



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 200/2015

In the matter between:

THEMBANI MABASO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mabaso v The State* (200/2015) [2016] ZASCA 29 (23 March 2016)

Coram: Leach and Zondi JJA and Fourie AJA

Heard: 2 March 2016

Delivered: 23 March 2016

Summary: Pointing out by accused person in terms of s 218 of the Criminal Procedure Act 51 of 1977 — flagrant disregard of accused's constitutional right to legal representation — unlawful production of a confession in the guise of a pointing-out — handwritten notes of pointing-out not read back to accused — notes not constituting admissible probative material — conviction and sentence set aside.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Sishi J sitting as court of first instance):

The appeal is upheld and the conviction and sentence imposed pursuant thereto are set aside.

JUDGMENT

Fourie AJA (Leach and Zondi JJA concurring):

[1] The appellant, Thembanani Mabaso, was indicted in the KwaZulu-Natal Division, Pietermaritzburg, on a charge of murder. He pleaded not guilty to the charge. In his written statement in terms of s 115(1) of the Criminal Procedure Act 51 of 1977 (the CPA), he recorded that he had been interrogated and assaulted by members of the South African Police Service, resulting in him making a formal pointing-out to the police which was not done freely and voluntarily.

[2] At the commencement of the trial before Sishi J, the prosecutor informed the court a quo as follows:

'My lord, the only evidence that I have linking the accused to this offence is a pointing [out] to which he refers, so we will have to proceed with a trial-within-a-trial when I get to the evidence.'

[3] In the event, a trial-within-a-trial was held with several police officers and the appellant testifying under oath. At issue was the admissibility of a pointing-out made by the appellant to Captain E G van Rensburg (Van Rensburg) at Estcourt, KwaZulu-Natal on 14 July 2005, during which the appellant made certain statements

amounting to a confession. At the conclusion of the trial-within-a-trial the pointing-out evidence was ruled admissible and the main trial proceeded. The court a quo subsequently convicted the appellant of murder, solely on the strength of the utterances made by him during the course of the pointing-out.

[4] The trial court proceeded to sentence the appellant to imprisonment for life. His application for leave to appeal was refused by the trial court but, on petition to this court, he was granted leave to appeal against his conviction and sentence.

[5] It was common cause that the deceased had been murdered, having been shot execution style while in his vehicle on the outskirts of Estcourt. There were no witnesses to the murder, but some five months later a number of police officers, members of the Serious and Violent Crime Unit at Cato Manor, arrived at the appellant's residence in Estcourt and arrested him on a count of murdering the deceased. The appellant denied all knowledge of the murder, but was taken into custody by the police who transported him to the Cato Manor Police Station, about two hours away from Estcourt. The appellant travelled in a police vehicle with Captain Dladla (Dladla), the arresting officer. According to Dladla the murder of the deceased was not discussed at all during the journey. However, he testified that, soon after their arrival at Cato Manor, the appellant suddenly indicated that he had been involved in the murder of the deceased. According to Dladla he warned the appellant that what he said amounted to a confession and therefore he was not going to continue questioning him. Dladla then asked the appellant whether he would be prepared to do a pointing-out in regard to the aspects that he had mentioned to him. The appellant agreed.

[6] A strange feature of Dladla's evidence was his failure to record the fact that the appellant had allegedly given him this information. He said that his diary contained a note to this effect, but he was unable to produce the diary. It is also strange why, had the appellant provided Dladla with information regarding the murder, which Dladla considered amounted to a confession, Dladla did not suggest

to the appellant that he should make a formal confession to a magistrate. He chose rather to arrange a pointing-out by the appellant under the auspices of a member of the police, Van Rensburg, stationed at the provincial headquarters in Durban. After all, the purpose of a pointing-out under s 218(2) of the CPA is not to extract a confession, but to obtain evidence of something pointed out by the accused or discovered as a consequence of information given by the accused.

[7] Be that as it may, Van Rensburg conducted the pointing-out at Estcourt on 14 July 2005, with Inspector S C Zondo (Zondo) as the interpreter. A formal record of the pointing-out was kept by Van Rensburg, which served as Exhibit E in the court a quo. The document contains a number of prescribed questions to be put to the person making the pointing-out and provides space for a written note of the actual pointing out. At the outset, one asks why the appellant had developed this sudden urge to do a pointing-out. The events following his arrest, as described by Dladla, provide no indication why the appellant, after initially denying all knowledge of the murder, would now wish to implicate himself by pointing out features related to the murder. When the appellant was asked by Van Rensburg what was said to him by the police when he was approached to do the pointing-out, he said that they had asked if he can assist them with a pointing-out in the Estcourt area. This rather begs the question as to why he had the sudden change of heart.

[8] Several entries made by Van Rensburg on Exhibit E tend to fuel one's sense of disquiet. Strangely enough, Van Rensburg not only recorded the date of the pointing-out as 13 July 2005 (while it was 14 July 2005), but he also indicated that he had met the appellant in person at the Estcourt Police Station, while it was in fact at Cato Manor, whereafter they departed for Estcourt. Also, with regard to the right of the appellant to consult a legal representative, the entries made by Van Rensburg raise concern. When asked whether he wished to avail himself of legal representation, the initial answer of the appellant was recorded as 'N/A' [not applicable]. Then follows the following recordal by Van Rensburg:

'Accused requests to speak to Mrs Mabaso at Estcourt Police Station to arrange money for an attorney. But don't want him now only for court.'

This indicates that the appellant wished to be assisted by a legal representative. It is difficult to understand why he would have added that legal representation would only be required at court. By all accounts the appellant is an intelligent person who was on the brink of pointing out matters which could incriminate him, yet he refrains from obtaining legal representation to protect his rights. I should add that, in his evidence, the appellant reiterated that he wished to have immediate legal representation, but that his request was refused.

[9] Exhibit E further records that the appellant was then asked whether he wished to continue with the pointing-out. His answer is recorded as 'yes'. However, the following appears immediately thereafter:

'[The] person requested again that he want to speak to Mrs Mabaso so that she knows that he is arrested. Request was honoured.'

I should add that Mrs Mabaso is the sister-in-law of the appellant and that she is a captain in the South African Police Service, stationed at Estcourt Police Station.

[10] It is alarming that Van Rensburg, well-knowing that the appellant wished to contact Mrs Mabaso for the purpose of obtaining legal representation, then proceeded with the pointing-out. Even more alarming, is the fact that the entry 'request was honoured' is incorrect. The entry conveys that the request to speak to Mrs Mabaso was honoured at that point in time, however, it is common cause that the appellant was only afforded an opportunity to speak to Mrs Mabaso after the pointing-out had taken place. This amounted to a flagrant disregard of the appellant's constitutional right to legal representation.

[11] Van Rensburg kept handwritten notes of the pointing-out by the appellant. The notes show that the appellant firstly pointed out a tuck shop where he and two others drank some beer and then he pointed out another spot, saying '[h]ere the mayor Mr Bhengu was shot'. Thereupon Van Rensburg asked him 'who shot Mr Bhengu?' The appellant is recorded as answering 'I did'. This constituted the evidence upon which the appellant was found guilty of the murder of the deceased (Mr Bhengu).

[12] As already mentioned, a pointing-out by an accused is regulated by s 218(2) of the CPA. This subsection entitles the prosecution to adduce evidence of the pointing-out by an accused notwithstanding that the pointing-out forms part of an inadmissible confession. However, our courts have often warned that s 218(2) does not authorise the production of a confession in the guise of a pointing-out. See *S v Mbele* 1981 (2) SA 738 (A) at 743C; *S v Magwaza* 1985 (3) SA 29 (A) at 36 and Du Toit *et al Commentary on the Criminal Procedure Act* (loose-leaf) vol 2 at 24-67.

[13] In this court the State correctly conceded that the circumstances giving rise to the pointing-out, as well as the manner in which Van Rensburg questioned the appellant and obtained the damning answer from him, constituted a confession being elicited from him. The issue then becomes whether evidence of either the pointing-out itself, without regard being had to the appellant's answer to the question he was asked, or such answer was admissible.

[14] In the light of the failure of the police to allow the appellant to obtain legal advice from his sister-in-law before the pointing-out, serious doubt must exist as to whether either the pointing-out or the appellant's utterance was admissible in the light of his right to a fair trial guaranteed by s 35(3) of the Constitution. This is particularly so as we know that the following day, after seeing his sister-in-law, the appellant refused to make a formal confession when taken to another senior police officer to do so. The inference is irresistible that this was due to the advice she had given him and that, if he had seen her before the pointing-out, he would have remained silent or not done the pointing-out at all. Bearing that in mind, it can hardly be said that the admission into evidence of the confession at the pointing-out, made only after the appellant had been denied legal assistance and questioned by Van Rensburg, was not detrimental to the administration of justice.¹ In these circumstances both the pointing-out and the confession probably fell to be excluded under s 35(5) of the Constitution.

¹ Cf *S v Mthembu* 2008 (2) SACR 407 (SCA) paras 25-26.

[15] But no final decision on that issue needs be taken as it is not the sole difficulty facing the State. In keeping the written notes of the pointing-out, Van Rensburg was assisted by the interpreter, Zondo. When considering these notes it has to be borne in mind that the *ipsissima verba* of the appellant, recorded in English, is the product of a translation by Zondo from isiZulu to English. This includes the crucial part of the notes, which records the appellant as stating that he had shot Mr Bhengu, the deceased. Van Rensburg testified that, upon the conclusion of the pointing-out, he read the notes back to the appellant, with Zondo translating, and that the appellant indicated that the notes were correct. Zondo, however, testified that they did not go through the written notes with the appellant. When it was put to him that Van Rensburg testified that he did read the notes back to the appellant with the assistance of Zondo as the interpreter, the latter responded, '[n]o it never, it did not happen'.

[16] If one has regard to the pointing-out record, and in particular questions 6, 7 and 8 dealing with the reading back of the pointing-out notes to the appellant, there is no recordal of any reply to those questions by the appellant. This corroborates the version of Zondo, namely that the handwritten notes of Van Rensburg were not read back to the appellant. It follows that the appellant, who denied that he had made the alleged incriminatory statements, at no stage confirmed the correctness of Van Rensburg's pointing-out notes. The result is that the handwritten notes of Van Rensburg did not constitute admissible probative material. In fact, the notes constituted no more than inadmissible hearsay statements. On this basis alone the evidence of the confession allegedly made by the appellant ought not to have been admitted.

[17] As the confession was the sole evidence against the appellant, and ought not to have been admitted, he should not have been convicted. Therefore the appeal must succeed.

[18] The following order is made:

The appeal is upheld and the conviction and sentence imposed pursuant thereto are set aside.

P B FOURIE
ACTING JUDGE OF APPEAL

APPEARANCES:**For Appellant:****C B Mann SC****Instructed by:****S P Mncwango and Associates, Durban****Ponoane and Associates, Bloemfontein****For Respondent:****D A Paver****Instructed by:****The Director of Public Prosecutions, Pietermaritzburg****The Director of Public Prosecutions, Bloemfontein**