CASE NO: 458/96

In the matter between :

MICHAEL FELTHUN Appellant

and

THE STATE Respondent

Coram: Hefer, Vivier JJA *et* Madlanga AJA

Heard: 22 February 1999

Delivered: 3 March 1999

Criminal Procedure - Special entry - Re-opening of State case

---

J U D G M E N T

VIVIER JA

VIVIER JA:

This is an appeal on a special entry in terms of secs 317 and 318 of the Criminal Procedure Act 51 of l977 (“the Act”). The appellant and one Agnew were convicted in the Cape Provincial Division by **Foxcroft J** and assessors on a charge of murder and the appellant was, in addition, convicted of theft. The appellant was sentenced to an effective sixteen years’ imprisonment. His application for leave to appeal against his convictions was refused by the Court *a quo* and a petition to the Chief Justice was unsuccessful.

The special entry was made under the following circumstances. During the trial, after both the State and the defence had closed their cases but before argument commenced, the State applied to reopen its case so as to lead the evidence of a pharmacist, one Albert, relating to the exact time Denis Marock (“the deceased”) visited the pharmacy on the day he was killed which was Tuesday 4 October 1994. Despite objection by the defence the State was allowed to lead the evidence. Immediately after Albert had testified the presiding Judge made the following special entry on application by the defence -

> “Whether or not the order allowing the State to reopen its case, withdraw an admission and to lead evidence as to the

> time the State witness Albert saw the deceased on 4 October 1994 after the close of the defence case was irregular or not according to law."

The State case was that the deceased was killed during the late afternoon of 4 October 1994 in the warehouse of a firm called Bi-Lo Wholesalers in Albert Road, Woodstock, by a hired killer or killers acting for reward at the instigation of the appellant and Agnew. The deceased was killed with a pickaxe handle or similar blunt object. There was no direct evidence as to what happened in the warehouse or how exactly the deceased met his death. It was not in issue that the deceased was seen alive in the warehouse at about 17h00 that afternoon. The appellant's evidence was that he met the deceased and Agnew at the warehouse at about 16h30 that afternoon and that he left the warehouse together with the deceased at ten minutes to five. Thornhill-Fisher, who testified on behalf of Agnew and whose evidence was accepted as reliable by the trial Court, said that he saw the appellant talking to the deceased in the warehouse at about 17h00. The State witness Sharon Reynolds, who lived with the deceased, said that the deceased left their house at half past two that afternoon for an

appointment with his attorney at three o'clock after which he intended calling at a pharmacy to get his medication for his eczema before attending a meeting with the appellant and Agnew at the warehouse. She never saw him alive again. His body was discovered a week later in the boot of his car in an open field some distance from the warehouse.

Albert is the owner of a pharmacy near the warehouse and did not originally testify during the State case. In an affidavit deposed to by him on 10 March 1995 and handed in by consent as part of the State case, he said that the deceased arrived at the pharmacy at five minutes to five that afternoon, that he purchased his normal monthly medication on a repeat prescription and that he left the pharmacy at about five minutes past five. Albert was able to determine the time of the deceased's visit to the pharmacy from the computer clock time printed on the invoice of the sale, which shows the time of the sale as 17h12. Albert stated in his affidavit that when he made the affidavit on 10 March 1995 he checked the accuracy of the computer clock and found it to be ten minutes out. He thus calculated that the real time he attended to the deceased was 17h02 and not 17h12 as indicated on the invoice.

Albert's time conflicted with the evidence I have referred to above. It was for that reason that the State applied to reopen its case and to lead Albert's evidence in order to show that the times stated in his affidavit could be wrong. Albert then testified that when he was first approached by the police he had no independent recollection of the time of the deceased's visit to the pharmacy and that he was only able to fix the time from the computer clock time printed on the invoice. During the week before he testified he was again approached by the police who wanted to know whether it was possible that the deceased's visit to his pharmacy was earlier than what he had stated in his affidavit. He then re-examined his computer records and found the so-called audit trail in respect of the day in question. This is a computer print out reflecting the day's entire transactions and the times thereof. This document, which was handed in at the trial, shows the last sale for the day in question to have taken place at 18h53. Albert testified that this time was without a doubt wrong as it is his invariable practice to close the pharmacy at 18h00 every weekday. This meant that on the day in question his computer clock was at least 53 minutes and not 10

minutes out as he had previously thought so that the sale to the deceased had taken place at 16h19 instead of 17h02 as stated in his affidavit. Albert said that he again checked his computer clock on the day he testified in Court (2 April 1996) when it was 23 minutes out. The State thereafter called Wayne Bouwer from the computer firm who services Albert's computer clock. His evidence was that the computer is a very old one with a very old battery and that it was last serviced on 23 November 1994. He said that as the battery gets older the clock would lose time, as much as 24 hours.

After the State had lead the evidence of Albert and Bouwer, the defence was afforded an opportunity to lead further evidence. Counsel for the appellant then recalled the investigating officer for further cross-examination, successfully applied for Agnew to be recalled in terms of sec 167 of the Act and also recalled the appellant. The latter merely confirmed what had taken place at the inspection *in loco.*

It is quite clear that Albert's evidence as to the time of the deceased's visit to his pharmacy is completely unreliable and should be ignored. In its judgment on the merits the trial Court found it to be so and had no regard to it.

Sec 317(1) of the Act provides that if an accused person considers 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 apply for a special entry to be made on the record. Sec 318(1) provides that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the ground of the irregularity or illegality stated in the special entry. In considering the appeal regard

must be had to the proviso to sec 322(1) of the Act, in terms of which the accused's conviction and sentence are not to be set aside by reason of any irregularity or defect in the record or proceedings, unless it appears to this Court that a failure of justice has in fact resulted from such irregularity or defect.

Generally speaking, an irregularity or illegality in the proceedings at a criminal trial 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 and conducted. The basic concept underlying sec 317(1) is that an accused must be fairly tried (per **Botha JA** in *S v Xaba* 1983(3) SA 717 (A) at 728 D).

As to the question whether there has been a failure of justice, this Court has in a number of decisions recognised that in an exceptional case the irregularity may be of such a kind that it *per se* results in a failure of justice vitiating the proceedings, as in *S v Moodie* 1961(4) SA 752 (A) and *S v Mushimba en Andere* 1977(2) SA 829 (A). Where the irregularity is not of such a nature that it *per se* results in a failure of justice, the test to be applied to determine whether there has been a failure of justice is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings, if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no resultant failure of justice (per **Holmes JA** in *S v Tuge* 1966(4) SA 565 (A) at 568 F-G; and see also *S v Xaba, supra,* at 736 A-B and *S v Nkata and Others* 1990(4) SA 250 (A) at 257 E-F.)

The first question which thus arises for decision in the present case is whether the trial Court's ruling allowing the reopening of the State case constituted an irregularity within the meaning of sec 317(1) of the Act. Counsel for the appellant submitted that it did so and that it

was, moreover, an irregularity of the kind which *per se* vitiated the proceedings.

That a trial Court has a general discretion in both civil and criminal cases to allow a party who has closed his case to reopen it and to lead evidence at any time up to judgment is beyond doubt. The proper approach is that the Court's discretion should be exercised judicially upon a consideration of all the facts of each particular case, having due regard to the considerations mentioned in the cases and applying them as guidelines and not as inflexible rules. In *Mkwanazi v Van der Merwe and Another* 1970(1) SA 609 (A) **Holmes JA** stated the correct approach thus at 616 B-D :

> "It is inappropriate for judicial decisions to lay down immutable conditions which have to be satisfied before the relief sought can be granted. Over the years the Courts have indicated certain guiding considerations or factors, but they must not be regarded as inflexible requirements, or as being individually decisive. Some are more cogent than others; but they should all be weighed in the scales, the pros against the cons."

Mkwanazi's case was concerned with Rule 28 (1) of the Magistrates' Court Act 32 of 1944 but, as **Holmes JA** pointed out at 616 D in his majority judgment, the Supreme Court has, inherently, much the same discretion to allow evidence before judgment. The majority of this Court held on the facts of that case that fresh evidence should have been admitted by the magistrate after both sides had closed their cases even though there was no satisfactory explanation as to why the evidence had not been led before. The omission to lead the evidence

was, however, not deliberate and there was no prejudice to the other side.

In *Hladhla v President Insurance Co Ltd* 1965 (1) SA 614 (A) this Court held that new evidence in that case should have been allowed after the argument stage. In his judgment (at 621 E-G) **Van Blerk JA** referred to the danger mentioned by Wigmore, para 1878 that to make a general practice of introducing new evidence when, after argument, it is found where the shoe pinches, may lead to perjury. **Van Blerk JA** then pointed out, however, that Wigmore in the same passage goes on to say that :

> "Nevertheless, situations might easily arise in which an honest purpose may justly be served, without unfair disadvantage, by admitting evidence at this stage, and it has always been conceded that the trial Court's discretion should not be hampered by an inflexible rule."

With regard to the test to be applied to an application to reopen see further : *Oosthuizen v Stanley* 1938 AD 322 at 333 and *Barclays Western Bank Ltd v Gunas and Another* 1981(3) SA 91 (N) at 95 C - 96 H.

The considerations mentioned by the Courts include the following: the reason why the evidence was not led timeously, the degree of materiality of the evidence, the possibility that it may have been shaped to relieve the pinch of the shoe, the possible prejudice to the other side, including such factors as the fact that a witness who could

testify in rebuttal may no longer be available, the stage which the

proceedings have reached and the general need for finality.

In the present case Albert's evidence that the error in his computer clock was greater than that mentioned in his affidavit was clearly material to the case as it affected the time of the deceased's visit to the pharmacy. When the police first approached Albert for a statement on 10 March 1995 there was no reason for him to doubt the ten minute discrepancy which he then discovered in the computer clock and it was accordingly unnecessary for him to investigate the matter any further. It was only when Albert's time was considered in the light of the other evidence that a doubt arose as to its accuracy. In my view, accordingly, there was a satisfactory explanation before the trial Court as to why Albert's evidence that the computer clock was 53 minutes instead of 10 minutes out was not led in the first place.

In the light of the above decisions there is no room for the absolute rule contended for by counsel for the appellant namely that the trial Court's discretion to admit evidence for the State after the close of the defence case should be limited to where new matter is introduced which the State could not foresee. An inflexible rule of this kind hampers the trial judge's discretion and cannot be supported. In each case it is a matter for the trial judge's discretion whether, on the facts of that case and applying as guidelines the considerations mentioned in the cases, the new evidence could be allowed without injustice to the accused.

With regard to the question of possible prejudice counsel for the appellant submitted that an accused is inevitably prejudiced when the State case is reopened since he may then be compelled to testify to answer the new evidence. I do not agree. An accused is never compelled to testify. His right to remain silent remains unaffected. In the present case the defence was given the opportunity to lead further evidence but the appellant was not compelled to testify. Counsel for the appellant further submitted that in a trial of more than one accused, prejudice to any accused will inevitably result if a co-accused is recalled by the court under sec 167 of the Act, as happened in the present case. Again I am unable to agree. Apart from the fact that his co-accused was recalled by the trial Court at the request of the appellant's counsel so that the appellant could not have been prejudiced, his right to remain silent was unaffected by the recall of his co-accused. He himself elected to testify again.

In considering the question of possible prejudice to the appellant it

is necessary to refer to the facts of the case. These may be briefly stated as follows. The deceased and one Abramowitz were partners in various business ventures and they took out life policies in excess of R1 m on each other's lives. Their relationship soured so that when Abramowitz formed Bi-Lo Wholesalers in December 1993 he would not give the deceased a share in the new business but allowed him to sell franchises for the business. Agnew was a manufacturer of household chemicals and was allowed to process raw materials purchased by Bi-Lo in its warehouse. The appellant is an accountant. His estate was finally sequestrated in February 1994 and he had no meaningful employment from then until he was employed by Abramowitz in January 1994 as the general manager of Bi-Lo. The appellant was aware of the life policy which Abramowitz had on the life of the deceased.

It was not disputed that the appellant made various attempts over a period of time to find a hired killer to kill the deceased for reward. A number of State witnesses gave evidence to that effect and their evidence was not challenged. Renzo Ceccarelli, who had lost about half a million rand which he had invested in the appellant's trust account, before his sequestration, testified that during May and August 1994 the appellant more than once asked him to find someone who would kill the deceased. Ceccarelli was promised the sum of R100 000 if the deceased was killed. Ceccarelli contacted Vincent Bracale whom he introduced to the appellant. A few days later the appellant told him that Bracale's fee of R60 000 was too high. Ceccarelli thereafter approached Moggamat Jordan whose fee was R20 000 of which R10 000 had to be paid in advance.
Ceccarelli obtained the R10 000 from the appellant and handed it to Moggamat who disappeared with the money. During October 1994 the appellant came to Ceccarelli's flat and told him that the job had been done in a factory. Ceccarelli's evidence was fully corroborated by Bracale and Jordan. Bracale testified that the appellant told him about the life policies and that he would share in the proceeds received by Abramowitz.

Agnew, Willem Adriaan Smit and Philip Lloyd were partners in a small business. Smit was originally an accused in this matter but he took his own life shortly before the start of the trial. Lloyd testified that he heard from Agnew that he was looking for a hired killer and that he told Smit about it. At about 17h30 on 4 October 1994 Smit arrived at his home and handed him the sum of R5 000. Smit asked him for a saw. When Smit opened the boot of his car he observed the handle of a pickaxe protruding from a plastic bag in the boot.

A number of employees at the warehouse testified that on 4

October 1994 the appellant told them to go home early as there was to be a meeting at the warehouse that afternoon. They all left the warehouse before three o'clock. The next morning they noticed that the carpet in the office had been removed and Agnew explained that chemicals had been spilt on the carpet. Agnew testified that he found blood on the office floor on the night of 4 October 1994.

In his evidence at the trial the appellant admitted the substance of the evidence given by Ceccarelli, Bracale and Jordan. His defence was that it was Abramowitz and not he who wanted to kill the deceased and that he acted under duress from Abramowitz in his attempts to find a hired killer. His evidence that he acted under duress was rejected by the trial Court.

As I have already said, Thornhill-Fisher's evidence, which was accepted as reliable by the trial Court, was that he saw the deceased at the warehouse at 17h00 on the fateful afternoon. This means that the deceased could not have been at the pharmacy at five o'clock (which is about ten minutes by car away from the warehouse), and that the time as deposed to by Albert in his affidavit was inaccurate and could not be relied upon to show that the deceased visited the pharmacy after the meeting at the warehouse.

Counsel for the appellant submitted that the effect of the reopening of the State case was that the defence could no longer contend that the deceased visited the pharmacy after he had been to the warehouse. As I have indicated, however, Albert's oral evidence was no more reliable than his affidavit and was ignored by the trial Court. On all the other evidence, particularly that of Reynolds, supported by the overwhelming probabilities, there can be no doubt that the deceased's visit to the pharmacy took place before he arrived at the warehouse. It was conceded by counsel for the appellant that the defence did not apply for Reynolds to be recalled. In the result Albert's oral evidence did not in any way affect the State case against the appellant and no injustice was done by the re-opening of the State case.

For the reasons I have given I am of the view that the re-opening of the State case did not constitute an irregularity within the meaning of sec 317 (1) of the Act.

The appeal is dismissed.

W. VIVIER JA.

HEFER JA)

Concur.

MADLANGA AJA)