IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS26/2014

DATE: 2015/06/15

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: In this matter there is a dispute as to whether or not a particular question can be asked of the witness.

During the questioning of Captain Ramuhala by accused 1's counsel, accused 1's counsel put to him, that during March to April 2013 accused 3 had arranged a meeting between accused 1 and Colonel Ximba. The

response of Captain Ramuhala, was that he did not know whether or not this had taken place. It was then put to him that this had in fact happened, and that during that period accused 3 had arranged a meeting between accused and Ximba. The counsel for accused 3 did not put anything to Captain Ramuhala, and the matter was left at that during the course of Captain Ramuhala's evidence.

Accused 1 came to give evidence and the state sought to cross examine on the issue of what had been put. There was a dispute between counsel for accused 1 and counsel for the state, as to whether or not this had in fact been put. This resulted in the question being put on hold during the course of the cross examination. Thereafter the issue was not dealt with again and the evidence of accused 1 was finalised.

Currently accused 3 is giving evidence. During the course of accused 3's evidence, the question was put by counsel for the state, as to why his counsel had not put it to Captain Ramuhala that what had been put to Captain Ramuhala by counsel for accused 1, was not correct. This was put to the witness as the witness disputed that he had arranged such a meeting. The purpose of the question was to enable a response to be given which the counsel for the state, hoped would enable him to argue by reason of inference that the current statement of the witness was a recent fabrication.

I stated to counsel for the state that it appeared to me that it was impermissible for this question to be asked. Counsel for accused 3 then made submissions that it was impermissible for the question to be asked. Those submissions hinge on three primary bases. The first is that the

response of Captain Ramuhala is not admissible evidence before this court against accused 3. The second is that it would not have made any difference to his perspective and his answer to the question to put a different version to him (one of the primary reasons why a version is put). The third is that counsel had in any event believed that it was not his duty to put anything to the witness and hence the inference could not be drawn.

I heard argument from the state and the state was unable to furnish me with any authority on the matter, save the general principles set out in the matter of *S v Boesak*, 2000 (1) SACR 633 (SCA). In that matter the principle is stated that a version should be put to a witness and that it should be explicit insofar as the evidence which is given by that witness differs from the evidence which the accused in due course proposes giving. So it was submitted, absent a version being put, the state is entitled to assume that the evidence which had been led is correct and is entitled then to advance its case and cross examine further witnesses on that basis.

It appears to me that the correct starting point is to consider what the value of the evidence given by the witness, is. Captain Ramuhala had nothing to say about the issue. He was not a party to the arrangement of the issue, or in any way privy to how the meeting which was dealt with came to be arranged. This was his evidence. That is the first matter. This leads to the inevitable conclusion that whatever is put to him concerning the meeting, would elicit no further response than that he did not know.

The second matter to be considered is whether there is any value to accused 3 putting a version in relation to the evidence which is not admissible against him. The Criminal Procedure Act excludes extra curial statements made by one accused as evidence against another accused. It seems to me that what is put by the counsel of one accused is no more than an extra curial statement of what that particular accused might, in due course, say if he is put into the witness box. What is put does not constitute evidence against accused 3. This being so, there was no evidence as to who had arranged a meeting, between whom and when and the fact that accused 1's counsel put anything about such a meeting, does not translate what is put into being evidence, before me. This being so, the principles set out in *Boesak*'s case, which deals with evidence before the court and the attitude and obligations of counsel towards such evidence, is not of application.

There in any event simply was no admissible evidence before me relating to the meeting, who arranged it, how it was arranged for as the witness knew nothing about the event. Counsel's statement does not amount to evidence. Hence there remained no evidence, notwithstanding what counsel said.

This being so, there was no obligation which arose on the part of counsel for accused 3, to put anything to the witness. In my view, he properly did not put anything to the witness and was not required to do so.

This being so, no inference can be drawn as the Prosecutor would hope from an answer to the question, that by reason of the statement not having been put by counsel, it was a recent fabrication. This being so, the

question is irrelevant.

There is a further reason why, in the particular facts before me, the question should not currently be allowed. Although it did not appear at the time that the matter was originally argued, that counsel had deliberately not done anything, it being his view that he was not obliged to do something, it came out during the argument that this, in fact, was the position of counsel. This being so, the inference cannot be drawn that there is a new version, as there is a break in the chain, namely the intervention of counsel who did not put a version.

10 The state submitted that it was not proper for me to consider this fact. In my view, it is proper and relevant as an additional feature of why the question should not currently be allowed.

In my view, the question should be disallowed and I disallow it.

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Counsel for The State:	**Adv. L. Mashiane**
Attorneys for Accused 1 and 2:	**BDK Attorneys**
Counsel for Accused 1 and 2:	**Adv. A van den Heerver**
Attorneys for Accused 3,4,5 and 6	**Spangenberg Attorneys**
Counsel for Accused 3,4,5, and 6	**Adv. Spangenberg**
Date of Hearing:	**15 June 2015**
Date of Judgment:	**15 June 2015**