

SOUTH AFRICA / JUDGMENT

Moses v S (CA & R 42/22) [2023] ZANCHC 55 (8 September 2023)

[2023] ZANCHC 55

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane, Nxumalo

CASE / FILE NUMBER

CA & R 42/22

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTHERN CAPE
DIVISION, KIMBERLEY)

CASE NO:	CA & R 42/22
DATE HEARD:	08 MAY 2023 DATE
DELIVERED:	08 SEPTEMBER 2023
In the matter between:	JOHANNES MOSES Appellant and THE STATE Respondent
Coram:	Phatshoane DJP et Nxumalo J

JUDGMENT

Nxumalo J

1. The appellant was convicted in the Northern Cape Regional Court, Kimberley, on one count of rape, read with the provisions of Section 51 (1) of CRIMINAL LAW AMENDMENT ACT 105 of 1997. He was subsequently sentenced to 18 years' imprisonment. He is before us on appeal against his conviction with leave of the trial Court.
2. It was submitted for the appellant that the complainant was a single witness whose evidence was not clear and satisfactory in all material respect. It was further argued for him that the Magistrate erred in placing too much reliance on the hearsay evidence of the complainant's father. More fundamentally, it was argued that the trial Court erred in curtailing the cross-examination of the complainant on a prior statement she made to the police without affording the state and the defence the opportunity to address the Court on this issue. In so ruling, it was contended, the trial Court accepted, without more, the complainant's version that the said statement was not read to her and that she made it unaccompanied by a guardian. It was further submitted that the complainant's sister directly contradicted the complainant's version by stating that she was with the complainant when she made the impugned statement. This contradiction, it was argued, is reason enough why the trial Court ought not to have prematurely accepted the complainant's testimony without the benefit of having heard other evidence. It was further contended that the trial Court's decision to prevent the appellant's attorney to cross-examine the complainant on her prior statement, amounted to a gross irregularity which infringed the appellant's constitutional right to challenge evidence.
3. The respondent conceded that the disallowance of the complainant's cross-examination amounted to gross irregularity justifying the setting aside of the conviction and sentence. Mr Makhaga, for the respondent, submitted that in this case the irregularity was of a worst kind because the appellant was not even allowed to show the complainant the statement despite the fact that the state had no objection.
4. A brief background is necessary. The 13-year old complainant testified that on the night of 26 January 2018, whilst in the room in which the light was still on, she was woken up by someone who removed her underwear. The assailant opened her legs, penetrated her vagina with his penis and had intercourse with her. In the course of this, she noticed that the appellant was the perpetrator. Her father entered the room and interrupted the appellant by grabbing and pushing him aside. The appellant decamped and the police were summoned. During the cross-examination of the complainant, the appellant's counsel

requested that the statement that the complainant made to the police be handed in evidence as he was still laying the basis for its admission. The state did not object. What follows is what is reflected on record:

“COURT:

Are you asking the Court if you can show her [the] the document?

MR JORDAAN: Indeed, Your Worship. Please, Your Worship. I understand that it is a bit of a... [interjection].

Court: Mr Prosecutor?

PROSECUTOR: No objection to that.

COURT:

Mr. Jordaan, kindly explain to the Court that you wish to...[interjection].

MR. JORDAAN: Your Worship, my apologies, Your Worship. Your Worship, just before adjournment, Your Worship, I was in the process of laying the basis for the statement which the complainant gave to the police official, Your Worship. Hence the questions, Your Worship. So just before I do cross-examine on the statement, I just wish to show here the statements.

COURT:

Alright, Mr. Jordaan. How is that going to help you, because even if I do allow the statement to get confirmed, that her signature, by the witness, the witness has already stated that the statement was not read back to her.

MR. JORDAAN: It was not ...[interjection].

COURT:

So the Court will not allow any cross-examination on that statement as it was not read back to her.

MR. JORDAAN: As the Court pleases...[interjection]”

5. In its judgment the trial Court recorded the following on this aspect:

“[The complainant] stated that she was alone with the police officials when she told them what happened. Her sister was not with her at any stage when she gave her statement as the police official said that they only wanted her. They wrote down what she told them, but they did not read it back to her. She stated that her sister would be lying if her sister said she was present with the complainant when the complainant made her statement.

She remembered that she wrote her name on the paper that they wrote on and she confirmed that she was happy with the story that she told them and that she put her name on it. The defence wanted to hand the statement to the witness but the Court refused to allow the defence to lead the witness on the statement as a proper basis had not been laid. The complainant’s evidence was that it had not been read back to her. Nor on the evidence before the Court was the guardian of the minor present when the statement of the complainant was taken.”

6. As I see it, the question before us in this appeal lies within a narrow scope. It should be considered whether the curtailment of the appellant's cross-examination on the statement the complainant made to the police resulted in failure of justice of a degree which vitiated the proceedings. Section 35(3)(i) of the Constitution affords every accused person a right to fair trial which includes the right to adduce and challenge evidence. An accused person also has a right to cross-examine any witness called by the prosecution.[1] The well-established procedure in respect of cross-examination of a witness on a previous written statement was articulated in *S v Govender and Others*[2] as follows:

"In the present matter the cross-examination of the State witness, in so far as it was directed at the contents of their police statements,

was done properly. In each instance the witness was asked to confirm that he had made a statement to the police. The witness was then asked whether that which he told the police was written down; whether it was read back to him; whether he was asked to confirm the correctness thereof and whether, having done so, he was asked to sign... The witness was then asked to identify, with reference to his signature ... that the statement in question was in fact the statement he made. Once confirmation of this had been obtained, counsel proceeded to go through the whole statement with the witness."

7. In *S v Heslop*[3] the Supreme Court of Appeal held that disallowing proper cross-examination on the witness's previous inconsistent statement amounted to a fundamental irregularity which justified the appeal to succeed on that ground alone. In *S v Gama*[4] the following was said:

"The failure to allow the cross-examination of what purported to be the original statement of the complainant, alternatively the failure to make available the original statement of the complainant to the appellant so that the complainant could be cross-examined on that statement, constituted an irregularity in the proceedings. This being the case, such failure to deliver the statement, and the ruling to disallow the cross-examination on the two statements, vitiated the proceedings, unless it is clear that no prejudice was caused to the appellant by the irregular exclusion of the previous statement made by the complainant. See: R v Ntshangela 1961

- (4) SA 592 (A) at 599 E-H.

The complainant was the primary witness on whose testimony the Appellant was convicted. She was the only witness who testified to the aggravating circumstances alleged in the charge sheet – namely the alleged use of a knife in the robbery. Cross-examination on her original statement may have assisted the Appellant to challenge her credibility and, in the absence of such cross-examination being allowed, it is not possible to assess where that cross-examination would have led." (With emphasis)

8. Significantly, in *Barends v S*,[5] this Court held as follows, per Kgomo JP:

“The Magistrate should have asked Mr Kotze for his authority in bringing the application. What should have happened is that Mr Kotze should have cross-examined Fish on the discrepancy and leave it to the state to call the police officer who obtained the statement and his interpreter. If the prosecutor was not disposed to doing so the defence could call them when it presents its case. What has happened is that the Magistrate has unwittingly ruled on the credibility of Mr Fish (by believing the police witnesses and disbelieving Fish) before he completed his evidence because he allowed Fish to be cross-examined after the ruling. The credibility finding also came before the accused testified and therefore before all the evidence in the case was adduced or

presented. This was highly irregular and the magistrate placed himself in an invidious position when it came to the consideration of the conspectus of the entire case.” (My emphasis)

9. Seminally, in *S v Nedzamba*[6] where the appellant had been wrongfully prevented from cross-examining the complainant fully, it was held that this militated against the appellant’s right to a fair trial, in particular, the right to adduce and challenge evidence. Further, that on its own, this was a sufficient ground to set aside a conviction. Remarking on the nature of prejudice resulting from the irregularities in the case, the Supreme Court of Appeal, held as follows:

“The irregularities referred to above, singularly or cumulatively, are of such a nature that they have resulted in justice not having been done. Put differently, the appellant did not have a fair trial...The irregularities render the convictions and sentences liable to be set aside. The consequence is that the appellant has already been in prison for more than four years without a fair trial to finality. Equally, for the child complainant there has been no closure. In this instance the administration of justice appears to have failed them both.”[7]

10. Clearly, in this case, the defence intended to cross-examine the complainant on her previous written statement to the police but was abruptly barred by the learned Magistrate from pursuing this course. The learned Magistrate held an incorrect view that immediately when the complainant intimated that the statement was not read back to her, that was the end of the matter. An irregularity occurs ‘whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted’.[8] The appellant’s fair trial rights were infringed when his cross-examination of the complainant was stopped in its tracks.

I am of the opinion that this irregularity, singularly, is of such a nature that it has resulted in failure of justice and consequently

vitiating the proceedings. It follows that the conviction and sentence ought to be set aside.

11. In light of the conclusion I reached, I do not deem it necessary to determine the remainder of the issues raised in this appeal on the merits. It was submitted for the respondent that no order, barring the prosecution from resorting to the provisions of Section 324(c) read with Section 313 of the CRIMINAL PROCEDURE ACT 51 of 1977 (“the CPA”), ought to issue regard being had to the seriousness of the offence and its prevalence. Section 324 (c) of the CPA, stipulates as follows:

“Whenever a conviction and sentence are set aside by the Court of appeal on the ground- there has been any other technical irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.”

Whereas Section 313 of CPA provides that:

“The provisions of Section 324 shall mutatis mutandis apply with reference to any conviction and sentence of a lower Court that are set aside on appeal or review on any ground referred to in that Section.”

12. In *Director of Public Prosecutions, Transvaal v Mtshweni*,^[9] the Court held that the provisions of the Act that permit the institution of criminal proceedings against an accused person in terms of ss

322 and 324 are premised on the basis that the trial in which the accused was acquitted was vitiated by an irregularity such that the acquittal was not one on the merits of the charge. Resultantly, where an acquittal is based on the wrong answer to a legal question a retrial does not in fact amount to double jeopardy.

13. In *S v Mdyogolo*^[10] the Court held that the offence was a severe one and it would not be in the interest of justice for the appellant to go free if he is in fact guilty, merely because the Magistrate did not conduct a fair trial. Therefore, the Court ordered that the appellant be tried afresh before another Magistrate. In *S v Jolingana*^[11] the Court, after holding that the appellant was unfairly prevented from exercising his right to cross-examination, set aside the

conviction and sentence for murder and ordered that the matter be remitted to the Court a quo to start de novo. In *S v La Kay*^[12] it was said to be undesirable for an Appellate Court to order a trial de novo because it was the duty of the Director of Public

Prosecutions to decide whether prosecution must be instituted again or not.

14. In my view, Section 324(c) read with Section 313 of the CPA makes it plain what order ought to issue where a conviction and sentence are set aside by the Court of appeal due to technical irregularity or defect in the proceedings. We propose to make an order on terms as set out in the CPA. In the result:

ORDER:

1. The conviction and sentence of the appellant is set aside.
2. The proceedings in respect of the same offences of which the appellant was convicted may again be instituted on the same charges, suitably amended if necessary, as if the appellant had not previously been arraigned, tried and convicted: provided that no Magistrate before whom the original trial took place shall take part in the proceedings.

JUDGE APS NXUMALO

HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION

KIMBERLEY

Phatshoane DJP concur in the Judgment of Nxumalo J.

Counsel for the Appellant:

MR H STEYNBERG Instructed by:

Legal Aid South Africa, Kimberley Counsel for the Respondent: ADV R R MAKHAGA Instructed by:

Office of the Director of Public Prosecutions

[1] Section 166(1) of the CRIMINAL PROCEDURE ACT 51 of 1977 (the CPA)

[2] 2006

(1) SACR 322 (E)

[3] 2007

(4) SA 38 (SCA) para 12 at 46D - G

[4] 2016

(2) SACR 530 (GJ) paras 12-13

[5] 2017

(1) SACR 193 (NCK) para 37

[6] 2013

(2) SACR 333 (SCA) at para 33-34

[7] Para 34

[8] S v Xaba 1983 (3) SA 717 (A) at 728D

[9] 2007

(2) SACR 217 (SCA) at 29

[10] 2006

(1) SACR 257 (EC)

[11] 2016

(2) SACR 404 (ECB)

[12] 1998

(1) SACR 91 (C).

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