

SOUTH AFRICA / JUDGMENT

Nojiyeza v S (AR185/23) [2024] ZAKZPHC 63; 2024 (2) SACR 516 (KZP) (12 August 2024) [2024] ZAKZPHC 63

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Chithi, Sibisi

CASE / FILE NUMBER

AR185/23

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO.:AR185/23

In

the matter between:

SIHLE

ISIAH NOJIYEZA

APPELLANT

and

THE

STATE

RESPONDENT

This

judgment was handed down electronically by circulation to the

parties' representatives by email, and released

to SAFLII. The date for hand down is deemed to be 12 August 2024 at

11:00

ORDER

On

appeal from:

Ntuzuma

Regional Court (sitting as
the court of the first
instance):

The appellant's appeal against his conviction is dismissed.

JUDGMENT

Chithi AJ (Sibisi AJ concurring):

- [1] The appellant was found guilty by the Regional Court in Ntuzuma on 25 February 2022 on the following two counts, namely:
 - (a) possession of a prohibited firearm; and
 - (b) possession of ammunition.
- [2] On 23 March 2023 the appellant was sentenced to eight years' imprisonment for possession of a prohibited firearm and to six months' imprisonment for possession of ammunition which sentences were ordered to run concurrently.
- [3] The appellant now appeals to this court only against his conviction having been granted leave to appeal by the trial court on 8 March 2023.
- [4] The grounds upon which the appellant seeks to assail his conviction are broadly the following:
 - (a) The trial court erred in lowering the standard of proof to a civil standard of balance of probabilities.
 - (b) The trial court erred in concluding that the two police officers who testified for the respondent corroborated each other and that their evidence was clear and satisfactory in all material respects particularly as to where and from whom the firearm was recovered.
 - (c) The trial court erred in admitting the ballistic report in evidence without first verifying with the appellant whether he had any objections to it being admitted in evidence.
 - (d) The trial court erred in accepting the ballistic report in evidence when the appellant had not admitted it in terms of s 220 of the Criminal Procedure Act[1] ('the CPA').
 - (e) The trial court erred in permitting the ballistic report to be admitted in evidence without it being read into the record in terms of s 150(2)(b) of the CPA.
- [5] The appellant was legally represented throughout the pre-trial proceedings and during the trial until the close of the respondent's case by Mr Ndwandwe. Thereafter he was legally represented by Mr Hlongwa who represented him until the conclusion of the trial.
- [6] The respondent called two witnesses, Constables Sabelo Goodman Dumakude and Sikhumbuzo Sibongiseni Sikhakhane who were both stationed at Inanda Police Station. The appellant testified in his own defence and called two witnesses, Thobani Ngidi and Thandithoko Wiseman Nojiyeza.

- [7] The evidence of Constables Dumakude and Sikhakhane was almost identical in nature. It is therefore unnecessary to give an outline of their evidence individually. The broad overview of their evidence is that on 2 July 2017 at midnight, they were performing crime prevention duties in the Inanda area, which comprises Amaoti Dube Village, Bhambayi, and Ezimangweni, together with their colleague Constable G Gokhe who did not testify.. They were in full uniform and driving a marked State vehicle. While they were driving on an incline, they spotted four African males that were standing along the road under a streetlight. As they were approaching, they noticed one of the four males stepping away from the other three. They drove the police van and stopped it in their immediate vicinity. They then instructed these males to stop. They introduced themselves as police officers and the male who stepped away from the others introduced himself as Isiah Sihle Nojiyeza, the appellant. They then asked for permission to search him to which request he agreed.
- [8] Constable Dumakude proceeded to then search the appellant while his colleagues were on guard. He recovered a firearm from the appellant's right hip which he removed.[2] Upon requesting the appellant to produce a license to possess the firearm the appellant failed to do so. He then placed the appellant under arrest. He thereafter took the appellant and placed him in the police vehicle. The firearm was a 9mm Norinco Star Fire with one 9mm magazine and four live ammunition. The serial number of the firearm was erased.
- [9] He then went back to search the area where the other males were standing. He requested to search each one of them to which they consented. He searched them and found nothing and then released them. The police then drove the appellant to Inanda Police Station whereat Constable Dumakude entered the firearm, magazine and the four live ammunition in the exhibit register (SAP13). He then placed them in a seal bag in the presence of the appellant. He then detained the appellant for being in possession of an unlicensed firearm and ammunition. A copy of the SAP13 and the ballistic report was handed in as exhibits and that concluded the respondent's case.
- [10] The appellant testified that on 2 July 2017 at about 21h00 while he and his two companions Thobani Ngidi and Thanditholo Wiseman Nojiyeza were on their way to the tuckshop they were stopped by police who came out of a police van which had emerged in their immediate vicinity. They pointed firearms at them and proceeded to search them without their consent. When the appellant enquired as to why they were being searched Constable Dumakude remarked that the appellant talked too much and that the appellant thought he was clever. During the search Constable Dumakude did not find anything on him except keys and some money. Constable Dumakude then went across the road in the bushy area where he picked up something using his cellphone flashlight. Constable Dumakude then came back to the scene with a firearm and attributed possession thereof to the appellant. The appellant denied ever having stepped away from his companions when the police approached them. The appellant further denied that he and his companions were standing along the road under a streetlight.

- [11] The evidence of Messrs Ngidi and Nojiyeza was not materially different to the evidence of the appellant. However, Mr Ngidi did not know when exactly in 2017 the incident happened. In addition, he did not know whether Constable Dumakude used a cellphone or torch when he went looking for something in the bush. The evidence of Mr Nojiyeza differed from that of the appellant and Mr Ngidi in that he testified that they were each searched by the other two officers while Constable Dumakude went into the bush. This means that the three officers searched each one of them. He further testified that the appellant refused to be searched. Furthermore, he testified that upon being searched in addition to the keys and money the police also found cell phones and wallets in their possession. Moreover, Mr Nojiyeza denied that firearms were pointed at them.
- [12] On 26 June 2024 two days before the hearing, this court requested the parties to file supplementary heads of argument on or before 28 June 2024 on the following issues:
- (a) The effect of the admissions that were made on behalf of the appellant in respect of the chain evidence and ballistic report during the pre-trial conferences held on 16 April 2018 and 16 May 2018 respectively.
 - (b) The grounds upon which the trial court was alleged to have applied the incorrect standard of proof.
 - (c) The approach which the trial court had to adopt in assessing two conflicting versions.
- [13] Both parties duly filed their respective supplementary heads of argument on 27 June 2024 and we are grateful for their endeavours at short notice. However, the parties' supplementary heads of argument did not take the matter any further.
- [14] It is trite where there has been no misdirection on the facts by the trial court the presumption is that its conclusion is correct, and the appellate court will only reverse it where it is convinced that it is wrong.[3]
- [15] Mr Moola on behalf of the appellant argued that the two witnesses for the respondent did not corroborate each other in relation to where

exactly the appellant's firearm was recovered. Mr Moola's argument was not borne out by record and when his attention was drawn to the evidence of both Constables Dumakude and Sikhakhane in which they both testified that the firearm was found on the appellant's right hip[4] he found himself impelled to concede that both witnesses in fact corroborated each other in relation to the recovery of the firearm.

Mr Moola's insistence on this point to the extent of including it in the appellant's grounds of appeal was rather puzzling. It was puzzling because he had already conceded and abandoned this point in the application for leave to appeal.[5] On the face of this concession, we could not fault the findings of the trial court in relation to the recovery of the firearm.

- [16] Mr Moola further argued that the trial court ought to have verified with the appellant whether he had any objection to the admission of the ballistic report before admitting it in evidence. Moreover, Mr Moola argued that in view of the ballistic report not having been admitted by the appellant in terms of s 220 of the CPA before it was tendered in evidence it ought to have been read into the record in terms of s 150(2)(b). Lastly Mr Moola argued that the trial court applied a civil standard of proof in deciding the case.
- [17] Ms Mkhize on behalf of the respondent argued that on at least two occasions during the pre-trial conferences the appellant's erstwhile attorney Mr Ndwandwe recorded that the chain evidence and ballistic report were not in dispute. Moreover, the ballistic report was by virtue of the provisions of s 212(4) of the CPA admissible upon its mere production. Consequently, it was unnecessary for the report to be read into the record as the appellant's attorney had a copy thereof. Lastly Ms Mkhize argued that the appellant's contention that the trial court applied a civil standard of proof is not borne out by the record.
- [18] Mr Moola insisted that the ballistic report was not properly admitted into evidence despite this court drawing to his attention the fact that Mr Ndwandwe who represented the appellant during the pre-trial proceedings and during a portion of the trial did not place the ballistic report in dispute.
- [19] Mr Moola clearly did not have this portion of the record as he shuffled his record when this was drawn to his attention until Ms Mkhize gave him a copy of her record. This court can only strongly discourage as a highly undesirable practice for any legal practitioner to seek to argue an appeal without having the full record and making himself au fait of it not only during the preparation of the heads of argument but also as part of the preparation for the hearing.
- [20] In order to determine whether the ballistic report was properly admitted into evidence and whether the contents should have been read into the record it is necessary to consider the relevant Regional Court practice directives, together with the provisions of ss 220 and 150(2)(b) of the CPA.
- [21] Practice directive 3 of the Criminal Practice Directives for the Regional Courts in South Africa[6] provides:

'3 JUDICIAL CASE MANAGEMENT: PRE-TRIAL HEARING AND CERTIFICATION OF CASES AS TRIAL READY

In compliance with paragraph 5.2.4 of the Norms and Standards dealing with judicial case flow management, no matter may be enrolled for trial unless certified trial ready by a court.

3.1 Prior to certifying the case as trial ready a court must have conducted a pre-trial hearing during the court proceedings.

3.2 At the pre-trial hearing the issues enumerated below, but not limited thereto, are to be considered and addressed where relevant:

3.2.1 Whether the prosecution is ready to proceed to trial?

3.2.2 Whether the accused/defence is ready to proceed to trial?

3.2.3 Whether the accused person is legally represented and in the case of a private practitioner, whether the legal representative has sufficient funds or acceptable financial arrangements for the determined number of trial dates.

3.2.4 Whether the legal representative has received copies of the final charge sheet, further particulars (if any) and copy of the docket/statements;

3.2.5 Whether the legal representative has consulted with accused person.

3.2.6 Where multiple accused have the same legal representative, whether there is a possibility of any conflict of interest.

3.2.7 Whether the parties had exhausted all possibilities to make representations to the prosecution.

3.2.8 Whether the state intends to present any evidence of a technical nature. This may include, for example, admissions or confessions, pointing out by the accused person, forensic evidence, expert testimony, or statements in terms of section 212 of the Criminal Procedure Act, 51 of 1977 (CPA) or other documentary evidence.

3.2.9 The number of accused and the number of legal representatives.

3.2.10 The number of witnesses the prosecution intends to call.

3.2.11 Whether such witnesses include any child witnesses, witnesses with mental or other disabilities.

3.2.12 Whether an appropriate language intermediary is necessary and whether arrangements have been made.

3.2.13 Whether there are any technical requirements for the trial, such as the use of an intermediary, audio visual equipment, etc.

3.2.14 Whether any foreign language interpreters or other specific interpreters are necessary for any of the accused or for any of the witnesses and whether any arrangements have been made.

3.2.14.1 The court must conduct any inquiry to determine the language the accused understands (as provided in s 35(k) of the Constitution) rather than the mother tongue or preferred language of the accused. Such enquiry must be recorded.

3.2.15

Whether the appointment of assessors is necessary?'

- [22] Pre-trial hearings were held in this matter on 16 April and 16 May 2018 respectively where the issues which are enumerated in practice directive 3, particularly those set out in practice directive 3.2.8, were considered and addressed.
- [23] During these two pre-trial hearings Mr Ndwandwe the appellant's erstwhile attorney did not place the ballistic report in dispute and in fact during the pre-trial hearing of 16 May 2018, he specifically recorded that he had no objections to the admission of any formal evidence. [7] The appellant was present during both pre-trial hearings and the court interpreter must have interpreted the proceedings to the appellant.
- [24] Shortly before the respondent closed its case the issue of the ballistic report having been admitted in the pre-trial hearings was pertinently raised by the prosecutor. The trial court confirmed that the ballistic report was not placed in dispute during the pre-trial conferences. [8] The ballistic report was thereafter handed in as an exhibit. Mr Ndwandwe was present in court when the issue arose and did not object to the ballistic report being handed in as an exhibit. In any event had Mr Ndwandwe objected, in my view, he would not have been able to do so without any difficulty as this would have amounted to a withdrawal of an admission which he had previously made.
- [25] The question which arises from this context is, did the admissions which were made during the pre-trial hearings amount to admissions in terms of s 220 of the CPA.
- [26] In order to answer this question, it is necessary to consider the provisions of s 220 which provide:
- 'An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.'
- [27] Section 220 of the CPA does not prescribe the stage at which admissions can be made. Equally it also does not prescribe that admissions have to be in writing. In practice admissions are made at any time, at the pre-trial conference stage to before the delivery of judgment. The purpose of admissions at a pre-trial conference is to promote the effective disposal of litigation.
- [28] The ballistic report which forms the foundation of the appellant's grounds of appeal was admitted during the pre-trial conferences which were held in terms of the practice directive 3. While the trial court did not record the admission of the ballistic report as an admission in terms of s 220 of the CPA if one considers practice directive 3.2.8 the admission of the ballistic report by Mr Ndwandwe was clearly an admission in terms s 220.
- [29] The effect thereof is that the appellant was bound by those admissions unless he was able to prove that his legal representative was not properly instructed to make those admissions or that the admissions were made as a result of a bona fide mistake.[9]

- [30] The appellant did not at any stage of the proceedings after the ballistic report was handed in seek to challenge it or seek to revoke the admissions which had been made on his behalf. Even after the respondent's case was closed the appellant did not challenge the evidence that the article that was found in his possession was not a firearm. The appellant did not assert that his legal representative was not properly instructed when he made the admissions or that the admissions were made as a result of a bona fide mistake and therefore revocable.
- [31] It is trite that formal admissions in terms of s 220 of the CPA have the effect of relieving the State of the burden of adducing evidence concerning the facts admitted. If the admission is still standing at the end of the case, it becomes conclusive proof of the facts admitted.[10]
- [32] The trial court was fully aware of the admissions which the appellant made not only in relation to the ballistic report, but in relation to all formal evidence in general. In my view while it might have been desirable for the trial court, before admitting the ballistic report into evidence, to verify with the appellant's attorney if the appellant confirmed that during the pre-trial conference, he did not place the ballistic report in dispute. This failure does not on its own vitiate the proceedings resulting in a failure of justice.
- [33] Consequently, I cannot fault the trial court in finding the appellant guilty based on the ballistic report.
- [34] Allied to the issue of the admission of the ballistic report is the whether the ballistic report should have been read into the record in terms of s 150(2)(b) of the CPA.
- [35] Section 150(2)(b) provides:
- 'Where any document may be received in evidence before any court upon its mere production, the prosecutor shall read out such document in court unless the accused is in possession of a copy of such document or dispenses with the reading out thereof.'
- [36] When the appellant's counsel was directed to the proviso in s 150(2)(b) he correctly conceded that in view of discovery having been effected upon the appellant on 6 December 2017[11] it was unnecessary for the ballistic report to be read out. In view of this concession, it was therefore unnecessary to take this point any further.
- [37] In relation to the issue of the trial court having allegedly applied a civil standard of proof when the appellant's counsel was referred by the court to the relevant authorities with regard to the proper approach which the trial court was by law entitled to adopt when it was confronted with mutually destructive versions between the appellant and the respondent, he conceded that he was wrong to have contended that the trial court applied a civil standard of proof in the case.
- [38] It is a matter of fact that after the trial court had assessed both the appellant's and the respondent's evidence regarding where the firearm was recovered from and as to when the appellant was arrested it remarked that 'it was highly improbable that, if the accused was

arrested at around nine p.m., that the statement would have been commissioned that late - or early hours of the morning at 01:05.' In arriving at this conclusion, the trial court employed the well-established approach that is usually applied when a court is confronted with two mutually destructive versions.[12] The concession by the appellant's counsel was therefore correctly made.

[39] Accordingly, for all these

reasons

the appellant's appeal against his conviction must fail.

Order

[40] In the result I make the following order:

The appellant's appeal against his conviction is dismissed.

CHITHI AJ

SIBISI AJ

APPEARANCES

Counsel for the appellant: Mr M N Moola Instructed by: M N Moola Attorneys C/o Omar Attorneys 1a, Hillrand 15/21, Hill Street, Overport Durban 4091 Email: mnlaw27@gmail.com
Counsel for the respondent: Ms HT Mkhize Instructed by: Specialized Commercial Crime Unit: Durban Tel: 0331 335 6608 Dated of hearing: 28 June 2024 Date of Judgment: 12 August 2024

Judgment

is electronically handed down on 12 August 2024 at 11:00

[1] Criminal Procedure Act 51 of 1977.

[2] Record: page 7, line 10 and page 28, line 14.

[3] R v Dhlumayo and Another 1948

(2) SA 677 (A).

[4] Record: page 7, line 10 and page 28, line 14.

[5] Record: page 159, lines 3-5.

[6] Criminal Practice Directives for the Regional Court in South Africa, 5th Revision (2017).

[7] Record: pages 1R, 1T, 4H and 41.

[8] Record: page 43, lines 12-18.

[9] S v Malebo en Andere 1979

- (2) SA 636 (B) at 644; Dlamini v Minister of Law and Order and Another 1986 (4) SA 342 (D); Vilakazi v S

[2010] ZASCA 125 para 17.

[10] S v Seleke en 'n Ander 1980

- (3) SA 745 (A) at 754A-B; S v Groenewald 2005

- (2) SACR 597 (SCA) para 33; S v Van Der Westhuizen 2011

- (2) SACR 26 (SCA) para 32.

[11] Record: pages 1P and 4E.

[12] S v Saban en 'n Ander 1992 (1) SACR 199 (A) at 203J-204A-B; S v Trainor 2003 (1) SACR 35 (SCA) para 9; S v M 2006

- (1) SACR 135 (SCA) para 189.

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