Case no 452/88
/MC

ALSON MSABELI SOMCIZA

and

THE STATE

FRIEDMAN AJA.

Case no 452/88
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

ALSON MSABELI SOMCIZA Appellant

- and -

THE STATE Respondent

CORAM: VAN HEERDEN, MILNE JJA et FRIEDMAN AJA.

HEARD: 7 SEPTEMBER 1989.

DELIVERED: 19 SEPTEMBER 1989.

J U D G M E N T

FRIEDMAN AJA.

FRIEDMAN AJA:

The appellant and one Juju Tukela were jointly charged in the Magistrate's Court at Wynberg in the Cape with dealing in, alternatively possession of dagga. Appellant was, in addition, charged with attempted bribery, the allegation being that he offered the police officials who arrested him on the dagga charge, R3 000 not to proceed with the case against him. Appellant pleaded not guilty to both charges but Tukela pleaded guilty to the charge against him. After Tukela had pleaded guilty his attorney handed in, in terms of section 112(2) of the Criminal Procedure Act, Act 51 of 1977 (the Act), a statement signed by Tukela in which the latter acknowledged his guilt. In this statement Tukela explained that he had earlier on the day of their arrest, borrowed the car in which the

dagga was found from appellant and that when he returned the car to appellant, there was a cardboard box containing 164 parcels of dagga in the boot. The statement proceeded as follows :

> "This dagga was my property and I admit that I possessed it with the intention of selling it. Accused no 1 (appellant) was not at any stage aware of the fact that there was dagga in the boot of the car."

Tukela ended the statement with an admission that he knew it was unlawful to deal in dagga and that he was in possession of the dagga "with the intention to deal therein".

The Magistrate delivered a short judgment in which he stated that he was satisfied that Tukela had admitted all the allegations in respect of the charge

of dealing in dagga and he found Tukela guilty on that count. The prosecutor then asked the Court not to order a separation of trials. Appellant's counsel, on the other hand, applied for a separation of trials in terms of section 157 of the Act. In support of his request that a separation of trials be not ordered, the prosecutor informed the Court that the evidence which he would adduce would differ from the facts contained in Tukela's statement. He did not, however, disclose how it would differ. After an adjournment to consider the matter, the Magistrate delivered a judgment in which he stated that it was clear to him, the prosecutor having intimated as much, that Tukela's statement did not correspond with the version which the State wished to advance. Purporting to act in terms of section 113 of the Act, and relying on the decision in

S v Balepile, 1979(1) SA 702 (NC), the Magistrate altered Tukela's plea to one of not guilty and dismissed the application for a separation of trials. The trial then proceeded.

At the close of the State case appellant's counsel renewed his application for a separation of trials. He informed the Magistrate that Tukela's counsel had indicated to him that he did not intend to call Tukela as a witness and Tukela's counsel in fact confirmed this to the Court. Appellant's counsel explained to the Magistrate that since Tukela's evidence, as appeared from his statement in terms of section 112(2), was essential to appellant's case and as Tukela could not, by reason of the provisions of section(196)(1)(a) of the Act, be compelled to give evidence as long as he remained a co-accused, appellant

would be prejudiced in his defence unless a separation of trials were ordered. In a short judgment reading as follows, the Magistrate dismissed the application:

> "Na oorweging van hierdie aansoek, is die Hof van mening dat dit op hierdie stadium definitief nie in die belang van regspleging sal wees indien die Hof die verhore op hierdie stadium skei nie en word hierdie aansoek dus van die hand gewys."

Both appellant and Tukela then closed their respective cases without giving evidence and without calling any witnesses. They were both found guilty and sentenced.

Appellant noted an appeal to the Cape Provincial Division on the grounds, firstly, that the Magistrate had erred in refusing the application for a

separation of trials and secondly, that the sentences were excessive. Tukela noted an appeal only against his sentence. Some months later, but before the appeal was heard, appellant launched an application on notice of motion, citing the Magistrate as first respondent and the Attorney-general as second respondent, in which he sought an order reviewing and setting aside his conviction and sentence on the following grounds:

> "(i) A gross irregularity took place in the proceedings, which irregularity vitiated such proceedings and/or <u>alternatively</u>
>
> (ii) First Respondent, in the manner in which he regulated the conduct of the proceedings before him, in particular by the nature of the decisions made by him during such conduct of the proceedings, created

> in Applicant a belief that he (First Respondent) was biased against Applicant."

Appellant also asked, in his notice of motion, for an order that the costs of the application be paid by first respondent or, alternatively, by first and second respondents jointly and severally.

In his affidavit in support of the notice of motion appellant amplified the facts as set out above. He pointed out that the Magistrate's decision to alter Tukela's plea to one of not guilty, had come as a surprise to everyone at the trial, as no one had requested him to do so and no grounds entitling him to do so had existed. With regard to the second application for a separation of trials, appellant stated that as appeared from Tukela's statement,

the latter's evidence would probably have absolved him from blame on the dagga charge and would have assisted him on the bribery charge as it was improbable that he would have attempted to bribe the police (to drop the dagga charge against him) unless he was in fact guilty of dealing in dagga.

Appellant went on to state that because of what had occurred at the trial in regard to the application for separation as well as information he had received to the effect that the Magistrate was "friendly with all members of the South African Narcotics Bureau", and in particular with detective sergeant H Lazarus who was the investigating officer in the case and the main State witness, he was not satisfied that he had had a fair trial. He was, however, at pains to point out that the feeling which

he had as to the Magistrate's lack of impartiality was "purely subjective and based only on (his) impressions". He explained that he had not given evidence at the trial as he had felt that because the Magistrate was not well disposed towards him, he would have rejected his evidence and that, in any event, without Tukela's evidence to corroborate him, his evidence would not have been as convincing as it would otherwise have been.

Both respondents, i.e. the Magistrate and the Attorney-general, gave notice of their intention to oppose the application for review. However, only the Magistrate filed an answering affidavit. In his affidavit he stated that both accused had received an exceptionally fair trial ("'n uiters regverdige en billike verhoor") and that all his actions and decisions had been correct and in accordance with the

law. He also expressed the view that none of his decisions had prejudiced either of the accused in the presentation of their respective cases. He denied that there was any substance in appellant's suggestion of bias on his part.

Appellant's and Tukela's appeals and appellant's review application were set down for simultaneous hearing in the Cape Provincial Division before BURGER and CONRADIE JJ. BURGER J, in delivering the judgment of the Court, held that no valid grounds existed for the Magistrate's decision to alter Tukela's plea to one of not guilty in terms of section 113. He pointed out that at the time when the Magistrate altered Tukela's plea to one of not guilty, he did not know in what respect the State did not agree with Tukela's statement and that it had

subsequently transpired that it was only that portion of Tukela's statement in which he said that appellant had no knowledge of the presence of the dagga in the vehicle, that the State did not accept. BURGER J also held that in order to enable appellant to call Tukela as a witness, the Magistrate should, at the close of the State case, have ordered a separation of trials and that his refusal to do so had prejudiced appellant in his defence. Holding, however, that it was undesirable for the whole trial to take place de novo, BURGER J ordered that appellant's conviction and sentence be set aside and that the matter be referred back (to the trial Court) for further hearing, with leave to appellant to re-open his case.

The Court a quo disposed of the application for review as follows :

"Daar was 'n gelyktydige aansoek vir hersiening van die verrigtinge voor die landdros. Daar is geen objektiewe getuienis wat hersiening sou regverdig nie. Trouens die Applikant beweer:

> 'I wish to stress that I do not aver that my uneasy feeling (m b t beweerde optrede van die verhoor-landdros) was in any way justified. I merely state that I did gain such a feeling.'

Die aansoek vir hersiening word dus van die hand gewys met koste."

Appellant's application for leave to appeal against the judgment of the Cape Provincial Division was refused by the Court a quo, but a petition to this Court was successful - hence the present appeal.

The appeal to this Court was based on the following contentions:

(1) That the Court a quo's order that the matter be remitted to the same Magistrate was incompetent.

(2) That the review, and not the appeal, should have succeeded since the basis upon which appellant's conviction and sentence were set aside, involved the irregular manner in which the trial had been conducted.

(3) That success in the review entitled appellant to his costs.

The Court a quo's finding that the Magistrate should, at the close of the State case, have ordered a separation of trials and that the appellant had been

prejudiced in his defence by the Magistrate's failure to do so, was, with respect, correct. So was the Court a quo's decision to set aside the appellant's conviction and sentence. The only question which remains to be considered - apart from the question of costs - is whether the Court a quo should have ordered the matter to be remitted for further hearing before the same Magistrate.

It was argued on behalf of appellant, that section 324 of the Act, read with section 313, precluded a remittal to the same Magistrate. The question was also raised in argument, whether if the review, rather than the appeal, had succeeded in the Court a quo, it would have been competent for the Court to order that the matter be remitted to the Magistrate's Court for further hearing, the argument

being that the Court a quo's powers on review were limited to setting aside the conviction and sentence and did not extend to remitting a matter for further hearing. It is, however, unnecessary to decide either of these points. The decision of the Court a quo to remit the matter for further hearing before the same Magistrate cannot, for the reasons referred to below, be supported. Once a different Magistrate has to hear the matter, the trial would have to start afresh. There would then be no reason to order its remittal as the Attorney-general has a discretion, in terms of section 324, to charge appellant again (but not before the same Magistrate).

The Magistrate, in delivering judgment, made strong credibility findings in respect of all the State witnesses. It is highly undesirable that an accused

who has been found guilty by a particular Magistrate and whose conviction and sentence have been set aside, should be retried, or that his trial should continue, before the same Magistrate, where, as occurred in this case, that Magistrate has already made findings in which he has accepted the evidence tendered by the prosecution. However dispassionately the Magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that Magistrate. See R v Nqubuka 1950(2) SA 363(T) at 365; S v Siphambo 1963(1) SA 174(N) at 175.

The Court a quo does not appear to have considered the consequences of referring the matter

back to the same Magistrate for future hearing. BURGER J merely stated:

> "Dit is onwenslik dat die hele verhoor de novo moet plaasvind en ek meen dat die saak terugverwys moet word ....."

Only in his judgment dismissing appellant's application for leave to appeal did BURGER J advert to the argument that it would be undesirable for the same Magistrate to hear the case in view of the credibility findings he had already made. BURGER J dismissed this argument on the ground that the credibility findings were made without hearing the appellant's evidence and that after he had heard appellant's evidence, the Magistrate would obviously have to weigh up all the evidence afresh. That is undoubtedly so.

A Magistrate is not disqualified from sitting in a case merely because he has expressed an opinion in that case. A Magistrate is a trained judicial officer and he knows that he must decide every case that comes before him on the evidence adduced in that case. See R v T 1953(2) SA 479(A) at 483. In T's case it was held that a Magistrate who had convicted a black female of contravening the Immorality Act with a white male, need not recuse himself from subsequently hearing the case against the white male. T's case is, of course, distinguishable from the present case. In T's case the Court was considering whether the Magistrate should have recused himself from trying a person other than the one he had previously found guilty. In the present case the Magistrate had already found the appellant guilty and had made - admittedly on the evidence then

before him -favourable credibility findings in respect of the State witnesses whose evidence would be ranged against that of appellant should the trial be re-opened and continue before the same Magistrate.

In these circumstances the appellant is unlikely to be as sanguine about his prospects of receiving a fair trial as is necessary if justice is to be seen to be done.

For these reasons the Court a quo should, in my view, merely have set aside the conviction and sentence, thereby leaving it to the Attorney-general to decide whether to charge appellant again or not.

That leaves the question of costs. Appellant's counsel argued that the Court a quo erred in dismissing the application for review with costs, and that it should have upheld the review and ordered

the Magistrate, or alternatively the State, to pay the costs.

In his affidavit in support of the notice of motion in the review proceedings, appellant stated that the Magistrate, as first respondent, was cited in his "capacity as additional Magistrate, Wynberg". The Attorney-general, as second respondent, was likewise cited in his official capacity as such. There is no basis on which costs could have been awarded against the Attorney-general. Although the Attorney-general formally gave notice that he was opposing the application, he did not participate further in the proceedings. As far as the Magistrate is concerned, appellant's counsel contended that he should have been ordered to pay the costs since he had acted mala fide. Although it was not stated in the affidavit in support

of the review application that the Magistrate had been actuated by malice, appellant's counsel submitted that from the record, taken together with the absence of any satisfactory explanation by the Magistrate, the inference of mala fides could be drawn. Counsel pointed out that when the Magistrate dismissed the application for a separation of trials at the close of the State case, the only "reason" he advanced was that a separation at that stage would not be in the interests of justice, which - so it was argued - was not a valid reason. Moreover, in his answering affidavit the Magistrate likewise gave no explanation for his decision. Counsel argued, further, that there had been no justification for the Magistrate's initial refusal to order a separation of trials or for his alteration of Tukela's plea.

It is true that the Magistrate's initial decision to alter appellant's co-accused's plea from guilty to not guilty, was not warranted. Balepile's case, supra, on which the Magistrate purported to rely, is clearly distinguishable. In that case the differences between the accused's answers to questioning in terms of sec 112(2) of the Act and the State version, raised a doubt as to whether the accused was in fact guilty of the offence to which he had pleaded guilty. That was not the case with Tukela. However, having changed Tukela's plea to not guilty, the Magistrate was no longer faced with the position where one accused pleaded guilty and the other not guilty, which is the normal situation in which a separation of trials is ordered. See R v Zonele and Others 1959(3) SA 319(A) at 325. The fact that one

accused pleads guilty and another not guilty is, of course, not the only ground upon which a separation of trials could be justified. The Court has a discretion, in terms of section 157 of the Act, to order a separation of trials. In exercising its discretion under that section, the trial Court has to weigh up the prejudice likely to be caused to the applicant by a refusal to separate, against the prejudice likely to be suffered by the other accused or the State if the trials are separated and then to decide whether or not, in the interests of justice, a separation of trials should be ordered. See S v Ntuli and Others 1978(2) SA 69(A) at 73 F-G. In the present case the Magistrate appears not to have applied this test; indeed in the absence of reasons for his decision refusing a separation of trials, it is not possible to determine

what his thought processes were. Having said that and having said that the Magistrate clearly exercised his discretion incorrectly when he refused to order the trials to be separated, I do not, however, consider that it can be said that he acted mala fide. Misguided or even "wrong-headed" he may have been, but that does not justify characterising his conduct as mala fide. See Regional Magistrate Du Preez v Walker, 1976(4) SA 849(A) at 855 G-H. There was accordingly no basis for ordering the Magistrate to pay the costs de bonis propriis. Nor was there any justification for saddling the State with costs merely because the Magistrate, in his official capacity as such, gave an incorrect decision. See Walker's case, supra at 856 A. In view, however, of the Magistrate's failure to give a reasoned explanation for his rejection of the second

application for a separation of trials, the correct order would in my view have been to make no order for costs on the application for review, even if the conviction and sentence had been set aside pursuant to the review rather than the appeal.

For these reasons the appeal is upheld and the order made by the Court a quo is altered to read :

> "Die skuldigbevinding en vonnis van Beskuldigde no 1 word tersyde gestel. Geen bevel word gemaak ten opsigte van die koste van die hersiening."

G. FRIEDMAN AJA

VAN HEERDEN JA)
MILNE JA) Concur.