

IN THE HIGH COURT OF SOUTH AFRICA
KWA ZUZL-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR 170/14

In the matter between:

THOKOZANI THEMBINKOSI MHLONGO

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

STEYN J

[1] The appellant appeals against conviction and sentence, with the leave of the Court of first instance. He was convicted of three counts of murder, read with section 51(1), Part 1 of Schedule 2 of Act 105 of 1997, unlawful possession of a firearm, i.e. contravening the provisions of section 3 read with sections 1, 103, 117, 120(1)(a), section 121 and schedule 4 and section 151 of the Firearms Control Act 60 of 2000, read with section 51(2), Part 2 of schedule 2 of Act 105 of 1997 and a count of unlawful possession of ammunition, i.e. contravening section 90 read with sections 1, 103, 117, 120(1)(a), 121 read with schedule 4 and section 151 of Act 60 of 2000.

[2] Upon conviction the appellant was sentenced to life imprisonment in respect of counts 1, 2 and 3, 25 years' imprisonment in respect of count 4 and 1 year's imprisonment in respect of count 5.

- [3] Pivotal to this appeal is the finding of the trial court that the firearm found at the KwaMashu hostel was connected to the three murders, and in addition that the search and seizure was constitutionally fair. It is questionable whether the seizure of the firearm could have been accepted by the Court *a quo* as admissible evidence against the appellant. Mr Mngadi, acting on behalf of the appellant, submitted that the Court *a quo* was misdirected in finding that it was the appellant that had brought the firearm into the hostel and that the Court erred in finding that there was a sufficient nexus between the seizure of the firearm and the commission of the crimes.

When the matter was heard, Ms Naidu appeared on behalf of the respondent and submitted oral argument. The heads of argument were however compiled by Mrs Alamchand. Ms Naidu in her address conceded that the evidence of Captain Gcwensa was not satisfactory and that the respondent was in a difficult position to defend the challenges raised by the appellant.

- [4] On a factual basis it is important to consider the evidence relating to the alleged pointing-out. The first witness that testified on behalf of the State was Warrant Officer Bongani Mncube. He has 33 years' experience in the SAPS and worked at the KwaMashu police station. According to him on 10 September 2008 he was called out to a crime scene and when he arrived at the crime scene, Warrant Officer Petros was already at the scene. He later in his evidence indicated that he might have been mistaken as to the identity of the warrant officer on the scene. This concession came about when it was pointed out to him by the State advocate, Ms Mzila, that in fact one of the accused's name was Petros.

According to Mncube he noticed that the three male deceased persons had sustained multiple gunshot wounds. He established that all three of the

deceased came from the same area i.e Mbongolwane. The bodies were all found at block A19. He also searched for exhibits and found cartridges as well as heads of spent bullets which he took to the KwaMashu police station. He corrected himself once more and said that the cartridges and spent bullets were in fact taken by the photographer, a certain Ms Kirsten and it was then sent to ballistics. The bodies were removed and all taken to the Phoenix government mortuary. I shall return to the collection of the exhibits at the scene, when I deal with the evidence of Ms Raw, neé Kirsten.

[5] Although the incident occurred on the 28th September, it was only on 14 October that Officer Mncube established that the suspects had been arrested and that they may possibly be linked to the murders. Amongst those arrested was the appellant, Thembinkosi Mhlongo, who he then interviewed regarding the incident. In his view the appellant was about to say things that required the assistance of a magistrate. What transpired based on the evidence was that an inadmissible confession was tendered, that was challenged by the legal representative of the appellant. It was indicated to the Court *a quo* that the appellant denied the admissibility of the statement since he was severely assaulted before making the statement, accordingly it was neither voluntarily nor freely made by him. Officer Mncube stated that the suspects were arrested by other units. He insisted that it was merely coincidental that the appellant was interviewed for the alleged murders that were committed at KwaMashu hostel. He requested the assistance of Superintendent Ndlovu, head of the detectives in Durban North, to assist him and help him to get a statement from the appellant. After this involvement he handed the suspect over to Warrant Officer Mpanza.

[6] In cross-examination Mncube stated that Constable Kirsten was not immediately on the scene but was summoned by him. He confirmed that he had found at the scene 40 cartridges as well as some other projectiles. All of the cartridges were inside the house, nothing was found outside according to him. When he was confronted with the fact that there is a contradiction

between his and that of Constable Kirsten who confirmed that 43 cartridge cases were found, he tried to clarify the contradiction by stating that it was possible that more were found by her than him. He also stipulated that as much as he referred to two bullet heads, it should be born in mind that he considers heads and projectiles to be one and the same thing. His evidence in my view clearly contradicts his earlier statement when he said that all the cartridges were found inside the house. It is evidence of crucial importance and could not merely be regarded as a mistake.

- [7] Since the admissibility of the pointing-out is so vital, it is necessary to pause for a moment at section 218 of the Criminal Procedure Act, 51 of 1977, which reads:

"Section 218(1) – Evidence may be admitted at criminal proceedings of any fact otherwise in evidence, notwithstanding that the witness gives evidence of such fact, discovers such fact or obtains knowledge of such fact only in consequence of information given by an accused in dealing with such proceedings in any confession or statement which by law is not admissible in evidence against such an accused at such proceedings and notwithstanding that the fact that was discovered came to the knowledge of such witness against the wish or will of such accused.

(2) – Evidence may be admitted at criminal proceedings if anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information and given by such accused notwithstanding that such pointing-out or information forms part of a confession or statement by law is not admissible in evidence given against such accused."

- [8] In order to understand the provision in its context it is necessary to know that the person making or delivering such evidence through his conduct must be aware of the consequences thereof. The Constitutional position post 1994 is very important in that where pointings-out are obtained under circumstances where there is no waiver of rights by the accused, such pointing out or admission would be inadmissible.¹ Pointings-out are not *per se* admissible, it must be made freely and voluntarily, in instances where this is in issue, such

¹ See *S v Gaza and Others* 1998 (1) SACR 446D at 448c-d.

admissibility should be proved by the State in a trial-within-a-trial.² It was held that the failure to advise the accused of his right to legal representation raised the question whether undue influence had been brought on him to point out certain places. Where a pointing-out and accompanying statement are inseparable, the failure to advise an accused of his right to legal representation would in all likelihood amount to undue influence and would make such pointing-out inadmissible.

[9] Accordingly it is important, having due regard to section 218(1) that the evidence will only be admissible if the accused submits to a pointing-out after having due knowledge of his rights.³ Having considered the ambit of section 218, it is necessary to measure the conduct of the police officers *in casu* and the so-called seizure of the firearm against the requirements of section 218 of the Criminal Procedure Act. It is very clear from the evidence adduced that at the time when the firearm was handed in to the SAP13 register, it was done so by Captain Gcwensa. The SAP13 register per SAP13/1529, reflects that much.

[10] It is incumbent on this Court to consider what is contained in the SAP13 register and most importantly the evidence of Officer Mbatha that relates to it. Column 5 of the register shows that 279 was received on the 23rd March 2009 and that the Jennings firearm was entered Number 280 in the register and was however received on 22nd March 2009.⁴ The witness Mbatha could not explain how this discrepancy came about. The officer proffered the following explanation:

“I just don’t remember what happened, my Lord. If it is incorrect the recording of the date I cannot recall now but I am the one who received both the exhibits.”⁵

² See *S v Yawa* 1994 (2) SACR 709 (SE)

³ Also see *S v January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 808i-j.

⁴ See exhibit “G” of the record.

⁵ See page 56 of the record.

The errors regarding the handling of the firearm does not end here as will be seen later in this judgment when the evidence of the witness Kirsten is considered.

- [11] When officer Mncube was questioned about the interview he had with the appellant, he answered as follows:

“I assume when you went into the first interview with accused 1 you had this docket with you which in KwaMashu Cas 235/09/2008.

No – I was not carrying it because it was in officer Mpanza’s office.”⁶

When Mr Sabela the legal representative of the appellant confronted him with what was stated in his statement, he said:

“I informed the said Thokozane Thembinkosi Mhlongo of his rights as set out in the Constitution of the Republic of South Arica. I then asked him about this case.”

He was asked if “this case” refers to KwaMashu Cas 235/09/2008 and the response of Officer Mncube was “Yes”.⁷ When the evidence of Mncube is considered in its entirety, it shows that he was not consistent in his version, neither was he truthful.

- [12] The extract from the occurrence book reflects that on the 18th March 2009 at 18h55 “Suspect booked out Constable PC Mkhize booked out suspect Mhlabunzima Mhlongo, SAP14/327/03/2009 and Siboyelo Nembula on SAPS14/305/03/2009 for further investigation”.⁸ During the cross-examination of Officer Mncube he was asked by the representative of the appellant whether he was aware that the appellant was arrested and detained

⁶ See record page 88.

⁷ See record page 84.

⁸ See record page 487.

for the case in question. Mncube's response to this answer was "I am not even aware of the fact that accused was found with a firearm, I have never heard that."⁹

- [13] This brings me to the evidence of Captain Gcwensa which is crucial in dealing with the appellant's guilt. In 2008, he was merely a warrant officer and he was stationed at the Ntuzuma police station. On 13 October 2008 he was involved in what he referred to as a suspect raid. In other words he was engaging with a team which fell under the uniform branch following information of the most wanted suspects in cases emanating from the KwaMashu hostel. It had been his evidence that he had met with an informer on this day and thereafter assumed his duties when the operation was about to begin. According to him he had information which related to Cas 235/09/2008, a triple murder, and moreover that a certain Thokozane Mhlongo also known by the name of Bhunu was involved. He described the suspect to his colleagues and that there is a possibility that he stays at A178 Men's Hostel in KwaMashu. He proceeded to the given address where a search was conducted and when he arrived at the address according to him he knocked on the door, had members positioned at the windows at the back and front of the section and shouted in isiZulu for the people inside to open as they are police officers and wanted to enter and conduct a search. He informed the occupants and at 21h30 he and two other members entered the hostel. According to him he noticed the appellant inside and he just shouted to him, saying "Hi Thokozane". The appellant was leaning against a bed but was not sleeping and there were about three people inside the room. He was not dressed in uniform but he explained to the appellant that he was looking for him in Cas 235/09/2008. This is what he said:

"I further told him that he must declare the weapon that he brought on day one he arrived into this particular house. Then he asked me how I knew that he brought the firearm with him. I laughed and said 'The arm of the law is long'. Then he started looking for his clothing because he had tracksuit pants on in the bed and a vest. Then I said, 'Now you are under arrest' while he was starting moving to himself. Then I explained his constitutional rights

⁹ See record page 85.

while I instructed a member to search the balance of the African males who were in the room, so that he can leave the room clear.”¹⁰

The witness elaborated to say that he explained to the appellant that he had the right to point out anything to him that might incriminate him in the case and that he had the right to apply to be released on bail after his arrest and that he had the right to remain silent. It is doubtful that the rights mentioned are applicable at a time of an arrest but for purposes of the appeal I need not decide upon the issue. When the appellant was arrested another person in the room shouted “Don’t leave your firearm here.” According to Warrant Officer Gcwensa the appellant then said to him “Let’s go”.¹¹ It is at this point that Gcwensa took the appellant to a dining hall and under the table found a firearm. According to Gcwensa he kept on asking the appellant where the firearm was, and that is when the appellant showed towards the table. He asked the appellant, “Is this the firearm you were talking about?” and the appellant said “yes”. He specifically asked: “Is it yours” and he said “yes”.¹² The firearm was taped underneath the cement table in the dining hall with sellotape. It was a 9mm Norinco. The appellant was asked whether he had a licence for the firearm, whereupon the appellant just laughed and said “No I can’t have a licence”. Importantly this witness then informed the appellant that that he was arresting him on charges of possession of an unlicensed firearm without a licence as well as having ammunition without a licence. The record reads as follows:

“The rights were explained to him that he’s got a right to a legal practitioner of his choice or if he can’t afford one that the State would provide one with the service of a legal practitioner and to be careful of anything he says to me which might be used as evidence against him in a court of law and he has got a right to be released on bail.”¹³

¹⁰ See record page 94.

¹¹ See record page 95.

¹² See record page 95 lines 24 and 25.

¹³ See record page 96.

When the evidence adduced by the State is analysed it appears that there are a number of contradictions regarding the appellant's arrest on possession of an unlawful firearm.

- [14] Returning to the facts, the Court *a quo* was of the view that it should honour an agreement between the State and defence regarding the evidence tendered by the appellant. This in my view constituted an irregularity. Not only was the Court never a party to such agreement, assuming that one can agree to such procedure, the appellant's testimony during the trial-within-a-trial related to the specific circumstances on which he challenged the so-called confession. This is how the Court *a quo* dealt with the issue:

“At this stage I need not say anything more about those proceedings during the trial-within-a-trial, save to state that at the conclusion of the State case counsel for accused No 1 argued that there had been agreement between him and counsel for the State that the evidence led in the trial-within-a-trial will constitute evidence in the main trial in respect of the accused. Although the Court was not party to this agreement and this agreement was not placed on record at the appropriate stage, we are of the view that, in order not to unfairly prejudice either the accused or the State, this agreement will be acknowledged in this judgment and the judgment proceeds on the basis that there had been such an agreement with the concurrence of the Court.¹⁴ (My emphasis.)

It is my considered view that every accused person, as of right, is entitled to adduce evidence and such election should be exercised at the end of the State's case.¹⁵

- [15] In consideration of the judgment on the merits, it appears that the Court *a quo* was alive to the fact that there was no direct evidence that linked the appellant with the crime, and accordingly the evidence of the Norinco pistol was the only evidence that connected him to the crime. The evidence of the seizure and of the firearm and the admissibility thereof was wholly dependent upon the evidence of Gcwensa. It was Gcwensa who informed the appellant that he was looking for him in respect of a murder and he asked the appellant to

¹⁴ See record page 359 lines 11-21.

¹⁵ See section 151(b) of the Criminal Procedure Act.

produce the weapon that he had brought into the premises when he arrived there. The hearsay evidence of the witness who said “don’t leave your firearm here” was admitted without the witness being called and the Court ought to have excluded it.¹⁶

[16] The Court *a quo* cautiously and diligently analysed all the evidence at the trial-within-a-trial. Yet if one considers the cautious approach in the evaluation of Colonel Ndlovu’s memory, that approach was not followed through in evaluating the evidence in the main trial. As much as the mistakes by Ndlovu were just too many to account for as human error, that yardstick should also have been applied to the conduct of Sergeant Raw and her collection of the exhibits in the main trial. I do not consider it necessary to list all the mistakes by Raw, suffice to say that no reliance should have been placed on her evidence. The pointing-out by the appellant remains the only evidence that connected the appellant to the offences. Not only does the pointing-out not fulfil the requirements of section 218 of the Criminal Procedure Act on a number of levels, the firearm was discovered at a place where everyone in the hostel had access to and that everyone used on a regular basis. The respondent, quite rightly in my view, conceded that the State committed a comedy of errors which ultimately all operate in favour of the appellant. In the absence of any direct evidence, there is nothing that links the appellant to any of the crimes. The State had simply failed in its task, i.e. to prove the guilt of the appellant beyond reasonable doubt before the Court *a quo*.

[17] Accordingly I propose that the appeal be upheld and that the convictions be set aside.

¹⁶ See *S v Litako and Others* 2014 (2) SACR 431 (SCA).

STEYN J

K PILLAY J

MADONDO J

Appeal heard on : 30 January 2015

Counsel for the appellant : Mr S Mngadi

Instructed by : Justice Centre, Durban

Counsel for the respondent : Ms S Naidu

Instructed by : Director of Public Prosecutions, Durban

Judgment handed down on : 24 February 2015