REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: A607/10

In the matter between

NAIEM MOYCE Plaintiff

and

THE STATE Respondent

Coram	:	M I SAMELA, J	
Judgment by	:	SAMELA, J	
Adv for Plaintiff	:	Adv IB Maartens -	021 424 4692
Attorney	:	Instructed by Legal Aid	
Adv for Respondent	:	Adv M Blows -	021 487 7160
Attorney	:	Instructed by NPA	
Date/s of hearing	:	Commenced 18/05/2012 Ended 04/06/2012	
Date of Judgment	:	4 JUNE 2012	

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CASE NO.: A607/10

In the matter between

NAIEM MOYCE Appellant

versus

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JUDGMENT DELIVERED ON 4 JUNE 2012

SAMELA, J

[1] This is an appeal against the decision of the Magistrate at the Cape Town Regional Court. The Appellant challenged the decision of the court a quo on the basis that his constitutional right to legal representation was violated, resulting in his trial being unfair.

[2] The Appellant, Mr Naiem Moyce, and his co-accused Mr Wayne Morris, appeared in the Cape Town Regional Court on the 23rd January 2003 charged with six counts.

[3] It was alleged that the Appellant and his co-accused had robbed the Complainant at Green Point, Cape Town on the 22nd August 2002 of her vehicle, a Fiat Uno, her handbag with contents, jewellery and her car keys. The aggravating circumstances present were that during the

commission of the offence, a dangerous weapon, namely a knife, was used to threaten the Complainant. They both pleaded not guilty.

[4] As a result of the Appellant not returning to Court after a short interval during lunch break, on the 7th December 2005 whilst the trial was proceeding, the trials were separated and the matter finalised against Mr Morris. He was acquitted on all the charges, and a warrant of arrest was issued and authorised in respect of the Appellant.

[5] The Appellant was arrested on 7th February 2007 and on the 27th October 2009 was convicted of robbery with aggravating circumstances, and acquitted on all other charges. He was sentenced to ten years imprisonment after the Court found that substantial and compelling circumstances existed and did not apply the minimum sentence.

[6] He unsuccessfully applied for leave to appeal in the court a quo against his conviction and sentence. The Appellant petitioned the Judge President, and was granted leave to appeal.

[7] At the appeal, Mr Maartens, who appeared on behalf of the Appellant, conceded that the key question was whether the refusal to grant postponement on 17th July 2005 in order to give the Appellant an opportunity to obtain legal assistance, establishes a fatal irregularity which resulted in the Appellant's trial being unfair. Absent the unfairness of the trial, it was unnecessary for the court to decide the balance of the issues.

[8] I am of the view that the Appellant's quest for legal assistance on the 17th July 2003 would not be properly addressed without critically analysing the factors that occurred prior the mentioned date.

[9] During the bail application hearings on 13th September 2002 the Magistrate questioned the Appellant in the following:

"HOOF AAN BESKULDIGDE 2---------Is u seker dat u sonder ń prokureur wil voortgaan?

BESKULDIGDE 2---------Ja edelagbare.

HOF AAN BESKULDIGDE 2-------Want u het nou tyd om ń prokureur aan te stel of aansoek te doen vir regshulp. Verstaan u dit?

BESKULDIGDE 2---------Ek verstaan.

HOF AAN BESKULDIGDE 2---------Wat wil u doen?

BESKULDIGDE 2-------Ek gaan self praat edelagbare.

HOF AAN BESKULDIGDE 2-------Is u seker daarvan?

BESKULDIGDE 2---------Doodverseker".

The matter was postponed to 23rd January 2003 for trial.

[10] On the 23rd January 2003, the matter was ready for trial. The court record reflects the following:

"Saak gereed vir verhoor.

Verhoor datum gereel maar Mnr Arnold deel hof mee dat besk 2 sy mandaat beëndig het.

Besek 2 deel die hof nee dat hy homself wil verdedig. Die hof het hom meegedeel dat die aanklag teen hom erntig is en indien hy skuldig bevind word, baie lang gevangenisstraf op hom rus. Hy deel hof nee dat hy is bewus daarvan maar verkies on sy eie verdediging te behartig. Mnr Arnod verskoon".

On the same day a postea appearance was entered at 14h45 which read as follows:

"BESKULDIGDE 2--------Ek wil nie meer van Mnr Arnold se dienste as prokureur gebruik maak nie. Ek gaan ń prokureur van my keuse aanstel. Ek het nou nadere besonderherde van Staatsaanklaer ontvang. Versoek uitstel so dat my familie nodige reëlings kan tref".

The matter was postponed to 6th February 2003 for the Appellant's legal representative.

[11] On the 6th February 2003, only the Appellant appeared and the matter was postponed to 14th February 2003. On the 14th February 2003 the matter was postponed to 17th February 2003 as the Appellant was transferred to another prison (Helderstroom). On 17th February 2003 the Appellant was released on bail and the matter was postponed to 22nd April 2003 to trial. The record also reflects the following:
"BESK 2 verseker die hof dat hy tree vir homself op". On the 22nd April 2003 the Appellant was arrested on another matter. There were two further postponements in May 2003 and matter was brought to court for trial on the 21st May 2003.

[12] On the 21st May 2003 the Magistrate explained to the Appellant his rights to legal aid and consequences thereof. The Court's records reflect the following:
"BESEK 2 deel mee dat hy sy eie regsverteenwoordiging gaan behartig – is bewus van erns van die aanklagte. Bewus van sy reg tot regshulp. Ook bewus dat sommige van die aanklagte minimum vonnisse behels. Besk word herhaaldelik aangeraai om van sy regsverteenwoordiging gebruik te maak. Besk is vasbeslote om self sy saak te behartig. Saak staan af om verhoordatum te reel".

The matter was postponed to 16th July 2003 for trial. The Appellant was on bail in this matter but in custody in another matter.

[13] On the 16th July 2003 the matter did not proceed on account of logistical problems and was rolled over to 17th July 2003. On the 17th July 2003 the Appellant requested a further postponement saying he believed that his family was busy arranging an advocate for him, and that he had limited opportunity to contact his family, as he was in custody. The Magistrate refused the Appellant's application for postponement on the basis that the Magistrate was of the view that the Appellant was delaying the proceedings unnecessarily.

[14] Paras 10, 11, 12 and 13 above, clearly illustrate that the Appellant had sufficient time to hire the services of his own legal representative or to make an application to the Legal Aid for legal assistance. To be precise, from 13th September 2002 up to 17th July 2003, more than 8 months, had passed, and the Appellant had sufficient opportunity during that period, to get a legal representative but chose not to. This matter was postponed six times for trial. The Appellant did not take the court a quo into his confidence by explaining to the court his failure or difficulties in obtaining the services of a lawyer if any. The Magistrate could not speculate the hurdle/s which the Appellant encountered in his endeavours to solicite the services of a legal representative.

[15] In this matter a relevant part of the Constitution is section 35 (3) of The Constitution (Act 108 of 1996) which provides inter alia:

"Every accused person has a right to a fair trial, which includes the right –

(b) to have adequate time and facilities to prepare a defence;

(d) to have their trial begin and conclude without unreasonable delay;

(f) to choose, and be represented by, a legal practitioner, and to be informed of his rights promptly; and

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of his rights promptly.

The above indicates that the accused right to legal representation is fundamental and jealously protected by courts.

[16] An important question to be considered now is whether the Appellant had an absolute right to legal assistance in such circumstances. The

emphasis by Harms JA in **S v Halgryn** 2002 (2) SACR (SCA) 211 at 215 i-j is apposite, where the learned judge said:

> "The Constitution has two provisions which are relevant to the argument: the right to choose a legal representative and to be represented by that person (S 35 (3) (f), and the right to have a legal representative assigned by the State and at State expense if substantial injustice would otherwise result (S 35 (3) (g). Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations".

It is important to mention that in this matter the Appellant had been doing the ducking and diving, keeping the court guessing his next move in his next appearance, and also whether he would opt to have or not to have the legal representative.

[17] It was important for the Magistrate to be alive on the requirements of the Constitution recognising both the practical link between the legal representation on the one hand and a fair trial process on the other hand. In **Sanderson v AG**, Eastern Cape 1998 (2) SA(cc) 38 at 57G-58A, the court held that:

> "----- the point should not be overlooked that it is by no means only the accused who has a legitimate interest in a criminal trial commencing and concluding reasonably expeditiously. Since time immemorial it has been an established principle that the public interest is served by bringing litigation to finality. And, of course, quite apart from the general public, there are individuals with a very special interest in seeing the end of a criminal case. Conscientious judicial officers, prosecutors and investigating officers are therefore always mindful of the interest of witnesses, especially complaints, in bringing a case to finality."

The above confirms the principle that accused rights in a criminal trial are not more important than other parties, for example complainant/s and witness/es.

[18] The next question is whether substantial injustice would have occurred if the Appellant was not legally represented.

This issue was dealt with clearly in **S v Vermaas**, **S v Du Plessis** 1995 (3) SA 292 CC at 299 D-E, the court held that:

> "much better placed than we are by and large to appraise, usually in advance, its ramifications and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice".

[19] In this matter, despite the fact that the Appellant was a difficult person, the Magistrate nonetheless showed tolerance and patience. The Magistrate assisted the Appellant with his case throughout in the trial especially in cross examination, the fact that was also conceded by Mr Maartens. I am of the view that looking at this matter wholestically, there was no substantial injustice that occurred despite the Appellant having no legal representative.

[20] It is my considered view that the Appellant was not prejudiced by not having a legal representative. Taking into account his conduct in court, in that the Appellant initially informed the court that he would conduct his own defence. He on several occasions changed his stance and would tell the court that he wanted a legal representative and would also tell the court that he did not want it. It is not always a fatal irregularity where an accused does not get a legal representation the

trial does not become unfair. Each case is treated according to its circumstances. It is my view, that undoubtedly, the Appellant abused his constitutional rights to legal representation. Clearly, he tested the Magistrate's patience by such an uncalled for behaviour. Nevertheless, the Magistrate had shown utmost tolerance.

[21] It is not necessary in this appeal to deal with other points raised by Mr Maartens in detail. It is sufficient to say that the Magistrate was justified in ordering the separation of trials. The Magistrate was indeed frustrated by the Applicant's behaviour. The Appellant was arrested almost two years after his absconding from court (that is, he ran away during the lunch interval on 7th December 2005, and was arrested on 7th February 2007). The Magistrate, in his judgment, mentioned that the Complainant was unable to identify the Appellant in an identification parade but was able to identify him in court. This however did not change the fact that the Complainant, Mr Morris (Accused 1) Mr Bonzaaier (Appellant's witness) and the Appellant himself, all placed the Appellant on the scene. I disagree with Mr Maartens' contention that alcohol played a role in the hijacking of the Complainant's car, because the Appellant and Mr Morris all were conscious to the fact that what they were doing was wrong and punishable at law.

[22] Considering the totality of the evidence presented by the Complainant and the Appellant, the Magistrate correctly accepted Mrs van Reineveld's evidence, though a single witness, that it was competent and satisfactory in all material respects. The Magistrate correctly applied the cautionary rule that allows a conviction on the evidence of a single, competent witness (see section 208 of Act 51 of 1977, as amended). The Appellant's version was correctly rejected by the Magistrate. This was justified in the light of the improbabilities, that the Appellant was in an emergency situation and needed Mrs van Reineveld's car to get away from the scene. It is difficult to visualise

[24] Looking at all the above, I am of the view that the Appellant was correctly convicted by the court a quo. It is also important to record that the Magistrate made some significant credibility findings in favour of Mrs van Reineveld. Mrs van Reineveld's version was consistent, reliable and there was no reason to criticise this finding.

[25] The Appellant, on the other hand, was a poor witness. I am of the view that the Magistrate correctly preferred the evidence of Mrs van Reineveld. The appeal has no merit in respect of the conviction. The Appellant misused his constitutional rights to legal representation deliberately. This should not be allowed in our courts.

[26] The imposition of an appropriate sentence falls entirely within the discretion of the trial court. Unless the trial court has misdirected itself, which misdirection should appear *ex facie* the record, a court of appeal would not lightly interfere with the sentence imposed by the trial court. See **R v Dhlumayo and Another** 1948 (2) SA 677 (A). In the present matter, there is no basis on which this court can interfere. There is no misdirection and the sentence is not disturbingly inappropriate.

[27] I would propose the following order:

The appeal is dismissed. The conviction and sentence are confirmed.

Samela, J

I agree and it is so ordered

Traverso, DJP