



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 118/13

NOT REPORTABLE

In the matter between:

KEVIN NDIVHUWO MANAGA

FIRST APPELLANT

GODFREY MATHEBULA

SECOND APPELLANT

RODNEY NETSHISAULU

THIRD APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Managa & 2 others v The State* (118/13) [2013] ZASCA 121 (20 September 2013)

Coram: Ponnann, Malan, Tshiqi and Petse JJA and Zondi AJA

Heard: 26 August 2013

Delivered: 20 September 2013

Summary: Evidence – sufficiency of – evidence adduced by the State insufficient to found a conviction.

ORDER

On appeal from: High Court, Limpopo (Lukoto J sitting as the court of first instance)

1. The appeal of all three appellants is upheld.
 2. The convictions of each of the appellants and the sentences imposed pursuant thereto are set aside.
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JUDGMENT

**TSHIQI JA (PONNAN, MALAN AND PETSE JJA AND ZONDI AJA
CONCURRING):**

[1] The first and third appellants were indicted in the Limpopo High Court, Thohoyandou on seven charges, being: count 1 - robbery with aggravating circumstances; count 2 - attempted murder; count 3 - robbery with aggravating circumstances; count 4 - attempted murder; count 5 - theft; count 6 - unlawful possession of a firearm; and count 7 - unlawful possession of ammunition. The second appellant was indicted on counts 3 to 7. All three pleaded not guilty before Lukoto J. They were all acquitted on counts 6 and 7 and convicted on the remaining counts as charged. They now appeal to this court, with the leave of the trial court (per Ebersohn AJ).

[2] The first two counts relate to an armed robbery and attempted murder at the Shayadima Satellite Police Station in Thohoyandou. It was alleged by the State, in respect of those counts, that on 22 December 2000 the first two appellants as part of what appears to have been a group of four, dispossessed Inspector Phalo, who was then on duty, of his fire-arm and ammunition and further during the course of perpetrating that robbery that the appellants, shot at the said Inspector Phalo thereby attempting to kill him. In respect of counts 3 and 4, the State alleged that on 24 December 2000, the appellants robbed Mr Yunus Patel, the proprietor of the

Manamani Supermarket in Thohoyandou of R3000 and further that during the course of that robbery they made an attempt on his life by shooting at him. Thereafter, and whilst still in the vicinity of Manamani Supermarket, the appellants stole a bicycle from one Sedzuluwani Nebonde. That theft formed the subject of count 5.

[3] During the course of his evidence relating to counts 1 and 2, Inspector Phalo testified that:

'The court would like to know who these two men were? --- I was told about their names while I was in the hospital. They told me that they had arrested Kevin Managa and Godfrey Mathevula.

Inspector Phalo, are these two people in court today? --- Yes, I believe they are here because I am also here.

Can you point them out to the court? --- I can point to them, but I might lie to the court, because I first know them while I was in court.

Can you just point them out to the court? --- The first one is the one who is wearing a jacket. The second one is the one who is wearing a yellow t-shirt, the one in the middle.

I gather or let me put it to you this way, on the evening of the 22nd was the time that the two men approached the door and shot you, was that time the first time you had seen the two that evening? --- While I already reported to work at around past 19:00 they came at around 19:00.

. . . .

The shot that hit you when the two people visited the satellite station, can you tell the court where the bullet came from? --- I cannot say who shot me because my aim was that I was going to help them, because that is what they said when they came that they were looking for my assistance.'

[4] There was thus no reliable direct evidence implicating the first and third appellants in counts 1 and 2. The same was true of counts 3 and 4. Mr Patel testified that:

'Yes, but when they ..., when they came out of the shop, at that stage did you ... were you able to recognise any of the three people? --- (Your lordship, he says when the shootout, his body got bullet wounds and then he was falling down on the floor, he does not recognise any persons).'

And the evidence of Ms Joyce Silima, Mr Patel's shop assistant, went thus:

'Now let's proceed to paragraph 6 of your statement: You said "I cannot be able to give the descriptions of those four culprits or to identify them, as by then I was not aware that they are criminals".

Now in your evidence in chief you said ... (intervenes).

Is that what you wrote in your statement? --- Yes my Lord. Yes.

But now in your evidence in chief you were quick to say the three accused persons who are before Court today are the ones who were at that scene and you could recognise them. Now the question is, you said that the reason why you said that is it because they are the only accused persons before Court now? --- Yes my Lord.'

[5] The identification evidence of Mr Nebonde in support of count 5 was not any better. He testified:

'I said I could not recognise that person because on my arrival there, there were many people who were involved with assaulting those people or those victims. That is the reason which made me to fail to recognise those people.

....

What I can tell the court that I was sitting in the front seat and those people were full of blood and that is the only reason for me to fail or to recognise them properly.

....

I cannot because I have already explained or alluded to this court that on my arrival there I found that those people were already lying down and they were being assaulted.

....

So you cannot safely say exactly who took the bicycle from your possession? --- Correct.'

[6] Thus in respect of all of the charges that had been proffered against the appellants there was no direct evidence implicating any of them. In addition, the State case rested; in so far as the first appellant was concerned on a warning statement that he had allegedly made to a Captain Ramukhadi and a pointing out to a Captain Mutsila; and, in respect of the third appellant on a statement that he had allegedly made to an Inspector Shonisani.

[7] In granting leave to the appellants to appeal to this court Ebersohn AJ recorded:

'When hearing the application the court pointed out to both counsel that inadmissible statements by the accused were admitted in evidence by Lukoto J and other irregularities

which were also committed by the late Lukoto J. Mr Poodhun who appeared for the State conceded the irregularities, pointed out other irregularities too and he conceded that the convictions and imposed sentences of all the accused could not stand in view of the fatal irregularities.'

[8] What Ebersohn AJ appeared to have in mind was, inter alia, the following evidence:

(a) Inspector Shonisani stated:

'Did you ascertain whether this assault had any influence in his making a statement or answering questions that you put to him? --- No.

. . . .

When you explained his right against self-incrimination did you also take down the answer? -
-- No, I did not.

When you explained his right to legal representation, did you also take the answer down? ---
I did not.

As you were informed of what he says will be used as evidence against him, did he also still give you the permission to take it down? --- Yes, he did.

Did you write it down? --- I did not.

But now tell the court, how does the honourable court know for sure that that is exactly what you said if you did not take those answers down? --- I have taken an oath when I started my evidence. It is nothing new or nothing that I am just talking.

Was is not procedural or was it not obligatory for you to take down the answers? --- I have already said that that warning was made as a questionnaire.

But the question is was it not necessary to write the answer down? --- It was necessary.

So now is it a mistake that you have done? --- No, it is not a mistake.'

(b) Captain Ramukhadi stated:

'Did you also ascertain whether the suspect appear to be sound of mind and not under the influence of liquor or any other intoxicating substances, in a state of shock? --- No.

....

Is it not a requirement that when you – as you read those rights to the accused one by one, you must write down each and every answer to your questions? --- No, not that every answer must be written down.

When you advised the suspect on the right to remain silent for instance, whether or not he understands is, the answer thereof are you not supposed to write it down to show that he understands what you are saying to him? --- No.'

(c) Captain Mutsila stated:

'What then happened? --- We drove to Shayandima Satellite Police Station, where on our arrival he showed me or pointed out what I requested from him.'

Moreover, question 10 of the standard form that was completed by Captain Mutsila was left unanswered. It reads:

'Have you in any way been assaulted, threatened or influenced to point out the scene(s) and/or point(s)?'

[9] The pointing out itself was not accompanied by any statements by the suspect, instead Captain Mutsila simply noted with reference to the seven photographs that were adduced into evidence as part of the pointing out:

'01 Entrance to Satelite.

02 (blank)

03 Point where suspect was standing when he shot the victim.

04 Point where victim was standing when he was shot.

05 Building of Manaman Supermarket..

06 Entrance to Manaman Suptermarket.'

Confusing as that evidence was, it was compounded by the photographer, Inspector Nthangeni, who testified:

'And then? --- Mr Mutsila then told me that this is the pointing out and that person means that where he is standing is where he was standing when he, the shooting, or ... (inaudible) the shooting.

. . . .

Now according to you, the person who you were photographing there, according to your understanding, was that person just posing or pointing anything out? --- According to me here he is not pointing anything.'

[10] The trial court thus ought not to have been satisfied that the statements and pointing out had indeed been voluntarily made. It was thus not permissible for them to have been admitted into evidence simply upon their mere production. In the heads of argument filed on behalf of the State as well as initially in argument in this court by counsel who had since replaced Mr Poodhun, it was sought to support the convictions, despite concessions, before Ebersohn AJ that the convictions could not stand. During the course of argument however he conceded that no reliance could be placed on any of that evidence. A perusal of the record satisfies me that Ebersohn AJ was correct in his assessment of the matter. It follows that the convictions cannot stand.

[11] In the result I make the following order:

- 1 The appeal of all three appellants is upheld.
- 2 The convictions and sentences are set aside.

ZLL TSHIQI
JUDGE OF APPEAL

APPEARANCES:

For Appellant:

Mr M Madima

Instructed by

Justice Centre, Thohoyandou

Justice Centre, Bloemfontein

For Respondent:

Adv. A Madzhuta

Instructed by

The Director of Public Prosecutions, Limpopo

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