

SOUTH AFRICA / JUDGMENT

Sefatsa and Others v Attorney-General, Transvaal (304/88) [1988] ZASCA 143; [1989] 4 All SA 336 (AD) (23 November 1988)

[1988] ZASCA 143

COURT

Supreme Court of Appeal

BEFORE

Rabie, Corbett, Joubert, Hoexter, Van Heerden

CASE / FILE NUMBER

304/88

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION In the matter between: MOJALEFA REGINALD SEFATSA First
Petitioner REID MALEBO MOKOENA Second Petitioner OUPA MOSES DINISO Third
Petitioner THERESA RAMASHAMOLA Fourth Petitioner DUMA JOSHUA KHUMALO Fifth
Petitioner FRANCIS DON MOKGESI Sixth Petitioner and

ATTORNEY-GENERAL, TRANSVAAL First Respondent MINISTER OF JUSTICE Second Respondent

Coram: RABIE ACJ, CORBETT, JOUBERT, HOEXTER et

VAN HEERDEN JJA

Heard: Delivered:

7 September 1988. 23 November 1988 JUDGMENT RABIE ACJ: This is an application for leave to appeal against the dismissal by Human AJ, sitting in the Transvaal Provincial Division, of an application to reopen a criminal trial and to make a special entry on the record of the case. The facts relating to the matter are set out below.

The six petitioners were on 10 December 1985 found guilty by a court consisting of Human AJ and two assessors of the murder on 3 September 1984 of Mr Kuzwayo Jacob Dlamini, the deputy mayor of the town council of Lekoa. No extenuating circumstances were found to exist in the case of any of the petitioners - who were respectively accused nos. 1, 2, 3, 4, 7 and 8 at the trial - and they were accordingly all sentenced to death. The petitioners were also convicted on a charge of subversion in contravention of sec. 54(2) of the Internal Security Act, No. 74 of 1982. They were all sentenced to 8 years' imprisonment on this count. Thereupon they appealed, with the leave of the trial Judge, to the Appellate Division against their convictions and sentences on both the aforesaid counts. The appeals were heard by this Court on 2 November 1987 and were

dismissed in toto on

1 December 1987: see *S v Safatsa and Others* 1988(1) SA 868

(A).

On 16 March 1988 an application was brought before

Human AJ for a stay of the execution of the petitioners, which had been set for 18 March 1988, pending the

determination of an application for the reopening of the

trial. The application was granted subject to the proviso

that the application be brought by not later than 18 April

1988, failing which the stay would lapse. The application

to reopen the trial was launched by a notice of motion dated

15 April 1988, and the relief prayed for was an order that

the trial of the petitioners be reopened -

"(a) for the further cross-examination of the witness Joseph Motsumi Manete;

4

(b) for the further cross-examination of any

other State or defence witness arising from and in the light of the further cross-examination of Manete;

(c) for the hearing of any other or further evidence which the Court, in the exercise of its discretion, may require to be called;

(d) to re-appraise in the light of (a), (b) and (c) above, the convictions and sentences of all the applicants".

Manete (referred to in paragraph (a) above), of whom more will be said later in the judgment, gave evidence for the State at the aforesaid trial and implicated the fifth and sixth petitioners in the events of 3 September 1984 when the aforesaid Dlamini was murdered. See the report of the judgment of this Court in 1988(1) SA 868 at 872 C-G, 873 C-D, 876 C-H and 892 G-893 A.

In a notice of motion dated 1 June 1988 the petitioners stated that they would at the

5

hearing of their application for the reopening of the trial - which hearing took place on 7 and 8 June - seek leave to amend their notice of motion of 15 April 1988 by asking for the following additional relief:

"1. Condoning the Applicants' failure to

apply for a special entry to be made on the record either during their trial or within the period of fourteen (14) days after their convictions on charges of murder and subversion in terms of an indictment issued by the Attorney-General on the 27th August 1985;

2. Permitting the special entry hereinafter stated to be made on the record;

3. Directing the hearing of the evidence of JOSEPH MOTSUMI MANETE and JOHANNES MONGAULE, in regard to their allegations, as recorded in the documents supporting the Notice of Motion dated the 15th April 1988, that they were threatened and assaulted by members of the South African Police and were thereby procured to give false evidence against the Applicants at the said trial;

6.

4. Directing the hearing of the evidence of MOHAMED SULIMAN BHAM and AMICHARD SOMAN in regard to the statements made to them by JOSEPH MOTSUMI MANETE concerning his said treatment by the police and the truth of his evidence at the trial;

5. Directing the hearing of such other evidence as this Honourable Court may decide is required for the settling of the said special entry;

6. Directing that after the hearing of the aforesaid evidence, and should such evidence warrant it, a special entry be made on the record of the trial as follows:-

(a) the perjured evidence of the

witness, JOSEPH MOTSUMI MANETE, as procured by members of the South African Police, has resulted in a fraud having been practised on the trial court by such members, thus constituting an illegality or

7

defect in the proceedings which has caused a failure of justice;

(b) the threats and assaults by members of the South African Police on JOSEPH MOTSUMI MANETE and JOHANNES MONGAULE, revealing as they do, a systematic intimidation and a systematic procuring of false evidence, show a fraudulent system at work in regard to the whole trial when read with the evidence given at the trial, thus constituting an illegality or defect in the proceedings which has caused a failure of justice;

7. Directing the grant of alternative

relief."

The events which gave rise to the applications of 15 April 1988 and 1 June 1988 may be briefly stated at this stage. Manete, as I have said, gave evidence at the trial

8

in which he implicated the 5th and 6th petitioners in the murder of the aforesaid Dlamini on 3 September 1984. In the course of the trial counsel for the defence, while in the process of cross-examining Manete, informed the Court that he was in possession of a statement which Manete had made to an attorney, that it was prima facie a privileged statement, but that he wished to cross-examine Manete on it. In reply to a question by the learned Judge counsel indicated that according to the statement Manete had not voluntarily implicated accused nos. 7 and 8 (the 5th and 6th petitioners), but had been forced by the police to do so. Manete objected to being cross-examined on the statement, pleading that it was a privileged communication which he had made to an attorney when seeking legal advice. Human AJ upheld the objection and cross-examination on the statement was accordingly disallowed. This Court held that this ruling by Human AJ could not be faulted: see 1988(1) SA at 876 G-H. The judgment on appeal, as stated above, was given on

9

1 December 1987. On 27 January 1988 Manete signed a document in which he waived all privileges attaching to communications made by him to an attorney, Mr Mohamed Suliman Bham, during 1985 and 1986 in the course of their attorney and client relationship. (According to an affidavit made by the said Bham, Manete made statements to him during September and October 1985, in February 1986, and on 15 March 1988.) A similar waiver, relating to a statement made by Manete to Mr Amichand Soman, an attorney of Johannesburg, was signed by Manete on 15 March

1988. Details of the various statements made by Manete will be mentioned later in the judgment.

Human AJ dismissed the application to reopen the trial and also refused the application for the amendment of the application set out in the notice of motion dated 1 June 1988. With regard to the dismissal of the application for the reopening of the trial, the learned Judge held, briefly put, that he was functus officio, the accused in the trial

10

having been convicted and sentenced and their appeals having been dismissed by the Appellate Division, and that he had no jurisdiction to reopen the trial for the hearing of further evidence. As to the refusal of the proposed amendment, which was aimed at the hearing of further evidence with a view to the making of a special entry on the record of the trial, he held that the further cross-examination of Manete would be an exercise in futility and that the granting of the application would be an abuse of the process of the court. The statements made by Manete which were before Human AJ are, in so far as relevant, set out below.

On 11 May 1985, Manete consulted Mr Soman, who recorded what Manete said to him in the following terms:

"I am 20 years old and I am presently living with my aunt in 65/3 Evaton Road, Evaton. My permanent address is 2339. I am still a student at FUBA doing speech and drama. I completed my matric in 1983 at Mohlodi High School, Sharpville.

11

In November 1984 I was arrested by the Security Police of Sebokeng. I was detained for two days and then released. I was questioned about the death of one of the Councillors of Sharpville, a Mr Dlamini. I did not tell the police anything. I refused. I was assaulted. I was pushed against the wall, kicked and punched on my face. The policemen who interrogated me were policemen dressed in camouflage outfits. I cannot recognise them now. I made no statement and I was released.

On my release I was told to report the following Monday to the Sebokeng Pollce Station. I went as instructed to. I cannot remember the date. When I arrived at the Police Station I was told to wait for the Security Police from John Vorster Square. I waited for three (3) hours but they did not arrive. I took a taxi home and I was followed by the Security Police of Sebokeng. I went to Shaledi's motel and I played chess. While playing chess three white policemen approached me and asked me to go to the Police Station

12

I refused because I had already been there. They left me after telling me not to talk with the people. I was again detained in April 1985 by Krugersdorp Security Police. I was taken to Krugersdorp Police Station. I was assaulted and forced to write a statement about the Councillor Dlamini. They wanted to know about the people who killed Mr. Dlamini. I made a statement and I mentioned Don Mokhesi and Duma Khumalo's names. These names were given to (me) by the police and I was forced to write these names in the statement.

I was forced to say that Rev. Moselane and other UDF leaders held meetings and influenced people to protest against high rentals. All these names were furnished to me by police. I was questioned by two policemen and one was a Schoeman. I was assaulted by the other policemen and not Sohoeman. I was punched about three times on the head. I was held for a day only (about a few hours) and I was released after I made a statement as above.

Don Mogesi and Duma Khumalo are still in

13

Don Mogesi and Duma Khumalo are still in detention.

It is possible I may be called as a State witness "

Don Mokhesi (Mokgesi) is the 6th petitioner, and Duma Khumalo, the 5th. (Schoeman's reply to this statement, in so far as it relates to him, will be mentioned later in the judgment.)

In September 1985, shortly before the commencement

of the trial (on 23 September 1985), Manete went to see his attorney, the aforesaid Bham. He had been served with a subpoena to give evidence at the trial, and asked Bham what the consequences would be if he failed to appear in Court to testify. Bham advised him to testify. In the course of their consultation Bham took a statement from Manete which he recorded as follows (I have amended the date 1985, wherever it appears in the statement, to read 1984: 1985 is obviously an error):

"1. I was first detained by the police during October 1984. I was detained for one

14

day at Krugersdorp police station. I was asked by two white men, where I was on the 3rd September 1984. I replied that I was in the township. I was told that I was one of the persons who were responsible for the burning of the house of Mr Dlamini, a community counsellor and also his killing on that day. I denied this, and stated that I was visiting a friend by the name of Mahlomo, in Sharpville. The police said that I was talking 'Kak' and threatened to detain me if I did not tell them the truth. I repeated what I had stated earlier, namely, that I was not near the scene of the incidents relating to the burning of the house, and said that I was visiting Mahlomo. The interrogation continued for about two hours.

2. About a few months ago this year, I was visited by a black policeman, who told me to report at Sebokeng Police Station the next morning, I was taken to Krugersdorp police station again. At the station, I was interrogated by two

15

white policemen, who asked me again what I knew about the events of the 3rd September 1984. They threatened to assault me and detain me if I did not tell them the truth. They also asked me if I knew two persons named Don Mogese and Duma Khumalo. I initially denied that I have any knowledge of these two men, but later, under pressure, when I was threatened with assault, I admitted that I knew these persons.

3. After being threatened, I was forced to make the following statement:-

'On the 3rd September 1984, I went to visit my uncle, who had been looking for employment for me. After I returned from my uncle's place that morning, I met a crowd of people. One of the persons in the crowd, known to me as Don Mogese, told me to join the crowd. There were all together about 100 people in the crowd. Don Mogese was leading the crowd

16

towards Dlamini's house and he was shouting slogans such as 'Amandla' and 'People must come together and fight for the community'. When the crowd arrived at Dlamini's house, they surrounded the place and began throwing stones at the house. Mr Dlamini came out and fired shots at the crowd. After Mr Dlamini had fired all his shots, he began running towards his neighbour's house. As he ran he was confronted by the crowd who threw stones at him until he died'. I told the police that the only persons I knew in the crowd were Don Mogesi and Duma Khumalo. I further said that as I was afraid, I ran away from the place and before the police could shoot me. I also said that one of the other persons who were shot by Dlamini was a person known as Swag.

17

4. After making the above statement, I signed it before the policemen. I was released that same day.
5. -
6. The statement I made to the policemen that morning was not entirely true. The following did take place on the 3rd September 1984, to the best of my knowledge. 7. I went to Dlamini's house and saw a crowd of people stoning the house. Amongst the people I saw were Khumalo and Mosego. I saw both of them throw stones at Dlamini's house, but I did not see them actually pouring petrol on the house or stoning Dlamini himself. I also took part in the stone throwing, but I did not take part in the burning of Mr Dlamini."

On 17 October 1985 Manete again went to see Bham, According to an affidavit made by Bham, Manete told him that he had given evidence in Court. When Bham asked him what

18

he had said; Manete said that "he would write out the statement" and deliver it to Bham the next day. He did so, and when Bham asked him whether he would depose to an affidavit "regarding the contents of the documents he had handed to me", Manete agreed. Manete's statement was then typed in affidavit form and sworn to by him. The affidavit reads:

"1.

2. On the 3rd day of September 1984, I went to my uncle's place. My uncle had promised me that he would try to find a job for me. I arrived at my uncle's place, but he was not there. 3. On my way home, I met a group of people who were running away from the police.

I also ran away and hid myself in the yard of another house. I came out when the police had left. The crowds re-grouped again. I decided to take

another direction, but one of the people who was in the crowd stopped me. He was Don Mogesi. He said to me 'where are you going why don't you join the crowd because we are fighting for the whole

19

community'. I was afraid and I decided to join the crowd.

4. We marched to the house of Mr. Dlamini, they were shouting that Motsivi was shot by Mr. Dlamini in the thigh. When the crowd arrived at the house of Mr Dlamini, they were shouting slogans. Mr. Dlamini was standing outside with another man and woman. They went in the house when they saw the crowd. The crowd surrounded the house and they threw stones at the house. Don Mokhesi told the crowd to surround the house and set it alight. Stones were thrown in the house through the windows. Mr. Dlamini shot some bullets through the windows.
5. Later on, Mr. Dlamini came out from the house and ran to the yard of his neighbours, but some people caught him, but these people were afraid, as he still had his gun in his hand, so he managed

to escape, but these people followed him. Some of the crowds were still throwing stones at him. He managed to jump the fence, but with difficulty as people were

20

pulling him with his clothes.

6. After he jumped over the fence, some people who were standing in his neighbour's yard caught him in front of the kitchen door of his neighbour. Some people threw him with stones, others kicked him, as a result he fell. They continued to hit him with stones, others kicked him. One guy who was in the crowd stabbed him with a knife at the back of his neck several times. After some few minutes two people pulled Mr. Dlamini with his legs, until they put him next to his burning car. They placed some sponges on his body and set them alight.
7. Later the people put him in the boot of his car, but half of his body was in the boot while the other half was outside. Before the people put him in the boot, they had tried first to place him on the bonnet, but his body fell down.
8. After all this, I decided to run away because I was very scared and I thought

21

I can be shot. One of the people whom I

have noticed amongst the people who were throwing stones at the house of Mr. Dlamini is Duma Khumalo, and I also know Swaar who was shot in the hand, but I did not see him throwing stones."

On 14 February 1986 Manete again saw Bham. He made a brief statement to him in which he said that Mr Jordaan (of the Attorney-General's office) spoke to him before he gave his evidence at the trial. Jordaan told him, he said, that he should not lie in Court, that he should read the statement he made to the police, and that he should not "consult a lawyer" because he was a State witness. The statement ends abruptly with the sentence "I did not tell the court the whole truth", with no indication as to how far or in what respect(s) his evidence fell short of the truth.

Finally, in an affidavit dated 15 March 1988, Bham states that Manete said to him on that day -
"that the evidence he had given at the

22

trial of the abovementioned accused was false and that he had not seen the First and Second Applicants" - i.e. the 5th and 6th petitioners in the present proceedings - "at the scene of the crime",

and also that -

"the police had mentioned the names of
the First and Second Applicants to him
and instructed him to say in his evidence
that they were at the scene of the
crime."

Warrant-Officer Schoeman, a member of the South African Police, made an affidavit in which he deals with some of the allegations made by Manete in his aforesaid statements. With regard to the statement of 11 May 1985, quoted above, Schoeman says that he was one of the investigating officers in the case and that he was at no time attached to the security police. As to the events of 11 May

23

1985, Schoeman says inter alia:

"Die getuie was op geen stadium aangehou nie. Hy het vrywillig gekom en was daar aangebring deur sy broer. Ek was nie op enige stadium verbonde aan die veiligheidspolisie nie. Die onderhoud met MANETE het plaasgevind en teenwoordig was ekself en Sers. KWENAITE wat meeste van die tyd aanwesig was. Die getuie was hoegenaamd nie aangerand of gedreig of verplig om 'n verklaring af te lê nie. Daar was hoegenaamd geen druk uitgeoefen op die getuie nie. Na die beste van my wete was hy wel aanvanklik bang om 'n verklaring te maak en moes hy gerus gestel

word dat die Staat aansoek sou doen dat sy getuienis in camera afgelê sal word by die verhoor. Ek ontken ten sterkste dat die getuie voorgesê of beïnvloed was aangaande wat in sy verklaring moes verskyn.

Dit is korrek dat DOW MOKGESI en DUMA KHUMALO in aanhouding was gedurende April 1985. Ek ontken dat ek die name van die voormelde twee persone aan die getuie MANETE verskaf het. Ek kan nie

24

presies onthou hoe die gesprek verloop het nie. Ek kan nie die moontlikheid uitskakel dat ek miskien aan die getuie 'n lys name sou voorgehou het en hom sou vra of hy enige van die gemelde persone op die betrokke toneel opgemerk het nie. Ek glo nie dat dit is wat in hierdie geval gebeur het nie. Wat ek positief kan uitskakel is dat ek net hierdie twee name aan die getuie sou genoem het . ..".

In dealing with the statement made by Manete to Bham in

September 1985 (quoted above), Schoeman says inter alia:

"Ek wys verder daarop dat in hierdie beweerde verklaring meld MANETE na bewering teenoor sy eie prokureur dat DON MOKGESI en DUMA KHUMALO aanwesig was op die toneel van die moord en dat hulle met klippe na die huis gegooi het. Ek voer eerbiediglik aan dat dit uit bogemelde duidelik is dat die name van MOKGESI en KHUMALO nie van die polisie afkomstig was nie en dat die getuie hierdie name aan sy eie prokureur gemeld het onder omstandighede waar daar geen sprake kon

25

wees van intimidasie deur die polisie nie.

Ek wens daarop te wys dat in die weergawe wat in hierdie beweerde verklaring verskyn ten aansien van die gebeure gedurende April 1985 toe die getuie wel 'n verklaring gemaak het, beweer hy slegs dat hy gedreig was met aanranding. Die vorige bewering dat hy inderdaad aangerand was word opsigtelik weggelaat. Ten aansien van die bewering dat MANETE aan my sou gesê het dat hy geen kennis het van MOKGESI en KHUMALO nie, wens ek daarop te wys dat daar geen dispuut is dat die getuie MANETE wel vir DON MOKGESI en DUMA KHUMALO ken nie. Ek ontken dat hy teenoor my op enige stadium betwis het dat hy hierdie persone ken."

In discussing the statements made by Manete to Soman on 11 May 1985 and to Bham on 15 March 1988, Human AJ

26

referred to the statement Manete made to Bham in September 1985, shortly before the trial was due to begin. It will be recalled that in that statement Manete again alleged (as he had done in his statement of 11 May 1985) that he had been

forced by the police to make a statement in which he

implicated the 5th and 6th petitioners in the attack on Dlamini on 3 September 1984, but that he then went to say

what "did take place" on that day, viz.:

"I went to Dlamini's house and saw a crowd of people stoning the house. Amongst the people I saw were Khumalo and Mosego (Mokgesi). I saw both of them throw stones at Dlamini's house, but I did not see them actually pouring petrol on the house or stoning Dlamini himself. I also took part in the stone throwing, but I did not take part in the burning of Mr. Dlamini."

Human AJ pointed out that Manete made this statement to his attorney and that one could accept that he made it freely and voluntarily. This statement implicating the 5th and 6th

27

petitioners, the learned Judge said, confirmed that Manete's testimony in Court "was not false in that regard", and was supported by the evidence of the State witness Mabuti, who testified that the 5th and 6th petitioners were present at the scene of the crime and, it may be added, that they made petrol bombs which were used in the attack on Dlamini's house. Mabuti, the learned Judge said, was a reliable witness whose evidence was accepted by the trial Court. With regard to the statement made by Manete to Bham on 14 February 1986 that "I did not tell the Court the whole truth", Human JA remarked that this statement was "not surprising because he never admitted at the trial that he also took an active part in pelting the house of Dlamini with stones."

Human AJ also pointed out that there was in the papers before him no affidavit by Manete himself "that the evidence given by him at the trial was false or that the police instructed him to give false evidence against the

28

fifth and sixth applicants." As to the absence of such an affidavit, the learned Judge said:

"The attorneys for the applicants claim that they could not obtain such an affidavit because Manete is a State witness. The trial and the appeal to the Appellate Division have been concluded. Judgment was delivered in the Appellate Division on 1 December 1987. The reason advanced for the absence of such an affidavit by Manete is to say the least, in my opinion, utterly unconvincing and unacceptable. The attorneys for the applicants were instrumental in obtaining the waiver by Manete of his privilege pertaining to the statement he had made to Attorney Soman. They could have adopted the same procedure to obtain an affidavit from him that the evidence he had given at the trial was false and that the police had procured him to give false evidence."

29

With regard to the witness Mongaule, Human AJ said that the trial Court found his evidence to be untruthful and unreliable, and that his evidence was "completely disregarded in arriving at the verdict against the applicants." "Assuming for the moment therefore in favour of the applicants", the learned Judge also said, "that he was coerced by the police to give false evidence it follows that this exercise failed". It is clear, I think, that it was the view of Human AJ that the quality of Mongaule as a witness was such that the evidence which it was proposed that he should give could not in any way justify the reopening of the trial or the making of a special entry.

The petitioners applied to Human AJ for leave to appeal against his dismissal of their aforesaid applications of 15 April 1988 and 1 June 1988. Leave was refused. They then submitted a petition to the Chief Justice, seeking leave to appeal against Human AJ's refusal of leave to appeal. It was directed that the petition should be considered by the

30

Court, and it is this petition which we now have before us .

The main issues which call for consideration are

set out in the following terms in the heads of argument

submitted on behalf of the petitioners:

"(a) Whether or not the trial court, alternatively, this court, has jurisdiction to reopen the trial on the grounds advanced in the court below. (It will be contended on behalf of the petitioners that the trial court, alternatively this court, has inherent jurisdiction to do so.)

(b) Whether or not the court below should have directed further evidence to be heard in order to decide whether a special entry should be made on the record of the trial."

As to the question mentioned in (a), the

petitioners say in their heads of argument that it was

contended on their behalf in the Court a quo that the Court

had inherent jurisdiction "to regulate its own proceedings

so as to avoid or correct an injustice", but that Human AJ

31

held that the Court had no jurisdiction to set aside the verdict given by it at the trial, or to order the reopening of the trial and the hearing of further evidence. Human AJ, it is said, based his finding on two main legal grounds, viz. (1) the general rule that a Court which has delivered judgment is ordinarily functus officio, and (2) the remedy of restitutio in integrum is, according to the judgment of the Appellate Division in the case of *Mokoena v. Minister of Justice and Another* 1968(4) SA 708, not available in criminal cases. Counsel for the petitioners acknowledge in their heads of argument that "on the face of them" both these grounds "constitute formidable

obstacles to the granting of relief on the basis on which it was originally sought", but they submit that the Supreme Court has inherent jurisdiction "to regulate its own procedures so as to do justice and to prevent the abuse of its procedures by a dishonest litigant", and that a superior court, as distinct from an inferior court, has a jurisdiction which is "general and unlimited

32

unless cut down or forbidden by law." In support of these submissions they cite the provisions of sec. 19(1)(a) and sec. 19(3) of the Supreme Court Act, No. 59 of 1959; Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 3rd ed., p. 23; LAWSA, Vol 11, paragraphs 404-405, and the statement by Botha J in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v. Coucourakis and Another* 1979(2) SA 457 (W) at 463 A that "...

the Court will exercise an inherent jurisdiction whenever justice requires that it should do so."

The aforesaid submissions are too widely stated.

Sections 19(1)(a) and 19(3) of the Supreme Court Act, No. 59 of 1959, read as follows:

"1(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to

33

the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power -

(i) to hear and determine appeals

from all inferior courts within its area of jurisdiction;

(ii) to review the proceedings of all such courts;

(iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(3) The provisions of this section shall not be construed as in any way limiting the powers of a provincial or local division as existing at the commencement of this Act, or as depriving any such division of any jurisdiction which could

34

lawfully be exercised by it at such commencement."

These provisions contain no indication as to what inherent jurisdiction a provincial or local division of the Supreme Court possessed at the commencement of the Act, or possesses at the present time, and they are not of assistance in

deciding the issue with which we are here concerned.

The Moulded Components case, *supra*, was

concerned with certain rules of Court. Botha J held that

the Court had inherent power to come to the assistance of a

party even although the ground on which he relied was not

specifically mentioned in the rule in question. The learned

Judge said (at 462 D-E):

"I do not consider that if justice demands such a course in appropriate circumstances, the Court would decline to come to the assistance of a party where that party requires inspection of an object referred to in the opposing party's affidavits, simply because Rule 36(6) is limited by its wording to

35

actions and does not expressly include within its ambit applications. If justice requires an inspection of an object, in application proceedings, I consider that the Court will exercise an inherent jurisdiction to order production for such inspection, I should add, however, that I have no doubt that such a situation would be an unusual one and that this is a power that the Court would exercise very sparingly."

The remarks of Botha J were, as I have said, made with regard to a rule of Court, and it is unnecessary to consider the correctness thereof. It is sufficient to say that Courts have on occasion adopted what would seem to be a rather accommodating approach in the interpretation or application of rules of Court. This approach is well illustrated, I think, by the statement of Gardiner J P in *Cohen & Tyfield v. Hull Chemical Works* 1929 CPD 9 at 11 that: "Just as the Court has the power to make a Rule, so it has an inherent power, when just cause is shown, to do something which is not provided by the Rule."

36

The passages in *Herbstein and Van Winsen*, *The Civil Practice of the Superior Courts in South Africa*, and *LAWSA*, to which we were referred by counsel, while generally to the effect (as stated in *Herbstein and Van Winsen*) that a superior court "may do anything which the law does not forbid", do not provide authority for the contention advanced by the petitioners in the present case, viz. that a superior Court which has tried and convicted a person of an offence may thereafter reopen the trial and hear further evidence. There is, as will be shown below, direct

authority to the effect that a Court cannot do so.

A superior court - including this Court - is a creature of statute, and it is not correct to state, as a general proposition, that it has a jurisdiction which is general and unlimited unless cut down or forbidden by law. In *Rex v. Milne and Erleigh* (6) 1951(1) SA 1(A), an applicant asked this Court to set aside his convictions and sentences on the ground that the trial Judge, who sat with two

37

assessors, was biased. It was contended on his behalf that the proceedings were by way of review and that the Appellate Division had an "inherent jurisdiction to consider the application" (p.5 H). Centlivres CJ said (at 5 i.f.-6):

"This Court was created by the South African Act and its jurisdiction is to be ascertained from the provisions of that Act as amended from time to time and from any other relevant statutory enactment. There is no provision in that or any other Act conferring a review jurisdiction in criminal matters on this Court."

And also (at 6 E):

"No authority was quoted for the proposition that a Court such as this Court, which was created by statute, has any jurisdiction beyond what is conferred on it by statute."

Centlivres CJ (at 7B) raised the question whether this Court

38

could "assume a jurisdiction in certain cases in order to see

that justice is done", but he expressed no opinion thereon. In *R v. Sibande* 1958(3) SA 1 (A) Schreiner JA referred to the decision in *Rex v. Milne and Erleigh*, supra, regarding the jurisdiction of this Court in the following terms (at 4H-5):

"It seems to me to follow from *Rex v. Milne and Erleigh* that if any extraordinary jurisdiction in criminal cases remains, which seems to be very doubtful, it must be limited to rare cases such as those in which a Provincial Division has dealt with a matter over which it had no jurisdiction. Even in the case of an order made without jurisdiction it would seem that the special entry procedure might be available; if this were so it would rule out the assumption of an extraordinary jurisdiction in such cases (see *Rex v. Milne and Erleigh*, loc. cit.)."

In *The State v. Mofokeng* 1962(3) SA 551 (A) Williamson JA, delivering the judgment of the Court, said the following (at 558 C-F) regarding an extra-statutory jurisdiction of this Court:

39

"It was contended on behalf of the appellant that even if a special entry was wrongly made and accordingly there was strictly no appeal shown to be competent to this Court under sec. 365 (1), yet nevertheless this Court should come to the aid of the appellant to prevent a possible miscarriage of justice. Counsel rightly conceded that any extra-statutory jurisdiction this Court

may have possessed previously in criminal matters, disappeared after the amendment of Act 31 of 1917 by Act 37 of 1948; see *Rex v. Milne and Erleigh* (6), 1951 (1) S.A. 1 (A.D.) at p. 6. In *R. v. Sibande*, 1958 (3) S.A. 1 (A.D.) at p. 4 F, Schreiner, J.A., makes mention of a very guarded reference at p. 7 of the former case by Centlivres, C.J., of the possible existence of a jurisdiction which it was suggested this Court might assume 'in order to see that justice is done'. No such jurisdiction has yet been found to be still vested in this Court. This position was maintained in Act 56 of 1955. In terms of sec. 362 (2) of this Act it is specifically provided that

40

an appeal lies in criminal cases to this Court 'only as provided in secs. 363 to 365 inclusive and not as of right'; these sections cover appeals by leave, appeals on special entries and proceedings on the reservation of a question of law."

Reference may also be made to *S v. Heller* 1970(4) SA 679(A), where the question of the circumscription of the powers of the Supreme Court in criminal matters is dealt with at some length (see at 684 G-686 G). The cases referred to immediately above would seem to show, in my opinion, that it is the settled view of this Court that its jurisdiction in criminal matters is determined by statute, i.e. the Criminal Procedure Act and such other relevant statutory provisions as there may be. The position would a fortiori be the same in the case of other Courts.

With regard to the specific point with which we are concerned at the moment, i.e. whether Human AJ was correct in holding that he had no jurisdiction to reopen the case and

41

hear further evidence as he was requested to do by the petitioners in the application of 15 April 1988, there are several decisions of this Court in which it has been held that when a trial Judge has given a final judgment, he has no jurisdiction to reconsider or to alter it. In *S v. Fisher en 'n Ander* 1969(2) SA 632(A) three persons were convicted of murder and sentenced to death. In the course of his evidence regarding the question of extenuating circumstances the third accused stated that it was he who killed the deceased and that the other two accused took no part in the murder. After they had been sentenced, the first two accused sought leave to appeal on the ground that the trial Court should in the light of the evidence given by the third accused, which was not contested by the State, have altered its finding of guilty in terms of the provisions of sec. 187(2) of the Criminal Procedure Act, No. 56 of 1955.

This Court held that the trial Judge was correct in holding that the trial Court's conviction of the accused was a final

42

judgment and that the Court could not thereafter reconsider or alter it, whether by virtue of its general inherent jurisdiction ("algemene inherente bevoegdheid") or in terms of sec. 187(2) of Act 56 of 1955. In *S v. Augustine* 1980(1) SA 503(A) the accused, charged with murder, was found guilty of culpable homicide. After he had been convicted but before sentence was imposed, the trial

Judge was asked for leave to appeal because it appeared that the person whom the accused had allegedly stabbed to death was still alive. The trial Court heard evidence showing that the person who had allegedly been killed was still alive and postponed the imposition of sentence. The accused was then granted leave to appeal. This Court, referring to the decision in *S v. Fisher en 'n Ander*, supra, said that the trial Court was *functus officio* as far as the conviction of culpable homicide was concerned and that it did not have jurisdiction to set aside the conviction. In *S v. Leeuw* 1980(3) SA 815(A) at 823 A Rumpff CJ, referring to the case of *Estate Garlick v.*

43

Commissioner for Inland Revenue 1934 AD 499, held that when a trial Court has found a person guilty, it is normally

functus officio, and that the rule in Roman-Dutch law is

that, save for a few exceptions (none of which is here

relevant), the judgment of the Court cannot be altered by the Court itself. The view that a trial Court does not have

jurisdiction to alter a final judgment given by it, also

appears from judgments of this Court in which it recommended

to the authorities that trial Judges should, in appropriate

cases, be accorded power to reopen criminal proceedings and

hear fresh evidence. One of these cases is *S v. Zondi*

1968(2) SA 653(A), where Ogilvie Thompson JA said (at 655

BD):

"Before dealing with the merits of the appeal, I refer to two preliminary matters. The first is that, in order to achieve a re-opening of the trial, the only procedure available to appellant's advisers was the one which they have followed - namely, to approach this Court

44

on appeal after leave granted in that behalf. This procedure, as was rightly remarked by Kennedy, J., in granting leave in the present case, is cumbersome indeed; and delay is inevitably inherent in it. This procedural question has been mentioned by this Court on previous occasions (see *S. v. E.*, 1965

(4) S.A. 526 (A.D.) at p. 530E and S. v. Njaba, 1966(3) S.A. 140 (A.D.) at p. 145C) and is, I understand, receiving attention. I venture to express the hope that the necessary steps will soon be taken to accord trial Judges power - in appropriate cases and applying the principles applicable to these matters as laid down by this Court - to re-open criminal proceedings and hear fresh evidence." These judicial observations led to the enactment of sec.

316(3) and (4) of the Criminal Procedure Act, No 51 of 1977, which empowered a court hearing an application for leave to appeal to receive further evidence, provided that certain

pre-requisites were satisfied. These statutory provisions

45

were not applicable in the present case in that the application to reopen did not, and could not, accompany an application for leave to appeal. It could not do so because an application for leave to appeal had previously, after the conclusion of the trial before Human J in December 1965, been granted; and this of course had led to the appeal being heard by this Court towards the end of 1987. The appeal procedure had thus been exhausted and there was consequently no scope for the employment of the procedure laid down by sec. 316(3) and (4). (Cf. R v. Sibande, supra, at 6 E. See also S v. Masinda en 'n Ander 1981(3) SA 1157 (A) at 1164 E-H, where it is pointed out that sec. 316(3) of Act 51 of 1977 does not give full effect to the suggestion made by Van Blerk JA in S v. Njaba, supra.)

With regard to the decision of Human AJ that he had no jurisdiction to reopen the case for the hearing of further evidence, there is a further point which should be borne in mind. It is this: The application to reopen the case was

46

case was made after an appeal against the judgment of the trial Court had been dismissed by this Court. This means that the case which Human AJ was asked to reopen was not only one in which he had become functus officio and which he was, for that reason, not able to reopen, but one in which an appeal against his judgment had been dismissed. As indicated above, he would not have been entitled to reopen the case after he had convicted the accused (see S v. Fisher en 'n Ander, S v. Augustine and S v. Leeuw, mentioned above), and, this being so, it is difficult to see how he could have had jurisdiction to do so after his judgment had, in effect, been confirmed by the Appellate Division when it dismissed the appeal against it.

This takes me to the case of Mokoena v. Minister of Justice and Another, supra. It was an application for leave to appeal against a judgment in which an exception to a summons had been upheld. The applicant, Mokoena, was convicted of murder and sentenced to death. He appealed to

47

the Appellate Division, but his appeal was dismissed. He then petitioned the State President for commutation of the sentence of death. The petition was refused. Thereupon he instituted an action against the respondents in which he alleged that his conviction had been obtained fraudulently by the perjured evidence of three State witnesses, and that this evidence had been procured and instigated by the police officer who investigated the murder, while he was acting within the course and scope of his employment as the servant or agent of the first respondent (the Minister of Justice). He alleged, also, that this evidence was of such materiality that, but for it, the trial Court would inevitably have acquitted him, and he claimed that his conviction and sentence should, therefore, be set aside. In reply to a request for further particulars Mokoena stated that it was not alleged that the prosecutor had acted fraudulently. At the hearing of the application counsel for Mokoena acknowledged that Mokoena's real claim was one for

48

restitutio in integrum which would, if upheld, leave the Attorney-General at liberty to prosecute again on the same charge. The defendants in the action (the respondents in the application) excepted to Mokoena's summons on the following

grounds (see 710 G-H of the report of the judgment);

"1. (a) The Court has no power or jurisdiction in a civil action to set aside a conviction and sentence in a criminal case.

(b) The rights of an accused person are

governed entirely by the provisions of the Criminal Procedure Act, 56 of 1955, as amended, and the Court cannot exercise a civil jurisdiction to compete with or override a judgment or order or sentence given in a criminal case.

2. The Court has no power or jurisdiction, in this particular case, to set aside the conviction and sentence because the fraud relied on is that of a witness and not that of a party. The fraud of a servant of a party cannot in these circumstances be equated with the fraud of a

49

party (who is in fact alleged to be quite innocent of the fraud)."

The Court a quo came to the conclusion "that no remedy for restitutio in integrum on the ground of fraud or perjured evidence exists in our criminal law" (see at 711 A of the report) and accordingly upheld the exception. The question which the Court had to decide was whether an appeal against the order upholding the exception had a reasonable prospect of success.

Steyn CJ, after a review of common law authorities and cases decided in our courts, held that our law does not recognize a remedy of restitutio in integrum in criminal cases and that a convicted person whose case has been finally disposed of (as was that of Mokoena when his appeal was dismissed) cannot therefore claim, by instituting an action for restitution, to have his case reopened in order to prove that he was convicted on false evidence. (See at 716 G-H and 717 C-D.) He accordingly held that there was no prospect

50

that an appeal against the upholding of the exception could succeed. (See at 717 C-D.) It is to be observed that Steyn CJ came to the conclusion that he did despite Mokoena's allegation that he was convicted on perjured evidence procured and instigated by the investigating officer, and that he found it unnecessary to deal with the question whether the investigating officer's alleged fraudulent conduct was to be ascribed to the State as a litigant. It is to be inferred from this, in my opinion, that Steyn CJ was of the view that even if Mokoena had, as alleged by him, been convicted on perjured evidence which had been procured by the investigating officer, and even if the alleged fraudulent conduct of the investigating officer were to be ascribed to the State as a party, Mokoena would nevertheless not have been entitled to claim that his conviction and sentence should be set aside.

Regard must also be had to what Steyn CJ said in 51

the last paragraph of his judgment (at 717 D-H). It reads

as follows:

"Whatever the merits of the applicant's allegations in this matter may be, these proceedings draw attention to what may be regarded as a deficiency in our criminal procedures. There is substance in the submission on behalf of the applicant that the issues and investigations incidental to the functions of the State President in his exercise of the prerogative of mercy, differ materially from those in a court, where examination and cross-examination are the essential instruments for arriving at the truth beyond reasonable doubt. Depending on the nature of the case, it may well be an advantage if a petition by a condemned person, based on evidence discovered after the recognised judicial procedures have been exhausted or are no longer available, could be referred by the State President, if so advised after the usual departmental enquiries into the facts, to the trial Court for the hearing of further evidence

52

and a report thereon. That would be a

resuscitation of a similar procedure under

the common law, which has fallen into

disuse. The effect would be that the

doors of our Courts would at no stage be closed to an innocently condemned person beyond the possibility of a re-opening. It would be a procedure which could not be readily abused, and merits, I would suggest, consideration by the Legislature."

It seems to me that it is to be inferred from what is said in this passage, and from the decision at which the Court arrived, that it was the view of this Court that its jurisdiction relating to appeals and the reopening of a criminal trial is governed entirely by the provisions of the Criminal Procedure Act, and that consequently, when it has dismissed an appeal, it has no further jurisdiction in the matter. If this Court had at all thought that it had, after its dismissal of an appeal, an inherent jurisdiction to order the reopening of a trial, it would, I think, have made

53

mention thereof and would not, as it did, have recommended to the authorities the adoption of a procedure as suggested in the last paragraph of its judgment. It is reasonable to assume, I think, that it was this recommendation which ultimately led to the adoption of sec. 327 of the Criminal Procedure Act, No. 51 of 1977. As to the decision in Mokoena's case, reference may also be made to the judgment of the Cape Provincial Division in *Hoosain v. Attorney General*, Cape (1) 1988(4) SA 137 (C) in which Howie J (with whom Burger J agreed) rightly held that *S v. Titus* 1984(1) SA 505 (C) was wrongly decided. In the latter case a single Judge of the same Division held (without referring to Mokoena's case) that the Supreme Court has an inherent jurisdiction to order the reopening of a criminal case when there is reason to believe that a conviction has been obtained as a result of perjured evidence, even after all appeals have been dismissed or leave to appeal has been refused.

54

It is contended on behalf of the petitioners that their application for the reopening of their trial is not barred by the decision in Mokoena's case. Their submission is that they do not claim restitution in integrum, but are asking the Supreme Court to exercise its inherent jurisdiction to regulate its proceedings by way of carrying out a re-appraisal of their convictions in the light of further evidence which tends to show that the trial Court was the victim of fraud. The submission is untenable. In their application dated 15 April 1988 the petitioners seek an order directing that their trial be "reopened" for the purpose of hearing certain evidence, and that their convictions be re-appraised in the light of such evidence. The object of the application is clearly to have the trial reopened with a view to the ultimate setting aside of their convictions. Merely to reopen and reconsider the case, without more, would be a pointless exercise.

The petitioners also contended that the

55

ratio decidendi in Mokoena's case is limited to the proposition that an action for restitutio in integrum does not lie in a criminal case, and that the decision does not purport to limit the inherent jurisdiction of the Supreme Court. I have already indicated that it is to be inferred from the judgment in Mokoena's case that the powers of this Court are governed entirely by the provisions of the Criminal Procedure Act, and that when this Court has dismissed an appeal against a conviction it has no further jurisdiction in the matter which would entitle it to entertain proceedings aimed at setting aside the conviction. In the alternative to their contention that Human AJ had jurisdiction to reopen the trial, the petitioners submitted that this Court has an inherent jurisdiction which it should exercise in the present case. It will be apparent from what I have said above that in my view this Court has no jurisdiction as is contended for by the petitioners. In support of their contention counsel referred us to the case

56

of one Lesley Sikweyiya, where the facts were as follows. Sikweyiya was convicted of murder and sentenced to death. He asked the trial Judge for leave to appeal, but it was refused. He then petitioned the Chief Justice for leave to appeal, and was thereafter informed that leave was refused. About ten days later (on 26 November 1979) he was notified that leave to appeal had been granted, and in due course his appeal was heard. It is contended that this withdrawal of the refusal of leave and the substitution of an order granting leave could only have been done in the exercise of this Court's inherent jurisdiction to act in order to avoid the doing of an injustice, and that it provided support for the petitioners' contention in this case. The submission cannot be sustained. Records of this Court relating to the matter reveal the following. The Chief Justice referred the petition for leave to appeal to a member of this Division (see sec. 316(7) of the Criminal Procedure Act, No. 51 of 1977, as worded at that time) who, after considering it,

57

refused leave to appeal. Sikweyiya was so notified. About ten days later the same Judge cancelled his refusal of leave and granted leave. Sikweyiya was then notified that leave had been granted. There was no judgment by this Court on the matter. The decision of the Judge when he refused leave was, in terms of sec. 316(9) of the Criminal Procedure Act, No. 51 of 1977, "final", and the granting of leave thereafter therefore appears to have been contrary to the provisions of sec. 316(9). It hardly needs saying that a Court cannot have an inherent jurisdiction which would entitle it to act contrary to an express provision of an Act of Parliament. Sikweyiya's case cannot, therefore, be regarded as authority for the petitioners' submission.

Counsel also referred us to a passage in the judgment of Galgut AJA in S

v. Matshoba and Another 1977(2) SA 671(A) as providing support for the petitioners'

58

contention as to the inherent jurisdiction possessed by this Court. One of the appellants in that case, who had been convicted of murder and sentenced to death, applied to the trial Judge for leave to appeal against his sentence. Such leave was granted. At the hearing of the appeal the question was raised whether the said appellant could be permitted to appeal against his conviction. Galgut AJA, after referring to the provisions of sec. 369(2) of the Criminal Procedure Act, No. 56 of 1955, said (at 677H):

"The words in this sub-section are explicit. They deal only with sentence. They preclude the Appeal Court from enlarging the ambit of an appeal against the sentence so as to include an appeal against the conviction. I pause to say

59

that it may well be that in an exceptional and proper case the Appeal Court, being as it is the ultimate Court of the land, might decide to assume a jurisdiction not expressly provided for in the statute. I express no opinion."

The passage is obviously not authority for the petitioners' submission as to the inherent jurisdiction possessed by this Court. The learned Judge said, after all, that he expressed no opinion on the question mentioned by him. The suggestion made by the learned Judge was, it may be noted, rejected by

this Court in the case of *S v. Langa en Andere* 1981(3) SA

186. It was contended in that case, on the strength of the remarks made by Galgut AJA, that this Court could permit the appellants, who had been granted leave to appeal against their sentences by the trial Court but whose applications for leave to appeal against their convictions had been refused, to appeal against their convictions as well. Wessels JA rejected the submission and said that sec. 322(2) of the Criminal Procedure Act, No. 51 of 1977 - like its

60

predecessor, sec. 369(2) of the Criminal Procedure Act, No. 56 of 1955 - gave the Court no authority to accede to the appellants' submission and that they could not be allowed to appeal against the convictions. The Court went on to say that the appellants were not without a remedy since this Court could postpone the hearing of the appeal to enable them to petition the Chief Justice for leave to appeal against their convictions in terms of sec. 316 of the Criminal Procedure Act, No. 51 of 1977. In view of the foregoing I consider that the Transvaal Provincial Division had no inherent jurisdiction to reopen the trial, and that this Court also has no such jurisdiction.

I turn now to the petitioners' application for leave to lead further evidence with a view to having a special entry, as referred to above, made on the record.

The relevant sections in the Criminal Procedure Act, No. 51 of 1977, are sections 317 and 318. They provide, in so far as relevant for present purposes, as

follows:

"317. (1) If an accused thinks that any of the proceedings in connection with or during his trial before a superior court are irregular or not according to law, he may, either during his trial or within a period of fourteen days after his 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.

(2) Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the

62

trial or, if he is not available,

to any other judge of the

provincial or local division of which that judge was a member when he so presided.

(4) The terms of a special entry shall be settled by the court which or the judge who grants the application for a special entry."

"318. (1) If a special entry is made on the record, the person convicted may appeal to the Appellate Division against his conviction on the ground of the irregularity or illegality stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the Appellate Division and to the registrar of the provincial or local division, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided."

Human AJ dismissed the application on the facts. I propose, however, first to consider the question whether

63

he could in law have entertained and granted the application for a special entry after the petitioners' appeals against their convictions had been dismissed by this Court.

Counsel for the first respondent contended that proceedings by way of a special entry are in essence review proceedings (see *Rex v. Milne and Erleieh*, supra, at 7 A-B), and that such proceedings cannot be brought in the form of a special entry relating to an accused's conviction after an appeal against the conviction has been dismissed by this Court (see *R v. D and Another* 1953(4) SA 384 (A) at 390 F-391 D; *R v. Parmanand* 1954(3) SA 833(A) at 838 D; *Coopers (South Africa)(Pty) Ltd v. Deutsche Gesellschaft für Schadlingsbekämpfung MBH* 1976(3) SA 352 (A) at 368 H-369 E). The contention is, briefly put, that when this Court has dismissed an accused's appeal against his conviction the last word has been spoken on that issue; that this Court is *functus officio* when it has given its judgment on appeal, and that there is no procedure for dealing with a special

64

entry once an appeal has been dismissed. The petitioners contended (i) that the fact that an appeal on the merits has already been disposed of is no bar to a subsequent application for a special entry, save where the matter complained of in the special entry is substantially the same as a matter raised in the appeal (which, they say, is not the position in the present case), and (ii) that there is ample authority for the view that evidence may be adduced "after verdict" in order to show that there has been a material irregularity not apparent on the face of the record. As authority for contention (i), we were referred to *R v. Nzimande* 1957(3) SA 772 (A) at 774 F-775 F and *S v. Sibande* 1958(3) SA 1 (A) at 5 H-6 C; and, as authority for contention (ii), to *R v. Nzimande*, supra, at 774 B-C, 775 A-B; *S v. Alexander and Others* (1) 1965(2) SA 796 (A) at 805 B-E; *S v. Mushimba en Andere* 1977(2) SA 829 (A) at 836 D-G; *R v. Knight* 1935 AD 342 at 344-345; *R v. Velshi* 1953(2) SA 553 (A) at 561 A-D; *R v. Matsego and Others* 1956(3) SA 411 (A) at 415 A-C, and *S v. Mkhise*: *S v.*

65

Mosia; *S v. Jones*; *S v. Le Roux* 1988(2) SA 868(A).

I proceed to consider the contentions advanced by the petitioners.

As to contention (1) above, *R v. Nzimande*, supra, is not authority for counsel's submission. There had been no dismissal of an appeal in that case. An application for leave to appeal in terms of sec. 363 of the Criminal Procedure Act, No. 56 of 1955 (the predecessor of sec. 316 of the present Criminal Procedure Act) had been dismissed, and Schreiner JA pointed out that while the refusal of leave to appeal in terms of sec. 363 meant that there could be no

appeal as envisaged in that section, it did not mean that a special entry could not be made. In dealing with the question whether a special entry could be made, the learned Judge distinguished between the refusal of leave to appeal and the dismissal of an appeal. He said (at 774 H-775);

"The cases do not throw light on the question whether the refusal of leave to appeal is for present purposes equivalent to the dismissal of an

66

appeal. In my view it is not. The refusal, like the grant, of leave to appeal by this Court or one of its members is final (sec. 363 (7)), but this only means, as I understand the provisions, that the question of leave to appeal under sec. 363 is finally answered by the grant or refusal of leave. Where leave has been refused that channel is closed."

This passage is not authority for the view that the Court considered that a special entry would have been permissible if leave to appeal had been given and the appeal had been dismissed. It seems to me that if the learned Judge had thought that the dismissal of an appeal did not prevent the making of a special entry he would not have taken the care he did to say that the refusal of leave to appeal was not the same thing as the dismissal of an appeal when the question of the making of a special entry is considered. *R v. Sibande*, supra, is also not authority for counsel's submission. There had not been a dismissal of an appeal in that case. The applicant, to whom leave to appeal had been

67

refused by the trial Judge, and also by the Chief Justice interms of sec. 363 of the Criminal Procedure Act. No. 56 of 1955. applied for a special entry and for leave to lead further evidence. This Court held that the conduct of which the applicant complained, viz. perjured evidence, was not a matter for a special entry and that, as far as the hearing of further evidence was concerned, the Court's jurisdiction

rested upon its having an appeal before it, and that there was no appeal before it because leave to appeal had been

refused with final effect under sec. 363.

With regard to contention (ii) above, i.e., that there is ample authority that evidence may be adduced "after verdict" in order to show that there has been a material irregularity, it is true that the cases show that evidence with a view to applying for a special entry may be adduced after an accused has been convicted and sentenced, but none of the cases cited by counsel was one where leave to lead

68

evidence or to make a special entry was sought after an appeal to the Appellate Division had been dismissed. I have already said what the position in *R v. Nzimande*, *supra*, was. *S v. Alexander and Others*, S

- v. *Mushimba en Andere*, *R. Velshi and R v. Matsego and Others*, mentioned above, were all appeals on special entries made after the accused had been convicted, but in no case had there previously been an appeal which was dismissed by the Appellate Division. In *S v. Mkhisi*, *S v. Mosia*, *S v. Jones* and *S v. Le Roux* (also mentioned above and all reported in 1988(2) SA 868) there had also been no appeals before special entries were made. It may be added in regard to these cases, also, that they were of an unusual kind. The accused in each of these cases was defended by someone who had not been admitted to practise as an advocate, and this Court held that that fact constituted such a fundamental irregularity as to nullify all

the trial proceedings. The situation was therefore the same as if the accused had not been tried at all. (This reminds

69

one of the statement of Schreiner JA in *R v. Sibande*, *supra*, at 4 i . f . , that it seemed to follow from *Rex v. Milne and Erleigh*, *supra*, "that if any extraordinary jurisdiction in criminal cases remains, which seems to be very doubtful, it must be limited to rare cases such as those in which a Provincial Division has dealt with a matter over which it had no jurisdiction".) In *Rex v. Knight*, *supra*, the accused asked the trial Judge who had convicted him of certain offences to make a special entry. The Judge refused to do so, and the accused then applied to the Appellate Division for a mandamus directing the Judge to make such entry. The application was refused. It was not a case where an appeal had previously been dismissed by the Appellate Division.

In the course of my reading while preparing this judgment, I happened on a case in which Rumpff CJ expressed a view (to be mentioned presently) which would seem to lend support to the contention that an accused may appeal on a special entry after his appeal on the merits has been

70

dismissed by this Court. It is the case of *S v. Swanepoel* 1979(1) SA 478 (A), in which the applicant sought leave to appeal against a trial Court's refusal to make a special entry on the record of the trial. The applicant had previously been convicted of murder and sentenced to death. He appealed to this Court, but the appeal was dismissed. He then went back to the trial Court and asked it to make a special entry, alleging that his trial had been conducted in terms of the Criminal Procedure Act, No. 51 of 1977 instead of the Criminal Procedure Act, No. 56 of 1955, and that this constituted an irregularity which was of such a fundamental nature that it nullified his trial and the appeal which followed thereon. It appears from the judgment of Rumpff CJ (at 486 A-C) that counsel for the State raised ("geopper") the question whether this Court had jurisdiction to consider the application, but that he did not contend that it did not have jurisdiction. Rumpff CJ

stated that, because of the attitude taken up by the State, he found it unnecessary to

71

decide whether the Court had jurisdiction or not, but that

he would assume, for the purposes of the application, that the Court did have jurisdiction. After saying this, he proceeded to say (at 486 B-C);

"Ek sou in elk geval nie sonder grondige rede genee wees nie om te bevind dat, hoewel daar 'n appèl op die meriete van 'n saak was, 'n verdere verlot tot appèl op grond van 'n ernstige onreëlmatigheid uitgesluit is, terwyl daar miskien aanvaarbare redes mag bestaan vir die laat aansoek tot die tweede appèl, op grond van 'n ernstige onreëlmatigheid, wat vantevore nie bekend mag gewees het nie."

It is clear that this was not a considered opinion on the question whether the Court had jurisdiction or not. The Court, as indicated, did not hear argument on the matter, and the learned Chief Justice did not consider the cases relating to the question of the Court's jurisdiction which counsel for the State mentioned in his written heads of argument. (See at 482 C-E of the report.) It is clear, too, that the view

72

expressed by Rumpff CJ did not form part of the Court's decision on the application. The application was dismissed on the ground that the trial proceedings had not been irregular as alleged by the applicant. As will appear from what is said below, I am of the view that the dismissal of an appeal on the merits has the effect that there can be no subsequent appeal on the ground of an alleged irregularity, even if such irregularity is discovered only after the dismissal of the appeal - in the same way as there can be no second appeal on the merits on the ground of fresh evidence discovered after the dismissal of an appeal.

It appears from the foregoing that there is no judgment of this Court in which it has been held that a special entry may be made after an appeal against a conviction has been dismissed by this Court, and I am of the opinion that the Legislature did not intend that a special entry relating to a conviction could be made after the dismissal of an appeal against that conviction. Sec. 315(2)

73

of Act 51 of 1977 provides that an appeal to the Appellate

Division shall lie only as provided in sections 316 to 319 of the Act. Sec. 316 is in wide terms and clearly contemplates appeals on factual and legal grounds. Sec. 317(1) provides for the making of a special entry relating to an irregularity or illegality in the proceedings at a trial, and sec. 318 provides that a person who has been convicted may appeal to the Appellate Division on the ground of the irregularity or illegality stated in the special entry. Sec. 319 provides for appeals on reserved questions of law. The special entry procedure is designed to furnish an accused who has been convicted with a ground on which he can appeal against his conviction, in the same way as,

say, an alleged lack of sufficient evidence would constitute a ground on which he can appeal. The procedure is a useful, or perhaps even necessary, one when the irregularity or

74

illegality complained of is discovered only after the conclusion of the trial. The procedure need not, however, be followed when the irregularity or illegality appears from the record of the case, for in such an event the irregularity or illegality can be made the ground of an appeal under sec. 316 of Act 51 of 1977. (See e.g. *R v. Nzimande*, supra, at 775 A-D.) Sections 316 and 318 therefore both contemplate an appeal against a conviction. They do not provide for different remedies, but merely for different ways of bringing an appeal before the Court, the one (under sec. 316) based on a point of law or fact which appears on or arises from the record of the case, and the other (under sec. 318) on an irregularity or illegality in the proceedings at the trial. But, as I have indicated, an irregularity or illegality in the proceedings which appears from the record can be made a ground of appeal in an appeal as contemplated in sec. 316. All this being so, I am of the view that there cannot be an appeal against a conviction on a special entry under sec. 318 after an appeal against that conviction has already been

75

dismissed in an appeal as contemplated in sec. 316. A second appeal against a conviction, based on a special entry after an appeal against it (as contemplated in sec. 316) has already been dismissed, would create a situation which the Legislature could not have contemplated, and for which it made no provision. Suppose e.g. that this Court were to be asked to hear such a second appeal and that it were to be of the view that the appeal has merit. Would it be entitled to set aside the conviction although it dismissed an appeal against it in an earlier appeal and thereby in effect confirmed the judgment of the trial Court? And would the Court, if it thought that the second appeal was one that ought to succeed, have the power to set aside the order made by it in the earlier appeal? In my view the answer to these questions, which can arise if there were to be more than one appeal against a conviction, is clearly "no". Sec. 322 of Act 51 of 1977, which deals with the powers of this Court on appeal, does not contemplate

76

the hearing of such a second appeal, and it does not confer on the Court a power to set aside its dismissal of an appeal in earlier proceedings. Sec. 322(1) reads as follows;

"322. (1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may -

(a) allow the appeal if it thinks that the

judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice ; or

- (h) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
- (c) make such other order as justice may require:

Provided that, notwithstanding that the court of

77

appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect."

The subsection contemplates, in my view, the hearing of a single appeal in which all the grounds on which an appellant relies are adjudicated on at the same time.

In view of the foregoing I am of the opinion that the Transvaal Provincial Division did not in law have jurisdiction to accede to either of the applications of the petitioners, and that this Court also does not have the power to grant the relief sought by the petitioners.

In view of my aforesaid conclusion it is unnecessary for me to deal with the finding of Human AJ that, on the facts, the petitioners did not make out a case for the making of a special entry. In view, however, of the arguments that were addressed to us on the facts of the case, and because counsel for the petitioners tendered to the Court

78

an affidavit made by Manete after Human AJ had given his judgment, it may be advisable to state my views on the matter.

The affidavit to which I have just referred was deposed to on 16 June 1988, i.e. some 5 days after Human AJ had given his judgment. It cannot therefore be relied on as a ground for saying that Human AJ erred when he referred to the absence of an affidavit by Manete in giving the reasons for his judgment, and strictly speaking we are not entitled to take account of it in considering whether leave should be granted to appeal against the learned Judge's judgment. I shall nevertheless refer to it after I have dealt with the views of Human AJ on the facts of the case. I have already quoted from the various statements by Manete and have also set out what the learned Judge said in regard thereto. I therefore need not repeat at any length what has already been said above.

In dealing with the statements made by Manete,

79

counsel for the first respondent contended that Manete made contradictory statements as to whether he was assaulted by the police. In his statement of 11 May 1985 Manete said that he was assaulted by the police and that he was forced to make the statement. In the statement which he

made to his attorney in September 1985 he stated that he had been "threatened with assault", and not that he had actually been assaulted. Human AJ did not refer to these seemingly contradictory statements in his judgment, and I do not propose to dwell thereon. What weighed heavily with Human AJ was the statement which Manete made to his attorney in September 1985 in which he stated that he would tell the attorney what actually happened on the day Dlamini was murdered. It will be recalled that he said in his statement of 11 May 1985 that he was assaulted by the police, that the names of the 5th and 6th petitioners were mentioned to him by the police, and that he was "forced to write these names in the statement." In September 1985,

80

after he had been subpoenaed to give evidence at the trial, he went to see his attorney and told him that what he had previously said to the police was "not entirely true," and that he would now tell what "did take place" on the day of the murder. He then said, as has been indicated above, that he went to Dlamini's house on that day, that he saw the 5th and 6th petitioners among the people present there, and that he saw both of them "throw stones at Dlamini's house", but that he did not see them "actually pouring petrol on the house or stoning Dlamini himself." In this statement Manete placed the 5th and 6th petitioners at the scene of the crime, and, in doing so, he contradicted his statement of 11 May 1985 in which he said that the police gave him the names of the 5th and 6th petitioners and forced him to write those names in the statement.

Apropos this statement of September 1985 and the evidence given by Manete at the trial, Human AJ stated that at the time when the applications were argued before him,

81

i.e. on 6 and 7 June 1988, there was no affidavit by Manete saying that "the evidence given by him at the trial was false or that the police instructed him to give false evidence against the fifth and sixth applicants" (quotation from the judgment). There was, of course, also no affidavit or statement of any kind before the Court in which an explanation was offered of his statement, which was proffered as the truth, that he saw the 5th and 6th petitioners at the scene of the crime, whereas he had previously said that he was forced by the police to implicate them. Human AJ, as indicated above, rejected the explanation offered by the petitioners' attorneys for the absence of an affidavit, viz. that they could not obtain such an affidavit because Manete was a State witness. The learned Judge pointed out that the Appellate Division delivered its judgment in the appeal on 1 December 1987 and that the petitioners' attorneys had thereafter been instrumental in obtaining from Manete a waiver of all privileges relating to communications made

82

by him to his attorneys. I do not think it can be said that the learned Judge erred in rejecting the explanation offered by the attorneys for the petitioners. The following may be added in this regard. Counsel for the first respondent pointed out (and it was not disputed in any way) that on 17 March 1988, when Human AJ heard the petitioners' application for a stay of their execution on

the next day, counsel representing the first respondent submitted to the Court that one would have expected the petitioners' attorneys to have obtained an affidavit from Manete concerning the allegations he made in his statement of 11 May 1985, and that the petitioners' legal representatives could not have been in any doubt after that date (i.e., 17 March 1988) that they were free to take an affidavit from Manete. It is to be observed in this connection, also, that the fact that Mongaule testified for the State at the trial did not dissuade the petitioners' attorneys from obtaining an affidavit from him for the purpose of the hearing before Human AJ in June 1988.

83

This takes me to the affidavit to which Manete

deposed on 18 June 1988. Manete says, in paragraph 3 of this affidavit, that he made it to and in the presence of his attorney, Mohamed Bham. I refer, first, to paragraphs 7, 8, and 9 of the affidavit which relate to the consultation which Manete had with Bham in March 1985. (Bham says the consultation was on 15 March 1985, whereas Manete says it was

on 16 March 1988.) They read as follows:

"7. When I last consulted my Attorney on the 16th March 1988, I told him that I had falsely implicated these two persons (Khumalo and Mokgesi) in my evidence to the Court.

8. I had further told him that I had done so because I had been assaulted by the Police at the time and instructed to make a statement implicating these two persons. 9. However, when I consulted my Attorney,

I was not willing to give him a statement⁸⁴

to this effect, as I was afraid of being

charged with perjury and being imprisoned."

What is said in paragraphs 7 and 8 corresponds with the statement made to Bham on 15 March 1988, to which I referred above. 15 March 1988, it may be noted here, was the first occasion on which Manete stated that his earlier statements that he saw the 5th and 6th petitioners at the scene of the crime were untrue. As for paragraph 9, it is not clear to me precisely what Manete intends to say. According to Bham, Manete told him on the occasion of their consultation on 15 March 1988 that the evidence he had given at the trial was false; that he had not seen the 5th and 6th petitioners at the scene of the crime; that the police mentioned the names of these two petitioners to him, and that they instructed him to say in his evidence that he saw them at the scene of the crime. Manete's statement in paragraph 9 that he was not willing to give Bham "a statement to this effect" does not,

85

therefore, seem to make sense, nor does his statement that he did not give Bham such a statement because he was afraid of being charged with perjury. If one supposes that Manete had in mind an affidavit when he used the word "statement", and, also, that he had in mind contradictory statements made on oath when he referred to perjury, it is still difficult to understand how he could have been afraid of being charged with perjury. The statement which he made on 11 May 1985 was not on oath, and the one he made to his attorney in September 1985, in which he said that he saw the 5th and 6th petitioners at the scene of the crime, was also not on oath. The only statement on oath made by him was the one which he made in October 1985, in which he furnished his attorney with an account of what he had testified at the trial. He could not possibly have thought that this statement could form the basis of a charge of perjury.

In paragraphs 12, 13 and 14 of the affidavit Manete states that he was present when Dlamini was killed; that he

86

did not see any of the petitioners at or near the scene of the crime; that his evidence at the trial that the 5th and 6th petitioners were present when Dlamini was killed was not true, and that he gave such evidence because he had been assaulted by the police and instructed to implicate those two

petitioners in the crime. This is substantially the same as what he said to Bham on 15 March 1988 and corresponds with what he says in paragraphs 7 and 8 of his affidavit. No more need be said about it.

Paragraph 15 of the affidavit relates to the

statement Manete made to his attorney in September 1985. It reads as follows:

"The statement I made to my attorney during September 1985, when I stated that I saw Duma Khumalo and Don Mokgesi near the scene of the crime throwing stones at the deceased's house is also not true. I was afraid I may be charged with perjury, if I deviated from what I was told by the Police to say."

87

This is all he says about the matter, and in my view it cannot in any way be regarded as an explanation of why he told his attorney that he saw the 5th and 6th petitioners at the scene of the crime. The statement could not possibly have been prompted by a fear of being charged with perjury, as alleged by him. He had not previously made a statement on oath to the police, and he had not yet given evidence at the trial. The statement was made to his own attorney, and it was not on oath. Furthermore, although he says that he made the statement because he feared that he might be charged with perjury if he deviated from what he had been told by the police to say, he in fact deviated, to some extent at least, from what the police had allegedly told him to say by

ascribing to the 5th and 6th petitioners a lesser role in the events of 3 September 1984 than what the police had allegedly wanted him to do. I am of the opinion, therefore, that the affidavit offers no explanation as to why Manete told his attorney what he did, and that it furnishes no reason for

88

doubting that he told his attorney what he had in fact seen, and not what he had allegedly been forced by the police to say. In view of all the foregoing I am of the opinion that the decision of Human AJ as to the facts of the case relating to Manete cannot be faulted, and that nothing that is said in the affidavit of Manete, which was not before the learned Judge, can serve to disturb that finding.

It remains to refer to a further point concerning

the statement made by Manete on 11 May 1985. In the course

of his argument that it was essential that further

cross-examination of Manete should be allowed, counsel for

the petitioners referred us to a passage in the judgment of

Botha JA in the appeal in which he said (at 876D) that -

"... if this Court were to decide that the trial Judge had erred in disallowing Manete's cross-examination a re-appraisal of the entire case would be called for, leaving aside the evidence of Manete."

89

It was also pointed out to us that in his judgment on the application for the stay of execution, which was delivered on 17 March 1985, Human AJ referred to the aforesaid passage in the judgment of Botha JA and said that Manete's statement of 11 May 1985, which had been made available to him, Manete

having "waived his privilege", -

"may affect the guilt of the first two applicants (nos. 7 and 8 at the trial); it may affect the others."

The aforesaid observations by Botha JA and Human AJ should be seen in proper perspective by having regard to the circumstances in which they were made. Botha JA's knowledge of the contents of Manete's statement of 11 May 1985 was limited to a passage in the record of the trial in which counsel for the defence told Human AJ that the statement was to the effect that Manete implicated the 5th and 6th petitioners (accused nos. 7 and 8) in the offence because the police had told him to do so. Botha JA did not know of the

90

statement that Manete made to his attorney in September 1985 in which he said, as indicated above, that he saw the 5th and 6th petitioners at the scene of the crime. As for the statement made by Human AJ, his judgment contains no reference to the statement of September 1985, and it does not appear that his attention was directed to it.

With regard to the contention that the trial should be reopened for the purpose of hearing further evidence from Mongaule, I do not think it can be said that Human AJ erred in any way in the conclusion to which he came on the matter, and it is not necessary to say anything more about it.

In view of all the foregoing the application for leave to appeal cannot succeed.

During argument before us it emerged that the applicants had already unsuccessfully addressed the State President by way of a petition pursuant to the provisions of sec. 327 of Act 51 of 1977. It was common cause, however, that if this application should be dismissed, it would not

91

preclude the applicants from addressing the State President anew by means of a fresh petition.

The application is dismissed.

P J RABIE ACTING CHIEF JUSTICE.

CORBETT JA

JOUBERT JA Concur.

HOEXTER JA

VAN HEERDEN JA

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZASCA/1988/143.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/sefatsa-and-others-v-attorney-general-unknown-topic-asca-1988--6a3ea5123b1caa9129809a19>

Prepared on 14 October 2026 · Esheria