



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

CASE NO: CC08/2018

In the matter between:

THE STATE

And

ELTON LENTING AND 19 OTHERS

ACCUSED

JUDGMENT

LEKHULENI J:

Introduction

[1] The State brought an application for a hybrid hearing of this matter, akin to the one it filed at the beginning of this trial. For completeness, at the beginning of this trial, Mr Damon, appearing on behalf of the State, applied in terms of s 74(1)(b)¹ and

¹ Section 74(1)(b) provides: 'If the High Court, in any proceedings before it, is satisfied that—

(i) it would be in the interest of justice; or

(ii) there is a likelihood that harm may ensue to any person as a result of the proceedings being open, it may direct that such proceedings be held behind closed doors and that the public or any category thereof shall not be present at such proceedings or any part thereof.

74(2) of the Prevention of Organised Crime Act 121 of 1998 (POCA) that these proceedings be held behind closed doors in respect of civilian witnesses as provided for in s 74(1)(b)(i) of POCA. Mr Damon also applied in terms of s 158(2) of the Criminal Procedure Act 51 of 1977 ('the CPA') that the evidence of all civilian witnesses in this case be taken by means of a closed-circuit television or a similar electronic media. Alternatively, counsel proposed that witnesses testify only in the presence of the accused to whom the charges pertain. Counsel submitted that accused persons unaffected by specific testimony could remain at Pollsmoor Prison and attend the proceedings virtually via electronic media platform. In simple terms, the State sought an order that only the accused relevant to the day's testimony appear in person, while all others join virtually from prison.

[2] After considering the matter, I dismissed the State's application. I indicated to the parties that I will deal with the matter on a case-by-case basis in respect of each witness. I also indicated to the parties that, if necessary, in the future, I will reconsider the State's application for a virtual hearing of the matter.

The present application

[3] Recently, Mr Damon submitted that the interest of justice now warrants that the Court grants the application for the virtual presence of accused 3 to 20. The State further requested for that the virtual attendance of accused 3 to 20 continue until the conclusion of the cross-examination of accused 1 and 2. Specifically, the State sought an order for accused 1 and 2 to attend the proceedings in person, while accused 3 to 20 remain at Pollsmoor Prison, participating in these proceedings via an audiovisual link. Mr Damon further contended that, upon the conclusion of the relevant cross-examination, this Court should revisit the issue to determine whether to extend the proposed order or return to the conventional proceedings.

[4] Mr Damon developed these submissions in the course of his argument. He submitted that the relief sought by the State is interlocutory and the Court can revisit

(c) An application for proceedings to be held behind closed doors may be brought by the National Director, the *curator bonis* referred to in section 28 or 42 and any other person referred to in paragraph (b) (ii), and such application shall be heard behind closed doors.

or vary its order at any stage of the proceedings. Mr Damon further contended that the necessary arrangements relating to the equipment for the virtual hearing have been finalised with the Head of Prison for accused 3 to 20 to remain at Pollsmoor and be present virtually when accused 1 is being cross-examined. It was submitted that the accused will have full audio-visual access to the courtroom, ensuring their effective participation in the proceedings.

[5] The State's application was predicated substantively on the presence of a rival group of accused appearing before Kusevitsky J, whose simultaneous presence in this Court was submitted to be untenable. Mr Damon highlighted significant logistical constraints in having the two cases heard at the same time in this Court. In addition, the State cited a recent stabbing incident involving members of the alleged rival group, which resulted in accused 3 and 13 sustaining severe injuries. This violence caused the matter to be postponed as all the accused could not be brought to Court. On subsequent dates, when the accused were brought to Court, the Court invoked s 159 of the CPA. It excused accused 3 and 13, who were recovering from their serious injuries.

[6] Mr Damon contended that there is a likelihood of further assault between the alleged rival group should this matter continue simultaneously with the trial of the rival group ('the Mobsters'), appearing before Judge Kusevitsky. Mr Damon emphasised the necessity of preventative measures to ensure no loss of life occurs while these matters are being tried. Counsel pointed out that in both these matters, extra police officers and security had to be present, as the court orderlies of the High Court do not have sufficient human resources to secure all the accused. Counsel argued that transporting both groups to the High Court would present a significant logistical problem. The factor of logistic problems would entail a high probability that this matter would be delayed, as the 'Mobsters' group appearing before Judge Kusevitsky would be transported first, with the accused in this matter to follow later, and this is likely to cause a delay. Moreover, the Court will be required to adjourn early because all the accused (the two rival groups) will have to be transported back to Pollsmoor in time.

[7] In addition, Mr Damon referred the Court to the accused's unbecoming conduct during the court proceedings in support of his application. Counsel further referred the Court to the directive issued by the former Judge President of this Division in 2021 during the pandemic period which provided that for purposes of these directives, the words presence of the accused, referred to in s 158(1) of the CPA, shall be deemed to include the virtual presence or the ability of an accused person to participate in proceedings electronically, together with their legal representatives and or witnesses throughout the proceedings, some or all being virtually present. Mr Damon implored the Court to grant the State's application.

Principal submissions by the counsels for the accused

[8] The 20 accused, through their legal representatives, opposed the application. Mr De Villiers, counsel for accused 1, 2 and 3, submitted that from his reading and understanding of s 159A(2)(e) of the CPA, an audiovisual link may only be used for a further postponement or a consideration of release on bail and not where a trial is running. To this end, counsel argued that s 158 that the State is relying on cannot be used for the purpose of the application. Mr De Villiers implored the Court to invoke the provisions of s 342A of the CPA and investigate the delay in this case, which he placed at the door of the State. He prayed the Court to dismiss the State's application. The other defence counsels aligned themselves with Mr De Villiers' submissions. In addition, Mr Strauss, counsel for accused 4 and 15, submitted that a ruling that only a few of the accused should be present physically in Court while the others attend virtually will not be in the interest of justice, and the accused will see this as an infringement of their right to be physically present in Court to hear the evidence.

[9] While Mr Badenhorst, counsel for accused 5, 9 and 12, shared the sentiments of his colleagues and submitted that the State's request will infringe on his clients' constitutional rights, as it will be difficult for them to consult with the accused if they are not at Court. On the other hand, Mr Van Zyl, counsel for accused 6, 10 and 16, opposed the State's application. Mr Van Zyl submitted that his clients were concerned that if the application is granted, they will not be able to give instructions timeously. He implored the Court to dismiss the application. Mr Johnson, on behalf of

the accused 8 and 17, argued that the Constitution mandates, in terms of s 35(3), every person the right to a fair trial. According to counsel, that's where it all starts. Mr Johnson contended that s 35(3)(e) of the Constitution, which is intertwined with the right to a fair trial, mandates that the accused should be present at Court when the matter is tried. Mr Johnson argued that the State's application seems to be hinged on the transportation of the accused to Court. Counsel submitted that if the problem is about transporting the accused to court with their rival group, that issue can be resolved by keeping the two factions apart.

[10] Mr Klopper, counsel for accused 14, 18, 19 and 20, submitted that his clients wish to be physically present in Court to follow the proceedings. Mr Klopper aligned himself with the argument submitted by his colleagues. However, on the interpretation of s 158(1) of the CPA, Mr Klopper submitted that if one considers what it means to be present nowadays, it means also to be present virtually. Counsel highlighted that by using the various media platforms currently available, it is possible to convene a meeting in which participants from different parts of the world can engage and be regarded as virtually present. In Mr Klopper's assessment, a broad interpretation of 'presence' may encompass people who participate in a meeting via virtual means or other media. This interpretation, according to Mr Klopper, reflects a more expansive understanding of the term. Conversely, counsel noted, the traditional legal definition of 'presence' requires physical attendance, meaning a person must be physically present at the site where the event is taking place.

The relevant legal principles

[11] The general principle is that criminal trials should be held in open Court and in the presence of the accused. The constitutional right to be present at trial is reflected in s 35(3) of the Constitution, which sets out the requirements for a fair trial in criminal proceedings. A crucial component of the right to a fair trial is the s 35(3)(e) right to be present when tried, which is closely linked to s 35(3)(i) right to adduce and challenge evidence, and the right to a public trial before an ordinary court in s 35(3)(c) of the Constitution. A public hearing requires that all proceedings be conducted in open Court. However, sections 170A and 158(2) provide for certain

complainants to give evidence in a separate room outside the presence of the accused. These sections do not violate the accused's right to be physically present.

[12] Furthermore, in *Nel v Le Roux NO*,² the Constitutional Court noted that there are well-recognised exceptions to the general rule that criminal proceedings should be conducted in open court. Steytler points out that a 'public trial' should not be interpreted literally, and the openness of the proceedings should be assessed as a whole.³ Steytler identifies five broad areas of justification for in camera proceedings that override the right to a public trial and are recognised internationally in criminal proceedings, namely: in the interests of state security, good order, public morals, or the administration of justice. In such cases, the Court may direct that the proceedings be held in camera and that the public, or a class thereof, should not be present.⁴

[13] On the one hand, the general principle that the accused must be 'present in court' for his or her trial finds statutory expression in s 158(1) of the CPA. Section 158(1) provides that 'except as otherwise expressly provided by the Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused. This would also include the postponement of cases against the accused. Section 158(1) is peremptory. Neither an accused nor his legal representative can waive this fundamental right.⁵ The requirement that the accused should be present is applicable until the trial is completed.⁶ The accused must generally be present at all stages of the proceedings including in inspection *in loco* proceedings.⁷ In *S v Zenzile*,⁸ this Court held that this right extends to the right to participate in the reconstruction of a lost trial record.

² 1996 4 BCLR 592 (CC) 11.

³ Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa*, (1998) at 251 Butterworths, Durban.

⁴ Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa*, (1998) at 247 Butterworths, Durban.

⁵ *R v Blackbeard* 1925 TPD 965). *S v Roman* 1994 (1) SACR 436 (A).

⁶ *S v Roman and Others* 1994 (1) SACR 436 (A) at 442I.

⁷ *R v Makiep* 1948 (1) SA 947 (A).

⁸ 2009 (2) SACR 407 (WCC).

[14] Section 158(1) of the CPA is a very important provision in our law, as it ensures that an accused person knows what the State witnesses are saying about him.⁹ It gives an accused person the right to face his accusers, to cross-examine witnesses, to give evidence, and to generally participate in the trial. It also enables the accused to see his accusers as they depose against him and to observe their demeanour during the trial. The state witnesses must also give evidence in the presence of the accused. This principle is so fundamental that non-compliance amounts to a failure of justice. Although the section is peremptory and cannot be waived,¹⁰ it recognises that the accused and witnesses may give evidence by closed-circuit television or similar electronic media.¹¹

[15] In terms of s 159 of the CPA, the Act allows for the trial and postponement of cases against an accused person in his or her absence. Section 159 deals with the circumstances in which criminal proceedings may take place in the absence of the accused. Section 159(1) provides that if an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence. Section 159(2) provides that where a co-accused is absent due to, inter alia, ill-health, a court may authorise the continuation of the trial in that person's absence.

Discussion

[16] In this case, the State sought an order that accused 3 to 20 remain in Pollsmoor court while accused 1 and 2 are in Court during accused 1's cross-examination by the State. This application was also brought based on the unbecoming conduct of some of the accused in Court and the fact that another rival group is attending court proceedings before Kusevitsky J. It is alleged that the rival group severely assaulted accused 3 and 13 in this matter. These two accused were seriously injured, so much so that they had to be excused for weeks in terms of s 159(2)(a)(i) of the CPA to attend court proceedings. The state advocate advised the court that the necessary

⁹ *S v Motlatla* 1975 (1) SA 814 (T) at 815E.

¹⁰ *S v Roman and others* 1994 (1) SACR 436 (A).

¹¹ See s 158(2) and s 170A of the CPA.

equipment for the audiovisual proceedings is available and that the accused in Pollsmoor will remain present, hear, observe and participate effectively in the proceedings through the audiovisual link. According to the state advocate, this action would significantly address some of the critical challenges that have impeded progress on this matter over the past five years, since the trial commenced. Counsel for the State further emphasised that the two rival groups should not be present together in the High Court during the hearing of their respective cases. This precaution is necessary to mitigate the risk of serious consequences, including the potential harm or death to some of the accused.

[17] What this Court is enjoined to determine pursuant to the State's application is whether it can be said that the proceedings are taking place in the presence of the accused, notwithstanding that they are in Pollsmoor Prison and attending these proceedings virtually and not physically in Court. Expressed differently, whether the rights of accused 3 to 20 would be infringed if they attend court virtually or through an audiovisual link during the evidence and cross-examination of accused 1 and 2.

[18] A proper pronouncement on this critical issue lies in the proper examination and interpretation of the right to a fair trial within the context of s 158(1) of the CPA, which provides that, unless otherwise provided, all criminal proceedings in any court shall take place in the presence of the accused. This requires that meaning be assigned to the language used, of what was intended and what the purpose was of the provision. The Constitution requires a purposive approach to statutory interpretation.¹² The starting point should be s 39(2) of the Constitution which provides that:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

¹² See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC) at para 24.

[19] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,¹³ the Constitutional Court interpreted this provision to mean, *inter alia*, that the Constitution requires judicial officers to read legislation, where possible, in ways which give effect to its fundamental values and in conformity with the Constitution.

[20] Mindful of the imperative to read and interpret legislation purposively in conformity with s 39(2) of the Constitution, I turn to consider whether s 158(1) also envisages the presence of an accused person virtually. It bears emphasis that the phrase ‘in the presence of’ has been interpreted in some cases to mean physical presence or close proximity.¹⁴ In *Gulyas v Minister of Law and Order*,¹⁵ the court considered the meaning of the phrase ‘in the presence of’ in the context of s 40(1)(b) of the CPA. That section deals with the authority of a peace officer to execute an arrest, without a warrant, where the offence is committed in his presence. The court accepted that the ordinary dictionary meanings of the phrase indicate that ‘in the presence of’ a policeman means within the eyeshot of that policeman or in his immediate vicinity or proximity.¹⁶

[21] The interpretation presented in the *Gulyas* matter is significant within its context, particularly regarding the criteria that establish the lawfulness of an arrest made without a warrant. In my opinion, different considerations apply in matters that involve the presence of an accused person at court during the trial. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁷ the Supreme Court of Appeal (SCA) stated:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into

¹³ 2000 (10) BCLR 1079 (CC) at para 22.

¹⁴ *Firststrand Bank Limited v Briedenhann* 2022 (5) SA 215 (ECGq) para 29.

¹⁵ 1986 (3) SA 934 (C)

¹⁶ See *Firststrand Bank Limited v Briedenhann* fn 14 above, para 24.

¹⁷ 2012 (4) SA 593 (SCA) at para 18

existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[22] The literal meaning of the expression 'in the presence of accused' within the context of s 158(1) requires that the court proceedings take place in the physical presence of the accused. The purpose thereof is to ensure that the accused has the opportunity to have first-hand knowledge of proceedings which affect his or her vital interests, such as facing his or her accuser, hearing the case against him or her, consulting with counsel, cross-examining witnesses, participating in the trial and raising objections where necessary, having proper observations made of the demeanour of witnesses and, to make full answer and defence after the close of the case for the prosecution.¹⁸ To my mind, these objectives are not compromised if the accused appears virtually in court provided they can be fulfilled through a credible electronic media to the satisfaction of the court.

[23] It must be acknowledged that the right of the accused to be present in court during any proceeding relating to them is a fundamental right and one specifically protected by s 158(1) of the CPA. However, it must also be acknowledged that what being present meant in 1996 when the section was introduced in the CPA, is much different than what it means now. This finding does not seek to water down the

¹⁸ *R. v. Gibbs*, 2018 NLCA 26 para 56.

accused's right to be present in court. Rather, it suggests that with the evolution of technology and in our pursuit of effective justice, we should consider that the phrase 'in the presence of the accused' can be defined and interpreted in ways that were not anticipated over thirty years ago.¹⁹ As I see it, the accused's presence via a virtual platform fulfils the purpose envisaged in s 158(1). Simply put, it incorporates the essence of the accused's presence in court as envisaged in s 158(1) of the CPA. The following reasons bear out this conclusion:

[24] There is no substantial difference between the accused's physical presence and his participation in the proceedings by audiovisual link or videoconferencing. A video link allows the accused to see and hear what is going on in the courtroom, and the accused could be seen and heard by the other parties, the judge and the witnesses. The accused will thus be in a position to listen to the evidence given by the witnesses and grasp anything capable of refuting their evidence, request leave to address the Court and make any statement he considers necessary to his defence. It cannot be said that the accused's physical presence in court alone would ensure the effectiveness of this right. What is important is the accused's personal and conscious participation in the proceedings. In addition, the court has the power and duty to ensure that the technical means installed are appropriate to the aims sought to be achieved and could, if necessary, order the accused to be physically present in the courtroom during the hybrid sitting.

[25] It bears emphasis that although s 158 of the CPA is peremptory and cannot be waived, it recognises that the accused and the witness may give evidence by closed-circuit television or similar electronic media outside the presence of the accused. Simply put, s 158 supports the use of a virtual platform to expedite the hearing of criminal matters, prevent unreasonable delay, or save costs. Section 170A of the CPA also permits certain witnesses to give evidence with the assistance of an intermediary outside the physical presence of the accused at a place which is informally arranged to set that witness at ease whenever it appears to the court that

¹⁹ See Conference Paper of Judge Wayne Gorman - Provincial Court of Newfoundland and Labrador: *The Virtual Court* - The Provincial Court of Nova Scotia, Spring Education Conference 11 June 2021.

it would expose such witnesses to psychological, mental or emotional condition if they testify in open court.

[26] To my mind, where an accused person is held at a remote location, in this case, in the court in prison, and can participate virtually in a meaningful and effective manner in court proceedings, it cannot be said that the proceedings are not taking place in his presence. The essential reasons for the accused's presence in court can be fulfilled by alternative methods, provided that no reasonable sense of injustice arises. If the judge or magistrate can fairly and effectively hear, manage, and decide the case, then, in my opinion, the objectives served by s 158(1) of the CPA will not be subverted. An audiovisual link or a credible virtual platform would allow the accused to observe witnesses and hear what is going on in the courtroom, and the accused himself would be seen and heard by other parties, the Court and the witnesses.

[27] The defence counsels raised the issue of consultation as a challenging hurdle to the State's application. In my view, this problem is not insurmountable. Arrangements can be made for the accused to confer privately with their counsel present in court, via a telephone line connecting the court to the prison centre. Furthermore, Zoom and Microsoft Teams and other virtual platforms now have break away rooms feature that can be used for consultation purposes. In other words, these platforms allow a party to break away from the main line to a different channel or 'room' without being heard by others in the meeting. Thus, where an accused wants to consult with his attorney, the relevant accused and his legal representative can be put in a virtual breakaway room where they can talk without being heard by others and can go back into main virtual room when done to join virtual proceedings. Multiple virtual breakaway rooms are possible on these platforms, and it can be directed who goes to which room. It will therefore be easy for the accused and their lawyers to privately consult whilst on a virtual link. In my view, this is a viable option to address the consultation and instruction provision concerns raised by Mr Badenhorst and Mr Van Zyl.

[28] Moreover, on the meaning of 'in the presence of the accused', I find the analogy postulated in the *South African Law Reform Commission Report*,²⁰ (SLARC) which investigated the feasibility of postponing cases via an audiovisual link appropriate to the circumstances. The SALRC's postulation underscores Mr Klopper's submissions. In its report, the SALRC quotes with approval the opinion of Mr Nel, of the National Prosecuting Authority and notes that the question is not whether the accused is present at a specific place, but rather whether the accused is present during the proceedings when their trial is in progress. The report notes, to illustrate this by way of an analogous situation: When A and B are busy with a television debate, with A in the SABC Cape Town studio and B in the SABC Johannesburg studio, can one say that neither was present during the debate? Surely, they were both present during the debate. It is not their presence at a specific place that determines whether it was a fair debate, but the presence of the parties at all times during the debate and the opportunities they have to observe the proceedings and actively participate in the debate. As foreshadowed above, Mr Klopper articulated a similar argument at the hearing of this application.

[29] I repeat, in an audiovisual link or videoconferencing, the accused would still be able to listen to the evidence given by the witness and grasp anything said and dispute the evidence of witnesses adduced against him. The accused may still request leave to address the Court and make any submission they consider necessary for their defence. Using the virtual platform has almost the same benefit as his physical presence in Court in that the accused would have the benefit of contemporaneous audiovisual transmission of the proceedings. The accused would have the means of acquiring direct knowledge of all trial issues that involve his interests. The accused would still participate meaningfully in the proceedings, in the same way as if he were physically present. Even though the accused will be physically absent from the courtroom, the proceedings will still be open to the public, and the media and the public will have access to report on the matter.

²⁰ Project 113 Report the Use of Electronic Equipment in Court Proceedings (Postponement of Criminal Cases Via Audiovisual Link) at 43.

[30] I must add that in June 2021, this matter was heard in the accused's absence, when the matter was postponed via the virtual platform. The accused's respective counsels were in Court, and the accused were in the courtroom at Pollsmoor Correctional Centre. They effectively participated in the proceedings when the matter was postponed.

[31] I find the reasoning of the full court in *S v M*,²¹ apposite in the present matter. In that matter, the appellant, a well-versed attorney, appealed against his conviction on a charge of rape. He contended, inter alia, that he had not had a fair trial, in that the trial had been conducted in his absence. During the trial, the parties had agreed that the complainant's evidence would be held in camera and that the appellant would take up the position normally taken up by an intermediary. In other words, the appellant would sit outside of the Court, in the room in which the intermediary and the witness would normally sit, from where he was both visible and audible to the Court on a television monitor. However, on his taking up that position, witnesses would be audible, but not visible, to the appellant. As a compromise reached by the parties, the complainant then gave evidence in Court, with the Court able to see the appellant on the television monitor. However, the appellant was unable to see the complainant. After the matter was heard, the appellant was subsequently convicted of rape and sentenced to 14 years' imprisonment.

[32] On appeal against the conviction only, the appellant relied on s 158(1) of the CPA, which required that all criminal proceedings take place in the presence of the accused. It was argued before the full court that in these circumstances, the appellant was deprived of a fair trial because s 158 of the CPA requires that all criminal proceedings take place in the presence of the accused. Reference was also made to s 35(3)(e) of the Constitution of the Republic of South Africa Act 108 of 1996, which reads: 'every accused person has the right to a fair trial, which includes the right to be present when being tried.'

[33] The State's response was that, even if the procedure adopted had constituted an irregularity, the conviction ought nonetheless not to be quashed as, in terms of

²¹ 2004 (1) SACR 238 (N).

the proviso to s 322(1) of the CPA, the irregularity had not resulted in a failure of justice. The defence countered that the irregularity fell within the category of gross irregularities that, per se, resulted in a failure of justice, and that there was therefore no need to conduct an enquiry into whether, as a fact, it had resulted in a failure of justice. The appeal court found that one must look at the circumstances and facts of each case to determine whether it can be said that there was a failure of justice. The Court considered that there had been no failure of justice in this case as the trial court was, inter alia, alive to the appellant's right to a fair trial. The Court concluded that the appellant was correctly convicted and dismissed his appeal against conviction.

[34] In other words, notwithstanding that the appellant was not physically present in court, the full court found that in the circumstances of this case, there was not a failure of justice as the appellant was throughout represented by one of the most experienced senior counsels in the country. The Court reasoned that, as a consequence of the arrangement reached, the State withdrew its application for the complainant to give her evidence through an intermediary on closed-circuit television. The result was that counsel was able to observe the witness in open Court, subject her to extensive cross-examination and note at close quarters her reactions and demeanour.

[35] In my view, this case underscores that a one-size-fits-all approach does not apply in cases of this nature. One must consider the circumstances of each case to determine whether the interests of justice demand that a request for an audiovisual hearing be granted. In the same way, in *S v Basson*,²² the state applied for the issue of a letter of request in terms of s 2(1) of the International Co-operation in Criminal Matters Act 75 of 1996 to procure evidence from two people residing in Florida, United States of America, by way of commission. The Court held that the evidence of the two witnesses was indispensable to put the objective facts before the Court and was not merely a fishing expedition on the part of the State. It granted the State's request.

²² 2000 (2) SACR 188 (T).

[36] The accused feared for his personal safety to go to the United States when the evidence was to be taken. As to the accused's inability to attend the interrogation, the Court accepted that the accused had reason to fear that he was *persona non grata* in the United States and was justified in not attending. The Court found that his absence in the light of his active involvement in the trial would no doubt be a disadvantage to him, but with the aid of technology in the form of cell phones, telefax, computers and the like, the defence team would be able to consult with the accused in South Africa during the hearing. If, due to the accused's absence, certain relevant things were not taken up by the defence, that would have to be considered when the evidence was eventually evaluated. The Court granted an order allowing the evidence of two witnesses to be taken in America in the accused's absence and suggested the use of technology to remedy the shortcoming.

[37] Moreover, in *S v F*,²³ the Court stressed that the right to be present at criminal proceedings is, however, also not absolute. The Court emphasised that there can be little doubt that the provisions of s 158(2) allow for a witness to give evidence outside the presence of the accused. The very application by the State to lead evidence through the medium of a closed-circuit television system is demonstrative of the fact that the State proposes to lead the evidence of its witness outside of the physical presence of the accused.

[38] In my opinion, the right to be physically present is limited by sections 158(2), 159, and 170A(3) of the CPA. As foreshadowed above, s 158(2) allows the Court, on application, to order that a witness, irrespective of whether the witness is in or outside the Republic, give evidence by means of closed-circuit television or similar electronic media. The section also allows evidence to be given outside the accused's physical presence. In terms of s 170A(3), if a court appoints an intermediary, the Court may direct that a witness gives his or her evidence at any place informally arranged to set that witness at ease. These sections limit an accused person's right to challenge evidence.

²³ 1999 (1) SACR 571 (C) at 575.

[39] Importantly, sections 159A to 159D of the CPA provide for and regulate the postponement of criminal proceedings through an audiovisual link. Section 159A of the CPA provides specific types of cases in which the physical presence of the accused in Court can be substituted with an electronic one through the aid of a closed-circuit television. Section 159A(3) establishes that any proceedings in terms of subsection (2) shall be regarded as having been held in the presence of the accused person if, during the proceedings, that person is held in custody in a correctional facility; and can follow the court proceedings and the Court can see and hear the accused person by means of audiovisual link. The remote point shall be regarded as being a part of the Court.

[40] I see no compelling reason why the deeming provision outlined in s 159A(3) should not be applied with equal force and significance in both bail and trial proceedings. Significantly, in terms of s 158(2) an accused's physical presence in the court room may be dispensed with during the giving of evidence by the accused or a witness. In my opinion, there is no difference in a case where an accused appears through a virtual platform and the situation provided for in s 158(2) which permits a court, to order that a witness or an accused person give evidence by means of closed-circuit television. I am mindful that s 158(2) requires the consent of the accused. However, the emphasis, in my view, should be a fair and just trial. In both cases, to ensure, a fair and just trial, a court may impose the necessary conditions provided that the prosecutor and the accused have the right, by means of that procedure to question a witness and to observe the reaction of that witness and to participate meaningfully in the proceedings.

[41] Steytler notes that a 'virtual reality' trial by electronic means may take place only with the consent of the accused and on order of the trial court.²⁴ The learned author believes that while the participants in a trial may be dispersed geographically, the central purpose of the right to be present, the ability to exercise active defence rights, will not be prejudiced. From a constitutional perspective, if one assumes that the hearing of a matter where the accused is present virtually infringes s 35(3)(e) of

²⁴ *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa*, (1998) at 295 Butterworths, Durban.

the Constitution, the next question to consider is whether the accused's right cannot be limited by way of section 36 of the Constitution. The limitation of the right, as provided for in the CPA, must be assessed in terms of whether the accused's absence will detract from the fairness of the trial.²⁵

[42] As previously stated, the accused's right to be present when tried as envisaged in s 158(1) of the CPA is not absolute. This right is subject to limitation in terms of s 36 of the Constitution. The right to be physically present, in my view, is limited by the provisions of ss 158(2), 159, and 170A(3) of the CPA. Without delving into the full inquiry in terms of s 36, the limitation is evidently reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[43] Finally, s 39(1) of the constitution provides, inter alia, that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law; and may consider foreign law. In *Sanderson v Attorney-General, Eastern Cape*,²⁶ the Constitutional Court considered the application of comparative research and remarked as follows:

‘In this context I wish to repeat a warning I have expressed in the past. Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well-developed in mature constitutional democracies. Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable...Nevertheless the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management.’

[44] I deem it prudent to draw parallels with similar provisions in Canada, as our Bill of Rights in our Constitution is modelled around the Canadian Charter of Rights and Freedoms. Prior to the 2022 amendments,²⁷ the situation in Canada was a bit more convoluted. For summary conviction trials (for less serious charges), the accused could presumptively appear by way of an agent (s. 800(2)), so their lawyer could

²⁵ *Kentucky v Stincer* 482 US 730 745 (1987).

²⁶ 1998 (1) SACR 227(CC) para 26.

²⁷ See Legislative Summary of Bill S-4: An Act to Amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (Covid-19 response and other measures).

appear for them in the courtroom. For preliminary inquiries (pre-trial for serious offences), s. 537(1)(j), (j.1) and (k) allowed an accused to be out of the courtroom or to attend by CCTV or video. In indictable matters (serious offences) before 2022, procedural appearances could be handled by a designation of counsel (s. 650.01(1)) or a video appearance except where evidence was being taken (s. 650(1)(1.1)). There was a strong presumption that an accused had to be present for the whole trial, even where no evidence is being taken. The remedy for proceedings that occurred partially in the absence of the accused would be a mistrial: *R. v. Poulos*, 2015 ONCA 182.

[45] With the emergence of the Covid-19 pandemic, competing lines of case law emerged. One was that various provisions in ss. 606 and 650 would permit an accused to be "outside" the courtroom for an indictable trial. For instance, *R. v. Daley*, 2020 ONCJ 201, it was suggested that s 650(2)(b) of the *Criminal Code* 'permits the court to allow the accused to be completely out of the courtroom with no connection by video or audio even when evidence is being taken from a witness. However, another line of jurisprudence held that those sections did not allow for that. For instance, in *R. v. Pazder*, 2015 ABQB 493,²⁸ the court adopted a very restrictive approach to s 650(2)(b). The court found that the first fundamental principle is that s 650(2)(b) of the *Criminal Code*, should only be used sparingly, and with caution. An accused's absence should only occur where there is a valid and legitimate reason that does not offend public policy, and that is beneficial to the accused without prejudicing fair trial rights of the accused and other trial participants. The controversy is summarised fairly well in *R v. Twoyoungmen*, 2021 ABPC 88, at paras. 30-35. This controversy led to Parliament enacting the 2022 provisions to make it clear that remote appearances are possible.²⁹

[46] In terms of the new amendments, the Canadian justice system permits the hearing of matters through audioconference and videoconference. Section 650(1) of

²⁸ At paras 249 and 250.

²⁹ See Legislative Summary of Bill S-4: An Act to Amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (Covid-19 response and other measures).

the Canada *Criminal Code*³⁰ provides that ‘subject to subsections (1.1)³¹ and (2) and section 650.01, an accused, other than an organisation, shall be present in court during the whole of their trial, either in person or, if authorised under any of sections 715.231 to 715.241, by audioconference or videoconference’. Similar to s 159 of the CPA, s 650(2) of the Canada *Criminal Code*, provides that the court may (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper.

[47] The Canada *Criminal Code* further permits a Court, with the consent of the prosecutor and the accused, to allow an accused to appear by videoconference at a trial for an indictable or a serious offence.³² The court may, with the consent of the prosecutor and the accused, allow an accused to appear by audioconference or videoconference for the purpose of making a plea.³³ Furthermore, the Court may, with the consent of the prosecutor and the offender, allow the offender to appear by audio or video conference for sentencing purposes. Crucially, the Code emphasises that in any proceedings in respect of which this Code does not expressly authorise the Court to allow an accused or offender to appear by audioconference or videoconference or limit or prohibit their appearance by those means, the Court may allow the accused or offender to appear by either of those means. In other words, a court has the discretion to allow video conferencing even where it is not provided or prohibited by the Code.³⁴

[48] The overriding consideration in Canada for permitting a trial of an accused virtually hinges on the proper administration of justice. The objective of the Canadian criminal justice system is that an accused receives a fair trial, even if he is not physically present in court when a matter is tried. Thus, a fair trial occurs when an

³⁰ (RSC, 1985.c.C-46)

³¹ In terms of this section a court may, with the consent of the prosecutor and the accused, allow the accused to appear by counsel for any part of the trial, other than a part in which the evidence of a witness is taken.

³² S 715.233 of the Code.

³³ S 715.234 (1).

³⁴ S 715.24. See also *Woods v. Ontario*, 2020 ONSC 6899, at paragraph 35(ii)).

accused can make a full answer and defence. This conclusion is underscored by the provisions of s 715.22 of the Code, which provides that the purpose of the provisions of this Act that allow a person to appear at, participate in or preside at a proceeding by audioconference or videoconference, in accordance with the rules of court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.³⁵ The emphasis is not on whether the accused is physically present in court, but on whether the provision effectively gives the accused the right to participate in the process, in keeping with the right to a fair trial

[49] While in Europe, in *Marcello Viola v Italy*,³⁶ the European Court of Human Rights dismissed an appeal against an appellant who was convicted of various serious offences, including murder. Pursuant to his conviction, the applicant was subject to a restricted prison regime, provided for by s 41*bis* of Law no. 354 of 26 July 1975 (known as “the Prison Organisation Act”), which, among other things, limited his contact with the outside world. Accordingly, the appellant was no longer brought to the courtroom from prison for his subsequent appeal hearing. The appellant, however, was able to participate in the hearings of his appeal via an audiovisual link to the hearing room. Aggrieved by the decision of the trial court, the appellant appealed on points of law. The appellant complained that he had been forced to participate in the appeal hearings by videoconference during the second set of proceedings, which violated his fair trial rights under Article 6 of the European Convention on Human Rights. His appeal was dismissed in the domestic courts.

[50] On appeal to the European Court of Human Rights, the court found that the appellant did not claim that he had been denied the opportunity to follow the proceedings. Instead, he complained about the manner of his participation, which was via videoconference. He alleged that the use of this device created difficulties for the defence.³⁷ The court found that although the appellant’s participation in the proceedings by videoconference is not as such contrary to the Convention, it was incumbent on the Court to ensure that recourse to this measure in any given case

³⁵ See s 715.22 of the Code.

³⁶ (Application no. 45106/04) (05/01/2007).

³⁷ At para 64.

serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention.³⁸ The Court concluded that the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the "reasonable time" requirement in judicial proceedings.³⁹

[51] In reference to the present matter, and considering the preceding discussion, it is evident that there is a legitimate rationale supporting the State's application. It is my firm view that, to avoid possible conflict between the two rival groups, and at times the unbecoming conduct of some of the accused, there are merits in the State's application that this Court should seriously consider alleviating the challenges highlighted above. It seems to me that those accused who conduct themselves in a manner that makes the continuance of the proceedings in their presence impracticable can remain in attendance virtually, with a muted function applied or with such conditions as the court may imposed.

[52] I may also add that generally, the hearing of matters as suggested by the State has immense benefits. It will alleviate the problems of some of the accused not brought to Court, as has happened in this matter frequently. It will minimise the problem of the accused being brought late to Court. It ensures the protection of witnesses and victims of offences and court officials in respect of their rights to life, freedom and security. Moreover, it is also incontestable that the transportation of detained prisoners heightens the risk of escape and may lead to potential reprisals against the individuals involved.

[53] To this end, I share the views expressed by Satchwell J, in *Uramin Incorporated v Perie*,⁴⁰ that the technology of the video link is now accepted both in other jurisdictions and South Africa as an efficient and an effective way of providing oral evidence both in chief and in cross examination and that this is simply another tool

³⁸ At para 67.

³⁹ At para 72.

⁴⁰2017 (1) SA 236 (GJ).

for securing effective access to justice. The court emphasised that courts must adapt to the requirements of the modernities within which they operate and upon which they adjudicate. The Constitution and the Rules of Court enjoin the courts to make the necessary developments on a case-by-case and era-by-era basis.

[54] In *VJS v SH*,⁴¹ this Court stressed that as modernisation unfolds, it is important for the courts to open themselves to the modern trend of technology to securing effective access to justice. The court stated:

These developments, in my view, are a testament that the benefits of technology should be utilised and incorporated into our justice system to improve the efficiency of civil litigation in our courts. This will go a long way in optimising access to justice for civil court litigants. I understand that different divisions of the High Court in our country have adopted CaseLines, where pleadings, affidavits, and relevant documents are uploaded to the CaseLines portal. In my opinion, this clearly demonstrates that the courts are acknowledging the significance of technology and the advantages it brings. This recognition reflects an evolving understanding of how technology can enhance legal processes and improve access to justice.

[55] The views expressed by the court above are equally applicable to this matter. More so, recently, the full court in this division, observed in *Road Accident Fund v Van Wyk*,⁴² that courts must avoid a rigid or inflexible approach when considering applications for virtual hearings; instead, they should consider such applications with a thoughtful mind, always prioritising the pursuit of justice as their guiding principle.

[56] Two decades ago, the SALRC⁴³ noted that audiovisual hearing provides the following benefits:

- (a) it reduces inmate transportation costs;
- (b) the elimination of security problems in prisoner transportation;
- (c) a reduction in the number of jail personnel needed for inmate movement;

⁴¹ (19578/2024) [2024] ZAWCHC 333 (22 October 2024) para 27.

⁴² *Road Accident Fund v Van Wyk* (Appeal) (1169/2020; A186/2025) [2026] ZAWCHC 39 (9 February 2026) para 43.

⁴³ SALRC Report Fn 20 above, at p. 27.

- (d) a reduction in tension by eliminating inmate movement and waiting in holding cells;
- (e) allowing inmates to be released more quickly after the court hearing;
- (f) saving of travel time and costs;
- (g) saving of court time spent on awaiting the arrival of inmates.

Conclusion

[57] In conclusion, it is my considered view that the requirement of 'being present in court' in s 158 (1) should not be read too literally. Instead, the emphasis should be on the accessibility of the court to the accused, the accused's legal representative and the public. When the SALRC investigated the feasibility of postponement of cases through AVR, it noted that 'it is, however, sympathetic to the view that the procedure would introduce an innovation which should be implemented incrementally, and although convinced of the major advantages to the criminal justice system, recommends that it be introduced for limited purposes initially but with the reservation that it be expanded later'. The report was prepared 23 years ago. Clearly, the SALRC envisaged that the innovation it proposed would have developed after two decades of its report.

[58] I am of the view that each case must be dealt with according to its own merits. Hearing matters through the virtual platform as proposed by the State should not be the norm; however, where the interests of justice demand it, it should be considered.

Order

[59] In preparation for the judgment, I gathered that Justice Kusevitsky would be going on long leave in a week's time and that the matter concerning the other rival group would not be sitting for the full term. But for that reason, I refused the State's application and indicated that I would be willing to reconsider it in the future, if necessary, as the main underlying ground for the State's application no longer exist. I stated that if the accused continue to disrupt proceedings, I will consider excusing them under section 159(1) of the CPA and allowing them to attend these proceedings virtually, while they are in Pollsmoor prison.

APPEARANCES

For Accused 1, 2, 3 and 11: Advocate De Villiers

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For Accused: 4, and 15: Mr Strauss

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For Accused: 6, 7, 9 and 12: Advocate Badenhorst

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For Accused: 6, 10 and 16: Advocate Van Zyl

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