



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION-MTHATHA)**

CASE NO. CA & R20/18

In the matter between:

SIMFUMENE MACINGWANE

Appellant

and

THE STATE

Respondent

JUDGMENT

GWALA AJ

1. The appellant was charged, together with two other co-accused who do not feature in this appeal, with one count of malicious damage to property. The appellant was found guilty on that charge and sentenced to 10 years imprisonment. Now he is appealing to this court and the appeal lies against both the conviction and sentence.

2. The factual matrix against which the appellant was convicted and sentenced is that, on 03 May 2015, and at Mphemba, a village situated at kwaBhaca,¹ Eastern Cape, the appellant and the two co-accused set alight two motor vehicles which belonged to a certain Mr Msindwana who, apparently, is a police officer. They all pleaded not guilty to the charge. To prove its case the state called four witnesses namely Mr Silulami Msindwana² (Silulami), one Aphiwe Sobetshe (Aphiwe), Lungile Sobetshe (Lungile) and the investigating officer who also happened to be the arresting officer, Phumzile Ntando.
3. Silulami was the first to give evidence. He testified that on the night in question he was at home sleeping. Sometime between 01h00 and 02h00 in the morning, he was awakened up by a gunshot like sound. He peeped through the window and saw that the vehicles parked outside in front of his house were on fire.
4. He crawled out of the house to go and observe the incident. He noticed that there was a white Hyundai parked outside his yard. He saw three people who appeared from the direction of the burning vehicles. He could not identify them. They were at a distance when he saw them. They got into the back of the Hyundai after which it drove-off.

¹ Otherwise known as Mount Frere

² This is not the same person whose cars were set alight

5. Under cross-examination he testified that he managed to identify one of those persons, the one who was light in complexion, by the name Aphiwe. He came across him few months before the trial when someone whom he was chatting to next to Sollis Spar mentioned that "*here is Aphiwe*". None of the sort was mentioned in the statement he made to the police or in the evidence in chief. Silulami estimated the value of one vehicle at R200.000.00.
6. The second witness to give evidence was Aphiwe. He testified that on 03 May 2015, the appellant arrived at his homestead in Sofaya driving a Hyundai. He said the appellant stated that he had "*started the job*" that he had talked about to Lungile. Lungile was Aphiwe's brother. He said they were to burn Msindwana's vehicles. He promised to pay them R8000,00 of which R 4000.00 would be paid as a deposit. They boarded the Hyundai and drove to the scene. The Hyundai was driven by the appellant.
7. They found alcohol, namely a case of beer and a brandy, at the back of the Hyundai where they were seated which the appellant had come with. They consumed that alcohol on the way. On their way they passed by a filling station known as Spargs where 10 litres of petrol were bought and loaded at the back of the Hyundai. Their transport proceeded to the scene where the complainant's vehicles were.

8. They arrived at the scene at approximately 17H30 to 18H00. On arrival they were shown the vehicle that they were going to set alight. They did not immediately execute the assignment. They waited for a moment but not much time. While waiting they continued to drink some alcohol.
9. After some time, estimated to be less than an hour from the time they arrived, they proceeded into the yard where the targeted vehicles were parked. The appellant entered the premises first. He was followed by the accused number two (again, a person who does not feature in this appeal), then followed by his brother, Lungile, and he (Aphiwe) was the last to enter the premises.
10. On entering the premises Lungile poured petrol on the vehicles whilst he (Aphiwe) was guarding if any person would come out from the house. On the other hand, accused number two torched the vehicles after which they went back to board the Hyundai and left.
11. Under cross-examination, he stated that when the appellant arrived at his homestead, he did not get inside the yard, instead he stood outside the gate and spoke to Lungile. At that time when the discussion took place between Lungile and the appellant, he (Aphiwe) was inside the house. The appellant did not speak to him, so to speak, instead he spoke to his brother, Lungile only.

12. He was arrested together with his brother, accused number one and two as well as the appellant. They were interrogated by the police at the charge office. In that process the police tortured them. He was suffocated with a plastic bag which covered from head to neck. This was done because he was denying the commission of the offence. He admitted the commission of the offence pursuant to the torture. He stated that he was tortured with accused number one who also admitted the involvement in the commission of the offence.
13. Under re-examination he said the cars were put alight by accused number two, appellant and his brother.
14. The third witness, Lungile, testified that the appellant arrived at his homestead driving a Hyundai. On that day Aphiwe and himself, had already been consuming some alcohol which he had bought for a sum of R300.00 even before the arrival of the appellant. The appellant took them. He did not tell them where they were going.
15. First, they went to Spargs filling station where the appellant bought 10 litters of petrol and put it at the back of the Hyundai where they were sitting. Then they proceeded to the scene in a location unknown to him. When they arrived the appellant told them they were going to burn the motor vehicles of Mr Msindwana. They entered the yard and

he poured the petrol on the two vehicles. Accused number two set them alight. They went back to the Hyundai and drove off.

16. According to him, he entered the yard together with Aphiwe and accused number two only. The appellant remained in the Hyundai.
17. When the appellant arrived at their home and spoke to him, Aphiwe was inside the room. Lungile called Aphiwe and told him that the appellant wanted them to go and he would give them money. According to him the amount they would be paid for the execution of the job was R4, 000.00 and not R8, 000.00 as stated by Aphiwe.
18. He told the court that he had consumed liquor even before the arrival of the appellant. On their way to the scene the appellant bought them alcohol, a case of beer and brandy. According to Lungile the appellant brought the alcohol on the way contrary to what Aphiwe said that when they got into the Hyundai the alcohol was already there.
19. Still under cross-examination Lungile testified that on arrival at the scene only accused number two and his brother, Aphiwe, as well as himself, alighted from the vehicle. He poured petrol on the vehicles which were identified by accused number two. He disputed that the appellant identified the vehicles to be burnt as Aphiwe had testified.

20. The Investigating officer was also called to testify for the state as the last witness. He stated that when they interviewed accused number one, he told them that whilst he was in custody the appellant and himself planned to burn the subject vehicles. To carry out this plan they asked the two state witnesses, Aphiwe and Lungile.
21. After those witnesses the state closed its case. Accused number one attempted to apply for a discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act). The application was refused without ado. He testified in his defence. He denied that he gave any information to the investigation officer as alleged by him.
22. He stated that the police took him to the police station where they assaulted him and forced him to sign a statement. Suffice to say at the conclusion of the trial, accused number one was acquitted.
23. Accused number two also testified. He told the court of his treatment by the police at the police station. He testified that after his arrest, whilst he was kept in the police vehicle, a certain "young boy" unknown to him was brought and was asked if he (the boy) knew him. The boy's response was that he did not know him.

24. He was taken to a room or office by one Makhunga, a police official where he found two young men who were handcuffed and chained. The police by the name of Msindwana asked the young men if he was the person suspected. They confirmed. He was cuffed with chains. He was assaulted by Msindwana (the police officer whose cars were burnt) and other police officers, Makhunga, and the Ntando, the investigating officer.
25. He was also covered with plastic bag head to face which was tightened and held at the back of his head. He could not breathe. The police demanded that he should *"tell the truth"* that he burnt the subject vehicles. He persisted with his denial that he was not involved in the commission of the crime.
26. During the assault, the arresting officer instructed him to implicate the appellant with the commission of the crime in question which he did. When he implicated the appellant, the assault stopped.
27. The appellant also testified in his defence. He testified that he is a taxi driver. On the day in question he was at his home and never went to the scene. He could not remember how and when did he meet Aphiwe and Lungile. He denied though that he had discussed with Lungile that they would go and burn the subject vehicles. He denied

that he promised Lungile any money and that he went to fetch them from their homestead.

28. It is against the above evidence that the accused, including the appellant, were found guilty and convicted. The magistrate in his judgment stated thus:-

“... The state called section 204 witnesses to prove the case. Those witnesses were people who said they were there when this was happening. And section 204 specifies that these people before they testify, they have to be warned by this court. Indeed the court warned those people who testified under section 204... I have no reason not to find accused No2 and 3 guilty of malicious damage to property. What was in issue when the defence were addressing the court, was the time of the offence. They were saying the witnesses said those 204 witnesses said it was about 7 PM, whereas [the] Msindwana witness said it was quarter to 11PM. The bottom line there is that it was after sunset, then that is what we take home. Because none of those witnesses said it was in the morning, and one says in the evening, therefore the cars were burnt in the evening, by accused No2 and 3. Therefore I find both of you GUILTY of malicious damage to property”.

29. First, it does not appear from the record that Aphiwe was warned in terms of section 204 of the Criminal Procedure Act as the Magistrate suggest in his judgment. Second, it does not appear that any pronouncement was made whether any of the two, Aphiwe and Lungile, were indemnified in terms of section 204 of the Criminal Procedure Act at the end of the trial. It does appear though that Lungile was warned. To the extent that the Magistrate regarded Aphiwe as a section 204 witness, then an irregularity occurred in the proceedings because such witness was not warned at all.
30. The magistrates' court is a court of record. Whatever is done which is directly related to the proceedings has to be recorded in the record of the proceedings. It cannot just be accepted that a procedure, which is not recorded, was followed purely on the magistrate's *ipse dixit*.³ This, though, is not the turning point in this matter.
31. It is difficult to understand the reasoning for the judgment. The evidence was not analysed and no proper reasons for judgment were given. All that is said is that the so-called section 204 witnesses said "they were there when this was happening". And that "*they said it was at 7PM, whereas [the] Msindwana witness said it was quarter to 11*". It does not appear where the Magistrate get "quarter to 11 PM". The

³ Section 4(1) of the Magistrates' Court Act 32 of 1944 as amended provides: " (1) Every court shall be a court of record."

evidence of Silulami was that the incident occurred between 01h00 and 02h00. According to Aphiwe and Lungile it took place at approximately 19h00.

32. There is a plethora of authorities⁴ to the effect that in the process of reasoning and analysis of evidence presented before the court, in reaching its conclusion (whether it be to convict or to acquit) the court must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.
33. The Magistrate did not account for the judgment he gave. He did not analyse the evidence before arriving at his conclusion. He did not explain why the evidence of the accused persons was not accepted and why that evidence did not meet the standard of being reasonably possibly true. He did not even explain on what basis he found that the state had discharged its onus of proof and why its evidence was accepted.

⁴ S v Van der Meyden 1999 (1) SACR 447 (W) (1999 (2) SA 79) at 449j - 450c; S v Magadla 2010 (2) SACR 316 (ECM) para.14; S v Alam 2011 (2) SACR 553 (WCC)para.34; Haarhoff and Another v Director of Public Prosecutions, Eastern Cape 2019 (1) SACR 371 (SCA)para.37

34. He accepted the evidence of the state, apparently, despite the fact that it was replete with internal conflicts and contradictions. Even worse, Aphiwe, one of the state witnesses, stated in no uncertain terms that they were tortured by the police as a result of which they admitted the commission of crime. That they were tortured was confirmed by accused one and two. No evidence was put through the investigating officer to deny torture notwithstanding that he was also implicated in the torture meted out to accused number one and two as well as Aphiwe. The Magistrate did not engage on this at all. It does not appear from the judgment why this torture did not render the evidence unreliable.
35. Whilst it is accepted that the Magistrates Court is generally a busy court, justice still requires that he or she who sits to make judgment about the lives of the people must account for his or her judgment. A presiding officer, accounts for his or her judgment by giving an analysis of the facts before him or her leading to a conclusion ultimately reached. This is fair to both the complainant and the accused. Certainly, the accused person is entitled to know on the basis of what evidence is he or she found guilty and by what evidence did the state managed to discharge the onus resting on it. Sadly, it does not appear from the judgment of the Magistrate how the court was satisfied that the guilt of the appellant was proved beyond a reasonable doubt.

36. It is not unreasonable to require the judicial officer to give proper reasons for his or her judgment for the judicial officer does not preside over a matter for merely going through motions. Absent the reasons, there is no accountability. In such a case the affected person remains in doubt about the finding made against him.
37. The obligation to give reasons for a decision fulfils a variety of functions. Giving reasons is an opportunity for the judicial officer to account. The reasons will inform the person affected by the decision as to the justification thereof and enable him or her to take a decision whether he or she should abide the decision or take steps to have it corrected either on appeal as in a case like the present or corrected and set aside by way of review.
38. **Baxter: Administrative Law at 228** puts it thus:
- 'In the first place a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached and requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair- it is also conducive to public confidence in the administrative decision-making process. Thirdly, - and probably a major reason for the*

*reluctance to give reasons - rational criticism of a decision may only be made when the reasons for it are known...*⁵ [footnotes omitted)

39. In my view it is irregular for a Magistrate not to give reasons for his or her judgment. It is also unfair to the accused person. It creates doubt whether the trial was fair or not.
40. In any event there were internal conflicts and contradictions in the evidence of the state witness. Aphiwe in his evidence in chief stated that the appellant arrived at his homestead and said there was a job to be done. He promised to pay them R8000.00 for that job. He testified that the appellant said they were going to burn cars.
41. Under cross-examination it transpired that he was not even present when that was allegedly mentioned as he conceded that he was inside the house when the discussion took place. In fact, when Lungile testified he stated that when the appellant took them, he did not tell them where they were going and what they were going to do. He only told them when they were at the scene that they were going to burn the vehicles. Lungile disputed that they were promised a sum of R8000.00. According to him they were promised R4000.00.

⁵ See also *Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others* 1986 (2) SA 756 (A) at 772I - J).

42. According to Aphiwe, all four occupants of the Hyundai, namely the appellant, accused number two, Lungile and himself alighted from the Hyundai and went into the yard where they set the vehicles alight. According to Lungile, the appellant did not alight from that car and thus did not get into the yard. Lungile denied that the appellant identified the cars that were to be burnt.
43. It was Aphiwe, the state witness who confirmed that they were tortured and forced to admit their involvement which they did. As a result of this torture they implicated among others the appellant. That they were tortured was confirmed by accused number two who was tortured with them and forced to implicate the appellant. The torture was also confirmed by accused number one.
44. The sole evidence upon which the appellant was convicted was extracted from witnesses through unlawful means, namely torture.
45. Even if the evidence of third parties obtained through torture was admissible, the circumstances of the present matter would call for exclusion thereof because the admission of that evidence rendered the trial itself unfair especially given the contradictions in the evidence of the state witnesses. The appellant then had to contend himself with the contradictions and had to sift his defence through those contradictions.

46. Section 35(5) of the Constitution⁶ is important in this regard. The section reads as follows:

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”.

47. In *S v Tandwa*⁷ Cameron JA observed that section 35(5) of the Constitution marked a clear and unmistakable departure from the pre-constitutional approach regarding the exclusion of improperly obtained evidence and remarked in the following terms:

“The notable feature of the Constitution’s specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged.

⁶ Constitution of RSA, Act 1996

⁷ [2007] SCA 34 (RSA) para 116

Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused”.

48. In *S v Mthembu*⁸ the Supreme Court of Appeal put the debate whether the evidence of third parties extracted by way of torture was admissible beyond clarity. It held:-

“[27] A plain reading of s 35(5) suggests that it requires the exclusion of evidence improperly obtained from any person, not only from an accused. There is, I think, no reason of principle or policy not to interpret the provision in this way. It follows that the evidence of a third party, such as an accomplice, may also be excluded, where the circumstances of the case warrant it. This is so even with real evidence. As far as I am aware, this is the first case since the advent of our constitutional order where the issue has pertinently arisen...

[32] In regard to the admissibility of evidence obtained as result of torture, Article 15 of the CAT cannot be clearer. It requires that:

⁸ [2008] 3 All SA 159 (SCA); 2008 (2) SACR 407 (SCA)

'Each State shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.'

The absolute prohibition on the use of torture in both our law and in international law therefore demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'. As the House of Lords has recently stated, evidence obtained by torture is inadmissible, 'irrespective of where, or by whom, or on whose authority it is inflicted'. The reason is because of its 'barbarism, illegality and inhumanity'. In People (at the suit of the A-G) v O'Brien, the Supreme Court of Ireland held that 'to countenance the use of evidence extracted or discovered by gross personal violence would . . . involve the State in moral defilement'. Lord Hoffman, in A v Secretary of State (No 2) had no doubt that that the purpose of the exclusionary rule is to uphold the integrity of the administration of justice." [footnotes excluded]

49. I am of the view the fact that the evidence was extracted through unconstitutional means rendered the trial unfair to the appellant.

Such evidence should have been excluded and could not be relied upon for the conviction of the appellant.

50. Even if the evidence was not excluded by virtue of it having been extracted through torture, the state still had problems in its case. The evidence of Silulami did not prove anything. The evidence of the investigating officer was equally unhelpful. The evidence of Aphiwe and Lungile was replete with contradictions and thus unreliable.
51. There was yet another contradiction in the evidence of the state. Mr Msindwana said he was asleep when he heard a gunshot like sound. According to him, it was between 01h00 and 02h00 when the incident occurred.
52. According to the state witnesses they set the vehicles alight at approximately 19h00 in the early evening. The gap between these times mentioned by the state witnesses is too wide. In fact, Mr Msindwana was even asleep when it occurred such that he was awakened up from sleep. He could not mistake early evening with the morning.
53. The contradictions that appear from the testimony of the state witnesses compels one to conclude that the two state witnesses, Aphiwe and Lungile, made up the story to save themselves from the

assault and torturing at the hands of the police. The police were on a mission to find a solution to the damaged property of one of their colleagues, Mr Msindwana. They tortured witnesses and other accused persons to admit to the commission of the offence. Aphiwe and Lungile did not even know the actual time in which the incident occurred. They concocted the story based on their own imaginations just to save themselves from torture.

54. The evidence is suspect such that there is no way it could establish the guilty of the accused persons beyond reasonable doubt.
55. The conviction of the appellant was dependant solely on the evidence of Aphiwe and Lungile. I am of the view that this evidence should have been excluded, first, on the principle of *S v Mthembu* referred to above. Second, it should have been excluded in view of the contradictions.
56. Since there was no other evidence linking the appellant to the commission of the offence, he was entitled to the benefit of doubt. The state did not prove its case beyond a reasonable doubt.
57. In view of the conclusion I have reached, it serves no purpose to deal with the issue pertaining to sentence.

58. Accordingly, I am of the view that the appeal should succeed. In the result I propose the following order:-

58.1 the appeal is upheld;

58.2 the conviction and sentence of the appellant are set aside.

58.3 the prison authorities are directed to release the appellant from custody forthwith.

M Gwala
Judge of the High Court of South Africa (Acting),
Eastern Cape Division, Mthatha

I agree, and it is so ordered.

RWN Brooks
Judge of the High Court of South Africa,
Eastern Cape Division, Mthatha

Counsel for the Appellant: Mr Manitshana

Counsel for the Respondent: Adv. Trietsch

Date of Hearing: 18 November 2019

Date of Judgment: 20 November 2019