17/81

G.P.-S. J 445

# In the Supreme Court of South Africa
# In die Hooggeregshof van Suid-Afrika

(APPEL DIVISION)
(AFDELING)

**APPEAL IN CRIMINAL CASE**
**APPEL IN STRAFSAAK**

Dinkoane Mayela
**Appellant**

*versus/teen*

Die Staat
**Respondent**

Appellant's Attorney
Prokureur van Appellant Pas.ds

Respondent's Attorney
Prokureur van Respondent P G Johannesburg

Appellant's Advocate
Advokaat van Appellant D Koetze

Respondent's Advocate
Advokaat van Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op 17.9.81 5 15 18
w.P.17

SUKOYS

17-9-81 - Terug verwys na Hooggeregshof

Coram: Muller, Trollip & Van Heerden WAR

Appellant: C H Vermaak

Respondent: E. du Toit.

R/v gehoor op 25/9/81

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DINKOSE MAJOLA ..... Appellant

AND

THE STATE ..... Respondent.

Coram: MULLER, J.A., TROLLIP et VAN HEERDEN, A.JJ.A.

Heard: 17 September 1981.

Delivered: 25 September 1981.

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J U D G M E N T

TROLLIP, A.J.A. :

I agree with the reasons of MULLER J.A. for our making the aforementioned orders. But I wish to add a few reasons of my own on the legal problems that exercised

my .... /2

my mind concerning this appeal.

Firstly, can an appeal against a conviction of an accused by a superior court be brought to this Court before he has been sentenced? The question arose here because the Court a quo granted leave to appeal on the murder count before sentencing the appellant thereon. As it concerns the appellate jurisdiction of this Court (see section 315 of the Criminal Procedure Act 51 of 1977, and especially subsection (2) thereof) I think that the question must be considered and answered. In S. v. Harman 1978 (3) S.A. 767 (A), a decision to which I was a party, it was said that the Act does not envisage the bringing of an appeal by leave of the Court a quo before sentence has been imposed. The reason given was that section 316(1) specifically says that the convicted accused's

application .... /3

application to the trial court for leave to appeal must be made "within a period of fourteen days of the passing of any sentence as a result of such conviction" or any extended period as may be granted (my italics). That provision reflects, of course, the general rule that a convicted accused cannot appeal against his conviction until he has also been sentenced. That rule is enforced in order to avoid piecemeal appeals and to induce expeditious finality in criminal litigation.

But that notwithstanding, it will be immediately observed that the provision merely regulates the time limits within the application for leave to appeal is to be made. It does not expressly and absolutely prohibit the convicted accused from applying for leave to appeal, or the trial court from granting it, before he is sentenced. Why should that

not .... /4

not happen in appropriate cases? I can see no reason why not. Compare, for example, the procedure laid down for the making of a special entry under section 317 for an alleged irregularity in the proceedings and for reserving a question of law under section 319 so that this Court can deal with them on an appeal by the accused. Neither section enjoins that such procedure can only be invoked after sentence has been imposed. There is therefore no reason why such an absolute restriction should be read into the ordinary appeal procedure set out in section 316. Of course, the general rule that no appeal should lie to this Court, whether by means of a special entry, reserved law question, or in the ordinary way, unless the accused is first sentenced, should only be departed from in exceptional circumstances for the reasons already given.

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In Harman's case, supra, the accused was convicted and sentenced on a murder count. He was also convicted but not sentenced on a housebreaking count. This Court refused to entertain an appeal on the merits of the latter count. Despite the imposition of the death sentence on the first count he should also have been sentenced on the second count (S. v. Mathebula and Another 1978 (2) S.A. 608 (A)). Hence, there were no exceptional circumstances in Harman's case warranting a departure from the general rule reflected in section 316(1). I think that is how the decision must be understood.

On the other hand exceptional circumstances existed in S. v. Augustine 1980 (1) S.A. 503 (A) and the present case - it would have been futile in either case to have sentenced the accused before granting him leave to appeal because, in

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the view of the Judge a quo, this Court would inevitably set aside the conviction on appeal.

Secondly, that an act or omission by a legal representative of one of the parties to criminal litigation (in contradistinction to one by the trial Court itself) can constitute an irregularity vitiating the proceedings appears from S. v. Twopenny & Others, A.D., delivered on 8 September 1981, and cf. S. v. Mushimba & Others 1977 (2) S.A. 829 (A). Here, due to a bona fide misunderstanding by appellant's counsel of his duty towards his client, appellant was not afforded the opportunity of discussing, considering and deciding whether or not to testify in his own defence, and of terminating the mandate of his counsel if, contrary to his wishes, the latter insisted that he should not testify. That constituted an

irregularity .... /7

irregularity in the proceedings. I agree that Matonsi's case, 1958 (2) S.A. 450 (A) is therefore distinguishable on the facts. That the irregularity resulted in a failure of justice, justifying this Court making the abovementioned orders (cf. section 322(1) of the Act), is amply borne out by the facts that the Court a quo, in convicting the appellant, relied heavily and repeatedly on his failure to testify and the appellant was aggrieved by not having been afforded the opportunity of testifying.

Thirdly, counsel for the State expressed the fear that, if we departed from or distinguished Matonsi's case, it would lead to a flood of cases in which an accused, after conviction, would dispute his counsel's authority to have called or not to have called him as a witness or in other respects concerning the conduct of his case. But that fear, I think,

is .... /8

is unfounded. In most cases an accused and his counsel work in close collaboration and harmony in the presentation of his case, so such disputes are unlikely to arise frequently. But if such a dispute is raised, the trial court would immediately and expeditiously investigate the circumstances, if necessary by treating the accused's complaint as an application for the making of a special entry under section 317 and hearing evidence thereanent, and decide whether or not the accused's complaint is well-founded. In the majority of such disputes, I venture to say, it will emerge that Matonsi's case applies fully and the complaint is unfounded.