Bib. 57/87

ABSOLOM MALINGA ..... APPELLANT

and

THE STATE ..... RESPONDENT

CASE NO. 388/86
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

ABSOLOM MALINGA APPELLANT

and

THE STATE RESPONDENT

CORAM: JANSEN, JOUBERT, HOEXTER, SMALBERGER JJA et KUMLEBEN AJA

DATE HEARD: 12 MAY 1987

DATE DELIVERED: 27 MAY 1987

J U D G M E N T

KUMLEBEN, AJA:

The/ .....

The appellant stood trial in the Witwatersrand Local Division before Theron J and one assessor on inter alia a charge of murder. He was convicted on this count and sentenced to death, the court having found no extenuating circumstances proved. Leave to appeal was refused. A petition addressed to the Chief Justice for leave to appeal was restricted to the finding that there were no extenuating circumstances and was successful. The appeal failed. From the judgment dismissing the appeal (Case No 82/1985) it appears that during the course of argument, the court, in reference to the provisions of sec 145(2) of the Criminal Procedure Act, 51 of 1977 ("the Act"), drew

attention/.....

attention to the fact that only one assessor had been summoned and the death sentence was imposed. The possibility of an irregularity was thus raised. The court however found itself unable to decide this question since, as I have said, leave to appeal was restricted to the question of extenuating circumstances. There was in any event insufficient evidence or information before the court to determine whether an irregularity had in fact occurred.

This issue is now before us by virtue of the provisions of sec 323 of the Act, sub-sec (1) of which reads as follows:

> "If the Minister, in any case in which a person has been sentenced to death, has any doubt as to the correctness

> of the conviction in question, and such person has not in terms of section 316(1) applied for leave to appeal against the conviction or has not prosecuted an appeal after leave to appeal against the conviction has been granted or has not submitted an application to the Chief Justice in terms of section 316(6) for condonation or for leave to appeal against the conviction, the Minister may, on behalf and without the consent of such convicted person, refer the relevant record, together with a statement of the ground for his doubt, to the Appellate Division, whereupon that court shall consider the correctness of the conviction in the same manner as if it were considering an appeal by the convicted person against the conviction."

Thus in terms of this section the Minister is authorised to initiate an appeal (which I shall refer to as a "Minister's appeal") in the stated circumstances.

Counsel were agreed that the prerequisites for such an

appeal as laid down in the sub-section are in this case satisfied. Its manifest purpose is to ensure that in appropriate cases an appeal is prosecuted to reduce the risk of a serious miscarriage of justice. There is therefore no justification for restricting the words "correctness of the conviction" to cases in which the evidence does not support the verdict. Moreover, linguistically a conviction in proceedings tainted with a fatal irregularity can never be said to be correct. That the sub-section also provides for an appeal in the case of an irregularity is further borne out by the provisions of sub-sec (4) of this section read with those of sec 322 of the Act. They make it plain that an alleged

irregularity may form the subject matter of a Minister's appeal.

Thus the question to be decided in the first place is whether, in the light of the sentence imposed, the fact that the Judge sat with only one assessor constituted an irregularity. This involves an interpretation of the proviso to sec 145(2). The sub-section reads as follows:

> "(2) Where an attorney-general arraigns an accused before a superior court -
>
> (a) for trial and the accused pleads not guilty; or
>
> (b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge,
>
> the presiding judge may summon not more than two assessors to assist him at the trial: Provided that where the offence

in respect of which the accused is on trial is an offence for which the sentence of death is a competent sentence, the presiding judge shall, if he is of the opinion that, in the event of a conviction and having regard to the circumstances of the case, the sentence of death may be imposed or may have to be imposed, summon two assessors to his assistance."

The question has been before this court on at least four previous occasions. Since part of what was said and decided in each of these decisions pertains to this appeal, it is necessary to refer to each briefly.

In S v Chaane en Andere 1978(2) S A 891 (AD) it was argued on behalf of the appellant that the fact that the death sentence was passed without assessors having been summoned per se constituted an irregularity.

This submission was rejected, this court (per Rabie JA) pointing out at pages 894 and 895 that:

> "Die sub-artikel bepaal nie dat 'n Regter verplig is om in alle gevalle waar die doodvonnis volgens wet opgelê kan word assessore op te roep om hom by te staan nie. Sodanige verpligting ontstaan eers wanneer die Regter van oordeel is, 'met inagneming van die omstandighede van die geval', dat die doodvonnis by skuldigbevinding opgelê kan word. Dit volg dus dat die Regter in 'n geval soos die onderhawige 'n besluit moet neem oor die vraag of die omstandighede van die geval sodanig is dat die doodvonnis by skuldigbevinding opgelê kan word, en dat, wanneer hy besluit dat dit wel 'n geval is waar die doodvonnis opgelê kan word, hy assessore moet oproep om hom by te staan."

Applying this test, it was held that at the inception of the trial there was nothing to indicate that the

death sentence might result. The indictment, to which is appended a summary of the substantial facts of the State case, gave no such indication and there was no further evidential material on which such a conclusion could be based. As a matter of fact it was the impressive list of previous convictions which led to the imposition of the death penalty. The court was therefore held to have been properly constituted.

Similarly in S v Dyantyi, 1983(3) S A 532 (AD) the trial Judge sat without assessors but no irregularity was held to have taken place. Here too this court relied upon what was revealed in the summary of substantial facts furnished in terms of sec 144(3) of the Act (and on an

observation/ .....

observation made by the Judge to defending counsel during the latter's address on extenuating circumstances) for the conclusion reached. On how the trial judge ought to be assisted in his decision whether or not to appoint two assessors Hoexter, JA remarked at page 533 H that:

> "those responsible for the preparation of the prosecution should give anxious scrutiny to the evidence proposed to be led by the State with a view to the giving of timeous advance notice to the presiding Judge, either by the member of the Attorney-General's staff who reads the docket before the criminal roll is prepared, or by counsel prosecuting at the trial, that the case merits the summoning of assessors."

The third decision, S v Schoba 1985(3) S A 881 (AD), serves as a useful illustration of the

inadequacy and fallibility of whatever steps are taken to forecast what sentence will eventuate. In order to determine the reason for the Judge a quo deciding against the use of assessors, this court on appeal had regard to the recorded "evidence" of a discussion between counsel and the court when the question of extenuation was being considered. It revealed that counsel for the State and defence had been of the view that the evidence of the appellant would be acceptable and would sustain a finding of extenuation. They were proved wrong inasmuch as his evidence was totally rejected. In the course of the judgment the court (per Grosskopf, JA) stressed the inadequacies of the summary of substantial facts to serve as a guide.

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It was also pointed out in the judgment that whatever role counsel plays in assisting in the decision (the prosecutor before the trial started had expressly stated that assessors were unnecessary) it is ultimately a matter for the trial judge to decide: were he merely to act on the advice or opinion of counsel this would amount to an improper delegation of a decision entrusted to him by the terms of the sub-section.

Finally the significance of Van Willingh v Die Staat (Case No 296/85 - delivered on 30 May 1986), in which the appeal was allowed on account of the irregularity under discussion, lies therein that this court (per Jansen JA) held that the requirements of sec 145(2)

are peremptory: unless in the opinion of the trial judge concerned the possibility of a death sentence can be discounted, he is obliged to appoint two assessors. The enquiry on appeal, the learned Judge said, is "wat die verhoorregter se oordeel was oor die moontlikheid van 'n doodvonnis by die aanvang van die verhoor" (page 4 of the judgment). It was further held that such an irregularity, when proved to have been committed, is of such an order as to amount per se to a failure of justice vitiating the proceedings. (Cf The State v Moodie 1961(4) S A 752 (AD) and The State v Naidoo 1962(4) S A 348 (AD)).

Reverting to the present appeal, to decide whether an irregularity was committed the following

material/ .....

material is before us:

(a) The indictment and the summary of substantial facts.

In the summary it is alleged that appellant and the deceased were at the latter's home on the day in question. The appellant attacked the deceased and stabbed him several times with a knife in circumstances unknown to the State. He thereupon stole certain possessions of the deceased from his room, including an R1 rifle. Hence the two further counts of theft and illegal possession of a fire-arm. (I ought to point out in passing that a perusal of the rest of the record reveals nothing more which could be of any assistance in deciding the issue before us.)

(b)/.....

(b) A copy of a letter dated 9 October 1985 written by the Judge President of the Transvaal Provincial Division to the Director General: Justice in response to an inquiry made on his behalf. It reads as follows:

> "Ek bevestig dat ek mnr Kilian oor bogemelde aangeleentheid per telefoon geskakel het en hom meegedeel het dat ek van Regter Theron wat voorgesit het in gemelde saak verneem het dat hy gebruik gemaak het van slegs een assessor weens die feit dat 'n tweede assessor vir die verhoor van die saak nie verkry kon word nie."

This letter was written after the dismissal of the first appeal but before the Minister's appeal. The information was no doubt sought to assist the Minister in deciding whether or not he ought to take steps

in terms of sec 323 of the Act.

(c) An affidavit sworn by Miss Fleischack, who appeared for the State at the trial. In it the deponent states that although she has no independent recollection of having told the trial Judge that assessors were required, in the light of the seriousness of the charge, it is highly unlikely that she would not have done so.

(d) An affidavit of an attorney of the office of the State Attorney, a Mr Chester. According to his account of an interview with Theron J, the latter told him that he had no positive recollection of what led to his decision. He did however state that the fact that he did appoint one assessor is an

indication that Miss Fleischack did inform him that assessors were necessary. (This is, of course, consistent with his statement to the Judge President.) The trial Judge was at a later stage requested by this attorney to reduce these comments to writing but declined to do so.

At the hearing before us Mr Swanepoel, who appeared for the respondent, although he did not challenge the accuracy or reliability of the letter or the two affidavits, submitted that they were inadmissible and that for this reason this court could not have regard to them.

In/ .....

In regard to this contention it is to be noted in the first place that had the appellant raised this irregularity by way of an appeal in terms of sec 316 of the Act - as was the case in three of the decisions of this court to which I have referred - or by way of a special entry in terms of sec 317 of the Act - as was the case in the Van Willingh appeal - there is provision for the necessary evidence to be placed before the court of appeal. (Cf sec 316(3) and (4) and R v Matsego and Others 1956(3) S A 411 (AD) at 415 A - D). Counsel nevertheless submitted that, although a Minister's appeal involved in all respects a similar procedure intended to achieve the same end, no evidence other than that recorded at the trial could be introduced for the purpose

of this appeal. The reason being, so he submitted, that sec 323 does not make provision therefor.

It is unnecessary to do more than examine the merit of this contention with reference to the contents of the letter. Sec 320 of the Act, one observes, provides that:

> "The judge or judges, as the case may be, of any court before whom a person is convicted shall, in the case of an appeal under sec 316 or of an application for a special entry under section 317 or the reservation of a question of law under section 319 or an application to the court of appeal for leave to appeal or for a special entry under this Act, furnish to the registrar a report giving his (or their) opinion upon the case or upon any point arising in the case, and such report, which shall form part of the record, shall without delay be forwarded by the registrar to the registrar of the court of appeal."

(My italics).

It would appear to have been a casus omissus that the requirement that a report be furnished was not included in the provisions of sec 320 in the case of a Minister's appeal. Be that as it may, since such a report in terms of sec 320 is plainly admissible (and, one may add, in appeals involving the issue now under discussion is of obvious relevance and significance) there can be no logical objection to such a report being furnished by the trial judge and relied upon by this court in the case of a Minister's appeal although the obligation to furnish a report is not statutorily prescribed. Moreover, had the trial Judge in this case at the outset, or at any stage during the course of the trial, placed on record his reason for sitting with

only one assessor, or the view he held before the trial on the prospect of a death sentence being imposed, the admissibility of such a disclosure could hardly have been disputed. In principle why should his subsequent statement receive different treatment? Mr Swanepoel, rightly in my view, did not contend that the fact that the communication was to the Judge President rather than to this court was of any significance. The fact that it was oral and not in writing is similarly immaterial. There is plainly no qualitative difference between the two forms of communication. In the circumstances I can see no objection to our having regard to the contents of this letter. It states positively the reason for the summoning of only one

assessor and implicitly that the Judge considered this to be a case calling for two assessors.

Turning to the summary of substantial facts, it too supports the conclusion that an irregularity occurred. An inference to be drawn from it is that the motive for the murder was personal gain. Alternatively, as expressly stated in that document, it must be assumed that the murder was committed for a reason unknown to the prosecution. On either basis the indictment could have provided no assurance that at the end of the trial the death sentence would not have been imposed.

I am accordingly of the view that the letter and the indictment establish that the trial Judge ought to have appointed two assessors and that his failure to

do so constituted a fatal irregularity. In the circumstances it is unnecessary to consider, in the light of counsel's objection, whether the court is entitled to take cognisance of the contents of the two affidavits and, if so, to decide on the significance of what is said in them.

As the four previous decisions of this court illustrate and emphasise, there are, whatever procedure is adopted, insuperable difficulties in making any accurate forecast before a trial commences as to whether the death sentence will result. The summary of the substantial facts is in the nature of things not a reliable indication of the outcome of the trial or of what may turn out to be the appropriate

sentence. As was pointed out in S v Schoba (supra) at page 885 I, the information in the indictment does not focus on evidence relating to sentence. For the trial Judge to attempt to obtain more information about the case from State counsel or defence counsel, or from both, is for obvious reasons an unsatisfactory course to adopt. On the other hand, simply to rely on the opinion of counsel in this regard may amount to an improper delegation of the decision, which the trial judge is enjoined to take. It must be borne in mind that by the inclusion of the proviso the Legislature has acknowledged the merit of appointing two assessors to assist the judge when in the result the death penalty is to be imposed.

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This objective is not attained whenever such sentence is passed without two assessors having been appointed, notwithstanding compliance with the requirements of the proviso.

The statutory history of this requirement, which reflects the underlying intention of the proviso, is of some interest. In terms of the 1917 Criminal Procedure and Evidence Act, 31 of 1917, the trial judge, should an accused person have elected not to be tried by jury, had an unfettered discretion in deciding whether or not to summon the assistance of two assessors regardless of the nature of the charge (see sec 216(1)). These provisions were varied by a substituted section,

namely sec 216(2), introduced by sec 36 of Act 46 of 1935. It brought about a change in two respects relevant to the present enquiry; firstly the trial judge was authorised in his discretion to appoint either one or two assessors. Secondly, the following proviso was added:

> "Provided that if the accused person or persons is or are to be tried upon a charge of having committed or attempted to commit treason, murder, rape or sedition or in any case in which the Minister has given a direction under sub-section (5) the judge who is to preside at the trial shall summon to his assistance two assessors as aforesaid."

The Criminal Procedure Act of 1955 left the position unchanged (see sec 109(2) of Act 56 of 1955). However by an amendment introduced by sec 5 of Act 75 of 1959 the

proviso was deleted and the position reverted to that which had prevailed as a result of the provisions in the 1917 Criminal Procedure and Evidence Act. Such was the position until the proviso was re-introduced in its present form by sec 145(2) of the Act.

Thus, though consistency has not been a feature of past enactments in this regard, the desirability of assessors in cases where the death penalty may be imposed is currently recognised by the Legislature. It has also been acknowledged by this court. In R v Mati and Others 1960(1) S A 304 (AD) at 306 F Schreiner JA remarked on:

> "the advantage generally derived from the assistance of assessors in difficult cases or in cases where the outcome for the accused may be very serious."

(See/ .....

(see too S v Adriantos en 'n Ander 1965(3) S A 436 (AD) at 437 D - E).

In the light of this observation, the important principle underlying the use of assessors, and the difficulties in the application of the proviso to sec 145(2) in its present form, the Legislature might well consider it appropriate to review the position with a view to making the appointment of two assessors obligatory in all instances where the death sentence is a competent verdict on the charge or charges laid. I might add that in certain Divisions in such cases it is the practice - a salutory one in the circumstances - to make use of two assessors as a matter of course.

The/ .....

The appeal is allowed and the conviction and sentence are set aside.

M E KUMLEBEN, AJA

JOUBERT, JA)
HOEXTER, JA) CONCUR
SMALBERGER, JA)