IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS26-2014

DATE: 2014-10-24

In the matter between

THE STATE

And

RADOVAN KREJCIR	Accused 1
DESAI LUPHONDO	Accused 2
SAMUEL MODISE MARUPING	Accused 3
JEF NTHOROANE GEORGE MACHACHA	Accused 4
SIBONISO MIYA GQAMARE NDABASINHLE	Accused 5
LEFU JAN MOFOKENG	Accused 6

J U D G M E N T

LAMONT J: Captain Ramuhala was called as a witness. His evidence was led in a trial within a trial relating to the admissibility of the statement made by accused 2.

The Captain is a competent and compellable witness in terms of Section 192 of the Criminal Procedure Act No 51 Of 1977 ("CPA"). There is no issue in relation thereto.

After he had commenced giving his evidence he was cross-examined for a period of time, initially in relation to various matters concerning the trial within a trial. During the cross-examination I ruled that he could be cross-examined in respect of those issues and other matters relevant to the main trial.

While the captain was under cross-examination, the trial was adjourned. It is common cause that during the adjournment a charge was laid by accused 1. The charge (perjury) concerns the fact that there is a difference in what was said by the witness under oath in Court and what was said in an affidavit filed in bail proceedings as well as what was said in an affidavit filed by him in relation to this opposition to an application to produce certain documents which he had been subpoenaed *duces tecum* to produce.

At the resumed hearing the witness indicated that he feared that he would, by way of continuing to reply to the questions which were being posed to him in cross-examination, incriminate himself in respect of the perjury charge. I afforded him an opportunity to obtain legal advice, which he did.

The advice which he received was that he is entitled to refuse to answer the questions. I heard argument on that issue from his legal representative, as well as the legal representatives of the other counsel in this matter.

The first question to be decided is whether or not there should be an objection to each individual question put to him, raised separately, argued separately and dealt with separately.

It was apparent from the questioning which I put to counsel, that all counsel proposed to continue to cross-examine the witness to establish that he was a dishonest witness. It is a well-known feature of cross-examination that a seemingly innocuous question is but one link in a long chain leading to the question which is not innocuous and in which the proposition which counsel wishes to make is put.

For this reason, it is extremely difficult, both as the officer presiding as well as the witness to, in advance of knowing the length of the chain and what the pertinent question is at the end of the chain, determine whether or not any individual question is in fact innocuous. To compel a witness to answer a seemingly innocuous question in these circumstances is in fact a breach of his right to refuse to answer.

For this reason I propose to deal with the matter in its entirety, as if all the questions were directed to establishing facts which might incriminate him in the charge which has been laid.

The witness relies on the provisions of Section 203 of the CPA. That section reads:

> "No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the 30th of May 196,1 have been compelled to answer by reason that the answer may expose him to a criminal charge."

The right not to give evidence which results in self-incrimination was considered in the matter of *Magmoed v Janse Van Rensburg & Others* 1993 (1) SACR 67. It was there held that:

"In the sphere of the law of evidence a privilege may be described as a personal right to refuse to disclose admissible evidence ....

One such privilege is that against self-incrimination. In terms thereof a witness may refuse to answer a question where the answer may tend to expose him to a criminal charge ...

The privilege is that of the witness and generally must be claimed by him. Where the privilege is claimed, the Court must rule thereon.

Before allowing the claim of privilege, the Court must be satisfied from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.....

The witness should be given considerable latitude in deciding what is likely to prove an incriminating reply....[at 104 B-F]"

A useful survey of the status of this privilege is contained within the matter of *Black v Joffe* 2007 (3) SA 171 (CPD), particularly at paragraphs 10 and following. The rationale is set out within the paragraphs to which I referred and it is apparent that the intention of the

law is to provide a witness with an environment in which he can freely deal with matters relevant to the case in which he is a witness. To the extent that he is asked questions in relation to other offences which might incriminate him in those offences, these should not be permitted in Court.

The underlying unfairness to a witness of allowing incriminating questions is also apparent from the reasoning set out in *State v Lungile & Another* 1999 (2) SACR 597 (SCA) at paragraph 24.

The privilege which the witness has is not limited to criminal or civil trial proceedings. See *Ferreira v Levin N O & Others* 1996 (1) SA 984 (CC) at paragraph 96.

The laying of a charge has two results in relation to the witness.

1. The witness may fear that his evidence will incriminate him in the charge.
2. The witness may be tempted to ignore the truth and modify the answers which he gives if he is forced to reply so as to produce a set of facts which exculpates him.

In consequence the witness may be perceived wrongly to be unreliable in relation to other issues due to his reaction set out in (2) supra.

A witness is statutorily entitled in the ordinary course to protection from being forced to incriminate himself. The reason is to enable the witness to feel free and give appropriate responses. It is intimidatory to require a witness to incriminate himself as he will find himself caught in a cleft stick comprising the threat of the consequences of a refusal to answer and the temptation to modify his responses.

The laying of a charge of perjury by accused 1 in respect of a perjury allegedly committed during the course of the witness evidence accordingly impacts on the way that witness will react in the witness box and is an intimidatory act.

The issue remains however whether or not the section protects a witness from incriminating himself in an offence he has committed while giving evidence at the trail.

There is every reason why, in the normal course the rule which is contained within the Statute should exist and should be enforced strictly in its terms. This is not to say that the section must not be interpreted to mean what it properly does mean.

When a witness gives evidence in a Court of law, he is naturally exposed to cross-examination. One of the purposes of examination is to establish the inaccuracy of the evidence which the witness is giving. This function of cross-examination is well-known. It must have been apparent to the minds of the legislature at the time that Section 203 was enacted, that a witness in criminal proceedings could readily be exposed to making statements (assuming he was being dishonest) which conflicted with the evidence given during the trial and also extra-curially.

It happens every day in Court that affidavits made by witnesses are produced to them and that they are asked questions in relation to what they have said in the affidavits. It happens that in response to such questioning those witnesses, who are under oath in the witness box, claim the existence of facts which are different to the facts which appear in the earlier affidavits.

The existence of such differences could well expose the witness to a criminal charge as two different statements have been made under oath by the witness. No Court of whom I am aware has ever granted a witness a right to refuse to answer in these circumstances.

The fact that the witness is exposed to a risk of self-incrimination in the current circumstances, does not grant him a right of refusal to answer the question. If it were so, all witnesses in all cases, could refuse to answer any questions by reason of the potential self-incrimination.

This would obviously result in a failure of the system. Similarly, it would be a simple matter for an accused who wishes a matter not to proceed, to lodge a complaint against a witness by claiming that he is guilty of an offence and rely on the witness to refuse to answer further questions, thereby stalling the further conduct of the trial.

This may appear on the face of it to be a reduction of the issue to the absurd, it nonetheless in my view exposes the absurdity of an interpretation of the words “expose him to a criminal charge” contained in Section 203 to mean any and every charge.

The question to be answered in the present matter is whether or not those words include a criminal charge arising out of the criminal conduct of the witness (perjury) during his evidence at the trial or whether the words relate to other criminal charges.

It seems to be that the words “criminal charge” do not relate to charges which could follow in consequence of the conduct of the witness during his evidence at the hearing.

The previous affidavits filed in the matter which form the subject

matter of the charge of accused 1, together with the evidence in the present hearing of perjury, are sufficiently connected in my view with this matter and with this witness' evidence at this hearing for them all to form part of his giving of evidence in this hearing.

It is accordingly my view that the fact that a perjury charge has been laid against the witness in respect of the evidence which he has given at this hearing, does not constitute a criminal charge as contemplated by Section 203 of the CPA. This being so, in my view, the witness is obliged to answer the questions which are put to him notwithstanding that there is in existence a perjury charge and that on the face of it, his answers may incriminate him in such charge.

It is accordingly my view, the witness being both competent and compellable that he answers such questions as are put to him in cross-examination concerning his evidence in this Court. The refusal to give evidence further, which has been raised by the witness, is accordingly unlawful. The witness will again face questioning in relation to his conduct in the witness box and is obliged to answer such questions.

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Counsel for The State	:	Adv. Mashiane
Counsel for Accused 1 and 2	:	Adv. A Van Den Heever
Counsel for Accused 3, 4, 5, and 6	:	Adv. Spanenberg
Date of hearing	**:**	23 October 2014
Date of judgment	:	24 October 2014.