REPORTABLE

CASE NO.: SA 44/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE **APPELLANT**

and

PIO MARAPI TEEK **RESPONDENT**

CORAM: Streicher AJA, Mthiyane AJA *et* Brand AJA

HEARD: 6 APRIL 2009

DELIVERED: 28 April 2009

APPEAL JUDGMENT

BRAND AJA:

[1] In April 2006 the respondent stood arraigned in the High Court of Namibia before Bosielo AJ on eight separate main charges and various alternatives. He pleaded not guilty and submitted a plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 ("the Criminal Code"). At the end of the case for the appellant ("the State") the respondent successfully applied for his discharge under s 174 of the Criminal Code. In consequence, he was found not guilty and

discharged. The appeal by the State against that judgment, under s 316A of the Criminal Code, is with the leave of this Court.

[2] The issues on appeal will best be understood in the light of the background facts that follow. All eight charges against the respondent, both in the main and in the alternative, arise from events that allegedly occurred at the respondent's residence on a plot in the Brakwater area outside Windhoek between 28 and 29 January 2005. They all relate to two young girls, to whom I shall refer as "T" and "Q", who were respectively aged ten and nine years at the time. It is not in dispute that respondent picked up the two young girls at about 21:00 on 28 January 2005 while they were playing in a street, together with a group of other children, near their homes in the Windhoek suburb of Katutura and that he then took them by car to his residence. Nor is it disputed that the two girls were only returned to the area where they live during the morning hours of the next day and that the respondent had no permission from the girls' parents to take them away. The issues at the trial turned, first, on the purpose for which the girls were so removed and secondly, on what happened to them while they were in the company of the respondent.

[3] Based on the version of events presented by the two girls, to which I shall presently return, the various charges against the respondent, broadly speaking, included indictments that he:

- committed the common law crimes of abduction, alternatively kidnapping;
- contravened s 2(1)(a) of the Combating of Rape Act 8 of 2000 by committing a sexual act – which, by definition, includes the insertion of a finger into

the vagina of a female person – with a complainant under the age of fourteen years;

- contravened s 14(a) of the Combating of Immoral Practices Act 21 of 1980 by committing or attempting to commit a sexual act with a child under the age of sixteen who was more than three years younger than him;
- contravened s 14(b) of Act 21 of 1980 by committing an indecent or immoral act with a child under the age of sixteen who was more than three years younger than him;
- committed the common law crime of indecent assault;
- contravened s 16 of Act 21 of 1980 by causing a female person to take intoxicating liquor with intent to stupefy her so as thereby to enable him to have unlawful carnal intercourse with her;
- contravened s 71(s) of the Liquor Act 6 of 1998 by supplying intoxicating liquor to persons under eighteen years.

[4] Apart from counts 5 and 7 which pertained exclusively to "Q", the version presented by the two girls supported the charges against the respondent on all counts. The reason why counts 5 and 7 constitute exceptions to the general rule, is that "Q" retracted parts of her earlier statement to the police, under circumstances to which I shall return. As to the balance of the charges, the version presented by the two girls, in broad outline, amounted to this: when they arrived at his residence the respondent gave them intoxicating liquor and encouraged them to swim in their panties while he sat and watched. He took each one in turn, on his lap and made "movements". He inserted his finger in "T"'s vagina (according to "T") and then tried to persuade both girls to sleep with him in his bed. He showed

them what they referred to as "blue movies" and at some stage appeared in front of them in the nude.

[5] In his plea explanation the respondent admitted that he took the children to his home without the permission of their parents and that he only brought them back the next morning. The reason, he said, was that the children told him that they were hungry and that he took them home to give them food. Unfortunately, he explained, he fell asleep before he could return them home that evening. Accordingly, he said, he was asleep for most of the time that the two children were with him. In consequence he denied most of the children's version as to what he did to them during that night.

[6] Applications for discharge at the end of the State case are governed, as I have said, by s 174 of the Criminal Code. It provides:

> "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[7] Over the years the trite principle has been established – both in Namibia and with reference to the identically worded s 174 of the South African Criminal Code – that "no evidence" in terms of the section means no evidence upon which a reasonable court, acting carefully, may convict (see eg *S v Nakale* 2006 (2) NR 455 (HC) at 457 and the authorities there cited). Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a

discharge is sought under the section. But the generally accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg *S v Mpetha* 1983 (4) SA 262 (C) at 265; *S v Nakale supra* at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict?

[8] Further uncertainty arose with regard to the question: what should be the approach in an appeal against a discharge by the trial court under s 174? Both parties contended, on the authority of this Court's judgment in *S v Shikunga* 1997 NR 156 (SC) at 180F-G, that the approach should be the same as in an appeal by an accused person against conviction. But it will be borne in mind that *Shikunga* did not deal with an appeal by the State against the discharge of the accused person under s 174. Having regard to the wording of s 174, it is apparent that the "jurisdictional fact" – in administrative law parlance – required for the exercise of the trial court's discretion under the section depends on "the opinion" of that court. As explained by Corbett J in *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34H-35D, a jurisdictional fact prescribed as a prerequisite before a discretion afforded by statute can be validly exercised, may, depending on the wording of the statute, fall into one of two broad categories. On the one hand it may consist of an objective fact or state of affairs which is required to exist for the exercise of the discretion. In this event the objective existence of

the fact or state of affairs can be enquired into and is justiciable by a higher tribunal.

[9] On the other hand the statute affording the discretion may entrust the determination of the jurisdictional fact itself to the opinion of the repository of that discretion. In this event the question is not whether objectively speaking the fact or state of affairs existed or not. A higher tribunal can only interfere if the repository of the discretion, in deciding that the prerequisite facts or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his or her mind (see also eg Cora Hoexter *Administrative Law in South Africa* 265 *et seq* and the authorities there cited). It is accepted that "failure to apply the mind" can be proved by showing that either the grounds for that decision or the ultimate decision itself was so grossly unreasonable as to warrant the inference that the decision maker could not have applied his mind (see eg *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152C-D).

[10] As I see it, the legislature must be understood to have incorporated – maybe inadvertently – the administrative law concept of a "subjective jurisdictional fact" into s 174 when it made the discretion afforded by the section dependent upon the opinion of the trial court. If it intended otherwise the discretion to discharge at the end of the State case would simply have been made subject to the condition "that there is no evidence" without any reference to the opinion of the trial court. What, it may be asked, is the result of all this? I believe the answer to be as follows: since there is no suggestion that Bosielo AJ acted *mala fide* or from ulterior motive, this court can only interfere with his decision – in the exercise of

his discretion – to discharge the respondent if it can be found that he had failed to apply his mind to the matter when he decided that there was no evidence upon which a reasonable court could convict.

[11] Bosielo AJ's reasons for his conclusion that, despite the direct testimony of "T" and "Q" in support of the charges against the respondent, there was no evidence upon which a reasonable court may convict, appear in essence, to be twofold. Firstly, that the evidence of the two young girls, "T" and "Q", was "of such poor quality that no reasonable court can find it reliable and credible". Secondly, that in the absence of their evidence, there was no other basis upon which a reasonable court, acting carefully, could convict.

[12] I find it convenient first to deal with the validity of the second consideration. This immediately directs the focus to counts 1 and 2 which indicted the respondent of abducting, alternatively, kidnapping "T" and "Q", respectively. The common law crime of abduction is defined as the unlawful taking of an unmarried minor out of the control of his or her custodian with the intention of enabling someone to marry or to have sexual intercourse with that minor (see eg *S v Killian* 1977 (2) SA 31 (C) at 48; P M A Hunt *South African Criminal Law and Procedure,* Vol 2, 3ed (by J R L Milton) at 554; C R Snyman, *Strafreg* 4ed at 386). Though *de facto* control by the custodian is a requirement, the minor is not free from such control when she visits someone else or even when she goes somewhere without parental consent, but with no intention to leave parental control (see eg Hunt *op cit* 561; Snyman *op cit* 388).

[13] Through years of adaptation the common law crime of kidnapping has acquired a dualistic character in both South African and Namibian law. Apart from the more usual meaning of unlawful deprivation of a person's liberty, it now also refers to unlawful conduct which in other jurisdictions may be known as "child stealing". In accordance with its latter meaning, the crime is committed when a minor is intentionally and unlawfully removed from custodian control without the consent of the custodian. In this instance, consent by the minor is of no consequence (see eg *S v Levy* 1967 (1) SA 347 (W) at 354; *S v Blanche* 1969 (2) SA 359 (W) at 360; *S v Lopez* 2003 NR 162 (HC) at 169; P M A Hunt *op cit* at 544; C R Snyman *op cit* at 478). It is apparent that this form of kidnapping overlaps with abduction when the intention of the person carrying off the minor is marriage or sexual intercourse.

[14] The Court *a quo's* reasons for discharging the respondent on the charges of abduction and kidnapping appear to be threefold. First, that according to the respondent's plea explanation, he took them home with the noble intention of giving them food. Secondly, that "T"'s mother had exercised little, if any, control over "T" in that she was playing in the street at 21:00. Thirdly, that there was no real complaint of deprivation of control, in that criminal proceedings were instigated by the police and not by the two mothers, who were in fact quite relieved when their children were found the next morning.

[15] As to the first consideration I will accept, without deciding, that the exculpatory parts of an accused's s 115 statement, form part of the evidential material before the Court at the end of the State case (see eg *S v Tjiho* (2) 1990

NR 266 (HC) at 271E; *S v Shivute* 1991 NR 123 (HC) at 127C). But it must be self-evident that very little, if any, weight can be attached to an unsworn statement, not tested in cross-examination which amounts to no more than the accused's self-serving *ipse dixit* that his intentions were honourable. In any event, it appears that the respondent's professed good intentions could not serve to negate his intention – in the form of *dolus eventualis* – to deprive the custodians of the children of their parental control. After all, the respondent did not suggest that he thought these children to have been abandoned. Thus his professed good intentions, so it seems to me, would constitute no defence to the charge of kidnapping. At best it could be regarded as mitigating circumstances.

[16] As to Bosielo AJ's second consideration, I find the proposition that "T" was not subject to parental control because she was playing at the street at 21:00, unsustainable. Improper exercise of parental control can hardly be equated to abandonment of that control. Bosielo AJ's third consideration that the mothers had no wish to proceed with criminal charges after their children had been found the next day, is, in my view, of no consequence in the present context. As I see it, it can never justify the inference that the mothers did not consider themselves to be deprived of parental control. Such inference would in any event be negated by the fact that the mothers went to the police station in the middle of the night to report their children missing. What is more, the question whether custodians were deprived of their control is one of mixed law and objective fact which has nothing to do with the custodian's own opinion, let alone his or her intent to proceed with criminal charges.

[17] Despite all this, I agree with Bosielo AJ that if the evidence of "T" and "Q" were to be disregarded, a conviction of abduction would not be possible. This is so because any inference of an intention on the part of the respondent to have sexual intercourse with them – which is an essential element of the crime – is dependent on the evidence tendered by the State. But with reference to the kidnapping, the position is entirely different. As I see it, the long and the short of the matter is that on the evidence before the Court *a quo*, there was no possibility of an acquittal by a reasonable court on this charge. I therefore find the inference inevitable that Bosielo AJ had failed to apply his mind when he formed the opinion to the contrary, that the possibility of the respondent's conviction of kidnapping under counts 1 and 2 could reasonably be excluded. To this extent the appeal must therefore, in my view, succeed.

[18] As to counts 3, 4, 6 and 8 I again agree with Bosielo AJ that if the testimony of "T" and "Q" were to be completely discarded, there could be no conviction on any of these counts. The pertinent question is thus: could Bosielo AJ reasonably form the opinion, after having applied his mind, that their evidence was of such poor quality that it could not be relied upon by any reasonable court?

[19] From Bosielo AJ's judgment it is apparent that his opinion to that effect was largely, if not entirely, based on a catalogue of 21 occasions where, in his view, "T" and "Q" contradicted each other or where they contradicted their own previous statements to the police. The thesis the learned judge then seems to have subscribed to, although he did not say so in terms, is that in a case of conflict both versions should be rejected as untruthful. This, I believe, amounts to a *non*

sequitur. As was pointed out by Nicholas J in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-D:

> "Where the statements are made by different persons, the contradiction in itself proves only that one of them is erroneous: it does not prove which one. It follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only if the contradicting witness is believed in preference to the first witness, that is, if the error of the first witness is established.
>
> > 'It is not the contradiction, but the truth of contradicting assertion as opposed to the first one, that constitutes the probative end." (Wigmore [*On Evidence* Vol III] at 653.)'"

And, with regard to self-contradiction, at 576G-H:

> "But the process [of identifying contradictions of previous statements] does not provide a rule of thumb for assessing the credibility of a witness. Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence."

[20] It follows that a list of contradictions between witnesses in itself leads nowhere as far as dishonesty is concerned. It is only when it has been established on other grounds that the one witness is reliable and the other one not that the evidence of the latter can be rejected. This inevitably means, of course, that the evidence of the former will be accepted. What the Court *a quo* should have considered in the context of a discharge application, is that a reasonable court could come to the conclusion that there are good reasons to accept the evidence

of "T" in preference to that of "Q", in which event the version of "T" would, in the event of conflict between them, be accepted. What renders such finding by a reasonable court a more than mere theoretical possibility, is that "Q" expressly recanted part of her statement to the police under circumstances where she was clearly under pressure by her parents not to incriminate the respondent. In fact, it appears that "Q"'s father was related to the respondent and that he informed the legal practitioner for the defence that he did not want his daughter to give evidence against the respondent. According to the testimony of "Q"'s mother the father was so determined to stop the State from calling "Q" as a witness that he consulted a legal practitioner for that purpose. It also appears from the record of the proceedings that on occasion when the court reconvened after an adjournment, "Q" was so upset that no amount of persuasion could get her to continue with her testimony. What is also worthy of note is that her admission to the effect that she had not always been truthful in her statement to the police, came when she was recalled the next day.

[21] As to deviations by the two witnesses from their own police statements, the Court *a quo*, in my view, failed to take into account "that police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable . . ." (per Botha JA in *S v Xaba* 1983 (3) SA 717 (A) at 730B-C). What a reasonable court would also have regard to in this case, I believe, is the fact that we are dealing with young children – 9 and 10 respectively – who are Otjiherero speaking and whose statements were taken more than a year earlier in English by police officers who were neither Otjiherero nor English speaking. Having regard to the instances of self-contradiction included

by the Court *a quo* in its catalogue of 21, a reasonable court would eventually find it significant, I think, that despite these difficulties and despite lengthy cross-examination, "T", in particular, contradicted her police statement in very few respects. Even in those instances, the reasonable court would self-evidently consider whether the particular contradiction should be attributed to deliberate dishonesty or to some other cause. Suffice it to say, in my view, that, by their nature, the self-contradictions ascribed to "T" in the catalogue of 21 could hardly justify an inference of deliberate dishonesty. In short, if the reasonable court were to prefer the evidence of "T" where she came into conflict with "Q", I believe there would, in the absence of any other evidence, be little, if any, reason not to accept her version in all material respects.

[22] Reverting to the individual perceived contradictions included in the Court *a quo*'s catalogue of 21, analysis shows that a significant number of them amount to no contradictions at all and that they owe their inclusion into the catalogue to misinterpretations or wrong evaluations of the evidence. By its very nature, analysis of each individual item brings about a rather laborious activity. I find it unnecessary to burden the reader with a full account of this exercise. Suffice it, in my view, to illustrate the point by way of examples.

[23] The first example is to be understood in the context of the respondent's plea explanation that when he stopped at the group of children, including "T" and "Q", who were playing in the street in Katutura, he was looking for his labourer and that he enquired from the group whether the labourer was known to them. Against this background the Court *a quo* identified the following contradiction:

> ""T" conceded that when they went to the accused for the first time he did ask them if they knew somebody who stayed there. Furthermore, she conceded that he did mention a name but she forgot the name. On the contrary, "Q" who was with "T" at all material times whilst at the motor vehicle, disputed this version."

Analysis of the evidence, however, shows that:

• "T" reached the respondent before "Q" so that it is quite possible that the respondent made the enquiry before "Q" arrived.

• This was not a concession by "T". She volunteered this version on her own account. When asked what the respondent said, she testified:

> "Firstly he wanted to know from us whether we know a certain man, he mentioned the name, but at this stage I cannot recall the name and secondly he wanted to know the whereabouts of our elder sisters, where they are."

• "Q" never disputed this. When asked about the incident in cross-examination she specifically said that she cannot recall that it happened. What she did remember was that the respondent enquired about their older sisters.

[24] The next example is to be read against the background of the averments by the respondent in his plea explanation, that the group of children he saw playing in the street included both boys and girls; and that he gave N$5 to one of the boys and N$1 to one of the girls. The contradiction identified by the Court *a quo* appears from the following quotation from its judgment:

> "According to "T" the man in the motor vehicle gave the boys N$5 and told them to go away and not to go and tell. On the contrary, the evidence of "Q" . . . is to the effect that the boys left the motor vehicle as they were following Anthony to the shops to go and change the N$5 so that they could share. It is clear that by so saying "T" was trying to create a false impression that the boys were sent away by the man so that he could go away with the girls without disturbance."

Analysis of the evidence, however, shows that:

- "T" never said what is attributed to her. What she said was:

> "The boys were given N$5.
> Yes? --- Then they went to change their N$5. . . .
> Yes, and then? --- Then the man who was in the car gave Michelle N$1 so she cannot go to report to our parents. . . .
> Yes, and then, what did Michelle do? --- Michelle, she just said, yes, I won't go to report."

- Both "T" and "Q" testified that Michelle was given money "not to go and tell".

[25] The next example appears from the following quotation which is self-explanatory:

> ""T" testified that upon arrival at the man's house the man forcibly took them into the house by holding both herself and "Q" by their necks. [When] . . . asked in cross-examination if this happened, "Q" pertinently . . . stated in no uncertain terms that if anybody would come to court and say this is what happened that would be a blatant lie."

What the evidence reveals is this:

• "T" never said that the respondent "forcibly" took them into the house. What she said was that the respondent was holding them by the neck when they went into the house which, of course, does not necessarily indicate force.

• In cross-examination of "Q" it was then put to her – quite unfairly – that "T" had said that the respondent "grabbed" them by the necks which, of course, does indicate force. This is what "Q" denied.

[26] With regard to "Q"'s evidence Bosielo AJ found the following contradictions:

> "There is a charge that relates to the accused having unlawfully and intentionally put his finger into the private parts of "Q". It is noteworthy that "Q" testified unequivocally in this court that nothing of the sort happened to her at the house of this man. I find it necessary on this aspect to indicate that this court was left extremely shocked and perturbed when the State called . . . the mother of "Q" [who testified that she had been told by "Q"] . . . that she does not wish to testify in this case because nothing happened to her while she was at the accused's home."

The evidence, however, shows that:

• There was never a charge against the respondent that he had inserted his finger into the private parts of "Q".

• As I have already indicated, both "Q"'s parents were strongly opposed to their daughter giving evidence against the respondent.

• According to "Q"'s statement to the police, her testimony in court as well as the testimony of "T" "nothing" did not happen to "Q" while she was at the house of the respondent.

[27] The next example is again self-evident from the following quotation:

> ""T" testified further that whilst they were swimming in the swimming pool in their panties . . . the accused stood next to the swimming pool and was watching them. On the contrary, the evidence of "Q" is to the effect that as they were swimming in the swimming pool the accused was sitting at the stoep away from the swimming pool."

According to the evidence, this statement, however, amounts to a clear misdirection. What "T" in fact said was:

> "We jumped into the swimming pool, me and "Q" . . . . And the man was sitting there watching us."

[28] The last example does not really relate to a contradiction, but to a self-confessed untruth by both "T" and "Q". It appears from the following passage in the judgment of the Court *a quo*:

> ""Q" testified that when "T"'s mother met them the next day after they returned she asked them where they had been and where they came from and they told her that they are coming from a party. Suffice to state that both of them conceded that when they said this to "T"'s mother, they knew that they were deliberately and knowingly lying to her because they were not coming from a party. One is tempted to ask the question: why then did they say they were coming from a party?"

Later on in the judgment, the Court *a quo* expressed the view that this evidence "revealed "T" to be a pathological liar". As I see it, however, the reason for the false explanation by the two children was that they knew they did wrong by accompanying a strange man without their parents' permission and that they were trying to escape punishment. In addition, it is not improbable that in accordance with their immature way of thinking, they took the blame for whatever followed their disobedient conduct. To label "T" a "pathological liar" in these circumstances, is, in my view, not only unfair but amounts to a misdirection.

[29] This brings me to another factor which seems to have escaped the consideration of the Court *a quo*. It is that there are numerous instances where "T" and "Q" are in complete agreement. Even if both their versions therefore stand to be rejected whenever they disagree – a proposition I have already found to be untenable – logic dictates that these areas of agreement will remain intact. In addition, many of the aspects on which the two witnesses were in agreement, were either not disputed by the respondent or corroborated by other evidence. Included amongst these were the following:

- Both "T" and "Q" denied that they told the respondent that they were hungry, which destroys the reason advanced by him as to why he had taken them to his house.
- Both "T" and "Q" testified that on their way to the respondent's residence they passed a police road block and that the respondent then told them to hide.

This was not disputed on behalf of the respondent and seems to cast a long shadow over his professed noble intentions.

• Both "T" and "Q" testified that the respondent offered them beer and "T" said that he also offered them brandy. The respondent admitted that the two girls consumed both beer and brandy in his house, though he denied that he offered it to them.

• Both "T" and "Q" testified that the respondent showed them a pornographic video, which is corroborated by the evidence of a police officer who testified that the next morning he found what appeared to be the cover of a pornographic video in the respondent's house.

• Both "T" and "Q" testified that the respondent made them swim in their panties while he sat and watched; that he put them on his lap and made strange movements; that he appeared in front of them in the nude; and that he invited both of them to sleep with him in his bed.

[30] For these reasons I believe that, on the evidence before the trial Court, there is ample room for conviction of the respondent on all the charges against him, save perhaps for the crime of abduction, to which I shall return. Moreover, I cannot avoid the inference that in the circumstances the Court *a quo*'s opinion to the contrary was so unreasonable that it could not have properly applied its mind to the matter. As to the charge of abduction, there is no direct evidence that the respondent intended to have sexual intercourse with the two girls, which is an essential element of the crime. In fact, as pointed out by the respondent's counsel in argument, there are indications that he may not have intended to do so. On the other hand, as I see it, a discharge of the respondent solely on the charge of

abduction alone will have very little, if any, effect on the further proceedings. Sitting as a court of first instance, I would therefore, in the exercise of my discretion, have refused a discharge on the charge of abduction as well. Since the Court *a quo* had failed to exercise its discretion on this aspect, we must do so in its stead on all the charges, including abduction. I therefore propose to set aside the discharge and acquittal of the respondent on counts 1, 2, 3, 4, 6 and 8, in respect of both the main – and the alternative charges.

[31] In this event, the State contended, the matter should be referred back to the Court *a quo* for continuation and finalisation before Bosielo AJ. The counter proposal on behalf of the respondent was, however, that if the matter were to be referred back to the High Court, the trial should commence *de novo* before another judge. In motivating this proposal, reference was made to the strong credibility finding by Bosielo AJ against the State's main witnesses and his severe criticism of the conduct of the police investigation. Further support for the proposal was sought in the judgment of the Court of Appeal of Lesotho in *Mda v Director of Public Prosecutions* [2004] LSCA 12 (20 October 2004) where the order of a retrial before another judicial officer was endorsed in similar circumstances. But, as was pointed out in *Mda* (at para 27) the question whether a retrial should be ordered is not a matter of law. It depends on the exercise of the court's discretion in the circumstances of the particular case. In exercising that discretion, I may add, the court will obviously be guided by what is fair to both the accused person and the State. In this matter counsel for the respondent conceded that he can think of no potential prejudice his client may suffer if the matter is to continue before Bosielo

AJ. Neither can I. Since the only party who may be prejudiced is the State, I can see no reason why we should not be guided by its request.

[32] Finally there is the costs order which Bosielo AJ granted against the State in its unsuccessful application for leave to appeal, pursuant to s 316A(3) of the Criminal Code. According to the judgment in that application, the order was motivated by the learned judge's conclusion that there was no merit in the application for leave to appeal which he described as "stillborn". As should be clear by now, I came to the exact opposite conclusion. It follows that, in my view, the costs order against the State cannot stand.

[33] For these reasons it is ordered that:

(a) The appeal is upheld.

(b) The Court *a quo's* discharge and acquittal of the respondent on counts 1, 2, 3, 4, 6 and 8, in respect of both the main – and the alternative charges, is set aside.

(c) The matter is referred back to the Court *a quo* for continuation and finalisation before Bosielo AJ.

(d) The costs order against the State in its application for leave to appeal, is set aside.

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BRAND, A J A

I agree.

_____
STREICHER AJA

I agree.

_____
MTHIYANE AJA

COUNSEL ON BEHALF OF THE APPELLANT:	Mr D F Small
Assisted by:	Ms I Nyoni
Instructed by:	Prosecutor-General
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