37/95

REPORTABLE
CASE NO. 690/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KENNETH RAMALOPE APPELLANT

and

THE STATE RESPONDENT

CORAM: NESTADT, STEYN, JJA et OLIVIER, AJA

DATE OF HEARING: 24 FEBRUARY 1995

DATE OF JUDGMENT: 29 MARCH 1995

JUDGMENT

OLIVIER AJA;

Two interrelated issues are to be decided in this appeal: whether, on the facts of the case, the disallowance of re-examination of the appellant by his counsel amounted to an irregularity, and, if so, what the legal consequences of such an irregularity are.

The appellant (who, appearing at the trial with two others, was accused no 2) was convicted in the Regional Court at Germiston, Mr J J F Coetzer presiding, of armed robbery, in which R577 449,41 in cash and a 9mm

Browning pistol were taken on 28 October 1991 (count 1), and of theft of a Ford light delivery vehicle on 19 September 1991 (count 2). He was sentenced to ten years' imprisonment on the first count and five years' imprisonment on count 2. He and his two co-accused appealed against their convictions and sentences to the Witwatersrand Local Division. Le Grange J, with whom Flemming DJP concurred, confirmed the convictions and sentences. Subsequently the same court dismissed an application for leave to appeal to this Court.

In September 1993 this Court granted the appellant leave to appeal against his convictions, but only on the ground that the trial magistrate may have erred in disallowing re-examination of the appellant after he had been cross-examined.

The factual background

Twenty-one State witnesses testified on behalf of the prosecution and were cross-examined by counsel for the defence. The attitude of the trial magistrate with regard to re-examination is clearly evident from his instruction

to each of the State witnesses to stand down at the conclusion of their cross-examination. The prosecution was never offered an opportunity to re-examine any of its witnesses. Surprisingly, the prosecutor never requested an opportunity to re-examine any of his witnesses, and the correctness of the magistrate's attitude was never tested at that stage.

However, the matter was raised at the end of the cross-examination of the first accused. Without referring to counsel for the defence, the magistrate instructed the accused to return to the stand. Counsel for the defence rose and indicated that he had not been given an opportunity to re-examine, but that, in any event, he had no questions for re-examination. The magistrate asked him to elucidate that statement, whereupon counsel replied that the Court had not asked him whether he wished to re-examine the witness. The magistrate then enquired why the Court should ask such a question. Counsel replied that it was customary for the court to ask whether there was any re-examination. To this the magistrate replied: "Nee dit is nie hierdie hof se gebruik nie."

At the conclusion of the cross-examination of the appellant, his counsel requested an opportunity to re-examine, and the following interchange then took place:

"HOF: Waaroor?
MNR VAN DER MERWE: Oor aspekte wat die staat oor kruisverhoor het.
HOF: Is dit aspekte wat eers ontstaan het uit die kruisverhoor van die staat?
MNR VAN DER MERWE: Spesifiek aspekte wat die staat geopper het oor die sekerheid van mnr. Stewart oor die identifikasie van beskuldigde, en so meer.
HOF: Maar dit is nie aspekte wat ontstaan het tydens kruisverhoor nie.
MNR VAN DER MERWE: Is die hof se bevinding dat die vrae (onhoorbaar)?
HOF: Ja. U is alleen geregtig om her te ondervra oor aspekte, oor aangeleenthede wat ontstaan het uit kruisverhoor.
MNR VAN DER MERWE: Dit is my submissie dit het ontstaan uit kruisverhoor. Die kwessie, die staat het geopper dat mnr. Stewart so seker is van die identifikasie van beskuldigde 2 dat hy kan sê dat beskuldigde 2 die voertuig gesteel het en omdat dit ontstaan het onder kruisverhoor wil ek hê die beskuldigde moet verder daaroor getuig, met respek.
HOF: Die hof laat u nie toe nie. Die bedoeling van herondervraging is aspekte wat ontstaan het, met ontstaan word bedoel nuwe aspekte waaroor u nie kon gevra het onder ondervraging.
MNR VAN DER MERWE: Edelagbare ek stry nie met die hof nie. Ek aanvaar die hof se beslissing ..(tussenbei)
HOF: Die hof wil net verduidelik die hof se optrede want dit is duidelik

dat u beslis verskil met die hof.

MNR VAN DER MERWE: Dit is so, ek (onhoorbaar) dit .. (tussenbei)

HOF: Die hof wil net vir u die redes gee waaroor die hof dit nie toelaat nie.

MNR VAN DER MERWE: (Onhoorbaar) die hof op 'n regsbasis maar ek sal dit hou (onhoorbaar). Daar is een ander aspek wat ek ook oor wil herverhoor en dit is die aspek van die beskuldigde se beserings waaroor die staat wel gekruisverhoor het, 'n kwessie wat reeds al geopper is tydens kruisverhoor van 'n staatsgetuie maar ek voel dat die beskuldigde geregtig is omdat die staat in diepte op hierdie kwessie ingegaan het om dit by wyse van sy getuienis voor die hof te plaas naamlik dat hy aan die voorsittende beampte gerapporteer het dat hy aangerand is en 'n sekere aantal beserings getoon en dat dit inderdaad genotuleer is.

HOF: Dit word ook nie toegelaat nie.

MNR VAN DER MERWE: Soos dit die hof behaag (onhoorbaar).

HOF: U kan terugstap." (My italics.)

The right to re-examine

The time-honoured sequence of our adversarial system of examination-in-chief, cross-examination and re-examination is enshrined, as far as criminal trials are concerned, in sec 166(1) of the Criminal Procedure Act, 1977, which reads as follows:

> "166. **Cross-examination and re-examination of witnesses.**-(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at

> criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused."

The right of a party to re-examine his or her witness is, therefore, not a privilege or favour granted by the court, but a legal right, statutorily entrenched. The accused called to testify in a criminal trial is "... a witness ... on behalf of the defence" and he is entitled to rely upon sec 166(1).

As far as the right to re-examine a witness is concerned, the operative words in sec 166(1) are "... on any matter raised during the cross-examination of that witness". The corresponding Afrikaans text (which is the official one) reads "... oor enige aangeleentheid wat tydens die kruisondervraging van daardie getuie ontstaan."

Two points emerge from an analysis of the quoted words. First, there is a statutory right to re-examine on "any matter" if it is raised during the

cross-examination. These are words of very wide compass, "any" being a word of wide and unqualified generality (see R v Hugo 1926 AD 268 at 271).

Secondly, the right to re-examine a witness on "any matter" is only limited to the extent that it was a matter "... raised during the cross-examination of that witness." The contextual meaning of "... any matter raised during the cross-examination of that witness" cannot, in my view, reasonably lead to misunderstanding. "Raise" means "... to bring up (a question, point, etc.); to bring forward (a difficulty, objection, etc.); to advance (a claim)" (The Shorter Oxford English Dictionary, 3rd ed sv II.8.(b)). It does not, and cannot, be taken to mean, as the magistrate seems to think, "raised for the first time during cross-examination". The introduction of this qualification, in the context of a trial, would also be nonsensical. It would result in the absurdity that, if any matter were raised during examination-in-chief, and the witness were cross-examined thereon, no re-examination would be permissible. This would be a denial of the time-honoured rules relating to the examination of witnesses, acknowledged in our courts from the inception of

the adversarial system.

Generally speaking, the object of re-examination is to clear up any point or misunderstanding which may have occurred during cross-examination; to correct wrong impressions or false perceptions which may have been created in the course of cross-examination; to give the witness a fair opportunity to explain answers given by him under cross-examination, which, if unexplained, may create a wrong impression or be used to arrive at false deductions; to put before the court the full picture and context of facts elicited during cross-examination; or to give the witness an opportunity to correct patent mistakes made under cross-examination (See Du Toit, De Jager, Paizes, Skeen and Van der Merwe: Commentary on the Criminal Procedure Act, 1994, paras. 22-25; Hiemstra, Suid-Afrikaanse Strafproses, 5th ed., 427). All these objectives are covered by sec 166(1). The examples quoted above are not intended to be a numerus clausus. Re-examination can be, and frequently is, a very important mechanism for presenting a full and fair picture of the evidence of a witness and thus of arriving at the truth. Of course, if counsel wishes to deal

with new matter (i.e. not arising from the cross-examination) he requires the leave of the court to do so.

Unfortunately, in the light of the clear wording of sec 166(1) and of the long established practice in our courts, the presiding magistrate quite wrongly chose to limit the right to re-examine a witness to any matter raised for the first time during cross-examination. This emerges from the portion of the record to which I have referred and which I have underlined. However, there is even clearer proof of the magistrate's attitude towards re-examination. After an appeal had been noted, the magistrate furnished further reasons for his decision not to allow re-examination of the appellant as follows:

"Ingevolge die bepalings van Artikel 166(1) van Wet 51 van 1977 is her-ondervraging by wyse van uitsondering toelaatbaar, alleenlik oor enige aangeleentheid wat tydens die kruisondervraging van die getuie ontstaan het. 'n Aangeleentheid wat reeds in hoofondervraging behandel is, is nie 'n aangeleentheid wat in kruisondervraging ontstaan het nie." (The italics are those of the magistrate).

That the learned magistrate was misguided concerning the proper procedural principles, is clear. Perhaps he was misled by the Afrikaans text of the relevant statute, but at least he should also have referred to the English text. A reconciliation of the two texts, which is what is called for, would have avoided the wayward interpretation. But in any event, he should have been aware, having reached the ranks of magisterial seniority, of the implicit interpretation given to that section by judges and lawyers over decades, by allowing re-examination on all matters raised during cross-examination, whether they have been raised in examination-in-chief or not. He should also have adhered to the time-honoured tradition of inviting re-examination, and not waiting for counsel to apply for the right to re-examine.

My view of the matter is that the refusal of the magistrate to allow re-examination of the appellant on the two issues mentioned by his counsel amounted to an irregularity. Because of the presiding officer's wrong interpretation of the law, contrary to the provisions of sec 166(1) of the Criminal Procedure Act, an important step in the proceedings was wrongly

curtailed and the rights of the appellant correspondingly diminished. An irregularity occurs 'whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted', (S v Xaba 1983(3) SA 717 (A) at 728 D; S v Rudman and Another; S v Mthwana 1992(1) SA 343 (A) at 375 H - 377 C).

I now turn to a consideration of the second question based at the commencement of this judgment, viz. the legal effect of the irregularity. In this regard mr Yutar, who appeared pro amico for the appellant and to whom the court is indebted for his able assistance, submitted that the magistrate had committed an irregularity of the kind which would result in the appeal being upheld and the convictions and sentences being set aside. Mr Bhika, on behalf of the respondent, argued to the contrary.

The difficult task is to ascertain the legal effect of an irregularity. The fundamental approach to this task has been defined in striking terms by Holmes JA in S v Moodie 1961(4) SA 752 (A) at 755 in fin - 756A:

"Now the administration of justice proceeds upon well-established rules,

> but it is not a science and irregularities sometimes occur. To meet this situation the Legislature has enabled the Court to steer a just course between the Scylla of allowing the appeal of those obviously guilty and the Charybdis of dismissing the appeal of those aggrieved by irregularity."

The legislative provisions to which Holmes JA referred, are those dealing with the powers of a court of appeal in criminal matters. At present the powers of this Court in such matters are circumscribed by sec 322 (1) of the Criminal Procedure Act. The proviso to that section reads as follows:

> "Provided that, notwithstanding that the court of 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 effect of a provision, incorporating the criterion of "a failure of justice" was first analysed in R v Rose 1937 AD 467 at 474 in medio - 477. In that case (see 477) and numerous subsequent cases (see esp. S v Moodie 1961(4) SA 752 (A); S v Rall 1982(1) SA 828 (A) at 832 in fin - 833B; S v Xaba 1983(3) SA 717 (A) at 728D; S v Gaba 1985(4) SA 734 (A); S v

Rudman and Another; S v Mthwana 1992(1) SA 343 (A)) it was held that an irregularity could be said to result in a failure of justice whenever there had been "actual and substantial prejudice to the accused". (See also Hoffmann and Zeffertt, The South African Law of Evidence, 4th ed, 487.)

It is also trite law that there are two kinds of prejudicial irregularity resulting in a failure of justice: "... those which are, so to speak, mortal, and those which are merely venial." (Hoffmann and Zeffertt op cit 488.) The first category consists of prejudicial irregularities which are regarded as resulting in a failure of justice per se. In such a case the court will set aside the conviction no matter how strong the evidence against the accused. An example of such a case is afforded by S v Moodie, supra, where a conviction was set aside because of the presence of the deputy-sheriff in the jury room during the deliberations. (For further examples, see Hoffmann and Zeffertt op cit 488; S v Mushimba en Andere 1977(2) SA 829 (A); S v Mkhise, S v Mosia, S v Jones, S v Le Roux 1988(2) SA 868 (A)).

The second category of prejudicial irregularities consists of cases where

the conviction will be upheld, but only if, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt. (See esp. S v Tuge 1966(4) SA 565 (A) at 568B; S v Yusuf 1968(2) SA 52 (A)).

Whether a prejudicial irregularity falls within the first or the second category mentioned above, depends upon the nature and degree of the irregularity (S v Moodie, supra, at 758; S v Mushimba, supra, at 844 in fin. For a useful exposition of the applicable principles, see also S v Davids; S v Dladla 1989(4) SA 172 (N) at 193 E-H per Nienaber J).

That being the legal position, the present enquiry must proceed from the fact that counsel, who appeared for the appellant at the trial, did not persist in the exercise of his right to re-examine the appellant in general, unspecified terms. In spite of the magistrate's attitude as regards the right to re-examine, he did invite counsel to indicate the matters on which he wished to re-examine. Counsel, as I have pointed out, limited his need to re-examine to two specified matters only. Each one of the two matters related,

respectively, to one of the counts. This is therefore, on the given facts, not a "mortal" irregularity per se vitiating all the proceedings. The question rather is: what was the effect of the irregularity on each of the convictions? I proceed, therefore, to examine whether and to what extent the appellant was prejudiced by the irregularity in each case.

(a) The refusal to allow re-examination on the question of the appellant's having reported to the presiding officer that he had been assaulted by police officers and that such report had been recorded by the presiding officer.

The context in which this problem arose is as follows. From the record it appears that the three accused appeared before magistrate Van Eeden on 6 November 1991. The case was postponed, pending further investigation. The magistrate then recorded that the appellant had told him that he had been assaulted by the Brixton police. The magistrate noted for the record that the appellant was injured: his head was swollen; there were injuries to his left ear and right eyebrow, his face was scratched. An order was made that the appellant should receive medical treatment by the district surgeon at the

State's expense.

Two days later, on 8 November 1991, four accused (the original three accused as well as one against whom the charges were at a later stage withdrawn and who testified on behalf of the State) again appeared before magistrate Van Eeden. The investigating officer was then ordered to take the four accused to the district surgeon and the case was postponed once again for further investigation. After a number of further postponements, the trial commenced on 10 February 1992 before magistrate Coetzer, whose rulings are now under consideration.

All the relevant State witnesses were questioned about police assaults of the accused, including the appellant. They denied having assaulted the appellant.

When the appellant testified in his own defence, he alleged that he had been assaulted by the police; that he had complained loudly to the bystanders at Vosloorus that he had been assaulted; that he had been suffocated by means of a tube placed over his face; and that he had been hit with fists and

open palms and that he had suffered injuries. He denied having been part of the theft or robbery or that any money had been found in his possession.

He was cross-examined at length by the prosecutor regarding all his movements subsequent to his arrest, but the object of this exercise was not clear. Whatever it was, it was not achieved. He repeated his allegations of being assaulted in the motor car, at Brakpan and at Vosloorus.

After the conclusion of his cross-examination, the incident to which I have already referred, occurred i.e. the application of counsel for the appellant to re-examine him on the point that he had reported to magistrate Van Eeden that he had been assaulted, that he had pointed out a number of injuries and that this had been noted by the court.

In my view, no failure of justice resulted from the disallowance of these questions. First, in the context of the whole case and of all the evidence against the accused, the question of police assaults, however illegal and reprehensible, was not relevant and the trial court correctly so found. Indeed the alleged assaults did not feature in the magistrate's reasoning. The State

never denied that the appellant had complained to the presiding officer of having been assaulted; the evidence as to that clearly appears from the record and was admitted by the State. Asking the appellant, in re-examination, to confirm what was not disputed by the State and which was on record in the trial, would serve no purpose, and there could be no prejudice to the appellant by the disallowance of the proposed re-examination. In the light of the evidence outlined, the proposed question did not touch on the guilt or innocence of the appellant, nor his credibility. It was simply an irrelevant question and the magistrate was entitled to disallow it. That he in fact disallowed it for a wrong reason matters not.

(b) The refusal to allow re-examination on the question of identification of the appellant as the thief of the Ford vehicle

The context in which this problem arose is as follows. Early in the trial, the prosecution called one Stewart to confirm that a certain Ford Courier 3000 Leisure vehicle, registration number PLK 991T, belonged to him, and that it had been stolen from him on 19th September 1991. (This vehicle was later

used in the robbery.) He confirmed these facts and explained that on the day in question he had parked the vehicle in front of the post office in Boksburg to collect his mail. He spent a few minutes in the post office, and when he came out, his vehicle had disappeared. In November 1991 he was approached by the police, who had recovered the vehicle. After cross-examination by counsel for the appellant, and after questioning by the Court pertaining to the year of manufacture and the market value of the vehicle before it was stolen, the Court told Stewart that he could stand down. Stewart then, of his own initiative, volunteered that he knew who had stolen the vehicle. The Court then allowed the prosecutor to re-examine Stewart extensively on the unexpected revelation. During the course of such questioning Stewart identified the appellant as the probable thief. He gave his reasons for saying so. He explained that whilst in the post office, he had taken out the keys of his vehicle, put them on the counter next to him, and spent a few minutes looking through his mail. A stranger then took up position next to him at the counter and not, as was to be expected, at the end of the

queue. The witness was annoyed by this impertinence, and, in the space of a minute or so, twice stared at the man in such a way as to express his annoyance. He then completed his business and went outside to his vehicle. When he reached it, he found that he had forgotten the keys on the post office counter. He rushed inside, and despite a diligent search by him and the post office staff, the keys could not be found. He went outside again, only to see that his vehicle had disappeared. He then realised, or reconstructed, that most probably the stranger referred to had taken the keys and in this way had stolen the vehicle. When he attended court for the first time on 10th February 1992, he recognised the appellant as the person he had seen in the post office.

Stewart was cross-examined at length by counsel for the appellant, and it transpired that on recognising the appellant he had made a report to the investigating officer, warrant-officer Holmes. At that stage Holmes had not yet been called as witness but was waiting in the court corridor. It was put to Stewart that had he, in fact, made such a report, Holmes would have informed

the prosecutor immediately of the important new evidence. He was further cross-examined as regards his identification of the appellant, but remained adamant that the appellant was the man who had stood next to him in the post office.

Holmes was called as a witness by the State. He confirmed that Stewart had reported to him that he had recognised the appellant as the probable thief of his vehicle. Holmes conceded that he should have conveyed this information to the prosecutor and that he had failed to do so. He said that he had not wanted to interrupt the court proceedings at that stage. The fact of the matter is that, according to both Stewart and Holmes, the report of the identification was made to the latter on 10 February 1992 and that Stewart only commenced testifying on 11 February 1992. Holmes, therefore, had ample opportunity of informing the prosecutor of Stewart's new evidence after the adjournment of the court on 10 February and before Stewart took the witness stand on 11 February. As was to be expected, Holmes was cross-examined on his failure to report Stewart's new allegations to the prosecutor.

It was also put to Holmes by counsel for the appellant that Stewart did not recognise the appellant at court on 10 February, but that he, Holmes, had in fact pointed out the appellant to Stewart in the court corridor, where appellant had witnessed the incident. It was put to him that Stewart's identification of the appellant was not genuine.

In his evidence-in-chief, the appellant denied any knowledge of the robbery or of the theft of Stewart's vehicle. He denied being present at the Boksburg post office on 19 September 1991, as alleged by Stewart. Unfortunately, the appellant was not asked in evidence-in-chief to deal fully with the occurrences in the court corridor. Under cross-examination, Stewart's evidence was merely repeated and put to him, and he once again denied being present at the Boksburg post office on the relevant day or having stolen Stewart's vehicle. The prosecutor then put it to the appellant that Stewart was so sure of the identification of the appellant as the thief of his vehicle that he had told the court that he was aware of the identity of the thief. The appellant denied this, but a part of his further answer appears on the record as

"inaudible."

After the conclusion of the cross-examination, counsel for the appellant sought leave to re-examine him, the explanation being, as I set out above, that the state had raised the point in cross-examination that Stewart was so convinced of the correctness of his identification of the appellant that he could point him out at court. Counsel for the appellant requested leave to re-examine him on this point. He probably wanted to traverse the alleged identification in detail, i.a. what the appellant had observed taking place between Holmes and Stewart in the corridor of the court; whether Stewart had given any indication of recognising the appellant in the dock while he was testifying; whether he had ever been to the Boksburg post office; where and how far he lived from that post office; what he had been doing on the day in question, etc. All these questions relate to the matter of Stewart's identification of appellant. This was a matter raised during the appellant's cross-examination. His counsel was entitled to re-examine him at least to the extent mentioned. After all, the matter of Stewart's identification was raised

during the cross-examination of the appellant. None of this would in my view have been new matter.

The charge of theft being a separate and distinct one, the question is whether an irregularity which may have influenced the result as far as that charge is concerned had been committed: is there a reasonable possibility that the appellant was prejudiced as far as that charge is concerned to such an extent that there was a failure of justice?

The only evidence that connects the appellant to the theft of Stewart's vehicle, is his identification by Stewart. There are many unsatisfactory aspects of that alleged identification. His unusual conduct of not reporting the identification to the public prosecutor and Holmes' similar neglect to do so, casts suspicion over Stewart's evidence. The fact of his identification was put to appellant in cross-examination. Can it be said that re-examination of the appellant would not have mattered? That it would not have swayed the magistrate one way or another? That appellant could not possibly have shed any new light on the incident in the corridor?

To take up such an attitude would necessarily be tantamount to saying: whatever you say under re-examination, would not have mattered, because I have already made up my mind to accept Stewart's evidence. This is impermissible. It is expected of the judicial officer to keep an open mind until the end of the trial. In my view, it is not the duty of this Court to speculate on the possible answers and questions in re-examination, or their impact on the appellant's guilt. The appellant bears no onus; if there is any doubt whether he has been given a full and fair opportunity to present his case, then he has been prejudiced and the conviction cannot be upheld. In my view, it cannot be excluded that the appellant was substantially prejudiced. The conviction on the charge of theft (count 2) must therefore be set aside.

The appeal against the conviction on count 1 is dismissed.

The appeal against the conviction on count 2 is allowed. The conviction and sentence on that count are set aside.

P J J OLIVIER
ACTING JUDGE OF APPEAL

NESTADT, JA)

)CONCUR

STEYN, JA)