

SOUTH AFRICA / JUDGMENT

Mahlangu and Another v S (A13 /2020) [2021] ZAMPMHC 24 (23 September 2021)

[2021] ZAMPMHC 24**COURT**

Middelburg High Court, Mpumalanga

BEFORE

T.V. Ratshibvumo, S.S. Mphahlele

CASE / FILE NUMBER

A13 /2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**THE****HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION OF THE HIGH COURT****MIDDELBURG****LOCAL SEAT****CASE****NO: A13 /2020****REPORTABLE:**NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
23
September 2021
In**the matter between:**ALBERT
JABHI MAHLANGU
FIRST APPELLANT
NOVEMBER
SOLOMON ZULU
SECOND APPELLANT
And
THE
STATE
RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 23 SEPTEMBER 2021.

RATSHIBVUMO J:

[1].

Introduction.

On 08 April 2018 in a farm in Middelplaat, an elderly couple (Mr. Samuel and Mrs Emma Hlatshwayo) had strange visitors around 19h30. Two men walked into their premises under the pretext that they wanted a five litre container for petrol. It became clear from the beginning that they were about to be victims of a crime since the two men walked in wearing balaclavas and hand gloves. One of them also wore a blue work suit. At gunpoint, they were forced to surrender their cell phones, R5 000.00 in cash and their motor vehicle, a VW Golf. They were also assaulted. The two appellants were later arrested and charged with the crime of robbery with aggravating circumstances related to this incident. In a trial held at Ermelo Regional Court, they all pleaded Not Guilty. They were however convicted and sentenced to fifteen years' imprisonment each. They now appeal against the conviction with the leave by the trial court which refused the application for leave to appeal the sentence.

[2]. The facts.

Following is the evidence that led to the appellants' arrest and conviction. When the two victims of this robbery related the incident to their daughter, Ms. Rosalina Hlatshwayo (Rosalina) the following day, she remembered seeing two men one of whom was wearing a blue work suit in the late afternoon that day. The man who wore the blue work suit was known to her as Mr. Albert Mahlangu (the first appellant) from Hendrina. The two men had been given a lift in a motor vehicle that she was also a passenger. She found it strange that they alighted at a spot where there were no residential houses. The nearest house from the road where they got off was over seven kilometres away and it was in a farm that belonged to her parents. She suspected that they could be the ones who robbed her parents. She informed the police of her suspicions. The police then took in the first appellant for questioning.

[3]. Constable Chauke (Chauke) from Hendrina Police Station is the officer who took the first appellant for questioning. When being questioned, the first appellant denied any knowledge about the robbery. Chauke became suspicious when during questioning, the first appellant received a call from a person whom he told that things were bad. He was also asked about a person who was in his company on the date of the incident. The first appellant later told him that although he was caught, the police would not be able to get the person with whom he was talking on the phone. Chauke decided to arrest him on those suspicions.

[4]. The Investigating Officer, Warrant Officer Khoza also questioned the first appellant on persons who were with him on the date of the incident. The first appellant told him that he was with the second appellant and another friend. He then took the Investigating Officer to point the second appellant at his workplace. When he was arrested,

the second appellant confessed to the Investigating Officer that he knew about the incident and also handed over a cell phone saying it was taken during the robbery. The second cell phone also taken during the robbery was alleged to be with the third person who was his friend and colleague. He also took the police to this person as he was at the same workplace. Upon seeing the second appellant in the company of the police, the third person ran away. The cell phone taken from the second appellant was taken into the SAP 13 storage where it was kept pending the outcome of the trial.

[5]. Warrant Officer Khoza also testified that Mr. Samuel Hlatshwayo identified the phone as his by the colour and by the portion in it that was damaged. This version was however denied by Mr. Hlatshwayo who said the police only called him to say they recovered the phone. This prompted the State to have the phone booked out of the SAP 13 storage to be brought to court. Mr. Hlatshwayo was recalled to identify it during the trial. He indicated that the phone shown to him at the trial was his and that it was taken during the robbery. He identified it by its brand (AG), its colour (white) and the screen which could no longer display well. Although he still had the box in which the cell phone came when he bought it and its purchase invoice at home, he was not asked to bring these to the police or to court for confirmation.

[6]. During the trial, the two appellants denied involvement in the robbery saying they knew nothing about it. The first appellant testified that he merely took the police to the first appellant because they wanted to know as to who was in his company on 08 April

2018. He did not admit any knowledge of the crime to them. The second appellant on the other hand denied having admitted to the police that he took part in the robbery. The Investigating Officer only asked him

for his cell phone and he handed it over. When asked as to where he got it from, he took the police to a man from whom he bought it, and the said man ran away before he could be asked anything.

[7]. The applicable law.

Ordinarily, appeal courts are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.[1] Where there has been no misdirection on fact by the trial Judge, the presumption is that his/her conclusion is correct.

[8]. Few aspects stand out for determination in this appeal: The admissibility of confession made to Warrant Officer Khoza, if one was made, identification of the suspects and that of the “recovered cell phone.”

[9]. Confession.

Section 217 of Act 51 of 1977 (the Criminal Procedure Act) provides,

217. Admissibility of confession by accused

- (1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-
- (a) that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and ...

[10]. Over the years, the provisions above have been interpreted by courts to mean that before evidence on confession made to a police officer can be admissible, the said officer must be a justice of peace. A commissioned officer of the South African Police Services is ex officio justice of peace.[2] Evidence was led on the confession made by the second appellant to the Investigating Officer who held the rank of a Warrant Officer. While confession made to the Investigating Officer is often regarded as irregular and undesirable,[3] that is not what taints the case for the State in casu. What taints it, is his rank. It is common cause that as a Warrant Officer, he was not a commissioned officer, yet evidence of

confession allegedly made by the second appellant to him was just led.

[11]. Moreover, the section above provides for prerequisites such as being made freely and voluntarily which require that a trial-within-a-trial be held.[4] The trial court was not asked to and did not hold a trial-within-a-trial to determine the prerequisites for the said confession despite the protests by the second appellant that his rights were not explained to him. Evidence on confession made to a non-commissioned officer should have been ruled inadmissible before it was led. Handling of evidence of confession without making a ruling on its admissibility gets complicated when the second appellant denies having made any confession. If there was a confession made by the second appellant, one would have expected him to have also given an explanation on what happened to a motor vehicle that was robbed together with the cell phone. No explanation was given to Warrant Officer Khoza on the motor vehicle. While the courts are expected to exclude inadmissible evidence inadvertently led in a trial, they should guard against allowing deliberate leading of inadmissible evidence during a trial.

[12]. The fact that evidence is inadmissible does not mean that anything discovered pursuant to it should be discarded. This is in line with sec 218 of the Criminal Procedure Act which provides,

218. Admissibility of facts discovered by means of inadmissible confession

- (1) Evidence may be admitted at criminal proceedings of any fact otherwise in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.
- (2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

[13]. When evidence of a confession is excluded from this trial, what remains is evidence on the cell phone found in the person of the second appellant. I struggle to come to terms with how the cell phone was identified by Mr. Hlatshwayo, the old man in his late 70's. His recollection and memory appears to have faded with time. He had to be called back to the witness stand to identify the phone after he had initially denied that the police had shown it to him and that he identified it as his. When he appeared the second time, he conceded to have made a mistake earlier when he denied having been shown a phone by the police. He testified that he had just forgotten about it.

[14]. He mentioned two reasons through which he believed the phone was his. The first was its brand and the second was its colour. The third reason to the effect that the screen no longer reflected well was not taken to task as the phone was not switched on for him and the court to see if it did not reflect well. If this was done, the evidence does not reflect it. After all, this phone had laid in the SAP 13 storage for several months and one would expect the battery to have been flat at that stage. With these generic features, I find it difficult to conclude that the cell phone was well identified that it

can be said without doubt that it belonged to the complainant.

[15]. Surely there were avenues available to the State to prove it beyond doubt if the cell phone found in the person of the second appellant belonged to the complainant. He had a box for the phone and the purchase receipt at home from which the IMEI and/or serial number could be found and compared with the IMEI and/or serial number of the phone that was presented during the trial.[5] This was unfortunately not done. In the alternative, the State could also have presented evidence from the network providers giving

details of the IMEI numbers of the handset used by the cell phone number allocated to his SIM card and compare it with the IMEI of the handset found in possession of the second appellant. Several cases have had breakthrough in their investigations by following the new SIM cards inserted into cell phones stolen during robberies or murders, by means of tracing the usage of stolen handsets using IMEI numbers.[6] This could have also been done without a need to elicit confessions.

[16]. In this case, the complainant was not asked to do or show anything unique about the cell phone such as unlocking it with a password or PIN code if there were such features. He was equally not asked to identify it say through the screen background or the photos/images he may have stored in the cell phone memory if they were still there. For these reasons, I am not satisfied that the cell phone was properly identified by the complainant as his.

[17]. In case I am wrong in the conclusion reached regarding the identification of the cell phone, the link between the second appellant and the robbery is still bound to fail on the doctrine of recent possession. In *S v Madonsela*, [7] Van Oosten J (Mudau AJ concurring) said, “the nature of the goods involved, of course, needs to be considered. In the present day and age stolen vehicles do change hands with amazing speed and disingenuousness.” I am of the view that stolen cell phones can change hands at a lightning speed and as such, weight should be attached rather to the explanation given when one is found in possession thereof. In *casu*, the second appellant says he bought the cell phone from a person that he took the police to. That man ran away the moment he saw the police. With the above, it cannot be said that the second appellant failed to give a reasonable explanation for his possession of the cell phone.

[18]. What remains is the link between the first appellant and the robbery. Mrs. Hlatshwayo identified him in the dock as one of the two robbers. She conceded that when they were robbed, it was dark. The only source of light was the candle. The candle illuminated enough light for her to see that the men were wearing balaclavas. It is therefore not surprising that the police did not even arrange an identification parade. Had she indicated to them that she would be able to identify one of the robbers, there is no doubt that a proper identification parade would have been arranged. What happened when Mrs. Hlatshwayo

pointed out the first appellant during trial is commonly referred to as dock identification.

[19]. In *S v Maradu*, [8] Blieden J said the following about dock identification,

“This passage affords a good illustration of the danger of accepting evidence of identification in the circumstances of this case. Once the witness, Pantelis, sees the persons in the dock he feels reassured that he is correct in his identification, even though this may not have been the position were they not there. To any member of the public, such as Pantelis, the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect. In England the Devlin Committee has recommended that dock identification should become a purely formal matter allowed only where identification had been made by a parade, unless the Judge takes the view that to hold a parade would be impractical or unnecessary, depending on the circumstances of the case. To my mind the danger of a

dock identification is the same as that created by a leading question in examination-in-chief - it suggests the answer desired. As the latter type of question is inadmissible I see no reason why a dock identification should also not be inadmissible, save in certain special circumstances. In the present case there are no such special circumstances.”

[20]. I also hold the view that no special circumstances exist in this case to hold differently. The confession made by the second appellant would in any event not be admissible against the first appellant even if it was a properly made confession within the ambit of section 217 of the Criminal Procedure Act.[9] There is therefore no evidence that remains upon which a conviction can be sustained in respect of the two appellants.

[21]. For the reasons above, the following order is made.

21.1 The appeal against conviction is upheld.

21.2 The appellants’ convictions and the sentences imposed are set aside.

T.V. RATSHIBVUMO

JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

S.S. MPHAHLELE

DEPUTY JUDGE PRESIDENT

Date:

23 September 2021

Defence:

Ms. M Kgabi

Instructed by:

Legal Aid – Middelburg

For the State:

Adv. TB Molefe

Instructed by:

Director of Public Prosecutions

Mpumalanga

[1] Makate v Vodacom LTD 2016

(4) SA 121 (CC) at para 37 and R v Dhlumayo and Another 1948

- (2) SA 677 (A) at 705.
- [2] See *S v Mavela* 1990
- (1) SACR 582 (A), Sec 334 of the Criminal Procedure Act and Sec 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.
- [3] *S v Khoza en Andere* 1984
- (1) SA 57 (A).
- [4] *S v Nzama and Another* 2009
- (2) SACR 326 (KZP).
- [5] IMEI: International Mobile Equipment Identity is a unique number allocated to each handset device which is also described as a cell phone finger print in that there is no device with similar identification number.
- [6] See for example *S v Myeni and Another* (CC01/2020)
- [2021] ZAMPMHC 18 (28 June 2021).
- [7] 2012 (2) SACR 456 (GSJ).
- [8] 1994 (2) SACR 410 (W) at 413G-J
- [9] See sec 219 of the Criminal Procedure Act.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMHC/2021/24.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mahlangu-and-another-v-s-unknown-topic-ampmhc-2021--6a3ea51d3b1caa9129813a32>

Prepared on 12 October 2026 · Esheria