

REVIEW CASE NO. PH.12/1996

**The King**

**v**

**Solomon Mbuli and Gcina Mbonyani**

**REVIEW JUDGMENT**

*(17/03/1997)*

The accused persons were charged in the Subordinate Court for the District of Shiselweni held at Nhlanganano on three counts of Robbery and one assault with intent to do grievous bodily harm. Their first appearance was on the 17th June 1996.. Not until 2nd August 1996 were the Accused called upon to plead. The matter proceeded with little sense of urgency bearing in mind that the accused were in custody.

On 2nd December 1996 at an advanced stage of the hearing a further remand, one of a series of similar postponements for reasons not stated on the record, was ordered. The Accused's attorney was not then in court and Accused #1 enquired if the Magistrate had seen a statement he had made to his attorney. On being informed that the magistrate had not seen any such statement Accused #1 requested to see the presiding officer and the Prosecutor in Chambers.

Unwisely the Magistrate acceded to this request and the record does not

reveal what took place in the magistrate's chambers. The magistrate and prosecutor as well as the accused persons returned to court where the matter was postponed to have the accused's Attorney explain about the letter..

On the following day an Attorney represented the accused persons.. Again the Accused's complaint was discussed. The record now reveals the nature of the complaint. The Accused or at least Accused# 1 complained that the magistrate appeared to be dragging out the case so that the Magistrate and the Prosecutor could get more money "from him (i.e. accused persons).

The record then reads

*"Mr. Maphalala explains to the accused that in fact no money was paid to the Presiding officer and the Public Prosecutor, what had actually happened is that he and Accused ! Had decided that the two officers be paid expenses for working while on leave and on week-ends and that this had not been communicated to the two officers.'*

This is an amazing state of affairs. I cannot understand how an Attorney could possibly have discussed such a plan with his client. Who was to pay the "two officers" ?

The following paragraph of the record records Mr Maphalala's explanation. To say the least it is confusing and unacceptable. I do not at this stage wish to comment on what transpired and the question of payment to the Magistrate and the prosecutor should never have been raised. The officials should never have been put to the embarrassment they suffered. The incident can only redound to the prejudice of the Profession of Attorneys and the reputation of the Magistracy. This is a matter

which I refer to the Law Society for investigation.

The Magistrate with out being asked to do so recused himself after explaining in open court that neither he nor the Prosecutor had received any money, or had ever been informed of the scheme proposed by the attorney to his client, and if it had been proposed it would obviously have been rejected out of hand. All this should never have taken place.

I consider that it would be a great prejudice to the accused persons if the trial were to commence *de novo* before another magistrate. I therefor follow the course which was adopted in

*NEWELL V CRONJE AND ANOTHER 1985 (4) SA 692 (E)*

the head note of which reads

A regional magistrate had recused himself during a criminal trial after counsel for the accused had called the accused's attorney to give evidence which contradicted certain observations which the magistrate had made and had put to a previous defence witness. The accused thereupon brought review proceedings wherein he sought an order setting aside the magistrate's decision recusing himself.

Held, that, where a presiding officer makes personal observations (as the magistrate did in the present case), they must be conveyed to the parties who then have the opportunity of agreeing with or challenging such observations; and such a challenge

does not in any way impugn the presiding officer's integrity or render his position intolerable.

Held, accordingly, that the circumstances in which the magistrate was placed did not justify him in recusing himself and the accused having established on review a real and serious prejudice which would result from a trial de novo, the magistrate's decision had to be set aside.

I accordingly set aside the recusal of himself by the magistrate and order that the trial be resumed and concluded without further delay.

S W Sapire

ACTING CHIEF JUSTICE