

SOUTH AFRICA / JUDGMENT

Sekwae v S (CA 47/2023) [2024]
ZANWHC 172 (10 July 2024)
[2024] ZANWHC 172

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen

CASE / FILE NUMBER

CA 47/2023

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA 47/2023

Reportable: YES
/ NO
Circulate

to Judges: YES
/ NO
Circulate

to Magistrates: YES / NO
Circulate
to Regional Magistrates: YES /
NO
In

the matter between: PITSO
 SEKWAE
 Appellant
 and
 THE
 STATE
 Respondent

CORAM: HENDRICKS JP et PETERSEN J
 DATE
 OF HEARING
 : 17 MAY 2024
 DATE
 OF JUDGMENT
 :
 10 JULY 2024
 FOR THE
 APPELLANT
 :
 MR. LE GRANGE
 FOR
 RESPONDENT
 : ADV. MAMPO

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00am on 10 July 2024.

ORDER

Resultantly, the following order is made:

- (1) The appeal against both conviction and sentence is upheld.
- (2) The conviction and sentence are set aside.
- (3) The appellant is to be released forthwith from detention.

HENDRICKS JP

Introduction

- [1] This is an appeal with leave granted by the trial court against conviction and sentence. Mr. Pitso Sekwae (appellant) was arraigned before the Regional Court, Stilfontein before Ms. Van der Walt. It is quite apparent that not all the sections of the Firearms Control Act 60 of 2000 as contained in the annexure to the charge sheet were read or put to the appellant as accused, to plead thereto.

The appellant was charged as follows:

“Murder read with the provisions of Section 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended in that upon or about 26 August 2018 and at Kakana in the Regional Division of North West, the accused did unlawfully and intentionally kill Thato Lenake a male person (count 1); contravening section 4 of the Firearms Control Act 60 of 2000 in that the accused on 26 to 27 August 2018 at Kanana in the Regional Division of North West unfortunately (sic) had in his possession a from [firearm] (sic) to wit a 9MM CZ model 85 semi-automatic pistol of which the serial number or identification mark has been changed or removed without the written permission of the Registrar and therefore being a prohibited firearm’ (count 2); alternatively contravening section 3 of the Firearms Control Act the alternative is read without (sic) the provisions of section 51 subsection 2 and Schedule 2 of Act 105 of 1997 as amended that on 26 to 27 August 2018 at Kanana in the Regional Division of North West the accused did unlawfully have in his possession the following firearm to wit a 9MM Parabellum CZ model 85 semi-automatic pistol without holding a license, payment, or authorization issued in terms of the Act to possess such firearm of which this (sic) number was obliterated.”

[2] To these counts the appellant, who was legally represented, pleaded not guilty and in an explanation of plea stated that he ‘...deny ever committing these offences’. This accords with the instructions which he gave to his legal representative Mr. Mofokeng, and which he also confirmed. The prosecutor Mr. Kok informed the court that during the pre-trial proceedings a document was drafted which embodies admissions in terms of section 115(2) read with section 220 of Act 51 of 1977 “duly signed today by the legal representative as well as the accused before court in court before we started”. This was confirmed by Mr. Mofokeng, who had ‘no objection if it is handed in as an exhibit’. The court inquired from the appellant whether he signed the document, which he confirmed. Furthermore, whether the contents of this document was explained to him by his legal representative, to which he indicated that he does not understand. After being approached by Mr. Mofokeng, he confirmed that he understood “and the consequences of the admissions in terms of section 115 and section 220 was also explained ... that it will not be necessary for the State to call the witnesses with regard to the admissions made”. This was also confirmed by the appellant, and it was handed in as Exhibit A. The contents of this document were not read into the

record and interpreted to the appellant to hear what he consented to and to confirm same.

[3] It is prudent to quote the contents of the admissions verbatim, which reads thus:

“Admissions in terms of section 115 (2)/220 of Act 51 of 1977.

I, Pitso Sekwae, the undersigned wish to make the following admissions:

1. I am the accused in this matter.
2. I make the admissions freely and voluntarily and without being unduly influenced to make it.
3. I admit the following as being true and correct;

3.1 The contents of the photo album and forensic statement compiled by Warrant Officer Tebogo Rabotapi.

3.2 The sealed exhibit containing 3 cartridges was sent to the Forensic Science Laboratory.

3.3 The firearm seized by Constable Tello Jeremia Kgamadi from me on 27 August 2018 was sent to the Forensic Science Laboratory.

3.4 Statement in terms of section 212 Act 51 of 1977 compiled by Warrant Officer Maureen Maadintsi Mdawo on the firearm mentioned in paragraph 3.3.

3.5 Statement in terms of section 212 Act 51 of 1977 compiled by Warrant Officer Shere Lepono Lekgothoane on the comparison between the firearm in par 3.3 and the exhibits in par 3.2.

3.6 The identity of the deceased is Thato Lenake.

3.7 The body was transported to Tsepong Hospital where he was declared dead.

3.8 His body did not sustain any injuries up to the time that the post mortem was conducted.

3.9 The post mortem by Dr. Nidia Fuentes Sanchez on the body of the deceased on 27/08/2018.”

Both the signatures of the legal practitioner and the appellant is appended at the end of this document.

[4] A photo album depicting inter alia the scene of crime was handed in by consent as Exhibit B. Furthermore, affidavits in terms of the provisions of ‘section 212 of the Criminal Procedure Act’ were handed in as Exhibit C and D respectively. The postmortem report was admitted as Exhibit E. The contents of these affidavits will be dealt with later in this judgment.

[5] The evidence tendered on behalf of the State is briefly that in the early hours of the morning of 26 August 2018, Thato Lenake (deceased) was in the company of his girlfriend Nthabiseng Gautuse (Gautuse) and his siblings Mamosame, Malifumo and Refilwe at a Tavern. Nthabiseng testified that at some stage the deceased went outside. Upon his return he informed her that there were people outside who were fighting with him. He then suggested that they should leave. They left, and on their way home they met Ben Mokhele (Mokhele). The deceased told Mokhele about the people who were fighting with him at the Tavern. Mokhele said that they should go back to the Tavern, but she refused. They then walked on. They were in front followed by the deceased and Mokhele. The deceased then told them that someone was following them. He said that it was the same person who fought with him outside the Tavern. She saw that the deceased with a panga in his hand. She does not know whether the deceased took the panga from

Mokhele or whether Mokhele gave it to him.

[6] The deceased, armed with the panga, went to the person that was following them. This person fired two (2) shots at the deceased. The deceased told them to run away. When the deceased fell, Malifumo and Refilwe picked him up. She went to the parental home of the

deceased and reported what happened to his mother. Refilwe summoned an ambulance. When the ambulance later arrived with the police, she went home. She did not see the person who shot the deceased. She was about 15 metres away from the deceased when he was shot. The area was illuminated by a high-mast electric streetlight commonly known as an Apollo light. The appellant is known to her because she saw him after the incident at a court appearance. She was not subjected to cross-examination.

- [7] Mokgale Mokhele (Mokhele) was called as the second witness. His evidence can be summarized as follows. He was from a different Tavern. He was armed with a panga. On his way, he met the deceased and four ladies. The deceased reported to him that he was fought with at the Tavern attended by himself and the ladies. Mokhele suggested that they return to the said Tavern. The deceased partner (Nthabiseng) refused. As they were walking, they were followed by someone. When the deceased looked back, he said 'Here is that man'. The deceased grabbed the panga from him. He told the deceased not to attack, 'that man'. As the deceased approached the man, and just before he could reach him, that person took out a gun and shot him. The panga in possession of the deceased fell. As the deceased tried to run, that person shot him a second time'. The deceased ran away, and Mokhele followed suit. That person fired two more shots and ran away. The deceased said he was tired and proceeded to lay down. Mokhele left to summon help.
- [8] At the time that the deceased was shot, the deceased was about eight
- (8) metres from the person who shot him. According to Mokhele he could see the person who shot the deceased because there were two flashlights that were very bright. Upon being asked by the prosecutor, by way of dock identification, whether he could see who it was that shot the deceased, he pointed at the appellant. It was the first time that evening that he saw the appellant. Asked why he pointed at the appellant, he said he knew him, and he saw him that evening. He further testified that he said that if he were to see him again, he would be able to point him out. Mokhele maintained that the appellant's face was still in his mind. Mr. Mofokeng for the appellant (accused), during cross-examination, laid a proper basis for cross examination on the contents of the statement deposed to by Mokhele to the police. Mokhele stated that he spoke in Sesotho and the statement was interpreted in Afrikaans. The statement was read back to him, and he signed it. Before he testified in court, he was afforded an opportunity that morning to refresh his memory from the

statement. He was satisfied with the contents of the statement and there were no changes he wanted to make to the statement.

- [9] For the sake of completeness, I deem it prudent to quote the contents of this statement presented to Mokhele, which was handed in as Exhibit F. It is a typed statement in English, and reads thus:

"1.

I, (A5) Mokhele Mokhele @ Dithaba, declare under oath in English:

2.

I am a male person 22 years old. I residing at 1[...] K[...]. I am general worker at LC Garden in Orkney.

3.

I was informed by no 0430921-9 Warrant Officer H.J. Fourie of the seriousness of this matter that he is investigating and that I am a possible witness in this case. He also warned me that it is a crime to submit a false statement or to withheld information and that such crime is punishable by law. I understand the seriousness off this matter as and that it is a crime to withhold any information or to submit a false statement. I want to submit the following statement in connection with this case:

4.

On Sunday 2018-08-26 between 02:00 and 03:00 I was with my friend Thato Lenake from 1[...]3 K[...]. He was with his sister Refilwe, Malefu Mokodutlo from 1[...]1 K[...] and her sister Mamosa Mokodutlo and his girlfriend Nthabiseng Gaothuse. We were on our way home. I was carrying a panga.

5.

Thato told me he had trouble with other guys at Mazoeloe tavern. I was not there. I only met them on their way home and join them. While we were walking an unknown black male approach us. Thato grabbed the panga from my hand going for the unknown black male, Thato told me here is that man, he never told me what man. I told Thato to leave the unknown black male alone. The unknown black male took out a fire arm pointed it at Thato and start shooting. The unknown black male never cocked the firearm he just shoot. I heard in total 4 shots. I run away when the unknown black male started shooting. I don't know what happened after that. I later learn from Thato's family that he was hit by the shooter and that he passed on at Tshepong Hospital.

6.

I don't know the shooter. I don't know if I will be able to identify him again if I saw him.

7.

I am a gangster from Money Lovers in Kanana. Thato was also part of the Money Lovers gang.

8.

The scene where the shooting happened was well lit by Apollo lights. I could see clearly.

9.

I don't know why that unknown black male shoot Thato.

10.

That is all I can declare.”

This statement is dated 2018/08/26 at 15H00 being the same date of the incident and this statement was duly commissioned and signed. I will later on in this judgment evaluate the viva voce evidence of this witness and compare it with the contents of this statement.

[10] Constable Tello Jeremiah Gamade (Gamade) was on duty on 27 August 2018 with a colleague. He received information that an occupant of a certain car in Orkney had a firearm. He summoned for back-up. The Orkney police officers arrived and parked in front of that car whilst they parked at the back of it. The Orkney police officers and his colleague alighted and approached the car. The three occupants of the car were made to alight from the car and to lie on the ground. He then alighted and proceeded to them. He searched one of the occupants and discovered a firearm on his person. He, however, could not remember where on his person, whether in one of his pockets or on his waist. He enquired from that person whether he had a permit to be in possession of the firearm, but no response was forthcoming. During his testimony, when asked whether he could see the person in whose possession he found the firearm, in court, he said ‘No, I do not see him here’. The suspects were transported to the Crisis Centre in Kanana. As he discovered the firearm, he opened a case docket.

[11] At the Crisis Centre in Kanana, he was given three names of the suspects they apprehended, which was written on a piece of paper. One of the names was underlined and he therefore assumed that that this was the person he apprehended. He refreshed his memory from the statement he made and said he was given the name, Pitso. Why he did so, he could not explain. He was shown the person he apprehended but he still could not remember the name. By then the suspects were detained in temporary holding cells. He was simply unsure of the identity of the appellant. However, during cross-examination he categorically stated that the identity of the person he arrested or apprehended, is known to him but he did not see him in court. He could not even tell from whom he received the list with the names.

[12] He completed the ‘Notice of Rights’ document, in the absence of the appellant, and he does not know whether it was in fact handed to the appellant. He also cannot remember whether he read and explained the rights to the appellant. He also did not interview the appellant before he wrote his own statement.

[13] Warrant Officer Fourie (Fourie), the investigating officer was on duty on 28 August 2018. He proceeded to Orkney police station to obtain a warning statement from the appellant, who by then was a suspect, as part of the process of charging him. He informed the appellant about the seriousness of the case and that the firearm that was found in his possession would be sent to ballistics. The name of the suspect was ‘Pitso Sekwae’, who was the accused before court. He testified as follows:

“So, I then inform him if there is anything on the ballistics that show the weapon was used in another crime he will be responsible. I asked him if he want to tell something about the weapon. He then elects on the night of 26 August around about 3 o’clock he was in Kanana when he was approached by a guy with a panga. He shot at that guy of the panga where after he left the scene. He also told me when he was arrested for possession of firearm he was on his way to Lesotho.”

- [14] He then asked the appellant if he was willing to make a statement to a Magistrate or a peace officer. The appellant indicated that he was willing to make a statement to a peace officer. He reported this to his Branch Commander to make the necessary arrangements for the suspect (appellant) to be taken to a peace officer. A statement was later made to Colonel Makgosi and handed to him. He resultantly charged the appellant with murder as well.
- [15] During cross-examination he testified that he employed the services of Sergeant Sotiba who interpreted for him in English. It was put to him that the arresting officer Gamade, could not assist the court with the identity of the suspect that he arrested for being in possession of a firearm. He confirmed this contention. It was further put to him that if needs be, the appellant would testify that on that particular day when he was arrested, he was not in possession of any firearm. Fourie accepted this as the version of the appellant.
- [16] It was further put to Fourie that the appellant would deny at any stage from his arrest until his bail application, ever making any admissions to the offences which he was charged with. He would it was said deny any knowledge of the murder and the possession of a firearm. This last statement did not illicit any comment from Fourie.
- [17] Fourie conceded that from the murder docket, the identity of the shooter was not known. None of the statements obtained from the witnesses confirmed the identity of the shooter. Fourie relied heavily on the statement made by the appellant to Colonel Makgosi. The prosecutor placed on record that the statement allegedly made to Colonel Makgosi was disputed and that the State would not present that evidence. That concluded the evidence tendered for and on behalf of the State.
- [18] An application was made for the discharge of the appellant in terms of the provisions of section 174 of the Criminal Procedure Act 51 of 1977 (CPA) as amended, which was opposed by the State. The application for the discharge of the accused was refused in the ruling made by the court. The court was satisfied that on the evidence of the four witnesses that testified, as well as the admissions made in terms of section 220 of the CPA, that there was indeed prima facie evidence against the appellant. The defence thereupon closed its case without presenting any evidence.
- [19] During his address on the merits, Mr. Mofokeng was asked by the court what the court should make of paragraph 3.3 of Exhibit A, the admissions in terms of sections 115(2) and 220 of the CPA. The document (Exhibit A) contains the words “from me” indicating that the appellant admitted that the firearm which Gamade testified was seized by him, was seized from the appellant. Mr. Mofokeng explained that the copy he had emanated from a pre-trial conference and did not contain the words “from me”. Mr. Mofokeng did not know when the

contents of paragraph 3.3 changed, save for the fact that the State drafted the admissions. According to Mr Kok, the prosecutor, the document which was in his possession was the same as that of the court (Exhibit A). And, that version was signed by the legal representative Mr. Mofokeng as well as the appellant. Mr Kok intimated that he did not know what to make of it.

[20] Mr Kok further indicated that according to him, this was an extra-curial admission made in terms of section 219A of the CPA. Numerous postponements followed, for different reasons. At some stage, the bail of the appellant was cancelled and forfeited to the State. A fresh application for bail was made before a different Regional Magistrate, which was refused. The mandate of Mr Mofokeng was terminated and Mr. Motjope was instructed. Ultimately, before judgment, the appellant was represented by Mr. Le Grange, his present legal representative.

[21] Mr. Le Grange intimated to the court that he intended applying for the re-opening of the defence case. The purpose was to allow the appellant to testify regarding the admissions, as it was apparent that the erstwhile legal representative did not read the document to the appellant before the appellant signed it. The application was opposed by the State inter alia on a contention that it would not be in the interest of justice that such application be made at such a late stage of the trial proceedings. The application was dismissed by the trial court. In its ruling, the trial court stated:

“In the light of the long history in this matter the Court cannot grant the application before the court. If this is done then I am afraid that what... the Supreme Court of Appeal has predicted in paragraph 28 of the Ndlanzi matter will happen where litigants who is not happy with their instructing attorneys and counsel will flood the courts. For that

reason, the application is dismissed.”

[22] In her judgment, the Regional Magistrate stated that the appellant was charged in count 2 with contravening section 4 (1) (f) (4) of the Firearms Control Act. This is not what was put to the appellant. Reference was only made to section 4 of the Firearms Control Act and not a specific subsection of section 4. The plea explanation on behalf of the appellant stated that the appellant denied ever committing these offences, which he confirmed. Although this is not evidence since it was not repeated under oath, the State was obliged to prove all the elements of both offences. This is in stark contrast to the admissions made in terms of section 220 of the CPA. The Regional Magistrate placed much emphasis on these admissions.

[23] Gautuse did not see the person who shot the deceased. Mokhele made a statement under oath to the police on the very same day of the incident, to wit 26 August 2018 at 15H00, when the events of the incident were still fresh in his mind. He testified on 03 May 2022, some three (3) years and eight (8) months later. The contents of his statement made on the same day of the incident is diametrically opposed to his viva voce evidence in court. In the statement he categorically stated that the shooter was unknown to him. He refers no less than seven (7) times in his statement to an ‘unknown black male’ which is indicative of the

fact that he did not know the man who shot the deceased. He stated in paragraph 6 thereof not only that he did not know the shooter, but he also did not know if he would be able to identify him if he saw him again. This is in stark contrast to his viva voce evidence in court some three (3) years and eight (8) months later, when he made a dock identification in court. This, the Regional Magistrate failed to take adequately into account. A dock identification in the circumstances as in this matter, should be regarded by a court as inadmissible.

See: S v Tandwa 2008

(1) SACR 613 (SCA).

S v Mdlongwa 2010 SACR 419 (SCA).

- [24] Mokhele's evidence also contradicts that of Gautuse. Gautuse testified about hearing two (2) shots. Mokhele, however, spoke of hearing four (4) shots. The post-mortem report records that the deceased sustained three (3) bullet wounds, with an entrance in front and exit at the back. Mokhele and the deceased were friends, and they grew up together. They even served sentences together in prison. They belonged to the same group of gangsters called the 'Money Lovers'. It is unsurprising why he would denounce the contents of his statement in which he emphatically stated that he could not identify the shooter. He clearly had a motive to falsely implicate the appellant through dock identification, because as he stated, 'my aim is just to... I just want Thato's soul to rest in peace.'
- [25] Mokhele stated that the statement was interpreted into Afrikaans from Sesotho which he conversed in, yet the statement was typed in English. He also testified that he furnished the statement the next day (after the incident) which is incorrect. He made the statement the same day of the incident. He testified that the statement was read back to him to confirm its contents before he signed it. Sight should not be lost of the fact that he refreshed his memory from the statement, on the morning of his testimony. He made it clear under cross examination that he was satisfied with the contents of the statement and did not want to change anything. If this is indeed true, one may beg the question why Mr. Kok did not bring to the attention of the court that Mokhele's evidence in court differed remarkably from the contents of his statement.
- [26] Under cross examination, when probed on his memory refreshing on the morning of his testimony, he in an about turn, after testifying that the statement was read to him claimed that 'it was never read... the statement was....the whole statement was never read to me it was It only read the half of it.' The court asked Mokhele "Sir, there is first one aspect that I would like to clarify with you. This statement I see was typed in English, can you read English?. Mr. Mokhele: No, I cannot read English I can only hear English." It must have been quite obvious for the trial court to realize that this witness was not honest, truthful or reliable.

- [27] Gamade, the arresting officer, did not hand over the 'Notice of Rights' to the appellant or inform him of his rights. Gamade further wrote the name Pitso in his statement because that was the name underlined on a piece of paper handed to him by an unknown colleague. The identity of the suspect arrested with the firearm remains shrouded in uncertainty on Gamade's evidence.
- [28] Fourie, the investigating officer, also did not testify to reading and explaining the appellant's rights and warned him accordingly. According to Fourie the appellant told him that on 26 August 2018 at 03H00 in the morning, he was in Kanana and was approached by a person armed with a panga. He then shot the person, and he left the scene. He said he was on his way to Lesotho when he was arrested. Since Warrant Officer Fourie did not warn and appraise the appellant of his constitutional rights before he interviewed him, any admission obtained from the appellant by Fourie is unconstitutional and therefore inadmissible. It is therefore unsurprising that Mr Kok also did not present the evidence of Captain Mokgosi.
- [29] It is trite that the onus in a criminal matter, on the State, to prove the guilt of an accused beyond a reasonable doubt is onerous and remains on the State even in the absence of any evidence tendered by or on behalf of an accused in his defence. There is no onus on an accused person to prove his innocence. The trial court in its judgment relied heavily on the admission by the appellant in terms of section 220 of the Criminal Procedure Act (CPA) - ('Exhibit A').
- [30] At the inception of the trial, it was made plain in the explanation of plea by the appellant that he denied ever committing any of the offences he is charged with. This was put to Makgale, Gamade and Fourie even though not repeated in evidence by the appellant. It is telling that the plea explanation and version put to the aforesaid witnesses is in stark contrast to the admission in terms of section 220 of the CPA, that the firearm was seized from him.
- [31] The evidence of Gamade is also contrary to the admission in terms of section 220. Gamade testified that the person from whom he seized the firearm is not before court and was definitely not seized from the appellant. The name of the appellant, Pitso, was included in his statement as he was provided with this name written and underlined on a piece of paper. Much weight must be

attached to this evidence of Gamade as the arresting officer. If the arresting officer says that the person whom he arrested in the unlawful possession of a firearm is not the appellant, it puts paid to the admission tendered.

- [32] The Regional Magistrate in her judgment unjustifiably criticized Gamade when she said that his evidence in court 'was clearly not what the court would have expected from a police official. His explanation was so improbable that it is hard to believe anything that this witness was saying'. The Regional Magistrate appears to have moved from the premise that Gamade was looking for any possible escape to distance himself from his statement. Sight should not be lost of the fact that he is a material witness for the State insofar as the firearm

is concerned. If, as the Regional Magistrate said, “...it is hard to believe anything that this witness is saying.”, the State was left with no evidence allunde to prove the firearm charge.

- [33] A trial court was not at liberty once finding the evidence of Gamade to be “highly improbable” to embark on speculative hypothesis to find a reason to still admit the evidence of Gamade. The trial court, in particular found, selectively so, that ‘what is however important in his evidence is that he was on duty on 27 August 2018; that he was at the scene where people were arrested with a firearm; and that as a result of this arrest and the discovery of the firearm, it then led to the fourth state witness then having a “conversation” with the accused’. This reasoning is totally flawed and devoid of rationality.
- [34] In the final analysis, the appellant was one of three occupants in the suspicious car. Gamede was emphatic that the appellant was not the person he searched and in whose possession the firearm was found. This evidence exonerates the appellant, or at the very least casts serious doubt whether it was in fact the appellant who was in possession of the firearm.
- [35] To sum up. The finding by the trial court that the explanation proffered by Gamade as to why he wrote the name Pitso in his statement as the person from whom he found the firearm as improbable, by implications renders it doubtful whether the appellant was in possession of the firearm. The further reasoning by the trial court that since the appellant was arrested and Fourie had a “conversation” with him, which led to further investigation and incriminating evidence against the appellant, ignores a basic principle of the law of evidence, that the evidence of Fourie about what the appellant told him is inadmissible as evidence. It will be demonstrated how this misdirection on the part of the trial court and the fixation on the contentious admission in terms of section 220 of the CPA, clouded its judgment.
- [36] The trial court found that, based on the affidavits handed in as exhibits in terms of section 212 of the CPA, coupled with the contentious admission in terms of section 220, that the appellant was in possession of the firearm which was linked to three (3) spent cartridges found at the scene which were

ballistically linked. The trial court as result made a quantum leap by finding that this proved that the appellant was in possession of the firearm used to shoot and kill the deceased. A careful analysis of the contents of the section 212 affidavits, however, demonstrates that it cannot be concluded beyond reasonable doubt that the three (3) spent cartridges found at the scene, is ballistically linked to the firearm.

- [37] The trial court also found that the section 220 admissions made by the appellant exonerated the State from proving the chain of custody related to the exhibits. The three spent cartridges found at the scene were never compared with the firearm that was handed in. In “Exhibit B” marked CAS 128/8/2018,

Warrant Officer Robotabi states that he visited the crime scene and collected three cartridge cases found on the ground which he placed in a sealed evidence bag with serial number P[...] 5[...] that was sent for ballistic analysis. In “Exhibit C” marked CAS 149/08/2018, Warrant Officer Mdawo stated that she received a sealed evidence bag with serial number P[...]1 containing a 9MM firearm and twelve 9MM cartridges. In “Exhibit D” marked CAS 128/08/2018, CAS 136/08/2018 and CAS 149/08/2018 Warrant Officer Lekgotoane stated that he received a sealed evidence bag with serial number P[...] 6[...] marked CAS 136/08/2018 with five 9MM fired cartridge cases and two 9MM fired bullets, as well as a sealed evidence bag with serial number P[...] 6[...] with one 9MM cartridge case. It is quite apparent that the case (CAS) numbers as well as the sealed evidence bag numbers are different. These affidavits are not evidence that proves that the three cartridge cases found at the scene were fired from the firearm that was handed in, allegedly found in possession of one of occupants of the motor vehicle in Orkney. So much to say about the chain evidence.

[38] It is furthermore apparent that the contentious admission made on behalf of the appellant was made in error. Whilst it is trite that admissions made by the legal representative on behalf of an accused person, and confirmed by the accused person, is binding on him, this does not totally exonerate the State from proving its case beyond reasonable doubt. Similarly, it did not relieve the trial court of its duty to determine whether the formal evidence that was admitted, was indeed correct. It cannot be expected of an accused person, although legally represented, to admit formal evidence that the State failed to prove beyond a reasonable doubt and hold him accountable on the basis of the admission made.

See: *S v Groenewald* 2005 (2) SACR 579 (SCA).

[39] Lastly, the refusal by the Regional Magistrate, on application by the defence to re-open the case for the accused, to explain the discrepancies regarding the content and signing of the section 220 admissions, merits attention. Reliance was placed on *S v Ndlanzi* 2014 (2) SACR 256 (SCA). The facts of *Ndlanzi* are distinguishable from the present matter. It is not that there was a stratagem by the defence that were to be proffered.

[40] In the present matter there is a distinct difference between the admissions embodied in “Exhibit A”, which the State drafted, which was signed by the appellant and his legal representative on the morning of the trial and the copy in possession of the defence counsel from the pre-trial conference. The explanation for this discrepancy as aforesaid was brought to the attention of the trial court, not in passing by way of an application. The erstwhile legal representative, Mr. Mofokeng, clearly challenged the correctness of the contents of “Exhibit A”, since the words “from me” was not contained in the copy which he had from the pre-trial conference.

[41] It is correct as stated in *Ndlanzi* that a court cannot afford to accept any criticism by a litigant against his or her lawyer as such an approach has the potential to open floodgates of spurious complaints by disgruntled litigants. However, in the present matter, the peculiar circumstances of the matter, made it incumbent on the trial court to allow the appellant an

opportunity to re-open his case. If the application was allowed, the appellant would have been afforded a fair opportunity to address the discrepancies in the content of the section 220 admissions which he signed against the version put on his behalf to the State witnesses in which he disavowed the very content of the section 220 admissions. A fair trial required the re-opening of the defence case. This especially so since much reliance was placed by the trial court on the contentious admission to justify the conviction on the firearm charge and by way of quantum leap, in the absence of any other evidence implicating the appellant, the murder charge. The admissions, together with the inadmissible evidence of Fourie and the speculative hypotheses on Gamade's evidence, which was all but rejected, formed the very basis upon which the trial court convicted the appellant.

[42] The refusal of an opportunity to re-open the defence case under these circumstances is a material misdirection. The respondent concedes that it is misdirection on the part of the trial court because this was a bona fide mistake made by the appellant's erstwhile legal representative. I agree that this misdirection is material which vitiates the entire proceedings.

[43] The Regional Magistrate is reminded of the remarks by Curlewis JA in *R v Hepworth* 1928 (AD) 265 which remains salutary in our constitutional dispensation, as it was in 1928, that:

"A criminal trial is not a game where the one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to the recognised rules of procedure but to see that justice is done."

[44] For the aforementioned reasons, I am of the view that the appeal should be upheld and that the conviction on both counts should be set aside. It follows axiomatically that the sentence should also be set aside.

Order

[45] Resultantly, the following order is made:

- (1) The appeal against both conviction and sentence is upheld.
- (2) The conviction and sentence are set aside.
- (3) The appellant is to be released forthwith from detention.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT - HIGH COURT OF SOUTH AFRICA,

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