

IN THE HIGH COURT OF SOUTH AFRICA

BISHO

CASE NO: CA&R 71/2004

In the matter between:

THANDILE SAULE

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

EBRAHIM J:

Introduction

1. The appellant (and one of his co-accused) was convicted in the Regional Court of Mdantsane on three counts of robbery and two counts of contravening provisions of the Firearms Control Act, 60 of 2000 ('Firearms Act'), namely the unlawful possession of a firearm and the unlawful possession of ammunition. In respect of the convictions for robbery the court *a quo* imposed a term of imprisonment for fifteen years on each count. However, the sentences on counts 1 and 2 and a period of ten years on count 3 were to run concurrently. On these counts,

therefore, the sentence was an effective term of imprisonment for twenty years. In respect of the conviction for the unlawful possession of a firearm a term of imprisonment for three years was imposed, and for the conviction for the unlawful possession of ammunition a term of imprisonment for one year. The appellant was consequently to serve a term of imprisonment for twenty four years. The appellant now appeals against both the convictions and sentences.

2. Before addressing the issues raised by this appeal I need to comment, briefly, on an issue that was not canvassed by either the appellant or the State. In his judgment the regional magistrate (Mr E L Moss) stated that the appellant (and his co-accused) were being 'convicted on counts 1, 2, 3, 4 and 5 as charged' and described these as 'robberies with aggravating circumstances' when imposing sentence. The charge sheet, however, did not allege that the State would seek a conviction in respect of counts 1, 2 and 3 on the basis that aggravating circumstances accompanied the commission of these offences. Even though this omission would not necessarily be fatal it is good practise for the State to allege in the charge sheet that a conviction would be sought on this basis. In this regard the remarks of van Winsen AJA, as he then was, in *S v Molo* 1969 (4) SA 421 (A) at 424A are apposite:

'As a general rule it is a desirable practise to charge an accused in such a way that he is apprised of the fact that the State will ask for his conviction on an offence coupled, where this is permitted by law, with a finding that it was committed under aggravating circumstances. *R v Zonele and Others*, 1959 (3) SA 319 (AD) at p.323.'

The grounds of appeal

3. The notice of appeal details a number of grounds of appeal, many of which are repetitive, against the appellant's conviction. In the final analysis, the grounds can be reduced to the following, namely: (a) the regional magistrate was biased against the appellant and erred in refusing the appellant a postponement to enable him to obtain the services of another legal representative; (b) the regional magistrate failed to separate the trial of the appellant, who was not legally represented, from that of his co-accused who were legally represented; and, (c) the appellant did not receive a fair trial.
4. The regional magistrate did not deem it necessary to reply to any of the individual grounds of appeal contenting himself instead with his '*ex tempore* judgment and reasons for sentence'.
5. Mr Swartbooi, who appeared for the appellant, submitted that the regional magistrate committed a series of irregularities. Firstly, the regional magistrate had refused to grant the appellant a postponement to enable him to engage the services of another legal representative; secondly, he compelled the appellant to continue with the trial with a legal representative not of his choosing; thirdly, he unfairly discriminated against the appellant by ordering, without any submissions being made to this effect, that there be a separation of the trial of accused no. 3 due to his legal representative being absent, yet failed to do so when the appellant was placed in a similar position; fourthly, he insisted that the

appellant conduct his own defence and proceeded with the trial despite the appellant being unrepresented. Mr Swartbooï submitted that due to these irregularities an injustice occurred and the appellant's conviction on all the charges and the sentences should be set aside.

6. Mr Kruger, who appeared for the State, identified the same issues as being central to the appeal. Whilst conceding that there had been certain irregularities he contended that there had not been a failure of justice. The irregularities had not tainted the verdict and the convictions should not be set aside. He conceded, however, that the irregularity that had occurred at the sentencing stage of the proceedings necessitated that the sentences be set aside. But, he foresaw certain difficulties if the matter had to be referred back to the regional magistrate for the appellant to be sentenced afresh.

The initial stages of the trial

7. The trial of the appellant (who was accused no. 2) and two co-accused commenced on 28 March 2001. Mr Ngoma appeared for accused no. 1 and Mr Ntintelo for the appellant and accused no. 3. The appellant and accused no. 1 pleaded not guilty to the three counts of robbery and the two offences under the Firearms Act. Accused no. 3 also pleaded not guilty to the three counts of robbery, but tendered a plea of guilty to the two offences under the Firearms Act and submitted a statement in terms of s112 of the Criminal Procedure Act, 51 of 1977 ('CPA').

8. The State then adduced the testimony of two witnesses, who were cross-examined by the legal representatives for the accused, before the trial was adjourned to an unspecified date. On 20 January 2003, nearly twenty two months later, the trial resumed without any explanation for the long delay. It is only on 29 August 2003 that the regional magistrate, in deciding on an application for a postponement, revealed the possible reasons for the delay. He remarked that 'this matter has been dragging on for two and a half years almost' because Mr Ntintelo could no longer represent the appellant and accused no. 3, that the transcription of the record had been delayed, and that accused no. 1, and subsequently the appellant, had failed to attend court.
9. On 20 January 2003 the appellant and accused no. 3 were represented by Mr L Mvapantsi but the reason for the change in legal representation does not appear on the record. A further witness testified and was cross-examined before the trial was postponed to 27 February 2003. When it resumed on 27 February 2003 another witness testified and was cross-examined before the trial was postponed once again.

The incidents upon which the appeal is based

10. When the trial resumed on 26 June 2003 Mr Mvapantsi informed the court that he wanted to withdraw as the appellant's legal representative. He stated that the appellant had engaged the services of Mr Marongo, an attorney from Grahamstown, to represent him.

11. For a complete and accurate picture of what transpired, and to facilitate an analysis of the issues, it is preferable to let the record of the trial proceedings speak for itself (record, pp 108 to 115):

COURT: All right. Mr Mvapantsi, you indicated that you wish to withdraw as an attorney, can you put your reason on record, please?

MR MVAPANTSI: As Court please, Your Worship. Yes, Your Worship, I indicated that I wish to withdraw as accused 2's attorney of record, Your Worship. The accused and I, Your Worship discussed that we – it is in – it is necessary for me to withdraw as his attorney – as an attorney of record. The reason being that he has appointed another attorney privately since I was acting on legal aid instructions. What the accused wants, Your Worship, he wants another representative, Your Worship, whom he has paid. That is the reason why I say I'm – we decided that I should withdraw as attorney of record, your Worship. He has indicated no further reasons, Your Worship, to me.

COURT: He just wants another attorney

MR MVAPANTSI: Yes, Your Worship.

COURT: And did he inform you who he has appointed now?

MR MVAPANTSI: He has informed me, Your Worship, that Mr Marongo (?) from – an attorney from Grahamstown has been appointed by him to take over from me.

COURT: So that is the only reason he wants another attorney?

MR MVAPANTSI: Your Worship, as far as he told me, Your Worship, it's the only reason.

COURT: All right. You don't have a problem carrying on as his attorney apart from the fact that he now wishes to have another attorney, do you have any other objections?

MR MVAPANTSI: Your Worship, if I can – I've already put my mind away from this case because of the fact that, Your Worship, I have to withdraw – we have decided that I withdraw.

COURT: So when did he inform you about this?

MR MVAPANTSI: Today, Your Worship.

COURT: So you can't put your mind away within a couple of minutes, Mr Mvapantsi, because he just arrived at court.

MR MVAPANTSI: I fear that, Your Worship, that I will not represent him, Your Worship, from my – I will not do – I will not carry on, Your Worship, with his interest at my heart, Your Worship.

COURT: You realise obviously that if you withdraw – or let me put it to this way. If we proceed today and he doesn't have an attorney here, it will be his fault and then he won't be entitled to another attorney. Because I'm going to give him the chance shortly of proceeding with your services or carrying on on his own, because there's no other attorney for him before Court. So when he makes this choice, obviously if he decides he wants to carry on with you, you'll have to reconsider, but then I'll hear you again on that. Before we proceed with this, there are obviously other interested parties here as well that have been busy ... with this case since March 2001. First of all, let me hear Mr Ngoma on this, because there's not another attorney before Court. In effect, if this is granted, it means that the matter will have to be remanded again, a further transcription obtained, you're looking at a couple of months down the line before we can proceed. What is your view on this, Mr Ngoma?

MR NGOMA: Your Worship, I am opposed to a further postponement in that my client has – is in custody, Your Worship, and has been in custody for some time now, Your Worship. (CASSETTE 7)

COURT: Thank you. Your view, Mr Lande?

PROSECUTOR: Yes, Your Worship, even the State – in fact, the State is ready to proceed, the witnesses are here. And I feel that this matter has long been on the roll, Your Worship. That's the feeling of the State.... (inaudible).'

COURT: All right, thank you. Now let's address Mr Saule. I've been informed now that you want your attorney from Grahamstown to carry on, is that right?

ACCUSED No 2: Yes, Your Worship.

COURT: But your attorney is not here today and it is already half past 11 and we are ready to proceed with the matter. Now you can also advance reasons, Mr Saule, why I should give you a further remand for your attorney and then obviously further time for a further transcription of the matter to be made.

ACCUSED No 2: The attorney arrived at me, Your Worship, already being paid and I explained everything to him, Your Worship, and he told me that he will be here today.

COURT: Do you know of any reason why he is not yet here?

ACCUSED No 2: The only thing I know is that he is late and he is on the way, coming here. And he told me that he won't be starting afresh, he will be proceeding.

COURT: Right, now before we started this, I've been informed about the problem and a family member of yours indicated in court here that she spoke to your attorney at 11 o'clock and he was still in Grahamstown. So he won't be here before lunch, do you confirm that?

ACCUSED No 2: She said she phoned the attorney. The attorney was on the way by 11 o'clock when she was phoning the attorney.

COURT: That is not what she told me.

ACCUSED No 2: She said so, Your Worship, she was phoning from her cellphone.

COURT: In any event, sir, you made arrangements with your new attorney?

ACCUSED No 2: Yes.

COURT: And I take it you arranged with him to be here at nine o'clock this morning?

ACCUSED No 2: I've said to him that he will be here in the morning, Your Worship, today.

COURT: Mr Lande, did you receive any calls from this attorney from Grahamstown indicating that he is coming to East London and will be on record today?

PROSECUTOR: No, Your Worship. I did not receive anything.

COURT: Mr Saule, under these circumstances, I'm not going to delay the matter any further. You have two choices now today, let me spell it out to you. Mr Mvapantsi is here, he's been on record for you before and he's ready to proceed. And you now have the choice, you can either proceed with Mr Mvapantsi presenting you or you can proceed without an attorney. Because at this stage, it is your fault that your attorney is not here, because you decided to change midway in a case and he's not here. So the effect of that is, if you decide you don't want Mr Mvapantsi to carry on, you will have to carry on on your own, because we are proceeding with the matter. I'm not going to prejudice the other parties because of your arrangements. So what is it going to be?

ACCUSED No 2: Can I be given a chance to phone and being accompanied by a policeman to phone in the public telephone here, so that I can come to court with something I'm hearing from the attorney, whether when he will be here?

COURT: Right, you family member just walked back into court.

MS VANQA: The attorney is saying he is in King William's Town, Your Worship, he's entering King William's Town now.

NOTE: Time 11h30.

COURT: All right, do you have his number here? Please come forward, give the number to the prosecutor.

MACHINE SWITCHED OFF – ON RESUMPTION

PROSECUTOR: We went to phone for the – the number which was given for the attorney, but the cellphone is closed because they say the subscriber is not available, I must try again later. That's all I can get from the number's given.

COURT: Where's that family member now?

MR ?: (Inaudible) ... outside ... (inaudible).

COURT: Just call her in please.

MACHINE SWITCHED OFF – ON RESUMPTION

COURT: Right, I've just phoned the number myself, "subscriber not available." Any news from your attorney?

MS VANQA: It may happen, your Worship, that the problem is the network, because to me the phone also closed. And then you can also phone the office, because I even phoned the office, the office is saying he is on the way to Mdantsane.

COURT: Right, what is his office number?

MS VANQA: 0466225725.

COURT: What is his firm's name?

MS VANQA: Marongo

COURT: Marongo and Company?

MS ?: Yes.

MACHINE SWITCHED OFF – ON RESUMPTION

COURT: ... just now?

INTERPRETER: Yes, Your Worship.

COURT: All right. Mr Saule, your family member claims she has just spoken to your attorney on the phone. The prosecutor and myself phoned the number she provided, the subscriber is not available, so your attorney is not available on his cellphone. All right, so we're back to square one. Now you can tell me whether you're going to proceed with Mr Mvapantsi or whether you're going to carry on on your own?

ACCUSED No 2: What I'm asking, Your Worship, from this Court is a postponement until tomorrow if the attorney does not arrive now, because this allegation is so serious.

COURT: Yes, exactly. Application for a remand till tomorrow is refused. Now back to the question, you have an attorney present, do you want him to carry on or do you want to do it on your own?

ACCUSED No 2: I'm asking from this Court, Your Worship, whether we can't wait until lunch time. It may happen the attorney can arrive during the lunch time.

COURT: No, these attorneys have been sitting here since nine o'clock this morning. The witnesses have been sitting here since nine o'clock this morning. We're going to proceed with the matter now. So you've got to make up your mind now what you want to do. Do you want your attorney to proceed, Mr Mvapantsi, or do you want to carry on on your own? That's the only question.

ACCUSED No 2: I used to come to this court previously, round about 2000, year 2000, and the cases would be remanded for the reasons saying that the case is still investigated. Then I would like that my application to be heard, Your Worship.

COURT: Mr Saule, I've heard your application. I'm fully aware of the history of this case and that's the reason why I'm not going to postpone it any further. Mr Mvapantsi is an experienced attorney, he's been dealing this matter already on your behalf. There's no ... reason why you cannot make use of his services any more. If your attorney was here this morning, it would've been a different story. But it's now almost 12 o'clock, there's still nobody here. So I'm not going to debate the matter any further with you, you must just tell me what your choices are here.

ACCUSED No 2: This is my first time making an application to this Court, Your Worship. I'm asking this Court to listen to my application because I used to hear the application made in court and I used to understand that. Can I be given two to three hours for my application?

COURT: All right, I'll tell you what we'll do, seeing that you are apparently not interested in answering the question. We are now going to proceed with this matter. Mr Mvapantsi is here, he will carry on with the matter and if your attorney for some reason pitches up this afternoon, then he's free to take over. Right, where's accused No 3, Mr Maguma? All right, you may sit down, we're going to proceed.

ACCUSED No 2: I would like to Mr Mvapantsi to proceed with accused No 3. I'll be waiting for my attorney for a little while.

COURT: Mr Mvapantsi received instructions from you as well, so he'll proceed on your behalf as well up until the time that your attorney pitches up. Now that's the last word of this. You are wasting our time at this stage, so you may sit down. All right, who is your next witness, Mr Lande?'

12. After the adjournment was refused a further State witness testified and was cross-examined by Mr Ngoma. During cross-examination by Mr Mvapantsi the lunch adjournment was taken. When proceedings resumed Mr Mvapantsi informed the court that the appellant and members of his family had told him that he was not authorised to represent the appellant. A discussion ensued which concluded with the court again refusing to postpone the matter (record pp 139 to 142):

'MR MVAPANTSI:Your Worship before I proceed, the relatives of the accused and the accused No 2 again approached me before we left for lunch to say that I must make no mention of his name, your Worship, during my cross-examination. I should only mention the name of accused No 3. I'm just placing that on record, Your Worship. Another thing that I – I will not be able to take instructions – to take instructions from him, because he says to me I have not been authorised.

COURT: Ja, right, I understand the situation. Just interpret that as well. (Interpreter interprets). The family, is that the lady with the blue dress?

MR MVAPANTSI: Yes-yes.

COURT: What is your name?

MS: My name?

COURT: Please stand up and give me your name.

INTERPRETER: Brenda Vanqa (?), Your Worship

COURT: Now how are you related to accused No 2?

MS VANQA: He's my brother.

COURT: How old are you?

MS VANQA: I'm 29 years.

COURT: 29. Now first of all, let's get one thing clear. At 25 to 12 you told me the attorney told you he's in King William's Town and that was apparently a lie?

MS VANQA: A lie?

COURT: Yes, because ... (intervention)

MS VANQA: It was the truth.

COURT: Then he lied to you, but what was conveyed to me is not true ... (intervention)

MS VANQA: He said ... (inaudible) I told you ... (inaudible).

COURT: What I'm telling you what was conveyed to me is not the truth, because according to the prosecutor now, he only left his office at 11 o'clock in Grahamstown.

MS VANQA: Yes, ... (inaudible) .

COURT: Now understand the following, I don't want you to address me on this. Mr Mvapantsi is an officer of the court. At the request of your brother, accused No. 2, he was appointed by the Legal Aid Board to represent him.

MS VANQA: Mm.

COURT: Now you have no business in telling the attorney that he's not allowed to mention your brother's name ... (intervention)

MS VANQA: Then I ... (inaudible)

COURT: I do not want to hear you, listen to me ... (intervention).

MS VANQA: But I ... (intervention) because my brother is not ... (inaudible)

COURT: Thank you, you may sit down. No 2 listen and note the following as well. Your attorney is not here and I've made a ruling that Mr Mvapantsi as an officer of the court being instructed by the Legal Aid Board should carry on, on your behalf whilst your attorney is not here. He appeared before, so he has instructions from you. He knows what your defence is. Being instructed by the Legal Aid Board to represent you, having your instructions, it is his duty to represent you in court. You refuse to make the choice, whether you want to represent yourself or whether you want Mr Mvapansti to carry on in the absence of your own attorney that you claim is representing you. Now, Mr Mvapantsi is entitled to put your version to this witness as he has been instructed. In fact, it is his duty to do so. If you don't want to give him further instructions if he asks you for further information, you are doing it at your own peril. And I will advise you, whilst you don't have your attorney of choice before Court, that you cooperate with Mr Mvapantsi whilst he is representing you. If you don't want to cooperate, you do it at your own peril. Your attorney apparently left his office at 11 o'clock. That is three hours and 20 minutes after he left his office, that is more than enough time to get to Mdantsane from Grahamstown, and he is not here yet. Whilst I've been informed at 25 to 12 that according to your attorney he was in King William's Town, that was

apparently not true. And I'm here to see to it that you do not delay the business of this Court. And the ruling was that you have no leg to stand on to demand a remand for your purposes, not whilst other people are being disadvantaged and prejudiced by that. So we will now proceed and Mr Mvapantsi will conclude his cross-examination of his witness. You may sit down, sir. Mr Mvapantsi?

MR MVAPANTSI: As court please, your Worship, thank you.

CROSS-EXAMINATION BY MR MVAPANTSI CONTINUED:

The irregularities and the consequences thereof

13. A number of issues call for comment. There was no justification for the regional magistrate personally to telephone Mr Marongo in an effort to ascertain why he had failed to arrive at court. It was improper for him, as the presiding officer, to become embroiled in investigating issues that he was to adjudicate on. He was required not only to be impartial but also to manifest this through his conduct. Regrettably his actions failed to demonstrate that in presiding over the appellant's trial he was acting in a fair and unbiased manner. See *S v Tyebela* 1989 (2) SA 22 (A).
14. The regional magistrate's comment that the appellant was wasting their time was inappropriate and unwarranted. It is obvious that the appellant no longer wanted Mr Mvapantsi to represent him and was seeking to persuade the court to grant him an adjournment as he was hopeful that Mr Marongo would still arrive. An adjournment, even if only for an extended lunch period of two hours, would certainly not have prejudiced anyone. It would, at most, have amounted simply to an inconvenience. The appellant was in custody and obviously had limited opportunity to communicate with a legal representative or members of his family.

15. Mr Kruger submitted that an accused person's right to choose a legal representative was not absolute but subject to reasonable limitations. In support of this he referred the Court to *S v Halgryn* 2002 (2) SACR 211 (A) at 215-216. Further, despite the irregularities a failure of justice had not occurred. In this regard he relied on *Hlantlala and Others v Dyantyi and Another* 1999 (2) SACR 541 (SCA) at paras [8] and [9].
16. I am not persuaded that there is merit in Mr Kruger's submission. The circumstances in the present case are distinguishable from those in the *Halgryn* case. Firstly, the appellant was not demanding that Mr Mvapantsi (who had been instructed by the Legal Aid Board to defend him) be replaced with a legal representative of his choice also at the expense of the Legal Aid Board. Secondly, there was no indication that the appellant or members of his family would not be able to make the necessary financial arrangements to secure Mr Marongo's services. Thirdly, there was insufficient information to justify the conclusion that the appellant was to blame for Mr Marongo's absence from court. Fourthly, at the stage when the adjournment was refused, there was no indication that Mr Marongo would not be able to proceed with the trial immediately. The appellant had in fact stated that he would be able to proceed. Fifthly, this was the first occasion on which the appellant was seeking a postponement for this purpose.
17. The appellant had the right 'to chose, and be represented by, a legal practitioner' as entrenched in s 35(3)(f) of the Constitution of the

Republic of South Africa Act, 108 of 1996 ('the Constitution'). It was manifestly improper for the regional magistrate to compel the appellant either to retain Mr Mvapantsi as his legal representative or, alternatively, to conduct his own defence. See *S v Dangatyi* 1994 (2) SACR 1 (A) at 23a.

18. It is evident that the regional magistrate misdirected himself and dealt with the application in a manner that was prejudicial to the appellant. He was not prepared to recognise that the appellant had terminated the mandate of Mr Mvapantsi and had engaged the services of another legal representative. He erred in presenting the appellant with the choice of retaining Mr Mvapantsi as his legal representative (who no longer enjoyed the appellant's confidence) or to conduct his own defence. The charges were of a serious nature and the appellant should not have been placed in the invidious situation of having to choose between two equally unacceptable options.
19. The fact that Mr Marongo was not present did not justify the application being refused. It was the first time that this had happened. In denying the appellant an opportunity to establish why his legal representative was absent the regional magistrate committed an irregularity. See *S v Seheri en Andere* 1964 (1) SA 29 (A).
20. There is no indication that any negligence on the part of the appellant was responsible for Mr Marongo's absence. The request for an

adjournment was in the circumstances reasonable and *bona fide*. In the absence of any indication that the appellant's decision to terminate the mandate of Mr Mvapantsi was not genuine or reasonable, the regional magistrate should not have refused the application unless there were good reasons for doing so. See *S v Dangatye (supra)* at 23a-c. In my view no such reasons existed.

21. It is necessary to clarify that an accused person's right to legal representation of his choosing is not unfettered. Although a person must be afforded a reasonable opportunity to exercise this right it does not mean that a court is compelled to grant a number of postponements for this purpose. At some stage the refusal of further postponements would certainly be justified and the trial could then proceed without the accused being legally represented. Needless to say this will depend on the circumstances of each case and it would be ill-advised to prescribe when this may occur. In the circumstances of the present matter, however, this stage had clearly not been reached.
22. The denial to the appellant of a reasonable opportunity to secure the presence of his legal representative was an irregularity that rendered the trial unfair. See *S v Manguanyana* 1996 (2) SACR 283 (E) and *S v Philemon* 1997 (2) SACR 651 (W).
23. The regional magistrate's refusal to grant the appellant a postponement or, at the very least, a brief adjournment was not based on substantial

grounds. He manifestly did not exercise his discretion properly. The decision was prejudicial to the appellant and this Court is, in the circumstances, competent to intervene and required to do so. It follows that the convictions and sentences must accordingly be set aside. See *S v Dangatye* (*supra*) at 23f-g, and *S v Shabangu* 1976 (3) SA 555 (A), and *S v Maduna en 'n Ander* 1996 (1) SACR 646 (T).

24. Mr Swartbooi drew attention to the unwillingness of Mr Mvapanzi to continue to represent the appellant after his mandate was terminated. It is evident that this was indeed the case. Moreover, after being told by the appellant and members of his family that he was not authorised to represent the appellant he appears to have heeded this. It emerges that during cross-examination he only referred to the appellant on one occasion, and then, merely to put to the witness that the appellant would deny being present when the offences were committed. This certainly does not illustrate that the appellant's defence was presented in a satisfactory and comprehensive manner.
25. Mr Swartbooi submitted that the regional magistrate committed certain further irregularities at later stages in the trial. However, in view of my conclusion that the irregularities that were committed, when the appellant sought to secure a legal representative of his own choosing, justify intervention on the part of this Court I shall only refer to certain of these, and then not in great detail either.

26. On 3 May 2003 Mr W M Opperman appeared as the appellant's legal representative and was granted a postponement. However, prior to any evidence being tendered Mr Opperman withdrew as the appellant had not provided funds to cover the costs of obtaining a transcript of the record and the trial costs.
27. Thereafter, due to the fact that Mr Mvapantsi was absent, the court ordered that the trial of accused no. 3 be separated from that of his co-accused. In my view the court erred in doing so. It is evident that the regional magistrate wanted to avoid a further postponement but this did not justify the trials of the accused being separated. Although accused no. 1 indicated that he wanted a separation of trials if the case was postponed the State and accused no. 3 did not indicate support for this. The attitude of the appellant was never elicited. Since neither the State nor accused no. 3 had initiated an application for the separation of the latter's trial the court *a quo* should not have issued such an order. See *S v Goosen* 1988 (4) SA 5 (A).
28. During the course of the same day (3 May 2003) Mr E N Makhanya appeared as the legal representative for the appellant and applied for a postponement. This was refused and Mr Makhanya withdrew.
29. The following day (5 May 2003) Ms Wotshela appeared as the legal representative for the appellant and also sought a postponement. This was similarly refused and Ms Wotshela withdrew.

30. The next day (6 May 2003) Mr Boboyi appeared as the appellant's legal representative and also sought a postponement. This, too, was refused and Mr Boboyi withdrew.
31. At the stage when the State and the defence had to address the court on the merits the appellant was uncooperative and would not speak. The regional magistrate proceeded to deliver judgment and convicted the appellant and accused no. 1 on all the charges.
32. The appellant's non-cooperation persisted during the sentencing stage of the proceedings. In the face of efforts by the regional magistrate to ascertain if he wanted to address the court in mitigation or call any witnesses to testify he remained silent. When the court informed him that it was obliged to impose a minimum sentence of fifteen years on each of the three counts of robbery unless there were substantial and compelling circumstances not do so, his only response was that '(t)he person who was going to say anything about that, is the person who was driven away or expelled by the court'. The regional magistrate concluded that the appellant did not wish to say anything in this regard and proceeded with the imposition of sentence.
33. Even if the appellant was not willing to cooperate it did not relieve the court of the duty to enquire into his personal circumstances and possible mitigating factors with a view to establishing whether or not substantial and compelling circumstances existed. The court *a quo* erred in failing

to conduct such an enquiry. In the circumstances the finding that substantial and compelling circumstances did not exist is a material misdirection. It is evident that the court was not in possession of adequate evidence upon which to base such a conclusion. See *Rammoko v Director of Public Prosecutions* [2002] 4 All SA 731 (SCA), and *S v Malgas* 2001 (1) 469 (SCA).

The effect of setting aside the convictions and sentences

34. Mr Swartbooï urged the Court to indicate its dissatisfaction with what transpired in the trial by ordering that the State could not prosecute the appellant again. Mr Kruger, understandably, opposed this.

35. The appellant's appeal was not directed at the merits of his conviction but at the irregularities that had occurred in the trial. At no stage, save for the contention (without any elaboration) that the evidence did not establish the guilt of the appellant on counts 4 and 5 (the offences under the Firearms Act), did Mr Swartbooï submit that the merits of the convictions were being attacked. Indeed, Mr Swartbooï may well have been hard-pressed to sustain such a submission. On the evidence adduced, it appears that a strong *prima facie* case was made out against the appellant and his co-accused. Nevertheless, it cannot be discounted that if the appellant had been permitted to engage a legal representative of his choosing that the reliability of the evidence of the State witnesses could well have been brought into question.

36. I am not satisfied that a proper case has been made out for this Court to determine whether or not the appellant should be prosecuted again. This decision rests with the Director of Public Prosecutions and I am not persuaded that there is any basis to interfere therewith. See *S v Seheri (supra)* at 36E-F, also *S v Dangatye (supra)* at 23h-j, and compare *S v Xaba* 1983 (3) 717 (A) at 737G-H to 738.

Conclusion

37. In the light of the findings I have made and for the reasons enunciated the convictions and sentences cannot stand and must be set aside.

Order

38. In the result the appeal succeeds. The convictions of the appellant on all the charges and the sentences imposed are set aside.


Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO

16 March 2005

I agree


S P MAQUBELA
ACTING JUDGE OF THE HIGH COURT, BISHO

16 March 2005

Heard on:	18 February 2005
Judgment delivered on:	16 March 2005
Counsel for the Appellants:	Adv S J Swartbooi
Attorneys for the Appellants:	E N Makhanya & Co EAST LONDON
Counsel for the Respondent:	Adv F Kruger