IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: **NO**
Of interest to other Judges: **NO**
Circulate to Magistrates: **NO**
Case no: **A41/2023**

In the matter between:

TLOTLEGO MOOKI 1st Appellant
(Accused 3 in the court *a quo*)

LERATO MAHUMAPELO 2nd Appellant
(Accused 2 in the court *a quo*)

G[…] K[…] 3rd Appellant
(Accused 1 in the court *a quo*)

And

THE STATE Respondent

Coram: JP DAFFUE J
Heard: 27 JANUARY 2025
Delivered: 4 MARCH 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 15H00 on 4 MARCH 2025.

Summary: The three appellants were convicted of rape in the regional court. Two were sentenced to life imprisonment and the third to 15 years' imprisonment. The 14-year-old complainant committed suicide prior to being fully cross-examined. On appeal, the court held that the court *a quo* had no discretion to admit the untested evidence of the complainant and in doing so, it committed a misdirection, causing an unfair trial. In following the judgment in *S v Soni* 2021 (2) SACR 241 (SCA) the appeals of all three appellants against their convictions and sentences succeeded.

ORDER

1. The appellants' appeals against their convictions and sentences succeed.
2. The order of the court *a quo* is set aside and substituted with the following:

'All three accused are found not guilty and acquitted.'

JUDGMENT

Daffue J (Chesiwe J concurring)

Introduction

[1] This appeal emanates from the Regional Court Bloemfontein. The three appellants were convicted of the rape of a 14-year-old female which occurred on 16 December 2017. The first two appellants, accused 3 and 2 respectively in the court *a quo*, were found guilty on 30 March 2022 and sentenced to life imprisonment on 20 June 2022. The third appellant, being accused 1 in the court *a quo,* who disappeared after the closure of the State's case, but was arrested later, was convicted on 12 July 2023. On 20 October 2023 he was sentenced to 15 years' imprisonment.

[2] Accused 1 who escaped during the proceedings, is G[…] K[…], the third appellant in this appeal. He was 16 years old at the time of the incident. Accused 2, who is also the second appellant in this appeal, is Lerato Mahumaelo. He was 20 years old at the time. The first appellant, Tlotlego Mooki who was 19 years old at the time of the incident, was cited as accused 3.

[3] The third appellant applied for leave to appeal immediately upon being sentenced, but the court *a quo* dismissed the application in terms of s 309B of the Criminal Procedure Act 51 of 1977 (the CPA). He was only 16 years' old at the time when the offence was committed and it was therefore not necessary to apply for leave to appeal to the court *a quo*.[1] He had an automatic right to appeal.

[4] The first and second appellants, having been sentenced to life imprisonment, also had an automatic right of appeal in accordance with the provisions of s 309B of the CPA.

[1] Section 309B of the Criminal Procedure Act read with s 84 of the Child Justice Act 75 of 2008.

[5] In order to prevent confusion, I shall refer to the appellants as cited in the court *a quo,* or by their names as referred to in the court *a quo*, to wit Tlotlego, Lerato and G[...].

[6] The trial record is a mess. Mr Reyneke who appeared for the appellants, requested on a previous occasion that the appeal be removed from the roll because of the incomplete record. It was at a later stage again set down for hearing on 12 August 2024. The appeal was then allocated to Ramdeyal AJ and myself. Mr Reyneke again tried to remove the matter from the roll due to an incomplete record. Eventually, we ordered that the record pertaining to G[...] be transcribed and that the full record, including the reconstruction by the court *a quo* and any possible further reconstruction, be properly indexed, paginated in proper chronological order and bound in at least three lever arch files. Also, that the court *a quo's* certificate of completeness be filed as well. The aforesaid order was not properly complied with. However, bearing in mind the outcome of the appeal, it is not necessary to dwell into this any further.

The role players and evidence presented

[7] Reathile Sonkwala, a 14-year-old female was the complainant, she having been raped allegedly during the evening of 16 December 2017. She testified during a protracted trial which was endlessly postponed for numerous reasons from 3 September 2018. Her evidence-in-chief only commenced on 2 September 2020 and she was then cross-examined by the legal representative of accused 1 and 3 (Tlotlego and G[...]). This was not finalised, but continued over several days. After accused 1 and 3's cross-examination was concluded on 2 November 2020, accused 2's legal representative started with his cross-examination whereupon the matter was postponed for further cross-examination on 2 June 2021. On this day, during cross-examination, the complainant appeared to be uncomfortable. At a stage she simply returned her microphone to the intermediary and left the room from where she was testifying. No explanation for this conduct was obtained by the court *a quo* from the complainant herself at the time. However, the court *a quo* allowed addresses by the intermediary, the prosecutor and the legal representatives for the accused who speculated on the reasons for her conduct and relied on their opinions whether the complainant was in a position to proceed. The matter was then postponed to 4 June

2021 for further cross-examination by accused 2's legal representative. Unfortunately, the complainant committed suicide before this could happen.

[8] Briefly, the complainant's evidence-in-chief was that after she had closed the gate of the premises where she was staying with her grandmother that night, Tlotlego came to the gate, grabbed her by the hand and forcefully took her to his cousin's house which was situated in the third street from where she was staying. G[...], Lerato and Tlotlego's cousin, all known to her from before the incident, subsequently arrived at the house. Tlotlego and G[...] were known to her as they attended the same school. Tlotlego took her to a bedroom in the house, undressed her and had sexual intercourse with her without her consent, whilst the other two were seemingly seated nearby in the lounge. After being raped by Tlotlego, she was also raped in the same bedroom by Lerato and thereafter by G[...]. For the record: she testified that the accused did not know how old she was at the time. Some friends of the accused arrived and instructed her to wash herself, but she refused. Tlotlego took her back to where she was staying, telling her not to tell the people at home what happened. At her house she did not report what happened to her grandmother, but instead hid herself in a room on the premises used as a church as she was "afraid that they would kill her". She was later discovered by her grandmother after she had searched for the complainant. Upon enquiring where the complainant was, she told her grandmother that she was in the outside toilet, but later disclosed that "a boy" came and pulled her to his cousin's house where he and his friends raped her.

[9] The complainant's grandmother, Ms F[…] M[…] M[…], a 63-year-old female, was the first report witness. She was allowed to testify notwithstanding the demise of the complainant. I regard it unnecessary to summarize her evidence in light of the outcome of this appeal.

[10] The affidavit in terms of s 212(4) of the CPA of a forensic nurse, Ms Seekoei, together with her report pertaining to the medico-legal examination of the complainant, was handed in by agreement as an exhibit. The nurse found no visual physical injuries, although she concluded that the absence of physical injuries did not exclude violent behaviour. She recorded the first date of the complainant's last menstruation as 11 December 2017 and the duration of the period as five days,

which obviously is indicative of the fact that the complainant was menstruating on the date of the incident. No abnormalities or injuries were found during the gynaecological examination, particularly no scarring, tears or bleeding. The *fosa navicularis* was normal. The nurse indicated that there were remnants to the hymen. She concluded that in the absence of genital injuries, forceful penetration was not excluded. No anal injuries were detected. This concluded the evidence presented by the State.

The further proceedings

[11] On 5 July 2021, after the demise of the complainant, an application was lodged by the State to allow the evidence of the complainant and her witness statement in terms of the provisions of s 3 of Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Act). On 7 July 2021 the court *a quo* ruled the evidence to be admissible. It ruled as follows:

> '1. I am taking notice to what Mosidi J said in a well-reseached matter S v MSIMANGO AND ANOTHER 2010 (1) SACR 544 (GSJ)
>
> 2. …..
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> 3. It is clear that each court has a discretion to decide when to allow evidence as admissible in circumstances like this.
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> 4. In this instance the interest of justice dictates that all evidence that is already on record, both viva voce and documentary, must be regarded as admissible.
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> 5. In this case there are multiple accused's who are affected differently by the passing away from the complainant.
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> 6. I am taking note that with regard to both accused 1 and 3 the cross-examination was already completed. With regard to accused 2 the cross-examination was still in its infant stage when it was interrupted.
>
> 7. …….
>
> 8. This has the effect that there will be a different evidential burden on the state and I will have to evaluate the matter going forward in the trial, keeping the differences and the non-completion of the cross-examination on behalf of accused 2 in mind.
>
> 9. My comprehensive reasons for the following this approach will follow.'

[12] On 30 March 2022 the court *a quo* provided comprehensive reasons for its ruling, relying *inter alia* on *Du Toit*.[2] It dealt herein with s 3 of the Law of Evidence Act in order to explain why the complainant's written statement should form part of the evidential material. This was an incorrect approach. Hearsay is defined as evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.[3] The late complainant testified in court and admitted during cross-examination that she had deposed to the written statement which was admitted as an exhibit. It is irrelevant that Lerato's counsel, Adv Van Rensburg, did not object to the handing in of the statement. He would get in normal circumstances the opportunity to cross-examine on the statement. The witness' credibility could have been tested in cross-examination and the probative value of her evidence obviously did not depend on any other person, but herself. The court *a quo* misdirected itself to rely on the Law of Evidence Act in entertaining this application, but more importantly, it should have found that it had no discretion to allow either the untested *viva voce* evidence, or the written statement. It erred in granting the State's application.

[13] Tlotlego's legal representative decided to call him as a witness after the applications for the accused persons' discharge in terms of s 174 of the CPA were dismissed. When G[...] returned to the court at a later stage, his new legal representative called him to testify as well. Adv Van Rensburg wisely decided to close Lerato's case, obviously fully aware of the difficulties faced by the prosecution as a result of the demise of the complainant without being fully cross-examined.

The essence of the appeal: incomplete cross-examination

[14] An accused's right to a fair trial is entrenched in s 35(3) of the Constitution. Of significance in this appeal is an accused's constitutional right to cross-examine a witness whose evidence has been presented by the State. This is entrenched in s 35(3)(i) of the Constitution.

[15] In civil matters cross-examination and discovery are described as two of the main engines to discover the truth. In criminal matters cross-examination is particularly applicable to establish the truth. The complainant was already confused

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[2] *Du Toit et al*, *Commentary on the Criminal Procedure Act*, service issue 67, 2021, p 22-83; *S v Msimango and Another* 2010 (1) SACR 544 (GSJ); see judgment: exhibit "J," pp 16-18.
[3] Section 3(4) of Act 45 of 1988.

during the cross-examination by Tlotlego and G[...]'s legal representative. She deviated in several respects from her written statement and was clearly not at ease at the start of the cross-examination by Adv van Rensburg on behalf of Lerato. Adv van Rensburg, an experienced legal practitioner, started the cross-examination of the complainant on behalf of Lerato and as the court *a quo* correctly observed 'the cross-examination was still in its infant stage when it was interrupted'.

[16] It was not open to the court *a quo* to speculate as to what Adv van Rensburg would have achieved in cross-examination on behalf of Lerato. The complainant might have been able to explain the differences between her *viva voce* evidence and her written statement, or she might have collapsed totally under cross-examination. As the court *a quo* could not speculate, this court shall not speculate as to what might have happened. The dictates of fairness point in one direction only and that is that the evidence of the complainant should have been ignored *in toto*. That should have been the end of the case. In fact, the prosecutor's insistence that the matter be proceeded with instead of stopping the prosecution in terms of s 6(b) of the CPA upon the demise of the complainant should be frowned upon. A prosecutor must act with objectivity and 'must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances. Prosecutors, as officers of the court, should be guardians of human rights and must be sensitive to the Constitution and the rule of law. A prosecutor has an obligation to ensure that an accused's right to a fair trial is protected'.[4]

[17] The court *a quo* made serious derogatory remarks against Tlotlego and G[...]'s legal representative. It *inter alia* stated that his cross-examination of the complainant 'must have been the most inefficient cross-examination, that I have ever witnessed. He is in desperate need of re-training …. apart from the ineffective cross-examination he has no idea how to work with basic court orders'. It is an accused person's constitutional right to proper, effective, or competent defence as stated in *S v Halgryn*.[5] It is possible that the legal representative did not meet the high standards of the court *a quo* that resulted in its strong derogatory remarks, but such criticism was uncalled for. I do not want to comment on the cross-examination of the legal representative, save to state that the record shows that he clearly identified material

[4] Du Toit, *op cit,* p 1-40A.
[5] 2002 (2) SACR 211 (SCA) para 14; see also S v Tandwa 2008 (1) SACR 613 (SCA) para 7 where the court stated that incompetent lawyering can wreck a trial, thus vitiating fair trial rights.

differences in the evidence of the complainant when confronted with her witness statement. Such discrepancies did not warrant the court *a quo'*s observation that the complainant was a "saint" and that the discrepancies between her *viva voce* version and her witness statement were trivial. In view of the order that I intend to make, I shall not provide a detailed list of the discrepancies and deviations in her evidence. In any event, the mere fact that the court *a quo* regarded the cross-examination by the legal representative of two of the appellants to be so weak and inefficient, rendered the completion of Adv Van Rensburg's cross-examination of the complainant of utmost importance in order to have ensured a fair trial.

[18] Although the court *a quo* referred to Moshidi J's judgment in *Msimango*, it did not refer to *S v Soni (Soni).*[6] In all fairness, the court *a quo* was not referred to this judgment and/or it was unaware thereof, insofar as the judgment was delivered on 5 May 2021, two months before 7 July 2021. It was at that stage not yet reported in the South African Criminal Law Reports.

[19] As quoted above, the court *a quo* was of the view that it had a discretion whether to exclude or accept the evidence of the complainant. I am satisfied that the court *a quo* committed a serious misdirection to accept the untested evidence of the complainant. The Supreme Court of Appeal has now authoritatively stated the correct legal principle as follows:

'[82] The appellant enjoyed the right to challenge evidence. This right formed part of the appellant's overarching right to a fair trial, entrenched in the Bill of Rights in terms of s 35(3)*(i)* of the Constitution. Under our adversarial system of criminal justice, the right to challenge evidence includes the right of the accused in a criminal trial to cross-examine the witnesses whose evidence is led by the state. This is uncontroversial.

[83] Difficulties arise when a witness who has given evidence is no longer available for cross-examination, or, as here, cannot complete their cross-examination. In a number of decisions, the High Courts have had occasion to consider these matters. Two approaches have found support. First, …. The second approach is that the right to challenge evidence is a fundamental right. It is not a right of degree. If the right is infringed, the better view is that the evidence should be excluded. The adoption of a discretion fails to accord proper recognition to the right as fundamental to the fairness of the trial. A discretion of this kind

[6] 2021 (2) SACR 241 (SCA).

also gives rise to considerable indeterminacy as to how it is exercised. Better then, simply to exclude the evidence.

[84] The correct starting point for the analysis is the recognition that an accused has the right to cross-examine those witnesses whose evidence is relied upon by the prosecution. Where that right cannot be exercised, or cannot be exercised in full, the court has a duty to ensure that the trial remains fair. To do so, the trial court should not engage in conjecture as to what the cross-examination would have been likely to yield. That is speculative. Once a body of evidence cannot be cross-examined or cross-examined fully, the safest course, to ensure the fairness of the trial, is to disregard that evidence, because the right to challenge evidence is so intrinsic to what makes a trial fair. It matters not that the impossibility of cross-examination is not attributable to the fault of any person. It is the fact of impossibility that renders the right nugatory.

[85] The clearest case is one in which the witness called by the prosecution gives evidence-in-chief, but then cannot be cross-examined. The accused is deprived of the right to cross-examine. That is the deprivation of a fundamental right. The only question is this: what remedy should the court provide to the accused? In this situation, the remedy will ordinarily be self-evident: the evidence must be excluded from consideration by the trial court.'

The court continued and summarised its conclusions as follows:

'[90] In sum, our approach recognizes that the right to cross-examine is a fundamental right, and, if it cannot be exercised, the court must fashion a remedy that secures the fairness of the trial. What this requires is an appropriate remedy that cures the absence of the right to cross-examine. A remedy is not appropriate if it lacks proportionality or rational justification. The remedy flows from the right, and the recognition of the right as fundamental to our constitutional commitment to a fair trial.

[91] So understood, we do not favour the position that would repose a discretion in the trial court to weigh the probative value of the evidence that has not been subjected to cross-examination against the prejudice to the accused that arises from the absence of the right to cross-examine. Such a test, redolent of many common-law regimes for deciding whether to exclude evidence, fails, in our view, to recognize the constitutional significance of a right that is intrinsic to a fair trial. The absence of the right to cross-examine is not measured by a cost-benefit analysis as to who gains or loses, and by how much. Rather, if an accused cannot enjoy a right that is fundamental to the fairness of the trial, the court must restore the fairness of the trial. That is not done by attaching weight to the probative value of the

evidence and engaging in conjecture as to what difference the cross-examination might have made.' (emphasis added)

Applications for the accused persons' discharge in terms of s 174

[20] Having already concluded that the court *a quo* committed a misdirection to allow the evidence of the complainant who was not cross-examined fully, I now consider the outcome of the application lodged in terms of s 174 of the CPA at the close of the State's case.

[21] Accused persons are entitled to be discharged from prosecution at the end of the State's case if there is no possibility of a conviction, except if they give evidence and incriminate themselves. Failure to discharge in such circumstances is a breach of accused persons' rights guaranteed by the Constitution and affects their right to a fair trial negatively.[7] The only admissible evidence presented by the State that should have been considered by the court *a quo* in considering this application was that of the so-called first report witness, Ms F[…] M[…] M[…] and the affidavit with attached report of Ms Seekoei, which was handed in by agreement. If the evidence of the complainant had been ruled inadmissible as the court *a quo* should have done, the accused had literally no case to answer. No possibility of convictions existed. No possibility existed of the co-accused implicating each other and therefor possibly supplementing the State's case as the statements put in cross-examination to the complainant and her answers had to be ignored. The applications for the accused persons' acquittal should have been granted.

Conclusion

[22] Adv L Bontes appeared for the Director of Public Prosecutions (DPP) in the appeal before us. He was not the author of the heads of argument prepared on behalf of the DPP. In these heads the DPP's counsel supported the judgment of the court *a quo*. Mr Bontes conceded during oral argument that he could not defend that judgment and that the appeal ought to succeed. He correctly conceded that the appellants did not have a fair trial. His objectivity is commendable. Consequently, the appeals of all three appellants should be upheld.

Order

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[7] *S v Lubaxa* 2001 (2) SACR 703 (SCA) para 18.

[23] The following order is made:

1. The appellants' appeals against their convictions and sentences succeed.

2. The order of the court *a quo* is set aside and substituted with the following:
'All three accused are found not guilty and acquitted.'

JP DAFFUE J

I concur

S CHESIWE J

Appearances

For appellants:	Mr D Reyneke
Instructed by:	Legal Aid South Africa Bloemfontein
For respondent:	Adv L Bontes
Instructed by:	DPP Bloemfontein