

SOUTH AFRICA / JUDGMENT

Mitchell and Others v S (CC 04/2018) [2023] ZAECQBHC 13 (10 March 2023)

[2023] ZAECQBHC 13

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M Makaula

CASE / FILE NUMBER

CC 04/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GQEBERHA

Case

No: CC 04/2018

In

the matter between:

JERMAINE

MITCHELL

First Applicant (Accused 1)

GLYNN

SIMIONE CARELSE

Second Applicant (Accused 2)

WENDELL

JADE PETERSON

Third Applicant (Accused 4)

ROBIN

TAYLOR

Fourth Applicant (Accused 5)

and

THE

STATE

Respondent

JUDGMENT

MAKAULA J:

[1] These applications are in terms of section 317(1) of the Criminal Procedure Act 51 of 1977 for special entries to be made on the record of the proceedings as irregularities and illegalities had allegedly occurred.

[2] In the first application the accused persons (the plaintiffs) sought the following to be entered into the record:

“1. The Applicant’s stood trial in the Eastern Cape Local Division of the High Court on charges of Murder.

2. The only direct witness implicating the Applicants was Morne Nel, a 204 witness.

3. The State by way of which included both prosecutions, Advocate Gorbedan, the Deputy Director of National Prosecutions, and the Investigating Officer had more than one interview with the 204 witness, prior to the commencement of the trial, recorded on video.

4. There existed no privilege that the State could claim, over the audio and video footage of these interviews.

5. The existence of the interview and the video footage of the interview were never brought to the attention of the Defence nor was it made available to the Defence in preparation for trial until the existence thereof was volunteered by the 204 witness during cross examination.
(sic)

[3] In the second application they sought the following to be entered into the record as constituting an irregularity or illegality.

1. Adv MM Sandan was the complainant in a case of Conspiracy to commit Murder against Jermaine Mitchell, Glynn Simone Carelse and Wendell Jade Peterson.

2. Adv MM Sandan’s brother was the second complainant in the same case. He was also a complainant on a charge of Conspiracy to commit Murder.

3. Adv MM Sandan’s brother was placed under witness protection and Adv MM Sandan was given 24h00 personal protection as a result of the case.

4. The alleged offences were committed between the 6th and 12th of February 2018.

5. Adv MM Sandan was well aware of the charges preferred as early as February 2018.

6. The same accused persons, i.e. Jermaine Mitchell, Glynn Simone Carelse and Wendell Jade Petersen were also accused persons on charges of Murder in a separate case to be tried in High Court.

7. The case in High Court went on trial on the 23rd day of April 2018.
8. Adv MM Sandan led the prosecution in the High Court against the accused well knowing that he was a complainant against them in the case of Conspiracy at the same time. (sic)
- [4] The applications are opposed by the respondent (the State).
- [5] The crux of the applications, based on the founding affidavits is that the State withheld crucial evidence to wit two DVDs where Mr Nel (section 204 witness) was interviewed by the respondent's persons including Mr Sandan, the prosecutor in this matter. The applicants aver that had this information not been unearthed under cross-examination, it would not have been volunteered by the respondents. The failure to disclose the DVDs, goes to the credibility of Mr Nel, and was prejudicial to the applicants for the following reasons:

“5.1 In both these DVD’s Nykie made it very clear that he did not want to testify in this matter;

5.2 He made it unequivocally clear that none of us and / or our families had threatened him and / or his family (although the video shows a desperate attempt by some of those present to pressurise him into claiming that he was somehow bribed or threatened);

5.3 The first video ended abruptly and there is no explanation from the State as to why it suddenly ended, but when it ended, however Nykie was still in the position that he did not want to testify, this despite pressure from some of those present, which included both prosecutors, Advocate Gorbedan, the Deputy Director of National Prosecutions, and the Investigating Officer;

...

7.4 The second DVD appears to begin out of nowhere and it too ends with no indication whatsoever that Nykie had agreed that he would testify. (It therefore becomes worrisome as to how it came about that he eventually decided to testify, since this Court has no idea what happened between the time the second DVD ended and the “decision” that Nykie took to come and testify for the State, the court is effectively blindfolded)”. (sic)

- [6] The applicants in a nutshell argue that Mr Sandan and others trampled on the constitutional rights of Mr Nel by compelling him to testify without the presence of his erstwhile attorney Mr van der Spuy. Furthermore, the attack on the video is that it shows at some point that Mr Nel was threatened by one of them by telling him that if he refused to testify, he would be returned to the “lion’s den” i.e. St Albans prison where the rest of the accused were

detained. His co-accused would kill him if they got to know that he attempted to be a State witness. The resultant

prejudice suffered by the applicants is that they were denied the opportunity to “call a trial-within-trial” in order to determine the constitutionality of the evidence of Mr Nel in this regard.

- [7] The applicants further sought an order directing that:

7.1 Advocate MM Sandan;

7.2 Constable Warrant Hanse;

7.3 Mr Nel; and

7.4 Advocate BS Madolo, the Director of Public Prosecution in the Eastern Cape appear and give oral evidence before this court subject to cross-examination by the applicants.

[8] The application is opposed by the State primarily on the grounds that:

- (a) There is no other recording which was made other than the one given to the applicants;
- (b) the applicants were afforded ample time to view the video, consult on it and decide what action to take;
- (c) Mr Nel and other State witnesses were extensively cross-examined on the issues raised in the video and in this application;
- (d) that the video has no bearing on the case itself;
- (e) that there is no indication in the founding affidavit which evidence is sought from each witness;
- (f) that Mr Nel and Colonel De Bruin testified and were extensively cross-examined on the issue and; lastly
- (g) all the other witnesses sought, were available even during the stage when the video was referred to in evidence.

A.

Analysis:

[9] Section 317(1) of the CPA reads:

“If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court”.

[10] Mr Griebenow, addressed me at length about the witnesses he had asked that they be subpoenaed. He implored the court to call Mr Sandan, Ms Landman, Advocate Madolo, Mr Nel and Colonel De Bruin, the Investigating Officer and Constable Hanse as witnesses for the court. He placed reliance for such an application on *The State v Moodie* 1961(4) SA 114

(TPD).

- [11] Mr Stander, for the State opposed the application on various grounds. He argued that the founding affidavit is silent on what evidence is sought from the witnesses and what contributions they are expected to make in the enhancement of what is sought by the applicants.
- [12] I should mention upfront that I convicted the applicants on 8 June
2021. The application for a special entry was issued on 6 June 2022, exactly a year and 2 days later. No application for condonation for non-compliance with the 14 day period referred to the section 317 was made.
- [13] Other than what is stated in the founding affidavit, there is no evidence of an irregularity having occurred when the video surfaced. The State avers that it did not rely on the video to prove its case against the applicants. The issues raised in paragraphs 2 and 3 above were canvassed by the late Mr Price, who appeared on the applicant's behalf, and I dealt with them extensively in my judgment on the merits.
- [14] The applicants correctly conceded in argument that section 317(1) does not provide for the kind of application they brought, and the order sought[1] The concession is not unfounded. All that section 317(1) requires is that an accused person, if he or she is of the view that the proceedings are irregular or not according to Law, either during his or her trial or within 14 days after his or her conviction, on good cause shown be allowed to apply for a special entry to be made to such record such irregularity.
- [15] I convicted the accused on 8 June 2021 and the application for the special entry was made a year and 2 days later with no application for condonation as aforesaid. The application is fatal for lack of an application to condone its late filing.
- [16] Apart from what is contained in the founding affidavit and the grounds of irregularity relied upon, the applicants requested me to subpoena the witnesses referred to above. On the day of the hearing, the applicants applied that I should call the witnesses and lead them, so that they can be in a position to cross-examine them to prove the grounds of irregularities relied upon by them. I refused to call them because there was no basis upon which I should call them on the papers.
- [17] The facts of this matter are distinguishable from the Moodie matter. In that matter the court upon getting to hear that the deputy-sheriff was present when the jurymen were deliberating

contrary to the section 143 of the Criminal Procedure Act 56 of 1955 which required, in short, that the jury should be in a separate room, by themselves when they do their deliberations as to the guilt or otherwise of an accused. Affidavits were obtained from the jurymen and the deputy-sheriff as to what happened in the jury room. The court found that there was no need to call the jury to give viva voce evidence. The deputy-sheriff was called to testify. The court reasoned as follows:

“In the circumstances the point of substance, as I see it, that emerges from the accused’s complainant is one factor, namely, that the deputy-sheriff was in the jury room. That was clearly an irregularity of substance although I am satisfied the deputy-sheriff

acted in good faith. The jurymen in their affidavits have said that his presence did not worry them, but that seems to me not a matter for me to decide. As I see my duty it is simply to determine whether there was an irregularity, and if there was, to make a special entry to that effect. I must leave it to the Appeal Court to decide whether prejudice resulted from it or not”.

[18] The jurymen and the deputy sheriff, who were the subject of the inquiry, unlike in this matter filed affidavits upon which the court could rely to find if there was an irregularity or even a need to call them. In casu, it is only the applicants who filed affidavits upon which the premise that there was an irregularity is alleged. Based on the evidence contained therein, I find no reason to exercise the discretion vested in me by section 186 to call them. There are no affidavits filed by the persons I was asked to call as the court’s witnesses.

[19] Furthermore, the issues I am called upon to make a special entry about, were ventilated and thoroughly dealt with during trial by applicant’s counsel. They form part of the record and I dealt with them extensively in my judgment on the merits. They form part of the record and the applicant’s are free to appeal against my decision in respect thereof. For these reasons, I am of the view that there is no merit in the application and it stands to be dismissed.

[20] Consequently, the application is dismissed.

M MAKAULA

Judge of the High Court

Appearances:

For the Applicants: Mr A Griebenow Instructed by: Griebenow Attorneys Gqeberha For the Respondent: Adv M Stander Senior State Advocate Office of the Deputy Director of Public Prosecution, Gqeberha Date heard: 7 February 2023 Date delivered 10 March 2023

[1] A court only subpoena witnesses when it acts in terms of section 186 of the CPA.

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