THE HIGH COURT OF SWAZILAND

Criminal Case No. 46/2000

In the matter between:

REX

VS

CELANIMAPONI NGUBANE
JABULANI BHEMBE
MBONGENISANDILE BHEMBE
NHLANHLA VILAKATI

CORAM **: MASUKUJ.**

For the Applicant For the Respondent **: Mr T.A. Dlamini : Mr N.M. Maseko**

RULING ON APPLICATION FOR RECALLING OF WITNESS
9th SEPTEMBER, 2004

Introduction

The question for determination in this Ruling is whether a witness, Sifiso Charles Dlamini (PW 8), who testified in this trial, was cross-examined at length and eventually excused by the Court, should be recalled for further cross-examination at the instance of the Applicant, Accused 1.

The Applicant has brought this application for the recalling of PW 8, in terms of the provisions of Section 199 of the Criminal Procedure and Evidence Act No.67 of 1938, as amended, (hereinafter referred to as "the Act").

Background

During the course of the trial, PW 8 was introduced and warned by the Court to stay in attendance until formally excused by the Court. This was on the 24th May, 2004. Subsequent to that day, Mr B.S. Dlamini, Accused l's erstwhile attorney, consulted with this witness and this became evident when the witness was eventually called to testify. This was raised by Mr B.S. Dlamini himself in cross-examining the said witness.

In view of this conduct, which the Court adjudged as being improper and unethical, Mr Dlamini, in the interests of justice and fairness, was ordered to withdraw his services on behalf of the 1st Accused. He did withdraw as ordered and in his position, Mr T.A. Dlamini took over representing the 1st Accused as well, in addition to his original client, Accused 4. It is important to note that this development i.e. the change of attorneys for Accused 1, occurred after PW 8 had been excused by the Court. At that stage, he had completed his evidence, having been cross-examined, at length, if I may add, by the defence.

It was after Mr T.A. Dlamini took over and consulted with his client Accused 1 that he now moves the application, claiming, during an oral address, that his client's instructions in relation to certain matters were not carried out by his erstwhile attorney, particularly in relation to the evidence of PW 8, whom he seeks to recall in order to put those issues that were omitted by Mr B.S. Dlamini.

The affidavit filed by the Applicant is starkly deficient regarding the reasons why PW 8 should be recalled, obliviously to his inconvenience and why a disruption of the proceedings which are nearing finalisation is necessary.

All that is stated by the Applicant in this regard, is to be found in paragraphs 14 and 15 of the Founding Affidavit, where he states the following: -

> 14 "During the course of the numerous consultations with Attorney T. Dlamini it transpired that despite the instructions I had given to Mr B. Dlamini certain portions of the accomplice's evidence had gone unchallenged by my former defence Attorney.

15 "I have been advised and verily believe that in terms of Section 199 (2) a court of law has a duty to, amongst others, recall and re-examine any person if his evidence appears to it essential to the just and proper decision of the case. Legal argument shall be advanced on my behalf in this regard."

The Crown, represented by Mr Maseko, vigorously opposed this application on the grounds that during PW 8's sojourn in the witness box, Accused 1 was represented by a duly qualified legal practitioner and that the said witness had been cross-examined at length and eventually excused. At no time, Mr Maseko argued, did the Accused 1 indicate that his instructions were not carried out or were inaccurately carried out, in which case he would have made his intention to confer with his attorney known to the Court in the first instance and if the situation continued unabated, then he would make his protestations known to the Court with a view, possibly, of terminating his attorney's mandate.

It was Mr Maseko's contention that the Application, in view of the foregoing, particularly considering the stage at which it was moved, was unreasonable and obstructive. The Court was in this regard referred to **R VS MAKHUDU 1953 (4) SA 143 TPD at 144 D.**

The Law applicable.

Section 199 of the Act, reads as follows: -

"(1) The Court may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall any persons already examined.

(2) The Court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."

An interpretation of this Section and whose language was in *pari materia* with the above was undertaken in Swift, "Law of Procedure", 2nd Edition, Butterworths, 1969. It is worth pointing out that the wording of similar Sections in the Republic of South Africa as exemplified in subsequent amendments is not the same as ours and extreme care should

therefor be taken not to fall into the pitfall of assuming that all the interpretations and decisions in respect of that Section apply wholesale to this jurisdiction, particularly relating to the amended version of the Section.

At page 369, Swift discusses the implications of the then Section 210 of the Criminal Procedure Act, of 1955 as follows:-

> *"The power given to the Court in the first part of the section is a discretionary power, which vested in the judge alone and in the exercise of which the assessors and jury have no voice...Normally, the Court acts under this section mero motu but in practice it from time to time occurs that a suggestion that the section should be invoked is made either by the Crown or by the defence. When such a suggestion is made, the Court will, before exercising its powers under section 247 (210), no doubt ordinarily require to have some indication of the general nature of the evidence to be given by the proposed witness, but it appears to me to be manifestly undesirable that the details of the proposed witness' testimony should be conveyed to the court before the latter has decided whether or not the proposed witness is to be called at all. This will especially be the case where there also exists any additional reason, personal to the proposed witness, which may militate against his being called by the Court. "* See also the numerous cases therein cited.

In relation to the second aspect of the Section, the learned author states the following at page 372: -

> *"The discretionary power to subpoena mentioned in the first part of the section becomes a duty if the evidence of the witness appears to the court essential to the just decision of the case, and "if once a Court comes to the conclusion that it is essential to the just decision of the case to call or recall a witness, it becomes imperative on the Court to do so, and no discretion is then left to the Court... "*

The logical question then becomes, what is meant by the words "just decision of the case", in the above rendering?

The same learned author, at page 372 defines the said words as follows: -

> *"By the words 'just decision of the case', I understand the legislature to mean to do justice as between the prosecution and the accused".*

Hoffman and Zeffert, in their work entitled "The South African Law of Evidence" 4th Edition, Butterworths, 1997, say the following regarding the issue at page 473: -

> *"The judge must decide for himself on the information available to him, and if it appears that his evidence is essential, there is an unqualified duty to call him."*

The learned authors Du Toit *et al,* "Commentary on the Criminal Procedure Act", Juta, 1995, at page 23-13 say the following: -

> *"It is for the Court to decide whether the evidence is essential. If it appears that the evidence was in fact essential to the just decision of the case a failure to call the witness could be an irregularity. "*

Blackwell J., in R VS MAKHUDU 1953 (4) SA 143 (T.P.D.) at page 144 formulated the applicable principle as follows: -

> *"This question of recalling a Crown witness for cross-examination came before my Brother Steyn and myself on the 31st July, in the case of MONOSI VS REGINA, 1953 P.H. H.131, in which much the same circumstances existed and I expressed the opinion then, and I reiterate it to day that magistrates should not deny a request that a Crown witness be recalled for further cross-examination <u>unless they think that such a request is unreasonable or obstructive</u>"* (my own emphasis).

I should however hasten to point out that the decision immediately above is not one based on the provisions of any statutory enactment. It is predicated on the imperatives of justice and fairness, which have to characterise criminal proceedings, in particular.

Applying the Law to the facts

It now behoves me, having had the benefit of the above authorities, to consider whether in the present situation, the criteria set out above have been met by the Applicant.

The first thing to note is that from the Applicant's Founding Affidavit, particularly at paragraph 15, it is contended that the latter part of the Section, as analysed by Swift applies i.e. the Court is not being motioned to exercise its discretion in the recalling of the witness, but that the recalling of the witness in question is essential to the just decision of the case and that by extension, a refusal to have him recalled could result in an inegularity.

The question that follows there from is whether there has been placed before Court sufficient information on the Affidavit and on the basis of which the Court can come to an informed decision on whether the evidence sought to be led is such that it is essential to the just decision of the case. See **S VS B AND ANOTHER 1980 (2) SA 946 (A.D.) at 953 A.**

As recorded earlier above, the application should be granted if the evidence of the witness proposed to be called appears to the Court essential. The question of whether the evidence is essential or not can only be answered from a consideration of the general nature of the evidence to be adduced. See Swift (supra) at page 369. The difficulty that faces this Court *in casu* is that the affidavit discloses nothing that is close to a resemblance of the general nature of the evidence sought to be led. Without that information, the Court is not given the material upon which to make an informed decision.

The general nature of the evidence sought to be led or the general parameters of the cross-examination ought to have been set out in the Founding Affidavit, as I had ordered that the application be reduced to writing, in order to eliminate the element of surprise on the part of the Crown. It was therefor, in light of the Order made, improper for the Applicant's attorney to seek to place this information before Court *via* another medium i.e. facts disguised as submissions in his oral address.

From the oral address, Mr Dlamini's main argument was that the Applicant's erstwhile Attorney, Mr B.S. Dlamini, did not put the Applicant's instructions to PW 8 and that that failure may have dire consequences on the Applicant as he may be convicted. It was further

argued on the Applicant's behalf, that because of the default of Mr B.S. Dlamini, it cannot be said that the Applicant had a fair opportunity to defend himself against the Crown's accusations. The argument went to the extent that Mr B.S. Dlamini may be regarded as having refuted his erstwhile client's instructions.

In support of that argument, the Court was referred by Mr Dlamini to the recent case of S VS **MOFOKENG 2004 (1)** SACR **349 (WLD),** where the Appellant had been charged and convicted of robbery with aggravating circumstances by a Magistrate's Court. He was sentenced to eight (8) years imprisonment and he lodged an appeal against both conviction and sentence. An advocate from the Johannesburg Justice Centre drafted and signed heads of argument on the Appellant's behalf and in which the former conceded that both the conviction and sentence were proper and condign. The Appellant was not present at the hearing and there was no indication that there had been a *volte face* in his initial vigorious appeal against both conviction and sentence.

The hearing of the appeal served before Louw A.J. and Gudelsky A.J. and they took a position unfavourable to the Advocate, whose name was ordered not to be disclosed, on whether he had not refuted his client's instmctions. An *amicus curiae* was thus appointed to consult with the Appellant; to ascertain whether the Appellant intended to persist with the appeal; to prepare heads of argument and to argue the appeal on the Appellant's behalf. The judgement of the Court was refened to the Chairman of the Johannesburg Bar Council.

Before discussing the principle enunciated in the above and other cases, I have mentioned the absence of information on the basis of which the Court can exercise its powers in terms of Section 199 of the Act. Mr Dlamini sought to make up for the deficiency by providing the reasons in his oral address. As indicated above, this was an improper course in light of the Order that the application be reduced to writing but I will, in the interests of justice, recognising that this is a criminal matter and in which the Applicant faces the possibility of a capital punishment, have recourse to the oral reasons advanced. In future however, where an affidavit is ordered to be filed, all the relevant allegations must be made therein and no attempt to substitute what should be on affidavit with embellishing oral arguments should lightly be allowed.

Mr Dlamini informed the Court that after taking instructions from the Applicant, following the withdrawal of Mr B.S. Dlamini, he found that certain crucial portions of the Applicant's case had not been put to PW 8. In this regard, he stated that the cross-examination of PW 8, if sanctioned by the Court, would be confined solely to the telephone calls allegedly made by the Applicant to PW 8.

It was his contention that the failure by Mr Dlamini, the erstwhile attorney, to put these crucial questions amounted to an abrogation of the Applicant's instructions and could result in this Court convicting an innocent man. It was further argued that the application for PW 8 to be recalled was, to enable the Court to have the full facts before it prior to returning the verdict, particularly on the first Count. He argued further that the Applicant cannot in law challenge the competency of his representative after the verdict has been handed down.

In the case of S VS MOFOKENG (supra) at page **355** a -c, the learned Judge, cited with approval the case of S VS HALGRYN **2002 2** SACR **211** (SCA), where Harms J.A., in part stated the following: -

> *"Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend on the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective usually, if not invariably, without the benefit of hindsight... The Court must place himself in the shoes of the defence counsel bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions often with little time to reflect...The failure to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope is limited. "*

It would appear, from Mr Dlamini's argument that we are in this case dealing with the latter aspect, which is clearly difficult to determine, as it involves the discretion, experience and approach to the matter, based on the professional decision of the particular attorney. In this

case, there is clearly no allegation to the effect that instructions were not taken from the Applicant.

In measuring the effectiveness of counsel, in criminal matters, the learned Louw A.J. referred to an American decision in STRICKLAND VS WASHINGTON 466 US 668 (1984). In this regard, Louw A.J. said the following:-

> *"In terms of the test, a litigant in a criminal matter who contends that he had ineffective assistance of counsel has to show, not only that counsel did not function as the type of Counsel guaranteed by the Sixth Amendment to the United States Constitution and did not provide reasonably effective assistance, but also that counsel's errors were so serious as to have deprived the litigant of a fair trial. He must show a reasonable probability that, but for counsel's unprofessional errors, the results would have been different. "*

Louw A.J. in further enunciating this test, stated the following cautionary remark's at page 358 d-e:-

> *"This approach is certainly strict. The Court is highly differential to the conduct of the case by counsel. Taking into account all the very many conflicting forces which influence the making of decisions in the forensic process, the Court does not easily find that there has been a failure to justice, simply because the representation by counsel was not as excellent as it could have been. "*

In this case, I am of the view that the principles enunciated, do not have a bearing on this case as they apply to cases where the right to full legal representation is being attacked as being a fatal irregularity on appeal or review. This should not be confused with the application in terms of Section 199 for the recall of a witness. The attack of a right to a fair hearing unfortunately has the tendency to cast aspersions on the professional competency of a practitioner and one that should not, for that reason be lightly resorted to without the benefit of anxious consideration and reflection. I do however find myself in duty bound to make a pronouncement on the issue as raised by Mr Dlamini.

I am very much alive to the fact that this is a yardstick that is normally employed *ex post facto* and after the verdict has been delivered. It is however in my view, a useful one to employ even at this stage, considering, in the process, the manner in which the trial has been conducted by the attorney whose handling of the matter is complained of. The question, in this wise is whether it can be said that the Applicant has been deprived of a fair trial by his erstwhile attorney, appreciating as we should, that the matters that would be in question, relate to his erstwhile attorney's professional judgement as indicated earlier.

There is nothing on the record that in my view would corroborate the Applicant's view and assessment of his erstwhile Counsel's performance, as evidenced by the submissions made on his behalf. To the contrary, it would appear on an objective basis, which I am in a position to assess, being the trial Judge, that he put whatever questions he felt were proper to all the witnesses. I should, in this regard, also point out that he did so with vigour and even cross-examined the witnesses generally in a satisfactory fashion, questioning issues that other counsel would find immaterial or settled. I have in mind the attack on the admissibility of receipts handed in by PW **3** and PW **6** in proof of purchase of certain items introduced in Court as exhibits.

Secondly, there was no indication by the Applicant during the hearing that he wished certain ground to be traversed by his attorney during the cross-examination of the Crown's witnesses, including PW 8. This could have been done, as is normally the case, by the Applicant raising his hand to indicate that he wished to confer with his attorney at the time. I take due cognisance of the added fact that there were numerous recesses, including morning and lunch breaks, where such issues could have been raised and thrashed out between the Applicant and his erstwhile attorney.

Thirdly, at no point did the Applicant indicate his unhappiness with his attorney. There was no indication of any dissatisfaction up to the time that PW 8 was excused. I say this of course without the benefit of the knowledge and extent of the exact instructions given by the Applicant and to which I claim no privilege. If Mr. B.S. Dlamini did go against such instructions, as is now being alleged, then, it was incumbent upon the Applicant, who I must point, out struck me as an intelligent and "streetwise", young man, who followed the proceedings with relative ease, to point this out to the Court. The Applicant was, in my assessment, not a docile person, a lamb being led to the shearers as it were. To the contrary

he exhibited his sharp acumen when he requested that his present attorney takes over rather than introducing a fresh attorney in the fray.

In this regard, reference can be made to **S VS BENNETT 1994 (1) SACR 392,** which I should again advise, related to an attempt to set aside proceedings as a fatal irregularity because of the incompetence of counsel. I can however borrow from the reasoning in that case. At page 397-8 a - b, Horn A.J. stated the following:-

> *"The Appellate Division held, as to this, that since the appellant had taken no steps to withdraw his counsel's mandate and had expressed no disagreement with the conduct of his case until after the verdict had been given, the trial was regular and the correctness of the verdict could not be challenged on appeal. "*

It could be argued that the above quotation is not apposite *in casu* because the complaint has been lodged during the continuance of the proceedings and that the Applicant has not waited until the verdict. The point being made however, is that the Applicant never objected to the conduct of his trial, particularly during PW 8's sojourn in the witness box.

In **R VS MATONSI 1958 (2) SA 450 (A-D), at page 457,** Schreiner J.A. stated the following:-

> *"Cases of disagreement between the views of client and counsel arise from time to time and counsel may find himself between the Scylla ofprecipitately, therefore improperly withdrawing from the case, and the Chary odis of unreasonably overriding his clients will. The decision may be particularly difficult where the accused is being defended on a capital charge by counsel who is acting pro deo without other legal assistance ".*

This may be one of those disagreements *in casu,* which, looking at the chronology of events, would be unlikely to sustain the Applicant's argument. As indicated, more is needed, as recognised by Horn. A.J. in **S VS BENNETT** (supra), at page 398 g - h in the following terms:-

> *"It is that if complaints such as the appellant makes about the incompetence of*

> *counsel could found a complaint of a fatal irregularity, there would be no finality in any criminal trial until the proficiency of counsel who represented the accused and which is complained about after the event, had also been adjudicated upon. Regrettably, one of the events which sometimes follows a conviction is recrimination from the accused person who seeks to attribute his misfortune at having been convicted not to his own guilt, but to his counsel. "*

Mr Dlamini's argument that an accused cannot challenge the competency of his counsel after a verdict has been given finds great and consistent contradiction in the authorities he referred to. That line of reasoning cannot therefor be allowed to influence the decision whether or not to recall PW 8.

I would on this score find that the Applicant has failed. From the circumstances of this case, it cannot be held that the accused's right to a fair opportunity to defend against the Crown's accusations was compromised. I cannot, on the grounds stated by the Applicant, find that it can be said that Mr B.S. Dlamini refuted his client's instructions either.

Having said the above, there is one consideration that lurks and hovers precariously, exercising my mind considerably in the process. It is true that no substance was set out as to why Section 199 ought to be invoked in the Applicant's favour in the written application. The grounds raised orally related more to the question of the Applicant's attorney refuting his instructions, which I have found insupportable.

In the case of R VS MAKHUDU *(supra),* Blackwell J. as recorded above, stated that the criteria to be used in deciding whether or not to recall a witness is whether the request is unreasonable and obstructive. The learned Judge proceeded to state the following at page 144 E-F:

> *"The whole problem before our Courts is to arrive at the truth. You cannot, you should not convict an accused person upon testimony led by the Crown until you have probed that testimony to the fullest legitimate degree, ft sometimes happens that a point which should be explored immediately in cross-examination is not explored. In the earlier case I have mentioned, it was because of a change of legal advisers, but, whatever the reason may be, my own feeling is that Courts*

should lean over backwards, if I may use the phrase, in assisting the defence to bring out any points which they are anxious to explore. No prejudice is suffered by the Crown no harm is done to anybody, and all that results is that the accused is given a fairer trial that he might otherwise receive. "

These are the considerations that have weighed heavily on me. The confines of the issue(s) to be canvassed in cross-examination are well and clearly demarcated. This is not an attempt at another bite to the cherry being afforded the Applicant as it were. In my view, considering the possibility of capital punishment that the Applicant faces, the request for PW 8 to be recalled is not unreasonable or obstructive. I also point out in the Applicant's favour that the intention to make this application was evinced as soon as Mr T.A. Dlamini took over the defence of the Applicant, although I must mention that there was tardiness on his part in eventually moving the application. I cannot, due to that fact, infer a malicious intent which I would abhor, where the defence deliberately does not put the case adequately to the Crown witnesses, resting on the forlorn hope that the case against the client will be rendered weak and unsustainable and when the defence notices that the bricks of the case, together with mortar is concretising and constituting a weight heavy enough to sink the accused into the murky pools of an adverse verdict, they then move the application in terms of Section 199. It would, in my view be wrong, to allow such an abuse of the provisions of the Section.

In view of the foregoing, I am of the view that the Applicant's request be and is hereby granted, provided that PW 8's cross-examination is confined solely to the question of the calls made by the Applicant to PW 8. It may well be that re-opening the case in that regard could satisfy the Court in seeing that his full case has been put. If that is the case, then I am of the view that evidence would be rendered essential to the just decision of the case. This would give effect, hopefully, to the object of the Section, which is, "namely to see that substantial justice is done, that an innocent person is not punished and that a guilty person does not escape punishment." See REX VS OMAR 1935 A.D. 230 per Wessels C.J.

This decision must however not be viewed as authority for the proposition that the request for the recall of a witness will be granted merely for the asking. In this case, there was a change in representation and an allegation that certain pertinent questions were not put to the witness concerned. I do not think it would fair nor proper, to wait until the verdict is handed

down to actually ascertain what effect the cross-examination sought to be allowed will have. Justice, in this case calls for the grant of the application.

I do hope that no approaches have been made with PW 8, in the intervening period, particularly after he was excused by the Court, to try to persuade him to change his testimony. This, if evident, will be immediately picked up by the Court and appropriate sanctions would inevitably land in the lap of the guilty party.

Procedure to be followed

Since this is not a witness who is called at the instance of the Court, it is necessary to ascertain the rules that should apply. According to Swift *(supra),* at page **373,** the following applies:-

> *" Where a State witness is recalled, the witness remains a State witness and the prosecutor is not entitled to ask leading questions, or to cross-examine his own witness.."*

PW 8 is clearly a Crown witness and the above rules will have to apply to him. It being common cause what issue he is sought to be cross-examined on, I order the cross-examination to be strictly confined thereto.

T.S. MASUKU
JUDGY