IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS26/2014

DATE: 2015-04-14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
3.2.2016
DATE SIGNATURE

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
(Application to recall accused 2 during the trial-within-a-trial)

LAMONT, J: This court is in the process of conducting a procedure known as a trial-within-a-trial to determine the admissibility of a statement made by accused 2. Accused 2 is in the process of presenting his case to

the court.

During that process accused 2 has called a number of witnesses including himself. Accused 2 gave evidence previously and finished giving evidence after being cross examined and re-examined and returned to the dock.

Accused 2 indicated that during the course of his evidence, on that day when he had made the statement, the admissibility of which is in issue before me, he had prior to making the statement, been to see two other members of the South African Police Force and that after he had had discussions with them, he had not made a statement but had later made a statement to Captain Gininda.

One of the officers to whom he was presented as a person willing and able to make a statement may, according to his evidence and the evidence of those whom he called, have been a person who telephoned his family and provided the family with information concerning him. The other person to whom he was presented as a person willing and able to make a statement, was not identified. According to the evidence of accused 2, at that point in time, was not able to identify him.

During the course of the proceedings yesterday, accused 2 saw at court one of the officers to whom he had been presented. He is currently in a position to identify that officer and provide his name to the court. In order to enable that process to take place, accused 2 seeks leave that he be recalled as a witness in his own case.

The basis for the recall is, so it was submitted, that the evidence is

new, that it is not evidence which is being led to relieve the pinch of the shoe where it is pinching, and that it is only a procedural issue which is preventing accused 2 from producing evidence which is relevant to flesh out and provide substance to the facts which he has provided, concerning his presentment to that police officer. Accused 2 submits that there is no prejudice as this is purely a procedural issue, that at best for The State, he requires the leave of this court to be recalled as a witness.

The State has indicated that it opposes the application. The application is opposed on a number of grounds, concerning whether or not the evidence is truly new, whether or not the evidence is being delivered to alleviate the pinch of the shoe, on the basis that The State is prejudiced, as well as the fact that the person who accused 2 will identify if called, could himself be called to provide the evidence.

It is my view that the evidence is new as to the identity of the person to whom accused 2 was presented. It is also my view that it is relevant and germane to the issues before me, inasmuch as had the accused been presented to a police officer and declined to make a statement, it would impact on the evidence which he has given, that when he was later presented, he originally declined to make a statement, but later succumbed in consequence of pressure and assault.

It seems to me that the only prejudice which there can be to the State, is that the order which is customarily followed in the production of evidence, is not to be followed. There is a time honoured procedure in the way evidence is presented to a court to ensure the good orderly delivery

of facts and information to the court, so as to enable expeditious decisions of trials, to take place.

The question is, firstly, whether recall is prohibited by reason of the witness already having been called and having:-

led his evidence in chief,

been cross examined and

been re-examined.

The provisions of the Criminal Procedure Act, 51 of 1977 ("the CPA") deals with the matter in Sections 166, 167 and 186.

"166 Cross-examination and re-examination of witnesses

(1) 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 witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.

(2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings".

Section 166 of the CPA deals with cross examination and re-examination of witnesses. That section does not of its own prohibit the right of recall of a previous witness.

Section 167 of the CPA, which appears to me to be the relevant section, reads as follows:

> "167. The court may examine a witness or a person in attendance. The court may at any stage during criminal procedures examine any person other than an accused who has been subpoenaed to attend such proceedings, or who is in attendance at such proceedings and may recall or re-examine any person, including an accused already examined at the proceedings, and the court shall examine or recall and re-examine the person concerned, if there is evidence that appears to the court essential to the just decision of the case. "

Section 167 provides the authority for a court to re-examine any person including an accused who has already been examined and if the recall is essential to the just decision of the case the court is obliged to recall the accused. The issue, before me is whether or not an accused can out of sequence tender himself as a witness and apply to the court to be recalled. It does not matter how it is brought to the court's attention that the evidence is

necessary. Hence an accused can bring the application. As to the witness itself the rule is that evidence is given before court in an orderly fashion and that generally speaking there should be no deviation from that rule. Occasions arise when new evidence becomes available which is relevant and which should be led.

The Section determines that if evidence is essential to a just decision, then, notwithstanding that it is proposed to adduce it out of sequence it shall be allowed to be led. In determining whether or not the evidence is essential to a just decision the court must
10 necessary consider the value of the evidence, its reliability, whether it could have been created to meet a problem facing the accused, why it is not being led in sequence, whether it is truly new. This list is not intended to be exhaustive. It deals with the issues facing this court in deciding this application.

The rule simply provides that procedural rules must yield in the interest of justice and the need for a just decision of cases. The court must make appropriate rulings *mero notu* or on the application of a party.

Section 186 provides for the subpoena of witnesses by a Judge or
20 the Presiding Officer. That issue concerns the mechanism by which the attendance of the witness is achieved. That is not the issue which I am required to decide as I am not calling the witness.

If the just deciding of the case requires a witness to be recalled, whether that witness has been called or not, and whether or not there is

an application, such witness shall be called by the court.

It appears to me that accused 2 is entitled to give further evidence if he wishes to give evidence. The evidence is new. There is no impact upon the procedure prejudicing any person. There is no inherent likelihood that the evidence which the accused will give, has been tampered with by the accused to make it appear more credible than it is.

In the circumstances I grant the application of accused 2 to give such evidence as he may wish.

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