

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED.

CASE NO: AA02/2016

DATE: 31/07/2017 SIGNATURE: M/S Phatudi

In the matter between:

THOMAS SHIVAMBU

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT : APPEAL

CORAM:**M.G PHATUDI J, (MOKGOHLOA DJP, SEMENYA J, concurring)**

[1] **INTRODUCTION:**

1.1. This is an appeal against the conviction of the Appellant on 27 November 2014 by Webster J, sitting as a court of first instance. Tolmay J, who sat separately as a court of first instance, passed sentence against the Appellant on 19 August 2016, as Webster J who convicted him, was said to be unavailable for medical reasons. Section 275 of Criminal Procedure Act 51 of 1977 makes provision for a Judge other than a Judge who convicted an accused person to proceed with sentencing in the circumstances.

FACTUAL BACKGROUND:

1.2. The Appellant has been arraigned and charged in the circuit court Sekgosesa on one count of murder, two counts of possession of unlicensed firearms, and one count of unlawful possession of ammunition. He pleaded not guilty to all counts for which he was convicted. He was assisted by defence counsel throughout the trial.

1.3. Pursuant to the convictions aforesaid, he was sentenced as follows:-

1.3.1 On count 1, (murder read with Section 51 (1) of Act 105 of 1997),
twenty five (25) years' imprisonment;

1.3.2 On count 2, possession of an (unlicensed firearm) a 9mm Parabellum caliber CZ model 75B, Ten (10) years' imprisonment;

1.3.3 On count 3, (Unlawful possession of ammunition), ten years' imprisonment;

1.3.4 On count 4 (possession of an unlicensed fire-arm) a 9mm described as Parabellum caliber Norinko model 201C, ten years' imprisonment.

The sentences in counts 2, 3 and 4 were ordered in terms of the provisions of section 280 (2) of the Criminal Procedure Act 51 of 1977, to run concurrently. The effective sentence imposed against the Appellant was therefore twenty (25) years imprisonment.

[2] Leave to appeal to the Full Court which was only sought against conviction, was granted by the *court a quo* in respect of counts 1 and 4 only.¹ Leave to appeal on count's 2 and 3 were however, refused.

It is against this backdrop that the appeal which is opposed by the state, is before this court for consideration.

[3] In an attempt to establish its case against the Appellant, the state lined up several witnesses to testify. From the evidence adduced by each, none could be said to be an eye witness nor led direct evidence in respect of the murder charge. The state by

¹ The Criminal Procedure Act, 1977 as amended, Vol 10.p749 Record

and large, relied considerably on the confessions the Appellant allegedly made. The court *a quo*, it appears, based its conviction on the alleged confessions and without regard to other extraneous corroborative evidence which could have been adverse to the Appellant.

It was the admissibility or otherwise of these confessions that actuated Tolmay J to have considered granting leave to appeal in respect of the murder charge in particular. The learned judge considered the admissibility of the said statements or confessions "a vexed legal question"²

I propose to return to this contentious question in the course of this judgment.

- [4] Be that as it may, the gravamen of the state's case was largely that the Appellant on or about the 24 August 2012, at or near Dan Village Ritavi in Letaba district, unlawfully and intentionally murdered Edward Shivambu ("the deceased").

According to a summation of substantial facts, it is alleged that on the evening of 24 August 2012, the Appellant went to the deceased's household, positioned himself and waited to ambush the deceased, who happened to be his biological father.

The deceased, as anticipated by the Appellant, went outside the house, and was allegedly shot several times by the Appellant. The deceased succumbed and died in hospital. According to the post-mortem report the cause of death was recorded as:-

"multiple gunshot wounds followed by internal and external bleeding resulting in shock and death"

² Vol 10, P268, record

- [5] The issue really is whether could the Appellant be linked to the alleged killing following the totality of the evidence the state presented before the court below. I now proceed to have a closer examination of the evidence though not in greater detail as the evidence was mechanically captured on the record.
- [6] In the main trial proceedings, the state called Lieutenant Robert Malekutu Malapane to testify.³ He stated that having received a report of a shooting incident on 24 August 2012, he proceeded to the deceased's home where he met Mr Mathonsi who made a certain report to him. Based on this report, Lt Malapane visited the victim at the hospital. He then returned to the deceased's homestead. I must remark, though orbiter that no further mention of the "report" of Mathonsi to the witness was ever made while he gave his evidence. It is not apparent if it was ever necessary had any relevance. In any event, on return to the scene of crime and on further investigation, he spotted blood on the ground and also saw 10 spent cartridges and 3 bullet shells on the ground. He then called finger prints police officers to the scene who took photographs.
- [7] The second witness the state called was Mr Kulani Brian Maswanganyi ("Maswanganyi"), the manager at the Appellant workplace, a private security business. He stated that on the fateful night while expected to report for duty, the Appellant did not report on duty. The Appellant later arrived at work and Maswanganyi drove him in his vehicle to the Appellant's parental home as the appellant said that there was a "problem".

³ Vol 1 pp11 -21, record

[8] The next witness, Betlet Shivambu ("Shivambu"), testified briefly that he called the Appellant at around 19h30 – 20h00 to inform him of the gun shot sounds he heard from the direction of his father's residence. The Appellant was driven to his father's place in a certain motor vehicle. I hasten to remark that the evidence was that he was driven there by Maswanganyi. The Appellant according to Maswanganyi as a security officer always carried a fire-arm when reporting for duty. Maswanganyi's evidence on this aspect was, however, contradictory when confronted by the defence counsel under cross-examination. Maswanganyi's evidence did not establish if indeed the Appellant possessed an unlicensed fire-arm in 2012 as alleged.

[9] Next to testify was Cliff Mathye ("Mathye"). He testified that the Appellant was his relative. He saw him after the shooting incident. The Appellant handed to Mathye a firearm for safe keeping as he was to be busy with some funeral arrangements of the deceased as he would not find time to leave it at his homestead. The witness received it from the Appellant.

The witness intimated that he knows that firearm for safe keeping as it was previously owned by his late father. The witness volunteered to give it to Appellant for nothing as he did not need it. This was in 2007.

He went on to testify that on 28 August 2012, the police paid him a visit at his home to inquire about a firearm. The witness handed it to the police. He said it was the same firearm he received from the Appellant.

- [10] The issue that requires a closer examination at his point is whether could it reasonably be said that on the evidence, the firearm retrieved from Mathye was found in Appellant's possession.
- [11] It was at this stage of the main proceedings that when the state's counsel sought to introduce a statement purporting to be a "confession" by the Appellant that the trial court directed the prosecution to "call your next witness" even without first having to investigate, whether the Appellant made the statement, and if so, whether it amounted to a confession in law. This enquiry would ordinary best equip the presiding officer whether to hold a trial-within- a- trial. It is this vexed procedural issue which, to my mind, would anatomize its admissibility or otherwise.
- [12] Without determining whether a trial – within-a- trial was commenced with the court allowed the prosecution to call Warrant officer Phillip Rabothata ("Rabothata") to testify. From the record, it is hard to establish if his testimony and the following witnesses' evidence were in relation to the main trial or a trial within-a-trial. I propose to revert to this issue shortly.

Rabothata's evidence was that in September 2012, he was requested by the investigating officer in the case to present the Appellant before a Magistrate for the purpose of making a "confession".

Following Rabothata was Ms Mamiki Khoza, whose evidence was merely to explain her role as an interpreter during the alleged confession before the Magistrate concerned.

[13] The Magistrate, Ms Hulisani Lorraine Madima ("Madiba") was also called to deal with how she obtained the alleged confession from the Appellant. Prior to her adducing evidence with regard thereto, the defence counsel noted its intention to raise an objection against the admissibility of the controversial statement but was not allowed by the presiding officer.

[14] She testified that on 05 September 2012 at about 13h45, she took down the Appellant's confession. It was reduced to writing in the form of Exhibit "A" or Exhibit "BB". The contents thereof were read into the record by the witness. It is unnecessary to re-capture the same here. A copy thereof was identified as Exhibit "BB: Vol 10, p871 – 875.

[15] Cross-examined, the witness did not specify if she warned or advised the Appellant of his right to legal representation before he could make a confession.

In addition, in the confession, the Magistrate recorded that the Appellant, by making a confession, expected some "benefits" that is, "by telling the truth things may be easier for me and I might be released." The Appellant was keen to "explain" what is "the truth." The defence counsel contended during argument on appeal that the statement could not be a valid confession, the more so that the investigating officer,

one Lieutenant Makasela Henry Moshwana ("Moshwana") also took a statement after he had arrested the Appellant on 25 August 2012. The statement which he characterized as a "confession" was recorded in Exhibit P.

[16] According to Moshwana he, on investigation, managed to establish that the Appellant was not a holder of a license to possess a firearm.

He was also informed by the employer (Maswanganyi) who also transported the Appellant to the deceased's house before the shooting incident, that the Appellant is known to have a firearm.

[17] In order to verify that allegation, he obtained a search warrant which he executed on 28 August 2012, after which he conducted a search at the Appellant's house.

[18] He was accompanied by the Appellant during the search, to which he consented.

[19] In searching the Appellant's house, the witness found several items eg 6 firearm holsters, 2 black magazine holders, empty box of the ammunition, 2 sets of silver handcuffs, a magazine of 9mm pistol, and a starline 9mm pistol inside the wardrobe.

I pause to remark that this particular 9mm Lorenzo 21 C pistol is a firearm referred to in Count 4 of the Indictment in respect of which Moshwana gave evidence. It was found by Moshwana inside the Appellant's house and for which, the Appellant had no valid license to possess it. He exercised control and/or the intention to possess it contrary to the provisions of the Firearms Control Act 60 of 2000.

- [20] The firearm in Count 2, according to Moshwana's evidence, was brought to him by Cliff Mathye. The Appellant was arrested on the strength of Mathye's handing over of the said firearm, which needless to say, was not in the Appellant's physical control or possession on 24 August 2012.
- [21] It was after the handing over of the firearm that it was alleged that the Appellant was prepared to confess the murder to Moshwana. He then took from him "a warning statement."
- [22] Once again, the statement obtained by the investigating officer, Moshwana, was disputed by the Appellant. It was, however, captured on record and handed in as Exhibit "A¹ – A⁵"
- [23] Like the previous statement of "confession", and despite the prosecution having, informed the court of its intention to use the said confession against the Appellant, and also the defence's objections thereto, the presiding officer, nonetheless allowed such confession in evidence without further ado.
- [24] This then immediately leads to the next intriguing inquiry, namely, was it procedurally correct for the *court a quo* to have ostensibly permitted, in the middle of the principal trial proceedings, some evidence suitable to have been a subject of a so-called trial-within-a trial.

In casu the record shows peculiar situations where the prosecution attempted on two occasions to first investigate the circumstances under which the “confession” and “warning statements” were allegedly made, to gauge if the statement was tantamount to a confession or an admission.

S v Bontsi 1985 (4) SA 544 (BG) at 547.

- [25] It is trite practice in criminal proceedings for the trial court to conduct a preliminary inquiry to gauge the nature of the statement contested before a trial within-a-trial is conducted relating to the further question whether such as statement or confession was freely and voluntarily made, without any undue influence, and that the author therefore was in his/her sober senses. This is particularly significant where the parties are in agreement that the nature of the confession may content be established from the contents exclusively, without recourse to evidence aimed at its proper construction.
- [26] In this instance, no doubt, the trial court relied on the contents of the statement in convicting the Appellant, particularly on the count of murder.
- [27] In facts analogous to the present appeal, the Supreme Court of Appeal in S v Gama (Unreported case no: 127/13, p132 delivered on 27/09/ 2013) Salduker JA referred to a “disquieting feature” of the appellant’s conviction where, like in this matter, the trial court relied on a confession made by the appellant. This omission, like in this instance, no basis having been laid, and the trial court having convicted on it, the

SCA (Gama's case) supra found it a "fundamental miscarriage of justice" (P32,Par: [6] and [14] of the judgment.

[28] The legal position as it generally obtains in matters like this, I venture to suggest, may be aptly set out as follows:-

- (a) The prosecution will inform the court of its intention to use evidence of a confession against the accused. The defence will raise its objection if any, against the use of such confession in evidence.
- (b) A brief inquiry should be conducted by the presiding officer to determine first, if the accused person had indeed made a statement, and if in the affirmative, the nature and context in which it was made, and ultimately, whether it amounted to a confession;
- (c) If it was found to constitute a confession in law, it becomes imperative for the trial court to hold a trial-within-a-trial to determine its admissibility, and the prosecution, would be obliged to establish its admissibility within the precepts of Section 217 of the Act and as entrenched in case law on the relevant subject.

[29] In this case, the court below failed to hold a trial-within-a trial in order the admissibility of the confession. This was because the prosecution drew the court's attention that the defence intends to challenge its admissibility. Failure

to do so permeated the heart of the Appellant's right to a fair trial, which demands that it be held according to the dictates of equity and justice.

[30] Counsel for the Appellant also submitted and correctly so, in my view, that the investigating officer Lt Moshwana, should not have allowed himself to be a player and umpire in the matter, first by investigating the case and having obtained the ill-fated "Warning statement" much to Appellant's detriment. He should have assigned a different commissioned police officer to have obtained the statement from the Appellant.

[31] That said, I am of the opinion that, a conviction on murder which was actuated by the said; "confession" was unwarrantedly admitted in evidence. The conviction on the murder charge, as challenged on appeal, was clearly fatally flawed from inception, and this Court, having an inherent power and discretion to intervene where there was a gross misdirection on conviction, should be at large to set aside the conviction on that charge. There is clearly no sufficient supporting evidence on the murder charge.

[32] Turning to the conviction on Count 4, the evidence of Lt Moshwana who conducted a search at the Appellant's house where an unlicensed firearm was found hidden in a wardrobe, the court finds no reason to disturb the conviction in respect of this court. There is direct and uncontroverted evidence implicating the Appellant with regard to that finding of a firearm in his house, which the defense counsel also conceded to.

[33] In consequence, I propose If I may, that the following orders would be appropriate:-

ORDER:

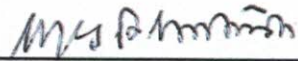
- [1] The conviction and sentence in respect of the murder charge in Count 1, is set aside;
- [2] The appeal against conviction in count 4 is refused.
- [3] The sentences imposed in counts 2, 3 and 4 are ordered to run concurrently in terms of section 280(2) of the Criminal Procedure Act, 1977.
- [4] The sentence imposed in 3 above, is ante dated to **19 August 2016**.

REPRESENTATIONS:

- | | | |
|--|----------|--|
| 1. Counsel for the Appellant
Instructed by | : | Mr L.M Manzini
c/o Legal Aid S.A
Polokwane Justice Centre |
| 2. Counsel for the Respondent
Instructed by | : | Adv N.C Molepo
c/o Director of Public
Prosecution
POLOKWANE |
| 3. Date heard | : | 05 May 2017 |
| 4. Date delivered | : | 31 July 2017 |

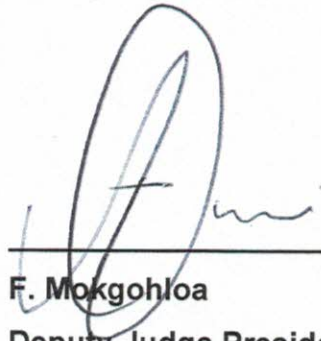
I agree

I agree



M.G PHATUDI

**Judge of the High Court, Limpopo
Division, Polokwane**



F. Mokgohloa

**Deputy Judge President, of the
High Court, Limpopo Division,
Polokwane**



M.V Semanya

**Judge of the High Court, Limpopo
Division, Polokwane**