
SOUTH AFRICA / JUDGMENT

Masuku and Another v S (AA12/2017) [2018] ZALMPPHC 23 (8 June 2018)

[2018] ZALMPPHC 23

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Semanya, Mokgohloa

CASE / FILE NUMBER

AA12/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

PROVINCIAL DIVISION, POLOKWANE)

(1)

REPORTABLE

(2)

OF INTEREST TO

OTHER JUDGES

(3)

REVISED.

CASE NO: AA12/2017

8/6/2018

In

the matter between: STEADY
 THAPELO
 MASUKU
 1ST APPELLANT
 LODRICK
 MAKHATHINI
 NGOBENI
 2ND APPELLANT
 And
 THE
 STATE
 RESPONDENT

JUDGMENT

KGANYAGO J

- [1] The appellants were charged in the Pretoria Circuit Local Division for the Northern Circuit District Court (Voster J) sitting at Phalaborwa, with one count of housebreaking and attempted robbery, one count of murder, one count of attempted murder, one count of possession of unlicensed firearm and one count of possession of ammunition.
- [2] On the first count it is alleged that the appellants acting in common purpose unlawfully and intentionally broke into the house of Jacobus Frederick van Standen (“deceased”) and Henriete Annelise van Standen. On the second count it is alleged that they unlawfully and intentionally killed the deceased. On the third count it is alleged that they attempted to kill Henriete van Staden. On the fourth count it is alleged that they were in unlawful possession of a firearm. On the fifth count it is alleged that they were in unlawful possession of ammunition.
- [3] On the 18th August 2014 the appellants were convicted on all the five counts they were facing. On the count of housebreaking and attempted robbery they were sentenced to 15 years imprisonment, life imprisonment on the count of murder, 15 years imprisonment on the count of attempted murder, 10 years imprisonment on the count of unlawful possession of a firearm, and 5 years imprisonment on the count of unlawful possession of ammunition. The appellants were also declared unfit to possess a firearm.
- [4] The appellants’ appeal against both conviction and sentence. Leave to appeal has been granted by the Supreme Court of Appeal on petition.
- [5] During the trial, the first witness to testify for the State was Isaac Phako. He testified that during February 2010 he shared the same cell with the first appellant at Hoedspruit SAPS. He alleges that on the day on which the first appellant was brought to Hoedspruit SAPS, he told him and one Duncan that he (first appellant) and the second appellant had gone to the house of a certain white person known as Majomba. On arrival at Majomba’s place a white person pulled the curtain of the window and he (first appellant) fired a shot through that window.

They then heard shots been fired from the house and they ran away. The witness had also made a statement to the police and that statement contradicts the oral evidence that he gave in Court.

- [6] The second witness to testify for the State was Henrietta van Staden, the deceased wife. She testified that on the 4th February 2010 at about 20h30 she was at home with the deceased who was also known as Majomba. She saw a man pointing a firearm through the window. That person fired a shot that killed the deceased. He fired the second and the third shots that missed her. She then took her own firearm and shot back and the assailants ran away. She could not identify the assailants. Under cross examination she conceded that the assailants did not enter the house. She further conceded that the assailants never made any demand.
- [7] The State called David Hlatswayo as its third witness. He testified that he is the one who arrested the first appellant on the 5th February 2010 and took him to Hoedspruit Police cells. On the 6th February 2010 he arrested the second appellant. The second appellant made a statement alleging that he knew nothing about the offences and was released. After he was released, the second appellant was rearrested on the 9th February 2010 and he admitted being involved in the commission of the offences. The second appellant told him that he was prepared to make a statement to an officer who was not involved in the investigation of the case. He then requested captain Sekgobela from SAPS Acornhoek to come and take the statement from the second appellant.
- [8] The State then sought to hand in as evidence a pointing out and a written statement made by the second appellant. The defence objected to the admissibility of the pointing out and the written statement on the basis that they did not comply with s 217 of the Criminal Procedure Act 51 of 1977 (the CPA) in that the second appellant was assaulted and threatened to make a statement and a pointing out. They further allege that the second appellant's rights to legal representation were not explained him.
- [9] A trial within a trial was held to determine the admissibility of the written statement and pointing out made by the second appellant. The State led the evidence of Captain Makhubela, warrant officer Mashile, warrant officer Haussman, constable Mangena and captain Sekgobela during the trial within a trial. The second appellant testified and also called Peggy Ngobeni to testify as his witness.
- [10] The Court in its ruling on the admissibility of both the statement and the pointing out, provisionally admitted them and deferred a final determination at the end of the main trial. The State proceeded to call its further witnesses and thereafter closed its case. Both appellants testified in their defense. Both appellants' defense was that of an alibi, and they called their witnesses to support their version.
- [11] The first issue to be determined is the finding which the trial Court has made during the trial within a trial in determining the admissibility of the written statement and pointing out made by second appellant. It is trite that the purpose of a trial within a trial is to determine the admissibility of either a confession, written statement or a pointing out. At a trial within

a trial, the admissibility of a confession, written statement or a pointing out is determined independently from the question of guilt. An accused can go into the witness box on the issue of voluntariness without being exposed to the general cross examination on the issue of guilt. (See Director of Public Prosecutions, *Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) at para 39 and *Gama v State* [2013] ZASCA 132 (27/09/13) at para 13)

- [12] The trial Court was called upon to determine the admissibility of the second appellant's written statement and pointing out. The second appellant was contending that the written statement and pointing out were not made freely and voluntary and further that he was not advised of his right to legal representation before making the written statement and pointing out.
- [13] Evidence was led during the trial within a trial by both the State and the second appellant. Thereafter both parties addressed the Court on the admissibility of both the written statement and pointing out. The trial within a trial was limited only to the issue of voluntariness of the written statement and pointing out. At the end of the trial within a trial, the trial Court did not make a final ruling on that, but instead provisionally admitted the two documents and deferred the final determination at the end of the main trial.
- [14] Under normal circumstances evidence will be provisionally admitted with a provision that evidence will be led at a later stage to determine its final admissibility. If no evidence is led, at the end of the trial the evidence that was provisionally admitted will be ruled inadmissible. In the present case all the evidence was before the trial Court, and what was left was for it to make a ruling on whether the two documents were admissible or not. It was not even necessary for the trial Court to give reasons for its decision at that stage. The trial Court was only required to rule on the voluntariness of the two documents without venturing in the main trial as that enquiry does not determine the guilt of the second appellant. However, the trial Court decided to defer the final determination at the end of the trial.
- [15] At the end of the trial in its judgment on the main trial, the trial Court made a final determination and admitted the second appellant written statement and pointing out as evidence. That was made after the trial Court has made credibility findings on the second appellant. In my view, the trial Court has lured the second appellant to testify in the main trial in order to enable it to make a credibility findings on him which it could not have done during the trial within a trial. The trial Court has therefore, failed to separate the issue of voluntariness from the main trial.
- [16] The conviction of the second appellant was solely based on his written statement and pointing out. Had the trial Court at the end of the trial within a trial made a ruling and ruled the two documents inadmissible as evidence, that was going to be end of the State case on the second appellant. By failing to make a ruling at the end of the trial within a trial, and waited to first make a credibility finding on him in the main trial, that has prejudiced the second appellant. That in itself is defeating the purpose of a trial within a trial. In my view,

the trial Court has committed a material gross irregularity. That now leaves this Court at large to deal with the matter as the trial Court should have.

- [17] Turning to the second appellant's written statement, it is settled law that the admissibility of a statement has constitutional implications. Section 35(5) of the Constitution provides that:

"Evidence obtained in a manner that violates any 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."

- [18] In *Mudau and Another v S* [2017] ZASCA 34 (29 March 2017) at para 14 the Court said:

"A confession made to and reduced to writing by a magistrate is upon its mere production, admissible in evidence provided that the

requirements of s 217 are satisfied. This means that the confession conforms to the prescripts set out in the Constitution. Even before the advent of the Constitution, cases are legion that emphasized the importance of informing the accused of his constitutional rights to legal representation and the right to silence at every important stage during the recording of a confession. Thus in *S v Mpetha & Others*: the court said at 408 E-H:

'Before the presumption comes into operation it must be clear "from the document in which the confession is contained" that such confession was made freely and voluntarily, etc. Normally no confession of itself would refer to questions of voluntaries or undue influence. A person making a confession is most unlikely to volunteer the fact that he is confessing freely and voluntarily, that he is in his sound and sober senses and that he has not been unduly influenced to make such confession. It is manifest therefore that implicit in the whole procedure envisage by the section is a questioning by the magistrate of the person confessing. These questions as well as the answers must be recorded for it to be able to appear from the document that the confession was made under the required conditions of the voluntariness etc. This of course, is also in accordance with long standing practice. It is well known that over a period of many years departmental instructions and the decisions of the courts have built a series of guideline designed to ensure that confessions are in fact freely and voluntarily made without the exercise of undue influence...'

These rights have since the advent of the Constitution been entrenched in s 35"

- [19] In paragraph 7 of exhibit J recording the second appellant's written statement, captain Sekgobela who took the second appellant's written statement had recorded injuries of handcuffs on both hands and also injuries to the back where he complained of pains. He has further recorded that the second appellant had informed him that those injuries were as a result of an assault by his co-accused and the police. From the form it does not appear that the captain has probed further and asked the circumstances under which he was assaulted by his co-accused and the police.

[20] When the captain testified in Court he stated that the second appellant was assaulted by his fellow inmates for giving information to the police. However, that explanation was not recorded on the form he used to record the second appellant's statement. His failure to record the question and answers is not in compliance with the principles as formulated in *S v Mphetha* above, which requires questions as well answers to be recorded for it to be able to appear on the

document. With regard to the assault by the police even in Court the captain failed to explain whether he attempted to find out the circumstances under which he was assaulted.

[21] The photos marked exhibit H5, photo 2 and 3 shows visible injuries of handcuffs on both wrists of the second appellant. That should have prompted the captain to probe the circumstances under which he sustained them since it was his second arrest for the same incidents, and on his first arrest he was released on the basis that he knew nothing about the offences. At the bottom of page 4, the second appellant did not sign to confirm the contents of that page. In my view his failure to probe the assault by the police and also to record questions and answers in full constitute a gross irregularity. It is clear that the procedural requirements provided in s 217 of the CPA have not been complied with in obtaining that statement.

[22] The second appellant's pointing out has been recorded in exhibit H. Captain Makhubela from Acornhoek SAPS is the one who conducted the pointing out. Paragraph 4.2 relates to the second appellant's right to legal representation. In that paragraph he is asked whether he wishes to exercise any of those rights and his answer was a "yes". Paragraph 4.3 is a follow up question to paragraph 4.2. In paragraph 4.3 the second appellant is asked if he wishes to exercise that right what does he wish to do. The answer recorded is that he indicated that he has no legal representative and wishes to speak on his own.

[23] At the bottom of the same page it is required of the captain to record steps he took to comply with paragraph 4 and he has recorded that the second appellant has indicated that he has no legal representatives and wishes to speak on his own.

[24] In my view, the answer recorded in paragraph 4.3 and also the answer at the bottom of that page contradict the answer given in paragraph 4.2. Since he had indicated that he did not have a legal representative, but wished to be represented, he should have been afforded an opportunity to obtain one from the Legal Aid Board or one whom he will pay out of his own pocket. Failure to give him an opportunity to secure the service of a legal representative amounts to denying him that opportunity and that amounts to a serious gross irregularity.

[25] In paragraph 8 and 9 it is recorded that the second appellant was told by inspector Mashile to do the pointing out. However, the circumstances under which inspector Mashile told him to do so were not recorded. The question in paragraph 9 is clear, it requires the captain to record what inspector Mashile has told the second appellant about the pointing out. That answer has not been recorded. The answer to that question is therefore incomplete.

[26] In paragraph 16.1 the captain has recorded that the second appellant has shown him injuries on his back and hands. At the part which state “Observation by the Officer” he has recorded the following

“Injuries at the back and front and hands. He alleges that he was assaulted by other five suspects. They suspect that he might be giving information to police. Photo no: 2 & 3.”

[27] Photo no: 2 and 3 shows handcuffs injuries on both wrists of the second appellant. During the trial the captain denied that the second appellant told him that he was assaulted by the police. He stated that the injuries on the second appellants hands could have been caused by many things in the cell like a piece of blanket, a piece of a trouser maybe cut off or oranges bags. Surprisingly two days later captain Sekgobela recorded the injuries on the hands of the second appellant as been caused by handcuffs. It is highly unlikely that the injuries on the second appellant’s wrists might have been caused by what captain Makhubela alleges.

Captain Sekgobela who took the second appellant’s statement has recorded that the second appellant informed him that he was assaulted by the inmates and police, and those are the same injuries that was observed by captain

Makhubela two days earlier as they appear on photo 2 and 3 taken on the day of the pointing out, even though he did not record them. The injuries on the second appellant’s wrists are clear and visible injuries caused by handcuffs. It is clear that captain Makhubela was economic with the truth. He had simply ignored the second appellant’s injuries and proceeded to conduct the pointing out. In my view, his actions amounts to a serious gross irregularity.

[28] After the pointing out was done, the second appellant was asked whether he is having any complaints about the manner in which the pointing out was conducted and he said “Yes”. However, Captain Makhubela did not attempt to find out what the second appellant’s was complaining about. In my view, his

failure to enquire about the second appellant’s complains taint the whole pointing out process.

[29] The second appellant when he was arrested on the first occasion informed the police that he did not know anything about all the offences and was unconditionally released. After the police received a complaint from the first appellant, the second appellant was rearrested and he is alleged to have suddenly admitted to the offences and made a pointing out and a written statement admitting all the offences. In the process he sustained injuries to his back and both wrists. There is a possibility that the injuries on the second appellants both wrists, were caused by handcuffs when the police were exerting pressure on him in order to elicit information as to who killed the deceased or attempted to kill the deceased wife. That in turn resulted in the second appellant making some admissions and pointing out. In my view, the tactics which the police have employed in eliciting information from the second appellant amounted to assault.

[30] In *S v Tandwa and Others* 2008(1) SACR 613 (SCA) at para 120 the Court said:

“...Though ‘hard and fast rules’ should not be readily propounded, admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused’s fair trial right at its core, and stains the administration of justice. It renders the accused’s trial unfair because it introduces into the evidence obtained by means that violate basic civilized injunction against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct”

- [31] Section 35(5) of the Constitution is designed to protect individuals from police methods of investigation that offend basic principles of human rights. It is clear that the written statement and pointing out by the second appellant was procured by assault. In my view, the trial Court should have rendered the second appellant’s written statement and pointing out inadmissible as they were not made freely and voluntarily without any undue influence.
- [32] With regard to the first appellant, his conviction was solely based on the evidence of Isaac Pako and the written statement that Mr Pako had made on the 7th February 2010 at Hoedspruit SAPS to inspector Mashile. In that statement he alleges that on 5th February 2010 he was in the same cell with the first appellant, when the first appellant told him that they have killed a white person (Majombo) at Hoedspruit farm on Thursday the 4th February 2010. In that statement he further alleges that the first appellant was with one Louis, Makhatini, (second appellant), Blaas and Sekani. He further alleges that the second appellant is the one who shot the old man inside the house.
- [33] During his testimony in Court, Mr Pako testified that the first appellant told him that he (first appellant) shot the white man and he was with the second appellant only. That is a clear and a material contradiction from the statement he made to the police in that in his statement he implicates the two appellants and three others, whilst in his oral testimony he implicates the two appellants only. Even under cross examination by the second appellant’s defense counsel he insisted that it was only the two appellants who went to the deceased farm.
- [34] Captain Hlatswayo testified that he had arrested the first appellant on the 5th February 2010 and took him to Hoedspruit Police Station on the very same date. Under cross examination captain Hlatswayo was confronted with a copy of a cell register from Lulekani Police Station that shows that on the 5th February 2010 the first appellant was detained at the cells of Lulekani SAPS, and was transferred to Hoedspruit SAPS on the 6th February 2010. In answering that question, he gave vague answers. He stated that it might have been so, but as far as his knowledge is concerned, he detained the first appellant in Hoedspruit, but the investigating officer might have decided otherwise.
- [35] The copy of the cell register, was handed in as an exhibit. In that cell register it shows that on the 5th February 2010 the second appellant was held at Lulekani SAPS cells. The State has failed to counter that evidence by submitting a copy of the cell register of Hoedspruit SAPS showing that on the 5th February 2010 the first appellant was detained at Hoedspruit SAPS. The copy of the cell register is an official document and the State did not challenge its

authenticity and also did not object to it being handed in as evidence. The version of the first appellant as to where he was detained on the 5th February 2010 remained unchallenged.

[36] In *R v Biya* 1952 (4) SA 514(A) at 521 C-D the Court said:

“If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonably possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime”

[37] There is unchallenged evidence that the first appellant was detained at Lulekani SAPS on the 5th February 2010, and transferred to Hoedspruit SAPS on the 6th February 2010. Therefore, it is impossible for him to have been in the same cell with Mr Pako on the evening of the 5th February 2010 at Hoedspruit SAPS and made the alleged admissions. That raises some suspicions in Pako’s evidence. Mr Pako could not explain why his evidence in Court materially differs from his statement to the police. On been confronted with a copy of the cell register of Lulekani SAPS that shows that on the 5th February 2010 the first appellant was detained at that station, he became evasive and argumentative when answering questions. In some instances, he had a selective loss of memory. In my view, his evidence is not credible and therefore, unreliable. The trial Court erred in accepting the statement and the evidence of Isaac Pako.

[38] The test in a criminal case is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. An accused is entitled to be acquitted if there is a reasonable possibility that an explanation which he had proffered might be true. The test is not whether one should believe it. In this case the appellants proffered an explanation about their whereabouts and even called witnesses to support their versions. In my view the appellants’ explanation about their whereabouts on the day of the incident is reasonably possibly true.

[39] Regarding the first appellant, without the evidence of Isaac Pako, there is no evidence to sustain his conviction. Regarding the second appellant, without the written statement and pointing out, there is no evidence to sustain his conviction. In the result this appeal must succeed and both appellants’ convictions must be set aside. In the light of this finding, I do not deem it necessary to consider the appeal against sentence.

[40] I accordingly propose the following order:

40.1 The appeal against conviction is upheld

40.2 The conviction of both appellants on charges of housebreaking and attempted robbery, murder, attempted murder, possession of firearm and ammunition are set aside.

40.3 The order of the trial Court is set aside in its entirety and replaced with the following:

“Both accused are found not guilty and discharged on all the charges”.

KGANYAGO J

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, LIMPOPO

DIVISION, POLOKWANE

I agree

SEMENYA J

SOUTH AFRICA LIMPOPO

I agree and it is so ordered

MOKGOHLOA DJP

APPEARENCES

On behalf of First Appellant

:Kgatlle EK

Instructed by

:Polokwane Justice Centre

On behalf of Second Appellant

:Nonyane DJ

On behalf of the Respondent

:Mphahlele WKK

Instructed by

:DPP-Polokwane

Date heard

:11th May 2018

Date of

Judgment

:

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Prepared on 11 October 2026 · Esheria