IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 187/2005
DPP REF NO: JPV 2005/187

In the matter between:

THE STATE

and

MSIMANGO, ZWELITHINI NDUMISO Accused 1

SINDANE, MENDI OTTIS READY PEDY BEL-AIR Accused 2

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This judgment deals exclusively with the issue as to what probative value, if any, must be attached to the evidence of a witness who was not completely cross-examined during a criminal trial, for example where a witness dies during cross-examination.

THE FACTS IN THE PRESENT MATTER

[2] In this matter, the two accused persons were charged with nine counts of robbery with aggravating circumstances; one count of assault with intent to do grievous bodily harm; kidnapping; the unlawful possession of firearms and the unlawful possession of ammunition. I have already convicted and sentenced the accused in a separate judgment, in spite of their pleas of not guilty on all the charges. The two accused persons were represented by separate counsel in a rather lengthy and delayed trial.

[3] During the trial, the accused alleged, *inter alia*, that they were assaulted by the arresting officers; that their constitutional rights were not explained; and that their complaints to the police officers in the cells at Germiston police station, fell on deaf ears. Several police officers testified. One of such police officers, based at the Germiston police cells at the time, was Insp H G Obisi (Obisi). He testified. However, his cross-examination on behalf of the second accused had not been completed when the witness died during such cross-examination. More on the facts of the present matter is contained in paras [20] and [26] *infra*.

[4] It is so that both at common law and statutory law an accused person has the right to cross-examine any witness called by the prosecution or any other co-accused who testifies. S 166(1) of the Criminal Procedure Act 51 of 1977 (the CPA) provides:

> "*An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.*"

In addition, s 35(3)(i) of the Constitution of the Republic of South Africa, Act 108 of 1996, provides that an accused person has the right to adduce and challenge evidence. A careful reading of s 166(1) of the CPA invests reciprocal rights in both the accused and the prosecution to cross-examine opposing witnesses, and to re-examine their own witnesses. Similarly, the right to cross-examine a co-accused or witness called on behalf of such co-accused is also extended to both an accused and the prosecution. The "*Concise Oxford Dictionary*", 10th ed, defines "*cross-examine*" as, "*question (a witness called by the other party) in a court of law to check or extend testimony already given*". Similarly, "*Webster's Third New International Dictionary (1993)*" defines "*cross-examine*" as "*to examine by a series of questions designed to check the accuracy of answers to previous questions; examine closely or repeatedly; to examine (a witness who has testified for the other side in a legal action) esp. in order to disprove testimony already given*".

[5] The right to cross-examine is trite in our criminal justice system that curtailing it inappropriately or interfering with it, may render a trial unfair, vitiating the entire proceedings. There is also an obligation on a judicial officer in criminal trials of unrepresented accused persons, not only to explain

to such accused persons their procedural rights, but specifically, the right to cross-examination. For example, in *S v Mdali* 2009 (1) SACR 259 (C), the court held that the failure on the part of the magistrate to adequately explain to an unrepresented accused the right to cross-examination; how it should be conducted; the purpose and scope thereof; and the consequences of a failure to cross-examine, breached the accused's fundamental rights to a fair trial. Indeed, the importance of the right to cross-examine in any disputed hearing, particularly in an adversarial trial system, such as ours, can hardly be over-emphasised. In Wigmore *On Evidence,* 3rd ed. Vol. V, para 1367, the learned author states:

> "*Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovering of truth.*"

In *Carroll v Caroll* 1947 (4) SA 37 (W), at p 40, Henochsberg AJ said:

> "*The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.*"

[6] Having sketched the importance and purpose of cross-examination, it is necessary to deal with the probative value of the evidence, if any, to be attached to the evidence of a witness who dies during cross-examination in a criminal trial. As stated earlier, s 166 of the CPA entrenches the right to

cross-examination. It is settled law that evidence of a witness who gives complete evidence-in-chief but thereafter dies or becomes unavailable, for whatever reason, before any cross-examination, clearly remains untested completely and its acceptance would defeat the purpose of cross-examination. In *R v Ndawo and Others* 1961 (1) SA 16 (N), the three accused persons were charged with housebreaking and theft in the magistrate's court. They were convicted and duly sentenced. On review, it appeared from the record of proceedings before the magistrate, that the State called as a witness, an 8 year old child of one of the accused. The witness was warned and gave brief formal evidence. Thereafter the witness burst into tears and said that the police had forced him to make a statement. As the magistrate formed the view that the child witness was distressed and frightened to testify, the magistrate suggested to the prosecutor to dispense with the evidence of the witness. The magistrate deemed it unnecessary that the witness be cross-examined by the accused. In finding that the denial of the right to cross-examination was irregular, the reviewing court, at p 17D, said:

> "*Now it seems to us that once there is a denial of a right of cross-examination of witnesses, that immediately causes prejudice to an accused person, and since we do not know what evidence this witness could have given, we cannot say that there has not been a failure of justice.*"

Needless to say that the convictions and sentence were set aside. See also *S v Wellington* 1991 (1) SACR 144 (Nm). The right of an accused to adduce and challenge evidence in terms of s 35(3)(i) of the Constitution was

reinforced in *S v Manqaba* 2005 (2) SACR 489 (W). In the latter case, the accused was convicted in a regional court on three counts of rape. The matter was referred to the High Court for sentencing in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997. During the trial, the magistrate ruled that the complainant, a child, could not be cross-examined on allegedly inconsistent statements made by her to the police prior to the trial. The magistrate based his ruling on his belief that the complainant would have been traumatised at the time she had made the statements, and that there may have been discrepancies between what she had said to the police officer in her home language and what he had written down in another language. In setting aside the convictions, Satchwell J held, *inter alia*, that criminal procedure and practice in South Africa were premised upon the right to a fair trial as enshrined in s 35(3) of the Constitution of the Republic of South Africa, 1996. That one aspect of such right was the right to adduce and challenge evidence, which necessarily included the right to examine witnesses.

[7] Relating to the issue in the present matter, the only case law I am aware of, dealing with evidence based on incomplete cross-examination are the following. The first is *S v Motlhabane and Others* 1995 8 BCLR 951 (B). In this matter, the accused was charged with murder and robbery. The State called one Jeanette Seoposengwe (Seoposengwe), as a witness. She was one of the victims of the robbery. She gave evidence-in-chief. Thereafter counsel for the accused commenced to cross-examine her. However, before cross-examination was completed, Seoposengwe died. The defence launched an application for the discharge of the accused in terms of s 174 of

the CPA, at the conclusion of the State's case. The issue to be decided by the court was whether any part of Seoposengwe's evidence could be taken into account in its consideration of the s 174 application. After considering Wigmore *On Evidence* (1974) Vol V, 3rd ed. para 1390, Khumalo J expressed the view that a judicial officer in a criminal case has a discretion to exclude the evidence of a deceased witness where full cross-examination has not taken place so as to ensure a fair trial. This discretion must however, be exercised subject to the provisions of the Constitution. Khumalo J, after granting the application for the discharge of the accused, held further that:

> "*The test should be whether the opposing party was given a full opportunity to test the evidence of the witness.*"

Further: "*That the accused's right to challenge the evidence of the deceased witness had been adversely affected. The witness gave testimony as to identification of the accused and on this aspect cross-examination had not proceeded to a satisfactory degree. Accordingly the testimony of the deceased witness had to be disregarded.*"

In dealing with the approach in *S v Motlhabane and Others (supra)*, the learned authors in "*The Law of Criminal Procedure and the Bill of Rights*", (Issue 7), para 5 B48, state:

> "*The approach adopted here seems to indicate that the violation of section 25(3)(d) does not lie therein that the witness was not fully cross-examined. The right is violated if the untested evidence is used against the accused. The right is not violated if adequately tested evidence is used against the accused, even though cross-examination*

> *might not have been completed. The issue arising from a finding of violation, is: Should that evidence be excluded?*
>
> *In Khumalo J's view the presiding officer retains a discretion. In this case he ruled that only her evidence on the identification of the accused (which was not yet tested) had to be disregarded when considering the section 174 application. Only that part of the evidence in relation to which a violation occurred is excluded. The violation in relation to one part of the evidence and does not, in the court's view, taint other parts of a witness' evidence. This case gives some indication of the possible problems with this approach. It will always remain unpredictable how the cross-examination would have progressed. It also does not follow that even if one issue had been dealt with, there was no intention to return to that aspect, or that other evidence might have placed it in a different light. It is preferable that, in a case such as this, violation of the right be found not only to parts, but to all the evidence. By its very nature cross-examination is unpredictable, may not be chronological or theme-by-theme, and may leave room for unexpected questions later on.*" (Emphasis added.)

With regard to full opportunity to cross-examine under one of the predecessors of the CPA, namely, the Criminal Procedure and Evidence Act 31 of 1917, see *R v McDonald* 1927 AD 110.

[8] Dealing with the principles enunciated in *S v Motlhabane and Others (supra)*, the learned authors, Du Toit *et al*, in "*Commentary on the Criminal Procedure Act*", (Service 38, 2007), at pp 22-23, suggest that if there has been complete cross-examination on certain aspects of the case then such evidence should be admissible and only the aspects on which there had been no or incomplete cross-examination should be left out of account. As discussed in para [25] *infra*, I disagree with this approach.

[9] Wigmore *On Evidence*, 3rd ed. Vol. V, para 1390 said:

> "*But, where the death or illness prevents cross-examination under such circumstances that no responsibility of any sort can be attributed to either the witness or his party, it seems harsh measure to strike all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation.*" (Emphasis added.)

[10] The second known South African case dealing with evidence based on incomplete cross-examination, although in civil trials, is *Engles v Hofmann and Another* 1992 (2) SA 650 (C). In this case, the first defendant had commenced testifying in a civil trial when the matter was postponed. When the trial was resumed, medical evidence showed that first defendant was critically ill and required certain treatment. The long and short, was that first defendant could never return to the witness stand. An application was eventually made on his behalf that he be excused from further court attendance, and that the evidence he had given should be regarded as not having been given, and be ignored for the purposes of the court's determination of the matter. The court, holding that there was no precedent in South Africa for the order sought that this course had been followed in English and American law, granted the order.

[11] The learned authors, W A Joubert *et al*, in, "*LAWSA*", 2 ed. Vol. 5, Part 2, para 306, state:

> "*The defence case must be put to the relevant witnesses. Failure to cross-examine leaves the evidence of the relevant witness unattacked, but the court will not for that reason necessarily accept it. Not too*

> *drastic an inference should be drawn from failure to cross-examine. It could be due to ignorance or inexperience. Failure by the prosecutor to cross-examine could, however, lead to an acquittal.*"

With respect, the above approach is not sufficiently helpful in resolving the difficult issue pertinent in the instant matter.

SOME FOREIGN CASE LAW

[12] Before concluding on this rather difficult novelty on which there is clearly insufficient South African case law and authority, it may be instructive to have regard to some foreign case law. Indeed, s 39(1) of the Constitution provides:

> "*(1) When interpreting the Bill of Rights, a court, tribunal or forum –*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) must consider international law; and*
>
> *(c) may consider foreign law.*"

[13] Writing in the "*Virginia Law Register*" Vol XII, No 10, under the heading, "*Admissibility, In A Criminal Trial, Of The Former Testimony Of A Witness, Since Dead*", and as far back as 1907, Walter R Staples, said:

> "*It is said that in the absence of constitutional or statutory mandate the rules of evidence are the same in criminal and civil cases since they are but the means of judicially ascertaining facts in issue, and are alike in each case, "founded upon the charities of religion – in the philosophy of nature in the truths of history – and in the experiences of common*

> *life*", for, as Lord Erkskine says, "*a fact must be established by the same evidence whether it be followed by a criminal or civil consequence … The rules governing the testimony of witnesses are neither numerous nor complicated, that under inquiry being the principal one of its class, to wit, that hearsay evidence is not admissible. The reason of the rule being its life, we find this in the danger which attends the presentation as evidence of statements made neither under the sanction of an oath nor the ordeal of cross-examination, and hence the requirement that the person from whose lips the evidentiary facts are taken must speak them under oath and in the presence (not of the jury or the tribunal, under the common law rule), of the party against whose contention those statements are directed, to the end that they may be also subjected to the test of cross-examination – spoken in the open, not in the dark – to the face and not behind the back.*"

[14] In *Chambers v Mississippi* 410 U.S. 284 (1973), in which Powell J delivered the majority judgment, the facts were briefly as follows: The appellant (petitioner) was charged with murder. One McDonald, in the meantime, made a written confession to the crime, which he later repudiated. On three separate occasions, each time to a different friend, McDonald orally admitted the killing. The appellant (petitioner) was subsequently convicted of the murder in a trial that he claimed was lacking in due process because he was not allowed, firstly, to cross-examine McDonald whom he called as a witness when the State had failed to do so, since, under Mississippi's common law "*voucher*" rule, a party may not impeach his own witness. Secondly, the appellant (petitioner) was not allowed to introduce the testimony of the three persons to whom McDonald had confessed, the trial court having ruled that their testimony was inadmissible as hearsay. The Mississippi Supreme Court confirmed the conviction. In upholding the appeal on the basis that the appellant (petitioner) was denied a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment, the US Supreme Court, found

inter alia, that, "*The application of the "voucher" rule prevented the petitioner, through cross-examination of McDonald, from exploring the circumstances of McDonald's three prior oral confessions and challenging his renunciation of the written confession, and thus deprived petitioner of the right to contradict testimony that was clearly "adverse"*" (my additions). In the course of the judgment Powell J, in which Burger, C.J.; and Douglas; Brennan; Stewart; White; Marshall; and Blackmun, JJ concurred, said:

> "*Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of his alibi, or to "sift" his conscious so that the jury might judge for itself whether McDonald's testimony was worthy of belief. Mattox v United States, 156 U.S. 237 242-243 (1895). The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process". Dutton v Events, 400 U.S. 740, 400 U.S. 89 (1970); Bruton v United States, 391 U.S. 123, 391 U.S. 135-137 (1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal". Pointer v Texas, 380 U.S. 400, 380 U.S. 405 (1965). Of course, the right to confront and to cross-examine is not absolute, and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g; Mancusi v Stubbs, 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the factfinding process", and requires that the competing interest be closely examined. Berger v California, 393 U.S. 314, 393 U.S. 315 (1969).*"

[15] The above approach bears some resemblance to the South African constitutional dispensation. The right of an accused person to adduce and challenge evidence in terms of s 35(3)(i) of the Constitution, although not explicit to the right of cross-examination, is also subject to the limitation of rights as provided in s 36 of the Constitution.

[16] The two English cases of *R v Scott and Another*, and *R v Barnes and Another* (1989) 2 All ER 305, although dealing with the discretion of a trial judge to exclude the admission of sworn statements in evidence, are possibly the nearest to the issue in the present matter. The sworn statements were those of witnesses who died before the commencement of the trial. In the *Scott and Another* case, the two appellants were charged with the murder of a special constable in a bar. The only evidence of identification was that contained in the sworn statement of a witness who deposed that he had seen the appellants' faces as they ran from the bar, and had subsequently pointed out the appellants to the police before they were arrested. However, the witness died before the trial. Both appellants gave evidence at their trial which amounted to alibis. On the other hand, in the *Barnes and Another* case, the three appellants were charged with shooting dead the driver of a van and stealing a factory payroll which he was carrying. A witness gave evidence at the preliminary hearing but was murdered before the trial. In his sworn statement he had stated that he saw the shooting and that it had been done by the three appellants, all of whom he knew. The only other eyewitness was unable to recognise anyone. All three appellants raised an alibi defence. In each case, without the evidence of the sworn statement, there would have been insufficient evidence to put any of the appellants on trial. In each case the trial judge admitted the sworn statement in evidence. In each case the appellants were convicted. The Court of Appeal of Jamaica refused the appellants leave to appeal against their convictions and they appealed to the Privy Council. It was held,

"*(1) A judge in a criminal trial had a discretion to exclude the admission of a sworn disposition of a deceased witness so as to ensure a fair trial, notwithstanding that the disposition was relevant and admissible evidence, but that discretion should be exercised with great restraint. Provided that (a) the jury were warned that they had not had the benefit of hearing the deponent's evidence tested in cross-examination, (b) particular features of the evidence in the deposition which conflicted with other evidence and which could have been explored in cross-examination were pointed out where appropriate, (c) the appropriate warning of the danger of identification evidence was given in an identification case and (d) inadmissible matters such as hearsay or matters which were prejudicial rather than probative were excluded from the deposition before was read to the jury, the deposition should be admitted in evidence. Neither the inability to cross-examine nor the fact that the deposition contained the only evidence against the accused nor the fact that it was identification evidence was of itself sufficient to justify the exclusion of a deposition. The crucial factor was the quality of the evidence in the deposition and if the deposition contained evidence of reasonable quality, even if it was the only evidence against the accused, the deposition should be admitted and the interests of the accused protected in the summing up. On the facts, the evidence of identification contained in the depositions was not of such poor quality that it would have been unsafe to*

convict on it if the jury had received the appropriate guidance in the summing up. There were, accordingly, no grounds on which the trial judges could have exercised their discretion to exclude the admission of the depositions. (See p 311f, p 312c j and p 313a to g post); R v Sang (1979) 2 All ER 1222, R v Blithing (1983) 77 Cr App 86 and R v O'Loughlin (1988) 3 All ER 431 considered.

(2) Where the sole evidence of identification connecting the defendant to the crime was uncorroborated, the trial judge should give the jury a clear warning of the danger of a mistaken identification and only in the most exceptional circumstances should a conviction based on uncorroborated identification evidence be upheld in the absence of such a warning. The fact that the defendant had been picked out at an identification parade did not obviate the need for such a warning. In the circumstances the failure of the trial judge in each case to give the jury the appropriate warning vitiated the convictions. It followed therefore that the appeals would be allowed and the convictions quashed (see p 314g i to p 315a c d and p 316f, post): R v Turnbull (1976) 3 All ER 549 applied."

[17] *R v Cole* (1990) 2 All ER 108 is another example of a case in which a statement of an eyewitness who died before the trial was admitted in evidence. There the trial judge, in the exercise of his discretion under s 26 of the Criminal Justice Act 1988, allowed the statement to be admitted in

evidence on the ground that it had been prepared for the purpose of the pending trial of the appellant and ought to be admitted in the interests of justice since there were other witnesses, including those for the defence, who could controvert it. The appellant was convicted of assault occasioning bodily harm. On appeal, it was held:

> "*In exercising its discretion under s 26 of the 1988 Act to allow a witness statement made by a witness who had died to be admitted in evidence the court was not restricted to considering the possibility of the statement being controverted by means of cross-examination of the prosecution witnesses and was not required to disregard the possibility of the statement being controverted by the evidence of the defendant or witnesses called on his behalf. However, the court was required to take into account the fact that the defence was unable to cross-examine the maker of the statement and to consider whether the potential unfairness arising from that fact could be effectively counterbalanced by a suitable warning and explanation in the summing up. On the facts, the judge had not erred in taking into account the possibility of defence witnesses controverting the witness statement when exercising his discretion to allow the statement to be admitted in evidence. The appeal would accordingly be dismissed.*"

[18] In dealing with this vexed question of the evidence of incomplete cross-examination of a witness, Halsbury's Laws of England, 4th ed. (2006 Re-issue), 11(3) para 1440, suggest the following approach:

> "*Where a witness for the prosecution gives evidence in chief but dies before the completion of his cross-examination or becomes too ill or distressed to go on, it may sometimes be necessary for a trial to be halted, but in other cases any potential unfairness to the defendant may be dealt with by a carefully worded direction from the judge.*"

This, in my view, suggests a discretionary approach to either discontinue the trial if the absent witness is a single witness to the incident, or to decide whether or not to disregard the evidence of such witness. Indeed, the footnote in the above quotation from Halsbury's Laws of England, refers to, *inter alia, R v Wyatt* (1990) CR. L.R. 343, CA. This case demonstrates the discretionary approach. In that case, the appellant was charged with indecent assault on a 7 year old girl. In her evidence-in-chief, the complainant described the incident in detail, and was then cross-examined (through video-link) for some 20 minutes. She became increasingly distressed. The judge adjourned the case briefly. After the adjournment the complainant continued to cry and the judge decided that her evidence should proceed no further. At that stage counsel for the defendant had still one important question to ask of the complainant. There was other corroborative evidence implicating the appellant. The appellant was convicted. On appeal, it was argued, *inter alia*, that (1) the judge did not adjourn for long enough to allow the complainant to compose herself; (2) the judge should have directed the jury more clearly as to the effect of pre-maturely terminating cross-examination. In dismissing the appeal, the court held:

> "*(1) That the judge had a discretion to adjourn the case for the length of time that he did and did not err in the exercise of his discretion;*
>
> *(2) It had been submitted that a lengthy warning about the effect of truncated cross-examination should have been given to the jury as was done in R v Stretton and McCallion (1988) 86 Cr. App. R. 7. However in the present case the judge had directed the jury fairly on the evidence of the girl and left it to the jury to determine her credibility.*"

The above case suggests clearly that the trial judge, in the exercise of the discretion, had regard to the other corroborating evidence implicating the appellant in the offence. In my view, the conviction would have been open to serious attack on appeal had the complainant been a single witness regarding the incident in question.

[19] The above foreign case law almost exclusively deal with the discretion of a trial judge in admitting in evidence statements of eyewitnesses who died before the commencement of a trial. These cases do not deal directly with the more difficult and novel question inherent in the present matter. I must refer to a more relevant case of the *United States v Malsom* 779F. 2^{d} 1228, 1240 (7th Circuit 1985). Briefly stated, the defendants, including McDonald Malsom, were convicted by a jury of attempting to export, exporting and conspiring to export implements of war and other controlled commodities from the United States of America to Libya without having the necessary export licenses. The defendants were also convicted of filing false statements with the federal government. Malsom was sentenced to 5 years imprisonment and also fined. On appeal, Malsom and another defendant, raised a plethora of issues, including a ground based on the Sixth Amendment Right of Confrontation. In this regard, the defendants contended that their constitutional right to confront and cross-examine witnesses was denied when the district court refused to grant a mistrial after one of the state witnesses, George Mosher, died during the trial <u>before the defendants had the opportunity of cross-examining him</u> (my underlining). The court explained to the jury that Mosher was no longer available as a witness (the court did not in

fact informed the jury that Mosher had died), and that his testimony was incomplete as he had not been cross-examined. The court then instructed the jury that the court would "*strike all of his testimony and instruct you to disregard it completely. I don't want you to even discuss his testimony among yourselves because you should wipe it out of your minds, and give it no credence or any effect whatsoever …*". On appeal, the defendants argued, *inter alia*, that anything less than a full cross-examination of Mosher would deny them their Sixth Amendment Right to confront witnesses. It was common cause that Mosher, after testifying in brief for the State, died of a heart attack in his hotel room after the matter was adjourned. The defendants also argued that the district court abused its discretion in refusing to grant a mistrial after Mosher's death as the jury once having heard the damning testimony would be unable to dismiss the testimony from their consideration of guilt. On the basis that the district court had not only struck Mosher's testimony, but also unambiguously instructed the jury to disregard the testimony, the court concluded that the inability of the defendants to cross-examine Mosher because of his untimely death did not violate the Sixth Amendment, and that the district court did not abuse its discretion in refusing to order a mistrial. The appeal was dismissed on this and other grounds advanced by the defendants. It may also be instructive to have regard to *United States v Canan*, 48F. 3^{d} 954, 959 (Sixth Circuit). The facts in *United States v Malsom (supra*) were less problematic as the evidence based on the incomplete cross-examination of the deceased witness, Mosher, was not taken into account at all in the adjudication of the merits of the case.

[20] The absence of any readily known authority in South African law exacerbates the search for a clear solution to the instant matter. To recall, the state witness, Obisi testified on behalf of the state. He was cross-examined to completion by counsel for the first accused. Thereafter the witness was cross-examined on behalf of the second, the last accused. However, the witness died during a postponement before such cross-examination could be completed. Several of the other state witnesses testified and were fully cross-examined on the same subject as the evidence of the deceased witness. The subject-matter of the evidence of the deceased witness, Obisi, was only part of several aspects of the trial. As a result, both accused persons were nevertheless convicted and sentenced, as stated at the commencement of this judgment.

[21] Apart from *S v Motlhabane and Others* (*supra*), there is no direct authority in criminal procedure known to me on the subject, nor have I been referred to any by either counsel for the accused. However, counsel for the State kindly referred me to *S v Mothabane and Others (supra*), and *Engles v Hofmann (supra*). In South Africa, in *Federation Co. Ltd v Bezuidenhout and Others* 1912 TPD 337, the issue related to the evidence of a deceased witness (not a criminal trial) at a previous trial. It had more to do with the admission of hearsay evidence than evidence based on incomplete cross-examination of a witness. On the other hand, *R v Matyeni* (1958) 2 All SA 443 (E), concerns the question whether the accused has had a full opportunity of cross-examining a deceased witness. The facts were, briefly, that during the preparatory examination, a witness was called on behalf of the

prosecution. At the conclusion of his evidence-in-chief, the magistrate recorded, "*accused reserves cross-examination*". The witness died after giving his evidence, that is, before any cross-examination. At the subsequent trial, the state prosecutor wished to put the evidence given by the deceased witness at the preparatory examination before the court in terms of s 243 of the Criminal Procedure Act 56 of 1955. In terms of the latter, the state, in order to secure the admission of evidence given by a witness deceased since the preparatory examination, had to satisfy the court that the witness has in fact died; that the evidence recorded was his evidence; and that the accused had a full opportunity of cross-examining the witness. The accused was legally represented when cross-examination was so reserved. Based on the principles enunciated in *R v McDonald* (*supra*), at pp 110 and 115, and in holding that the prosecution was entitled to put in the evidence given by the deceased witness at the preparatory examination, the court said:

> "*That the accused did have a full opportunity of cross-examining. He must know, having been represented by an attorney before the case began, that his attorney would cross-examine on his behalf and that he, in the absence of his attorney, would be entitled to put questions to the Crown witnesses.*"

It is indeed unquestionable that this finding, at present, would not pass muster constitutional scrutiny. The case was clearly, in my view, wrongly decided. In any event, it was, once more, not about the acceptance or otherwise of the evidence of a witness who dies during cross-examination.

[22] Although not entirely in point to the issue in the present matter, *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE), concerns the question whether s 170A of the CPA violated the right to a fair trial because it deprived an accused of the right of cross-examination and the right to a public trial. S 170A of the CPA, which I need not quote fully here, entitles a court to appoint a competent person as an Intermediary through whom a witness under the age of 18 years may give evidence. This occurs when it appears to the court that for the witness to testify in the usual manner would cause undue mental stress or suffering. The applicant accused was charged, in the regional court, with the rape of a 16 years old complainant. On the application of the prosecutor, and before the applicant pleaded, the regional magistrate appointed an Intermediary as envisaged in s 170A(1) of the CPA. The applicant then approached the former Supreme Court for an order, *inter alia*, that the criminal proceedings against him proceed without the application of s 170A of the CPA. In holding that s 170A of the CPA was not unconstitutional, the court, through Melunsky J, at 409G-H, observed that:

> "*Although the right to cross-examine is not mentioned in this section (section 25(3) of the Interim Constitution), the right to challenge evidence which includes the right to cross-examine, is listed in section 25(3)(d). But even at common law the right to cross-examine is regarded as so fundamental that its denial will almost invariably lead to prejudice (The South African Law of Evidence 4th Edition by Hoffman & Zeffertt at 456-457). It may be noted that an accused's right to cross-examine any witness called on behalf of the prosecution is also enshrined in section 166 of the Act. What has to be determined is whether cross-examination by means of an intermediary is inconsistent with the right to a fair trial because it violates the right of an accused person to challenge or cross-examine a child witness. Section 170A does not, of course, exclude the right to cross-examine.*" (My insertions.)

S 25(3)(d) of the Interim Constitution, is the predecessor of s 35(3)(i) of the 1996 Constitution referred to earlier in this judgment. The applicant in *Klink v Regional Court Magistrate NO and Others*, abandoned his application to refer the matter to the Constitutional Court as the parties had agreed that the court had jurisdiction to determine the question of the constitutionality of s 170A of the CPA. I am also not aware of any subsequent pronunciation by the Constitutional Court on the constitutionality of s 170A of the CPA. However, in *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T), Bertelsmann J declared certain parts of s 170A of the CPA to be unconstitutional and referred such issues to the Constitutional Court. The possible limitation of an accused's right to cross-examine witnesses through an intermediary was however, not part of such referral.

[23] This court has already dealt with the purpose of cross-examination in, *inter alia*, *Caroll v Caroll (supra*). There may indeed be other more useful guidelines in this regard. However, any infringement of this purpose may be detrimental to fair trial procedure.

[24] As indicated earlier, there is in fact authority for the proposition that in the South African context, the right of an accused person to adduce and challenge evidence as enshrined in s 35(3)(i) of the Constitution, also includes the right to cross-examine. For example, in "*Constitutional Criminal Procedure*" (a commentary on the Constitution of the Republic of South Africa, 1996), 1998, the Hon. author, Nico Steytler, at p 347, para 4.1, states:

> "*The primary interest of the confrontation clause in the Sixth Amendment, the US Supreme Court held in Douglas v Alabama, is the right of cross-examination. The same is true in South Africa, the right to challenge evidence includes the right to cross-examine. A prerequisite for cross-examination is that all evidence is produced in court and witnesses testify viva voce. Where an accused has been deprived of the opportunity to cross-examine a witness due, for example, to the latter's death, the use of such untested evidence will result in the infringement of this constitutional right.*" (My underlining.)

THE VARIOUS APPROACHES

[25] What emerge from the above quoted foreign case law and authorities suggest at least three approaches to the evidence based on incomplete and truncated cross-examination, for whatever reason. The obvious is that where evidence-in-chief was led with no subsequent cross-examination at all, such evidence ought to be disregarded entirely. So much is trite. The second approach seems to be that where there was partial cross-examination only but with other corroborative evidence of the absent witness on the disputed issue, the trial court has a discretion whether or not to accept the evidence. The third approach seems to suggest that where there has been no cross-examination at all, the trial court still has a discretion to accept the evidence depending on the nature of the evidence and the nature of the case. This discretionary approach is clearly not without problems as indicated hereunder. Indeed, the approach of the learned authors, Du Toit *et al*, in the "*Commentary on the Criminal Procedure Act*" (*supra*) is also with respect, not bereft of problems. In my view, such approach, although hugely attractive at first glance, may be problematic and may not pass muster constitutional scrutiny. It, for example, begs the question whether it would be fair to accept

such evidence in the case of a single witness not fully cross-examined whilst the accused still had one important question to put to the witness (cf *R v Wyatt (supra)*). It will always be difficult to predict what complete cross-examination could reveal. The possibility that it would reveal evidence completely favourable to an accused person can hardly be excluded. In practice, it may also be difficult to determine where to draw the line in accepting certain parts of incomplete cross-examination evidence and rejecting other parts, as well as how to exercise such discretion. There are simply too numerous imponderables which would only exacerbate an accused person's already heavy burden of facing the might, expertise, experience, costs, techniques, and resources at the disposal of the State. Indeed, in certain instances, the State also relies on certain presumptions against an accused person, as illustrated in para [27] *infra*.

CONCLUSION ON THE ISSUE AT HAND

[26] For the aforegoing reasons, I have come to the conclusion that no probative value should be attached to evidence where cross-examination of a witness absent, for whatever reason, including illness or death. It appears to be equally fair and equitable that such an approach should not only apply to prosecution witnesses, but also to defence witnesses, and witnesses called by the court in terms of s 186 of the CPA or, indeed other witnesses. In the instant matter, as stated earlier, Obisi testified on issues on which several other prosecution witnesses testified fully and were fully cross-examined. He was therefore not a single witness on the issues in dispute. The acceptance

or rejection of his incomplete evidence in cross-examination, in my view, was academic and immaterial in the circumstances of the case. Although there was a rather strong temptation to accept as credible and corroborative his evidence, not only in regard to accused 1 in respect of whom there was complete cross-examination, but also in respect of accused 2, I decided against such approach. There was indeed sufficient other corroborative evidence on the issues in dispute. The fact that the tenor of counsel for accused 2 indicated that he was nearing the end of his cross-examination by putting the version of accused 2 to Obisi, prior to the adjournment, was immaterial and not conclusive. It was extremely dangerous to rely on such tone for the suggestion that the cross-examination was almost completed. The fact of the matter is that such cross-examination on behalf of accused 2 remained incomplete. This court decided, in the exercise of its discretion, to ignore completely the evidence of Obisi in convicting both the accused. This approach was in accordance with *S v Motlhabane and Others* (*supra*).

[27] In the present matter, I am also of the view that the right of an accused person to adduce and challenge evidence as enshrined in s 35(3)(i) of the Constitution, undoubtedly includes the right to cross-examination. As indicated earlier in this judgment, there was overwhelming and persuasive authority for this proposition. In my view, the fact that s 35(3)(i) of the Constitution does not expressly or implicitly refer to cross-examination, to exclude such right, would amount to a too narrow and simplistic interpretation of the section. In this regard, it is more than instructive to have extensive regard to the illustrious remarks of Kentridge AJ in *S v Zuma and Others* 1995

(1) SACR 568 (CC). This case concerned the constitutionality of s 217(1)(b)(ii) of the CPA, in regard to the provisions of the Republic of South Africa Constitution Act 2000 of 1993 (the Interim Constitution). This s deals with the admissibility in evidence of a confession made by an accused person before trial. This s provides, in respect of alleged confessions, *inter alia*, that it shall, "*be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto. If it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto*". Although the s casts an *onus* on the prosecution to prove beyond reasonable doubt that a confession was made freely and voluntarily where it has to be accepted, the accused on the other hand, has to prove on a balance of probabilities, that such confession was not so made by him or her. Prior to declaring that s 217(1)(b)(ii) of the CPA was invalid, and in interpreting s 25(2) and (3) of the Interim Constitution (the predecessor of s 35(2) and (3) of the Constitution, and at para [15] of *S v Zuma and Others* (*supra*), Kentridge AJ said:

> "*Both Lord Wilberforce and Dickson J (in relation to R v Big M Drugs Mart Ltd (1985) 18 DLR (4th) 321 at 395-6 (18) CCC (3rd) 385 (my insertions), emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood. This must be right. I may nonetheless be permitted to refer to what I said in another Court of another constitution albeit in a dissenting judgment:*

> *'Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law. Attorney-General v Moagi 1982 (2) Botswana LR 124 at 184'.*"

At para [16] of the judgment, Kentridge AJ went on to say:

> "*The caveat is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.*" (My underlining.)

In quoting with approval what was said in *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), at 377, Kentridge AJ went on to say:

> "*That was an authoritative statement of the law before 27 April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.*"

At para [17] Kentridge AJ went on to say:

> "*I must also refer to where Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625 (E) (1994 (1) BCLR 75. The judgment of Froneman J contains much of value in its approach to constitutional interpretation. The learned judge (at 635B-C) (SA) and 81 (BCLR) that the previous constitutional system of this country was the fundamental 'mischief' to be remedied by the new Constitution. He says at 633H (SA) and at 80 (BCLR) that, because the Constitution is the supreme law against which all law is to be tested, 'it must be examined with a view to extracting from it those principles or values against which such law … can be measured'. He adds at 634C (SA) and in BCLR on the same page (80) that the Constitution must be interpreted so as 'to give clear expression to the values it seeks to nurture for a future South Africa'. This is undoubtedly true. South African courts are indeed enjoined by s 35 of the Constitution to interpret Chapter 3 so as 'to promote the values which underlie an open and democratic society, based on freedom and equality', and, where applicable, to have regard*

> *to relevant public international law. That section also permits our courts to have regard to comparable foreign case law.*" I fully endorse these persuasive comments.

[28] For the above reasons, the view that the right to adduce and challenge evidence also includes the right to cross-examine, is pre-eminently justified even in interpreting s 35(3)(i) of the final Constitution.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT
JOHANNESBURG

COUNSEL FOR THE STATE	M CHRISTOFOROU
INSTRUCTED BY	DIRECTOR OF PUBLIC PROSECUTIONS
COUNSEL FOR ACCUSED 1	C PILLAY
INSTRUCTED BY	LEGAL AID BOARD
COUNSEL FOR ACCUSED 2	J L KGOKANE
INSTRUCTED BY	LEGAL AID BOARD
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