trollip JJA et Viljoen AJA.

Heard: 27 February 1976. Order made: 1 April 1976.

Reasons filed: 11 May 1976.

REASONS FOR JUDGMENT.

JANSEN JA :-

An order allowing this appeal and setting aside the conviction and sentence has been issued. Here follow the reasons.

The / ....

The appellant (together with another) was convicted in the Magistrate's Court, Roodepoort, of dealing in dagga in contravention of section 2(a) of Act 41 of 1971. The quantity involved was substantial (1,45 kilograms); and he had some 4 years before been convicted for an offence of a similar nature, for which a sentence of a fine of R500 or 500 days imprisonment, as also an additional 18 months imprisonment, had been imposed. He was consequently sentenced to 7 years imprisonment in respect of the present conviction. An appeal against conviction and sentence to the Transvaal Provincial Division failed; he now pursues the matter further by leave of this Court in respect of conviction only.

The only contention raised on behalf of the appeal is (as in the Court a quo) that the court, by refusing a postponement of the trial, committed an irregularity, justifying the setting aside of the conviction, and, consequently, the sentence.

The appellant was arrested on 19 July 1974 and with the co-accused appeared in court on 22 July 1974, when he was granted bail and the case remanded for trial to 7 August 1974. He was apparently released on 29 July 1974. In respect of the resumption on 7 August 1974 the magistrate's note reads :-

> „Uitgestel tot 16.8.74 vir verhoor. Besk. 2 (appellant) Borg verleng. Besk. 1 borg vasgestel, in hegtenis. Staatsaanklaer deel mee op versoek van verdediging. Prokureur afwesig (Hoffmann). Geen verskoning by hof aangebied. Finaal."

On 16 August 1974 the trial proceeded, but only after an attempt to obtain a further postponement had failed. As it is the decision of the court to proceed with the trial which forms the basis of the appellant's appeal, it is necessary to quote the record as to what happened:-

> "Mnr. Ackerman: Mag dit u behaag. Namens Daniel Shabangu is ek vanoggend gevra vir uitstel.
>
> Hof: U is vanoggend genader.
>
> Mnr. Ackerman: Ja.

Hof: Ek sien daar was 'n uitstel - u naam is nie op rekord nie - die prokureur is afwesig - Mnr. Hoffmann.
Mnr. Ackerman: Dit is 'n ander prokureur.
Staatsaanklaer spreek toe: Edelagbare, mag ek net noem 'n prokureur het geskakel vanoggend. Ek het vir hom gesê dat saak vir verhoor neergesit is vandag. Daar kan 'n aansoek gedoen word by hof vir 'n uitstel.
Hof aan beskuldigde: Hoekom het jy so laat 'n prokureur gekry?
Beskuldigde 2: Ek het lankal 'n prokureur gaan sien te Johannesburg Edelagbare.
Hof: Wie was die prokureur?
Beskuldigde 2: Mnr. Lowenberg.
Hof: En toe kon hy nie jou saak vat nie, is dit reg?
Beskuldigde 2: Nee, hy het nie geweier nie, Edelagbare.
Hof: Toe kry jy 'n ander prokureur?
Hof aan Staatsaanklaer: Opponeer u die uitstel?
Staatsaanklaer: Ek moet dit opponeer. Een van die getuies in die saak - die saak is neergesit vir finale verhoordatum. Een van die getuies wat nou voor die hof sal verskyn, sal enige oomblik nou weggaan grens toe en hy sal eers in Januarie terug wees. Die Staat lei 2 getuies. Dit is nou een van die getuies.
Hof: Enigiets in repliek, Mnr. Ackerman?
Mnr. Ackerman: Nee, Edelagbare, dan vra ek om verskoon te word.
Hof: ~~No. 2 was sedert die 29ste~~ Julie op borgtog. Hy het voldoende tyd gehad om 'n prokureur te kry. Die aansoek word van die hand gewys.

Mnr. / ....

Mnr. Ackerman: Mag ek verskoon word, Edelagbare?
Hof: Seker, Mnr. Ackerman. Is daar nog iets wat jy wil sê, Nr. 2?
Tolk: Edelagbare, No. 2 sê hy sal nie sy verdediging behartig nie want hy het n prokureur gekry.
Hof: Ja, die prokureur kon nie jou saak neem nie. Jy het gehoor Mnr. Ackerman treë op namens die prokureurs wat jy eerste genader het en hy het vanoggend instruksies gekry. Jy het voldoende tyd gehad om jou behoorlik - om jou prokureurs te raadpleeg sodat hy hier kan wees. Verlede keer was daar klaar n finale uitstel verleen. Ek sal die saak n rukkie laat afstaan sodat jy n ander prokureur plaaslik kan raadpleeg. Daar is 12 van hulle hier in Roodepoort. Ek sal die saak laat afstaan tot 11 uur. Mnr. Ackerman is nie beskikbaar vandag nie. Dit is waarom hy hom onttrek het.
No. 2 beskuldigde vra dat die hof hom kans gee tot 2.00 nm.
Hof: Pas die tyd u - 2 uur?
Staatsaanklaer: Edelagbare een van die Staatsgetuies moet dringend vanmiddag lesings bywoon.
Hof: Tot hoe laat moet hy lesings bywoon?
Staatsaanklaer: Dit begin 2 uur te Hondeskool Pretoria, Edelagbare.
Hof: Ek sal hom kans gee tot half twaalf, hier is baie prokureurs in Roodepoort. "

The matter then stood down. At the resumption the following ensued :-

"Staatsaanklaer stel aanklagte:
Pleit: No. 1: Onskuldig.
No. 2: Edelagbare No. 2 sê dat sy prokureur het gesê hy kan Dinsdag hier wees.

Hof: Wie is jou prokureur? Jy het tot half twaalf gehad om n prokureur te kry. Dit is kwart voor twaalf. Wie het jy geraadpleeg?
Beskuldigde 2: Ek het met Mnr. van Vuuren van Johannesburg gepraat, Edelagbare. Hy is nou by die Hooggeregshof.
Hof: Dit is nou die 4de prokureur van wie jy praat. Die eerste een was Mnr. Hoffmann, die tweede waarvan jy gepraat het is Mnr. Lowenberg, vanoggend was Mnr. Ackermann hier en nou Mnr. van Vuuren.
Beskuldigde 2: Edelagbare, ek het Mnr. Lowenberg gespreek. Hy het Mnr. van Vuuren instruksies gegee.
Hof: Meneer die aanklaer, is dit enigsens moontlik om Mnr. van Vuuren te kontak?
Staatsaanklaer: Agbare daar het n prokureur vanoggend gebel. Hy het nie sy naam genoem nie en ek - hy het gevra vir uitstel in die saak en ek het vir hom gesê dat uitstel geopponeer sal word.
Hof: Hy het nie sy naam genoem nie?
Staatsaanklaer: Nee Agbare.
Hof: En hy is bewus dat die saak neergesit is vir verhoor. Het u dit so genoem?
Staatsaanklaer: Ja.
Hof: Beskuldigde, die saak gaan voort. Wat is jou pleit?
Tolk: Beskuldigde sê, Edelagbare, dat hy niks te sê het in die saak.
Hof: Die hof sal n pleit van onskuldig vir jou notuleer. Verstaan jy dit?
Beskuldigde 2: Ek verstaan Edelagbare, maar ek het niks te sê daarop.
Hof: Ja - nee ek verstaan dit. "

These passages disclose a number of obscurities. Who instructed Mr. Ackerman? Apparently not the appellant himself- he was asked to appear "namens" the appellant; nor Mr. Hoffmann - "dit is n ander prokureur". Was it the anonymous attorney who phoned the prosecutor that morning? And was this Mr. Lowenberg? Save for the remark by the magistrate to the appellant that Mr. Ackerman withdrew because he was unavailable, the reasons advanced for the application for a postponement do not appear at all. When had Mr. Lowenberg instructed Mr. van Vuuren (who, we are informed by counsel for the appellant, is an advocate)? In fact, what did the appellant mean when he said that he had "lankal" gone to see Mr. Lowenberg, who had not refused to take his case? What was the understanding with Mr. Lowenberg? Had he been firmly engaged and paid?

Despite these obscurities, which a few questions to Mr. Ackerman and the appellant could no doubt have cleared up, the court proceeded with the trial, even when it

was apparent that the appellant persisted in his attitude that he had appointed an attorney and that he would not conduct his own defence. He in fact asked no questions, gave no evidence, called no witnesses and did not address the court. That there were cogent reasons for proceeding with the trial is obvious, but the question is whether they should not have yielded to the appellant's predicament.

The court was clearly influenced by, inter alia, the fact that the appellant had been on bail, that he had been warned on 7 August 1974 that the postponement to the 16th was final, that even after the adjournment on the 16th, he could produce no more than a legal representative who would only be available on the following Tuesday. The court felt "dat beskuldigde voldoende tyd gehad het om die dienste van n regsman te bekom en dat n verdere uitstel geweier moet word" (Further Reasons for Judgment). This was the court's view when it refused the application by Mr. Ackerman

and / ....

and also at the resumption of the proceedings later that morning.

The clear implication is that the court accepted it to be the appellant's fault that he was not legally represented by someone able to conduct his defence. However, without further inquiry, the court was not entitled to come to that conclusion in view of what had occurred that morning. The appellant did say "hy het n prokureur gekry", and that he had seen Mr. Lowenberg - and an attorney (Mr. Ackerman) did appear, albeit that he only asked for a postponement; and later he said that Mr. Lowenberg had instructed Mr. van Vuuren. The inference that he had belatedly approached an attorney or failed to instruct him properly was clearly not justified in the absence of further clarification. It may well have been the fault of the attorney appellant had duly instructed that he was not represented that morning. The court, in exercising its discretion to proceed with the trial, had clearly misdirected itself in this respect. And were it not for this, the court would no doubt have

felt that the appellant's right to legal representation and the requirements of a fair trial outweighed the obvious inconvenience and delay, with the risk of evidence becoming unavailable, that would be attendant upon a postponement. The charge was a serious one, and the consequence of a possible conviction to the appellant disastrous in view of the penalties involved.

The case against the appellant on the merits certainly appears to be formidable and to have fully justified the conviction. But, on the other hand, it is impossible to say what effect a properly conducted defence could have had on the ultimate result. In view of the misdirection which materially influenced the court in exercising its discretion, the principles applied in S. v. Seheri en Andere (1964 (1) SA 29 (A), 36) are fully operative. It was there held that an accused unrepresented at a trial through his attorney's fault, does not as a result forfeit his right to legal representation, and that a refusal to grant a postponement

to the accused to enable him to be represented later amounted to a failure of justice as envisaged by sec. 364 (1) of Act 56 of 1955 (cf. sec. 103 (4) of Act 32 of 1944). Cases such as R. v. Zackey (1945 AD 505), upon which the State relies, are clearly distinguishable. There the appellant was clearly himself at fault by not appointing an attorney.

Hence the appeal was allowed and the conviction and sentence were set aside.

E.L. JANSEN

JUDGE OF APPEAL.

TROLLIP JA).
VILJOEN AJA). Concur.