



REPORTABLE

CASE NO: SCR 2/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

WERNER SHEETEKELA

First Respondent

KLEOPAS KAPALANGA

Second Respondent

ELIA NAKALE

Third Respondent

Coram: DAMASEB DCJ, HOFF JA and FRANK AJA

Heard: 15 April 2019

Delivered: 17 April 2019

SUMMARY: Review in terms of s 16 of the Supreme Court Act, Act 16 of 1990. Applicant seeking review of rulings in court *a quo* which prevents prosecution from cross-examining a witness it had previously consulted as State witness.

Review in addition sought against ruling by judge *a quo* that she could not revisit her decision not to allow cross-examination of the witness as she was *functus officio* and that she made all the rulings referred to without affording the prosecution an opportunity to address her.

On appeal, held that rulings were all reviewable:

There is no impediment in law to a prosecutor cross-examining State witnesses made available to the defence after the close of the State's case because the prosecutor consulted with such witness in preparation for the case. The failure to allow such cross-examination amounted to an irregularity.

The refusal to allow another prosecutor - who had not consulted with the witness – to cross-examine the witness on the basis that not more than one prosecutor may represent the State had no basis in law and constituted an irregularity.

The refusal to reconsider the abovementioned rulings based on the principle of *functus officio* was misdirected as the rulings were not final and could be revisited. This refusal thus constituted an irregularity.

The refusal to grant the prosecution an opportunity to address her prior to making her rulings is a breach of a fundamental principle in law that any party to proceedings in a court of law must have the opportunity to state their case. This omission thus constituted an irregularity.

Review upheld and all the rulings set aside and matter referred to back to court *a quo* for the cross-examination of the witness and the trial to proceed in the ordinary course.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and HOFF JA concurring):

[1] This is a review application pursuant to s 16 of the Supreme Court Act.¹ In essence the applicant seeks the review of rulings of the judge *a quo* which prevent the State (prosecution) from cross-examining a witness called by the first respondent as accused person in a criminal trial. The other two respondents are co-accused of the first respondent in the trial. I refer to the respondents in this matter jointly as the accused or individually as first, second or third accused where necessary. I now turn to briefly outline the facts giving rise to the application.

[2] The prosecution pressed charges of murder, kidnapping and defeating or obstructing or attempting to defeat or obstruct the course of justice against three accused persons. The summary of substantial facts and list of witnesses accompanying the indictment indicated that the prosecution envisaged calling 33 witnesses.

[3] The accused persons, who were represented, pleaded not guilty to all the charges and the trial commenced. The prosecution closed its case without calling all the witnesses indicated on the list of witnesses. The prosecution, as a result,

¹ Act 16 of 1990.

provided the witnesses' statements of such uncalled witnesses to the defence's legal practitioners and also made the witnesses available to the defence.

[4] The first accused called one of those witnesses, Raymond Röhm, to testify on behalf of the accused. After his evidence-in-chief, counsel for one co-accused cross-examined him whereas the counsel for the other co-accused had no questions for Mr Röhm.

[5] When it was the prosecutor's turn to cross-examine Mr Röhm the counsel for the first accused objected to this course of action on the basis that the prosecutor in his preparation for the trial when still envisaging calling Mr Röhm as a (State) witness consulted with him (Mr Röhm). The prosecutor confirmed to the court that he indeed consulted with the witness in this context.

[6] The presiding judge upheld the objection. The prosecutor inquired whether someone else from the Prosecutor-General's office would be allowed to cross-examine this witness. This was also declined as, according to the presiding judge, there could only be one prosecutor in any prosecution. The witness was then excused from the witness stand and the matter postponed. When the trial resumed the prosecutor applied for the witness to be recalled by the court for the purpose of being cross-examined by the prosecutor. From the heads of argument filed together with the application to recall the witness it appears that this was an attempt to convince the court to invoke its powers in terms of s 167 of the CPA which grants the court a discretion to recall, at any stage, any witness. The

presiding judge also made short thrift of this application on the basis that she had already made a ruling which she could not change as she was *functus officio*.

[7] It needs to be pointed out that in respect of none of the rulings aforementioned was the prosecutor given an opportunity to address the court prior to such ruling being made.

[8] The applicant seeks to set aside all the above rulings as being irregular so as to enable the prosecution (State) to cross-examine the witness Mr Röhm.

[9] Before I deal with the rulings it is necessary to mention that although notice was initially given on behalf of all three respondents that the review would be opposed, they all changed tack and filed notices withdrawing the opposition to this review application. The judge *a quo* also did not react to the application. As a result I shall deal briefly with the grounds of review.

[10] A witness who has been called and sworn in is liable to be cross-examined.² Failure to allow cross-examination is a serious irregularity which almost invariably leads to potential prejudice:³ There is also no rule of evidence disallowing counsel who consulted with the witness to cross-examine such witness. Thus, where a court declares a witness hostile to a party calling such witness it is trite law that such witness may be cross-examined by the party calling him or her. The fact that the lawyer may become a witness in such circumstances is no bar to such cross-examination. The undesirability of lawyers to become

² *State v Lesios en 'n ander* 1974 (1) SA 135 (SWA) and s 166 of the Criminal Procedure Act, 51 of 1977.

³ *R v Ndawo* 1961 (1) SA 16 (N).

witnesses in cases in which they act is a question of professional etiquette rather than anything in the nature of an exclusionary rule of evidence. Where this cannot be avoided there is nothing in the law of evidence precluding a lawyer from cross-examining a witness he or she has consulted with. When the witness is the lawyer's own client the question of privilege or conflict of interest may arise, but this is not relevant in the present matter.

[11] It is not correct that there can only be one prosecutor in any given case. It is not uncommon for the prosecution, like the defence, to use senior and junior counsel in criminal cases. In fact, from a private law perspective a client may use as many lawyers as desired (or as he or she can afford) but the procedure is such that court work cannot be duplicated, eg not more than one lawyer may cross-examine or lead a witness.⁴ I know of no impediment in law that prevents the prosecution from using as many lawyers as is deemed appropriate in a prosecution. Thus, not to have allowed another prosecutor to cross-examine the witness also amounted to an irregularity.

[12] The judge *a quo* was entitled to revisit her ruling that the prosecution could not cross-examine the witness or that another prosecutor could not cross-examine the witness. Rulings on evidence do not amount to final orders or final rulings and are thus not separately appealable although they may be raised as grounds of appeal against the final judgment.⁵ Not being final, such rulings may be revisited by a court and changed.⁶ The judge thus erred in finding she was *functus officio* with regard to her rulings.

⁴ LAWSA, first Reissue, vol 14 para 259.

⁵ *Dickenson and Another v Fishers Executives* 1914 AD 924.

⁶ *R v Solomons* 1959 (2) SA 352 (A) at 362H-363A.

[13] The failure to allow the prosecutor to address her prior to making the rulings referred to above also amounted to an irregularity. It is trite that the failure to allow a party to put his or her case before the court which is fundamental to our law will cause any order made in such circumstances to be set aside.⁷

[14] It follows from what is stated above that the court *a quo*'s decision to not allow the cross-examination of the witness Mr Röhm must be set aside.

[15] In the result the appeal succeeds and the High Court orders of 9 November 2017 and 10 September 2017 to not allow the cross-examination of the witness Mr Röhm is reviewed and set aside and it is ordered that the witness be recalled for cross-examination by the prosecution and that the trial thereafter continues in the ordinary course.

FRANK AJA

DAMASEB DCJ

HOFF JA

⁷ *Andreas Vaatz and another v Ruth Klotzch and 3 others* (SA 26/2001) delivered 11/10/2002.

APPEARANCES

APPELLANT:

C K Lutibezi

Instructed by Office of the Prosecutor-
General1ST AND 2ND RESPONDENTS

No appearance

3RD RESPONDENT:

K Amoomo

Of Kadhila Legal Practitioners