

SOUTH AFRICA / JUDGMENT

S v Mgushelwana and Another (CC15/2017) [2018] ZAECHBHC 13 (30 January 2018) [2018] ZAECHBHC 13

COURT

Eastern Cape High Court, Bhisho

BEFORE

Stretch

CASE / FILE NUMBER

CC 15/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, BHISHO

CASE

NO: CC 15/2017

In

the matter of:

THE

STATE

versus

LUNDI

MGUSHELWANA Accused

no. 1

KHAYALETHU

MAYAPHI Accused

no. 2

JUDGMENT**STRETCH J.:**

- [1] The accused have been indicted on two counts of murder, two counts of robbery with aggravating circumstances and one count of unlawful possession of a firearm and ammunition.
- [2] It is alleged that on 3 July 2015, at Thobela Store, Hlebani, in the district of Whittlesea the accused robbed Biruk Lakew and Steve Fombe whereafter they murdered Biruk Lakew and one Bongani Bastyane. They had firearms in their possession at the time.
- [3] It is common cause that Lakew (the first deceased) was shot at least three times in his chest and abdomen during the robbery from which injuries he succumbed the same day. Bastyane (the second deceased) also died the same day from a gunshot wound to his chest.

The first trial

- [4] The trial initially proceeded before Malusi AJ, but on 5 June 2017 he directed that the trial should proceed de novo before another court. Both accused were represented at that trial by an attorney referred to as Mr P in the transcript.
- [5] According to that ruling it appears that a conflict between the two accused became apparent during the defence case which resulted in Mr P withdrawing and Mr McConnachie and Mr Erasmus being appointed for the two accused respectively.
- [6] After accused no. 2 closed his case Mr McConnachie applied to re-open accused no. 1's case. This was apparently to traverse

inconsistencies between the first accused's version as placed on record by Mr P, and his testimony when Mr McConnachie represented

him. After re-opening his case, the first accused also criticised the standard of his legal representation by Mr P and alleged that Mr P did not properly and fully consult with him and his co-accused. Mr P deposed to an affidavit denying these accusations.

- [7] At the previous trial counsel for both accused contended that the trial should be aborted. The prosecutor on the other hand, argued that there was no gross incompetence on Mr P's part, that state witnesses could be recalled and that it was not necessary to start the trial afresh.
- [8] Notwithstanding this, Malusi J found that an exceptional irregularity had occurred which had vitiated the entire trial, and directed that it should commence de novo.

The present trial

[9] At the commencement of the trial before me both accused pleaded not guilty and denied all knowledge of or involvement in the offences

referred to in the indictment.

The scene

[10] Thobela Store consists of two interleading sections with separate entrances. The first section consists mainly of shelves and fridges and is referred to in the evidence as the shop. The second section consists of a counter, a fridge and a toilet and is described as the bottle store. The bottle store leads further into what appears to be living quarters.

Steve Fombe

[11] The complainant in the second robbery count, Steve Fombe, testified that on 3 July 2015 at about 9.30pm he was next to the entrance to the shop where he was employed as a cashier. Biruk Lakew (the deceased in the first murder count), was serving behind the counter in the bottle store.

[12] Fombe heard a gunshot and saw a person in a blue overall (whom he subsequently identified as accused number one at a formal line-up),

just outside the entrance to the shop. He and the first accused observed each other for some time. The first accused pointed a

firearm at him and instructed him to remain where he was. Fombe however crawled away and ran from the shop through the bottle store

and into the living quarters where he hid himself. There he heard a second shot going off. He thinks that in total about four shots were fired.

[13] When all was quiet he ran back into the bottle store. The first deceased was lying between the living quarters and the bottle store. He was bleeding. The deceased in the second murder count (Bongani Bastyane) was lying on the store's verandah where customers used to sit and drink.

[14] Fombe's two cell phones (which were behind the bottle store counter) and in excess of R25 000 were missing from the store as well as cigarettes and other stock.

On 6 August 2015 he pointed out the first accused at an identification parade without hesitation.

[15] Fombe was shown close circuit television (CCTV) footage recorded at the time when he said the incident had taken place. He identified a person in a blue overall brandishing a firearm, as accused number one. He also identified accused number one as the person placing a bottle containing their money on the bottle store counter, helping himself to cigarettes and later re-appearing carrying bottles of beer and a bag.

- [16] The footage also shows a person (whom Fombe identified as the deceased in count one), entering the store and being manhandled by a person wearing a maroon jacket. A third person wearing a blue cap is seen rummaging around the area where the bottle store takings were kept and taking possession of the cash register. Fombe also identified one Anele Vumazonke and his brother entering the store. The footage depicts Anele helping himself to a bottle of brandy and being manhandled by the person in the maroon jacket. According to Fombe, Anele and his brother subsequently returned items which they had taken from the store.
- [17] During cross examination Fombe was challenged about whether he had had sufficient opportunity to observe the first accused to the extent that he was able to identify him without hesitation at a line-up a month later. Fombe's response was that he had paid particular attention to accused number one (for about two minutes) as he was not a regular customer and the fact that he was just standing at the door, aroused his suspicions. Furthermore, the first accused and the customer whom Fombe was serving were the only two non-employees in the store at the time.
- [18] It was suggested to Fombe that at the aborted trial, he had testified that he heard a gunshot coming from outside, whereupon he went outside to investigate and saw a man standing at the door. In this regard the relevant transcript of the record reads as follows:

‘Then I heard a gunshot outside ... Then I went outside to investigate and I saw a man standing at the door. Then I peeped on the door, I saw a man standing there. He had a gun in his hands. Then I heard a second gunshot in the bottle store. Then I was afraid, I started running away. I went away after the second gunshot ... Then I ran and hide myself in a room in the store...

Let us unpack some few things properly. You testified that you heard a gunshot and you went to peep and saw a man with a gun. Am I correct? --- That's what I said, M'Lord.

And where was this man that had a firearm? --- He was at the door...The door of the shop ... He was wearing the blue overalls ... I managed to peep ... The lights are almost like these ones.

COURT: You mean fluorescent lamps ...? --- That's correct, M'Lord.

How many lights? --- Eight, M'Lord ... There are eight that are in the shop and outside there are three. These are security lights that light so strongly ...

When you saw Accused No. 1 how far were you from him? --- About 5m, M'Lord ... He was facing towards the shop but I saw him face to face ... Yes, he did say something as I was running, he said, "Stop, don't run away."...

Do you perhaps know if you can estimate how long did you face him before you ran away? --- It's about 2 minutes time M'Lord. ...

MR P:

And you also testified that after the first gunshot, you peeped ... through the door. --- I did not peep, I just went to see.

Mr. Fombe, did you count these 2 minutes or it was just your estimation? ... No I counted the minutes ...

COURT: Mr Fombe, with regard to the 2 minutes that you say you were there looking at Accused No. 1, if you were to count 1, 2, 3, 4 up to what number would you count as you are standing there watching him? --- When the first gunshot was fired I just stood up. The I just wanted to see [inaudible]. M'Lord, I was not expecting such a question and I never thought I could be asked such a question, so I'm now a little bit confused...

I'm now saying, think back to when you peeped at that door, saw the man, the time it took for to peep when you heard the second gunshot, I just want you to say I would have counted to this number. --- I would have counted 60, M'Lord. ...

Okay. On the day now that you made a statement to the Police, the Police wrote down your statement, did you give them a description of this person you saw with the firearm? ... --- I told them he was dark, short and heavy. And that night he was wearing blue overalls ... I said, M'Lord, he's dark and heavy. He's not quite tall and not quite short, medium. And he's dark in complexion...'

[19] It seems from the transcript them, that Fombe's previous version was that he had seen accused number one after the shot was fired, whereas his evidence before me was that he had observed him for some time before the first shot went off.

Siphokazi Nkwandla

[20] Siphokhazi Nkwandla testified that when the incident took place she was drinking on the verandah. At some stage a stranger wearing a maroon jacket (whom she pointed out as accused number two at an identification parade on 26 August 2015), entered the gate leading to the outside premises and joined their table. He told them that he had come from Cape Town to attend a funeral and that he was looking for a girl. In short, he was flirting with Nkwandla and her friend Zikhona. He chatted to them for 20 to 30 minutes, whereafter she and Zikhona went off to the toilet.

[21] When they returned he was standing outside the premises talking to two other men. He then proceeded to the area where the bottle store was situated but did not go in. Thereafter, he joined their table for the second time and continued chatting to them.

[22] She recalled that the second accused and the deceased in the first murder count engaged in an argument at the table where they were seated. She could not remember what the argument was about. The first deceased then went off to open up the bottle store. Accused number two got up, produced a firearm from the back of his trousers and fired a shot in the air.

- [23] While she and her companion were fleeing to nearby houses, further shots went off. Once they had reached a safe place, she phoned the police.
- [24] When all was quiet they returned to the scene. The deceased in count 2 was lying face down on the verandah. He had been fatally shot in the back of the neck. They found the deceased in count 1 inside the bottle store. He was lying on the floor, weeping and holding on to a gaping wound in his abdomen. He died on the way to the hospital.
- [25] She identified the second accused on the CCTV footage manhandling the first deceased as they entered the bottle store together. She said that the robber wearing the blue cap in possession of the cash register looked like one of the two men accused number two had been talking to outside. She candidly admitted that she did not observe accused number one during the incident.
- [26] During cross examination she testified that the verandah was well lit and that accused number two sat close to them while they were conversing. It was put to her that at the previous trial she had said (through an interpreter) that it was only after the second accused had entered the bottle store, that shots were fired. She denied having said this, and suggested that there may have been a misunderstanding at the previous trial because of the way in which the questions were put to her.
- [27] She denied that she partook in a protest at the court where the second accused first appeared. She said that she did not attend court at all. It was put to her that the second accused was working in Cape Town on the night of the incident, and that it was not he who had told her that he had come from Cape Town to attend a funeral. It was the erstwhile accused number three. She denied this.

Bonginkosi Thomas

- [28] Thomas testified that he sat at Nkwandla's table on the night in question and confirmed the presence of the man described by her as accused number two.[1] His description of what took place thereafter is not entirely consistent with what Nkwandla told this court.
- According to Thomas

they heard the first gunshot after the man referred to by Nkwandla as accused number two had entered the bottle store. Thomas explained that he thereafter ran into the shop and saw accused number one. He was wearing a blue overall and brandishing a firearm.[2] Accused number one pointed the firearm at them and instructed them to lie down. He looked at the accused's face. The accused repeated the instruction in an angry tone and Thomas looked at him again, whereafter he obeyed. He was able to hear the accused moving around in the room. He heard him walking towards the door. The accused fired one shot and exited. He returned and went out for the second time. They heard more shots being fired away from the premises.

- [29] Thomas and one Magopeni (who also worked at the store) went out and saw the second deceased lying outside. They went back into the bottle store and found the first deceased, who was still alive, lying face down on the floor.
- [30] Thomas was presented with the CCTV footage and he identified the person in the blue overall, holding a firearm, as accused number one.
- [31] During cross-examination, it was put to Thomas that at the previous trial he had said that he knew most of the people who were lined up at accused no. 1's identification parade. He agreed that, with the exception of acc. no. 1 and one other person, he had seen the others before.

Exhibits on the scene

- [32] Sergeant Ndikolo secured the scene after 9pm on 3 July 2015. The two deceased were still there.
- [33] Ndikolo found three spent cartridges inside the bottle store, one in the shop and two outside. He pointed them out to the official photographer, Warrant Officer Dickinson from the local criminal record centre (the LCRC), who seized and packaged them. Dickinson did the same with two further spent cartridges and a projectile fragment which he had received from Warrant Officer Matshoba the following day. Matshoba had found the cartridges inside the bottle store and the projectile outside. All these items were forwarded to the LCRC for comparison and analysis.

Lundi Mgushelwana (accused no. 1)

- [34] I will now deal with the chain of evidence relating to accused no. 1. Between 3 and 4 on the morning of 4 August 2015 Warrant Officer Matshoba, Warrant Officer Nduna and their crew paid a visit to accused no. 1's parental home in a rural area in Whittlesea. The accused was living in a room in this house. Nduna and some of these policemen entered the premises where the accused was together with his mother and sister. He explained who he was and the purpose for the visit. The accused's family remonstrated with Nduna, insulting them and shouting at them. As a result they asked the accused to accompany them to the police station instead. He did so. The accused was taken to Nduna's office and Matshoba went back to his own office.
- [35] According to Nduna (which the accused denies) he explained to the accused that he was investigating this case and explained his constitutional rights to him. He asked about the accused's cell phone. By then Nduna had taken possession of two cell phones belonging to the accused. The accused also gave him the number of one of the phones. In the directory of this phone Nduna found certain numbers which he had been looking for and jotted them down on a scrap of paper. Amongst these numbers was that of accused no. 2 whom Nduna knew from before. Accused no. 2's number was saved as "Casta" and had been dialled several times. I digress to mention that both accused deny that accused no. 2's phone number was saved in accused no. 1's directory, or that they knew each other at all.

[36] Nduna also wrote accused no. 2's address on this scrap of paper. According to Nduna it was accused no. 1 who had given the name "Casta" to them, and that when they arrested accused no. 2 he responded to this name.

[37] It was put to Nduna on accused no. 1's behalf that Nduna, one Vuyisile and one Fredericks assaulted him in order to extract

information from him and to induce him to admit involvement in the crimes in question. This was denied.

[38] At some stage Nduna had approached Matshoba and had said that there was a firearm in the flat outside the main house where they had found the accused. They returned to the accused's house with the accused. Accused no.1 pointed out a flat adjacent to the main house. He obtained a key to the flat from the main house, unlocked it, opened the door and Nduna, the accused and the two policemen named Fredericks and Vuyesile entered.

[39] The flat was a two-roomed structure of which the first was a bedroom. It was clear that it had been unoccupied for a substantial period of time. Nduna initially testified that the accused inserted his hand into a hole on the side of the mattress of a bed in that room. Out came a firearm in a plastic bag. The accused handed it to Nduna who made the arm safe and replaced it in the plastic bag.

[40] During cross-examination (when his own version and that of Fredericks at the previous trial was put to Nduna), he conceded that it could have been that the accused merely pointed out the spot and that it was he (Nduna), who had physically retrieved the arm. Indeed, this was also the evidence of Fredericks not only during the trial before me, but also at the aborted trial where the following is recorded:

'EXAMINATION BY MR RANTSANE ...

Was there any permission from the accused for you to go and search for whatever information or an article that was there? --- That is correct, M'Lord. He personally told us no, the firearm is there and you can go and fetch it there, and he almost took the firearm out the mattress where he hide it...

Why, if I may ask, when you received the information regarding these particular exhibits or this particular firearm, why did you immediately jump to go and get it instead of involving a commissioned officer? --- M'Lord it was about 05:00 in the morning when we recovered the firearm (emphasis added) and we were scared that maybe now if the occupants of that house knew where the firearm was, and would have taken it and we would not have found the firearm. So we immediately jumped on that information and proceed to the house and recovered that exhibit or the firearm (emphasis added)...

This particular flatlet was it locked or what is the position? How did you gain entry into it? --- M'Lord, it was not locked. The accused just pushed the door open and it went open and we entered the flat. It was not locked...

The firearm was in the mattress and there is a cut. The accused wanted to take it out but I told him not to go there and we took it out ourselves. The police took it out ourselves. That firearm was wrapped in plastic ...'

- [41] Fredericks said that after having retrieved it, Nduna opened the bag. It contained a Norinco Star pistol and five live rounds of ammunition in the magazine. The accused was shown the weapon and he said that this was the firearm he had told them about earlier.
- [42] They were in the flat for about ten minutes after which they came out and Nduna, carrying the white plastic bag said: 'Let's go, we've got it.' Back at police quarters Nduna opened the bag and produced the pistol with five live rounds.
- [43] These items were registered in the SAP13 as exhibits and the accused was detained. Warrant Officer Biko from Queenstown LCRC uplifted the same exhibits and delivered them to the forensic science laboratory in Queenstown.
- [44] The firearm was ultimately classified by the forensic experts as a 7,62x25 mm calibre Norinco semi-automatic pistol (in working order) with serial number 44014465. The forensic experts also positively linked this firearm to two fired cartridge cases found on the scene.
- [45] On that same day Nduna tried to arrange with one Colonel Oranje to take a confession from the accused, but according to Nduna Oranje was too busy right then and advised him subsequently that he had spoken to the accused who had refused to make a confession. According to the evidence of Oranje, Fredericks had phoned him at about 7.30am on 4 August 2015 requesting him to conduct a pointing out with respect to accused 1. He interviewed accused 1 just after midday that day. He advised him of the implications attached to a pointing out. The accused informed him that he wanted to contact his attorney so Oranje aborted the interview. It was put to Oranje that the interview was terminated because the accused had told Oranje that he had been assaulted. Oranje disputed this and maintained that the reason the interview was stopped was because the accused had realised the possible implications of a pointing out.
- [46] It is common cause that the accused also confirmed in his warning statement taken the following day that he had elected to make a statement to his lawyer. Nduna also arranged for the accused to attend an ID parade and explained to the accused what this entailed and again explained his rights to him.
- [47] According to Warrant Officer Jacobs, who had conducted the parade (and contrary to the accused's version), the accused had indicated that he did not want a lawyer present. In this regard Jacobs mentioned that it is customary to give accused persons notice some time before the ID parade, in order for them to secure the presence of their legal representatives in advance. Jacobs also indicated (and this is corroborated by Nduna) that the accused had nominated the other persons on the line-up himself. The accused denied this and said that Nduna had selected them. Jacobs said that he was satisfied that the candidates were sufficiently similar in appearance. He said that he was aware that the others were younger

than the accused, but was comfortable that the accused did not stand out by virtue of his age. If he was not so satisfied, he would not have proceeded with the parade. When it was put to him that there were two mentally ill persons on the parade, he denied that mentally challenged people were kept in the police cells.

As I have said, the accused's warning statement was taken on 5 August 2015, and significantly reflects an address in Whittlesea and another in Cape Town. It was put to Nduna on accused number 1's behalf that he (the accused) had accompanied the police to Cape Town to show them where one Sicelo lived. According to accused no. 1, when he first saw accused no. 2 after his arrest, he recognised him only as the owner of a carwash in Khayelitsha. He did not have accused no. 2's number in his cell phone directory. According to Nduna however, the purpose for accused no. 1 accompanying them to Cape Town was indeed to point out the second accused's home, whom accused no. 1 said would be able to show them where Sicelo lived.

[48] In short, despite the fact that the two accused denied knowing each other, it was Nduna's version throughout that the primary

purpose for accused no. 1 to accompany them to Cape Town was to show them where accused no. 2 lived, which he indeed managed to do after having admitted that the name and the phone number reflected in his cell phone directory was that of accused no. 2.

[49] Accused no. 1 testified in his own defence. He said that he had been visiting his parental home, where he was arrested, from about 30 June 2015. This means that he was in the vicinity of the crime scene at the time that the deceased were killed and not in Cape Town.

[50] His version with respect to what transpired during his arrest differs in one material respect from that of the prosecution witnesses.

According to the accused, the police had arrived at his parental home in the early hours of the morning, searched the main house and questioned him, and some of them (including Nduna, Fredericks, Matshoba and Vuyishile) also searched the unoccupied, unlocked flat on the same premises adjacent to the house. He added that he had been in the flat during the course of this visit from Cape Town and said it was used for storing an old mattress and some building rubble. Indeed, his mother even switched on the light of one of the flat rooms for those who were conducting the search. He then heard one of them saying 'Let's go! We've got what we are looking for'.

[51] They left the scene and he was taken to the police station where he heard from the police that they had retrieved a firearm from the flat during the search which I have just referred to. Indeed, Nduna even produced a plastic bag from his locker and told the accused that it contained the firearm which they had found in the flat. He did not dispute that the police recovered the arm in the flat at his parental home during this search.

- [52] After the recovery of the firearm, he was questioned about the whereabouts of one Sicelo Jiyane and 'other firearms'. He was assaulted during the questioning and was not informed of his constitutional rights. The police went back to his parental home for a second time and took photos. He was in their company when this happened.
- [53] He denied that he had pointed out the bag containing the firearm. According to the accused he saw it for the first time when he was taken to the police station and Nduna produced it from a locker. He said that he saw it before he was assaulted. He did not know why the police were assaulting him. All he knew was that they were demanding guns. He disputed that Nduna took notes while interviewing him or that he produced any information about Khasta. He disputed that Casta's number was in his phone directory. He said that he thought that calls made to a number ending in '7756' (apparently Casta's phone) had been made to a lady he was courting in Queenstown. He said he told the police this, but did not mention this to his legal

representative at the time that the police testified in this regard. He denied all knowledge of the second accused and claimed to have met him for the first time after accused no. 2's arrest. He said that the purpose of his visit to Cape Town with the police was to point out where Sicelo lived, which he did.

- [54] He told this court that he was also not satisfied with the manner in which the ID parade was conducted and had indicated that he wanted a lawyer first. This request was denied. He said that the others on the line-up were brought in by Nduna. He had eaten with them during detention and could see they were mentally ill. They were from a mental health centre called Fort England. They were also junior to him. After the parade he was asked if he was satisfied. Because it was a *fait accompli* he did not complain. He did not mention to Jacobs in advance that others on the parade were mentally ill and junior to him. It was simply his 'bad luck' that he was pointed out at the parade as he had never been to the scene and had had no contact with the second accused or Sicelo at the time the offences were committed.
- [55] With respect to Colonel Oranje, he stated that the colonel had informed him that he was there to take his confession. He said that he had no idea what he was meant to confess to. Oranje asked if he had been assaulted and the accused said yes and showed him indentations on his wrists caused by the handcuffs, and that his left cheek was swollen. Oranje aborted the interview there and then. He did not ask Oranje for a lawyer.

Khayaletu Mayaphi (accused no. 2)

- [56] This is the chain evidence with respect to the second accused. At about 8pm on 11 August 2015 one Cst. Mvumvu was patrolling at a certain BP Garage in Cape Town. He was with his partner, Cst. Yalez. Both these policemen testified at the trial and corroborated each other in all material respects.

- [57] Another policeman had given them a tip off that accused no. 2 (whom they did not know but who had been described to them) was at the garage carrying an unlicensed firearm. A person fitting the description of accused no. 2 came walking towards them. When Mvumvu saw that they were members of the police, he appeared shocked and veered off towards a nearby ATM. He entered the ATM cubicle and was in the process of closing the door when Mvumvu stopped him, introduced himself, instructed accused no. 2 to raise his hands and requested permission to search the accused. Mvumvu found an unlicensed firearm with the serial number erased on his waist concealed by his jacket. He also found live ammunition in the pockets of the jacket. The accused did not have a licence to possess the arm and ammunition.
- [58] Mvumvu explained the accused's rights to him, arrested him and took him to the local police station. He booked the firearm and ammunition into the SAP13 and cross-referenced the serial number with accused no. 2's name in the police register. All this took place in the accused's presence. Under cross-examination, it was put to Mvumvu and Yalezo on accused no. 2's behalf that the firearm and ammunition had been found in a nearby car and not on the accused's person.
- [59] It appears that the accused was released on bail on charges of possession of a firearm and ammunition, because on 21 August 2015
- Warrant Officers Nduna and Fredericks re-arrested him at his home in Khayelitsha, Cape Town. Upon his arrest he introduced himself as 'Casta'. They found him as a result of him having been pointed out to them by accused no. 1. In turn, accused no. 2 led them to the home of the erstwhile third accused.
- [60] I digress to point out that although the accused himself denies that he is known as Casta, his criminal record form describes him as Khayaalethu 'Casta' Mayaphi.
- [61] Thereafter they proceeded to the Harare police station where they seized the firearm which had been found on accused no. 2's waist by the local police, as well as the rounds of ammunition.
- [62] They returned to Whittlesea and booked these exhibits into the police register. After the exhibits had been properly packed and sealed Nduna himself took them to the forensic science laboratory in Port Elizabeth for comparison and analysis.
- [63] The forensic experts identified the firearm as a 9mm parabellum calibre Glock model 17 semi-automatic pistol (in working order) of which the serial number had been erased, and concluded that it had fired three of the cartridge cases found on the scene.

[64] When he testified, accused no. 2 denied all knowledge of the crimes and claimed to have been in Cape Town when they were committed. He said that although his parental home is close to Butterworth he had never been to Whittlesea. He also denied all knowledge of accused no. 1. After his arrest in Cape Town he appeared in a mobile courtroom. People were demonstrating outside the container and taking photos of them. He said he appeared in court three times before an

identification parade was held. On each occasion members of the public were present and he was photographed. He believed that the

witness Nkwandla pointed him out at the ID parade because she could have seen him in court before.

[65] He said that when he was first arrested he had just been given a lift to the BP garage by one Sqwero to buy stock for his carwash. When he exited the shop he saw the police surrounding Sgwero's car. He walked towards the car. The police asked him whether he had been travelling in the car. He said yes and added that he had left Sqwero behind in the motor vehicle. The police told him that they had found a firearm underneath the seat in the car and that Sqwero had escaped. He told the police that he knew Sqwero through the erstwhile accused no. 3. He said that the erstwhile accused no. 3 (Sicelo) would be able to point Sqwero's house out.

[66] The police instructed him to board their vehicle and they set off to look for Sgwero. He was nowhere to be found so they decided to return to Sqwero's abandoned car. Lo and behold, when they returned, Sgwero's car had also disappeared. The police asked the petrol attendants what had happened to the car. They said a man in a white lumber jacket had arrived, had boarded the vehicle and had driven it away. So the police arrested accused no. 2 instead, loaded him into the police van and took him to the local police station. He was subsequently released on R5 000 bail.

[67] He reiterated that only two policemen were present during his first arrest and denied that the car was surrounded by the police as was put to the state witnesses on his behalf. He said he had used the term 'surrounded' loosely, because there was more than one policeman.

[68] He was arrested for a second time at his house on 21 August 2015. The police were accompanied by the erstwhile accused no. 3 (Sicelo

Jiyane). The police asked him whether Jiyane's firearm was ever found on him. His evidence in this regard reads as follows:

'I told them I wasn't arrested with Sicelo's firearm but with the firearm of Sicelo's friend, Sqwero.'

[69] The police (including Fredericks) then questioned him about Sada (the area in Whittlesea where the crimes were committed) and Whittlesea

itself, and he said he had no knowledge of these places. The police assaulted him and told him about the robberies and murders at Whittlesea. They demanded firearms from him and searched his home. They then informed him that they were arresting him for the

Whittlesea matters. When it was put to him that his attorney had never suggested to Fredericks that Fredericks had assaulted the

accused, his response was that he told this to his previous but not to his present attorney. He could also not explain why it was not put to Fredericks that Sicelo was present when he was arrested, when Frederick's evidence was clear that accused no. 2 was arrested before Sicelo. All he could say was that he had told his lawyer that Sicelo had arrived at his home with the police.

[70] In response to questioning by the court, he stated that although Sgwero had visited his carwash regularly, Sgwero and Sgwero's car simply vanished after his first arrest. He even asked Sicelo to take him to Sgwero's home, but Sicelo said that Sgwero no longer lived there. For some reason the police never asked him for his cell number when he was arrested, but only for accused no. 1's number. He said that he knew his number at the time of his arrest and would have furnished the police with it if only they had asked. He added that he told his second legal representative that the police had assaulted him during his second arrest and was unable to say why this was not put to the relevant witnesses.

[71] During cross-examination his evidence about the purpose and circumstances of his first arrest completely contradicted his evidence in chief. In this regard my notes read as follows.

At your second arrest on 21 August 2015 you referred the police to qgwero's firearm? --- Yes.

But the police say they asked you for Sicelo's firearm. --- No, the police said that Sicelo told them that I had been arrested for his firearm. I told the police that the firearm that was found with me was Sqwero's and not Sicelo's."

It is noteworthy that accused no. 2 used the words 'the firearm that was found with me' at least twice during his evidence, despite initially having maintained that the police found the firearm in a car in his absence.

[72] He added that before the offences were committed his cell phone accidentally fell into water and was broken. At the time of his arrest the phone was still being repaired. He said that he had no recollection of his cellphone number except that it started with the digits 083 and not 073 like the number in accused number one's directory. He denied that he was known as Casta and averred that the name Casta as reflected on his criminal record form was not correct.

The evidence against accused no. 1

[73] The State's case against accused no. 1 consists of the following evidence:

a. The firearm found where he was taken into custody which is ballistically linked to the scene.

- b. His relationship with and frequent contact with accused no. 2 before, during and after the commission of the offences.
- c. His identification at the scene by two witnesses.
- d. His mendacity as a witness.

[74] The accused did not challenge the voluntariness of the pointing out of the firearm or allege that he was induced to do so without having been informed of his rights. He denied having pointed it out altogether and maintained that the police found it all by themselves

and in his absence. For this reason I provisionally ruled that it was not necessary to embark upon a trial within a trial to prove the admissibility of the pointing out. I stand by that ruling.

[75] In my view the State failed to prove beyond a reasonable doubt that the accused made a pointing out at all. The witnesses contradicted each other on material aspects which they ought to have remembered such as:

- a. Whether the door to the outside room was locked;
- b. Who opened the door;
- c. Who produced the arm from the hole in the mattress.

[76] Of particular significance to me also is the fact that it is common cause that accused number one did not make a pointing out or a confession to Oranje. Whether he did not make this confession or pointing out because he told Oranje that he was assaulted or whether Oranje declined to proceed with a confession or a pointing out because the accused said that he wanted a lawyer is to my mind irrelevant. The fact is that it is unlikely that he would have refused to make a confession or a pointing out to a commissioned officer immediately after having made a pointing out of a firearm which is ballistically linked to the scene.

[77] In the premises I am inclined to give the accused the benefit of the doubt and prefer his version that the police searched this room when he was outside and that this was when they found the firearm. It is also significant that the police tended to refer in their evidence to 'their recovery of the firearm' rather than the pointing out of the arm.

[78] This brings me to the legality of the search. Counsel for the accused contends that the police had had a meeting the day before and that they could have obtained a search warrant instead of performing this sting operation in the middle of the night. According to the police they had acted on information and had visited the place where the accused was staying merely to question him. However his family kicked up such a fuss (which the accused confirms) that they were constrained to remove him from the scene for questioning. It was then that he told them where the firearm was and returned with them to the scene for the second time when the firearm was produced.

- [79] I have already rejected the suggestion that the accused performed a formal pointing out. It is not disputed however that the ballistically linked firearm was found in a flat directly adjacent to the accused's parental home, at a time when the accused was present there and had been visiting there before, during and after the commission of the offence, and had also entered this flat (on his own version).
- [80] It is common cause that the police entered the accused's parental home, and the unoccupied flat adjacent to it, without a search warrant. The police say they did so because they did not go there to search and that the two cell phones and the accused's ID documents were on his person and did not necessitate a search. The point is simply that this firearm and the accused's cell phone which reflected the number of accused no. 2, are both real evidence which the police would probably have found in any event. It is also not so (as suggested by the accused's counsel) that the firearm was unfairly obtained or in a manner which brings the administration of justice into disrepute.
- [81] Section 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the 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. These rights include the rights to human dignity, to security of person and to privacy, and includes the right not to have one's person, home or property searched and one's possessions seized.
- [82] These rights are of course limited by section 36 to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors such as the nature of the right, the importance of the purpose of the limitation, the nature and the extent of the limitation, the connection between the limitation and its purpose and less restrictive means of achieving the purpose.
- [83] The police testified that it was important for them to seize the firearm there and then as it would surely have disappeared if they left the premises to obtain a warrant. I agree. There is no doubt, taking the facts into account, that they would have been granted a warrant in any event. This is also not a case where the police in seizing the firearm deprived the accused and/or his family of their possessions as further suggested. According to the accused the firearm was a res derelicta and could have been left in this unused room by anyone as it was not locked. This being so, this court is not dealing with a case of an invasion of the home and persons of the accused and his family. This is an unused, unoccupied room which is not even part of the parental home, but only on its premises.
- [84] In this regard I refer to *S v Gumede* 2017 (1) SACR 253 SCA where it was held that since the firearm was real evidence, and the police would probably have found it had they entered the premises legally, the fact that the evidence of the firearm was unfairly obtained (by the police seizing it without a warrant from under the pillow where the accused had been sleeping when they had four days to obtain a warrant), did not necessarily result in unfairness in the actual trial. As I have said, I am not persuaded that the evidence in the

matter before me was unfairly or unconstitutionally obtained. I am in any event satisfied that it is in the interests of justice that it be admitted, particularly in that the state has proved beyond a reasonable doubt that this firearm was used in the murder and robbery of two people in that very same area just short of a month before.

[85] As was stated in *Key v Attorney General*, CPD and another

[1996] ZACC 25; 1996 (2) SACR 113 (CC) at para 13 :

“... What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin fairness is an issue which has to be decided upon the facts of each case and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded, but there will also be times when fairness requires that evidence, albeit obtained unconstitutionally, nevertheless be admitted.”

[86] In my view this is one of these situations. Having regard to the position internationally, I briefly refer to extracts from two Canadian cases where the Canadian Charter upon which much of our Constitution is based, is referred to and upon which I likewise rely. The first case is *R v Valentine* 2014 ONCA 147 where Epstein JA said the following in the Ontario court of appeal:

‘The three main purposes of a search incident to arrest are to ensure the safety of the police and the public, to protect evidence from destruction and to discover evidence that may be used at a trial.’

The second case is *R v Poletz* 2014 SKCA16 where Justice Caldwell said the following:

‘Because the misconduct here is minor and there is no nexus between the convictions and the charter breach in the case, the remedy of a stay is, to all appearances, entirely out of proportion to the breach, and could, by its weight, bring the administration of justice into disrepute.’

The above are, of course, for more serious inroads into the accused’s rights than in the matter before me. It cannot be said that this search has brought the administration of justice into disrepute. On the contrary, there is a direct nexus between the convictions and the so called breach of the bill of rights, viz the firearm found at the accused’s place of residence was used in a murder and a robbery a month earlier in the same area.

[87] I may have come to a different conclusion if this was the only evidence against the accused. However, not only did he have accused no. 2’s name and phone number in his possession and had contacted him on several occasions before, during and after the commission of the offences (and I will deal with the damning evidence against accused no. 2 in due course) but he was properly identified by no less than two eye witnesses at an ID parade immediately after his arrest.

[88] Differently put, I would be hard pushed not to convict accused no. 1 on the evidence of the identity parade alone. In this regard Fombe was criticised for his inability to accurately estimate how long he had observed accused no. 1 at the scene. This may well be so. The

point is that he had good reason to specifically pay attention to the accused who stood out like a sore thumb. He was not a local. He was an outsider. He looked suspicious. He spoke. Fombe's descriptions of what he said, he did, he wore and he carried are corroborated by what is reflected in the CCTV footage. The lighting was good. When he first saw the accused the scene was not a moving one. He had no hesitation in pointing him out at the ID parade.

[89] There was no real criticism levelled at Thomas's identification of the accused at the ID parade except that it was pointed out that Thomas had seen six of the eight members of the parade before. I am not sure how this adversely affects his credibility or his reliability or how he can be accused of being "a doubting Thomas". In terms of the Home Office Circular ID parade rules, witnesses must not see the members of the parade, and in particular the suspects, in advance of the parade. There is nothing that suggests that the members of the line-up must be unknown to the witnesses. In any event, it was not the evidence of Thomas that he pointed out the accused because the accused was known or unknown to him. He pointed him out because he had seen him before committing a crime. He had also seen others on the line-up before, but not committing crimes.

[90] I digress to mention that it was suggested that the evidence pertaining to the line-up be led in a trial within a trial. I declined to do so. Any suggested irregularities can only affect the weight of the ID parade evidence, not its admissibility (see *S v Chabalala* 2003 (1) SACR 134 SCA; *S v T* 2005 (2) SACR 318E; *S v Carolus* [2008] ZASCA 14; 2008

(2) SACR 207 SCA).

[91] Over and above that, accused no. 1, unlike the state witnesses, was mendacious, vague and argumentative. He deliberately distanced

himself from accused no. 2's telephone number written on the scrap of paper, and suggested that one could see that most of the witnesses on the line-up were mentally ill (although he never complained of this when he had the opportunity to do so). Having

studied the photos of the ID parade myself, it does not occur to me that anyone looks mentally ill (whatever such look might entail) or markedly older or younger than the accused.

The evidence against accused no. 2

[92] As I have said, the evidence against accused no. 2 is overwhelmingly strong:

- a. He was arrested in physical possession of a firearm ballistically linked to the scene and several live rounds of ammunition, by independent policemen in Cape Town five weeks after the commission of the offences.
- b. He did not have an innocent explanation for this possession but denied it altogether.
- c. He was identified at the ID parade held three days after his first appearance in court by a woman with whom he had been sitting in tight proximity at the same table for just short of an hour, chatting and flirting in a brightly lit area.

- d. He was not an impressive witness. He contradicted himself on whether the firearm was found in his possession or in the car at the BP garage. He frequently vacillated between various versions.
- [93] On the other hand, I was most impressed by the two Harare policemen who arrested the accused. They had no knowledge of this case when they did so. They were tipped-off that a man dressed in a certain way approaching the BP garage was carrying an illegal arm. They saw this man, confronted him, searched him and found a Glock firearm on his waist and 46 live rounds of ammunition in his pockets. At that stage they had no knowledge that this arm was ballistically linked to the scene.
- [94] Conversely, the accused's version of what had transpired at the BP garage is surreal to say the least. It is highly improbable that the police would have found another person in possession of this arm in a car, turned their backs on the suspect and approached an innocent bystander (the accused), and then would have returned to the car only to find that the suspect had disappeared. Thereafter to have taken the accused on a frolic of their own to look for the suspect and to have abandoned the car, only to have returned to find that the car had also disappeared, and thereupon to have arrested the accused for no reason whatsoever, is so improbable that it deserves to be rejected outright.
- [95] As for the identification of the accused by Siphokazi Nkwandla, I am of the view that her identification of him was honest and reliable. She saw him and interacted with him on a number of occasions:

Firstly, when he entered the gate of the outside perimeter of the premises, wearing a maroon jacket which she identified when shown the CCTV footage. Secondly, when he sat down in a lit area with her and her friend and had a lengthy conversation (20 to 30 minutes) with them about his home in Cape Town (which is objectively correct), about his reasons for being in the area and that he was looking for a girl. In short, he was flirting with them somewhat intimately and at his leisure. Thirdly, when he stood up and moved towards the bottle store. Fourthly, when they returned from the toilet and he was chatting to two strangers (the objective facts being that the robbery and murder were committed by at least three people as three different types of cartridges were found on scene). Fifthly, when he returned, sat down and chatted to them again. Sixth, when he was involved in an altercation with the first deceased (Mr Lakew) at their table in their presence. Seventh, when the accused got up and followed Lakew when Lakew opened the premises and she saw him firing a shot in the air.

- [96] It is so that her evidence from the first trial was recorded to say that she only heard shots being fired. She denied that she had said this and blamed it on a mistake ostensibly in the interpretation or transcript. I am inclined to believe her. Having read the transcript of the previous trial and many others, and the transcript of the argument in this trial, I am constrained to express dismay at the words and expressions which have crept in. They are simply nonsensical. But even if the difference between the two sets of evidence is genuine, I do not consider it as a defect material enough to detract

from the recordal of the time she spent with the accused and her opportunity to have sufficiently observed him. Indeed, it is significant that there was no need for her to panic or to be nervous during all the time she spent with him. Her scene was calm and convivial. It only became a moving one right at the end before she fled. Her opportunity for accurate observation was accordingly not interfered with or reduced in any way.

[97] In the premises I am of the view that the State has succeeded in proving the charges preferred in the indictment beyond reasonable doubt.

[98] One further aspect deserves mention. From the little I know about the previous trial (and I have only seen the ruling directing the de novo proceedings and the reasons therefor) it seems that the main reason for the order was due to a complaint from the accused (and

particularly from accused no. 1) about the manner in which their erstwhile attorney took instructions. Having heard both the accused,

their instructions as put to the witnesses and their evidence, I can only express sympathy for this erstwhile representative. Indeed, even during the trial before me, the accused were inclined, on a number of occasions, to once again blame their representatives (who in my view were extremely thorough) for loopholes in their cases; alternatively, to say that they had given certain instructions to their previous representative but not to their present ones.

[99] Will the accused stand please. On counts 1, 2, 3, 4, 5 and 6 as preferred by the prosecution against you in this indictment, I find you guilty. You may be seated.

I.T. STRETCH

JUDGE OF THE HIGH COURT

Date of Judgment:

30 January 2018

Counsel for the State:

Mr Willemse

Director of Public Prosecutions

Counsel for the Accused no. 1: Mr McConnachie

Grahamstown

Counsel for Accused no. 2: Mr Erasmus

Legal Aid Board

- [1] Thomas attended the same ID parade as Nkwandla. He did not point out accused number two as she did, but a man whom he thought was the stranger sitting at their table. He said that the lighting on the veranda was not as good as the lighting inside the building.
- [2] As I have said, there were two ID parades, one in respect of the first accused held on 6 August 2015, and one in respect of the second accused held on 26 August
2015. Both Fombe and Thomas positively identified the second accused at this special parade. According to Thomas, the lighting inside the shop was better than on the veranda and he had a proper look at accused 1. He said that he spent more time looking at acc. no. 1 than the man who sat on the veranda chatting to the women at the table. He and this other man did not speak to each other.
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Prepared on 13 October 2026 · Esheria