

SOUTH AFRICA / JUDGMENT

S v Ntantiso and Others (CC04/2015) [2017] ZAECMHC 43 (23 August 2017)

[2017] ZAECMHC 43

COURT

Eastern Cape High Court, Mthatha

BEFORE

RWN Brooks

CASE / FILE NUMBER

CC04/2015

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

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE No: CC04/2015

Reportable

In the matter between

THE STATE

and

WANDILE NTANTISO

AND TWO OTHERS

J U D G M E N T

(Section 174 Application)

BROOKS J

The three accused are all charged with the following offences:

· Count 1 – Robbery with Aggravating Circumstances:

IN THAT upon/or about 3 November 2013 and at/or near Kwenqura Administrative Area in the district of Mqanduli the accused did unlawfully and intentionally assault Dumekhaya July and did take by force and violence the following property, to wit:

§ a motor vehicle Ford Fiesta with registration number [H...];

§ two Blackberry cellphones; and:

§ a sum of R160.00 cash;

the property of/or in the lawful possession of Dumekhaya July.

· Count 2 – Murder:

IN THAT upon/or about the same time and at/or near the same place as mentioned in count 1 the accused did unlawfully and intentionally

kill Dumekhaya July, a male person, by shooting him with a firearm

· Count 3 – Unlawful Possession of a Firearm:

IN THAT upon/or about the same time and at/or near the same place as mentioned in count 1, the accused did unlawfully and intentionally

possess a firearm, to wit 7.65 pistol with serial number 660031 without being in possession of a licence to possess the said firearm.

· Count 4 – Unlawful Possession of Ammunition:

IN THAT upon/or about the same time and at/or near the same place as mentioned in count 1, the accused did unlawfully, intentionally

have in their possession rounds of ammunition, quantity unknown to the State, without being in possession of a permit to possess such ammunition.

· Count 5 – Possession of a Firearm with Intent to Commit an Offence:

IN THAT upon/or about the same time and at/or near the same place as mentioned in count 1, the accused did unlawfully and intentionally

possess a firearm, to wit 7.65 pistol with serial number 660031, with the intent to commit an offence of murder and/or robbery.

On count 1 the provisions of section 51(2) of Act 105/1997 are applicable in that aggravating circumstances were present when the

robbery was committed, namely the use a firearm.

On count 2 the provisions of section 51(2) of Act 105/1997 are applicable in that the deceased was killed during the commission of a robbery with aggravating circumstances.

All three accused were admitted to bail and have been represented throughout these proceedings. After they had confirmed that in preparation of their defence the provisions of Act 105/1997 had been taken into account, the three accused pleaded not guilty to each of the five charges against them. The legal representatives of the accused confirmed that the pleas were in accordance with their instructions. As is their entitlement, the accused elected not to outline the basis for their pleas of not guilty in accordance with the provisions of section 115 of Act 51/1977.

At the close of the State case applications were made on behalf of all three accused for their discharge on all counts in accordance with the provisions of section 174 of Act 51/1977. In each instance the submission was made that the State had failed to produce evidence upon which a conviction on any of the charges may be made and accordingly, the accused are entitled to be discharged. It is necessary to deal with the evidence led in order to assess in the judicial exercise of my discretion whether there is merit in the applications.

A statement made by accused No 1 to a Magistrate on 17 March 2014, Exhibit H; a statement made by accused No 2 to Captain Vundle on 15 March 2014, Exhibit A; a statement made by accused No 3 to Captain Nzamela on 16 March 2014, Exhibit B; the documentation pertaining to a pointing-out by accused No 2 on 16 March 2014; and the documentation pertaining to a pointing-out made by accused No 3 on 21 March 2014, came under scrutiny in a trial-within-a-trial. In each instance the admissibility of the documentation as evidence against the accused was challenged by their respective legal representatives. Accordingly, the potentially incriminating portions of the exhibits were concealed from the Court prior to their introduction into evidence.

A single element common to the opposition by the accused's legal representatives to the admissibility of the evidence was that in obtaining it there had been a violation of rights enshrined in the Bill of Rights in favour of the accused and contained in the Constitution. The relevant portion of section 35 thereof reads as follows:

“Evidence obtained in a manner that violates any rights 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.”

It has been held that if one were dealing with an ordinary statute it would be reasonable to assume that the Legislature intended the exclusion to be confined to instances where there is a causal connection between the violation of a right and the self-incriminating acts. However, the Constitution being no ordinary statute, it may be assumed that on a purposeful interpretation thereof the evidence contemplated in the phrase “evidence obtained in a manner that violates any right in the Bill of Rights” encompasses acts performed by a detainee subsequent to a violation of his or her rights in the course of pre-trial

investigations, even in the absence of a direct causal connection between the violation and the subsequent self-incriminating acts by the accused. The question of prejudice to the accused is inseparable from the question of fairness, in that a trial cannot be completely fair where the accused is in any way prejudiced. Conversely, a trial can hardly be unfair where there is no prejudice. (*S v Soci* 1998

(2) SACR 275 (ECD) 293 C–294 B). With these views I am in respectful agreement.

The generally accepted approach in what constitutes a fair trial was eloquently explained by Kriegler J in *Key v Attorney-General Cape Provincial Division and Another* [1996] ZACC 25; 1996 (2) SACR 113 (CC) 1996 (4) SA 187 (CC) at paras [13] and [14]. The explanation was endorsed by Howie JA in *S v Khan* [1997] ZASCA 72; 1997 (2) SACR 611 (SCA) [1997] 4 AllSA 435 (SCA) at 619 B–F SACR and 441 C–F (All SA) in the following terms:

*“In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators, nor does it mean a predilection for technical niceties and ingenious legal stratagems. 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 will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.”*

Moreover, there exists a tension in the evaluation of whether the admission of evidence unconstitutionally obtained would otherwise be detrimental to the administration of justice. On the one hand, the Court is enjoined to uphold the provisions of the Bill of Rights enshrined in the Constitution in ensuring that an accused person receives a fair trial, but may in so doing be in danger of creating a situation where members of the public perceive the criminal justice system as a system which allows a rapist or a murderer to go free on account of a blunder on the part of a member of the State’s agencies employed in the preventing, investigation or prosecution of crime. Of the management of this tension Erasmus J had the following helpful comment in *S v Nombewu* 1996 (2) SACR 396 (E) [1996] 4 AllSA 621 (E) at 423 (SACR) and 648 d - f (AllSA):

“The Court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial and vice versa. Pronouncements on human rights by the Courts and academics obviously add body to the jurisprudence which surrounds the Constitution. But abstract statements of law very often mean different things to different people and very little to the bereaved and the aggrieved who see factually guilty accused go free in consequence of some infringement of his constitutional rights by officials enforcing the law. It is therefore the duty of the Courts in their everyday activity to carry the message to the public that the Constitution is not a set of high minded values designed to protect criminals from their just desserts; but is in fact a shield which protects all citizens from official abuse.

They must understand that for the Courts to tolerate invasion of the rights of even the most heinous criminal would diminish their constitutional rights. In other words, the Courts should not merely have regard to public opinion, but should mould people's

thinking to accept constitutional norms using plain language understandable to the common man.”

Accused No 1 was arrested on 11 March 2014. No evidence was led pertaining to the manner of his arrest by any witnesses testifying on behalf of the State. However, in his evidence in the trial-within-a-trial accused No 1 stated that he was fetched from his school hostel by a police officer who, after asking accused No 1 to identify himself, arrested him. He was then taken to Mqanduli Police Station where he was questioned by the investigating officer in this matter, Warrant-Officer Gebengana. He stated that he knew nothing about the matter. He was then placed in the cells. After a few days he was taken again to the investigating officer's office. According to accused No 1 he was promised bail by the investigating officer if he made a statement. Accused No 1 said that he agreed to the investigating officer's proposal because he wanted to be released.

It is convenient to record that the State led the evidence of the investigating officer after evidence had been led pertaining to

statements made by accused No 2 and accused No 3, but before any evidence was led pertaining to the statement by accused No 1.

However, Mr Baliwe, who appeared on behalf of the State, indicated prior to calling the investigating officer that his evidence would pertain to the obtaining of statements from all three accused.

Evidence relating to the statement made by accused No 1 was led after the evidence of the investigating officer. Certain aspects thereof were challenged and certain aspects were in accord with accused No 1's version of events. Notwithstanding this, no application was made to call the investigating officer again to deal with the circumstances pertaining to the statement made by accused No

1. Accordingly, his evidence to the effect that the investigating officer had promised to get him bail if he made a statement was not challenged.

Unlike his co-accused, accused No 1 was taken to a Magistrate with a view to him making a confession. The evidence of the Magistrate was led in respect of the process. At the outset the Magistrate placed on record that he had no independent recollection of the process pertaining to the taking of a statement from accused No 1 and placed reliance for his evidence upon the content of the relevant proforma as completed by him and handed in as Exhibit H. It is apparent therefrom that accused No 1 came before the Magistrate on 17 March 2014. This is in accordance with the estimate of a timeframe as presented by accused No 1 in his evidence. Also consistent with his evidence is the recordal by the Magistrate of the assertion by accused No 1 that he had previously made a statement to the investigating officer on 13 March 2014, that is two days after his arrest. Further corroboration for the evidence of accused No 1 is to be found in the recordal

by the Magistrate of an assertion by accused No 1 that as a benefit from making a statement he expected “to be released from custody”.

The question which arises is whether it is apparent from the introductory questions and answers that accused No 1 was about to make his statement “freely and voluntarily”, or whether there is room to draw an inference therefrom in support of accused No 1’s claim that he had been unduly influenced to make his statement. In my view the introductory portion of Exhibit H records unequivocally that accused No 1 had been promised the benefit of a release from custody if he made a statement. The relevant portion of Exhibit H is corroborative of the unchallenged evidence of accused No 1 on the point. He stated that he only agreed to the proposal of the investigating officer because he wanted to be released from custody on bail. In my view he was unduly influenced by a direct promise made by the investigating officer, and this excludes the finding that the statement was made “freely and voluntarily”. These circumstances are distinguishable from those where an accused person may reply to the question whether

he or she expected benefits if the statement is made by the giving of a general response such as, “Yes, I expect benefits.

Things like bail and being warned for court”. Such general expectations do not justify an inference of undue influence. (*S v Nyembe* 1982 (1) SA 835 (AD) 841 F-G)

It has been held that where an accused person has been brought to a Magistrate for the purpose of making a confession and it appears that he or she has already made a statement, such as must have been apparent to the Magistrate from the answer by accused No 1 on the point, the questioning of the accused by the Magistrate should be directed at what has been described as “piercing the veil between the previous interrogations by the police and the subsequent appearance by the interrogated persons before the Magistrate” so as to satisfy the Court that whatever possible untoward circumstances may have prevailed at the time the accused made the statement to the police were no longer operative when he or she appeared before the Magistrate. (*S v Gumede and Another* 1942 (AD) 398 433, *S v Jika and Others* 1991

- (2) SACR 489 (E), *S v Colt and Others* 1992 (2) SACR 120 (E) 124). Had this approach been adopted by the Magistrate, the impropriety of the promise made by the investigating officer and the undue influence it had upon the decision by accused No 1 to make a statement would have been identified. In such circumstances one would expect a Magistrate to decline to take a statement on the subject matter of the investigation from the accused person.

A second area of concern emerges from the recordal of the preliminary questions and answers contained in Exhibit H. One of the introductory paragraphs which precedes any questioning records that the Magistrate has informed the prospective deponent that he or she is entitled to legal representation by a legal representative, either of his or her own choice or appointed by Legal Aid South Africa. The question immediately thereafter, and indeed the first of the preliminary questions to be put to the prospective deponent, asks whether he or she wants to obtain legal representation. In Exhibit H, pertaining to accused No 1, the answer that is recorded is “Yes”.

In both his evidence-in-chief on the point and under cross-examination by Mr Kekana who appeared on behalf of accused No 1, the Magistrate claimed that the answer was wrongly recorded “due to human error”. Having no independent recollection of the interview process, the Magistrate relies upon the fact that it is apparent that the interview proceeded beyond this point as an indication that the answer could only have been “No”. This, he said, was because if an accused person were to have answered “Yes” to this question, he would immediately terminate the interview because the accused was unrepresented and wanted to be assisted by a legal representative.

It was submitted by Mr Baliwe that the Magistrate’s explanation should be accepted. Unfortunately, in my view several factors emerge which militate against a simple acceptance of the Magistrate’s explanation. Firstly, he has no independent recollection of the interview with accused No 1. In such circumstances the possibility that the Magistrate proceeded with the interview, notwithstanding the fact that the accused wanted legal representative and answered “Yes” to the relevant question which was then correctly recorded, cannot be excluded by a claim of the occurrence of a “human error” in the absence of some pertinent recollection on the point.

Secondly, other evidence on the point cannot be ignored. Prior to the evidence of the Magistrate the State led the evidence of the interpreter who had been involved in the interview process, an official court interpreter in the employ of the Department of Justice and Correctional Services at the Magistrate’s Court in Mthatha. This witness stated that all the questions and answers exchanged between the Magistrate and accused No 1 had been interpreted by her from English into “isiXhosa” and vice versa accurately and to the best of her ability. She was an excellent witness and her evidence is supportive of a conclusion that the answer to the relevant question was correctly recorded on Exhibit H. Moreover, it is the first question to be asked in the process. Both its position and the importance of its content militate against any error relating to accuracy creeping in due to fatigue or inattention.

Thirdly, it was the evidence of accused No 1 that indeed his answer to the Magistrate on the particular question was “Yes”.

This was because he wanted legal representation. He expected the Magistrate to do something about it. When this was put to the Magistrate, he denied that the answer given by accused No 1 was “Yes”, but could only do so in the absence of independent recollection by relying upon what he knew would have been the correct procedure had the answer been “Yes”, namely to stop the interview.

A disturbing feature of the Magistrate’s evidence emerged under cross-examination. When he was asked why the human error he claimed to have made was not detected when the proforma and statement were read back to accused No 1, he stated that he had only read back that portion of the document which contained the content of the statement made by the accused. When asked to explain this selective approach, he responded by saying that he did not regard the preliminary questions and answers as being important, this notwithstanding the fact that many of the questions therein are intended to address what are often referred to colloquially as “an accused’s

constitutional rights.”

In my view such an attitude is utterly inconsistent with what must be expected of a person who holds magisterial office. Inter alia the role of a Magistrate who records a confession in writing made by an accused person must be to ensure that such accused person

speaks freely and voluntarily and within a climate of constitutional fairness which in no way operates to the prejudice of the accused person.

In recording a confession the Magistrate must be mindful of the provisions of section 217 of Act 51/1977 and must ensure that a

confession is only recorded in writing if indeed it is made freely and voluntarily and with full cognisance of the implications which may flow from a deliberate abandonment by the accused of the right to avoid self-incrimination, and where it is clear that there has been due observation of all the accused person’s constitutional rights. The Magistrate’s endorsement at the foot of a confession recorded by him or her in writing should indicate to the trial Court that the Magistrate has performed his or her role with due and serious attention to the need to ensure both the preservation and creation of a healthy climate of constitutionality where every effort is made to prevent the abuse or neglect of the constitutional rights of an accused person. It is not the task of a Magistrate to simply obtain a statement from an accused person for the purposes of assisting in the investigation of an offence in which it may be alleged that such accused person may be involved.

It is apposite to record that the manner in which he gave his evidence, and his demeanour generally, did little to assist the Magistrate in his request that the Court accept his explanation that he had made a human error in recording the first answer given to him by accused No

1. In my view the Magistrate’s demeanour could be described as dull and disinterested. Such a demeanour is more consistent with an awareness that the Magistrate erred in ignoring the request of accused No 1 that he be legally represented and in proceeding to take a statement than it is with a candid and informed admission on the part of a judicial officer that he or she has made an error and wishes to explain it.

In all the circumstances, in my view the State had not proved beyond a reasonable doubt that the statement made by accused No 1 to a Magistrate on 17 March 2014 had been made freely and voluntarily and in the absence of any violation of one or more of the rights set out in the Bill of Rights. Moreover, in my view the admission of the evidence contained in the statement made by accused No 1 would render the trial against him unfair. It would also be detrimental to the administration of justice because its admission would indicate to those charged with the prevention, investigation and prosecution of crime in our country, and indeed her citizens and judicial officers alike, that a violation of the rights of an accused person in the course of pretrial investigations is acceptable. This would be an erroneous message. As expressed by Erasmus J in *S v Nombewu*: “A fair trial means a constitutional trial, and vice versa”.

Accused No 2 was also arrested on 13 March 2014. According to the investigating officer who arrested him accused No 2 made an immediate confession. He was detained in the cells at Mqanduli Police Station and then transferred along with accused No 3 to Elliotdale Police Station. On 15 March 2014 they were returned to Mqanduli. According to the investigating officer on the day following his arrest, 14 March 2014, he was “still trying to organise a person to conduct a confession”. A confession was taken by Captain Vundle on 15 March 2014.

It is common cause that on 14 March 2014 the investigating officer interviewed accused No 2 in his office. When asked by Mr

Mthambo who appeared on behalf of accused No 2 why this was necessary if accused No 2 had already made a confession the previous day, the investigating officer stated that it was in order “to hear clearly what he had said to me”. When pressed he stated further that, “It is the usual practice that when you question a person, you question him again to make sure that he will say it again”.

It was the evidence of the investigating officer that upon his arrest accused No 2 was fully informed of his constitutional rights.

According to accused No 2 he was not informed of his constitutional rights. He denied making any sort of confession to the

investigating officer on the day of his arrest. He stated that on 14 March 2014 he was taken to the office of the investigating

officer for questioning. He was handcuffed at the time. When he told the investigating officer that he knew nothing about the case, the investigating officer produced a plastic bag. He came closer to accused No 2 and told him to bend his head. The investigating officer then placed the plastic bag over accused No 2's head and tied it to prevent fresh air from entering the bag. Some soap powder had been put in the bag.

This process was repeated a number of times in response to accused No 2's persistent claim that he knew nothing about the case. In the process the investigating officer instructed the accused to lie down on his back. Whilst suffocating him with the bag the investigating officer told accused No 2 that when he was ready to tell the truth, he must indicate this by stamping his right foot. When this process proved ineffective, accused No 2 was returned to the cells.

In the afternoon of 14 March 2014 accused No 2 was fetched again from the cells and taken to the investigating officer's room.

He was handcuffed with his hands in front of the body and seated on a chair. The investigating officer told him: “We

should continue”. Accused No 2 asked him: “With what?” The investigating officer answered: “With the battle we were having in the morning”. Accused No 2 stated that when the plastic bag had been tied over his head, he found that he could not breathe and he tore the plastic. The investigating officer asked him why he had “messed up” and fetched another plastic bag. He put

some more soap powder into it and then instructed accused No 2 to lie on his back. He did so. The investigating officer then placed the plastic bag over his head and then stamped on accused No 2's chest with his feet. Accused No 2 said this caused him to scream and he could not breathe. He stated that he "passed out". When he regained consciousness he was taken back to the holding cells.

Accused No 2 also described events that occurred on 15 March 2014. According to him the investigating officer fetched him from the holding cells in the morning. He was handcuffed and taken to the office where his breathing was again restricted by a plastic bag. When this did not produce a change of attitude he was taken back to the holding cells. Hardly an hour had passed before the investigating officer fetched him again and took him back to the office. An unknown man was already present in the office and introduced himself to accused No 2. It appears that this was Captain Vundle.

After introductions had been made the investigating officer left and Captain Vundle told accused No 2 to tell him what he (accused No 2) wanted to tell him. When accused No 2 replied that he had nothing to say, Captain Vundle became angry and said, "Do not waste my time, I can not come all the way from there to here". He then slapped accused No 2. At that stage the investigating officer re-entered the office and asked whether things were proceedings or not. Captain Vundle replied, "This prisoner is giving me a hard time". The investigating officer then said that accused No 2 should be left alone because "he has forgotten me". Accused No 2 remembered the plastic bag being placed over his head. It seems that the investigating officer had left briefly and Captain Vundle said to accused No 2, "Have you heard? He is coming back. Let us proceed and not have a problem". Accused No 2 again said that he knew nothing. The investigating officer then reappeared carrying a plastic bag. He instructed accused No 2 to proceed. Explaining in his evidence that he was very afraid of the investigating officer and his use of the plastic bag, accused No 2 then agreed to make a statement.

The investigating officer denied having tortured or assaulted accused No 2 in any way on 14 March 2014 or on 15 March 2014. Captain Vundle also denied that accused No 2's version of events was true. However, the number of times that accused No 2 was brought from the holding cells was not placed in dispute and it can be accepted that his description of the frequency of his visits to the office of the investigating officer is correct. The question that arises in the face of the obvious dispute about what happened there is how to reconcile the apparent need for frequent trips to be made to the office of the investigating officer on 14 March 2014 if accused No 2 had already confessed to him on 13 March 2014, even if one were to entertain the explanation of the investigating officer that it was standard procedure to question a suspect who had confessed more than once to ensure consistency.

In my view it is more likely that frequent visits to the office of an investigating officer will be made by a suspect who is uncooperative.

Moreover, I was struck by the detailed account given by accused No 2. Bearing in mind that all the accused have been admitted to bail which has been extended where necessary, it is highly unlikely that accused No 2 has picked up on stories told in prison about a means to challenge the admissibility of a confession. When it was put to the investigating officer that he had stamped on accused No 2's chest while he was lying on the floor, the response of the investigating officer was to say that accused No 2 has "heard something that was done to another person, but not to him".

In due course the Court asked the investigating officer whether he had ever heard this being done to someone else. He was very quick to reply "No". When then asked how if that be the case he could say that accused No 2 had heard of it being done to someone else, the investigating officer was quick to respond by saying "I said maybe he heard that was done to someone else". Not only was this different from his previous answer under cross-examination, but in the manner of the delivery of his answers to the Court the investigating officer was unconvincing. In giving evidence generally the investigating officer was perfunctory and bland in his approach. Many of his answers were minimalistic and unhelpful. The impression was created that the process of giving evidence was a necessary ordeal which did not require proper engagement with the questions. This is consistent with the demeanour of a person who has something to hide and who believes in the safety offered by a consistent bare denial. When such an approach is adopted, even detail which may be favourable to an acceptance of the version offered by such a witness becomes forfeited in favour of confidentiality.

In this matter upon a consideration of all the relevant evidence I was unable to conclude that the State had proved beyond a reasonable

doubt that the statement made by accused No 2 on 15 March 2014 had been made freely and voluntarily.

It is common cause that accused No 2 participated in a pointing-out conducted on 16 March 2014, the day after making a statement to Captain Vundle. In my view, there being a reasonable possibility that accused No 2's version of the pretrial investigation procedures adopted by the investigating officer is true and having regard to the short lapse of time between the making of the statement and the pointing-out, the State has failed to prove beyond a reasonable doubt that the pointing-out by accused No 2 was

conducted freely and voluntarily.

Accused No 3 was arrested on 13 March 2014 by the investigating officer and taken to Mqanduli Police Station. According to him his constitutional rights were not explained upon his arrest. He and accused No 2 were transferred later that day from Mqanduli Police Station to Elliotdale Police Station where they were placed in separate holding cells. They were returned to Mqanduli on 15 March 2014. Accused No 3 made a statement to Captain Nzamela on 16 March 2014.

The version of the investigating officer with regard to the willingness of accused No 3 to cooperate with him was very similar to that given in respect of accused No 2. It is apposite to record though that when cross-examined on behalf of accused No 3 by Mr Tiya, who appeared on behalf of accused No 3, the investigating officer became marginally more defensive and tetchy in his demeanour.

According to accused No 3 he was also handcuffed during interviews with the investigating officer. Initially when he'd indicated that he knew nothing about the matter, the investigating officer slapped accused No 3 and told him that he better tell the truth. As he was seated at the time this caused accused No 3 to fall to the floor. Whilst on the floor he lay on his back and the investigating officer pressed the handcuffs on accused No 3's wrists in order that they become tighter. Not only was this painful, but it caused lacerations on the wrists. When accused No 3 persisted with his denial the investigating officer left the room, saying that accused No 3 was "going to see him clearly".

He returned carrying a black plastic bag and some soap powder as well as a certain type of plant. Although accused No 3 did not know the name of the plant when he gave evidence, it appears to be common cause that it is known as "mbabazane" or "rheletyane". When contact is made with this plant the skin becomes unbearably itchy and irritated. It was accused No 3's evidence that the investigating officer undressed him and hit him with a piece of "mbabazane". When this had no apparent effect upon accused No 3's state of mind, the investigating officer placed the black plastic bag containing some powdered soap over his head, telling him to indicate when he was ready to tell the truth by stamping his foot. This process was repeated for some time. In the absence of evidence of a change of mind accused No 3 was returned to the holding cells.

Accused No 3 remained in the holding cells until he was taken together with accused No 2 to Mqanduli on the morning of 15 March 2014. Whilst at Mqanduli Police Station accused No 3 was taken by the investigating officer to his office. There he was told by the investigating officer that he had evidence against him from accused No 1 and accused No 2. He said that because accused No 3 was denying the allegations against him he would remain incarcerated, whereas because accused No 1 and accused No 2 had told him what he wanted them to say, they would be released. Accused No 3 again said he knew nothing and he was returned to the holding cells. Later that day he was fetched again from the holding cells and the investigating officer told him that if he made a statement he would be released because his co-accused were going to be released. Accused No 3 said he then agreed to cooperate because he was scared of staying in prison.

As was with the case with accused No 2, I was again struck by the detail in the evidence of accused No 3. That the same modus operandi involving a plastic bag and soap powder may have been employed by the investigating officer to influence accused No 3 unduly to make a statement, as well as induce accused No 2 to do so, seems to me to be in accordance with the probabilities. The fact that both accused claimed that this procedure was invoked does not automatically suggest that the assertion is the result of a mutual fabrication of evidence. Had this been the case one might have expected accused No 1 to have made a similar claim, which he did not.

Moreover, only accused No 3 claimed that he had been assaulted using a piece of “mbabazane”. Had this been a fabrication one might have expected it to be a feature of accused No 2’s evidence, which it was not. Although denying its use on accused No 3, the investigating officer admitted under cross-examination that he knew the plant and had used it mischievously as a youngster when he was still a shepherd. This was a factor which I took into account in my evaluation of the extent to which the version of accused No 3 may be reasonably possibly true. In addition, and with the leave of Mr Baliwe who appeared on behalf of the State, accused No 3 was able to show the Court the scar left on his right wrist by the handcuffs.

In argument Mr Tiya submitted that the Court would draw an inference that the claims of assault made by accused No 2 and accused No 3 were true from the fact that both of them were taken first to Elliotdale Police Station and then returned to Mqanduli to make statements before peace officers who were officers of the South African Police Service, whereas accused No 1 who had not been assaulted was taken to a Magistrate to make a statement and had only been detained at Mqanduli Police Station. The import of this submission was that accused No 2 and accused No 3 were taken to other members of the South African Police Service to make their statements, because in their case the investigating officer had something to hide and could rely upon his fellow members of the South African Police Service to cover up for him and to make no record of the assaults or the promise of liberation if complaints were made to them by the accused. Whilst the elements common to the pretrial investigations of accused No 2 and accused No 3 are clearly identifiable, as are the distinctions drawn between those investigations and the pretrial investigation of accused No 1, the inference sought to be drawn was not canvassed in cross-examination either of the investigating officer or of the two members of the South African Police force who took the statements of accused no 2 and accused No 3. In such circumstances it is not open to the Court to draw the inference desired by the submission made.

Be that as it may, a consideration of the submission on the point provides an opportunity to revisit an expression of the view that it is more desirable that an accused person be taken to a Magistrate for the purposes of making a statement with a view to it being submitted as a confession in terms of the provisions of section 217 of the Criminal Procedure Act 51/1977, than that an accused person be taken to a police officer for the same purpose. The requirements for admissibility in section 217 of the Criminal Procedure Act 51/1977 are aimed at ensuring fairness. The rationale for the exclusion of a confession under that section is threefold, namely the potential unreliability of the confession, the privilege against self-incrimination, and the importance of proper behaviour by the police towards those in custody. (*S v Khan* 1997 (2) SA 611 (SCA)).

The vital role to be played by a Magistrate in this regard has been stressed for many years. Van den Heever JA stated:

“The very object of bringing an accused person before a Magistrate is to safeguard him against duress or undue influence in making a statement which may be used as evidence against him. As Innes CJ pointed out in Barlin’s case (at p 465) even the authority and the ascendancy of a policeman - his ius reverentiale - may conceivably affect the exercise of free will unduly in certain circumstances.”

(R v Kuzwayo 1949 (3) SA 761 (AD) 768. The citation for Barlin’s case is R v Barlin 1926 (AD) 465).

None of the wisdom evident in the principles stated by Van den Heever JA has diminished with the passage of time. Indeed, in the era of a constitutional democracy in our country it is even more desirable that for the purposes of making a confession which may be used as evidence against him or her, an accused person should preferably be brought before a Magistrate in whose judicial independence members of the public should be confident, rather than before a peace officer who is a member of the same agency of the State as the investigating officer or team whose business is the pretrial investigation of the accused person’s potential involvement in any case under investigation. This would avoid the undesirable impediment in ensuring that a confession has been made freely and voluntarily and without undue influence which may otherwise be imported if an accused person is brought before a peace officer who may be connected with the investigation team or who may be perceived by the accused to be so connected. No new duress is imported by the identity of the person as a Magistrate and a constitutional climate is created in which an accused person feels free to speak of any undue influence, or worse, which he or she may have experienced at the hands of the police. Ultimately this is an approach which would enable more than hinder the attainment of that constitutional goal, a fair trial.

Lastly, regard must be had to the inquiry into the admissibility of the pointing-out conducted by accused No 3 on 21 March 2014.

As in the case of accused No 2, in the light of the conclusion to which I had arrived regarding the existence of a reasonable possibility that the accused’s version of events leading up to the giving of a statement may be true, I was unable to find that the State had proved beyond a reasonable doubt that the pointing-out had been conducted by accused No 3 freely and voluntarily. The factors which influenced his decision to make a statement would still have operated in his mind to influence him unduly in his decision to cooperate.

It goes without saying that to the extent that those factors are constituted by the employment by the investigating officer of a means to suffocate the accused on a temporary basis and of a means to inflict upon him bodily discomforts, whether by way of the use of bodily force or by way of the use of “mbabazane”, such behaviour on the part of a person charged with the investigation of crime is highly deplorable and plays no part in the creation of a society where the rights expressed in the Bill of Rights in the Constitution are nurtured and observed. It is entirely reasonable to expect an investigating officer to combine the skilful

questioning of an accused person in the absence of physical violence, or the threat thereof, or of torture in any form, with other tools of investigation extraneous to the interview room in order to investigate thoroughly the commission of any offence. It is so that in any investigation positive results may be elusive, but it is of no use if shortcuts are taken in an investigation which are offensive to the rights contemplated in the Bill of Rights in the Constitution and which result in a defeat of the investigation.

When it comes to the securing of a confession the end result cannot simply justify the means by which it was obtained, particularly where it was obtained unconstitutionally. The same applies to a pointing-out.

In the light of the conclusions at which the Court arrived based upon the reasonable possibility of undue influence being brought to bear upon the three accused, it was not necessary to decide the issue of whether or not they had been made aware of their constitutional

rights upon arrest, or in the case of accused No 2 and accused No 3, before making their statements.

In the result, after hearing argument at the end of the trial-within-a-trial I gave an order to the effect that the statement made by accused No 1 to a Magistrate on 17 March 2014, the statement made by accused No 2 to Captain Vundle on 15 March 2014, the statement made by accused No 3 to Captain Nzamela on 16 March 2014 and the documentation pertaining to pointing's-out

conducted by accused No 2 on 16 March 2014 and by accused No 3 on 21 March 2014 respectively, were to be excluded from the evidence against the accused in this matter.

It would be a fair and accurate observation of the State case that it relied primarily upon the statements purportedly made by the accused as the evidence against them. Little evidence was tendered by State witnesses which fell outside the ambit of the trials-within-a-trial. The crisp question which now remains to be answered is whether on the basis of any of that evidence there is a possibility that the Court may convict any of the accused on one or more of the charges against him.

In meeting the application for the discharge of the accused in terms of section 174 of Act 51/1977 Mr Baliwe indicated that he was not able to oppose the application in respect of accused No 2 and accused No

3. He very properly conceded that in the cases against those two accused, there was merit in the application. Notwithstanding that concession it remains necessary to consider the evidence placed before the Court to determine whether or not there is any evidence upon which a reasonable Court acting carefully may convict accused No 2 and accused No 3. (*S v Kanyapa* 1979 (1) SA 824 (A) 838).

In respect of count 1, the charge of robbery with aggravating circumstances, the only evidence before the Court relates to the cellphone which apparently belonged to the deceased. The evidence was given by Bulelani Njara. In essence the crucial

part of this witness' evidence was that accused No 1 had been in possession of this cellphone, but could not use it and wanted Njara's help with it. Upon enquiry accused No 1 told Njara that he had picked up the cellphone somewhere.

Accordingly the evidence against the accused on count 1 is confined to evidence against accused No 1 only. It is also

circumstantial in nature. Two cardinal rules of logic apply to the necessary process of reasoning by inference that arises when such evidence is evaluated:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.

(R v Blom 1939 (AD) 188 at 202 – 203).

No real issue exists as to the fact that the cellphone concerned belonged to the deceased. The inference sought to be

drawn is that accused No 1 was in possession of the cellphone which belonged to the deceased because he had been involved in the robbery of the deceased. The difficulty which I have in accepting this as the only reasonable inference to be drawn from his possession of the cellphone is that on the version of Njara, relied upon by the State, accused No 1 contemporaneously and extracurially explained to Njara that he had picked the cellphone up. Nothing emerges from the proven facts in this matter to exclude this from the possible inferences to be drawn from accused No 1's possession of the cellphone. Accordingly, it remains a possible inference that indeed he did so. This in turn prevents the inference sought to be drawn by the State, namely that accused No 1 participated in the robbery, from being evaluated as an inference which excludes all other inferences. In such circumstances the accused must be given the benefit of the doubt.

It follows that I am of the view that there is no evidence before the Court upon which accused No 1, accused No 2 or accused No 3 may be convicted of the offence of robbery with aggravating circumstances, that is count 1.

As far as count 2 is concerned, the charge of murder, once against there is no direct evidence linking the accused to the offence. The only evidence before the Court is in the form of a post-mortem report (Exhibit L) and a ballistics' report (Exhibit I) and limited evidence relating to the recovery of a firearm. Whilst it is clear from the post-mortem report that the cause of death was a gunshot wound, it is necessary for the State to prove beyond a reasonable doubt that the gunshot wound was inflicted by the accused with intent to kill. The firearm which was handed over for ballistic analysis was stated by Warrant-Officer Gebengana to have been the firearm which was recovered from Orlando Yasweni, a friend of accused No 1 at the time, shortly after the arrest of accused No 1. According to Yasweni the firearm was found by him under the mattress in the

bedroom occupied by accused No 1 at the time. This is evidence to which I shall return in due course. For present purposes it is sufficient only to state that according to the ballistics' report the trigger or hammer mechanism of the firearm was defective and because of this it was not able to discharge ammunition. The inference sought to be drawn by the State from the evidence linking this firearm to accused No 1 is that it was used by accused No 1 in the murder of the deceased. This inference would not be consistent with the proven facts. Whilst the cause of death was a gunshot wound, the ballistic evidence tendered by the State shows that the firearm which was recovered was not able to discharge ammunition. The inference that it was the firearm used in the murder does not arise. The inferences that the gunshot wound was caused by a different firearm and by a different person or persons are not excluded. In these circumstances the benefit of the doubt must accrue to accused No

1. There is no evidence linking accused No 2 or accused No 3 to the firearm. For the reasons given the evidence relating to the firearm does not link accused No 1 to the offence of murder. There is no evidence before the Court upon which accused No 1, accused No 2 or accused No 3 may be convicted on count 2.

There are differences in the evidence of the State witnesses about the exact mechanism by which Orlando Yasweni came to be the person who took the firearm from under the mattress in the bedroom of accused No

1. I do not consider it necessary to resolve these differences in the evidence as they are not material. What is material and what is clear is that Yasweni had the firearm at his home shortly after accused No 1 had been arrested. Warrant-Officer Gebengana arrived there with accused No 1 in his company. Both in his evidence and in his statement Yasweni indicated that the firearm had been removed by him from under accused No 1's mattress earlier that afternoon. Whether communicated to him by accused No 1 personally or by Warrant-Officer Gebengana or indeed by a third person, it is clear that Yasweni was told to retrieve the firearm with the intention of handing it over to the police. Indeed Yasweni was arrested for possession of an unlicensed firearm when he could not produce the licence for the firearm and spent some time in custody. However, there is evidence that however it might have been communicated to him, Yasweni only went to fetch the firearm because accused No 1 requested that this be done. How else would Warrant-Officer Gebengana know to come to Yasweni to recover the firearm? It was not suggested to Yasweni that he was lying and that in fact the firearm was his or was in his possession for more than a few hours. Charges against him were dropped in due course. He could think of no reason for any ill feeling or bad blood between him and accused No 1 at the time. Nor was it put to him by Mr Kekana who appeared on behalf of accused No 1 that any ill feeling or bad blood existed which would explain why Yasweni would falsely implicate accused No 1 in respect of the recovery of the firearm. In my view, the evidence of Yasweni must be accepted.

Mr Kekana argued that because it was not able to discharge ammunition the firearm did not qualify as a firearm within the definition of a firearm set out in section 1 of the Firearms Control Act 60/2000. The relevant portion of section 1 of the Firearms Control Act 60/2000 reads as follows:

“Firearm means any:

- a. (Irrelevant).
- b. Device manufactured or designed to discharge rim fire, centre fire or pin fire ammunition.
- c. (Irrelevant).
- d. (Irrelevant).
- e. (Irrelevant).”

The ballistic report (Exhibit I) makes it clear that the firearm was designed to discharge centre fire ammunition. It was there recorded that the trigger or hammer mechanism was defective and because of this it was not able to discharge ammunition. “Defective” is defined in the Shorter Oxford English Dictionary 6th Edition as:

“Having a defect or defects; imperfect; incomplete (in some respect); faulty.”

All of these definitions convey a sense of temporary difficulty capable of remedial action. Given that according to the ballistics’

report the firearm had a purposeful design, it seems to me to be clear that the firearm was not capable of firing ammunition, but

could be readily altered or repaired to be a functional firearm. The ballistic report also stated that the firearm had a self-loading mechanism, but was not capable of discharging more than one shot with a single depression of the trigger. In terms of section 1 of Act 60/2000 this brings the firearm within the definition of “semi-automatic”. It follows that in my view the defective condition of the firearm does not place it outside the ambit of the provisions of Act 60/2000. No licence was produced to the police in respect of the firearm.

In my view there is evidence before the Court upon which accused No 1 may be convicted of being in unlawful possession of a firearm as envisaged in count 3. The same can not be said for accused No 2 or accused No 3.

As far as the offence of being in unlawful possession of ammunition is concerned, there is no evidence before the Court that any of the three accused were found in unlawful possession of ammunition. Accordingly there is no evidence upon which the Court may convict any of the accused on count 4.

The remaining enquiry relates to the unlawful possession of a firearm with intent to commit an offence. The evidence is confined to that relating to count 3. However, on this charge the all important element of intent to commit an offence in contravention of section 120(10)(B) read with section 103 of Act 60/2000 must also be met. In my view, even linking accused No 1 to the possession of the firearm does not satisfy the requirement that the State must prove the necessary mens rea beyond reasonable doubt. Of this there is no evidence before the Court. In my view there is no evidence upon which the Court may convict any of the accused on count 5.

It follows that I am of the view that there is no possibility of a conviction on counts 1, 2, 4, 5, other than if the three accused

enter the witness box and incriminate themselves. In the circumstances they are entitled to be discharged on those counts at the close of the State case. (S v Lubaxa 2001 (2) SACR 703 (SCA) para [18])

On count 3 the same considerations apply to accused No 2 and to accused No 3. The same can not be said of accused No 1 on this charge.

The following order is made:

· ACCUSED No 1:

§ On COUNT 1, the charge of robbery with aggravating circumstances, you are found NOT GUILTY AND DISCHARGED.

§ On COUNT 2, the charge of murder, you are found NOT GUILTY AND DISCHARGED.

§ On COUNT 3, the charge of unlawful possession of a firearm, the APPLICATION in terms of section 174 of Act 51/1977 IS DISMISSED.

§ On COUNT 4, the charge of unlawful possession of ammunition, you are found NOT GUILTY AND DISCHARGED.

§ On COUNT 5, the charge of possession of a firearm with intend to commit an offence, you are found NOT GUILTY AND DISCHARGED.

· ACCUSED No 2:

§ On COUNT 1, the charge of robbery with aggravating circumstances, you are found NOT GUILTY AND DISCHARGED.

§ On COUNT 3, the charge of unlawful possession of a firearm, you are found NOT GUILTY AND DISCHARGED.

· ACCUSED No 3:

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the State: Adv Baliwe

Director of Public Prosecution

Broadcast House

Lower Sissons Street

Fort Gale

Mthatha

Eastern Cape,

5099

On behalf of the Defence: Adv KEKANA

Accused No 1 Attorney

Legal Aid Board Mthatha

PRD Building,

96 Sutherland Street,

Mthatha,

On behalf of the defence: MR Mthambo

Accused No 2 Attorney

Nompumelelo Notununu & Ass

No 66 Owen Street

MTHATHA

On behalf of the defence: MR Tiya

Accused No 3 Attorney

Tiya Pata Inc

Office No 16, 4th Floor

Sanlam Building

Cnr Madeira Leeds Street

Date delivered:

23 August 2017

Source & reproduction note

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

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECMHC/2017/43.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-ntantiso-and-others-unknown-topic-aecmhc-2017--6a3ea51c3b1caa9129812b54>

Prepared on 10 October 2026 · Esheria