

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

Case no: CC 14/13

In the matter between:

MAYBAAS JOLINGANA;Appellant

and

THE STATE;Respondent

JUDGMENT

MBENENGE J:

Introduction

[1] The appellant appeared before the court *a quo*¹ on charges of murder, unlawful possession of a firearm and unlawful possession of ammunition. He pleaded not guilty to all the charges, but was found guilty of murder, and not guilty on the charges of unlawful possession of a firearm and unlawful possession of ammunition. He was sentenced to undergo 15 years' imprisonment.

[2] The instant appeal, brought with the leave of the court *a quo*,² is against the appellant's conviction. The basis for the appeal is, in the main, that the court *a quo* misdirected itself in ruling that the appellant's counsel could not cross-examine a state witness, Ms Adelaide Mpenyana (Mpenyana), on a written statement she had made to the police. The cross-examination was refused because Mpenyana had not "*owned*" the statement. The ruling made is appealed against, in the alternative, because the court *a quo* had not given the appellant's counsel an opportunity to address the court on the statement Adelaide had made. The appellant contends that, in the result, he did not have a fair trial.

¹ The appellant was convicted and sentenced by Dukada J.

² Due to the passing on of Dukada J, the application for leave to appeal was heard and granted by Stretch J.

[3] The issue before this Court is whether the ruling made by the court *a quo* amounted to a violation of the appellant's right to a fair trial and, in the event of it being found that there was such violation, whether the violation is justifiable in terms of section 36 of the Constitution.³ The section 36 argument was not pertinently raised at the hearing of the appeal.⁴ However, it is available to a court *mero motu* to delve into a limitation analysis where it is found that a right, as contained in the Bill of Rights, has been violated.⁵

The facts

[4] It had been alleged before the court *a quo* that on or about 12 April 2013 and at or near [1... S.] Township in the district of Keiskammahoek the appellant shot and killed Tobela Herbetina Mpenyana, the deceased. It is common cause that the appellant and the deceased had been in a love relationship at the time of the shooting. On the fateful morning the appellant arrived at the residence of the deceased. While the deceased and the appellant were outside fire shots went off and the deceased was shot. She sustained three gunshot wounds; a fractured skull; lacerated brain, lungs, and spinal cord; intra cranial bleeding; blood in the chest cavities and pale internal organs. The deceased died at the scene.

[5] The trial court was faced with two main questions namely, the identity of the shooter and whether the murder had been premeditated. The prosecution relied on the testimony of the only eye witness, Mpenyana; she is the mother of the deceased. The court *a quo* also relied on the testimony of Mpenyana in convicting the appellant for murder as she was the only state witness who gave direct testimony against the appellant.

The cross-examination

³ Act 108 of 1996.

⁴ In dealing with matters where the State has failed to put up argument regarding section 36 the Constitutional Court, in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC), at para [19], held:

"It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment"

⁵ This was the approach adopted by the Constitutional Court, in *Phillips and Another v Director of Public Prosecutions and Others* 2003 (3) SA 345 at para [22], where the High Court had failed to embark on a section 36 analysis because the parties had not raised it. The court held that it must "embark on that exercise" although it was not raised.

[6] As this appeal hinges on the cross-examination of Mpenyana, it becomes necessary to extract the relevant questions posed and answers proffered comprising the cross-examination of Mpenyana from the transcript.

[7] After testifying that she knew and had seen the accused at her place of residence on the morning in question, Mpenyana testified that she had been outside, standing on the veranda, when she saw the appellant shoot the deceased three times. The record further reveals the following:

“And when the Accused arrived with what did he arrive at your place? --- He left his car outside the yard

And was he ... wearing a civil clothes or uniform? --- He was in brown uniform.

Okay so you said they followed each other to the side of the house.

And then what happened? --- A little moment after they got out I heard the deceased voice saying “*I have forgiven you, I have forgiven you*”

I could see when you were saying this you were in a shouting voice is that what the deceased said? --- That is the way she was shouting.

Proceed. --- **I jumped outside I stood on the stoep** that is on one of the stairs and I could see them on that other side, the Accused back was facing the gate and the deceased was facing the Accused holding the firearm and he fired.

Who was holding the firearm? --- The Accused was holding the firearm.

And you said he fired? --- Yes.

Where did he fire? --- He was firing at Tobela.

...

MS TOKOTA Were the shots following each other or was there a pause in between the shots? --- It was a very short time I cannot remember well but the time was very short.

Okay you said you were standing on the stoep and the Accused was standing on top of the deceased as she was lying there in a pool of blood? --- Yes

Then what happened? --- The Accused was looking at me holding the firearm then he left and went out of the gate his firearm.”⁶ (Sic)

[8] The appellant’s then legal representative proceeded to cross-examine Mpenyana. The relevant portion of the cross-examination relates to the inconsistency between the statement Mpenyana made to the police and her testimony during examination-in-chief. Mpenyana testified that she had been outside and saw the appellant shoot the deceased three times.

[9] Whilst being cross-examined, Mpenyana testified:

“Now you heard your daughter screaming saying: “I have forgiven you I have forgiven you”? --- I heard her.

Now you went out to investigate or to see what was happening? --- Yes I went out to investigate.

And you saw the Accused with his back looking at your daughter?

COURT: She saw them facing each other.

MR SIDZUMO: Yes

COURT: Yes. --- Yes.

...

Now at what stage madam did a firearm when this firearm a round went off?

⁶ My emphasis.

COURT: At what time was the first shot fired? --- Just immediately after I got out of the doorway Tobela just looked at me and then the fire was shot.

MR SIDZUMO: Now the second shot when did it follow? --- The shots were not far from each but I cannot remember because that was a difficult time for me.

...

Now madam is it correct that after this incident you had made a statement to the Police? --- I made the statement the following day.

And the events were still fresh in your mind? --- Yes

...

I want you to look at this statement here especially your signature on the second page.

--- Yes the signature is mine.

Madam I am going to read one paragraph of your statement which reads as follows; "On Friday 12 April at about eight I was at my daughters house Tobela who is the deceased at 1[...], S[...] Township, I was with the deceased Tobela after preparing for the children to go to school I saw a man wearing a Correctional Service uniform which was not the first time to see him and entered the house and then asked for Tobela who was with me at the time. Tobela go out with this familiar guy and after a shot [inaudible] I hear Tobela (deceased) saying that I forgive you after that I hear a gunshot outside the house three times". Now your testimony today is that when this gunshot went off you were outside already." (Sic)

[10] This form of questioning attracted an objection from the prosecution's camp on the basis that the "*witness never owned*" the statement and had thus not laid a basis for such cross-examination. It is apposite to quote directly the interaction between the court *a quo* and Mr Sidzumo, which formed the basis of the impugned ruling:

"MR SIDZUMO: M'Lord, the witness I was just reading Your Worship, [interrupted]

COURT: No, no [interrupted]

MR SIDZUMO: I was reminding [interrupted]

COURT No, no, no you were cross examining her on the statement now I also let you proceed to the stage where the State, I mean State counsel objected. You were cross examining her putting to her, her evidence comparing it with what is in the statement can you do that if the witness has not owned the statement she is telling the Court that she cannot remember whether that was read and she gave the statement in Xhosa, I do not know in what language is the statement? Has she owned the statement?

MR SIDZUMO: It is in English

COURT: Yes, has she owned the statement?

MR SIDZUMO: Yes M'Lord, she said does not remember.

COURT: Yes she has not owned the statement and in terms of rules you cannot cross examine her on the statement which she has not owned. Objection sustained."

The law

[11] Our courts have set out guidelines in determining whether a witness may be cross-examined on a previous statement made to the police. In *S v Govender and Others*⁷ Nepgen J, in relation to whether a state witness had owned a previous statement made to the police, held that:

⁷ 2006 (1) SACR 322 (E). The court in *Govender* repeated the guidelines as set out in *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593i-j.

“[I]n the present matter the cross-examination of the State witnesses, insofar as it was directed at the contents of their police statements, was done properly. In each instance the witness was asked to confirm that he had made a statement to the police. The witness was then asked whether that which he told the policeman was written down; whether it was read back to him; whether he was asked to confirm the correctness thereof; and whether, having done so, he was asked to sign ... on the statement. The witness was then asked to identify, with reference to his signature ..., that the statement in question was in fact the statement he made. Once confirmation of this had been obtained, counsel proceeded to go through the whole statement with the witness. After each sentence, or on occasion after a whole paragraph, had been read to the witness he was asked whether he had in fact said to the police what had been read to him Sometimes the answer was in the affirmative, other times not. Having gone through this exercise, the witness was then referred to differences between such witness’ earlier evidence and those portions of the police statement which he had confirmed reflected what he had told the police. In some instances these differences were marked, in other the differences could be described as subtle. Where appropriate, the witness was asked why certain facts mentioned during his evidence did not appear in the statement, with it being suggested that the reason therefor was that he had not told the police. The witness was asked why there were such contradictions and/or omissions, thereby being afforded an opportunity to provide an explanation.”⁸

[12] The approach adopted by Nepgen J has been followed in a long line of decided cases;⁹ it is the process used in criminal trials in dealing with previous statements made to the police. In the present matter, it seems that the court *a quo* was alive to this when it made the ruling regarding the cross-examination. From the portions of the proceedings quoted above it is clear that the learned Judge required Mpenyana to first own the statement before she could be cross-examined on it. From the transcript it seems the learned Judge in all probability based his ruling on the fact that Mpenyana had testified that she did not remember whether the statement had been read back to her after the policeman had written it down.

[13] It is available to a cross-examiner to ask whether a witness has previously made a statement in conflict with what he or she has said while on the stand. At the time of questioning the witness about the previous statement, the examiner need not show the witness the statement. When the witness denies having made the previous inconsistent statement, then the examiner must produce the previous inconsistent statement to rebut the denial by the witness.

[14] The transcript of the court *a quo* reveals that when the objection was raised, Mr Sidzumo was still in the process of laying the basis for his cross-examination on the previous inconsistent statement. From the above quoted portions of the transcript it is clear that Mr Sidzumo was still developing his

⁸ *Ibid* at 327b-g.

⁹ See *Gabriel v S* [2010] 2 All SA 212 (SCA); *Meje and another v Mocumi* [2015] JOL 32802 (FB); *Ludick v S* [2011] JOL 27816 (ECG); *S v Mahlangu and another* [2012] JOL 29277 (WC); *Meje and Another v S* [2014] ZAFSHC 98.

cross-examination. He had asked Mpenyana questions relating to whether she had made the statement; whether the signature appended thereon was hers; whether after having dictated the statement to the police officer, the police officer had read it back to her. He then proceeded to put it to her that during her examination-in-chief she had stated that she was outside when the gunshots were being fired.

[15] At the moment the objection was raised the learned Judge interrupted Mr Sidzumo. There is nothing from a reading of the record pointing to the learned Judge affording Mr Sidzumo the opportunity to address him on the objection raised; he made the ruling without having given Mr Sidzumo an opportunity to address him on whether the objection should be sustained or overruled.

[16] The importance of cross-examination should not be underestimated. No doubt, a trial can be fair or not fair resultant purely from how the cross-examination was conducted or permitted to unfold.

[17] Section 35(3)(i) of the Constitution and section 166 of the Criminal Procedure Act¹⁰ govern the right to cross-examine a witness in criminal proceedings. Section 35(3)(i) affords an accused person a right to “*adduce and challenge*” evidence. Cross-examination is the equivalent of challenging evidence. The right to cross-examine a witness in criminal matters is also found in our common law. Our courts have long recognised the importance of affording an accused person the opportunity to challenge the evidence of the State.¹¹

[18] The mainstay of the appellant’s grounds of appeal is that the ruling made by the court *a quo* in refusing the appellant an opportunity to cross-examine Mpenyana amounted to a violation of the appellant’s right to a fair trial. In relation to cross-examination, the Supreme Court of Appeal in *S v Ndhlovu*¹² held:

“The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to ‘*challenge evidence*’.”¹³

[19] The importance of cross-examination was correctly highlighted by the court in *S v Shaw*.¹⁴ In that matter the court held that “*[t]esting all reasonable possibilities fully is indispensable not only for discrediting evidence and for*

¹⁰ 51 of 1977 (the CPA).

¹¹ *Rex v Togoe and Another* 1929 GWLD 4; *S v Makaula* 1961 (4) SA 600 (E); *Rex v Landro, Penny and Mears* 1929 TPD 300; *S v Nkomo* 1975 (3) SA 598 (N).

¹² 2002 (6) SA 305 (SCA).

¹³ *Ibid* at para [24].

¹⁴ [2011] ZAKZPHC 32.

enabling the witnesses to refute attacks on their credibility, but also for eliciting for the trier of fact, not speculation, but explanations which, if reasonable, would enable appropriate inferences to be drawn. Failure to examine and cross-examine effectively may not only bar a party from later seeking to draw inferences from facts not attested to or disputing the truth of a witness's evidence, but also impair the ability of the trier of fact to draw the most reasonable inferences."¹⁵

[20] Section 166(1) of the CPA, in so far as relevant hereto, provides:

"An accused person may cross-examine any witness called on behalf of the prosecution at criminal".

[21] Section 166(1) affords an accused the right to cross-examine a witness in a criminal trial. As already stated, the right to cross-examine a witness on previous statements made to the police has checks and balances. In the present matter the appellant had to meet the requirements as highlighted by Nepgen J in *Govender*.¹⁶ In order for counsel for the defence to cross-examine Mpenyana he first had to ensure that she had "*owned*" the statement as set out in *Govender*. It remains to be seen, however, whether it is open to a court to rule against the cross examination of a witness while counsel is still in the process of following the steps outlined by Nepgen J. The appellant contends that the ruling made by the court *a quo* was "*premature and invalid*".

[22] It is trite law that before counsel for the State or the accused begins cross-examining a witness on a previous inconsistent statement, counsel has a duty to lay the basis for such cross-examination. One might argue that the process outlined by Nepgen J indicates the basis which must be laid by counsel before beginning with the cross-examination. The State, in its heads of argument, conceded that a "*judicial officer should realize that whenever questioning has to start on a previous inconsistent statement, he has a duty to see to it that the cross-examiner first laid the basis for cross-examination. Failure to observe this rule may adversely affect the probative value of such evidence.*"

[23] The State's main argument is that counsel for the appellant was not laying the basis for the cross-examination regarding the previous inconsistent statement but rather actually cross-examining Mpenyana on a statement she had not owned. The record points to the contrary.

[24] In *S v Shabangu*¹⁷ the court had to decide whether the accused had been properly convicted taking into that he had not had legal representation throughout the trial. The court observed that "*it is impossible to say what effect*

¹⁵ *Ibid* at para [113].

¹⁶ *Supra*.

¹⁷ 1976 (3) SA 555 (A).

a properly conducted defence could have had on the ultimate result.”¹⁸ Those remarks apply with equal force in the instant matter. It is impossible to state what the outcome would have been had the appellant been afforded the opportunity to pursue cross-examination of Mpenyana in relation to the previous inconsistent statement.

[25] In my view, the impugned ruling constituted a misdirection and resulted in the violation of the appellant’s right to a fair trial.

[26] It now remains to consider whether the violation is justifiable in terms of section 36. The Court in *Ndhlovu* confirmed the approach adopted by courts in dealing with rights as contained in the Bill of Rights. All rights are subject to limitation in terms of section 36 of the Constitution. This means that even if one finds that the appellant’s right to a fair trial was violated, if the violation is justifiable in terms of section 36 then the trial would be rendered fair. I hasten to answer the question at hand in favour of the appellant.

[27] As already pointed out, a whole range of scenarios could have emerged had the cross-examination on the statement been allowed. Mpenyana could have contradicted herself in many respects with the result that the court *a quo* might have ended up not relying on her testimony at all.

[28] In the light of the foregoing, the appeal falls to be upheld with the result that the matter ought to be referred back to the court *a quo* for the prosecution to be commenced *de novo*.

[29] The order that I grant is the following:

- (a) the appeal succeeds;
- (b) the conviction and sentence of the appellant are set aside; and
- (c) the matter is remitted to the court *a quo* so as to start *de novo*.

S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

¹⁸ *Ibid* at 558F.

F DAWOOD

JUDGE OF THE HIGH COURT

I agree

B HARTLE

JUDGE OF THE HIGH COURT

Attorney for the appellant;Mr P Daubermann

Instructed by;Peter Daubermann Attorneys

;PORT ELIZABETH

Counsel for the respondent;Ms N Tokota

Instructed by;The DPP's Office

;BHISHO

Date heard : 29 April 2016

Judgment delivered : 31 May 2016