THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 41/2020

In the matter between:

ALFRED JAN BEZUIDENHOUT **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Alfred Jan Bezuidenhout v The State* (41/2020) [2021] ZASCA 52 (23 April 2021)

Coram: SALDULKER, MOCUMIE and NICHOLLS JJA and WEINER and MABINDLA-BOQWANA AJJA

Heard: 17 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 12h00 on 23 April 2021.

Summary: Criminal law and procedure – application of s 309B(5) of the Criminal Procedure Act 51 of 1977 – appeal against conviction – whether the appellant had a fair trial – trial to start *de novo* before a different presiding officer.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Monama J, and Thobane AJ):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following order:

'(a) The appeal is upheld and the conviction and sentence of the appellant are set aside.

(b) The trial is to start *de novo* in the regional court, Vosloorus before a different presiding officer.'

JUDGMENT

Nicholls JA (Saldulker, and Mocumie JJA and Weiner and Mabindla-Boqwana AJJA concurring)

[1] The central question in this appeal is whether the appellant had a fair trial. The appellant was charged with murder and the unlawful possession of a firearm, in the Regional Court, Vosloorus. He pleaded not guilty to the charge of murder but guilty to the charge of the illegal possession of a 38 special calibre revolver. On 1 June 2018, the appellant was convicted on both counts and sentenced to 15 years' and 8 years' imprisonment, respectively. The sentences were ordered to run concurrently, an effective term of imprisonment of 15 years.

[2] The appellant was refused leave to appeal by the trial court. So too, was an application in terms of s 309B(5) of the Criminal Procedure Act 51 of 1977 (the CPA) to adduce further evidence. On petition to the High Court, Gauteng Division, the appellant was granted leave to appeal against the sentence only. In his application for leave to appeal the conviction for murder to this Court, he also sought an order that the case be remitted to the regional court for further evidence to be heard. On 26 November 2019, he was granted special leave by this Court to appeal the merits of his conviction.

[3] At his first appearance, on 3 July 2017, the appellant appeared in person. His right to legal representation was explained to him. For the next appearances on 10 July 2017 and 17 July 2017, he remained unrepresented, but on 22 August 2017, it was noted that he had procured the services of an attorney from Legal Aid, Ms Gqwede. However, she was not present as she was busy in another court. On 30 August 2017, Ms Gqwede was present and confirmed that the appellant did not require the court to sit with assessors. On 3 October 2017, the trial was postponed because Ms Gqwede was ill. When the matter was next set down on 22 October 2017, Ms Gqwede was ill again.

[4] On this occasion, the appellant addressed the court stating that he did not wish to have an attorney and had only done so on the court's advice. He claimed that this was his 14th court appearance and he did not want to waste the court's time. He stated:
'. . . I believe the Court wants to determine the truth, and I think that for the truth I do not need anybody else to speak on my behalf . . . I think my counsel will probably end up sick again when we have to start the proceedings again, and I would ask the Court to indulge me, that if that happens, let me rather please speak the truth on my own behalf . . . The truth does not need any explanation.'

[5] On the strength of his request, the magistrate told the appellant that it was his right to conduct his own defence, but he should understand that he would have to lead and cross-examine witnesses. He was further informed that he could change his attorney if he was dissatisfied. The matter was postponed until 21 November 2017 and then again to 2 February 2018, when the trial finally commenced. He remained legally unrepresented throughout.

[6] The appellant was charged and convicted of the murder of Mr Bisani Tshukela (the deceased) by shooting him with an unlicensed 38 special calibre Rossi revolver. The incident took place in a farming area near Dawn Park, within the Boksburg Municipality, between 08h00 and 09h00 on 26 November 2016.That the appellant shot the deceased with his unlicensed revolver is not in dispute. Nor is it disputed that the deceased was unarmed at the time, carrying only a two litre container of milk. The murder conviction of the appellant turns on the circumstances of the shooting.

[7] On the appellant's version he had no intention to kill the deceased and was merely defending his property, his wife and grandchildren. He claims that the shooting occurred while the deceased was trying to wrestle the firearm from him. In contrast, the version of the only eyewitness, Mr Muzivukile Dumezweni who was employed as a herdsman by the deceased, is that the deceased was intentionally shot and killed by the appellant for no good reason. Mr Dumezweni however did not see the actual shooting.

[8] The appellant owns a small holding on which he grows vegetables. He said that there had been ongoing arguments for the past two to three years over the fact that Mr Dumezweni herded cattle on to his property, destroying his vegetable and trampling his garden. Despite his protestations, this occurrence, he said, took place several times a week. On that particular day, the deceased and Mr Dumezweni were herding 110 head of cattle. The appellant was adamant that the cattle were on his property, just as they had been three or four times the previous week. Mr Dumezweni vehemently denied that the cattle grazed on the appellant's property that day, or in the past. He maintained that he and the deceased were herding the cattle along the tarred road, towards grazing land further away. He also denied ever having spoken to the appellant previously, although he acknowledged having seen him on occasion.

[9] Mr Dumezweni described the incident as follows. He was at the back of the herd while the deceased was guiding the cattle from the front. He heard a firearm going off and the herd of cattle started running towards him. He herded them back towards the deceased. Mr Dumezweni saw the appellant on the road next to the herd, holding a 'pump-action gun'. After Mr Dumezweni had herded the cattle back, he saw the appellant

talking to the deceased at close quarters. He did not see the shooting incident but heard a firearm go off and he saw the deceased had fallen to the ground on his back. At that stage the pump gun was on the ground. The appellant then shouted at him in a language that he did not understand and pointed a small firearm at him and went back into his house. Mr Dumezweni approached the deceased who told him he had been shot by the appellant. He saw blood on the T-shirt of the deceased in the chest area. The appellant returned, placed the deceased into his car and drove off. It is common cause that the appellant took the deceased to Sunward Park Hospital where he later died. The police arrived at the scene and Mr Dumezweni explained to them what had happened.

[10] The appellant's version was that the vegetables grown on his small holding were regularly being destroyed and trampled by Mr Dumezweni's herd of cattle. He had also been the victim of 18 robberies in the past few months and the police had been of no assistance when he reported them. On the day of the incident, he had the pellet gun in his possession as he was shooting at Indian Myna birds that were pulling out his thatch. He saw Mr Dumezweni on the tar road approaching him from the right-hand side and he told him he would shoot the cattle if they came onto his property. Realising that it would be pointless to shoot cattle with a pellet gun, he went to get his 38 special calibre revolver which was in the shed. He fired a warning shot and then noticed a second person (the deceased) approaching him from plot 105 on the left. He fired two more warning shots into the air but both men continued towards him. He fired a fourth warning shot into the ground but this did not deter the men. The deceased then 'jumped on [him] with both his hands and grabbed [the appellant's] hand'. His hand was on the trigger of the revolver. The appellant, who weighs 53kg and was almost 60 years old, described in detail how the deceased, who was younger, bigger and stronger than him, tried to wrestle the firearm from him. They both fell backwards; the deceased fell on top of him. During the skirmish, the firearm went off and he remembers Mr Dumezweni looking down at him. He shouted to Mr Dumezweni to call an ambulance and turned his attention to the deceased. He saw the deceased had no blood at that stage, just a 'tiny wound'. He tore off the deceased's T-shirt and put it under his head, threw his firearm into a ditch and then put the deceased into his car with the help of a passer-by and rushed to Sunward Park Hospital. The police

fetched him from the hospital and on his return to the property he fetched the firearm from the ditch and gave it to the police, and his wife also handed over the pellet gun.

[11] Mr Dumezweni denied having seen the appellant wrestling with the deceased for the firearm; denied that they both fell; denied that the fatal shot went off during the altercation as they fell; and denied seeing the appellant lying flat on his back. Mr Dumezweni was insistent that both the appellant and the deceased were standing when the deceased was shot. Any suggestion that the incident took place on the appellant's property was vehemently rejected. When this was put to Mr Dumezweni his response was that the appellant's property was 'far away from the spot where [the appellant] shot [the deceased]'. He maintained that the deceased had fallen on the road.

[12] It is difficult to understand, on his own version, exactly what was visible to Mr Dumezweni and what he actually saw of the shooting incident. He said the reason why he did not see the shooting was because the cattle were in front of him and he was approaching from behind. Even though he did not see the shooting, he heard the sound of a gunshot and saw the deceased falling down. In his evidence in chief Mr Dumezweni said that he heard only one shot. Later he confirmed to the appellant that he had heard three shots being fired but maintained that these were from the pellet gun and not the revolver.

[13] Constable Phoshoko and Constable Chepape were the police officers who arrested the appellant soon after the shooting. They testified that they were called to the scene of the shooting where they found the deceased's jersey, jacket and a two litre bottle of milk lying on the ground. Mr Dumezweni told them that the deceased had gotten into an argument with the appellant, who had then shot him. The appellant had taken the deceased to hospital immediately afterwards. The police fetched the appellant from the hospital and brought him back to the scene. As requested, the appellant went into the house and fetched two guns, a revolver and a pellet gun. The revolver had no ammunition in it and there were no spent cartridges on the scene. Both constables said there was no blood on the clothing of the appellant and no blood on the scene. They saw no fencing

around either of the properties, the appellant's and the neighbouring plot 104, although Constable Chepape made reference to a fence around the appellant's house.

[14] Warrant Officer Shadung, working with the forensic unit confirmed that the revolver and air gun were in working order. The revolver had a chamber for 5 rounds of ammunition in the cylinder. He testified that the revolver could not go off accidentally.

[15] What took on great significance in the course of the trial was whether there was gunshot residue around the wound sustained by the deceased. If a bullet were to be fired at close range, as in a struggle, one would expect to find 'tattooing' or 'starring' on the skin. This is the presence of small puncture-like wounds on the skin in a regular pattern. Warrant Officer Shadung said that a gunshot from up to 50 cm away would cause tattooing from the gun powder residue. The skin would tear apart into a star shape or cross sign and that is where you would find the powder tattooing. Dr Alverez, the trauma surgeon at Sunward Park said that the deceased was bleeding profusely from a gunshot wound on the right side of chest, under the arm. Although not a ballistics expert, he saw no tattooing, no starring, and no stellated lesions (these are lesions normally seen with close proximity contact or high velocity ballistic penetration).

[16] Dr E Apatu, the forensic pathologist who conducted the post mortem testified that the bullet went into the right hand side of the chest, then upwards and back into the left chest cavity. There was blood in the right chest cavity, a partially collapsed right lung with a perforating wound in the lower lobe of the right lung. The left lung was intact. As to the position of the shooter when the revolver was fired, she vacillated between saying that the gun was shot at a ninety degree angle which she then changed to forty five degrees, and then again, changed to somewhere in between. On whether the shot was at close range Dr Apatu said that she did not note any gunshot residue around the wound but because it was a regular circular wound it was not a distant shot. She then said it was 'maybe at the end of close range, the beginning of intermediate range'. She said if she were to make, what she described as a very rough guess, the gun would have been perhaps 30 cm or more from the deceased when it went off. She concluded that the autopsy was not suggestive of a close contact wound, based on her findings. This was

because one would have found imprints of the muzzle, either partial or complete, and a stellate wound. If a little further away one would expect tattooing which was also not present.

[17] The trial court identified 5 issues for determination: whether the appellant intentionally shot the deceased; whether the deceased and the appellant were a distance away from each other when the shot went off, or struggling for the firearm; whether Mr Dumezweni and the deceased threatened the appellant; whether the cattle were on the appellant's property; and whether the firearm was recovered from inside the appellant's house or from a trench on his property.

[18] The trial court accepted the testimony of Mr Dumezweni describing him as a consistent and honest witness who withstood 'lengthy and gruelling' cross examination by an unrepresented accused. The court appeared to accept that the evidence of Mr Dumezweni as a single witness, who on his own admission did not see the firearm go off, would have been insufficient to prove that the version of the appellant could not be reasonably possibly true. It held that the cautionary rule in respect of single witnesses required further 'guarantees'.

[19] These took the form of corroboration for Mr Dumezweni's version in the evidence of the other state witnesses, particularly Dr Apatu, Warrant Officer Shadung and Dr Alverez. The trial court said that 'all three experts testified the firearm was not in close proximity to the deceased when he was shot. There was no starring or tattooing to show the firearm was close to the deceased's chest when the deceased was shot'. Therefore, it was concluded that there was no close contact at the time and the appellant's version that he was in a skirmish over the firearm with the deceased when the shot went off could not be believed.

[20] It is against this evidence that one must assess whether the appellant had a fair trial. While the trial court had been cognisant of the need to explain fully to the appellant the consequences of declining legal representation at the outset of the trial, at the end of the state's case, the court merely reminded the appellant that he had the right to testify

and to call witnesses and that they would be cross-examined by the prosecutor. Notwithstanding the technical nature of some of the state's evidence, it was not drawn to the attention of the appellant that the expert evidence may need to be rebutted by an expert witness. Nor was it suggested to him that in light of the evidence led by the state he should reconsider whether he required legal representation.

[21] Even during sentencing, on 1 June 2018, the magistrate remarked that the appellant believed that his conviction 'was based on perceptions, and that the expert evidence should be reconsidered.' This could have been remedied when the appellant procured the services of an attorney to argue his leave to appeal. Together with the application for leave to appeal, the appellant's legal representative brought an application to adduce further evidence in terms of s 309B(5) of the Criminal Procedure Act 51 of 1977 (the CPA). This section provides:

'(5) *(a)* An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.

(b) An application for further evidence must be supported by an affidavit stating that—

(i) further evidence which would presumably be accepted as true, is available;

(ii) if accepted the evidence could reasonably lead to a different decision or order; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must—

(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and

(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question.'

[22] An application was made by the appellant to call the evidence of a land surveyor, Mr Muller, and Mr Wolmarans, a forensic and ballistic expert, formerly employed by the South African police for more than 20 years. Mr Muller, using the police photographs, identified the spot where the deceased was shot by establishing where the clothing was

photographed by the police immediately after the shooting. He concluded that this point was on the appellant's property, not on the road or the neighbouring plot. This contradicts the evidence of Mr Dumezweni.

[23] Mr Wolmarans reconstructed the scene. His report details various inconsistencies in the evidence of Mr Dumezweni. Significantly, he stated that because the deceased was wearing a T-shirt, any gunshot residue would be found on the clothing rather than the skin. As the clothing was not sent to the forensic unit, Warrant Officer Shadung was not aware that it could provide a filter effect for the gun shot residue. Similarly, the pathologist never received the T-shirt, nor was this fact put to her during her testimony. In Mr Wolmarans' view, because the shot was fired upwards, the possibility of the shot going off in a struggle could not be excluded. As regards the pressure required to fire the revolver, he stated that Warrant Officer Shadung was correct that the firearm can only fire with the correct pressure and double action requires more pressure than single pressure but the pressure was not tested.

[24] In his judgment on the application to adduce further evidence, the magistrate dismissed the application on the grounds that he had already found that the appellant's evidence on how the deceased had obtained the gunshot wound to be a fabrication. Therefore, the evidence of the proposed witnesses would not materially change the outcome of the trial. As regards the fact that the appellant had conducted his own defence, quoting *S v Petzer and Another,*[1] the magistrate found this to constitute insufficient grounds to allow further evidence. This was particularly so, the magistrate found, in circumstances where he had explained to the appellant that he was entitled to call witnesses to support his case.

[25] The *locus classicus* on the test to be applied for a successful application to adduce further evidence is *S v de Jager.*[2] This decision was before the enactment of s 309B[3] but the basic principles remain unchanged, now subject to the Constitution. Holmes JA said:

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[1] *S v Petzer and Another* [1992] 1 All SA 99 (A); 1992(1) SACR 633 (A).
[2] *S v de Jager* [1965] 2 All SA 490 (A); 1965 (2) SA 612 (A) at 613c-d.
[3] This section was inserted by s3 of The Criminal Procedure Amendment Act 76 of 1997, which came into effect on 28 May 1997.

'This Court, can, in a proper case, hear evidence on appeal; see *R v Carr* 1949 (2) 693 (AD); but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the hearing of the further evidence, as was done, for example, in *R v Mhlongo and Another* 1935 AD 133. However, it is well settled that it is only in an exceptional case that the Court will adopt either of the foregoing courses. It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which is sought to lead, was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.'

Non-fulfilment of any one of these requirements would ordinarily be fatal to the application.[4]

[26] It has been held that the exercise of the court's discretion to receive further evidence will be reserved for only exceptional circumstances.[5] There can be no doubt that there is a general need in the public interest for finality in duly concluded litigation.[6] This must be seen in the light of every person's right to a fair trial as set out in s 35(3)[7] of the Constitution, which is now the overarching consideration in all trials.

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[4] *S v de Jager* fn 2 above at 613E.

[5] *Colman v Dunbar* 1933 AD 141 at 161-3; *R v Carr* 1949 (2) SA 693 (A) at 699; *S v Louw* [1990] 4 All SA 703 (AD);1990 (3) SA 116 (A) at 123H; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metro Rail and Others* [2004] ZACC 20 (CC); 2005 (4) BCLR 301 (CC);2005 (2) SA 359 (CC) para 41; *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2020] 2 All SA 330 (SCA); [2020] ZASCA 15 para 64.

[6] *S v Sterrenberg* 1980 (2) SA 888 (A) at 893F-G.

[7] Section 35 (3) of the Constitution provides:
'(3) Every accused person has a right to a fair trial, which includes the right –
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present, when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

[27] This Court in *Hanuman v S*[8] found that the affidavit of an 11 year old complainant who sought to retract her allegations of sexual impropriety against her step-father, could not reasonably be true. The application to adduce further evidence was refused. So too, in *S v Romer,*[9] where an appellant sought to lead further medical evidence on the appellant's defence of sane automatism. This Court held that the medical evidence was controversial and related to conviction rather than sentence which was the subject of the appeal.

[28] The question of adducing further evidence has been dealt with in several high court decisions. In *Munyai v S,*[10] the complainant sought to recant her evidence that the appellant raped her. The court was not entirely convinced that the second requirement, namely the truth of the complainant's allegations, had been met. However, it was not disputed that the complainant and the appellant had had consensual sex encounters when he was out on bail. While this did not necessarily mean that the earlier rape had not occurred, the court held that there was the very real danger of a miscarriage of justice. The conviction and sentence were set aside and the matter referred back to the trial court for the hearing of further evidence, on the truth or falsity of the rape allegations, subject to certain directives, including making provision for legal representation for the complainant.

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(I) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(0) of appeal to, or review by, a higher court.'

[8] *S v Hanuman* [1998] 1 All SA 254 (A); 1998 (1) SACR 260 (SCA).
[9] *S v Romer* [2011] ZASCA 46; 2011 (2) SACR 153 (SCA).
[10] *Munyai v S* 2017 (2) SACR 168 (GJ); [2017] 3 All SA 23 (GJ); [2017] ZAGPJC 121.

[29] In *Sebofi v S,*[11] the court *mero motu* remitted the matter for further evidence and directed that the magistrate call for evidence relating to the specimens taken at the medical examination and the laboratory results, as well as any cell phone records that may exist. In that matter, another rape case, the court decried the paucity of evidence which was not commensurate with the seriousness of the charges and the resultant life sentence. The calibre of the case presentation by both the defence and the prosecution, and the lack of proper forensic investigation was deprecated. It was found the magistrate, despite her best endeavours, had not done enough to ensure that there was a fair trial.

[30] In *War v S*[12], another instance of the recantation of a rape allegation by a child whose father allegedly raped her, the court granted an application to the trial court to lead further evidence. In this instance, the child herself had given conflicting versions even before the trial began. The court found that there was no reason to prefer the one version over the other and as the appellant was facing life in prison, it would be an affront to justice to deny the appellant the opportunity to investigate the evidence foreshadowed in the application.

[31] More recently in *Lottering v S,*[13] an application in terms of s 309B(5) by the appellant, who was a policeman convicted of armed robbery, was declined. The appellant sought to call his wife as witness and laid his failure to do so during the trial at the door of his legal representative. The court held that the appellant's wife clearly had an interest in her husband's acquittal and, in any event, the complainant's identification of the appellant was overwhelmingly convincing. The court noted the different considerations in criminal and civil trials[14] and stressed the importance of finality in litigation, which had been enunciated in a long line of decisions. It was held that such applications should not be granted where there is but a token compliance with s 309B(5)(*b*).

[11] *Sebofi v S* [2016] ZAGPJHC 290.
[12] *War v S* 2015(1) SACR 571 (GP).
[13] *Lottering v S* 2020 (2) SACR 629 (WCC).
[14] Ibid para 28, where reference is made to *S v Carr.*

[32] While finality in litigation is an important consideration, this should not be at the expense of an accused person's fair trial rights. In this instance, it was not enough for the magistrate, at the end of the State's case, to have merely informed the appellant, an unrepresented accused, that he could call witnesses in his defence. The importance of the forensic evidence, and its possible impact on the eventual outcome of the trial, should have been fully explained to the appellant. As a layperson, and from a perusal of the record, it is clear that he did not have sufficient skill and expertise to understand what countervailing evidence was required and, indeed, where he may procure evidence of such a specialised nature. The magistrate, after explaining the consequences of the evidence, should have asked the appellant whether he wished to call expert witnesses in rebuttal, and if necessary, assisted him in doing so. It would also have been apt at this stage to suggest to the appellant that he reconsider his stance on legal representation, once faced with evidence of a technical nature. The magistrate's failure to adopt either course of action, in my view, rendered the trial unfair.

[33] Where an appeal court has found the trial to be unfair, various options are open to it. Section 19 of the Superior Courts Act[15] empowers a court hearing an appeal to remit a case to the court of first instance or 'confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require'.[16] Generally, courts have looked favourably upon remittal to the trial court for the hearing of further evidence, which is primarily of a formal and technical nature.[17] But this is not necessarily so. The overriding principle must always be the interest of justice.

[34] The question then arises whether to remit the matter back to the trial court or direct that the matter commences *de novo*. In *Sebofi* the court declined an invitation by the State to order that the trial start *de novo* in terms of ss 313 and 324 of the CPA.[18] It found that this was not an option open to it, as there was no question of invalidity in the sense contemplated in those sections, which are confined to technical failures.

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[15] Superior Courts Act 10 of 2013.
[16] Ibid, section 19(*d*).
[17] Mathikinca v S [2015] ZAWCHC 134; 2016 (1) SACR 240 (WCC) para 17; S v Ross [2012] ZAWCHC 171; 2013 (1) SACR 77 (WCC) para 13.
[18] *Sebofi v S* fn 11 above.

[35] In *Mokoena v S*[19] this Court dealt with a technical irregularity in terms of s 324A which resulted in the failure of justice. The high court had remitted the matter back to the same magistrate for the re-opening of the case to allow the leading of further evidence. This Court found that because the magistrate had already made strong credibility findings against the appellant it was not in the interests of justice that the same magistrate adjudicate the case.

[36] Here too, the magistrate has made an adverse credibility finding against the appellant. More importantly, he has decided that the proposed evidence would make no material difference to the outcome of the case. In circumstances where a judicial officer has pre-determined an issue, remittal on the very same issue would amount to a miscarriage of justice. To remit this matter to the trial court under these circumstances for the adjudication of further evidence would not be fair to the appellant. Once this is so, the only alternative is for the matter to start *de novo* before a different magistrate.

[37] In the result the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following order:

‘(a) The appeal is upheld and the conviction and sentence of the appellant are set aside.

(b) The trial is to start *de novo* in the regional court, Vosloorus before a different presiding officer.’

[19] *Mokoena v S* [2019] ZASCA 74; 2019 (2) SACR 355 (SCA).

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C NICHOLLS

JUDGE OF APPEAL

APPEARANCES:

For appellant:	F Roets
Instructed by:	Botha-Booysens & Van As Attorneys, Boksburg
	Symington & De Kok, Bloemfontein
For respondent:	M Mashego
Instructed by:	The Director of Public Prosecutions, Johannesburg
	The Director of Public Prosecutions, Bloemfontein.