IN THE HIGH COURT OF SOUTH AFRICA

(BISHO)

CASE NO.: CC89/2003

DATE: 13 OCTOBER 2004

In the matter between:

THE STATE

versus

SANGO KHWAKHENI	1ST ACCUSED
SIZWE MQADARU	2ND ACCUSED
XOLILE NYANDA	3RD ACCUSED

EX TEMPORE JUDGMENT

EBRAHIM J

The issue that confronts this Court at this stage is whether or not the Court as presently constituted, that is with a judge sitting alone, may proceed at a later stage with the trial of the three accused. The reason for this problem arising is that at an earlier stage the Court had on the occasion of various postponements of this matter sat with an assessor. At a certain stage during the course of those postponements the assessor had to undergo an operation and asked to be relieved of her responsibilities as an assessor. After listening to both the legal representative for the State and the accused the Court discharged the assessor from her duties as she could not in any way indicate whether or not she would be available in future to resume her duties. I need to mention that at a particular stage accused no. 2, Mr Sizwe Mqadaru had indicated to his legal representative, Mr Jozana, that he would prefer the Court to sit with an assessor.

The matter was then subsequently postponed for a lengthy period. The reason for this postponement was not confined to the issue of an assessor but it was also because a legal representative for accused no. 3, Mr Xolile Nyanda, had to be arranged. In due course a legal representative, Ms Conjwa, was appointed for accused no. 3 and at a certain stage Mr Jozana informed the Court that his client was no longer insisting that the Court sit with an assessor for the purposes of the trial.

This matter was due to proceed with the trial today. However, Ms Esau who appears for the State had encountered certain personal problems which had to be dealt with and in view of her unavailability the matter will now have to be postponed until tomorrow for the trial to commence.

The Court, *mero motu*, today again raised the issue as to whether it was bound to continue sitting with an assessor at the trial or whether it was open to the trial court to sit without an assessor or assessors.

I have listened to submissions from Mr Rothman who appears for the State today as well as Mr Mbanjwa who appears for accused no. 1, Mr Sango Khwakheni and Mr Jozana on behalf of accused no. 2 and Ms Conjwa on behalf of accused no. 3.

In brief, both the State and the defence are *ad idem* that it rests with the Court to determine whether or not to sit with an assessor or assessors for the purpose of the trial. I am in agreement with that submission. It is clear that in terms of the provisions of section 145 of the Criminal Procedure Act, 51 of 1977 it is for the presiding judge at the trial to determine whether or not to summon one or two assessors to sit with the trial judge.

I need to mention that the Court had approached the previous

assessor to again ascertain whether the assessor would be available, initially the assessor had indicated that there would be difficulty in so far as that is concerned, but she was somewhat positive that her health would improve so that she could again resume duties as an assessor. On Monday of this week, that is 11 October 2004, however, she sent a telefax in which she indicated that complications had arisen and that she had to undergo a further operation. She also indicated in the particular telefax that the matter should proceed without her.

The effect of this is that it is clear that she is not able to physically continue at the moment or rather to be reappointed as an assessor since the position of her health appears to be totally uncertain. This issue, there is no doubt, adversely effects the accused in that if the trial has to be delayed until she recovers it may result in a delay of indeterminate length. It goes without saying that such a delay would clearly be prejudicial to the accused. I say so since the submissions made to me are also *ad idem* that a speedy trial is a Constitutional right that the accused are entitled to.

The crucial question, however, is whether the Court as constituted when sitting with a single assessor is the same Court as sits today without any assessor. In my view, and I have not heard any submission to the contrary, it is clear that they are two differently constituted courts. The further crucial question that arises, perhaps it is the paramount question, is whether the trial court that will be hearing the trial of the accused is bound by any decisions that have been made by the Court as previously constituted, that is sitting with a single assessor, or the Court as constituted today, that is sitting as a judge alone.

In my view the trial court has not yet been constituted. I say so,

since the charges have not been put to the accused in order to enable them to plead, nor have they pleaded in fact. The fact that they have been served with indictments, and the fact that there have been numerous postponements, does not in my view constitute the trial itself. To put it differently, whatever may have taken place thus far, does not mean that the trial itself has commenced. In this regard I want to refer to the case of **S v PERSKORPORASIE VAN SUID-AFRIKA BPK** 1979 (4) SA 476 (T) in which the issue of the word 'trial' was determined by the Court. This judgment is regrettably in Afrikaans and accordingly I shall not quote from the body of the judgment, but simply the headnote which has been translated into English. I refer to the headnote where it says:

> "Held, that the Legislature had intended that the trial should form part, and not the whole, of the criminal proceedings. that the outset thereof was when judicial investigation was commenced by the Court."

The case of **PERSKORPORRASIE** was quoted with approval in **POLI v MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT AND ANOTHER** 1990 (1) SA 598 (ZSC). There Chief Justice DUMBUTSHENA referred to various cases in order to determine the word 'trial' or the phrase 'at the trial'. I shall at some length quote from his judgment; I quote at 602J - 603F:

> "It appears to me that 'at the trial' should be read together with the phrase 'who is tried' appearing in the same sentence. Read as such there can be no other meaning to the phrase 'at the trial' other than that the person or the accused is appearing before the court at a judicial investigation or determination of his case. That this is so

becomes clear when reference is made to a few cases.

In **WOZNIAK v WOZNIAK** [1953] 1 All ER 1192 (CA) at 1193A DENNING LJ defined the phrase 'at the trial or hearing' as meaning the final determination. He said:

> 'I see no point whatever in the words 'at the trial or hearing' unless they mean the final determination of the matter. They do not include preliminary applications.'

ELOFF J said in **S v PERSKORPORASIE VAN SUID-AFRIKA BPK** 1979 (4) SA 476 (T) at 478F that:

> '....the general meaning of the word "trial" in the context of criminal proceedings is reasonably well established in respect of the commencing stage thereof; that is when the judicial investigation by the court commences.'

Trial would mean the stage from the commencement up to the conclusion of the judicial enquiry.

In **CATHERWOOD v THOMPSON** (1958) QR 326, a Canadian case, SCHROEDER J said at 331:

> 'In a general sense, the term 'trial' denotes the investigation and determination of a matter in issue between parties before a competent tribunal, advancing through progressive stages from its submission to the court or jury to the pronouncement of judgment. When a trial may be said actually to have commenced is often a difficult question but, generally speaking, this stage is reached when all

> preliminary questions have been determined and the jury, or a Judge in non-jury trial, enter upon the hearing and examination of the facts for the purpose of determining the questions of controversy in the litigation.'"

In my view the definitions of 'trial' as set out in the two cases I have quoted are equally apposite in the present instance. Further confirmation that the trial itself has not commenced is to be found in various provisions in the Criminal Procedure Act, No. 51 of 1977. Thus for example section 105 which relates to an accused pleading to the charge, reads as follows:

> "The charge shall be put to the accused by the Prosecutor before the trial of the accused is commenced and the accused shall, subject to the provisions of section 77, 85 and 105A be required by the Court forthwith to plead thereto in accordance with section 106."

There are various other examples in the Criminal Procedure Act, but I think that the particular example is explicit enough. At the end of the day it can only be said that the trial has commenced once section 105 has come into operation. To make it more explicit, what this means is that whatever has taken place thus far does not form part of the trial of the accused.

I have taken cognizance of the submissions made by Mr Jozana and Ms Conjwa in relation to the fact that the Court at a previous stage exercised its discretion to sit with an assessor. However, in view of what I have said, that was not the trial court's decision, but the Court sitting as it was then constituted. I also accept their submissions that

in practice what happens is that the decision whether or not the judge sits with an assessor is often taken before the charge is put to the accused. That is clearly done for the sake of convenience. Whether on that basis it may be said that a Court is bound to exercise its discretion at a stage prior to the charge being put to the accused is in my view extremely debatable and in fact cannot be said to bind this Court. The provisions of section 145(2) are instructive in this regard, and read as follows:

> "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."

In my view on a proper construction of those provisions the question of the trial judge's discretion coming into operation is at the stage after the charges have been put to the accused and they have pleaded thereto. I appreciate that this often is not the case as that discretion would have been exercised earlier and, I emphasise, it has been done for the sake of convenience.

The question of prejudice to the accused has been raised. It is so that if the Court were to sit with two assessors for example that there may clearly be potential prejudice to the accused, since two assessors may overrule a judge on a question of fact, but not on a question of law. In the case of a single assessor, however, the decision of the presiding judge both on questions of fact and law override that of any decision of fact of the assessor. Consequently it seems to me that it cannot be

prejudicial to the accused if the single assessor who was to sit, is not appointed to sit in the trial itself. I need to emphasise that any decision that the single assessor may take on a point of fact, if a contrary view is adopted by the judge, cannot overrule that of the judge's opinion on the question.

I am not dealing with the question of certain advantages that may arise from having a single assessor and any other issue in relation to that.

A further issue that arises is the right of the accused to a speedy trial. As I understand the submissions that had been made both by the State and the defence, the Court is asked to give proper regard to this right in the sense that a speedy trial is of grave importance to the accused. I agree. For various reasons this matter has been postponed on a number of occasions and in order not to infringe on the right to a speedy trial it is important that this trial commence tomorrow as is intended. Any further postponements of the commencement of the trial will infringe on the rights of the accused to a speedy trial. I am also of the view that there is no prejudice to the State and indeed this has been conceded by Mr Rothman.

In all the circumstances I am satisfied that what has taken place thus far is not prescriptive in so far as the potential trial court is concerned. Prior to the trial commencing at the stage when the accused are asked to plead, and do plead, to the charges the trial court as then constituted may apply its mind as to whether it is necessary to summon one or two assessors or not and thereafter proceed with what it considers is necessary and in the interests of justice.

Y EBRAHIM

JUDGE : BISHO HIGH COURT