



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, PHUTHADITJHABA**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 13/2017

In the matter between:

THE STATE

and

THABANG MAKOKO MMAKI	ACCUSED 1
THIEHO WILLIAM MOFOKENG	ACCUSED 2
MAGAISHO SEHLAKO	ACCUSED 3
TLADINYANA SAOANA	ACCUSED 4
JACOB LETUKA SAWANA	ACCUSED 5

HEARD ON: 22, 23, 25 & 29 May 2017;
5, 6, 7, 8, 9, 12, 13, 14, 15 & 20 June 2017

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 20 June 2017

- [1] The accused persons were arraigned before me on a plethora of charges ranging from housebreaking with the intent to rob and robbery, housebreaking with the intent to steal and theft, attempted murder, unlawful possession of firearms, unlawful possession of ammunitions and murder. These charges were read in conjunction with Section 51 (1) and (2) of Act 105 of 1997. They all pleaded not guilty and did not proffer any plea explanations.
- [2] This matter has a long and unfortunate history. The proceedings commenced before my sister Ebrahim, J on the 29th February 2016 until the 1st April 2016. Thereafter because of matters beyond her control they were halted. On the 2nd February 2017, my brother Musi AJP ordered that the trial commence *de novo* before me from the 22nd May to the 30th June 2017.
- [3] On the 25th May 2017 per agreement, the parties applied that the transcribed record of the proceedings and its contents before my sister Ebrahim, J be admissible before me. A formal application was moved for the admissibility of hearsay evidence and I granted it on the 29th May 2017.
- [4] In terms of section 3 of Act 45 of 1988, hearsay evidence means evidence, whether oral or in writing the probative value of which depends upon the credibility of any person other than the person giving such evidence. The section reads as follows:-
- Hearsay evidence.- (1) Subject to the provisions of any law, hearsay evidence shall not be admitted as proceedings, unless-**
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;**

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account'

is of the opinion that such evidence should be admitted in the interest of justice.

- [5] In **S v Ramavhale 1996 (1) SACR 639 (A)** the court held that “a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so”.
- [6] Hearsay evidence is fraught with potholes and minefields. The court must be cautious in admitting it. There are three pillars governing the admissibility of hearsay evidence namely the consent between parties, testimony by the person on whose credibility the value of the hearsay depends and judicial discretion in the interests of justice.
- [7] In this matter there was express consent between the parties that the record be admissible. It was submitted by both counsel that the accused persons have been appraised of the implications and

consequences thereof and that they gave instructions to that effect. I was also assured by them that the instructions to both legal counsel were also the same as in the previous proceedings. This aspect was confirmed by the individual accused.

- [8] The state submitted that some witnesses are reluctant to testify again. It is not always a pleasant exercise to be in court. It is understandable given the path that this matter progressed until now. I do not have legal authority to compel them to come to court and obviously like interested parties they would prefer closure at the earliest convenience.
- [9] Central to every criminal proceedings is the right to a fair trial. This is enshrined in the Bill of Rights and is incumbent upon every court to jealously guard against any infringement of the principle. The court is also endowed with the discretion which must be exercised judicially whether to accept or reject hearsay evidence.
- [10] In this matter, accused 1 and 4 have been incarcerated for over four years awaiting trial. This is tantamount to serving a jail term. It will be fair to them that this matter is concluded as swiftly as is humanly possible. If the transcribed record is rendered inadmissible, the witnesses will have to be recalled and the process started *de novo*. In the event of the matter not being concluded for one reason or the other, then it will be postponed to the fourth term. This will have the effect of adding approximately six (6) months to the period that they will have to spend in jail. Undoubtedly this matter is also causing a disruption in the daily life activities of the accused persons who are on bail.

- [11] Assessing all the submissions in totality, adhering to the law and decided cases, I ruled that the transcribed record be admissible and handed in as **Exhibit “AA”**. The missing part of the record was reconstructed and handed in as **Exhibit “BB”**. The portion that followed the last mentioned part was also admitted and handed in as **Exhibit “CC”**. It comprises 594 pages in total.
- [12] The complainants in different matters gave a detailed description of what transpired on those occasions that they were attacked by their assailants. Their houses were broken into by two (2) or three (3) hooded men under the cover of darkness either in the middle of the night or early hours of the morning. They will get up only to be confronted by a gun wielding foul mouthed male person in their house. If they submit, these individuals will help themselves by removing their belongings particularly electric appliances like hi-fi, amplifiers, speakers etc. On occasions that they resisted or the assailants panicked they were shot. One Junius Boloko went out to investigate after probably hearing someone smashing his sliding door and paid the ultimate price. He was shot dead. The lawlessness and mayhem that reigned in and around the villages of Boiketlo, Namahadi, Mangaung, Ha Sethunya and others in 2013 was not only their **“annus horibilis”** but also the **“Night of the Long Knives”**.
- [13] The different witnesses were also able to identify their recovered properties with different distinct marks and in some occasions had proof of purchases and package boxes with matching serial numbers to the recovered items. In some occasions it was general descriptions given the fact that the item concerned had long been in the family and no documentary proof could be provided.

- [14] The complainants were *ad idem* about one aspect regarding their assailants i.e. they were black male persons. However they gave descriptions which were general in nature like their physique that the one was tall and the other short, the one was a bit stout while the other was slender and the one was talkative while the other remained mute etc. In short they were general and not distinct in nature. These descriptions did not meet the requirements laid out in the celebrated judgement of **S v Mthethwa 1972 (3) SA 766 (A) at 768 A - C** and cited with approval in **S v Chabalala and another, Case Number A126/2016 (FB unreported)**.
- [15] Warrant Officers Tsotetsi and Mohale who were the core investigative team in these matters also took to the stand. They testified about how the complaints trickled in and obtained statements from complainants raided the residence of accused number 2 and discovered suspected stolen property which was removed; collected evidentiary material in the form of spent cartridges from various crime scenes and found a firearm at the residence of accused number 1 and finally the arrest of all the accused before the court. The two (2) turned out to be the central role players in these matters although with disastrous consequences.
- [16] The testimony of Mamorena Matlabe was a confirmation that accused number 1 was her tenant and she gave permission to the police to forcefully enter the residence on the day of the **23rd May 2013**. The accused was arrested there on that occasion.

- [17] Captain Freddie Weitz attached to the Local Criminal Record Centre Phuthaditjhaba also testified that on the **29th May 2013** at about 14H00 pm, he received exhibits in the form of a firearm and spent cartridges from Warrant Officer Mohale. They were then packed, marked and sent for analysis to the Forensic Laboratory in Pretoria.
- [18] The outcome of the analysis was confirmed by David Kabini and Shere Lekgothoane who are Forensic Analysts attached to the Ballistic Unit at the Laboratory. Their findings are contained in **Exhibits “EE”, “FF”, “GG” and “HH”**. These were handed in per agreement between the state and both defence counsel. They relate to the examination of the injuries and clinical findings in **charges number 8 and 12** respectively. The defence also handed in **Exhibits “JJ” to “OO”**. These pertain to the identity of the deceased, date and cause of death, contents and findings contained in the post mortem report in **charge number 20**.
- [19] At the conclusion of the state case, both counsel for the defence made an application for a discharge of all accused in terms of **Section 174 of Act 51 of 1977**. Written heads of arguments were handed and they are part of the record. The section read as follows:-
- “If, at the end of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty”**
- [20] In his seminal work titled **Commentary on the Criminal Procedure Act on page 22 -122, Service 57 of 2016 Du Toit et**

all describes the phrase “**no evidence**” in the section to “**have been interpreted to mean no evidence upon which a reasonable man acting carefully may convict**”. It therefore stands to reason that the court must carefully evaluate and consider the evidence tendered by the state like the reasonable man. Thereafter exercise its discretion in a judicial manner, free of misdirection. The cardinal principle of the law is that “**he who alleges must prove**”. It was held in **S v Mia 2009 (1) All SA 447 (SCA)** that the proper approach in a criminal matter is that evidence must be considered in its totality.

[21] I have already alluded to the established fact that the complainants were unable to identify at all relevant times any of the accused before me. It therefore became obvious that the state case centred around the collection or discovery, the marking, storage or safekeeping, delivery or dispatching of exhibits to the Forensic Laboratory. The second aspect was the statement purported to have been made by accused 2 implicating accused 1 and 3 on charges 7 -10. This was ruled admissible in the proceedings before my sister Ebrahim, J and marked **Exhibit “R”**.

[22] On the **23rd May 2013 at around 10H00**, a police contingent led by Tsotetsi descended on the residence of accused number 1. Among them was a young and inexperienced Constable Rantso Patrick Nkoko. He discovered a firearm and confiscated it. He apparently handed it to Mohale at the residence of accused number 1. This aspect is denied or could not be confirmed by the latter that the firearm was indeed handed to him. According to the SAP13 records a firearm was handed in by Nkoko on the **24th May 2013 at 12H25**. This is extrapolated from the records handed in

and marked **Exhibit QQ**. This is almost a day after it was found and confiscated from accused number 1. **There is no plausible explanation about the lapse of approximately 24 hours between the two (2) events.** The evidence of Nkoko, Mohale and Tsotetsi was unhelpful in providing an explanation of any value. The questions that remains pertinent are the following:-

1. Where was the firearm in the missing 24 hours?
2. In whose custody was the firearm during this period?
3. Is the firearm that was discovered and the one ultimately sent to the Forensic Laboratory the same weapon?
4. What are the possibilities of tampering with it during the period that its whereabouts cannot be accounted for?

[23] There was also the evidence of Mohale pertaining to the cartridges which he collected from the scenes of crime in **charges 7 to 10 and 15 to 18**. Mohale cannot explain as to what happened between 11th May 2013 (being the date of his discovery) to the 29th May 2013 (being the date that he handed the same to Weitz). This resulted in exhibits being incorrectly marked and wrong CAS numbers being documented in the process. This creates further doubt in the final outcome of the analysis and also depicted the kind of police investigation that must be frowned upon. No reasonable man will place reliance on such comical errors of Mohale.

[24] The importance of proper handling of the exhibits was discussed in **S v Sithole 2013 (1) SACR 298 (GNP)**. In paragraph 30 the following is said:-

“It is important that the chain be properly proved if it is not admitted by the accused”

In that matter the court was confronted with a situation similar to the one in our present matter. It held in paragraph 33 as follows:-

“Pertaining to the chain evidence the gathering of the samples and the marking and safekeeping thereof they were dispatched to the laboratory, whilst not dealt with in the s212 statement, it follows that the chain evidence regarding those issues was not proved. Accordingly, in view of the lack of the said linking chain evidence, the s 212 statement in any event became irrelevant and inadmissible evidence. It should therefore have been disregarded by the trial court”.

The existence of that unexplained lacuna has the effect of being the catalyst that breaks the chain. I hold the same views as those expressed by the learned judges and that the evidence of the state in this regard did not pass the legal muster.

- [25] These circumstances create doubt in the integrity and fairness of the entire process. The investigation of the police was in this aspect a monumental failure limping from one disaster to the next. Their lackadaisical approach is disheartening.
- [26] It is also an established fact that the duo of Mohale and Tsotetsi as well as other six (6) or so unidentified policemen descended on the residence of accused number 2. After receiving the necessary permission they broke the door and entered it. They removed a number of items and even went to the extent of taking photographs. This is contained in **Exhibit “N”** of the proceedings before my sister Ebrahim, J. The oral evidence presented in court is inconsistent with the photographs. It appears that there were more items removed than what is shown in the photo album.

Those items were transported to the police station in two (2) separate loads in police vans. Once again the laxity of the control required reared its ugly head. The two (2) investigators did not watch this process like a hawk. It appears that the unidentified policemen were left to guard over the property without any supervision or accountability to anyone. It boggles the mind why Tsotetsi and Mohale jolt into action selective memory to remember everything else but who are those colleagues that accompanied them on the day in question. Are they hiding something or protecting someone?

[27] The list of the property was compiled in a flippant manner apparently at the police station. Is there a reason why it was not done there at the scene of their discovery? Some property was removed for absurd reasons. The bed was removed because it looked **“too new”**. There is no basis for this conclusion except to regard it as shallow reasoning. Some shoes and packets of tobacco were considered too many. These items were not recorded anywhere and no proper explanation for such a failure was provided by any of them. The identification of the recovered property was also a disastrous process. The items were left lying on the floor in no order at all and in some cases even in the charge office. They returned some items to the complainants and retained others. The question is: **Why such an unequal treatment?**

[28] In the previous proceedings the warning statement deposed by accused number 2 before one Lieutenant Borotho was admitted and marketed **Exhibit “P”**. Unfortunately no reasons were handed down to support that ruling. As these are not appeal or review

proceedings I shall not deal with the merits or demerits of the ruling.

- [29] The matter of the state not having any evidence against the accused except it he himself or co-accused implicating himself or each other has been dealt with in detail by the court. The court has repeatedly held that it is against the right to a fair trial to convict the accused under these circumstances. The matter is crisply stated by Traverso, DJP in **S v Dewani, Case Number CC15/2014 (WCC)** who found the law to be **clear** on the question that **“the evidence of the accused – if he does not incriminate himself - can never strengthen the State’s case, since, even if the accused were to be a wholly unsatisfactory witness, the court would still be left with a weak state case which could not, on any basis, pass legal muster.** Given the fact that there is no evidence against accused 2 and others, it will be a misdirection that the accused should be called upon to plug the gaps in the state case.
- [30] The circumstances leading to the arrest of accused number 3 are also bizarre and laughable. Apparently he was assaulted by the community and rescued by the police. In his possession some 5 packets of 12 or 25 g of Boxer tobacco was found. It appears that this formed the basis of his linking with the offences he was charged with. I cannot find logic in the reasoning of Mohale that such a small quantity of tobacco that is easily and legally obtainable can be considered to be suspicious of being stolen.
- [31] A further absurdity was done when the accused number 4 was arrested for being in possession of an amplifier. Mohale could not

explain the make of that amplifier and whether it belongs to or was identified by any complainant. I was not given any reason or any evidence tendered why accused number 5 was eventually charged and linked to any of the offences contained in the indictment.

[32] In the light of the above, I am of the view that no evidence upon which a reasonable man can convict was tendered in this matter. The state did not establish sufficient nexus to the offences that will require the accused persons to answer any case. The state witnesses in particular the police officers through their conduct, bungled their investigation. They were not only unconvincing but unreliable in their evidence. Both did not create a good impression on me. They were evasive and ambiguous in their responses.

[33] Accordingly, I make the following order:-

The applications in terms of Section 174 of Act 51 of 1977 are granted and you are all discharged.

MATHEBULA, J

On behalf of The State:	Adv. R Hoffman
Instructed by:	Director of Public Prosecutions

On behalf of Accused 1 & 3:	Adv. B Daffue
Instructed by:	Legal Aid, Bloemfontein

On behalf of Accused 2, 4 & 5:	Adv. M M Steytler
Instructed by:	Legal Aid, Bloemfontein